No. 11-35854

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Doe #1, et al.

Plaintiffs-Appellants,

v.

Sam Reed, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington,
Case No. 3:09-CV-05456-BHS

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center (CLC) is a non-profit organization organized under Section 501(c)(3) of the Internal Revenue Code. The Campaign Legal Center neither has a parent corporation nor issues stock. There are no publicly held corporations that own ten percent or more of the stock of The Campaign Legal Center.

/s/ Paul S. Ryan
Paul S. Ryan

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STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center (CLC) is a nonprofit, nonpartisan organization that works to strengthen the laws governing campaign finance and political disclosure. The CLC has participated in numerous past cases addressing disclosure, including *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *FEC v. Wisconsin Right to Life (WRTL)*, 551 U.S. 449 (2007) and *McConnell v. FEC*, 540 U.S. 93 (2003). *Amicus* thus has a longstanding, demonstrated interest in the laws at issue here.

SUMMARY OF ARGUMENT

Appellants (collectively, "Doe" or "PMW") allege that, as applied to them, disclosing the identities of Referendum 71 (R-71) petition signatories pursuant to the Public Records Act ("PRA"), Wash. Rev. Code § 42.56.001 *et seq.* (2010), is unconstitutional. As an initial matter, *amicus* agrees with Appellees that this case is moot and that Appellants lack standing to assert their claim. Appellees' Br. at 16–37. PMW's appeal fails for both reasons. If this Court nevertheless proceeds to a ruling on the merits, the appeal still fails.

The Supreme Court routinely upholds compelled disclosure in the face of First Amendment challenge—including twice in 2010, by 8 to 1 votes. *See*

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[1] Counsel for Appellants and Appellees have been contacted and all parties, through counsel, have consented to the participation of the Campaign Legal Center as *amicus curiae* and to the filing of this brief.

Citizens United, 130 S. Ct. at 914 (upholding federal campaign finance disclosure and reporting obligations); *Doe v. Reed*, 130 S. Ct. 2811 (2010) (rejecting Doe's facial challenge). As the Supreme Court has stated with respect to campaign finance laws, "disclosure requirements . . . do not prevent anyone from speaking." *Citizens United*, 130 S. Ct. at 914 (internal citations omitted). Accordingly, disclosure has been called the "least restrictive" form of electoral regulation, and is subject only to "exacting scrutiny."[2] To withstand exacting scrutiny review, there must be a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," and the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 130 S. Ct. at 2818 (internal citations omitted).

Disclosure laws advance core First Amendment goals; any burden on First Amendment rights resulting from disclosure laws must be weighed against the competing democratic values that they protect. Disclosure laws guarantee a transparent and responsive government, as well as "robust" and "wide-open"

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[2] By comparison, expenditure restrictions, as the "most burdensome" campaign finance regulations, are subject to strict scrutiny and reviewed for whether they are "narrowly tailored" to "further a compelling interest." *WRTL*, 551 U.S. at 476; *see also Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976) (per curiam). Contribution limits, also more burdensome than disclosure requirements, are constitutionally "valid" if they are "closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted).

debate on public issues, by securing "the widest possible dissemination of information from diverse and antagonistic sources." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Democratic self-government depends on an informed and active citizenry, especially where citizens engage the legislative process directly. As Justice Scalia opined in upholding the PRA against Doe's facial challenge, "requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring).

In rare circumstances, compelled disclosure will present such a severe burden on the freedom to speak and associate, as applied to a particular group, that an exemption is warranted. This is not such a case. When the exemption has been granted in the past—and it has seldom been granted—organizations presented overwhelming evidence that disclosure would create "a reasonable probability of threats, harassment or reprisals." The probability of severe reprisals was not speculative, but demonstrable. Moreover, it has been granted only to historically and pervasively reviled groups.

Indeed, only one group has obtained an exemption from the Supreme Court since *Buckley*. In *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), the Socialist Workers Party of Ohio ("SWP") produced evidence of widespread public and private hostility, including actual

violence, to demonstrate its need for protection. Accordingly, the Court found that disclosure would have placed the 60-member SWP at considerable risk, with no hope of mitigation by law enforcement. The harassment exemption was created to protect dissident groups like the SWP, not widely supported and well-funded organizations like PMW, nor the more than 137,000 people who signed R-71 petitions and who PMW dubiously claims to represent in this litigation.

Buckley's standard for exemption is exceedingly narrow. Groups that claim it must satisfy a high evidentiary burden to prevail. Accepting Doe's invitation to relax the standard would be inconsistent with Supreme Court precedent, and would do violence to important disclosure laws in other contexts. The harassment exemption springs from the contested world of campaign finance law, i.e., from *Buckley*, and that is where the effects of a broadened exemption from disclosure would be most pernicious. If the exemption is drawn inconsistently with precedent and made more lenient, important information about the sources of money in politics could soon be hidden from view—at great cost to all citizens.

If this Court construes the exemption to reach groups like PMW, the exemption will no longer be an exception to the rule, but will have swallowed the rule. Neither Justice Scalia, nor *amicus* Campaign Legal Center, "look forward to a society which, thanks to [this Court], campaigns anonymously . . .

and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave." *Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring). To avoid that outcome, the district court's decision should be affirmed.

ARGUMENT

I. Disclosure Provisions Constitutionally Advance Vital Democratic Interests

A. As The 'Least Restrictive' Means Of Protecting The Integrity Of The Electoral Process, Disclosure Provisions Are Widely Upheld

An unbroken line of Supreme Court authority has recognized the value and importance of political disclosure laws in our democracy. Meaningful disclosure improves political transparency, which gives citizens access to the information they need to make informed political choices. The integrity of the democratic process is likewise enhanced by disclosure, because transparency aids in efforts to root out fraud and mistake. *See Doe*, 130 S. Ct. at 2819. In 2010, the Supreme Court twice upheld political disclosure laws—both times by 8 to 1 votes—and reaffirmed the value of transparency in "[enabling] the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916; *see also Doe*, 130 S. Ct. at 2820.

Disclosure laws are of long lineage. In the campaign finance context, the first federal disclosure law was enacted in 1910 to counter the effects of unchecked political spending. *Buckley*, 424 U.S. at 61. Then, as now, disclosure was deemed a "cornerstone" to effective campaign finance regulation. *See Buckley v. Am. Const. Law Found. (Buckley II)*, 525 U.S. 182 at 222–23 (1999) (O'Connor, J., dissenting). As Justice Brandeis recognized almost a century ago, "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." Other People's Money 62 (National Home Library Foundation ed. 1933), *quoted in Buckley,* 424 U.S. at 67.

When asked to evaluate the constitutionality of campaign regulations, the Supreme Court applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed. Disclosure laws implicate the First Amendment rights to speak and associate freely, but they also advance the public's interest in maintaining an informed electorate and open government. Disclosure is considered a "less restrictive alternative to more comprehensive regulations of speech" that advance these governmental interests. *Citizens United*, 130 S. Ct. at 915; *see also Buckley*, 424 U.S. at 68. As a consequence, the Court has traditionally reviewed disclosure laws under a more relaxed standard than other electoral regulations.

Disclosure obligations are subject only to "exacting scrutiny"—they are valid so long as there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914, *quoting Buckley*, 424 U.S. at 64, 66 (internal citations omitted). To withstand exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 130 S. Ct. at 2818, *quoting Davis v. FEC*, 554 U.S. 724, 744 (2008).

The *Buckley* Court upheld disclosure provisions contained in the Federal Election Campaign Act (FECA) even as it invalidated the Act's expenditure limitations, calling disclosure the "least restrictive means of curbing the evils of campaign ignorance." *See Buckley*, 424 U.S. at 68. Disclosure requirements ultimately have a constitutional significance apart from any incidental effects on individual rights. The fact that they can invade constitutionally protected rights does not necessarily make them invalid, because they serve the First Amendment's overall purpose of promoting open and responsive democratic governance.[3]

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[3] In general, "campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy." Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002).

B. Washington's Interest In Disclosure Is Undiminished In This As-Applied Challenge

Washington has a strong and continuing interest in preserving public access to electoral information, including the contents of R-71 petitions. That interest is not extinguished merely because the election has come to an end. Neither is it, as Doe claims, "non-existent," "trivial," "negligible," or "detached from reality" in the as-applied context. *See* Appellant's Br. at 32, 34–35. The fact that a somewhat different set of governmental interests are implicated at this stage of the litigation in no way "undermines" the vitality of Washington's interest in disclosure. *Id.* at 33.

PMW's account of the interests supporting disclosure is incomplete. Washington asserted two broad interests justifying disclosure in the facial challenge: preserving the integrity of the electoral process and "providing information to the electorate." *Doe*, 130 S. Ct. at 2819. Finding the first interest sufficient to defeat Doe's facial argument, the Supreme Court expressly did not reach the latter. *See id.* ("Because we determine that the State's interest in preserving the integrity of the electoral process [is sufficient] . . . we need not, and do not, address the State's 'informational' interest."). This Court may choose to base its decision on Washington's "undoubtedly important" interest in electoral integrity. *Id.* In the alternative, the state's informational interest is

sufficiently important on its own to render the PRA constitutional as applied here.

Fundamentally, the First Amendment embraces the principle that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times*, 376 U.S. at 270. This Court has previously recognized the same in the context of disclosing ballot measure campaign contributions. *See Human Life of Wash. v. Brumsickle*, 624 F.3d. 990, 1005–06 ("Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment."). As the Eastern District of California recognized in a similar case, the informational interest applies with equal force before and after an election:

> No legislation is carved in stone . . . nor do ballot initiatives . . . become a legacy that future generations must endure in silence. Indeed, it is the initiative process itself that directly allows individuals to affirm or correct prior decisions. To assume that passage of an election draws a line in the sand past which no issues remain open to public debate is simply not congruent with [this] form of democracy.

ProtectMarriage.com v. Bowen, No. 2:09-CV-00058-MCE-DA, 2011 WL 5507204, at *36 (E.D. Cal. Nov. 4, 2011) (rejecting as-applied challenge to the disclosure of California Proposition 8 contributors) (internal citations omitted), *appeal docketed*, No. 11-17884 (9th Cir. Dec. 2, 2011).

Buckley identified three broad categories of governmental interests supporting campaign finance disclosure requirements. 424 U.S. at 66–67 (finding that disclosure is justified by informational, anti-corruption and enforcement interests). The Court later refined that framework to incorporate the particular interests at stake in ballot measure elections. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). While the risk of campaign finance-related corruption present in candidate elections does not apply in the ballot issue setting, *see id.* at 790, the enforcement interest is at full force in ballot measure elections—particularly with regard to preventing fraud and mistake that would compromise the integrity of the electoral process. *See Doe*, 130 S. Ct. at 2819. Appellees detail the many ways the State's anti-fraud interests more than justify any burden on Doe's First Amendment rights resulting from the PRA. *See* Appellees' Br. at 24–26.

The public's informational interest also remains at full force in ballot measure elections. As the Ninth Circuit recently reaffirmed, there is a "longstanding interest in learning who supports and opposes ballot measures" that has been recognized "repeatedly" by circuit precedent. *Family PAC v. McKenna*, No. 10-35832, 2012 WL 266111, at *3 (9th Cir. Jan. 31, 2012). Indeed, the *ProtectMarriage.com* court stated that the government's

informational interest is "not only compelling, but of the highest order." 2011 WL 5507204, at *23 (internal citations omitted).

Following *Buckley*, the Supreme Court again recognized the state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to ballot measure committees. Although the Court struck down the contribution limit, it based this holding in part on the disclosure that the law required from such committees. *See id*. at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance . . . .").

The "informational interest" has also supported disclosure provisions in different, though related, contexts. Notably, it has buttressed a line of Supreme Court and lower court decisions approving disclosure relating to lobbying. For example, in *U.S. v. Harriss*, 347 U.S. 612 (1954), the Court upheld the federal Lobbying Act of 1946, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to disclose their clients and their contributions and expenditures. *Id*. at 615 & n.1.

The *Harriss* decision has been followed by lower courts, which have uniformly upheld state lobbying statutes on the grounds that the state's informational interest in lobbying disclosure outweighs the associated burdens. *See, e.g.*, *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460–61 (11th Cir. 1996); *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985); *Comm'n on Indep. Colls. and Univs. v. N.Y. Temp. State Comm'n*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982). Ballot measure advocacy, like lobbying, constitutes a direct effort to intervene in the law-making process. Just as "Congress may require lobbyists to disclose who is paying for [their] services," voters in issue elections "have an interest in knowing who is lobbying for their vote." *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003); *see also Chula Vista Citizens For Jobs and Fair Competition v. Norris*, No. 3:09-CV-0897-BEN-JMA, slip op. at *18 (S.D. Cal. Mar. 22, 2012) (informational interest in ballot measure advocacy outweighed claim for anonymity).

Washington's interest in maintaining the integrity of its elections is closely related to its informational interest. As the Court pointed out in *Buckley*, "informed public opinion is the most potent of all restraints upon misgovernment." 424 U.S. at 67 n.79, *quoting Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (relating to federal lobbying disclosure requirements).

In a similar vein, *Bellotti* noted approvingly that disclosure has a "prophylactic effect" on the electoral process because it allows people "to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. Political disclosure channels critical information into the "marketplace of ideas," thereby improving the overall quality of political discourse and ensuring that citizens are "armed with information" necessary to make political choices and to hold government actors accountable for any misdeeds. *Buckley*, 424 U.S. at 67.

The State of Washington has an abiding interest in maintaining transparency with respect to voter-initiated referenda. In general, public records laws enable citizens to keep tabs on elected officials, an ability that is "vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). And with respect to ballot initiatives, petition signatories step into the shoes of public officials by taking formal legal action to place legislation before voters. States that allow ballot initiatives are afforded "substantial latitude" in regulating their electoral processes, *see Doe*, 130 S. Ct. at 2818, and disclosure of initiative petition signatories is "the rule in the overwhelming majority of States" that permit legislation by public action. *Id.* at 2828 (Sotomayor, J., concurring).

The fact that Washington's initiative and referendum petitions are subject to disclosure reflects the considered judgment of its citizens. Washington voters

enacted the PRA in 1972 with the stated purpose of "remaining informed so that [the people] may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030.[4] The state's strong interest in "remaining informed" is not tethered to a given issue or election, but is fundamental to Washington's chosen form of government. To overcome such an interest, this Court should follow the guidance of *Doe*'s concurring Justices and "demand strong evidence." 130 S. Ct. at 2831 (Stevens, J., joined by Breyer, J., concurring).

II. The District Court Below Properly Denied *Buckley*'s Limited 'Harassment' Exemption

In rare cases, disclosure that is otherwise permissible would present such a severe and unmitigated burden on a group's associational rights that the group may seek an as-applied exemption. *Buckley* articulated the exemption narrowly, conceding that there could be a case where the "threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that [the challenged disclosure requirements] cannot be constitutionally applied." 424 U.S. at 71. Since *Buckley*, the Supreme Court has been generally reluctant to grant exemptions. *Compare Brown*, 459 U.S. at 101–02 *with Citizens United*, 130 S. Ct. at 916 (rejecting claim for exemption

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[4] Similar public records statutes exist in all 50 states and under federal law. *See* Brief of Nat'l News Publishers, *et al.*, as *Amici Curiae*, *Doe*, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 1362079.

and noting that Citizens United had been disclosing their donors for years without incident); *McConnell*, 540 U.S. at 199 (refusing to exempt parties from disclosure despite their "expressed concerns" of harassment); *Buckley*, 424 U.S. at 69–74 (concluding that the "substantial public interest in disclosure" "outweigh[ed] the harm generally alleged"). Only a handful of groups have met this high standard, and they bear little resemblance to PMW.

A. The 'Harassment' Exemption Is Narrowly Drawn To Protect Pervasively Reviled and Unorthodox Viewpoints

For the purposes of obtaining an exemption, Doe's version of the applicable standard flatly contradicts *Buckley* and its progeny. Doe misstates the exemption test by suggesting it begins and ends with showing a "reasonable probability of threats, harassment or reprisals." *See* Appellant's Br. at 15. That is only part of the analysis. The "harassment" occasioned by disclosure must also create an unconstitutional burden on speech. Doe's conclusory standard is at odds with the actual test articulated in *Buckley*; as the district court in *ProtectMarriage.com* emphasized, it "renders superfluous" the "Court's analysis of the relative governmental interest and individual burdens." 2011 WL 5507204, at *14. Doe also argues that *Buckley* did not establish a "minor party rule," but the test for exemption makes little sense without one. *See* Appellant's Br. at 14. The burden that disclosure places on any particular group logically depends on the prevalence and acceptability of its viewpoint. Disclosing views

that are widely shared is simply less likely to create the kind of chill that would justify exemption.

Since the associational right recognized in *Buckley* protects citizens' ability to "amplify their voices" through group membership, a group's relative prevalence is necessarily part of its claim for exemption. *See* 424 U.S. at 64–65. No court has held otherwise. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court explicitly tied a group's First Amendment associational harm to its public notoriety. 357 U.S. at 460, 462. In shielding the NAACP from the compelled disclosure of its rank-and-file membership lists in Alabama, the Court noted that group association enhances the "[e]ffective advocacy of both public and private points of view, *particularly controversial ones*." *Id.* at 460 (emphasis added). While privacy might be required in some instances to preserve freedom of association, disclosure poses a measurably greater threat to speech when "a group espouses dissident beliefs." *Id.* at 462. The converse must also be true: compelled disclosure is less likely to chill associational rights when a group espouses mainstream beliefs.

In *FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416 (2d Cir. 1982), the Second Circuit Court of Appeals granted an exemption to a group specifically identified as "unpopular or unorthodox." 678 F.2d at 420. But unpopularity among some members of the public, without more, is not

sufficient. For instance, in *McConnell* the district court rejected a claim for exemption, noting:

> Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization . . . faces the hardships that the NAACP and SWP were found to suffer.

251 F. Supp. 2d 176, 247 (D.D.C.), *aff'd* 540 U.S. 93 (2003).

Furthermore, the standard does not depend exclusively on the chill experienced by individuals, as Doe claims. *See* Appellant's Br. at 19. Rather, it reflects the overall burden on group speech. Individual instances of reprisal bear on the likelihood that speech will be curtailed, but their quantity and quality must support a "reasonable probability" of overall chill. Presenting a handful of threatening incidents directed at R-71's vocal and public proponents hardly establishes the likelihood that any of the petition's 137,000 signers will receive similar threats. *Doe*, 130 S. Ct. at 1215. To hold otherwise would effectively allow any group to claim exemption, so long as it could document that some members felt harassed.

Whether the quantum of evidence is sufficient in a given case will vary, but the degree of public opposition must create an actual—not speculative—burden on the group's freedom to associate. *See Buckley*, 424 U.S. at 70. This record, however, contains no evidence that Doe's associational right was or

would be chilled by disclosure. As the court below noted, "it is not clear that the R-71 signers have actually sought to associate with each other in a constitutionally protected manner." *Doe v. Reed*, No. 3:09-CV-05456-BHS, 2011 WL 4943952, at *8 (W.D. Wash. Oct. 17, 2011). To the extent that R-71 signatories actually wanted to associate, there is no evidence that fear of harassment prevented them from doing so; PMW's measure gained more than enough signatures to qualify for the ballot.

Under *Buckley* and its progeny, the exemption may only apply where there is evidence that disclosure would not only place group members in peril, but would imperil the group's very existence. *See* 424 U.S. at 71 ("In some instances fears of reprisal may deter contributions to the point where the movement cannot survive."). The SWP had a total of 60 members, yet supported its claim for exemption with evidence of widespread and "ingrained" societal hostility. *Brown*, 459 U.S. at 99. In granting an exemption, the Court emphasized the extensive "past history of government harassment," including "massive" surveillance efforts by the FBI and other government agencies. *Id.* As noted in *ProtectMarriage.com*, massive ballot measure campaigns are "a far cry from the sixty-member SWP . . . [which was] repeatedly unsuccessful at the polls, and incapable of raising sufficient funds." 2011 WL 5507204, at *13 (internal citations omitted).

The NAACP made a similarly compelling and uncontroverted showing that disclosing the identities of rank-and-file members exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Patterson*, 357 U.S. at 462. While the Court did not expound on the "uncontroverted" evidence supporting its ruling, the NAACP's brief contained extensive evidence of violent acts—including bombings, shootings, cross-burnings, and other "manifestations of public hostility."[5]

The district court's interpretation of relevant authority is in line with the narrow scope of the exemption remedy. To arrive at its decision, the lower court observed that each exempted group produced "uncontroverted and ample evidence" of "pervasive hostility by the government and private parties." *Doe*, 2011 WL 4943952, at *7, *citing Brown*, 459 U.S. at 98–99. Likewise, the court concluded that exemptions have only been upheld in cases involving politically and socially marginalized groups, or "fringe organizations." *Doe*, 2011 WL

[5] *See* NAACP Br., *Patterson*, 357 U.S. 449 (1957) (No. 91), 1957 WL 55387 at *12–*17. PMW cannot plausibly equate its experience with that of the NAACP in 1950s Alabama. At that time, the NAACP was very active in lawful desegregation efforts. Resistance to desegregation was particularly virulent in Alabama, where even the Governor vowed to defy federal law and oppose desegregation. *See id.* at *13. When private acts of violence could not extinguish dissenting views, the state used its laws to do so. It was against this backdrop that the exemption emerged.

4943952, at *8. By contrast, Doe's supporters are a long way from the political fringe.[6] PMW collected over 137,000 signatures to qualify R-71 for the November 2009 ballot. Moreover, nearly 840,000 voters supported PMW's efforts to repeal SB-5688, only losing by a narrow margin of 53% to 47%. *Id.* at *2. This case stands in stark opposition to those finding an exemption was warranted, which "involved groups seeking to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens." *ProtectMarriage.com*, 2011 WL 5507204, at *14.

Fundamentally, the exemption carves out a protected space for viewpoints that would otherwise be forced to retreat from the "marketplace of ideas." Groups whose views are widely and historically accepted, on the other hand, have little need for such protection. Whether a group with a following as large as PMW's can ever qualify for exemption is ultimately irrelevant to the disposition of this case, as Doe's evidence of harassment, threats and reprisals does not meet *Buckley*'s high standard.

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[6] Currently, 38 states have enacted statutory or constitutional restrictions on same-sex marriage, and only 20 provide any spousal rights for same-sex partners. Nat'l Conf. of State Legis., *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (2012), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.

B. Doe's Evidence Of Harassment Falls Far Short Of The Standard For Exemption

In Doe's facial challenge, the Supreme Court reiterated the standard that groups claiming exemption must meet. They must show "specific evidence of past or present harassment of group members, harassment directed against the organization itself, or a pattern of threats or specific manifestations of public hostility." *Doe*, 130 S. Ct. at 2823 (internal citations and quotations omitted). Additionally, "[n]ew [groups] that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.* (internal quotations omitted). This Court has since recognized that the standard can only be met under extraordinary circumstances. *See, e.g.*, *Family PAC*, 2012 WL 266111, at *4. The record here is woefully inadequate to meet this standard.[7]

Doe makes too much of *Buckley*'s "flexible" standard, using it to cast widely for evidence from similar groups around the country. While it is true that "groups must be allowed sufficient flexibility in the proof of injury," flexibility is required only so far as necessary to "assure a fair consideration of

[7] The Supreme Court does not share Appellants' belief that modern technology makes disclosure more burdensome or intrusive. If anything, the Court has expressed approval of web-based disclosure, insofar as it makes disclosure information more accessible to more people. *See Citizens United*, 130 S. Ct. at 916 (noting that "modern technology makes disclosures rapid and informative").

their claim." *Buckley*, 424 U.S. at 74. Doe was provided ample opportunity to present a "wide array of evidence" to satisfy the flexible standard. *Doe*, 130 S. Ct. at 2823. The consequent failure to produce anything but a "mountain of anecdotal evidence from around the country" is no basis for demanding *even greater* flexibility of proof. *Doe*, 2011 WL 4943952, at *10. Yet Doe argues that producing adequate evidence of reprisals would amount to "an impossibility" "unless and until" the petitions are disclosed. *See id.* at *16; Appellant's Br. at 23.

In fact, it would be impossible for some organizations to make the requisite showing if they were confined to directly related evidence. Because the exemption test is fundamentally an empirical inquiry, it accommodates a variety of groups and circumstances. The *Buckley* Court recognized that, for certain new groups, "unduly strict requirements of proof" would place an unacceptable burden on associational rights. 424 U.S. at 74. Therefore, groups with "no history upon which to draw" "may offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.* The corollary to that point is also true. Groups with a history and following as large as PMW's cannot make their case on the basis of indirect evidence. Simply as an empirical matter, they face problems of "proportionality and magnitude." *See ProtectMarriage.com*, 2011 WL 5507204, at *17.

When granting an exemption under *Buckley*'s "flexible" standard, the inquiry is therefore not whether relevant evidence about similarly situated groups *exists*. Rather, the appropriate question is whether "a fair consideration" of Doe's claim would be impossible without it. *See id.* The district court did not impose an unworkably strict standard of proof, but considered a "wide array" of evidence and weighed its credibility in light of the surrounding circumstances. The fact that this "mountain of anecdotal evidence" could not persuade the court exposes the weakness of Doe's case, not the need for an even looser evidentiary standard. *Doe*, 2011 WL 4943952, at *10.

Doe relies substantially on evidence of threats directed against supporters of California's Proposition 8, a case involving the disclosure of the initiative's campaign *contributors*. However, there is a more directly analogous group of contributors—those who donated to PMW, whose names have been public knowledge for more than two years. PMW reported 857 campaign contributors in 2009, but presented no evidence two years later that these donors experienced threats, harassment or reprisals based on the disclosure of their information. *Id.* at *17. Doe may not reach beyond Washington simply because evidence from its direct supporters is either less potent or does not exist.

Appellants further assert that they are entitled, under *Brown*, to prove their case with evidence from outside Washington. *See* Appellant's Br. at 22–

23. *Brown* granted a disclosure exemption based on the "totality of the circumstances," including evidence of harassment both in Ohio and in neighboring states. 459 U.S. at 101 nn.19–20. The record contained evidence of pervasive harassment and reprisals against the SWP, including by government officials, and widespread hostility that was "ingrained and likely to continue." *Id.* at 101. Given the demonstrable scope of public hostility, the Court did not require evidence of chill to be "directly attributable" to the SWP's sixty Ohio members, and instead endorsed the district court's fact-specific analysis. *Id.* at 101 n.20. As predicted in *Buckley*, the Court was not "insensitive" to the fact that the SWP, though plainly qualified for exemption, could not meet the standard if confined to evidence concerning its 60 Ohio members. 424 U.S. at 74 (rejecting the need for a blanket exemption because courts would not "be insensitive to similar showings when made in future cases"). The Court did not consider evidence from other states because it offset relatively less convincing evidence from Ohio, but to ensure that the SWP's claim was fairly and fully considered. The test's flexible and case-specific nature allows a group to present its best case with the evidence available, but it certainly does not require courts to ignore unconvincing direct evidence in favor of more persuasive, but less relevant, instances of harassment.

Unlike the SWP, PMW is not a small, overwhelmingly vilified group with an extensive history of public and private harassment. Nearly half of Washington voters cast ballots in favor of R-71 and, as already noted, the laws of most states also reflect Doe's views.[8]

Unlike the SWP, Doe's out-of-state evidence of harassment is qualitatively different from that relating to its own supporters. Doe relies heavily on evidence of harassment arising from Proposition 8, but fails to identify any reprisals that took place in other states that voted on similar measures. Since 2005, in fact, Knowthyneighbor.org has publicized the names of over one million Florida, Arkansas and Massachusetts voters who signed petitions in support of traditional marriage. If those disclosures generated the kind of harassment allegedly present in California and Washington, there is no evidence of it in the record.[9]

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[8] *See* Note 6, *supra*.

[9] *See* Transcript of Oral Argument at 40, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 1789917. *See generally* Brief for Direct Democracy Scholars as *Amici Curiae* at 12–13, *Doe*, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 1256467 ("Upwards of a million names" in Arkansas, Florida, and Massachusetts have been posted online, but Doe did not identify "a single individual who has actually faced any threat of intimidation, retaliation or harassment as a result of merely signing any of these petitions and having that signature publicly disclosed."). After a thorough review of statewide news media in Arkansas, Florida and Massachusetts, Direct Democracy *amici* were unable to find any evidence of intimidation or reprisals. *Id.* at 13.

Finally, unlike the SWP, PMW does have a direct "history upon which to draw"—the 857 contributors to R-71, whose names have been public knowledge for over two years. *Doe*, 2011 WL 4943952, at *17. Doe does not explain why evidence of harassment directed at Proposition 8 contributors should outweigh the lack of such evidence relating to R-71 contributors. As the District Court stressed, the experiences of R-71 donors are "far more closely related to the issues at hand" than the scattered instances of harassment around the country offered by Doe. *Id*. Doe supplies no reason to think that mere petition signers face a "reasonable probability" of harassment, even though contributors demonstrably did not.

In addition to publicly available contribution records, Doe had a list of the names and contact information of R-71 signatories well in advance of the election. Appellant had ample opportunity to introduce evidence "from among its own number," and did in fact solicit such evidence from petition signers—apparently without success. *Id.* at *10, *17. Instead, the record contains a spectrum of allegedly intimidating episodes directed at PMW's most prominent supporters, none of them rising anywhere close to the level of harassment present in *Brown* and *Patterson*.

C. The As-Applied Exemption Does Not Embrace Speculative, Isolated Or Trivial Instances Of Harassment

Buckley's harassment exemption applies narrowly to groups that can demonstrate a "reasonable probability of threats, harassment and reprisals." The standard is not one of *possibility*, but "probability." If it were otherwise, as Doe suggests, the exemption would have been granted with much more frequency. Instead, courts have only intervened where exemption is the last and only means of avoiding the kind of associational harm present in *Patterson* and *Brown*.

In most cases there are better ways to stop intimidation, at once more immediate and less sweeping, than anonymity. As Justice Scalia observed, "[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." *Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring).

Doe argues that law enforcement mitigation is "immaterial" to the standard, but that cannot be true. *See* Appellant's Br. at 19. Because there are laws against intimidation and harassment, and because the police resolutely enforce such laws, it is less likely that R-71 signers will be subject to threats, harassment or reprisals. The district court consequently rejected the argument that law enforcement mitigation is irrelevant to the standard. *Doe*, 2011 WL 4943952, at *18 ("Doe has supplied no evidence that police were or are unable or unwilling to mitigate the claimed harassment."). Where the exemption has

been granted in past cases, the capacity and willingness of law enforcement to address alleged harassment has always been a consideration. *See, e.g.*, *Brown*, 459 U.S. at 424 & n.18 (emphasizing the massive history of government surveillance by numerous state and federal agencies); *Hall-Tyner*, 678 F.2d at 421–22 (surveying historical and extant laws criminalizing communist activity and concluding that the probable restraint on speech warranted exemption).

Justice Sotomayor, in her concurrence, characterized circumstances that would justify case-specific relief as "rare," noting that the exemption was only available when "disclosure poses a reasonable probability of widespread harassment that the state is unwilling or unable to control." *Doe*, 130 S. Ct. at 2829. In deposition testimony, Doe's witnesses uniformly conceded that law enforcement efforts were either sufficient or unnecessary. *See Doe*, 2011 WL 4943952, at *18. In the aggregate, most of the alleged harassment was relatively trivial—e.g., the removal of yard signs, public "mooning," and profane language—and was directed only at R-71's vocal proponents. Isolated incidents such as these are not tantamount to a "pattern" of hostility, especially when they typify behavior in any heated election. There is no evidence to suggest that mere petition signers are equally likely to face retaliation. Accordingly, the district court found that Doe had "only supplied evidence that hurts rather than helps its case." *Id.*

Doe points to actual instances of alleged law-breaking to show that the existence and willing enforcement of anti-harassment laws has no bearing on the need for exemption. *See* Appellant's Br. at 19–20. Of course, it is reprehensible to commit unlawful acts calculated to intimidate or threaten. But there will always be someone ready to break the law, whether in pursuit of a political agenda or for more mundane criminal purposes. That cannot justify a disclosure exemption, or it would in every case.

In addition, many of the incidents Doe cites as harassment, including "picketing, protesting, boycotting, distributing flyers, destroying yard signs and voicing dissent" are "typical of any controversial campaign." *ProtectMarriage.com*, 2011 WL 5507204, at *19. More than that, some of those activities are themselves constitutionally protected speech. As the district court observed in *ProtectMarriage.com*, "numerous of the acts about which Plaintiffs complain are mechanisms relied upon, both historically and lawfully, to voice dissent." *Id.* Boycotts and picketing occupy a particularly important position in our constitutional firmament. The Supreme Court has long recognized that "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982). Doe provides no justification for this Court to privilege anonymity over lawful forms of dissent,

especially where citizens voluntarily take part in the democratic process by signing their names to a petition. The First Amendment does not unconditionally protect groups like PMW "from the accountability of criticism" at the expense of open public debate. *Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring).

III. A Decision By This Court Broadening the Exemption To Include PMW Would Undermine Disclosure Laws From Coast To Coast

Amicus urges this Court to consider the far-reaching implications of relaxing the 'harassment' exemption standard in this case. Federal district courts have invoked the Supreme Court's *Doe* decision to, *inter alia*: shield corporate communications from discovery in a toxic tort class action, *see City of Greenville v. Syngenta Crop Prod.*, No. 11-MC-1032, 2011 WL 5118601 (C.D. Ill. Oct. 27, 2011); uphold the Texas Open Meetings Act (TOMA), *see Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 701 (W.D. Tex. 2011), *appeal docketed*, No. 11-50441 (5th Cir. May 9, 2011); and hold disclosure unconstitutional as applied to a stalled initiative petition, *see Utahns for Ethical Gov't v. Barton*, 778 F. Supp. 2d 1258, 1266 (D. Utah 2011).

Doe has been cited most frequently in challenges to federal and state money-in-politics disclosure laws. In *Many Cultures, One Message v. Clements*, the district court in Washington rejected an as-applied challenge to the compelled disclosure of grassroots lobbying contributions and expenditures,

noting that "[t]he evidence, or rather the lack thereof" was "substantially similar to that [which] the Supreme Court found lacking" in *Buckley* and *Doe*. *See* No. 3:10-05253-KLS, 2011 WL 5515515, at *59 (W.D. Wash. 2011), *appeal docketed*, No. 11-36008 (9th Cir. Dec. 6, 2011). A Mississippi federal district court has followed *Doe* and this circuit's campaign finance decisions to uphold political committee registration and reporting requirements because they effectuate the state's informational interest. *See Justice v. Hosemann*, No. 3:11-138-SA-SAA, 2011 WL 5326057, at *14 (N.D. Miss. Nov. 3, 2011) (denying preliminary injunction).

If this Court accepts Doe's invitation to broaden the 'harassment' exemption, savvy political operatives—who over the years have proven quite adept at exploiting loopholes and circumventing disclosure requirements, *see, e.g.*, *Buckley*, 424 U.S. at 62 n. 71—will seize this Court's decision in their efforts to undermine disclosure laws from coast to coast.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision below.

RESPECTFULLY SUBMITTED this 28th day of March 2012.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Paul S. Ryan
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Dated: March 28, 2012

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I hereby certify that on March 28, 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.

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