NO. 11-35854

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

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,

Respondents.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. 3:09-CV-05456-BHS
The Honorable Benjamin H. Settle
United States District Court Judge

# CONSOLIDATED BRIEF OF RESPONDENTS AND INTERVENORS

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Rule 26.1 CORPORATE DISCLOSURE STATEMENT

Appellee Washington Families Standing Together is a non-profit political organization under section 501(c)(4) of the Internal Revenue Code. Washington Families Standing Together does not issue stock, and no parent corporation or any publicly traded corporation owns 10% or more of its stock.

Appellee Washington Coalition for Open Government is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Washington Coalition for Open Government does not issue stock and no parent corporation or any publicly traded corporation owns 10% or more of its stock.

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## I. INTRODUCTION

This case is moot. The petitions at issue were publicly disclosed months ago and are now available on multiple internet websites. Since the requested confidentiality can no longer be granted, the case is moot.

Moreover, this Court correctly noted that the Appellants have a problem with standing. The John Doe Appellants do not have third party standing to assert the claims of other petition signers, and Protect Marriage Washington (PMW) lacks standing because it cannot establish that the petition signers are members of PMW or in any way associated with PMW.

There is no probability that further disclosure will subject those identified to threats, harassment, or reprisals that will impair PMW's ability to associate. PMW is a well-funded political organization which lost the State Referendum 71 (R-71) election by a close margin, not an ostracized or minor party whose existence is threatened by disclosure. Despite two years to gather evidence, PMW was unable to show that a single petition signer or campaign donor experienced threats, harassment, or reprisals.

## II. STATEMENT OF JURISDICTION

The Court lacks jurisdiction to hear this appeal. Article III of the United States Constitution confers jurisdiction to the federal courts only when there is

a case or controversy. Because this case is now moot, there is no case or controversy for the Court's consideration. In addition, the Appellants lack standing.

## III. STATEMENT OF ISSUES

A. The R-71 petitions and the district court order were publicly disclosed four months ago, and have been widely disseminated by the media and private persons on the internet. Is the Appellants' request for an injunction prohibiting public disclosure moot?

B. Appellants John Doe #1 and #2 have testified that they do not oppose having made public that they signed the referendum petitions. Not all, if any, R-71 petition signers are members of PMW and they may not agree that anonymity is necessary for petition signers. PMW has accomplished its main purpose of placing the R-71 before Washington voters. Do Appellants have standing to bring this action on behalf of themselves and all petition signers?

C. The district court found that R-71 signers do not constitute a minor party that would face a reasonable probability of harassment that the State of Washington is unable or unwilling to control. Did the district court properly determine that R-71 signers are not a minority, are not a party, and

that R-71 signers do not face a reasonable probability of threats, harassment, or reprisals more than two years after the election?

## IV. STATEMENT OF THE CASE

### A. Referendum 71

In 2009, the Washington Legislature enacted a bill expanding the rights and responsibilities of same-sex and senior domestic partners. 2009 Wash. Sess. Laws page nos. 3065-3141 (E2SSB 5688). Bills passed by the Legislature are subject to a referendum upon the timely filing of a petition with a requisite number of signatures. Wash. Rev. Code § 29A.72.030 (2010). The signed petitions are filed with the Washington Secretary of State (Secretary), who determines whether the petitions contain a sufficient number of valid Washington voter signatures to satisfy state constitutional requirements for placing the measure on the ballot.

PMW sponsored a referendum to put E2SSB 5688 to a vote at the November 2009 general election. PMW received many financial contributions to support its campaign, which it disclosed to Washington's Public Disclosure Commission pursuant to Wash. Rev. Code § 42.17A.235 (2012). *See* SER 545. The names, addresses, occupations and employers of 857 PMW contributors have been available on the Commission's website for nearly three

years. ER 31; *see also* SER 545. PMW produced no evidence that any of its contributors were harassed for making a contribution. ER 31-32.

In less than three months, PMW gathered approximately 137,000 petition signatures for a referendum election on E2SSB 5688. Signature gathering occurred in busy public places, such as outside Wal-Mart and Target stores and at community events and fairs. SER 624, 626. Each petition page allowed twenty signatures, with space for each person to print his or her name and address. Wash. Rev. Code § 29A.72.130 (2010). Although not required by state law, PMW asked signers to disclose their email addresses. The names, addresses, and email addresses on the petition sheets were easily viewable by other signers and potential signers who reviewed the petition. SER 367. After canvassing the R-71 petitions, the Secretary concluded that the sponsor had collected enough valid voter signatures to qualify the measure for the ballot.

The election was held November 3, 2009. Washington voters approved E2SSB 5688, with 951,822 (53.15%) voting to approve it and 838,842 (46.85%) voting to reject it. SER 42, 44-50. However, R-71 was defeated in twenty-nine of Washington's thirty-nine counties; meaning that a majority of those who voted in a majority of Washington's counties supported PMW's effort to repeal E2SSB 5688. SER 44-50.

### B. Washington's Public Records Act

Washington's Public Records Act (PRA) requires disclosure of every record containing information relating to performance of a government function, unless the record is specifically exempted from disclosure. Wash. Rev. Code §§ 42.56.030 (2010); 42.56.010(2) (2010); 42.56.070(2) (2010). There is no exemption for ballot measure petitions.

The Secretary received numerous public records requests for disclosure of the signed petitions. Among those requesting the petitions were Washington Families Standing Together (WAFST) and the Washington Coalition for Open Government (WCOG). SER 627-28, 663.[1]

### C. Procedural History Of Count I

PMW and two John Doe appellants (collectively PMW) filed an action alleging that the PRA violates the First Amendment rights of persons who sign referendum petitions, and seeking to enjoin the release of such petitions. PMW advanced two claims. In Count I, it asserted that releasing signed petitions for any referendum would violate First Amendment rights. SER 678. In Count II,

[1] WAFST sought the petitions to facilitate a challenge, per Wash. Rev. Code § 29A.72.240 (2010), to the Secretary's conclusion that PMW submitted a sufficient number of valid signatures to qualify R-71 for the ballot. SER 653-54. WCOG sought the petitions to support its mission to promote public access to government records and champion the PRA. SER 664.

it asserted that disclosing R-71 petitions would violate the petition signers' First Amendment right of association by subjecting them to threats and harassment. SER 678-79.

The district court granted PMW's motion for a preliminary injunction based on Count I and declined to rule on Count II. SER 603-19. This Court reversed. *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009).

In an eight-to-one decision, the Supreme Court affirmed, holding that disclosure of petitions does not, as a general matter, violate the First Amendment. *Doe v. Reed*, 130 S. Ct. 2811 (2010). The Supreme Court did not consider Count II, which was not before it. *Id.* at 2821. Although the majority opinion did not address PMW's as-applied challenge, it noted that PMW had provided "scant evidence" and that "what little plaintiffs do offer with respect to typical petitions in Washington hurts, not helps." *Id.* In three concurring opinions, five Justices articulated the standard governing Count II on remand, emphasizing that the disclosure exemption PMW sought was available only in "rare circumstances" and that PMW would need to muster "strong evidence." *Id*. at 2829 (Sotomayor, J., concurring), 2831 (Stevens, J., concurring).

### D. Procedural History Of Count II

On remand, the parties engaged in discovery. PMW identified witnesses it believed supported its claim, and these witnesses were deposed. All were public advocates of R-71 who promoted R-71 by, for example, broadcasting their names, faces, and opinions on television and radio, in newspapers, on PMW's campaign webpage, speaking at public rallies, holding R-71 signs at busy intersections, and posting R-71 signs at their homes. SER 548-67, 568-79.

PMW also produced 1,542 pages of documents in response to the State's request for documents regarding to "any alleged harassment, threat or retaliation relating directly or indirectly to R-71," primarily newspaper articles regarding the 2008 Proposition 8 campaign in California. SER 54. Although PMW's campaign manager sent an email solicitation to R-71 signers, asking them to share their experiences of harassment, PMW's production contained no emails responding to his solicitation. ER 30.

On June 29, 2011, the parties filed cross-motions for summary judgment. PMW premised its motion primarily on news stories related to Proposition 8, which it attached to an attorney declaration. ER 149-63. PMW also relied on the testimony of its public spokesperson witnesses. ER 78-127, 133-39.

On August 15, 2011, the district court ordered PMW to submit supplemental briefing to provide any evidence in the record establishing a genuine issue of material fact. SER 12. The district court noted that PMW submitted a "miscellany of unorganized documentation," but no evidence (1) that any person who merely signed the R-71 petition was threatened or harassed as a result or (2) that any person had refused to sign the R-71 petition for fear of harassment. SER 13. PMW responded to the district court's request by stating, "Of course there is no such evidence." ER 29-30 (quoting Dkt. #259 at 2 (SER 11)).

While the cross-motions were pending, the parties prepared for trial. On September 12, 2011, the district court struck the trial and indicated it would resolve the matter on the pending summary judgment motions. SER 7. On October 3, 2011, the district court heard oral argument and advised the parties it intended to rule within two weeks. PMW did not ask the district court to impose a temporary injunction or stay pending appeal if the court were to grant the cross motions for summary judgment filed by the State and Intervenors (collectively Appellees).

The district court granted summary judgment to the Appellees, dismissed Count II, and dissolved the preliminary injunction. *Doe v. Reed*,

No. C09-5456BHS, 2011 WL 4943952 (W.D. Wash. Oct. 17, 2011); ER 2-34. The district court first concluded that PMW was not the sort of disadvantaged organization that could successfully prevail on an as-applied challenge. The district court then observed that if the minimal evidence supplied by PMW were sufficient for its as-applied challenge, then PMW "would have prevailed on Count I's facial challenge to the PRA because anyone could prevail under such a standard." ER 33.

As discussed above, PMW agreed that it had no admissible evidence that anyone had been harassed for signing an R-71 petition or declined to sign the petition for fear of harassment. The district court concluded PMW could not rely on evidence unrelated to R-71 but, even if it could, such evidence was stale and unconvincing in the context of R-71. ER 18, 19 n.3. The district court examined the testimony of PMW's public spokesperson witnesses at length, concluding it could not extrapolate from their experiences to individuals who merely signed the R-71 petition and that, in any event, these witnesses' testimony failed to support PMW's claim. ER 19-30.

Finally, the district court held that PMW had offered no evidence that law enforcement condoned or failed to respond to any alleged harassment of PMW or its supporters during the R-71 campaign. ER 33. It therefore

concluded that PMW's as-applied challenge failed because the effectiveness of law enforcement either operated as an independent bar to PMW's claim or demonstrated the isolated and minimal nature of the alleged harassment. ER 33.

The district court's order identified the two John Doe Appellants and PMW's other witnesses by name. Consistent with the decision on the merits, the order was not sealed. The order has since been in the public domain, and many media and other websites posted it online.[2] Moreover, some of PMW's

[2] *See, e.g.*, The Seattle Times http://seattletimes.nwsource.com/html/edcetera/2016531125_referendum_signers_names_have.html; The Los Angeles Times http://latimesblogs.latimes.com/nationnow/2011/10/gay-marriage.html; The Tacoma News Tribune http://blog.thenewstribune.com/politics/2011/10/17/u-s-district-court-judge-benjamin-settle-says-protect-marriage-washington-not-entitled-to-disclosure-exemption/; The Bellingham Herald http://www.bellinghamherald.com/2011/10/17/2232340/judge-release-r-71-names-gay-rights.html; http://www.keprtv.com/news/local/132023628.html; The Everett Herald http://heraldnet.com/article/20111017/NEWS01/710179864; The Stranger http://slog.thestranger.com/slog/archives/2011/10/17/judge-orders-names-on-r-71-petitions-to-be-released; Ballotpedia http://ballotpedia.org/wiki/index.php/Doe_v._Reed; http://thinkprogress.org/lgbt/2011/10/17/346055/washington-anti-gay-group-must-finally-disclose-referendum-71-ballot-signatures/.

witnesses publicly identified themselves as witnesses subsequent to issuance of the district court's order.[3]

With the preliminary injunction dissolved, Wash. Rev. Code § 42.56.520 required the State to respond to disclosure requests for the petitions—many of which had been pending for more than two years—and provide the petitions to thirty-four individuals and organizations. The State promptly complied with its statutory obligation.

Images of every signed petition have now been posted on the internet in a form identical to that available from the State under the PRA.[4] Many websites, including Wikipedia, contain links to the signed petitions.[5] In

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[3] http://pamshouseblend.firedoglake.com/2011/10/23/why-is-protect-marriage-washington-filing-an-emergency-motion-for-secrecy-after-theyve-divulged-their-own-identites/.

[4] Scribd http://www.scribd.com/HaxoAnglemark; Torrents.net http://www.torrents.net/torrent/1939006/R71-Names.zip/.

[5] *E.g.* Wikipedia http://en.wikipedia.org/wiki/Washington_Referendum_71_%282009%29; Seattle Weekly http://blogs.seattleweekly.com/dailyweekly/2011/10/ref_71_washington_anti-gay_mar.php; The Stranger http://slog.thestranger.com/slog/archives/2011/10/17/judge-orders-names-on-r-71-petitions-to-be-released; Publicola http://publicola.com/2011/10/21/anti-gay-rights-group-appeals-r-71-decision-ag-mckenna-defends-release-of-names/; Pam's House Blend website http://pamshouseblend.firedoglake.com/2011/10/23/why-is-protect-marriage-washington-filing-an-emergency-motion-for-secrecy-after-theyve-divulged-their-own-identites/; ThinkProgress website

addition, Whosigned.org has posted a searchable database of the persons who signed the R-71 petitions. www.whosigned.org.

On October 17, 2011, after the State disclosed the requested public records, PMW filed a notice of appeal and a motion in the district court for injunctive relief pending appeal. Although PMW had not requested that the district court consider its motion on an expedited basis (noting the motion for November 4, 2011), PMW filed an emergency motion in this Court three days later. SER 1, 9th Cir. Dkt. No. 3-1. This Court denied the procedurally flawed motion, but entered a temporary injunction to prevent further disclosure of the petitions (but not the identities of the Doe Appellants and their witnesses) while the district court considered the motion to it. *Doe v. Reed*, No. 11-35854 (9th Cir. Oct. 24, 2011).

The district court rejected PMW's motion. ER 48. This Court denied PMW's renewed request for an injunction. ER 39. PMW requested a Writ of Injunction Pending Appeal from Justice Kennedy, who referred the issue to the full Court, which in turn denied it. ER 37.

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http://thinkprogress.org/lgbt/2011/10/21/350353/washington-state-halts-release-of-referendum-71-signatories-nom-asks-supporters-to-pray-over-loss/.

## V. SUMMARY OF ARGUMENT

PMW's appeal fails for multiple, independent reasons. First, as this Court has preliminarily recognized, this case is moot.[6] Full copies of the R-71 petition have been publicly available on the internet for months. Because the purpose of PMW's lawsuit was to keep this information secret, there is no relief this Court can grant on appeal that would further the lawsuit's purpose.

Second, neither PMW nor the individual John Doe Appellants have standing to bring this appeal on behalf of R-71 petition signers. PMW has failed to establish any of the mandatory prerequisites for organizational standing. The John Doe Appellants have not established an associational interest or even a common goal with the petition signers. And, PMW cannot prove that the R-71 signers are its members, that protecting the identity of R-71 signers is germane to PMW's core purpose of placing R-71 on the ballot, or that the claims asserted and relief requested do not require participation of the R-71 signers.

Third, on the merits, PMW has failed to show that R-71 signers constitute a "minor party" sharing a vilified viewpoint subject to protection

[6] *See* ER 40 (preliminarily finding appeal moot), 43 (Smith J., dissenting, explaining that although the emergency stay request might not be moot, the appeal "will clearly" be so absent the requested stay).

through an as-applied challenge, that they have associational interests that the First Amendment is designed to protect, or that they face a reasonable probability of threats and harassment that the State is unable or unwilling to control. Most tellingly, PMW has no evidence that any R-71 signer has been harassed, either during the signature-gathering process or during the months since the petitions have been publicly disseminated on the internet. PMW presented no evidence that any of its 857 publicly disclosed financial supporters have been harassed. Finally, PMW has no admissible evidence that anyone failed to sign an R-71 petition because of fear of harassment.

Each of these three core deficiencies in PMW's claim provides an independent basis for affirming the district court's dismissal of PMW's suit.

## VI. ARGUMENT

### A. Standard Of Review

On review, the Court must consider whether the case is properly before it. This Court lacks jurisdiction to hear the appeal unless a live controversy exists. *Feldman v. Bomar*, 518 F.3d 637 (9th Cir. 2008).

The Court also is required to consider standing to assert the rights of parties not before it.[7] *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The Court must determine whether there is a sufficient relationship between the John Doe Appellants and the rights of persons not before the Court, and whether there is a genuine obstacle preventing third parties from asserting their own rights. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). In considering whether PMW has standing as an association to bring suit on behalf of others, the Court must determine whether petition signers are PMW members, whether such members would themselves have standing, whether the interests PMW seeks to protect are germane to its purpose as an association, and whether the claim requires the members' participation in the suit. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

If the Court has jurisdiction, the summary judgment order is reviewed de novo to determine whether there is a genuine issue as to a material fact and whether the moving parties were entitled to judgment as a matter of law. *See GoPets Ltd. v. Hise*, 657 F.3d 1024, 1029 (9th Cir. 2011); Fed. R. Civ.

[7] In denying PMW's renewed emergency motion for injunction pending appeal, the Court directed the parties to address whether the case is moot and whether Appellants have standing.

P. 56(c). The evidence is viewed in the light most favorable to the non-moving party "only if there is a 'genuine' dispute as to those facts." *Ricci v. DeStefano*, 557 U.S. 557 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). There is no genuine issue of material fact if the record as a whole "could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks omitted). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

**B. This Case No Longer Presents A Live Controversy**

Article III of the United States Constitution confers jurisdiction to the federal courts only when there is a case or controversy. "[I]t is not enough that there may have been a live case or controversy when the case was decided" by the court whose judgment is under review. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67

(1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). This case is now moot.

**1. No Relief Can Be Crafted To Restore Confidentiality**

PMW's as-applied challenge sought to prevent disclosure of R-71 petitions. That is now impossible. After the district court lifted the injunction, Wash. Rev. Code § 42.56.520 (2010) mandated release of the petitions.[8] Copies were provided to thirty-four media representatives and individuals who requested the public records. The petitions are now widely available on the internet. *See supra* notes 4, 5. The district court order is also available on multiple internet websites. *See supra* note 2. No relief this Court can grant will prevent anyone from obtaining a complete set of the petitions or the district court's order.

Since there is no ability to "undisclose" the petitions or prevent further disclosure, the case is moot. This Court has consistently recognized that when it cannot grant effective relief, the case is moot. *Feldman*, 518 F.3d at 642, 644 (challenge to eradication of feral pigs in a national park moot after some pigs

[8] PMW could have prevented the case from becoming moot by asking the district court to stay its order pending appeal in the event of an adverse decision. Alternatively, PMW could have prepared a motion for stay to file immediately after receiving notice of the adverse court ruling. As a result of PMW's tactical decisions, the records became extremely public before PMW took any steps to prevent disclosure.

were killed during the pendency of the case, regardless of whether *every* pig had been killed); *In Def. of Animals v. U.S. Dep't of the Interior*, 648 F.3d 1012 (9th Cir. 2011) (challenge to wild horse roundup moot after the initial stage of the roundup); *Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012 (9th Cir. 1990) (challenge to timber sale moot after timber cut and some logs removed).

When secrecy is at issue, disclosure renders the case moot. *C & C Prods., Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983). In *Messick*, disclosure rendered moot a request for modification of a protective order to prevent access to discovery materials. After noting that a third party had obtained the confidential documents, the Eleventh Circuit stated that "no order from this court can undo that situation." *Id.* at 637. This case presents the same issue. The Court cannot undo disclosure that has already occurred, or prevent anyone who wishes to obtain a copy of the petitions from doing so. Given the inability to craft the relief PMW seeks, this Court and the Supreme Court have already denied its request for an emergency injunction. ER 37, 39.

Disclosure claims remain viable after disclosure only if the court can still provide relief. For example, in cases involving disclosure of grand jury materials, the court can prevent use of the materials in later civil proceedings.

Improper disclosure of grand jury material to government attorneys was addressed in *In re Grand Jury Investigation No. 78-184, Sells, Inc.*, 642 F.2d 1184 (9th Cir. 1981). Under Federal Rule of Criminal Procedure 6(e), the government must obtain a court order to access grand jury materials for use in a subsequent civil case. *Id.* at 1190-92. Although the documents had been disclosed to the government, the case was not moot because the court could issue an order preventing use of the materials in future civil cases. *Id.* at 1188; *United States v. Sells Eng'g*, 463 U.S. 418, 442 (1983); *United States v. Nix*, 21 F.3d 347, 350 (9th Cir. 1994) (disclosure not moot after class action settlement because grand jury materials could be used in an action against those who opted out of the class); *Detroit Int'l Bridge Co. v. Fed. Hwy. Admin.*, 666 F. Supp. 2d 740, 745 (E.D. Mich. 2009) (court "cautiously proceeds" to consider case after agency disclosed to a single congressman, but ultimately denies requested injunction).

PMW's reliance on *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997), is also misplaced. In *Smith*, the Third Circuit considered two issues regarding disclosure of grand jury documents. First, the court addressed disclosure of a sentencing memorandum containing grand jury material. Because the press already had access to the memorandum and was free to publish it, the court

ruled that disclosure was moot, since "no meaningful relief [could] be granted." *Id.* at 146. The second issue was whether undisclosed briefs should remain sealed. The briefs and a hearing on the matter would address "previously undisclosed grand jury material," as well as some information disclosed in the government sentencing memorandum. *Id.* at 143. The court held that although it could not stop dissemination of material that had already been disclosed, it could bar further dissemination of grand jury secrets by barring disclosure of the briefs. *Id.* at 155. In sharp contrast to *Smith*, all R-71 petitions have already been disclosed to the press and public—the entire case is moot.

This is not a case in which the Court can craft an alternative remedy to provide relief that is impossible to grant. For example, in a case involving a challenge to destruction of bird habitat, this Court was able to "develop ways to mitigate the damage to the birds' habitat by . . . creating new nesting and foraging areas" after the habitat at issue was destroyed. *Cantrell v. City of Long Beach*, 241 F.3d 674, 678-79 (9th Cir. 2001); *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988) (challenge to 1986 fish management practices not moot in 1989 because Court could order mitigation and habitat repair).

In contrast, here there is no alternate remedy. Keeping the names out of the public domain was the only relief sought. There is no remedy possible that would restore even a modicum of confidentiality. Enjoining the Secretary and the district court would be pointless, now that the material is widely available on the internet. "'Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot.'"[9] *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007) (quoting *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978)).

**2. The Case Is Not Capable Of Repetition, Or Evading Review**

An exception to the mootness doctrine exists for cases capable of repetition, yet evading review. *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*), 551 U.S. 449, 462 (2007). The exception is "limited to extraordinary cases" in which two factors are both present: (1) the duration of the challenged action is

[9] As PMW notes, the Eastern District of California heard an as-applied challenge to disclosure of campaign contributions to Proposition 8, after disclosure occurred. *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DA, 2011 WL 5507204 (E.D. Cal. Nov. 04, 2011); PMW Br. at 46 n.20. Disclosure did not render *Bowen* moot because one of the plaintiffs in that case is a general purpose campaign committee that is still operating and may continue to report new contributions. *Bowen*, 2011 WL 5507204 at *3. In addition, *Bowen* is not moot because part of the relief requested is that all campaign reports be expunged from government records. *Bowen*, 2011 WL 5507204 at *4.

too short to allow it to be fully litigated prior to cessation or expiration; *and* (2) there is a reasonable expectation that the same party will be subject to the same action again. *WRTL*, 551 U.S. at 462. Neither factor exists in this case.

First, this case does not involve a challenged action that is limited in duration, such as a pregnancy or a brief election campaign period. *Roe v. Wade*, 410 U.S. 113 (1973) (pregnancy's duration would not allow time for appellate review); *WRTL*, 551 U.S. at 462 (judicial review cannot be completed during the time allowed for election ads). The public records challenge at issue is not limited in duration. PMW filed this case in response to public records requests made in June 2009. SER 674. As the history of this case demonstrates, there is no expiration date on the public records requests. On PMW's motion, disclosure was enjoined for over two years while the case was heard by the district court, this Court, the Supreme Court, and by the district court on remand. Had PMW timely moved the district court to stay its order pending appeal, disclosure might still be enjoined. When an appeal has become moot, "not because of the nature of the challenge, but because of the inaction of the parties," the capable-of-repetition exception is not applicable. *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1257 (11th Cir. 2001).

Second, the same party will not be subject to the same action again. Since the Supreme Court ruled against PMW on its facial challenge, this case no longer presents the broader issue of whether public disclosure of initiative petitions is constitutional. The only issue remanded was PMW's as-applied challenge to disclosure of R-71 petitions. The state law that was the subject of R-71 has since been significantly amended by ESSB 6239 passed by the legislature in 2012, which permits civil marriage for same-sex couples and eliminates domestic partnerships other than for seniors as of 2014. *See* Wash. Rev. Code § 26.04.010 (2012). Because it would be impossible to have another referendum on the law that was at issue in R-71, PMW cannot be subject to the same action again.

PMW contends that similar issues might arise with respect to a new state law permitting same-sex couples to marry. PMW Br. at 48-49; 2012 Wash. Sess. Laws ch. 3 (ESSB 6239). A proposed referendum has been filed addressing the new law. PMW is incorrect for two reasons. First, the same party is not involved. PMW is not the sponsor of the proposed referendum. In a case involving a First Amendment challenge to disclosure, the identity of the challenging party is central to the analysis of the legal claim, as the court must consider the facts concerning the specific party alleging that its right of

association will be impaired, the history of harm to the group, and the current political climate. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958); *Brown v. Socialist Workers'74 Campaign Comm.*, 459 U.S. 87 (1982). Second, it is irrelevant that some people who signed R-71 may choose to sign another proposed referendum. If disclosure of *those* petitions is challenged, a court can determine whether disclosure of *those* petitions is likely to harm *those* petition signers' right of association.

### 3. The State Interest In The Integrity Of The Electoral Process Did Not End After The Election

While PMW claims it has a cognizable claim even after disclosure of the petitions in question, it contends that the State's interest ended after the election on R-71. PMW Br. at 32. But as this Court has recognized, the State's concern with the integrity of the electoral process, including ferreting out circumstances of illegal signature collection, did not end with the election. Ensuring the integrity of the election system is a matter of continuous state concern. *Porter v. Bowen*, 496 F.3d 1009, 1013 (9th Cir. 2007). In *Porter*, this Court held that after an election concludes, a challenge to the legality of a Secretary of State's actions is not moot, because the state could act similarly in future elections. Consistent with *Porter*, the Supreme Court noted in this very

case that detecting mistakes remains important after the election. *Doe*, 130 S. Ct. at 2820.

The Supreme Court emphasized that the State has a "particularly strong" interest in eliminating fraud. *Id.* at 2819. Fraud "drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Public disclosure may be the only way to determine whether PMW engaged in "bait and switch" fraud, by misrepresenting the issue in order to persuade individuals to sign the petitions. *Doe*, 130 S. Ct. at 2820. Even when each signature is checked, State detection of bait and switch fraud is nearly impossible. "The signer is in the best position to detect these types of fraud, and public disclosure can bring the issue to the signer's attention." *Doe*, 130 S. Ct. at 2820. Since PMW is still active in Washington, the question of whether PMW engaged in forgery or fraud, and the State's response to such behavior, continues to be a matter of public interest. SER 546.

In addition to verifying the accuracy of its anti-fraud measures with respect to R-71, the State has an ongoing interest in ensuring and confirming the legitimacy and efficacy of its processes. Given the difficulty of the task, transparency and government accountability are particularly important. Public

oversight after the conclusion of the election helps the State identify and "cure the inadequacies of the verification and canvassing process" and can provide the public confidence about the quality of the State's performance in upcoming elections.[10] *Doe*, 130 S. Ct. at 2820.

### C. The John Doe Appellants Lack Standing To Represent All Petition Signers

John Doe #1 (Ronald Perkins) (hereinafter Perkins) and John Doe #2 (Matthew Chenier) (hereinafter Chenier) lack standing to represent all petition signers because they have not satisfied the strict requirements to assert the constitutional rights of others not before the Court.

#### 1. Lack Of Standing Is Appropriately Raised On Appeal

Federal courts are required "*sua sponte* to examine jurisdictional issues such as standing." *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). "Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender*, 475 U.S. at 541 (quoting *Mitchell v. Mauer*, 293 U.S. 237, 244

[10] PMW's reliance on *Utahns for Ethical Gov't v. Barton*, 778 F. Supp. 2d 1258 (D. Utah 2011), is misplaced. Unlike R-71, the measure at issue in that case had not qualified for the ballot and Utah was not actively verifying signatures to determine if the measure could qualify.

(1934)). Therefore, this Court should and must address whether Appellants have standing.

**2. Legal Standard To Bring Litigation On Behalf Of Others**

Determination of third-party standing requires consideration of two factors: "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 US at 114-15). As to the first factor, PMW must prove that the rights of persons not before the Court are "inextricably bound up" with the relief sought, 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." *Singleton*, 428 U.S. at 114-15. Concerning the second factor, PMW must show "some genuine obstacle" preventing third parties from asserting their own rights. *Id*. at 116.

**3. Chenier And Perkins Do Not Have A Substantial Relationship With Those They Purport To Represent**

Chenier and Perkins are not representative of the other signers they attempt to represent because: (1) they do not oppose making public their signing of the petitions; (2) their support of R-71 was publicly known; (3) there is no showing that other petition signers desire to remain anonymous; and

(4) there is no genuine obstacle preventing other petition signers from asserting their own rights.

**a. Perkins And Chenier Do Not Object To Public Release Of The Fact That They Signed The R-71 Petition**

Perkins and Chenier are identified in the Complaint only as persons from Stevens County (Perkins) and Skagit County (Chenier) who "signed the Referendum 71" petition. SER 671. Aside from their John Doe status, no facts support any need for keeping their signing of the petition secret.

During his deposition, Perkins stated that he did not care if his signature was made public:

> Q: And if you had been aware at the time you signed that it could be publicly available, would that have changed your decision on whether to sign?
>
> A: Probably not.
>
> Q: And why is that?
>
> A: Well, I felt very strongly about the issue at the time.

SER 557.

Similarly, Chenier testified that he does not care if his signing is made public:

> Q: So, did you ever try to keep your support of Referendum 71 a secret?
>
> A: No.

Q: So do you feel comfortable telling people that you signed the petition?

A: Yeah.

SER 83.

Because Perkins and Chenier do not oppose making public their signing of the petition, they lack the necessary nexus to the persons they claim to represent (those who allegedly wish to keep their signing secret).

**b. Perkins And Chenier Publicly Supported The R-71 Campaign**

Given their public stance, Perkins and Chenier are not "effective proponents" of maintaining anonymity for all other petition signers.

Perkins and Chenier publicly supported putting R-71 on the ballot. Perkins provided an interview about his support to a journalist knowing the interview would be posted online, "was happy to have his name associated with the campaign," and was not concerned about testifying publicly regarding signing the R-71 petition. SER 558, 561, 69, 70-71.

Likewise, Chenier gathered R-71 petition signatures in a public park with approximately 10,000 people in attendance, spoke to his church youth group in support of R-71, held signs with 70 other persons in support of R-71,

and traveled to Olympia to publicly observe the Secretary's signature review process. SER 96, 30, 65, 559, 89.

Because of their public stance, Perkins and Chenier are not "effective proponents" of maintaining anonymity for all other petition signers.

**c. Not All Petition Signers Share Appellants' Beliefs**

Perkins and Chenier are supporters of "traditional" marriage. SER 30-31, 556-57. However, Appellants have conceded that not all petition signers necessarily share Appellants' views or the alleged need of anonymity for petition signers. SER 594. This lack of uniformity is fatal to the standing of Perkins and Chenier to represent others.

**d. There Is No Genuine Obstacle To Other Petition Signers Asserting Their Own Rights**

A party seeking standing to represent others must demonstrate a "genuine obstacle" preventing others from asserting their own rights. *Singleton*, 428 U.S. at 116. Perkins and Chenier have not shown that other signers who wished to do so could not have joined this lawsuit as John Does. The identities of other petition signers would not have been disclosed publicly had they participated and the injunction been granted, because the district court entered several orders protecting such identities pending its decision. SER 584, 620, 666. Thus, there was no obstacle to other signers bringing their

own action, joining in this lawsuit, or otherwise asserting their rights. "Lack of motivation" to assert those rights is not a genuine obstacle. *Viceroy*, 75 F.3d at 489.[11]

**4. Perkins And Chenier Lack Individual Standing**

Perkins and Chenier also do not have individual standing to seek anonymity for themselves because they are not harmed by public disclosure of the identity of petition signers. Individual standing is premised on actual "injury in fact" – "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Here, the purported harm (the potential of previously anonymous petition signers being subjected to threats, harassment, and reprisals) cannot be shown by Perkins and Chenier. First, their names, along with those of all petition signers, already have been disclosed. Second, Perkins and Chenier

[11] Had Appellants wished to represent others' interests, they should have moved to certify a class action lawsuit under Federal Rules of Civil Procedure 23. This was the procedure followed when a challenge was raised to California's proposed disclosure of contributors to a referendum in opposition to same-sex marriage. *Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009); *Protectmarriage.com v. Bowen*, 262 F.R.D. 504 (2009). The class certification procedure would have tested Appellants' adequacy as class representatives and afforded an opportunity to "opt out" for R-71 signers who did not wish to be involved in this lawsuit. Fed. R. Civ. P. 23(a).

have been outspoken in their support of the R-71 campaign and traditional marriage, so any threats, harassment and reprisals that would have occurred (although there is no proof of the same) would have arisen from the public stance taken by them, and not from signing the R-71 petition. Thus, the "relief" sought of anonymity was never available to Perkins and Chenier and is even less so now that their petition signatures have been made public.

Moreover, Perkins admits that he has not suffered *any* harassment as a result of signing the petition and taking a public stance on R-71. SER 70, 72. There is no evidence that Perkins suffered any threats, harassment or reprisals upon public release of his signature.

Chenier's alleged "harassment" was limited to a single text message from his brother, an alleged "flipping off," cussing and a "mooning incident" on a public, high-traffic bridge while he was waiving an R-71 sign. SER 85, 86. Chenier did not face any physical attacks. SER 32. Neither Chenier nor Perkins suffered an "injury in fact" sufficient to give rise to individual standing in this matter.

### D. PMW Does Not Have Standing To Assert The Rights Of All R-71 Petition Signers

Courts have generally insisted that parties rely only on constitutional rights which are personal to themselves. *Tileston v. Ullman*, 318 U.S. 44

(1951); *NAACP*, 357 U.S. at 459. Here, PMW lacks standing to assert the constitutional rights of others not before the Court because it cannot satisfy the test for associational standing set out in *Hunt*, 432 U.S. 333.

### 1. PMW May Only Represent Its Members And Not All R-71 Petition Signers Are Members Of PMW

In *Hunt,* the Supreme Court limited applicability of associational standing to narrow situations in which the following criteria are satisfied:

> [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.

*Id*. at 343 (emphasis added).

PMW has not shown that all, or even some, petition signers are members of PMW.[12] In *Hunt*, the Court held that Washington State's Apple Advertising Commission had standing to represent apple growers and dealers in litigation because they were its members. They financed its activities, elected and served as its representatives, and the Commission provided "the means by which they

[12] PMW's filings with the Washington Public Disclosure Commission indicate it is a political committee with a campaign manager and treasurer. SER 546. Nothing in the record indicates PMW has members.

express[ed] their collective views and protect[ed] their collective interests." *Hunt*, 432 U.S. at 345.

In contrast, PMW has shown no indicia that any petition signers are PMW members. There is no evidence that signers elect PMW members or are the only ones who can be PMW members. The activities of PMW are not financed exclusively, if at all, by petition signers, and there is no showing that PMW provides the means by which petition signers can express their viewpoints.[13] The only connection between R-71 signers and PMW is that PMW was an R-71 sponsor.

Cases cited by PMW concerning associational standing underscore the need for some degree of membership in an association by persons it seeks to represent. *See, e.g.*, *United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274 (1986) (members of a labor union); *NAACP*, 357 U.S. 449 (members of a civil rights organization); *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153 (9th Cir. 1998) (golf club members). Because PMW has failed to establish that any, much less all, of the R-71 petition signers were

[13] Before the Supreme Court, counsel for PMW acknowledged that some petition signers may not even share PMW's views, but may have signed the petition only as support for letting voters decide the issue. SER 594. Similarly, none of PMW's witnesses objected to public disclosure of their signatures. Clearly, not all petition signers seek anonymity. SER 19-29.

its members, this case should be dismissed to the extent PMW asserts it represents all petition signers.

### 2. PMW Failed To Show That Non-Disclosure Of R-71 Signers' Identities Is An Interest Germane To Its Purpose

To satisfy the second element of associational standing, PMW must show how petition signers' anonymity is germane to the purpose of PMW. *Hunt*, 432 U.S. at 343. In this case, the Supreme Court in this case defined PMW as "a State Political Committee" organized "for the purpose of collecting petition signatures necessary to place a referendum on the ballot, which would give voters themselves an opportunity to vote on SB 5688." *Doe*, 130 S. Ct. at 2816. PMW has not explained how seeking to keep confidential the identities of R-71 signers is germane to this purpose. Even if PMW has a legitimate long-term interest in growing its organization, it has retained copies of all the petitions, which means it has access to all 137,000 names, addresses, phone numbers, and email addresses for contact purposes. PMW has failed to satisfy the second *Hunt* criteria for standing.

### 3. The Relief Requested Cannot Be Granted Without Participation By Individual Petition Signers

The third element of standing requires a showing that "neither the claim asserted nor the relief requested requires the participation of individual

members in the lawsuit." *Hunt*, 432 U.S. at 343. If individualized proof on the part of "members" of an association is required, then associational standing does not exist. *United Union of Workers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990).

Here, participation by petition signers is necessary because PMW cannot prevail on its as-applied challenge without establishing "a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." *Doe*, 130 S. Ct. at 2816. Attempting to make that showing, in turn, required PMW to identify R-71 signers who it thought would support its allegations. SER 584-85. Because involvement by petition signers is a prerequisite for proving the need for injunctive relief, the third element of the associational standing test cannot be satisfied.

PMW cannot establish that petition signers are members of PMW, that the anonymity of signatories is germane to PMW's goal of getting R-71 passed and that participation by petition signers is not required in this litigation. PMW has no standing to assert claims on behalf of R-71 signers.

### E. PMW Has Not Demonstrated Injury To Its Constitutional Rights

PMW does not have independent standing because there is no showing that its constitutional rights have been violated. Without showing peculiar

injury to itself, PMW does not have standing to pursue this litigation. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). PMW is not a petition signer, so providing anonymity to petition signers through the injunctive relief sought does not protect PMW's anonymity.

As noted above, because PMW has copies of the petitions, it has access to the petition signers' names and addresses.[14] Therefore, it can pursue associating with such signers. There is no showing that making the names of the petition signers public infringes the activities of, or causes injury to, PMW. Any solidarity PMW believes it has with petition signers is speculative at best and in any event, is not a sufficient basis for standing to pursue the litigation. *Supra* note 12. "Feelings of solidarity do not confer standing to sue." *Minority Police Officers Ass'n v. City of South Bend*, 721 F.2d 197, 202 (7th Cir. 1983).

Because PMW cannot substantiate injury to its constitutional rights, it lacks standing.

[14] Before the Supreme Court, counsel for PMW acknowledged that organizations sponsoring referenda retain copies of the petitions, use names from petitions for fundraising programs, and sometimes sell or trade names. SER 590.

### F. PMW Failed To Meet Its Burden Of Proving That R-71 Signers Are Entitled To An As-Applied Exemption To The PRA

Even if the case were not moot and the Appellants had standing, the district court correctly held that PMW failed to establish its case on the merits.

First Amendment jurisprudence provides a narrow exemption from generally applicable disclosure requirements where a group adduces sufficient evidence to show that (1) it espouses a minor or fringe viewpoint, (2) is a party with associational interests, whose rank-and-file members, if their names become public, will face (3) a reasonable probability of threats, harassment, and reprisals that will impair the group's ability to associate and (4) that the government is unable or unwilling to control the threats and harassment. *E.g.*, *Doe,* 130 S. Ct. 2811; *Brown*, 459 U.S. at 88.

This Court should affirm the district court's thorough analysis, which held against PMW on each ground: To the extent R-71 signers have a shared viewpoint, they do not espouse a viewpoint vilified by the majority; R-71 signers have no cognizable associational interests; R-71 signers do not face a reasonable probability of threats and harassment that would impair an ability to associate; and there is no evidence the State is unwilling or unable to respond to threats or harassment. The Court should and must affirm if even one of the

district court's alternative reasons for granting summary judgment in Appellees' favor is sustained.

### 1. R-71 Signers Are Not A Minor Party Qualified To Take Advantage Of The Minor-Party Exemption

#### a. Only Marginalized, Vulnerable Parties May Have Privacy Interests That Outweigh The Government's Interest In Disclosure

PMW seeks relief from a disclosure exemption that applies only to "minor parties." *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 71-74 (1976) (per curiam) (discussing the vulnerability of the associational rights of minor parties); *Brown*, 459 U.S. at 101 ("The First Amendment prohibits a state from compelling disclosures by a *minor party* that will subject those persons identified to the reasonable probability of threats, harassment or reprisals." (emphasis added)); *Dole v. Local Union 375, Plumbers Int'l Union*, 921 F.2d 969, 973 (9th Cir. 1990) (refusing to grant exemption to group that failed to show it was "politically weak, politically unpopular, or politically disadvantaged"); *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 417, 420 (2d Cir. 1982) (acknowledging the exemption's importance for "fostering the existence of *minority political parties*" and "nurtur[ing] the free expression of *minority views*" (emphasis added)); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D.

Cal. 2009) ("[T]he 'minor party' requirement articulated in *Buckley* is very much relevant and intact.").

The district court reached the conclusion that this uniform body of precedent compels—only marginalized groups may utilize this exemption. ER 14-15. PMW has presented this Court with no sound reason to disturb decades of precedent applying the exemption to disempowered and unpopular minor parties alone. *E.g.*, *Brown*, 459 U.S. at 88-89 (Ohio Chapter of the Socialist Workers Party with 60 members); *NAACP*, 357 U.S. at 466 (NAACP in 1950s Alabama); *Hall-Tyner*, 678 F.2d 416 (election committee supporting the Communist Party); *ProtectMarriage.com*, 599 F. Supp. 2d at 1216 ("Since *Buckley*, as-applied challenges have been successfully raised only by minor parties, specifically those parties . . . having small constituencies and promoting historically unpopular and almost universally rejected ideas").

Courts have good reason to limit the exemption from disclosure laws to minor parties—not majority groups.[15] Mandatory disclosure may impose

[15] PMW asserts that the minor-party exemption must apply to major parties because the First Amendment does not permit discrimination among speakers. PMW Br. at 13. But this case involves associational interests—not speech—and *Buckley* created just such a distinction in permitting an exemption for certain minor parties where the probable harm of disclosure became so great that the government's interest in disclosure paled in comparison. *E.g.*, *Buckley*, 424 U.S. at 69-70.

greater burdens on the associational abilities of small minority groups than on large majority groups. As the Second Circuit explained in *Hall-Tyner*:

> Acknowledging the importance of fostering the existence of minority political parties, we must also recognize that such groups rarely have a firm financial foundation. If apprehension is bred in the minds of contributors to fringe organizations by fear that their support of an unpopular ideology will be revealed, they may cease to provide financial assistance. The resulting decrease in contributions may threaten the minority party's very existence.

*Hall-Tyner*, 678 F.2d at 420.

Rejecting the exemption's reason for existence and decades of precedent applying the exemption only to minor parties, PMW contends that *Buckley*'s reference to minor parties was just a shorthand term for the specific party before the Supreme Court at that time. PMW Br. at 12-13. This characterization of *Buckley* renders superfluous the Supreme Court's analysis of the relative governmental and individual burdens in that case. Because minor parties may cease to exist if their membership lists are disclosed, and because governmental interests in disclosure are less profound with respect to minor parties (who will not seriously challenge an election), courts must treat minor parties with extra care. *E.g.*, *Buckley*, 424 U.S. at 70. Unlike a mainstream organization, for a minor party a fear of reprisal "may deter contributions to the point where the movement cannot survive." *Id.* at 71.

If any group, no matter how large or powerful, could successfully pursue an as-applied challenge to disclosure laws, the exception would swallow the general rule of disclosure. For example, the Democratic Party undoubtedly could show that in many elections Democrats are subjected to heated rhetoric, stolen signs, and angry phone calls of the type at issue here. SER 39-42. The Republican Party could do the same. SER 540-41. This is why "minor status is a necessary element of a successful as-applied claim," and the Supreme Court "created an exception not for the majority, but for those groups in which the government has a diminished interest." *ProtectMarriage.com*, 599 F. Supp. 2d at 1215-16.

PMW does not cite a single case in which any court has granted the minor-party exemption to a major party. In the three cases PMW cites in favor of its unprecedented position, the courts did not address the issue of minor-party status, and two of the cases refused to grant an exemption because the Appellants did not present any evidence of harassment. *See Colorado Right to Life Comm., Inc. v. Davidson*, 395 F. Supp. 2d 1001, 1016 n.17 (D. Colo. 2005); *Herschaft v. N.Y.C. Campaign Fin. Bd.*, 127 F. Supp. 2d 164, 169 (E.D.N.Y. 2000). The courts, therefore, did not discuss whether the parties seeking the exemption were minor, because the groups failed to satisfy the

evidentiary requirement for the exemption. These courts' non-decisions on the minor-party issue are not dispositive or even illustrative of whether minority status is a necessary condition for the minor-party exemption. *See, e.g.*, *Sorenson v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 2001) ("[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.").

Instead of facing these hurdles head on—that the exemption is based on the special needs of minor parties and prior precedent applies the exemption only to minor parties—PMW seeks to sidestep them. According to PMW, the Supreme Court's remand to consider the as-applied challenge was a tacit decision that groups of any size may take advantage of the exemption or, at least, that R-71 signers must be permitted to do so. But the as-applied claim was not before the Supreme Court, which specifically noted that it was leaving it "to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition." *Doe*, 130 S. Ct. at 2815. It was not until the remand proceedings that the district court conducted the necessary fact-finding and determined that PMW was not a minor party whose associational interests would be impaired by threats or harassment that the State was unwilling or unable to address.

Without the aid of such fact-finding, there was no basis for a ruling by the Supreme Court on the as-applied challenge.

Thus, by declining to decide an issue not before it, the Supreme Court did not implicitly undo decades of settled precedent that the disclosure exemption is limited to small groups that might cease to exist if their members become publicly known. On the contrary, the Supreme Court's decision in *Doe v. Reed* recognized the foundational principle that the exemption applies only to minor parties by quoting *Buckley v. Valeo* for the proposition that "'minor parties' may be exempt from disclosure requirements" in certain circumstances. *Doe*, 130 S. Ct. at 2820-21 (citing *Buckley*, 424 U.S. at 74).

**b. R-71 Signers Are Not A Minor Or Fringe Organization**

PMW does not attempt to argue that the collection of individuals who signed R-71 petitions constitutes a minor party. Its case rests entirely on its argument that there is no minor-party requirement. PMW's Br. at 12-15. As discussed above, PMW is wrong. As the district court properly concluded, R-71 petition signers do not constitute a minor party or fringe organization. ER 15-17. PMW's claim fails for this threshold reason.

Minor parties are those "with little chance of winning an election" and which do not have a "sound financial base." *Buckley*, 424 U.S. at 70-71. They

promote causes that are generally "reviled." *E.g.*, *Goland v. United States*, 903 F.2d 1247, 1260 (9th Cir. 1990); *see also Dole*, 921 F.2d at 973 ("politically weak, politically unpopular, or politically disadvantaged"); *Hall-Tyner*, 678 F.2d at 420 ("abhorrent"). Few litigants have obtained a minor-party exemption. Examples include the Ohio chapter of the Socialist Workers Party in the 1980s, which had 60 members and whose candidate(s) garnered 1.9% of the annual vote, and the NAACP in 1950s Alabama. *Brown*, 459 U.S. at 88; *NAACP*, 357 U.S. 449.[16]

As the district court concluded, PMW cannot "with any credibility analogize [its] situation to that of a small group of rank and file members of the [Socialist Workers Party] or the NAACP." ER 15-16. More than 137,000 people signed R-71 petitions to put Washington's domestic partnership bill to a popular vote, and ultimately nearly 840,000 Washingtonians (47% of those who voted) voted against E2SSB 5688 at the ballot box. ER 5.

R-71 signers do not constitute a historically vilified or unpopular minor party. Even assuming a unity of identity between R-71 signers and the political

[16] PMW's callous and bizarre suggestion that the NAACP in 1950s Alabama did not espouse rejected or minority views ignores history. PMW's Br. at 14 n.8; *see Hall-Tyner*, 678 F.2d at 421-22 (noting the NAACP had been "associated with unpopular positions" and "suffered significant harassment in the past").

beliefs of PMW, losing a fairly close election does not make R-71 signers a minority akin to the tiny and powerless Socialist Workers Party during the Cold War, which faced significant government antipathy. *Cf. ProtectMarriage.com*, 599 F. Supp. 2d at 1215 ("There is surely no evidence that the seven million individuals who voted in favor of Proposition 8 can be considered a 'fringe organization' or that their beliefs would be considered unpopular or unorthodox.").

The district court thus correctly determined that the R-71 signers are not a vulnerable minority that can seek the protection of the First Amendment disclosure exemption. ER 14-15 ("*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. Doe has not provided adequate authority to support any departure from requiring such a showing.") (citation omitted) (internal quotation marks omitted). This Court should affirm the district court's grant of summary judgment in Appellees' favor on this ground.

### c. Individuals Who Signed An R-71 Petition Have No Associational Interests

As the district court properly found, PMW's claim fails for a second threshold reason as well: Individuals who signed the R-71 petition did not form a "party" with cognizable and ongoing associational interests.

The First Amendment's minor-party exemption grew from the recognition that, at times, disclosure of a vulnerable and marginalized group's participants may inhibit future associational activities. *E.g.*, *Buckley*, 424 U.S. at 73 (explaining that a minor party seeking application of the as-applied exemption must show that the disclosure requirements "will impinge upon protected associational activity"); *Brown*, 459 U.S. at 93 (noting that the exemption exists to ensure that a fear of reprisal does not "deter contributions to the point where the movement cannot survive" (citation omitted) (internal quotation marks omitted)). The group seeking an exemption must, therefore, engage in ongoing associational activity. If there is no associational activity, there is nothing for the First Amendment to protect.

The R-71 signers are not a cohesive group that can even theoretically qualify for a disclosure exemption under the First Amendment. While PMW's case rests on an effort to conflate R-71 signers with its own political beliefs, one did not need to "join" PMW to sign an R-71 petition. *Any* registered

Washington voter can sign a referendum petition. Wash. Const. art. II, § 1(b). No association is required. Moreover, as discussed above in Section V.D.1, it is not clear that PMW even has members.

PMW does not cite a single case holding that people who sign a ballot measure petition are in an association with each other or with the sponsor of the measure. In fact, as the Supreme Court recognized in this very case, a petition signer may be "agnostic as to the merits of the underlying law" and sign to "express[] the political view that the question should be considered 'by the whole electorate.'"[17] *Doe*, 130 S. Ct. at 2817 (quoting *Meyer v. Grant*, 486 U.S. 414, 421 (1988)). The only commonality among the R-71 signers is that they signed a petition for the same ballot measure. *See* ER 15. The record contains no evidence regarding the collective views of R-71 signers, and no evidence that R-71 signers sought to associate with each other in a constitutionally protected manner. ER 15. Citizens would likely be shocked to learn that they joined a "party" by signing a petition in front of a grocery store.

Finally, any conceivable interest in associating for purposes of attracting more people to sign a ballot measure dissipates after the vote takes place. The

[17] PMW thus selectively quotes the Supreme Court as stating that signing a petition is an expression by the signer "that the law subject to the petition should be overturned." *Doe*, 130 S. Ct. at 2817; PMW Br. at 11.

election is long since over. The purpose of any "association" of R-71 signers is likewise long since over.

The district court properly concluded that only actual groups with associational interests may take advantage of the minor-party exemption, and that the R-71 signers are not such a group. *See* ER 14-17.

### 2. PMW Cannot Show A Reasonable Probability That R-71 Signers Face Severe And Widespread Harassment

Because PMW failed to meet the threshold burden described above, the Court need not consider whether the district court erred in determining that PMW failed to present sufficient evidence that R-71 signers will face a reasonable probability of threats, harassment, or reprisals if the State is not enjoined from further release of R-71 petitions. But if this Court does reach that issue, PMW failed its burden of proof here as well.

PMW bears the burden of establishing that there is "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*, 130 S. Ct. at 2820 (quoting *Buckley*, U.S. 424 at 74).

Five members of the Supreme Court, through concurring opinions, provided a clear articulation of the applicable framework to the district court and this Court when deciding the propriety of PMW's as-applied challenge.

Although PMW attempts to dismiss the concurring opinions,[18] their explanation of the reasonable probability test is the Supreme Court's most recent guidance on the First Amendment's disclosure exemption—and was offered in this very case. Appellees submit that the Court should pay close attention to the Supreme Court's direction.

As the concurring Justices noted, it is not easy to make the requisite showing. The courts are "deeply skeptical" of as-applied exemptions from disclosure laws and a plaintiff seeking an as-applied exemption from disclosure laws bears a "substantial burden." *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring); 2831 (Stevens, J., concurring). According to Justice Sotomayor, joined by Justices Stevens and Ginsburg, "[c]ase-specific relief may be available . . . in the *rare circumstance* in which disclosure poses a reasonable probability of *serious and widespread harassment* that the State is *unwilling or unable to control*." *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., joined by Stevens and Ginsburg, JJ., concurring) (emphases added). Similarly, Justice Stevens, joined by Justice Breyer, noted that "[f]or an as-applied challenge to a law such

[18] PMW claims that only three Justices agreed on these standards—Justices Sotomayor, Ginsburg, and Stevens. PMW Br. at 16. But Justice Breyer signed Justice Stevens' concurrence, and Justice Scalia doubts that any petition signatures should be kept secret. *Doe*, 130 S. Ct. at 2837. Thus, five Justices agree on this guidance—not three.

as the PRA to succeed, there would have to be a *significant threat of harassment* directed at those who sign the petition that *cannot be mitigated by law enforcement measures*." *Id.* at 2831 (Stevens, J., joined by Breyer, J., concurring) (emphases added); *see also id.* at 2831 (requiring "strong evidence"). Justice Scalia, meanwhile, was skeptical that petitions should *ever* be kept secret, noting that "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance." *Id.* at 2837 (Scalia, J., concurring).

The concurring opinions in *Doe* were explanations of the reasonable probability standard rather than refinements of it. They reiterate the Supreme Court's prior holdings that the State's interest in disclosure may be overcome only "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot constitutionally be applied." *Buckley*, 424 U.S. at 71. But, as the district court recognized, regardless of how the reasonable probability standard is stated, PMW's evidence "falls far short." ER 34.

### a. PMW's Attempt To Lower Its Burden Of Proof Is Unavailing

PMW's efforts to downplay its burden of proof are unavailing. PMW argues that the burden is low and flexible, in part because PMW is a new party and so cannot draw upon the history of its members and donors in order to show a reasonable probability of harassment of R-71 signers. PMW Br. at 17-18, 21-24. Again, PMW attempts to conflate itself with R-71 signers. In any event, PMW is not a new party with no history upon which to draw. *See* ER 18-19. Rather, PMW has existed since May 2009, its contributors have been publicly known since June 2009, and a complete list of petition signers has been public since November 2011. Therefore, consistent with Supreme Court precedent, PMW must offer evidence of a "significant threat of harassment *directed at those who sign the petition* that cannot be mitigated by law enforcement measures." *Doe*, 130 S. Ct. at 2831 (Stevens, J., concurring) (emphasis added); *see also Buckley*, 424 U.S. at 74 (requiring "specific evidence of past or present harassment of *members* due to their associational ties, or harassment directed against the *organization* itself" (emphases added)); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 915 (2010) (disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's *members* would face threats,

harassment, or reprisals if their names were disclosed" (emphasis added) (citation omitted)).

PMW cannot meet this standard. As discussed below, the fact that PMW has no evidence of harassment of its own donors or of R-71 signers does not imply that PMW is the sort of new party that may rely on outside evidence; rather, it proves that PMW cannot sustain its burden, however "flexible" the standard.

**b. PMW's Evidence Is Insufficient To Meet Its Burden**

In evaluating the evidence presented, the district court found that PMW's evidence of alleged harassment, threats, and reprisals "[fell] far short." ER 34.

In its effort to convince the Court that it should reject this portion of the district court's analysis, PMW distorts the district court's conclusions. Arguing it met the reasonable probability standard, PMW selectively quotes the conclusion of the district court's opinion, in which the district court exhorted the public to engage in civil debate on contentious issues. PMW Br. at 24-25. The bold text indicates the language PMW omitted:

> **While Plaintiffs have not shown serious and widespread threats, harassment, or reprisals against the signers of R-71, or even that such activity would be reasonably likely to occur upon the publication of their names and contact information**,

> they 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. The district court confronted PMW's profound failure of proof and reached the only possible conclusion—PMW did not meet its burden.

Taking the same tack as it did before the district court, PMW presents this Court with a litany of supposed threats, harassment, and reprisals, peppering its brief with an array of out-of-context and misleading "sound bites" drawn from newspaper articles, blog posts, and opinion columns, most of which are unauthenticated, inadmissible, and did not involve R-71.

Appellees commend a review of the record evidence to the Court. It reveals PMW's profound failure of proof. While much can be said about PMW's evidentiary showing, three points are key: (1) PMW failed to present the most fundamental type of evidence to support its claim—evidence that R-71 signers (or even PMW donors) were harassed as a result of their support of R-71 or PMW; (2) most of PMW's evidence is related to Proposition 8 in California—not R-71; and (3) the only colorable evidence PMW *did* submit related to R-71 took the form of testimony from people actively and visibly

engaged in the R-71 campaign, which clearly established that even public supporters of R-71 face no reasonable probability of harassment.

**(1) PMW's Lack Of Evidence**

PMW did not present the most basic evidence in support of its claim. First, PMW presented no evidence that a single R-71 signer has been harassed or threatened by either private parties or government officials merely for signing an R-71 petition, despite its efforts to solicit such evidence. ER 29-31.[19]

Second, when the district court ordered PMW to submit supplemental summary judgment briefing providing evidence that any R-71 signer had been harassed or threatened, PMW responded "there is no such evidence." ER 29-30 (quoting district court Dkt. #259 at 2 (SER 11)).

Third, PMW presented no admissible evidence that people refused to sign R-71 petitions because they were reasonably afraid of threats, harassment, or reprisals, or because they feared that their names might become public some day.[20] To the contrary, although the record reflects that R-71 petitions were

[19] At the time PMW filed its brief, R-71 petitions had been available online for approximately three months—PMW has presented no evidence that a single R-71 signer has been threatened or harassed as a result.

[20] The *only* evidence PMW points to of a supposed "chill" on signing the petition is the deposition testimony of a single witness, in which the deponent

signed in public, PMW and others collected more than 137,000 signatures in just sixty-eight days and fulfilled its mission to qualify R-71 for the ballot. *E.g.*, ER 4, 31.

Fourth, PMW presented no evidence that any of the 857 individuals who contributed to PMW has been harassed or threatened for doing so, despite the fact that the donors' names have been publicly available on the internet, in searchable format, since June 2009.[21] ER 31. In *Citizens United*, the Supreme Court rejected an as-applied challenge when the group at issue "ha[d] been disclosing its donors for years and ha[d] identified no instance of harassment or retaliation." *Citizens United*, 130 S. Ct. at 916.

Fifth, PMW submitted no evidence that government officials were unwilling or unable to help any R-71 proponent who reported harassment, or

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stated that unnamed individuals told him that they would have signed the R-71 petition, but did not want to leave their names on the petition for reasons they did not explain. *See* PMW's Br. at 2 n.2 (citing Dkt. #211-2 (*e.g.*, ER 81-84)). There is no way to verify the truth or relevance of this inadmissible hearsay. Indeed, PMW omits from the record the critical part of the witness's testimony: The witness does not know *why* the persons in question refused to sign the petition. SER 21-22 ("They knew the cause of this petition and they refused to sign it, even though they supported. This is all I can tell you").

[21] Although PMW suggests it had a "difficult time" raising money, it neglects to mention that it raised nearly half a million dollars in contributions. SER 16-17. There is no evidence any person has been harassed as a result of contributing money to PMW.

would be unwilling or unable to do so in the future. *See* Section V.F.3, below. This lack of evidence is fatal.

**(2) Information Regarding Proposition 8 Is Irrelevant And Inadmissible**

The evidence PMW did submit was no better. PMW's primary evidence related to "stale experiences of those persons involved with Proposition 8." ER 31. Proposition 8 was a 2008 ballot measure in California concerning a different issue (a constitutional amendment prohibiting same-sex marriage as opposed to a domestic partnership law). This evidence failed for both evidentiary and substantive reasons.

First, though the district court found it unnecessary to make evidentiary rulings to reject PMW's claim, PMW presented its Proposition 8 evidence in the form of collections of unauthenticated, foundationless, hearsay materials printed from the internet and attached to a declaration from PMW counsel, a subset of which PMW presents here. *See* ER 141-327. A party must support or oppose a motion for summary judgment with admissible evidence. Fed. R. Civ. P. 56(c). PMW did not do so here.[22]

[22] Thus, in no event would entry of summary judgment on PMW's behalf be appropriate. The district court did not reach Appellees' motion to strike PMW's Proposition 8 evidence. Even if this Court did conclude (1) the case is not moot; (2) PMW has standing; and (3) summary judgment on

Second, even if these evidentiary deficiencies are ignored, as the district court concluded, the Proposition 8 evidence does not aid PMW's cause. ER 19 n.3. Only new parties with no prior history can rely on the experiences of other entities or organizations to support a disclosure exemption. The R-71 vote took place two years prior to both its summary judgment order and the signature-gathering process before that. ER 18-19. PMW was thus limited to evidence regarding Washington's R-71, as it had ample opportunity to uncover evidence of harassment against R-71 signers (or even PMW donors and spokespeople) in Washington. *See id.*

Moreover, the district court concluded that the substance of PMW's Proposition 8 evidence did not support PMW's claim.[23] The Eastern District of California, considering a similar claim brought in the context of the Proposition 8 campaign by an organization similar to PMW, found the Appellants' evidence insufficient. *See ProtectMarriage.com*, 599 F. Supp. 2d 1197 (ruling on preliminary injunction); *ProtectMarriage.com v. Bowen*, No. 2:09-CV-

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Appellees' behalf was improvidently granted, it should remand for consideration of Appellees' motion to strike—not enter judgment on PMW's behalf.

[23] PMW complains the district court erred in concluding PMW's out-of-state evidence was inadmissible but fails to mention the district court's alternative conclusion that even if PMW *could* rely on such evidence to support its claim, such evidence was not compelling when applied to this case. ER 19 n.3.

00058-MCE-DA, 2011 WL 5507204 (E.D. Cal. Nov. 04, 2011) (ruling on cross-motions for summary judgment), *appeal docketed*, No. 11-17884. Even if the California evidence were relevant, PMW's "evidence" of alleged occurrences in California four years ago is even less probative now than it was in *Protectmarriage.com*.

**(3) PMW's Washington-Based Evidence Does Not Establish A Reasonable Probability Of Harassment**

Finally, PMW presented very little evidence of any sort of harassment (or even "uncomfortable conversations") that took place in Washington related to R-71. This evidence is grossly insufficient to sustain PMW's burden.

As the district court detailed, PMW's Washington evidence principally related to the testimony of 18 witnesses, all of whom were more than mere signers; they had made themselves public spokespersons or advocates for R-71. ER 19-29 (describing the experiences of PMW's proposed witnesses). But even these public spokespeople—whom PMW hand-picked in its effort to prove its case of harassment—were subjected to only "a few isolated incidents of profane or indecent statements, gestures, or other examples of uncomfortable conversations that are not necessarily even related or directly connected to the issue at hand." ER 19. PMW's witnesses and declarants did

not have any serious concerns if the fact that they signed R-71 were to be publicly disclosed. ER 5-6. Moreover, they did not face serious harassment or feel threatened. ER 19-29. PMW wishes to ignore the record because its own witnesses prove that even public supporters of R-71 did not face serious harassment during the heat of the R-71 campaign—let alone that a person who merely signed an R-71 petition three years ago faces a reasonable probability of threats, harassment, or reprisals *today* unless the State is precluded from releasing additional copies of the R-71 petition.

As all this suggests, PMW's presentation of the record must be viewed with caution because its rhetoric regularly outstrips its evidence. For example PMW's support for its assertion that "PMW received death threats over the Internet," is a comment posted on YouTube by a person residing in the U.S. Virgin Islands expressing disagreement with the views of a candidate at a candidate forum. *Compare* PMW Br. at 20 *with* SER 26-27, ER 308. As support for its assertion that it presented evidence of "slashed tires," PMW cites a news story discussing a tire-slashing incident that does not suggest in any way that the incident was tied to R-71. *Id.* at 28 (citing ER 269). PMW thus either overstates its evidence or cites "evidence" unconnected to the R-71

campaign.[24] What PMW offers is its own subjective, speculative, and unsupported fears, which are insufficient to sustain an exemption from a disclosure requirement. *See Dole*, 921 F.2d at 973 ("A subjective fear of reprisal is insufficient to invoke first amendment protection against a disclosure requirement.").

PMW's evidence of "harassment" consists of some "uncomfortable conversations," heated rhetoric during the midst of a contested campaign, experiences unrelated to R-71, and a handful of incidents when the police were contacted and swiftly addressed the issues raised. As the district court concluded, PMW's evidence fell far short of the showing required.

In short, there is no colorable evidence to support PMW's as-applied challenge. Its brief makes plain that what it largely objects to are not real "threats" or "harassment," but, rather, others exercising their own First Amendment right to disagree with PMW's political views. *See, e.g.*, PMW Br. at 26-27 (characterizing as 'harassment,' among other things, "angry

[24] There are many other instances of this evidentiary sleight of hand. For example, PMW asserts that a "deterrence campaign" prevented people from signing the R-71 petition. PMW's Br. at 2. As support, PMW cites a declaration of counsel filed in a lawsuit in California, in which counsel relays hearsay communications between herself and unidentified third parties regarding the California lawsuit—*not R-71*. *See* SER 33-37.

protests").[25] PMW complains of normal, protected activity in a democracy. *Cf. ProtectMarriage.com*, 2011 WL 5507204, at *19 (noting that a "good portion of [the actions the plaintiffs called 'harassment'] are themselves forms of speech protected by the United States Constitution"). Indeed, PMW characterizes the thrust of its claim as an attempt to prevent R-71 signers from "being exposed publicly and confronted with uncomfortable conversations by those who opposed R-71." PMW Br. at 12. This is protected speech. It is the core of the First Amendment. The Founders did not adopt the First Amendment out of concern the government would proscribe "comfortable" speech.

Moreover, "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011). The "language of the political arena . . . is often vituperative, abusive, and inexact," *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), and the answer lies in "more speech, not less." *Citizens United*, 130 S. Ct. at 911; *see also Snyder*, 131 S. Ct. at

[25] Similarly, PMW cites as harassment that those who opposed the referendum "advocated" that people "promise not to sign the R-71 petition." This is part of the public debate and effort to sway votes—not harassment. PMW Br. at 2.

1219 (2011) (noting that we "must tolerate insulting, and even outrageous, speech") (internal citation omitted).

Therefore, even if this Court determines that R-71 signers are a minority and an associational group, which it should not, it should affirm the district court's conclusion that the scattered examples of colorful language and offensive gestures from around the country, combined with the testimony of PMW's witnesses that they have not experienced substantial harassment, "falls far short" of meeting the standard for an as-applied exemption. ER 34.

### 3. The State Is Willing And Able To Control Any Alleged Harassment

Finally, the Court should affirm because the State is willing and able to control or respond to any speculative, hypothetical future harassment.

#### a. Appellants Seeking An Exemption Must Establish That The State Is Unable Or Unwilling To Control The Harassment

PMW baldly asserts that "whether police can mitigate a situation cannot be the proper test" as to whether a minor party can prevail on an as-applied challenge to a disclosure law. Again, PMW ignores Supreme Court precedent, including the guidance in this very case.

Justices Sotomayor, Stevens, Ginsburg, Breyer, and Scalia indicated that a plaintiff bringing an as-applied challenge must prove not only serious

harassment, but also that law enforcement is unwilling or unable to control the harassment. *See Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring); 2831 (Stevens, J., concurring); 2837 (Scalia, J., concurring).

The concurring Justices in *Doe* did not invent this requirement. They merely articulated the existing standard. The only cases to sustain as-applied challenges to disclosure laws have done so where the government was either involved in the harassment or unwilling or unable to protect the organization's members from private harassment. *E.g.*, *Brown*, 459 U.S. at 98-102; *NAACP*, 357 U.S. at 462. It is the very fact that the government does not or cannot adequately protect minor parties that may justify a constitutional exemption from disclosure laws, and it is the relative powerlessness of the minor organization that, in turn, diminishes the government's interest in enforcing disclosure laws. *See Buckley*, 424 U.S. at 69.

**b. PMW Cannot Establish That The State Is Unwilling Or Unable To Control Harassment Of R-71 Signers**

PMW's evidence fails here as well. PMW affirmatively establishes that the State of Washington has rigorous laws against harassment. PMW Br. at 19-20. PMW does not even allege any government actor harassed R-71 signers or that law enforcement was unwilling or unable to mitigate alleged private

harassment against PMW's public spokesperson witnesses brought to its attention.

In fact, many of PMW's public spokesperson witnesses testified that they did not feel sufficiently threatened to even inform the police of any alleged harassment. *E.g.*, ER 21, 23-24, 26. The few times any of PMW's witnesses did call the police, the police handled the matters "without further incident." ER 26. PMW presents no evidence to cast doubt on the district court's correct characterization of police action in this case:

> Doe has supplied minimal testimony from a few witnesses who . . . stated either that police efforts to mitigate reported incidents was sufficient or unnecessary. Doe has supplied no evidence that police were or now are unable or unwilling to mitigate any claimed harassment or are now unable or unwilling to control the same, should disclosure be made.

ER 33.[26]

In short, this is not an extraordinary situation like the one presented in *Brown* or *Hall-Tyner*, where the government itself engaged in the harassing activities. For example, in *Brown*, the Supreme Court granted an exemption to the Socialist Workers Party after chronicling the government's hostility toward that party. *Brown*, 459 U.S. at 99 n.17, 98-101. Similarly, in *Hall-Tyner*, the

[26] The district court found that PMW's evidence fell short regardless of whether the district court followed the guidance of the *Doe* concurring opinions. ER 32.

Second Circuit affirmed an exemption based on, among other things, "the extensive body of state and federal legislation subjecting Communist Party members to civil disability and criminal liability, [and] reports and affidavits documenting the history of governmental surveillance and harassment of Communist Party members." *Hall-Tyner*, 678 F.2d at 419. In stark contrast to the evidence in those cases, there is no evidence suggesting governmental hostility here. *Cf. ProtectMarriage.com*, 2011 WL 5507204, at *18 (rejecting as-applied challenge in part because, "Plaintiffs cannot assert that there is some sort of governmental hostility to their cause, nor can they in good conscience argue that law enforcement was or would be non-responsive to any illegal acts directed at Plaintiffs' contributors").

The district court's grant of summary judgment in Appellees' favor should be affirmed because PMW cannot establish that the State was or is unwilling or unable to control any alleged harassment of R-71 signers.

In sum, this Court should affirm the district court's holding that R-71 signers do not form a minor party that will face a reasonable likelihood of threats, harassment, and reprisals that the State of Washington is unable or unwilling to control.

### G. The District Court Order Was Properly Released

PMW's contention the district court violated PMW's due process rights by not redacting its summary judgment order deserves short shrift. PMW cites no authority recognizing a liberty interest in anonymity in the judicial process in this context, and a due process claim brought on this basis would not be properly before the Court in any event. Regardless, PMW's characterization of the district court's protective order is simply wrong.

While discovery was proceeding, PMW moved for a protective order under Fed. R. Civ. P. 26(c). PMW stated that its motion was "limited to materials exchanged during discovery" and would "not confer blanket protections on all disclosures." SER 582. The district court granted the motion but indicated it might revisit the issue. ER 343.

PMW never asked the district court to seal or redact the order on the merits, prior to the district court's issuance of its order. The minute order cannot be stretched to encompass an issue PMW did not raise. Unlike the "good cause" standard for issuance of a Rule 26 protective order, sealing or redacting a summary judgment order would require a finding under Local Civil Rule 5(g)(2) of a "compelling showing" sufficient to overcome the "strong

presumption of access to the court's files." That would require a separate motion PMW never brought.

Citing *Perry v. Brown*, 667 F.3d 1078 (9th Cir. 2012), PMW contends that the district court's minute order implied that the district court would redact names from a future order, in the event that it later issued a decision against PMW on the merits. *Perry* is not comparable to this case. In *Perry,* the district court placed a video recording of the trial under seal at a party's request and made "unequivocal assurances that the video recording at issue would not be accessible to the public." *Id.* at 1085. This Court found that "no other inference" could plausibly be drawn from the judge's order but that the district court would provide notice prior to unsealing the video recording. *Id.*

Given PMW's failure to raise the issue, the district court was not obligated to redact or seal its order sua sponte.[27] Becasue the issue was not raised, and no assurance regarding disclosure of future orders was made by the district court, PMW plainly had no due process interest in disclosure of the order.

[27] There are few issues that courts are obligated to consider sua sponte. *See, e.g., Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (subject matter jurisdiction must be considered sua sponte).

## VII. CONCLUSION

For the reasons stated above, the Court should affirm the district court's entry of summary judgment to Appellees.

RESPECTFULLY SUBMITTED this 21st day of March 2012.

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c) the Appellees state that *ProtectMarriage.com v. Bowen,* 11-17884 (9th Cir.) is a related case. *Bowen* raises a related legal issue, but applies the legal analysis to a factual context unrelated to the facts of this case.

## CERTIFICATE OF COMPLIANCE

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 14,576 words. This brief complies with the enlargement of brief size granted by court order dated March 2, 2012.

March 21, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2012, I electronically filed the foregoing with the Clerk of the Court of 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/ Anne E. Egeler
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