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,
BRENDA GALARZA, in her official capacity as Public Records Officer
for the Secretary of State of Washington,
Appellees.

and

WASHINGTON COALITION FOR OPEN GOVERNMENT and
WASHINGTON FAMILIES STANDING TOGETHER

Intervenors/Appellees.

On Appeal from the United States District Court
District of Washington, at Tacoma
No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

Reply Brief of Appellants

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I. Disclosure Is Not a Moot Issue.

A. This Court Can Provide Effective Relief to PMW.

The State concedes that "[d]isclosure claims remain viable after disclosure . . . if a court can still provide relief." (State Br. at 18.) Yet, the State contends that this case is moot unless this Court can restore complete confidentiality. (State Br. at 17.) But, "'the question is not whether the precise relief sought at the time the application for an injunction was filed is still available . . . [but] whether there can be any effective relief.'" *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001); *see also Church of Scientology of California v. U.S.*, 506 U.S. 9, 12-13 (1992) (rejecting a claim that an appeal of disclosure of tape recordings was moot and noting, "While a court may not be able to return the parties to the *status quo ante* . . . a court can fashion *some* form of relief in circumstances such as these.").

B. Preventing Further Disclosure is Effective Relief.

This Court can still provide relief by preventing *further* disclosure of the R-71 petitions. *See In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1187-88 (9th Cir. 1981) (Courts "can grant partial relief by preventing further disclosure.") *Id*. at 1187-88), *aff'd sub nom., United States v. Sells Engineering Inc.*, 463 U.S. 418 (1983) ("*Sells*").

The State contends that disclosure of grand jury material in *Sells* was not moot because the court could have issued an order preventing the use of that material in future civil proceedings. (State Br. at 18-19.) But such an order would not have prevented *disclosure*. In fact, "the Civil Division attorneys and their assistants enjoyed access to the grand jury materials *for more than two years* while [the] case was pending in the Court of Appeals." *Sells*, 463 U.S. at 422, n.6 (emphasis added).

But even two years of disclosure did not render the issue moot because the court could still provide partial relief by preventing further disclosure.

> Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but *we can grant partial relief by preventing further disclosure.*

In re Grand Jury Investigation No. 78-184, 642 F.2d at 1187-88 (emphasis added).

The U.S. Supreme Court affirmed the Ninth Circuit, noting, the "Court of Appeals correctly rejected the contention" "that the case was moot because the disclosure sought to be prevented had already occurred." *Sells*, 463 U.S. at 422 n.6. *See also U.S. v. Fischbach and Moore, Inc.*, 776 F.2d 839, 841 n.2 (9th Cir. 1985) (continuing disclosure causes harm).

The State also misstates the import of *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997). Whether the newspapers were entitled to the grand jury material

contained in the briefs and proceedings "to the extent that that information ha[d] already been publicly disclosed," *id* at 154, is highly relevant. The court explained that even those grand jury secrets contained in the briefs that had already been publicly disclosed were still entitled to protection:

> [A] court is simply not powerless, in the face of an unlawful disclosure of grand jury secrets, to prevent all further disclosures by the government of those same jury secrets. In other words, even if grand jury secrets are publicly disclosed, they may still be entitled to at least some protection from disclosure.

Id. (relying on *Sells*).

Thus, even if the briefs and proceedings had contained no undisclosed grand jury material, the newspaper would still have been denied access to that material because disclosure *does not remove the need to protect against further disclosure*. The same is true here. Even though the petitions have been disclosed to some people, the need to protect against further disclosure presents a live controversy.

The State's mootness argument rests primarily on one 11th Circuit case, *C&C Prods., Inc. v. Messick*, 700 F.2d 635 (11th Cir. 1983). There, a third party successfully moved to gain access to discovery materials for use in a different case. *Id*. at 636. The district court and the Eleventh Circuit denied C&C's request for a stay of the order and the discovery materials were furnished to the third party. *Id*. On appeal of the order granting access, the Eleventh Circuit held the issue to be moot, as the third party had already obtained the material in question.

In *Messick*, the modification order granted access *only* to the third party. No other disclosure of the discovery material occurred or could occur under the order. In other words, the appeal moot because the only disclosure at issue had occurred and could not be undone. Unlike *Sells*, no further disclosure to additional parties could be prevented. And unlike *Smith*, no party to the litigation was subject to an order by the court. The *Messick* court could not order the third party, or any other party, to return the discovery materials.[1] Here, an order from this Court would be enforceable against the State and would completely foreclose further disclosure.

Hence, the State is incorrect that this Court cannot craft an alternative remedy to restoring confidentiality. (State Br. at 20.) Preventing further disclosure is precisely the type of alternative remedy courts have crafted in situations like this where "the disclosure sought to be prevented had already occurred." *Sells*, 463 U.S. at 422 n.6. Even when a court "cannot restore the secrecy that has already been lost . . . [the court] can grant partial relief by preventing further disclosure." *In re Grand Jury Investigation No. 78-184*, 642 F.2d at 1188.

This court can provide effective relief. Therefore, this matter is not moot.

[1] Even if those factual differences did not exist, *Messick* predates *Sells*, and therefore is of little precedential value.

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

1. A Public Records Challenge Will Not Receive Full Appellate Review Prior to Expiration.

The State contends that there is no expiration date on public records requests, (State Br. at 22), and therefore this case is not "too short to be fully litigated prior to cessation or expiration," *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), 551 U.S. 449, 462 (2007).

While no fixed date exists on which a public records request expires, such a date need not exist for an action to be too short in duration to be fully litigated. Once requested, public records are made available in as little as 5 days. *See* RCW § 42.56.520. Even assuming petition-signers file an exemption action within that time, if the exemption is denied, the State is required by law to fulfill records requests "promptly." *See* RCW § 42.56.520.

Indeed, in this case, disclosure occurred within hours of the district court's summary judgment order. The district court, the Ninth Circuit, and the U.S. Supreme Court denied PMW's request to stay that order and disclosure continued. Thus, even if PMW had requested an injunction prior to that order, the court's

decision shows that request would have been futile and disclosure would have nonetheless occurred before PMW received full appellate review on the merits.[2]

Nor must *every* similar challenge be too short in duration to receive full appellate review in order for a the repetition/evasion doctrine to apply. What matters is that public records requests must be fulfilled by law within a time frame that does not allow for full appellate review. As this case illustrates, challenges to public records request are too short in duration to receive full appellate review. The first criterion of the repetition/evasion test is therefore satisfied.

2. The Case Is Capable of Repetition.

The issue is not whether the same *law* will be subject to a referendum again, but whether it is reasonably likely anyone will again request an exemption to protect the identities of those who have signed a referendum or initiative petition. As PMW explained in their opening brief, a reasonable expectation exists that an exemption will again be requested.

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[2] *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251 (11th Cir. 2001) is inapposite here. In *Kaye*, a third party waited a year and a half to seek injunctive relief in a civil action between two other parties. *Id*. at 1257. Due to the substantial delay, the court could not determine whether the third party could have received full review of its request for relief before the underlying action became moot. There was no corresponding delay here.

Protect Marriage Washington is currently supporting the signature gathering effort for Initiative 1192, an initiative that would define marriage as a civil contract between one man and one woman and thereby prohibit marriage for same-sex couples. *See* Initiative 1192 Petition, available at http://protectmarria-gewa.com/petition.html. The official Initiative 1192 petition states, "This Petition is paid for by Marriage = One Man + One Woman (Stephen Pidgeon) ProtectMarriageWA.com Political Action Committee." *Id*. Protect Marriage Washington is also actively soliciting financial support for Initiative 1192 through it website.

As the group's financial sponsor, Protect Marriage Washington could request an exemption for the Initiative 1192 petitions, in the likely event disclosure is requested.[3] Therefore, "there is a reasonable expectation that the same complaining party will be subject to the same action again." *WRTL*, 551 U.S. at 462 (2007).

Referendums 71 and 74 and Initiative 1192 share a common goal—protecting a traditional definition of marriage. Thus, it is reasonably likely that the individual plaintiffs will sign both Referendum 74 and Initiative 1192. Any harassment faced by Joe Does #1 and #2 in regard to Referendum 71 would be highly relevant in

[3] Based on their past activity, it is reasonably likely KnowThyNeighbor.org and WhoSigned.org will request copies of the Initiative 1192 petitions and attempt to make them available on the Internet. (*See* ER–287.)

determining whether a exemption was warranted in a subsequent action involving either Referendum 74 or Initiative 1192. In a subsequent exemption action, John Does #1 and #2 would allege, as they have here, that there is a reasonable probability they will face harassment for supporting traditional marriage. With respect to the individual plaintiffs, "there is a reasonable expectation that the same complaining party will be subject to the same action again." *WRTL*, 551 U.S. at 462.

Even if this case were moot, the controversy falls within the exception for those claims capable of repetition, yet evading review. This Court should therefore consider the merits of Plaintiffs' claims.

II. Plaintiffs Have Standing to Seek A First Amendment Exemption On Behalf of All R-71 Signers.

A. Individual-Plaintiffs John Does #1 and #2 May Assert the Rights of All Signers.

1. John Does #1 and #2 Have Standing.

The State's claims regarding each individual plaintiffs' standing to challenge the PRA on behalf of himself are misplaced. (State Br. at 31.)

The individual plaintiffs need not have suffered threats and harassment to have standing to seek an exemption. Rather, in challenging disclosure laws, a plaintiff has standing if he has engaged in an action, (e.g. signing a petition or making a

contribution) for which the law requires disclosure. That is because, in general, disclosure of one's political views produces an "injury in fact" to speakers' First Amendment rights. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("[The Supreme Court has] repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."); *Citizens United*, 130 S.Ct. 876, 914 (2010) (In general, disclosure provisions can "burden the ability to speak");

Because disclosure causes harm even when threats and harassment are absent, the test for standing does not change when an exemption is sought. What does change is the exacting scrutiny analysis. In general, the State may disclosure referendum petitions because where a reasonable probability of harassment is not shown, the State's interest in disclosure outweighs the burdens of disclosure. *Doe v. Reed*, 130 S.Ct. 2811 (2010). But where a reasonable probability of harassment is present, i.e., the burdens are much heavier, the burdens outweigh the State's interest. *Id*. at 2820.

If plaintiffs were required to suffer threats and harassment simply to have standing, the exemption would be functionally meaningless, for the very harm they seek to avoid would become a threshold to filing a action to avoid such harm. *See id*. at 2822 (Alito, J., concurring) (An "as-applied challenge provides adequate

protection for First Amendment rights only if (1) speakers can obtain the exemption sufficiently far in advance to avoid chilling protected speech and (2) the showing necessary to obtain the exemption is not overly burdensome.").

A plaintiff must show a reasonable probability of harassment to *prevail* in an exemption action, not to bring the exemption action itself. John Does #1 and #2 have standing to seek an exemption because they signed the R-71 petition signers and the State has harmed them by requiring disclosure of their identities. And, as explained, the continuing disclosure caused by the State's fulfilling additional public records request creates an ongoing injury this Court can remedy. *Fischbach and Moore*, 776 F.2d at 841 n.2 (continuing disclosure causes harm) Therefore, the individual plaintiffs have standing.

2. John Does #1 and #2 Satisfy the Third-Party Standing Test.

John Does #1 and #2 satisfy the test for third-party standing established in *Singleton v. Wulff*, 428 U.S. 106 (1976), and may therefore assert the rights of all signers to challenge State-mandated disclosure of their identities.

"The Supreme Court has considered two factors in determining whether to permit a party to bring suit on behalf of another: (1) the relationship of the litigant to the person whose right he seeks to assert; and (2) the ability of the third party to

assert his own right." *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 488 (9th Cir. 1996) (citing *Singleton*, 428 U.S. at 114-15). Both elements are satisfied.

The State argues the individual plaintiffs are not representative of the R-71 signers because they do not object to the public release of the fact that they signed the petition. (*Id*. at 28-29.) To the contrary, the individual plaintiffs filed this action seeking precisely to prevent the state-mandated release of their personal information and the fact that they signed the petition. They object *per se* to that release. Whether they are willing to reveal that they signed the R-71 petition to certain individuals or in other ways is irrelevant to whether they object to the disclosure at issue in this action.

Second, the State contends the individual plaintiffs are not "effective proponents" of each signer's rights because they publicly supported R-71. (State Br. at 29-30.) Again, the individual plaintiffs' public support for R-71 is irrelevant. Petition signers have a First Amendment right to prevent state-mandated disclosure when a reasonable probability is shown that such disclosure will subject each signer to harassment. The individual plaintiffs have lodged a *per se* assertion of that right by filing this action. The individual-plaintiffs are "fully

. . . as effective as a proponent of th[at] right" as would be any other third-party seeking the exemption, *Singleton*, 428 U.S. at 115, because the "reasonable probability" they seek to establish adheres to not just them, but every signer.

By implication, the State argues that a speaker cannot assert his right to prevent state-mandated public disclosure of his political activity once he has revealed, to *anyone*, that he engaged in that same activity. The State is simply wrong. *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) ("Even information that is available to the general public in one form may pose a substantial threat to privacy if disclosed to the general public in an alternative form potentially subject to abuse."); *id*. (Referendum signers' "substantial privacy interest in [their] petition is not diminished by the fact that many individuals may have signed it in their business or entrepreneurial capacities."); *see also United States Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989) ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.").

It is also irrelevant that some signers may not have signed to support the underlying basis for the petition. It is a First Amendment violation, when harassment is shown, for the government to reveal that one signed a petition

regardless of the reason for which a person signed. *Doe*, 130 S.Ct. at 2817 ("Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered 'by the whole electorate.'") (citation omitted). The R-71 signers have a constitutional right to privacy in their political views whether those views are controversial or not.

Nor does the exemption standard require every individual whose name might be exempted from disclosure to come into court and object to disclosure. Such a requirement would fly in the face of the "flexibility" promised to groups seeking an exemption. *Buckley*, 424 U.S. at 74. Certainly the NAACP was not required to prove that each and every person on its membership list objected to its disclosure before it could assert every members' constitutional right to privacy in their association.

As explained, the purpose behind R-71 was stated with unmistakable clarity on the R-71 petition—to "Preserve Marriage" and "Protect Children." (ER–352.) Even assuming a small number of people who signed were agnostic as to the merits of the underlying law, it is impossible to determine from the petitions themselves which people did so. Each signer therefore faces the same threat of harassment and the same threat to his First Amendment rights by virtue of having signed the petition.

Lastly, the State argues that PMW have not shown a "genuine obstacle" preventing each individual signer from asserting their own rights, (State Br. at 30), suggesting that every signer who objects to disclosure should have participated as a "John Doe." (State Br. at 30.) Such a suggestion is absurd for two reasons. First, to require PMW to offer tens of thousands of John Doe witnesses is the anthesis of the "flexibility" provided in *Buckley*. 424 U.S. at 74. Second, representational standing doctrines were created precisely to prevent the need for thousands of plaintiffs. 138,000 people signed the R-71 petition, making representational standing uniquely appropriate in this case.

Moreover, as the Supreme Court has held, PMW has shown that a "genuine obstacle" exists . Protecting one's privacy presents an "genuine obstacle" for purpose of the third-party standing test. *Singleton*, 428 U.S. at 116 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), as an example). *This is true despite the availability of pseudonyms and class actions*. *Id*. at 118.

The individual plaintiffs satisfy both third-party standing elements and may assert the rights of all signers not before the court.

B. Committee-Plaintiff Protect Marriage Washington May Assert the Rights of All Signers.

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

The State does not address PMW's argument that under *NAACP*, PMW is the appropriate organization to assert the associational-privacy rights of the R-71 signers. The NAACP Court expressly rejected the argument that the NAACP, as an association, "lack[ed] standing to assert…[the] constitutional rights pertaining to [its] members," who were not parties to the litigation. *NAACP*, 357 U.S. at 458-60. The Court held that to require that each member to assert his right to privacy in his association by himself "would result in nullification of the right at the very moment of its assertion." *Id*. at 459. Because each signer engaged in an act of association with Protect Marriage Washington when he signed the petition, Protect Marriage Washington may assert the signers' rights to privacy on their behalf. *NAACP*, 357 U.S. at 459. (Where individuals "are constitutionally entitled to withhold their connection with [an] [a]ssociation . . . it is manifest that this right is properly assertable by [that] [a]ssociation.").

2. PWM Also Satisfies the Association-Standing Doctrine.

The Supreme Court provides a three-part test for associational-standing:

> [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; iand (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). Each element of the *Hunt* test is satisfied in this case and associational-standing is appropriate.

i. Membership Is Not a Requirement of the Associational-Standing Doctrine.

Citing *Hunt*, the State argues only organizations with "members" may invoke the associational-standing doctrine. (State Br. at 33.) The State claims that the "Washington State's Apple Advertising Commission had standing to represent apple growers and dealers in litigation *because they were its members*." (*Id*.) However, the opposite is true. The *Hunt* Court determined that the Commission was "a state agency, rather than a traditional voluntary membership organization[.]" *Hunt*, 432 U.S. at 344. And, "the apple growers and dealers [were] not 'members' of the Commission in the traditional trade association sense . . . ." *Id*. However, because the Commission "represents the State's growers and dealers and provides the means by which they express their collective views and protect

their collective interests," the Court held it had standing to represent their interests. *Id*. at 345.

Likewise, the R-71 signers are not official "members" of Protect Marriage Washington in the traditional sense. However, Protect Marriage Washington, like the Commission, provided the means by which the R-71 signers "express[ed] their collective view[]" to overturn Senate Bill 5688, and "protect[ed] their collective interests" by financially supporting the signature gathering effort and election campaign.[4] *Id*.

Moreover, this Circuit has rejected the argument that "membership" is required for an organization to assert standing.[5] *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003). In *Mink*, the Ninth Circuit held that a governmental organization had standing to represent mentally incapacitated criminal defendants even though those individuals were not members of the organization. 322 F.3d at

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[4] That some signers may not have signed to express a desire to overturn SB-5688 is not a barrier to establishing association-standing because this Circuit has "reject[ed] the suggestion that unanimity of membership be required in organizations seeking standing." *Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991).

[5] More recently, the Ninth Circuit heard a challenge to Washington's monetary thresholds that trigger disclosure of political contributions. *Family PAC v. McKenna*, 2012 WL 266111 (9th Cir. filed Dec. 29, 2011, amended Jan. 31, 2012) The plaintiff that represented the contributors' interests was a political committee organized to support R-71 that had no formal members.

1110 (the "membership argument is overly formalistic"). The court also rejected the State's argument that an organization asserting standing must have the indicia of membership that were present in *Hunt*. *Id*. at 1111. The organization in *Mink* was afforded associational-standing despite not being funded by its constituents, allowing non-constituents to choose its leadership, and allowing non-constituents to serve on its leadership bodies. *Id*. Associational-standing was appropriate because "the organization [was] sufficiently identified with and subject to the influence of those it seeks to represent . . . ." *Id*. The same is true here. Protect Marriage Washington is identified with those who expressed support for traditional marriage and desired to overturn SB-5688 by signing the petition. Protect Marriage Washington is likewise subject to the influence of those same supporters, on which it depends for financial and other support.

ii. Non-Disclosure is Germane to Protect Marriage Washington's Purpose.

Buckley explained that "strict [disclosure] requirements may well discourage participation by some citizens in the political process." 424 U.S. at 83. When those who signed the R-71 petition are publicly revealed, it is less likely those same people will support future petitions sponsored by Protect Marriage Washington, such as the Initiative 1192 petition currently being circulated. Non-disclosure is not

just germane, but crucial to Protect Marriage Washington's purpose because it relies heavily on an individual's willingness to support its cause by signing its petitions, which are plainly controversial.

iii. Individual Signers Need Not Participate As Plaintiffs in This Case.

The exemption merely requires the plaintiff to present evidence showing a reasonable probability compelled disclosure will result in harassment. There is no limit on who may present this evidence. And, there is no requirement that the evidence pertains directly to the party presenting it. *See Buckley*, 424 U.S. at 74.

And, the *Hunt* test "does not require participation of individual members when the suit does not seek individualized damages." *Darensburg v. Metro. Transp. Comm'n*, 611 F.Supp.2d 994, 1038 (N.D. Cal. 2009) *aff'd*, 636 F.3d 511 (9th Cir. 2011). The State's authority is inapposite because it involved claims for individualized, monetary damages. *See United Union of Workers v. Ins. Corp. of Am.*, 919 F.2d 1398, 1400 (9th Cir. 1990). Where "[an] association seeks a declaration, injunction, or some other form of prospective relief" individuals need not participate. *Hunt*, 432 U.S. at 343.

3. PMW is Injured By Disclosure, but Such An Injury Is Not Required For Associational Standing.

Protect Marriage Washington need not to suffer an injury to itself to have associational standing. *Hunt*, 432 U.S. at 343 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . ."). However, as *NAACP* explains, Protect Marriage Washington suffers unique harm from disclosure that supports standing: "The reasonable likelihood that [a] [a]ssociation itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the [disclosure] on behalf of its members." As disclosure of the R-71 signers continues, Protect Marriage Washington faces a reasonable likelihood that it will be unable to garner a sufficient amount of signatures for its future petitions. PMW has an injury distinct from that of the R-71 signers, which is a further reason this Court should grant it standing on behalf of all signers.

III. The State's Interest Is Not Sufficiently Important At This Point in the Litigation.

While public disclosure may further the State's interests with respect to petitions in general, those interests are no longer valid in this narrow challenge.

As counsel for the State conceded at oral argument, it would have no impact on R-71 if it were determined *now* that R-71 was improperly certified. Oral Argument Transcript, at 20, *Doe v. Reed*, No. CV09-5456BHS (Oct. 3, 2011). Indeed, the whole point of ferreting out fraud and detecting invalid signatures, is, as the Supreme Court recognized, to help "ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures." *Doe*, 131 S.Ct at 2820. Even detecting instances of "bait and switch" fraud cannot provide that assurance with respect to R-71 because the petitions have been certified and the election is over. And, even if public disclosure could somehow help cure the inadequacies of the verification process, any alleged inadequacies with respect to R-71 are now irrelevant given that the verification and certification process took place over 2 years ago. Those interests are simply not valid in this narrow challenge.

Porter v. Bowen, 496 F.3d 1009 (9th Cir. 2007), does not support the State's argument. *Porter* involved a constitutional challenge brought by operators of a "vote swapping" website, which the state had threatened to shut down for violating California law. *Id*. at 1013-15. The court did not rule that the state's interests were valid in perpetuity following an election, but rather, that the case was not moot because it was not clear the state would cease threatening to prosecute similar

websites in the future. *Id*. at 1017. The court proceeded to analyze the state's interests, (which were found to not justify the constitutional violations), *id*. at 1018, not because they were somehow still valid after the election, but because the "allegedly wrongful behavior could . . . reasonably be expected to recur," and the case was therefore not moot, *id*. at 1017.

The same is true here. This case is not moot and the court should address the merits, but that does not mean the State's interests remain valid. In applying exacting scrutiny, this Court should weigh against the First Amendment burdens against the State's interests as they exist *at this point in the litigation*.

IV. PMW Is Entitled to an Exemption.

The State, like the district court, has added extraneous requirements to the exemption standard articulated in *Buckley*. But the *Buckley* standard has not changed, and PMW's burden remains low. *See e.g.*, *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 2012 WL 987294, *14 (S.D. Cal. Mar. 22, 2012) (citing *Doe*, 130 S.Ct. at 2823 (Alito, J., concurring) ("[T]he particularized showing required for an as-applied challenge . . . is not high[.]")). Under the *Buckley* standard, PMW need show only "a reasonable probability that the compelled disclosure of personal information will subject them to threats,

harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. PMW have satisfied their burden.

A. PMW Falls Within the Exemption Standard.

1. The Exemption Is Not Limited to a Subjectively-Defined Category of Organizations.

PMW is not ineligible for an exemption as a matter of law. In *Buckley*, only the "minor" party plaintiffs asked for a blanket exemption from disclosure. 424 U.S. at 68-69. It was thus appropriate for the Court to discuss the exemption in terms of those "minor" parties. So while the Supreme Court indicated that the "damage" disclosure provisions might cause to the associational interests of "minor" parties could be "significant," *id*. at 71, the Court did not mean that only "minor" parties' members are harmed significantly by disclosure. In fact, it said the opposite when addressing FECA's disclosure provisions generally: "[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id*. at 64 (compiling cases).

Accordingly, this Court interpreted *Doe v. Reed* as not limiting the exemption's availability to fringe organizations. *Family PAC v. McKenna*, 2012 WL 266111. Despite its support for R-71 and traditional marriage, the Ninth Circuit indicated Family PAC, a political committee, would have been eligible for the exemption

had its proved a "reasonable probability" of threats, harassment and reprisals. *Id*. at *5.

That *Citizens United* admonished against discriminating based on the speaker's identity in the context of independent expenditures and not disclosure, (State Br. at 40, n.15), is irrelevant. The First Amendment does not allow discrimination based on association or the speaker's identity. Yet limiting the exemption to minor parties would be to discriminate against certain associations and their interests.

More fundamentally, limiting the exemption to minor parties would mean that major parties and organizations could *never* be exempted from disclosure no matter how severely their members were being threatened or harassed. This cannot be the appropriate standard, as PMW would be denied relief even if signers were being murdered en masse.

Non-minor parties have received an exemption. In *New York Civil Liberties Union, Inc. v. Acito*, 459 F.Supp. 75 (S.D.N.Y. 1978) an exemption was granted for contributors to the New York ACLU, which had approximately 40,000 members, based on evidence that *five* contributors had been harassed, *id*. at 88. And other courts do not read *Buckley* as requiring a threshold "minor party" requirement. *Colorado Right To Life Comm., Inc. v. Davidson*, 395 F.Supp.2d 1001, 1016 n.17 (D. Colo. 2005) (exemption considered for an organization with

over 1,300 yearly contributors); *Herschaft v. New York City Campaign Fin. Bd.*, 127 F.Supp.2d 164, 169 (E.D.N.Y. 2000) (exemption considered for Jewish contributors to candidate for New York City Council).

Nor does the exemption require a reviled cause. *See Acito*, 459 F.Supp. at 78-79 (exemption granted to civil liberties group that promoted an Equal Rights Amendment to New York Constitution); *Davidson*, 395 F.Supp.2d at 1007 (exemption considered for group promoting "reverence and respect for human life"); *Herschaft*, 127 F.Supp.2d at 169 (exemption considered for New York City's Orthodox Jewish residents).

2. The R-71 Signers Have Associational Interests At Stake.

The State claims that the exemption is not available to the R-71 signers because they have no ongoing associational activity. (State Br. at 47.) But would an individual who makes a single contribution to the Socialist Worker's Party be ineligible for the exemption because he has not made contributing a regular practice? Must an individual sign more than one petition to be eligible?

It is self apparent what a signature on the R-71 petition meant, (PMW Br. at 10-12), — a desire to repeal SB-5688 in order to protect traditional marriage. Each signer's choice to associate with Protect Marriage Washington, even for the limited purpose of repealing SB-5688, is protected by the First Amendment. *Buckley*, 424

U.S. at 64. And, that act of association has not somehow "expired," but rather, it is protected by the First Amendment in perpetuity.

B. PMW Has Satisfied Its Evidentiary Burden.

At bottom, the State argues the exemption standard is controlled not by established Supreme Court precedent, such as *Buckley v. Valeo*, *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982), and *Doe v. Reed*, but by the significantly more stringent standards advocated by four concurring members of the Court that decided *Doe v. Reed*. (State Br. at 49-51.) The proposed standard nullifies the "flexibility" of the standard announced in *Buckley*, 424 U.S. at 74—a standard the Court has repeatedly confirmed, *see Doe*, 130 S.Ct. at 2821; *Citizens United*, 130 S.Ct. at 915, *McConnell v. FEC*, 540 U.S. 93, 198 (2003); *Brown*, 459 U.S. at 93. The evidence compiled in this case demonstrates the required "reasonable probability."

1. PMW May Rely On Wide Array of Evidence.

The State, like the district court, contends that PMW is strictly limited in presenting evidence related solely to R-71. (State Br. at 52-53, 57-59.) Such a stringent standard renders PMW's task impossible and flies in the face of the "flexible" standard of proof promised by the Supreme Court.

To requiring PMW to prove their case only by way of offering instances of harassment directed at victims who merely signed the petition, and who kept the fact of that signing a private matter, is next to impossible, for such evidence would not exist prior to disclosure because no one could possibly know who to target for harassment. Such a requirement also violates *Buckley*'s admonition on requiring that "chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." 424 U.S. at 74.

PMW is less than 3 years old and was formed for the unique purpose of collecting enough signatures to force a referendum vote on SB-5688 (ER–393.) As a new organization, PMW may present evidence of reprisals against supporters of similar causes elsewhere, *Buckley*, 424 U.S. at 74, including California, where supporters of traditional marriage faced a calculated campaign of harassment and intimidation. But even if PMW were not a new organization, such evidence is still admissible and highly relevant. *Brown* held unanimously, that evidence of out-of-state reprisals against persons holding similar views is relevant to, and therefore should be considered in, the exemption analysis. *Brown*, 459 U.S. at 99.

2. It is Irrelevant Whether The State Is Willing To Control Harassment.

Under the appropriate legal standard, PMW does not bear the burden of showing law enforcement measures are inadequate. But even if they did, the evidence is self-explanatory. Despite laws to the contrary, it is clear that threats and harassment have occurred, are occurring, and will continue to occur. (PMW Br. at 18-20.)

The State equates police response with a lack of government harassment. (State Br. at 64.) In the State's view, a lack of government harassment is fatal to PMW's claim because in past exemption cases, some form of governmental harassment was alleged. But the exemption test is not one of comparison. *Brown* and *NAACP* did not purport to set a baseline for evidence, below which an exemption need not be granted. And, the exemption standard does not require government harassment. "[H]arassment, reprisals or threats from private persons is sufficient to allow this court to enforce the plaintiff's first amendment rights . . . ." *McArthur v. Smith*, 716 F.Supp. 592, 594 (S.D. Fla. 1989).

3. PMW Presented Sufficient Evidence of Threats, Harassment, and Reprisals.

a. Under the Appropriate Legal Standard, the District Court's Factual Findings Warrant an Exemption.

The State is correct that the district court found PMW's evidence insufficient. (State Br. at 53.) But, of course, the district court relied upon an exemption standard not supported by Supreme Court precedent. Under *Buckley* and its progeny, PMW is not required to show threats and harassment that are "serious and widespread." A "reasonable probability" is all that is required.

The district court found that PMW "have developed substantial evidence that the public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex partners, has engendered hostility in this state, and risen to violence elsewhere, against some who have engaged in that advocacy." (ER–34.) This alone is sufficient under the Supreme Court's exemption standard.

b. PMW Do Not Lack Necessary Evidence.

The State views evidence of harassment aimed at those who merely signed the petition as the most basic evidence. (State Br. at 55.) But as explained, prior to the summary judgment order allowing for disclosure of the petitions, such evidence

could not have existed. That is precisely why PMW did not present any such evidence when the district court ordered supplemental briefing on the matter.

The State asserts that PMW presented no admissible evidence that people refused to sign the R-71 for fear of disclosure. (*Id.*) But the Court does not require "chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." *Id*. at 74. Nor is direct evidence of actual "chill" on speech necessary to grant an exemption. *See Doe*, 130 S.Ct. at 2820; *Citizens United*, 130 S.Ct. at 915; *McConnell*, 540 U.S. at 198. Rather, a finding of a reasonable probability of threats, harassment, or reprisals creates a "legal presumption" that exposure would chill speech and thus would violate the First Amendment. *Averill v. City of Seattle*, 325 F.Supp.2d 1173, 1179 (W.D. Wash. 2004). Conversely, evidence of chill reinforces that "reasonable probability," *id*. *See* ER-81 (A PMW witness testified, "During collecting signatures, however, several people told me that they would not sign because they feel threatened."). For the same reasons, PMW need not present evidence showing its donors were harassed. (State Br. 56.) Again, there is no "strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." *Buckley*, 424 U.S. at 74. The Supreme Court expressly re-

affirmed that view in *Brown*, where the Court granted an exposure exemption despite the absence of such evidence.

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

When properly considered, PMW's evidence overwhelming demonstrates a "pattern of threats" and "specific manifestations of public hostility." *Buckley*, U.S. at 74 (1976). (*See e.g.*, PMW Br. at 24-31.) While the State prefers to attack how PMW labels some of its evidence, PMW has presented evidence showing death threats (*e.g.*, ER–89); physical assaults and threats of violence (*e.g.*, ER–101-04; ER–205); vandalism and threats of destruction of property (*e.g.*, ER–226; ER–320); arson and threats of arson (*e.g.*, ER–253-58; ER–266); angry protests (*e.g.*, ER–228-29; ER–231-32); lewd and perverse demonstrations (*e.g.*, ER–106-08); intimidating emails and phone calls (*e.g.*, ER–133-140); hate mail (*e.g.*, ER–96-97); multiple web sites dedicated to blacklisting those who support traditional marriage and similar causes (*e.g.*, ER–289-93; 4-190, ER–314-18); and gross expressions of anti-religious bigotry, including vandalism and threats directed at religious institutions and religious adherents (*e.g.*, ER–194-96; ER–210-11; ER–223-24; ER–251; ER–260-62.) (*Compare with* ER–72-73 (State disavowing any "actual harm" or "meaningful" harassment).)

The State's assertion that PMW offers "subjective, speculative, and unsupported fears" of harassment depends on its belief that PMW may only present evidence strictly related to those who signed the R-71 petition and did nothing more. But, the exemption is not so limited. *See supra* Section IV.B.1. Rather, under *Buckley* and its progeny, this Court may consider all of PMW's evidence.

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

The district court violated PMW's due process rights when it, despite an active protective order, revealed the identities of PMW's John Does and witnesses in its summary judgment order (PMW Br. at 35-40.) The State argues that such disclosure was proper because PMW's failed to raise the issue prior to the court's order. (State Br. at 68.)

It is irrelevant that PMW never moved to redact the summary judgment order itself. PMW had a liberty interest in the protection afforded by the court. *see, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). The court impermissibly deprived PMW of that interest without notice and an opportunity to be heard. S*ee Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976).

Moreover, PMW relied on the court's assurance that the protective order "may be revisited closer to the trial date." (ER–343.) The court abused its discretion by

publicizing information obtained through discovery that was placed in the record under seal. *Perry v. Brown*, 2012 WL 308539 (9th Cir., Feb. 1, 2012).

VI. Conclusion

For the foregoing reasons, this Court should reverse the district court's judgment and grant PMW's request for an exemption.

Respectfully submitted this 4th day of April, 2012.

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

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,993 words.

DATED this 4th day of April, 2012.

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Certificate of Service

On April 4, 2012, the foregoing document described as Reply Brief of Appellants was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct. Executed this 4th day of April, 2012.

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