No. 11-A_____

In the Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, AND PROTECT MARRIAGE WASHINGTON,
Appellants

v.

REED et al., *Appellees and Intervenor-Appellees*,

Appeal from No. 11-35854 in the
United States Court of Appeals for the Ninth Circuit

and

Case No. 3:09-CV-05456-BHS in the
U.S. District Court for the Western District of Washington

Application of John Doe #1, John Doe #2, and Protect Marriage Washington for a Writ of Injunction Pending Appeal – Appendix

To the Honorable Anthony M. Kennedy

Associate Justice of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

James Bopp, Jr.
THE BOPP LAW FIRM
1 South Sixth Street
Terre Haute, IN 47807
Phone: (812) 232-2434
Fax: (812) 235-3685
jboppjr@aol.com

November 18, 2011

Table of Contents

Order Granting Summary Judgment In Favor of Defendants and Intervenors and Denying Plaintiffs' Motion for Summary Judgment. 1a

District Court's Order Denying Plaintiffs' Motion for Injunction Pending Appeal. 35a

Ninth Circuit's Order Denying Plaintiffs' Motion for Injunction Pending Appeal. 40a

Minute Entry Granting Motion for a Protective Order. 49a

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

John DOE # 1, et al., Plaintiffs, v. SAM REED, in his official capacity as Secretary of State of Washington, et al., Defendants.	CASE NO. C09-5456BHS ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND INTERVENORS AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross motions for summary judgment (Dkts. 196, 204, 208, 209). The Court has considered the pleadings filed in support of and in opposition to the motions, the remainder of the file, and heard oral argument on October 3, 2011, and hereby grants summary judgment in favor of Defendants and Intervenors and denies Plaintiffs' motion for summary judgment. The Court also lifts its injunction preventing the disclosure of the Referendum 71 ("R-71") petitions and closes this case.

I. PROCEDURAL & FACTUAL BACKGROUND

On July 28, 2009, Plaintiffs (collectively "Doe") filed this action to object to and enjoin the disclosure of R-71 petitions on two constitutional bases: Count I, that disclosure of any referendum or initiative petitions is unconstitutional as a general matter; and Count II, that disclosure of R-71 petitions would be unconstitutional as applied to Doe (i.e., R-71 initiative signers). *See* Dkt. 2 (Complaint). On September 10, 2009, the Court granted preliminary injunctive relief on Count I but declined to rule on Count II. Dkt. 62.

Defendants appealed the Court's ruling and the Ninth Circuit reversed. *Doe v. Reed*, 586 F.3d 671 (2009). The Supreme Court accepted review and affirmed the Ninth Circuit. *Doe v. Reed*, 130 S. Ct. 2811 (2010). The Supreme Court left open the possibility of relief under Count II (Doe's as-applied challenge to disclosure).

On June 29, 2011, the parties each filed motions for summary judgment regarding Doe's as-applied challenge. Dkts. 196, 204, 208, and 209. The parties fully briefed these matters. Additionally, the Secretary of State of Washington moved to strike certain evidence relied upon by Doe. Dkt. 231 (motion to strike and reply to Doe's response in opposition to summary judgment).

A. Prior to Remand

In denying relief under Count I of Doe's Complaint, the Supreme Court of the United States set out the following factual and contextual background, which remains relevant in resolving the instant motions before the Court:

The State of Washington allows its citizens to challenge state laws by referendum. Roughly four percent of Washington voters must sign a petition to place such a referendum on the ballot. That petition, which by law must include the names and addresses of the signers, is then submitted to the government for verification and canvassing, to ensure that only lawful signatures are counted. The Washington Public Records Act (PRA) authorizes private parties to obtain copies of government documents, and the State construes the PRA to cover submitted referendum petitions.

This case arises out of a state law extending certain benefits to same-sex couples, and a corresponding referendum petition to put that law to a popular vote. Respondent intervenors invoked the PRA to obtain copies of the petition, with the names and addresses of the signers. Certain petition signers and the petition sponsor objected, arguing that such public disclosure would violate their rights under the First Amendment.

***

The Washington Constitution reserves to the people the power to reject any bill, with a few limited exceptions not relevant here, through the referendum process. Wash. Const., Art. II, § 1(b). To initiate a referendum, proponents must file a petition with the secretary of state that contains valid signatures of registered Washington voters equal to or exceeding four percent of the votes cast for the office of Governor at the last gubernatorial election. §§ 1(b), (d). A valid submission requires not only a signature, but also the signer's address and the county in which he is registered to vote. Wash. Rev. Code § 29A.72.130 (2008).

In May 2009, Washington Governor Christine Gregoire signed into law Senate Bill 5688, which "expand[ed] the rights and responsibilities" of state-registered domestic partners, including same-sex domestic partners. *Doe v. Reed*, 586 F.3d 671, 675 (9th Cir. 2009). That same month, Protect Marriage Washington, one of the petitioners here, was organized as a "State Political Committee" for the purpose of collecting the petition signatures necessary to place a referendum on the ballot, which would give the voters themselves an opportunity to vote on SB 5688. App. 8-9. If the referendum made it onto the ballot, Protect Marriage Washington planned to encourage voters to reject SB 5688. *Id.*, at 7, 9.

On July 25, 2009, Protect Marriage Washington submitted to the secretary of state a petition containing over 137,000 signatures. See 586 F.3d, at 675; Brief for Respondent Washington Families Standing Together 6. The secretary of state then began the verification and canvassing process, as required by Washington law, to ensure that only legal signatures were counted. Wash. Rev. Code § 29A.72.230. Some 120,000 valid signatures were required to place the referendum on the ballot. Sam Reed, Washington Secretary of State, Certification of Referendum 71 (Sept. 2, 2009). The secretary of state determined that the petition contained a sufficient number

> of valid signatures, and the referendum (R-71) appeared on the November 2009 ballot. The voters approved SB 5688 by a margin of 53% to 47%.
>
> The PRA, Wash. Rev. Code § 42.56.001 *et seq*., makes all "public records" available for public inspection and copying. § 42.56.070(1) (2008). The Act defines "[p]ublic record" as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency." § 42.56.010(2). Washington takes the position that referendum petitions are "public records." Brief for Respondent Reed 5.
>
> By August 20, 2009, the secretary had received requests for copies of the R-71 petition from an individual and four entities, including Washington Coalition for Open Government (WCOG) and Washington Families Standing Together (WFST), two of the respondents here. 586 F.3d, at 675. Two entities, WhoSigned.org and KnowThyNeighbor.org, issued a joint press release stating their intention to post the names of the R-71 petition signers online, in a searchable format. *See* App. 11; 586 F.3d, at 675.
>
> The referendum petition sponsor and certain signers filed a complaint and a motion for a preliminary injunction in the United States District Court for the Western District of Washington, seeking to enjoin the secretary of state from publicly releasing any documents that would reveal the names and contact information of the R-71 petition signers. App. 4. . . . Count II of the complaint alleges that "[t]he Public Records Act is unconstitutional as-applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." *Id.*, at 17.

Doe, 130 S. Ct. at 2815-2817. The Supreme Court did not rule on Count II, which is the issue now before this Court.

B. After Remand

On remand, the parties engaged in discovery. During discovery, Doe identified nineteen witnesses, including John Does Nos. 1 and 2. Discovery closed on October 22,

2010. Dkt. 128 (scheduling order).[1] Doe's witnesses include individual plaintiffs and declarants that are each already known to the public as being supporters of R-71 and none have testified by declaration that they would be seriously concerned if their personal identifying information related to R-71 (e.g., name, address, etc.) is disclosed pursuant to the PRA. The planned testimony of these witnesses and the other discovery that was supplied in preparation for trial is discussed in detail below. These witnesses and other pieces of documentary evidence comprise the only evidence Doe has offered in direct relation to actual R-71 signers in support of the instant as-applied challenge to the PRA.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must

---

[1]Defendant Secretary of State Sam Reed moves the Court to strike any evidence relied upon that Doe did not disclose prior to the discovery cutoff date. *See* Dkt. 231. The Court denies this motion because, even if such evidence were considered, the ruling herein would be the same.

present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

Applied here, the Court finds that Doe has failed to raise a material question of fact. Because the evidence submitted in support of the parties' cross-motions is not in any meaningful way controverted, the Court can resolve the issues presented herein as a matter of law.

B. Standards

1. Exacting Scrutiny

In *Doe*, the Supreme Court set out the standard of scrutiny to be applied in electoral cases such as this:

> We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) ("Since *NAACP v. Alabama* [357 U.S. 449 (1958),] we have required that the subordinating interests of the State [offered to justify compelled disclosure] survive exacting scrutiny"); *Citizens United, supra*, at ----, 130 S.Ct., at 914 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny' " (quoting *Buckley*, *supra*, at 64)); *Davis v. Federal Election Comm'n*, 554 U.S. ----, ----, 128 S.Ct. 2759, 2775, 171 L.Ed.2d 737 (2008) (governmental interest in disclosure "'must survive exacting scrutiny'" (quoting *Buckley*, *supra*, at 64)*; Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204 (1999) (ACLF) (finding that disclosure rules "fail[ed] exacting scrutiny" (internal quotation marks omitted)).
>
> That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, *supra*, at ----, 130 S.Ct., at 914 (quoting *Buckley*, *supra*, at 64, 66). To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, *supra*, at ----, 128 S.Ct., at 2774 (citing *Buckley*, *supra*, at 68, 71).

130 S. Ct. at 2818. The Court further noted that "The State's interest in preserving the integrity of the electoral process is *undoubtedly important*. 'States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally."' *Buckley v. ACLF*, 525 U.S. 182, 191 (emphasis added).

Therefore, exacting scrutiny applies in this case.

2. Reasonable Probability

In as-applied challenges such as the instant case, the Supreme Court has "explained that those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe*, 130 S. Ct. at 2820 (quoting *Buckley*, *supra*, at 74; *see also Citizens United*, 558 U.S. at ----, 130 S. Ct. at 915).[2]

To prevail on an as-applied challenge, Doe will have to satisfy this reasonable probability standard with "respect to those who signed the R-71 petition." *See id.* at 2820-2821 (leaving this narrow issue open on remand); *see Buckley*, *supra*, at 74 ("minor parties" may be exempt from disclosure requirements if they can show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties"); *Citizens United*, *supra*, at ----, 130 S. Ct. at 915 (disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed") (quoting *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 198 (2003)).

---

[2]Doe brings its as-applied challenge based upon Doe's belief that a reasonable probability exists that disclosure would result in threats, harassment, or reprisals from private parties. Doe has supplied no evidence or argument that any governmental agency engaged in such conduct. Therefore, the Court limits its analysis to evidence regarding private parties.

Additionally, while the majority opinion in *Doe* provides only a minimal discussion as to the ability of Doe to prevail on an as-applied challenge, the concurrences in *Doe* elaborate on this issue and aid the Court in resolving this case. *See* 130 S. Ct. at 2822-2837 (concurring opinions).

a. Justice Sotomayor, Concurring

Justice Sotomayor, with whom Justice Stevens and Justice Ginsburg join, stated the following with respect to as-applied challenges such as the instant matter:

> Case-specific relief may be available . . . in the rare circumstance in which disclosure poses a reasonable probability of *serious and widespread harassment* that the State is unwilling or unable to control. *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue. Accordingly, courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process.

Doe, 130 S. Ct. at 2829 (Sotomayor, concurring) (emphasis added).

b. Justice Stevens, Concurring

Justice Stevens, with whom Justice Breyer joins, explained the following with respect to Doe's as-applied challenge:

> There remains the issue of petitioners' as-applied challenge. As a matter of law, the Court is correct to keep open the possibility that in particular instances in which a policy such as the PRA burdens expression "by the public enmity attending publicity," *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 98 (1982), speakers may have a winning constitutional claim. "'[F]rom time to time throughout history,'" persecuted groups have been able "'to criticize oppressive practices and

> laws either anonymously or not at all.'" *McIntyre v. Ohio Elections Com'n*, 514 U.S., 334, 342.
>
> *In my view, this is unlikely to occur in cases involving the PRA.* Any burden on speech that petitioners posit is speculative as well as indirect. For an as-applied challenge to a law such as the PRA to succeed, there would have to be *a significant threat* of harassment directed at those who sign the petition *that cannot be mitigated by law enforcement measures*. Moreover, the character of the law challenged in a referendum does not, in itself, affect the analysis. Debates about tax policy and regulation of private property can become just as heated as debates about domestic partnerships. And as a general matter, it is very difficult to show that by later disclosing the names of petition signatories, individuals will be less willing to sign petitions. *Just as we have in the past, I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech.* A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co. v. Knott*, 235 U.S. 23, 26 (1914).

Doe, 130 S. Ct. at 2831-2832 (footnotes omitted) (emphasis added); *see also id.*, n. 4 (citing but not agreeing with Justice Scalia's concurrence at 2832, which concluded that granting relief to Doe on its as-applied challenge would amount to establishing a right to anonymous speech).

C. Doe's As-Applied Challenge

Doe makes an as-applied challenge to the PRA, seeking to prevent the disclosure of the personally identifying information of 137,000 R-71 petition signers. To succeed in this challenge, Doe must establish that such disclosure that is otherwise proper under the PRA would cause the signers to face a reasonable probability of threats, harassment, or reprisals. In opposition, Defendants and Intervenors assert that Doe has not supplied the Court with competent evidence to meet such a showing on an as-applied basis; Defendants and Intervenors also contend that Doe cannot or has not supplied adequate

authority upon which it can succeed in its challenge based on the evidence that has been supplied by Doe and could be admissible at trial.

1. The Progeny of As-Applied Challenges

The as-applied exemption that Doe seeks has been upheld in only a few cases. *See Buckley*, 424 U.S. at 31-35; *Brown*, 459 U.S. at 102 (granting exemption to Socialist Worker Party ("SWP") deemed to have minor party status due to its 60 members, little success at the polls, and small amount of financial backing); *NAACP*, 357 U.S. at 466 (holding that disclosure of rank and file membership of NAACP would restrain members' exercise of freedom of association); *but see ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1213 (2009) (rejecting an as-applied challenge for failure to supply adequate evidence and failure to establish minor party status).

In *NAACP*, the Supreme Court found that "Petitioner [ ] made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462-463. The *NAACP* Court concluded that:

> Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

Id.

Similarly, in *Brown*, the Supreme Court determined that "the evidence of private and government hostility toward the SWP and its members establishe[d] a reasonable probability that disclosing the names of contributors and recipients [would] subject them to threats, harassment, and reprisals." 459 U.S. at 100. Specifically, the *Brown* Court found that the SWP had uncontroverted and ample evidence of its experience with pervasive hostility by the government and private parties. *Id*. at 98-99 (evidence of threatening phone calls and hate mail; the burning of SWP literature; the destruction of SWP members' property; police harassment of a party candidate; the firing of shots at an SWP office; and evidence that, in the 12-month period before trial, 22 SWP members, including four in Ohio, were fired because of their party membership).

In contradistinction, the district court in *ProtectMarriage.com* declined to extend an as-applied exemption to a group challenging the California PRA disclosure requirements with respect to a ballot measure adopted by California citizens. The measure, "Proposition 8, [ ] changed the California Constitution such that marriage would only thereafter exist 'between a man and a woman."' 599 F. Supp. 2d at 1199. In *ProtectMarriage.com*, the plaintiffs, much like Doe in this case, sought injunctive relief on the basis that they are "entitled to an as-applied blanket exemption from [their State's] compelled disclosure provisions because Plaintiffs have demonstrated a reasonable probability that compelled disclosure will result in threats, harassment, [or] reprisals because of their support for [the measure]." 599 F. Supp. 2d at 1204 (quotations omitted).

The *ProtectMarriage.com* court found that plaintiffs did not and could not allege that a movement to define marriage as being between a man and a woman "is vulnerable

to the same threats as were socialist and communist groups, or, for that matter, the NAACP." *Id*. at 1217.

After a thorough analysis of precedent, the *ProtectMarriage.com* court further concluded that "it would appear that . . . minor status is a necessary element of a successful as-applied claim." *Id*. at 1215. In fact, Doe has not supplied and the Court has not found any case wherein a court granted an as-applied exemption to the disclosure laws to a group, organization, or political party that did not have minor status. *See, e.g.*, *Buckley*, 424 U.S. at 31-35; *Brown*, 459 U.S. at 102; *NAACP*, 357 U.S. at 466.

Notably, a common thread exists among the cases wherein an exemption has been extended on an as-applied challenge. The *Protectmarriage.com* analysis highlights this common thread:

> Since *Buckley*, as-applied challenges have been successfully raised only by minor parties, . . . having small constituencies and promoting historically unpopular and almost universally-rejected ideas. The parties' "aim [in *Brown*] was the abolition of capitalism and the establishment of a workers' government to achieve socialism." The party was historically unsuccessful at the polls though its members regularly ran for public office. Additionally, campaign contributions and expenditures . . . averaged approximately $15,000 annually.
>
> Similarly, in *Hall-Tyner*, a committee supporting the Communist Party successfully sought exemption from state disclosure laws.

599 F. Supp. 2d at 1216 (citations omitted).

In short, "*Brown* and its progeny each involved groups seeking to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens." *Id*. at 1215. Doe has not provided adequate authority to support any

departure from requiring such a showing in order to bring a successful as-applied challenge to the PRA disclosure laws.

Based on this precedent, Defendants and Intervenors assert that, absent minor party status, Doe's as-applied challenge must fail. If the term "minor party" were attributable only to minor political parties, Doe's claims absolutely fail; indeed, the people making up the collective Doe cannot be categorized as a political party.

However, Defendants and Intervenors argue more subtly that the "minor party" rule in *Buckley* and the cases following it actually refer to fringe organizations, similar to the NAACP in the 1950s. Specifically, they argue that R-71 signers are not a fringe organization and have not established that they can qualify for minor party status as an organization because there is no cohesion in the 137,000 people who signed the R-71 petition or the 838,842 people who voted to reject the expansion of rights for same sex partners. The Court is persuaded that it is difficult to categorize the R-71 signers as a group or an organization; the only fact known to be common among these signers to any reasonable certainty is that they signed the R-71 petition. Significantly, in each of the cases where a court upheld an as-applied challenge to the disclosure laws, the party or organization making the challenge established that their constitutional right to associate freely would be illegally infringed upon should disclosure be ordered. Here, it is not clear that the R-71 signers have actually sought to associate with each other in a constitutionally protected manner.

However, even if the Court considered the R-71 supporters to be such a group or organization, Doe has not and cannot with any credibility analogize their situation to that

of a small group of rank and file members of the SWP or the NAACP, discussed above. Instead, they are much more akin to the petitioners in *ProtectMarriage.com* who "orchestrated a massive movement to amend the California Constitution. Proponents of the initiative were successful in their endeavor, raising nearly $30 million, securing 52.3% of the vote and convincing over seven million voters to support Proposition 8." 599 F. Supp. 2d at 1215.

Similarly here, PMW was able to secure 137,000 signers for R-71 and obtained nearly half the vote with 838,842 votes. And Doe has not supplied competent evidence or adequate authority to support its claim that the R-71 signers constitute a fringe organization with unpopular or unorthodox beliefs or one that is seeking to further ideas that have been "historically and pervasively rejected and vilified by both this country's government and its citizens." *Id*. This fact makes Doe's case quite similar to *ProtectMarriage.com* wherein the district court rejected plaintiffs' as-applied challenge to the California PRA. *Compare id*. at 1214 ("Plaintiffs succeeded in persuading over seven million voters to support their cause") *with Brown*, 459 U.S. at 88 (sixty-member SWP party unable to garner public support at the polls or sufficient financial resources to be successful due to being unpopular, vilified, and historically rejected by the government and the citizenry).

Finally, the as-applied exemption is intended to prevent an organization from being forced to retreat from the marketplace of ideas, which would materially diminish discourse. Doe has not provided competent evidence that it is in any material way similar to the organizations, groups, or parties who have received the as-applied exemption in the

past. Instead, the evidence before the Court logically leads only to the opposite conclusion.

Therefore, if minor party status (a.k.a. fringe organization) is required, as it appears that *Buckley* and its progeny require, Doe's claim fails in all material respects.

2. Doe's Evidence of Threats, Harassment, or Reprisals

Assuming *arguendo* that Doe can get by the hurdles discussed above, Doe would still have to produce sufficient evidence of threats, harassment, or reprisals. In the cases where the exemption Doe seeks has been granted, the plaintiffs have supplied the courts with ample, uncontroverted evidence of a reasonable probability that disclosure will result in threats, harassment, or reprisals. As the *ProtectMarriage.com* court correctly summarized:

> Indeed, the *Brown* Court was confronted with countless acts of government harassment and retribution against members of the SWP, which are detailed above. Furthermore, in *Hall-Tyner*, the Second Circuit stated, "[t]he evidence relied on by the district judge included the extensive body of state and federal legislation subjecting Communist Party members to civil disability and criminal liability, reports and affidavits documenting the history of governmental surveillance and harassment of Communist Party members, as well as affidavits indicating the desire of contributors to the Committee to remain anonymous." 678 F.2d at 419.

599 F. Supp. 2d at 1217.

In *Doe*, the Supreme Court accurately and succinctly described the issue now before this Court: whether the PRA "is unconstitutional as applied to the [R-71] petition." 130 S. Ct. at 2817. Doe has provided the Court with a mountain of anecdotal evidence from around the country that offers merely a speculative possibility of threats, harassment, or reprisals. Doe has also provided the Court with numerous examples of

what may be considered threats, harassment, or reprisals experienced by those supporting Proposition 8 in California.

In *Buckley*, the Supreme Court articulated that the proof of threats, harassment, or reprisals "may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." 424 U.S. at 74. Such evidence is to be specifically and directly related to a group or organization. Here, to the extent Doe could be characterized as a group or organization, Doe would be required to present evidence pertaining directly to R-71 signers and perhaps to the PMW donors. What is not included in the type of evidence that can be relied upon, Defendants and Intervenors argue, is random anecdotal evidence from around the country that pertains to individuals that did not sign the R-71 petition.

To the extent Doe argues that it is permitted to rely on the historical evidence of others that it believes to be similarly situated to the R-71 signers, Defendants and Intervenors argue that Doe is largely mistaken given the circumstances of this case. In *Buckley*, the Court noted that "[n]ew parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id*.

The R-71 signers, however, cannot be characterized as a group or an organization that could be considered new. The vote at issue took place nearly two years ago and petition signatures were being gathered well before the vote. Perhaps if the posture of this case were as it existed just before the vote at issue when the R-71 petition had just been

submitted, Doe might persuade the Court that it is "new." However, it is now long past that point, and Doe has the ability to produce historical evidence from the past few years related to R-71. Doe also has the ability to draw on the experiences of those who financially supported PMW's efforts during the heat of the R-71 petition signing and prior to the vote. Therefore, Doe is limited to evidence from among its own number, R-71 petition signers. Doe has not supplied adequate authority to the contrary.[3]

The Court turns now to Doe's historical evidence that may be considered relevant and admissible to establish that Doe would face a reasonable probability of threats, harassment, or reprisals if disclosure of the R-71 signers' information were required. The majority of evidence supplied by Doe includes individuals' claimed experience of threats, harassment, or reprisals that Doe contends is connected to R-71.

Ronald Perkins, John Doe # 1. Ronald Perkins ("Perkins") is a known public supporter of R-71. He has announced his opposition to same-sex marriage in an internet video, and signed the R-71 petition publically. Declaration of William B. Stafford (Stafford Decl.), Ex. A at 11-15, 16-17 (Perkins Dep.) 8:14-12:22, 22:19-23:19. In his deposition, Perkins also expressed his willingness to participate publically in this case and that he was aware of no threats to him should he testify in this case. *See, e.g.*, Perkins Dep. 31:3-17, 45:3-21, 47:17-48:7. Although Perkins stated that the concern of

---

[3]Additionally, even if Doe could rely on evidence from the Proposition 8 experience, such events are now stale and occurred during the "heat of an election battle surrounding a hotly contested ballot initiative." *ProtectMarriage.com*, 599 F. Supp. 2d at 1217. This case may have begun during the heat of an election but such is not the case now.

harassment remains, he also stated that no one has ever threatened him for his involvement with R-71 in any way, shape, or form at work or at home. *Id*.

Matthew Chenier, John Doe # 2. Matthew Cheiner ("Chenier") gathered signatures for R-71 in public locations and waved an R-71 banner in a high-traffic area with approximately seventy other people. *See* Stafford Decl., Ex. B (Chenier Dep.) 10:19-11:17, 14:17-15:10. Cheiner has stated he does not have concerns over the publication of his name and that he joined this action as a John Doe for the benefit of other people. Chenier Dep. 19:8-13, 38:6-17. The only negative events that Cheiner testified about in his deposition included (1) an angry text message from his brother; (2) being "mooned" by an unidentified passenger in a passing car; and (3) being "flipped off" by people in passing cars. *Id*. 19:17-20:4, 22:23-23:6, 25:7-23, 29:9-23. Absent from the record is any competent evidence, other than a text from Cheiner's brother, that these incidents pertained to R-71.

Richard Long, John Doe # 3. Pastor Richard Long ("Long") publically endorsed R-71 on several occasions. Stafford Decl., Ex. C (Long Dep.) 10:10-18, 12:19-20, 13:1-24. Long likely signed the petition at his church and publically encouraged others to do so. *Id*. 9:23-10:21. Long stated in his deposition that he has no problem testifying publically in this matter and that his involvement with R-71 need not be kept secret. *Id*. 8:13-24.

Long testified that he experienced harassment related to R-71 when he received a call from a purported transgender woman. *Id*. 20:1-9. Long claims the woman stated that

she and her friends would picket the church or attend a morning service, but she affirmed they would conduct themselves appropriately. *Id*. 20:10-17.

Long also testified that he only received two calls about R-71 and that these were the only "harassing" events. Long testified that he did not receive other calls about R-71 or other types of "harassment" before or after the R-71 election. *See, e.g., id.* 28:2-5.

Roy Hartwell, John Doe # 4. Roy Hartwell ("Hartwell) testified about R-71 in front of the Washington State legislature, gathered signatures for the petition in public places, and participated in television interviews regarding R-71. Stafford Decl., Ex. D (Hartwell Dep.) 7:13-8:18, 16:1-17:16, 25:17-23, 30:24-31:10.

Hartwell testified in his deposition that one harassing incident involved two ladies that glared at him and one said "we have feelings too." This occurred while Hartwell was collecting signatures for R-71 at a grocery store. *Id*. 18:3-12 (also discussing that the comment appeared to shake an older lady up, who signed the petition anyway). Hartwell also testified about others who he believed harassed him about the R-71 petition. *See, e.g., id*. 19:1-20:25 (discussing a woman who approached him at the grocery and asserted she would bring her friends to the church, which did not occur); 21:10-22:16 (discussing a lady who took Hartwell and Hartwell's wife's picture while they were collecting signatures at a Wal-Mart and said she would post them on Facebook to enable her friends to see what the Hartwells look like; Hartwell is unaware if the Facebook posting occurred); 22:23-23:10 (discussing a customer at Wal-Mart that asked a manager to ask the Hartwells to leave; the manager did not ask them to leave). In none of the events described by Hartwell did he feel the need to contact the police. *See id*. 23-11-25:9.

Valerie Hartwell, Jane Doe # 5. Ms. Hartwell's involvement with R-71 and claimed experience with harassment related thereto is not materially different than Mr. Hartwell's, discussed above.

Viktor Anishenko. Viktor Anishenko ("Anishenko") was a public advocate for R-71 and solicited signatures for the petition on five or six occasions. Stafford Decl., Ex. F (Anishenko Dep.) 16:12-23, 23:12-25:6. Anishenko also posted an R-71 sign in the yard of his residence. *Id*. 25:7-8.

Although Anishenko claims to have had two or three Post-It notes containing vulgar language placed on his vehicle, he does not know if it was related to R-71. *Id*. 28:21-30:24. Anishenko does not allege any other instances of threats, harassment, or reprisals. *Id*. 28:5-14.

Ken Hutcherson. Pastor Ken Hutcherson ("Hutcherson") is a senior pastor at Antioch Bible Church. Stafford Decl., Ex. G (Hutcherson Dep.) 6:1-6. Hutcherson has long been a public opponent of gay marriage and has been covered extensively regarding this in the media. *See, e.g.*, *id*. 13:25-17:8, 18:15-19:2 (asserting that "Googling" his name results in approximately 300,000 hits related to his stance opposing gay marriage).

Although Hutcherson points to many examples of phone calls his church has received regarding his stance on gay rights, he does not point to any calls or other methods of contact that relate specifically to R-71. *Id*. at 38:22-39:2, 46:4-22, 63:7-64:10, 66:3-13, 71:10-21, 75:22-76:19. Hutcherson is also not aware of any death threats, attacks, or harassment of his congregation as it relates to R-71. *Id*. 64:24-66:2, 48:3-8, 69:5-10.

Alexander Kaprian. Pastor Alexander Kaprian ("Kaprian") hosted and attended a meeting to support R-71. Stafford Decl., Ex. H (Kaprian Dep.) 8:24-9:7, 14:4-11. Kaprian signed the R-71 petition at his church and posted an R-71 sign in front of his residence. Kaprian testified in his deposition that some woman took photographs of his home and that he felt he was being watched; however, he points to no incident directly attributable to R-71, and he did not report these incidents to the police. *Id*. 42:11-43:2, 48:10-50:22, 52:19-53:3, 38:11-22.

Dmitry Kozlov. Dimitry Koslov ("D. Koslov") was actively involved in gathering R-71 signatures, waving R-71 signs at intersections, engaging in campaign organization and other involvement between two and three times a week for three months. Stafford Decl., Ex. I (D. Koslov Dep.) 33:23-34:5. D. Koslov remained involved with R-71 following the close of voting on the referendum, and he is not concerned about testifying publically in this case. *Id*. 14:8-9, 33:21-22, 9:14-22.

D. Koslov testified regarding three incidents that he characterized as harassment: (1) a man directed expletives at him and pushed him; (2) a man mooned the group and threw garbage at the group from a van, no physical injuries; and (3) a woman approached him and said "we'll do everything to stop what you're doing" and a man said "we'll have your kids." *Id*. 30:20-32:1. D. Koslov did not claim to have been concerned for his safety regarding any of these incidents, and he did not inform the police. *Id*. 32:2-12, 33:8-20.

Sergey Koslov. Sergey Koslov ("S. Koslov") publically supported R-71 and "people knew [his] view about this matter." Stafford Decl., Ex. J (S. Koslov Dep.) 8:6-10. S. Koslov is not concerned about testifying publically, and he does not claim to have

experienced any harassment related to R-71. *Id*. 11:25-12:16. However, he did testify that notes were left near his church stating "you're worse than the fascists," "get out of here," and "your children . . . will be homosexuals"; he also testified that he did not feel threatened by these notes and did not call the police. *Id*. 11:25-12:16, 15:15-16:16.

Leonid Pisarchuk. Leonid Pisarchuk ("Pisarchuk") actively supported R-71 by publically gathering signatures, waving signs, and placing a bumper sticker on his car and a sign in his yard. Stafford Decl., Ex. K (Pisarchuk Dep.) 8:25-10:25, 13:17-14:14. Pisarchuk also interviewed with a reporter who published a story identifying him as an R-71 supporter.

Though he is not concerned about testifying in this matter, Pisarchuk testified in his deposition that he felt harassed on a couple occasions. *See id*. 39:25-40:4. Specifically, he claims that passing motorists made offensive gestures and shouted insults but he was not threatened by these events. *Id*. 21:12-24:20, 47:20-25. He experienced being yelled at with profanity and his name was placed on a pro-gay rights website but neither of these events left him feeling concerned for his personal safety, and he did not call the police. Pisarchuk Dep. 31:1-5, 33:7-12, 34:6-11. Pisarchuk does not point to any events of threats, harassment, or reprisals following the R-71 vote. *Id*. 35:7-10; 51:22:4.

Gary Randall. Gary Randall ("Randall") is the president of the Faith and Freedom Network ("FFN") and was one of the organizers/spokesmen for R-71. Stafford Decl., Ex. L (Randall Dep.) 9:25-10:2; 91:16-18, 94:6-8. Randall has expressed his support for R-71 on websites, in public speeches, and in interviews and articles published by news organizations. *Id*. 19:6-20:8, 20:11-22:14, 36:6-39:10, 40:19-25, 41:22-43:3,

83:2-18, 85:10-21. Randall also authorized the FFN's political action committee to spend funds on R-71 activities, which are disclosed at the Public Disclosure Commission's website. *Id*. 29:8-31:3.

Randall testified that he received death threats via a blog site; however, when asked to demonstrate where in the copy of the blog posting he believed a threat of his or another's life was made he could not do so without relying on assumptions. *Id*. 43:4-51:3 (finally conceding that no actual death threat was made on the website).[4]

Elizabeth Scott. Elizabeth Scott ("Scott") was a state legislative candidate who publically endorsed R-71, including the gathering of signatures for R-71. Stafford Decl., Ex. M. (Scott Dep. 7:11-18, 11:19-13:12, 62:6-13, 89:11-13). Scott is not concerned about testifying in this matter. *Id*. 17:11-16.

The Everett Herald (a local paper) published an article on Scott, which included the fact that she signed the R-71 petition. *Id*. 8:25-9:17, 10:25-11:18. The article contained her cell phone number and other contact information; notably, Scott did not receive any calls on her mobile phone regarding R-71. *Id*. 23:12-24-1, 96:1-16.

However, Scott's family did receive a phone call to its residence and the caller asked for Scott and said "I will kill you and your family," and then hung up the phone. *Id*. 17:19-18:18, 21:9-25. However, other than speculation, Scott does not attribute to R-71 this death threat or any other incident that she claimed could be considered harassment

---

[4]The blog site that Randall relied on for his claims of a death threat is www.pinkpistols.org. This website appears to advocate for homosexuals to be armed if desired to use only in self defense. Doe has not supplied competent evidence to the contrary.

that occurred before or after the R-71 vote. *See, e.g., id*. 32:10-20, 37:16-20, 38:17-234, 40:21-41:11, 64:15-19. Additionally, she called the police about the death threat and it was handled without further incident. *Id*. 19:13-21:2, 30:10-31:24.

Valera Stevens. Valera Stevens ("Stevens"), a Washington State Senator, had her picture and statement of support printed on the back of each R-71 petition. Dkt. 27, Ex. A at 12. She endorsed the websites of PMW and FFN. Stafford Decl., Ex. N (Stevens Dep.) 15:6-17:4, 24:17-25:22. Stevens also wrote a fundraising message for the PMW website and made six donations to PMW. *See id*. 24:17-25:22. Stevens has no concern about testifying in this case, except if it occurs during the legislative session. *Id*. 7:4-13.

Stevens testified that she received several calls and two faxes in October of 2009 that she believed related to her support of R-71. *Id.* 26:17-28:13, 36:21-37:13, 46:12-48:2. Although she recalls the callers using vulgar language she does not recall being told her support of R-71 motivated the calls. *Id*. 29:8-30:17. None of these contacts made Stevens feel threatened, and she did not notify the police; she has not experienced any other harassment, threats, or reprisals due to her involvement with and support of R-71. *Id*. 42:22-43:8, 45:10-13.

Larry Stickney. Larry Stickney ("L. Stickney") served as PMW's campaign manager. Stafford Decl., Ex. O (L. Stickney Dep.) 6:1-13, 7:7-11. L. Stickney testified that his involvement in R-71 is "extremely public." *Id*. 22:14-17. L. Stickney has spoken with reporters and been discussed on the Internet and in print regarding R-71; he has also had upwards of twenty radio appearances, appeared on TV, participated in public

debates, and spoken in front of approximately 2000 people regarding R-71. *Id*. 22:18-23:15, 35:23-37:15, 38:7-39:20.

L. Stickney did not personally experience any physical harassment or violence during the campaign for R-71. *Id.* 48:16-49:9, 73:1-2. He did testify, however, that the PMW campaign received threatening and/or hostile emails. *Id*. 48:16-49:9, 73:1-2. He also testified that he felt threatened by a Bellingham, WA blogger who wrote "[w]hy can't we go to Arlington and harm his family?" *Id*. 53:2-24, 130:15-131:2. L. Stickney contacted the police who said they would investigate the matter; he never reported any further incidents regarding the blogger. *Id*. 56:20-58:2, 140:21-142:6. L. Stickney also received a "bothersome" phone call from a transgendered individual. *Id*. 86:9-87:15, 90:7-91:3, 124:22-125:1.

The only other time L. Stickney felt threatened was when his daughter informed him that a man took a photo of his home. However, L. Stickney cannot point to any facts other than speculation to contend that this event related to R-71. L. Stickney did not contact the police with regard to the unknown photographer.

Following the R-71 vote, Stickney has remained in the public's eye and occasionally received emails calling him a "rat" or a "homophobic bigot." *Id*. 83:17-85:21.

Matt Stickney. Matt Stickney ("M. Stickney") publically participated in R-71 events and was listed in newspaper articles connected to the campaign. Stafford Decl., Ex. P (M. Stickney Dep.) 5:24-25, 7:3-24, 10:3-15, 11:16-25. M. Stickney commented online regarding an article about R-71 published by The Stranger, a local publication. *Id*.

8:4-13. M. Stickney testified that, although people responded to his comment and made comments about his father, L. Stickney, and their family in general, "[t]hey never said anything about me – you know, they never said, you know, I am a jerk for working on the campaign or whatever." *Id*. 13:17-23. M. Stickney did not testify about any personal experience of harassment, threats or reprisals due to his involvement with R-71, before or after the vote.

Robert Struble. Robert Struble ("Struble") acted as a spokesman for PMW and shared his opinions on R-71 in public debates, on the radio, at a public state legislative hearing, and in a letter to the Kitsap Sun editor. Stafford Decl., Ex. Q (Struble Dep.) 11:8-12:8, 13:17-21, 14:4-17, 17:25-18:15. Struble testified that the fact he signed the R-71 petition is "so minuscule compared to the fact that [he's] a public spokesman, so it's not really – [his] signature is hardly the issue." *Id*. 19:1-24; *see also id*. 20:25-21:2 (Struble does not believe he would be at risk if the R-71 petitions were publically released).

Struble testified about one incident he considered to be harassment. While handing out brochures on a ferry, one person receiving a brochure, crumpled it up and threw it back at Struble stating it was "a bunch of shit" and that he and his partner "had just as much right to get married" as did Struble. *Id*. 23:13-20. The person attempted to get other passengers to "vote" on the issue. *Id*. Eventually ferry workers stopped the person from following Struble around on the ferry. *Id*. 29:1-3, 31:4-9.

Barbara "Rachel" Whaley. Rachel Whaley is Hutcherson's assistant. Stafford Decl., Ex. R. (Whaley Dep.) 5:13-16. Whaley did not testify to any personal experience

with threats, harassment, or reprisals related to her involvement with R-71 or for having signed the petition. *See generally*, Ex. R. (Whaley Dep.). She did testify, however, that the church did receive several phone calls telling the church to "shut up" and that failure to do so would result in the church being "taken down," but nobody followed through on these statements. *Id*. 15:21-16:13, 24:2-10, 40:9-16.

The Court turns now to Doe's other evidence that comes in the form of written discovery. Defendants requested that Doe produce documents "relating to any alleged harassment, threat or retaliation relating directly or indirectly to R-71." Stafford Decl., Ex. S. Doe produced 1,542 pages of documents, which predominantly included newspaper articles regarding the California Proposition 8 campaign and the R-71 campaign in Washington.

Significantly, in his deposition, L. Stickney testified that he solicited R-71 signers to share any experiences they had with harassment. Stickney Dep. 30:3-35:8. If any responses were obtained by Doe, none were included within their production to Defendants' request.

Further, on August 15, 2011, the Court ordered Doe to identify for the Court:

> specific documents already in evidence that Plaintiffs believe will establish a material question of fact as to whether disclosure of R-71 signers' identities would result in the reasonable probability of threats, harassment, or reprisals. These documents shall only include the declarations, depositions, and documentary evidence already in the record of actual R-71 signers who have not already made themselves public figures on this issue (e.g., information regarding Prop 8 in California, op-ed publications, and the like will not be considered relevant for purposes of this request).

Dkt. 250 at 3.

In response to the Court's order, Doe stated unequivocally that "[o]f course there is no such evidence." Dkt. 259 at 2 (stating that Doe's theory is that "[u]nless and until the identities of the signers are publically exposed, there will be no harassment of R-71 signers (who signed the petition but did not make that fact public knowledge)."

3. Sufficiency of Doe's Evidence

The record in this case of what might be considered evidence of a reasonable probability of threats, harassment, or reprisals of actual R-71 signers has been limited by the evidence supplied by Doe. That evidence is comprised of experiences shared only by publicized individuals who have taken public stances on the R-71 issue and against same-sex marriage in general. *See, e.g.*, L. Stickney Dep. This evidence, however, does not rise to the level or amount of uncontroverted evidence provided in cases wherein a group was able to obtain an as-applied exemption to otherwise permissible disclosure. *See Brown* and *NAACP*, *supra*. Further, Doe has failed to provide competent evidence or adequate authority from which this Court could conclude that disclosure of the R-71 petitions would result in similar experiences for those who signed the petition.

To begin with, it is undisputed that L. Stickney has a list containing the names and contact information of people he knows that signed the R-71 petition. This list was compiled prior to the vote at issue. Doe has, therefore, had ample opportunity and time to contact these individuals to obtain information about their experiences that might support Doe's request for an as-applied exemption to disclosure. No such evidence has been produced. In fact, L. Stickney solicited such evidence from these individuals. Doe has not supplied any such evidence to the Court nor informed it that such evidence exists.

Moreover, no doubt the majority of people who signed an R-71 petition did so in a public place or forum and could have been contacted by mass publication or other means to obtain their testimony as to any threats, harassment or reprisals they had experienced in connection to their signing of the petition. However, no such evidence exists in the record before the Court.

Further still, PMW secured donations to finance the campaign for R-71. It is undisputed that between May and November of 2009, PMW reported 857 contributions to its cause. The names and other personally identifying information of these donors has been public knowledge for over two years. Doe has had ample time and opportunity to contact these individuals, some of which likely signed the R-71 petition in addition to donating to PMW's R-71 campaign. Even if none of these donors signed the R-71 petition, their experiences are far more closely related to the issues at hand than the random "evidence" supplied by Doe based on experiences of individuals around the country and the now stale experiences of those persons involved with Proposition 8. However, Doe has failed to supply sufficient, competent evidence that the publically known donors – as active supporters of R-71 – have experienced sufficient threats, harassment, or reprisals based on the disclosure of their information in connection to R-71 that would satisfy the reasonable probability standard that Doe must meet in this case. The Supreme Court has previously rejected a similar as-applied challenge based on such a failure. *Citizens United*, 130 S. Ct. at 916 (rejecting Citizens United's as-applied challenge because it "has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and

has identified no instance of harassment or retaliation."). The same can be said for PMW's donors.

D. Widespread Evidence, Strong Evidence, Police Mitigation

As concluded above, the Court finds that Doe's as-applied challenge cannot meet the threshold required to obtain an as-applied exemption to the PRA in this case. Doe's claim would also fail under the standards – if considered distinguishable from the applicable standards discussed above – articulated by a majority of the concurring Justices in the Supreme Court's opinion in *Doe*, 130 S. Ct. 2811.

As discussed above, Justice Sotomayor, with whom Justice Stevens and Justice Ginsburg concurred, would require evidence of "serious and widespread harassment that the State is unwilling or unable to control." Justice Stevens, with whom Justice Breyer concurred, also stated that the Court would "demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech." *Doe*, 130 S. Ct. at 2829. While Doe correctly points out that the concurrences in *Doe* are dicta, their opinions remain instructive on what may likely be the standard applied by the Supreme Court if it were to hear this case on appeal.

In any event, Justice Sotomayor and those Justices concurring in her opinion would require a showing of "*serious and widespread harassment* that the State is unwilling or unable to control." *Doe*, 130 S. Ct. at 2829 (emphasis added). To the extent this is a different standard than what is required to satisfy the reasonable probability standard from *Buckley*, it is more stringent. Otherwise, it is merely an explanation as to

what the reasonable probability standard requires in this case. In any event, Doe cannot satisfy such a requirement under either understanding of the law.

Applied here, the Court finds that Doe has only supplied evidence that hurts rather than helps its case. Doe has supplied minimal testimony from a few witnesses who, in their respective deposition testimony, stated either that police efforts to mitigate reported incidents was sufficient or unnecessary. Doe has supplied no evidence that police were or are now unable or unwilling to mitigate any claimed harassment or are now unable or unwilling to control the same, should disclosure be made. This is a quite different situation than the progeny of cases providing an as-applied exemption wherein the government was actually involved in carrying out the harassment, which was historic, pervasive, and documented. To that end, the evidence supplied by Doe purporting to be the best set of experiences of threats, harassment, or reprisals suffered or reasonably likely to be suffered by R-71 signers cannot be characterized as "serious and widespread."

E. Conclusion

In this case, Doe asked the Court to grant an exemption to the PRA based on a few experiences of what Doe believes constitutes harassment or threats, the majority of which are only connected to R-71 by speculation. If Doe's position were correct, then Doe would have prevailed on Count I's facial challenge to the PRA because anyone could prevail under such a standard in the context of referenda, which are often heated, regardless of the subject matter. Indeed, if a group could succeed in an as-applied challenge to the PRA by simply providing a few isolated incidents of profane or indecent

statements, gestures, or other examples of uncomfortable conversations that are not necessarily even related or directly connected to the issue at hand, disclosure would become the exception instead of the rule.

Considering the foregoing, Doe's action based on Count II falls far short of those wherein an as-applied challenge has been successfully lodged to prevent disclosure of information otherwise obtainable under the PRA. Thus, the State's undoubtedly important interest in disclosure prevails under exacting scrutiny.

While Plaintiffs have not shown serious and widespread threats, harassment, or reprisals against the signers of R-71, or even that such activity would be reasonably likely to occur upon the publication of their names and contact information, they have developed substantial evidence that the public advocacy of traditional marriage as the exclusive definition of marriage, or the expansion of rights for same sex partners, has engendered hostility in this state, and risen to violence elsewhere, against some who have engaged in that advocacy. This should concern every citizen and deserves the full attention of law enforcement when the line gets crossed and an advocate becomes the victim of a crime or is subject to a genuine threat of violence. The right of individuals to speak openly and associate with others who share common views without justified fear of harm is at the very foundation of preserving a free and open society.

The facts before the Court in this case, however, do not rise to the level of demonstrating that a reasonable probability of threats, harassment, or reprisals exists as to the signers of R-71, now nearly two years after R-71 was submitted to the voters in Washington State.

III. ORDER

Therefore, it is hereby **ORDERED** that:

(1) Defendants and Intervenors' motions for summary judgment are **GRANTED**;

(2) Doe's motion for summary judgment is **DENIED**;

(3) The injunction preventing disclosure of R-71 petitions is **LIFTED**;

(4) All other pending motions are **DENIED as moot**; and

(5) This case is **CLOSED.**

Dated this 17th day of October, 2011.

BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

John DOE # 1, et al., Plaintiffs, v. SAM REED, in his official capacity as Secretary of State of Washington, et al., Defendants.	CASE NO. C09-5456BHS ORDER DENYING PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

This matter comes before the Court on Plaintiffs' motion for injunction pending appeal. Dkt. 320. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies Plaintiffs' motion for injunction pending appeal for the reasons stated herein.

I. PROCEDURAL & FACTUAL BACKGROUND

On July 28, 2009, Plaintiffs (collectively "Doe") filed this action to object to and enjoin the disclosure of Referendum 71 ("R-71") petitions on two constitutional bases: Count I, that disclosure of any referendum or initiative petitions is unconstitutional as a

general matter; and Count II, that disclosure of R-71 petitions would be unconstitutional as applied to Doe (i.e., R-71 initiative signers). *See* Dkt. 2 (Complaint). On September 10, 2009, the Court granted preliminary injunctive relief on Count I but declined to rule on Count II. Dkt. 62.

Defendants appealed the Court's ruling and the Ninth Circuit reversed. *Doe v. Reed*, 586 F.3d 671 (2009). The Supreme Court accepted review and affirmed the Ninth Circuit decision. *Doe v. Reed*, 130 S. Ct. 2811 (2010). The Supreme Court left open the possibility of relief under Count II (Doe's as-applied challenge to disclosure).

On June 29, 2011, the parties each filed motions for summary judgment regarding Doe's as-applied challenge. Dkts. 196, 204, 208, and 209. The parties fully briefed these matters. Additionally, the Secretary of State of Washington moved to strike certain evidence relied upon by Doe. Dkt. 231 (motion to strike and reply to Doe's response in opposition to summary judgment). On October 17, 2011, the Court granted summary judgment in favor of Defendants and denied Doe's motion for summary judgment, lifted the injunction that prevented the disclosure of the R-71 petitions, and closed the case. Dkt. 319.

On October 17, 2011, Doe filed the instant motion for injunction pending appeal and noted the motion for November 7, 2011. Dkt. 320. Also on October 17, 2011, Doe filed their notice of appeal. Dkt. 321. On October 20, 2011, Doe filed an emergency motion at the Ninth Circuit Court of Appeals requesting that the Ninth Circuit: (1) enjoin Defendants from releasing the R-71 petitions pending this Court's ruling on the motion for injunction pending appeal; and (2) enjoin this Court from disclosing the identities of

the plaintiffs and their witnesses. *See* Dkt. 324. The Ninth Circuit denied Doe's motion for failure to comply with Rule 8(a) of the Federal Rules of Appellate Procedure as they did not seek expedited consideration of the motion in this Court, nor did they await this Court's ruling on the motion. *Id*. However, the Ninth Circuit issued a temporary injunction enjoining Defendants from further releasing any R-71 petitions and ordered that the injunction remain in effect for five days following this Court's ruling on the motion. *Id*.

For a more complete procedural and factual background in this matter, see the Court's order on the parties' motions for summary judgment (Dkt. 319).

II. DISCUSSION

A. Mootness

"Mootness is a threshold jurisdiction issue." *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Defendants argue that the controversy brought in Plaintiffs' motion for injunction pending appeal was rendered moot "by the disclosure of the Court order and R-71 petitions, and the extensive broadcasting of these documents on the internet." Dkt. 327 at 8-10. Defendants maintain that the Court cannot grant Doe effective relief, and therefore, a live controversy no longer exists. *Id*. at 9-10.

The Court agrees with Defendants that the effectiveness of any relief now given would be less than that available had the injunction been sought prior to the disclosure of

the Court's order releasing the names of Plaintiffs and their witnesses and Defendants' dissemination of some R-71 petitions. However, to the extent that some relief could be given by enjoining Defendants from disseminating any further R-71 petitions, the Court concludes that there remains a live controversy and Doe's motion is not entirely moot. Accordingly, the Court will consider Doe's motion on its merits.

B. Injunction Pending Appeal

The standard for issuing an injunction pending an appeal is the same as that used for issuing a preliminary injunction. *See Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009) (citing *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008)). The court may issue a preliminary injunction where a party establishes (1) a likelihood of success on the merits, that (2) it is likely to suffer irreparable harm in the absence of preliminary relief, that (3) the balance of hardships tips in its favor, and (4) that the public interest favors an injunction. *Winter*, 555 U.S. at 20.

For the reasons stated in the Court's order granting Defendants' motion for summary judgment (Dkt. 319), the Court concludes that Doe has failed to show a likelihood of success on the merits. In addition, even if Doe could show such likelihood, they have failed to establish that irreparable harm would occur in the absence of an injunction. Defendants have already released several copies of the R-71 petitions (*see* Dkt. 327 at 6-7) and such petitions are now available on the internet. Doe has failed to show how they would be irreparably harmed by Defendants releasing further R-71 petitions when copies of such petitions have already been posted on the internet and given to individuals and organizations whose activity cannot be reached by the injunction

sought. In addition, Doe has failed to show how redacting the names of Plaintiffs and their witnesses would provide relief when the order revealing such information has been available for several weeks. In addition, the Court concludes that the balance of equities tips in favor of denying the injunction where the Court has decided the merits of the case in favor of disclosure and the names and petitions have already been disclosed. Finally, the Court concludes that it is in the public interest for the names and petitions to be released as the Court has found that the public is entitled to disclosure. Accordingly, Doe's motion for injunction pending appeal must be denied.

III. ORDER

Therefore, it is hereby **ORDERED** that Doe's motion for injunction pending appeal (Dkt. 320) is **DENIED**.

Dated this 8th day of November, 2011.

BENJAMIN H. SETTLE

United States District Judge

FILED

NOV 16 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual; et al., Plaintiffs - Appellants, v. SAM REED, in his official capacity as Secretary of State of Washington and BRENDA GALARZA, in her official capacity as Public records Officer for the Secretary of State of Washington, Defendants - Appellees, WASHINGTON COALITION FOR OPEN GOVERNMENT and WASHINGTON FAMILIES STANDING TOGETHER, Intervenor-Defendants - Appellees.	No. 11-35854 D.C. No. 3:09-cv-05456-BHS Western District of Washington, Tacoma ORDER

Before: PREGERSON, TASHIMA, and N.R. SMITH, Circuit Judges.

Appellants have renewed their emergency motion for an injunction pending appeal under Ninth Circuit Rule 27-3. They seek to enjoin the Washington Secretary of State from further releasing the R-71 petitions, the Intervenors from distributing the petitions, and the district court from further disclosing the identity

LSC/MOATT

of Protect Marriage Washington's John Doe parties and witnesses in the district court's unredacted order. Because the court preliminarily believes that the appeal is moot due to the release of R-71 petitions, appellants' renewed emergency motion for an injunction pending appeal is denied. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In addition to all issues the parties wish to brief, the parties shall address the following issues: (1) whether the appeal is moot due to the release of the R-71 petitions and the district court's order identifying the Doe plaintiffs; and (2) whether any plaintiff-appellant has standing to bring this appeal on behalf of R-71 petition signers.

The briefing schedule established previously shall remain in effect.

N.R. SMITH, Circuit Judge, dissenting:

This entire case rests on our determination of whether there should be disclosure of the identities of R-71 petition signers, because of harm the signers may incur from such disclosure. We could have easily granted this injunction to prevent any further disclosures of R-71 petitions and ensure that we had time to

make a careful decision of this issue on appeal. Instead, the majority races to decide the case at this preliminary stage based on incomplete information and without even reviewing the record. Further, the majority makes mootness the basis of their decision, a basis the district court would not use, after considering all of the information in the record. Thus, based on the briefs and after reviewing the district court's order, I cannot join my colleagues.

The district court, which has extensive familiarity with the record, found that "some relief could be given by enjoining [appellees] from disseminating any further R-71 petitions." Injunction Order at 3-4. A preliminary injunction could prevent the State from responding to the pending requests for the petitions, the Intervenors from distributing of the petitions, and the district court from further disclosing the identities of the John Does and witnesses in the Order. Accordingly, the district court concluded that the "threshold jurisdiction[al]" requirement of a "live controversy" remains and the case is not moot. *Id.* (quoting *S. Pac. Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993)).

The appellees argue that the case is moot, because the petitions and district court order are already widely available on the web. Brief in Opp. 5. However, the links that the appellees listed in footnotes 5 and 6 do not clearly display the petitions, *id.*, and it is not certain that the links contain all of the petitions or are

easily accessible by the general public. Further, though organizations have threatened to create searchable databases with the petition-signers names once the organizations obtain the names, *id.* at 9-10, to date no such database appears to exist. Therefore, based on such incomplete information regarding who has confidential information, what exact information they have obtained, and what they plan to do with it, it is a rush to judgment to say this case is moot.

Although the remedy available to the appellants is less than what it could have been if no disclosures were made, "[a] case does not become moot simply because an appellate court is unable completely to restore the parties to the *status quo ante* . . . . The ability of the appellate court to 'effectuate a partial remedy' is sufficient to prevent mootness. " *SunAmerica Corporation v. Sun Life Assurance Company of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (quoting *Church of Scientology of California v. United States*, 506 U.S. 9, 12-14 (1992)). Because it appears that a partial remedy may still be available to the appellants, we should wait to decide the mootness issue until we have more fully reviewed the case on appeal.

Furthermore, an injunction pending appeal may be granted upon showing that there are "serious questions going to the merits," and "the balance of hardships tips sharply in the plaintiff's favor," but only if "the plaintiff also shows a

likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale" analysis, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.* at 1131.

1. Balance of the hardships and likelihood of irreparable injury if the motion to stay is not granted.

By not granting the injunction, this court will essentially decide the merits of the case and remove the potential for the appellants to receive *any* of the relief they seek from this court on appeal. As legal scholars have noted, "the most compelling reason in favor of entering a [preliminary injunction] is the need *to prevent the judicial process from being rendered futile* by defendant's action or refusal to act." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2947 (2d ed. 1995) (emphasis added); *see also Perry v. Schwarzenegger,* 591 F.3d 1126, 1137 (9th Cir. 2009) (explaining that irreparable harm exists where a "post-judgment appeal would not provide an effective remedy"). While it is now debatable whether this case is moot, the majority's decision will foreclose any further debate on the topic. It is therefore ironic that our order directs the parties to address whether the appeal is moot, since the majority's decision will clearly make it so.

Enjoining the appellees will not cause any harm to the State. The State was willing to voluntarily stop releasing petitions, and the State has provided us no reason to suggest why waiting until this matter is resolved on appeal will cause the State any specific harm.

2. Serious questions going to the merits.

The district court found that appellants were not eligible for a harassment-based exemption, because they did not meet the "threshold" requirement of being a minor party. *Doe v. Reed*, 2011 WL 4943952 at *17 (W.D. Wash.). However, it is debatable whether Supreme Court precedent supports such a threshold requirement. The Court in *Buckley* merely said that the First Amendment requires an exception for groups that show "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 v. Valeo*, 424 U.S. 1, 74 (1976). The Court suggested that it might be *easier* for a minor party to demonstrate this requirement, but it never stated that *only* a minor party could do so. *See id.* at 70. Moreover, when the Supreme Court granted review of this case last time, *Doe v. Reed*, 130 S. Ct. 2811 (2010), it recognized that an as-applied exemption was possible for appellants without any mention of some "minor party" requirement. Instead, it merely required a strong

showing of "threats, harassment, and reprisals." *Id.* at 2821. Had the Supreme Court wanted to strike down appellants' claim based on their lack of minor party status, it could have done so then.

In addition, the question of what evidence of harassment or threats should be required, in a situation that involves an amorphous group of individuals who seek an exemption from a disclosure requirement relating to voting rights, is not governed by clear precedent. *See, e.g., Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1214-15 (E.D. Cal. Jan. 30, 2009). Precedent is instead unclear whether evidence of harassment or threats made against supporters of traditional marriage initiatives that occurred in other parts of the country should be considered. *Buckley,* 424 U.S. at 74 (suggesting there is no requirement that "chill and harassment be directly attributable to the specific disclosure from which the exemption is sought"); *see also id.* ("New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views."); *Doe v. Reed*, 130 S. Ct. at 2823 (Alito, J., concurring) ("The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case.").

It is also not clear what amount of evidence is necessary to establish a "reasonable probability" of threats, harassments, or reprisals—whether the threats or harassment would have to be "serious and widespread," whether it has to be "significant," or courts should be "generous" in granting as-applied relief. As for evidence related to the specific R-71 petition signers who made their support of the petition public, some of the witnesses were "mooned," "flipped off," received angry phone calls, were confronted by individuals in public places, had pictures taken of them to "post on Facebook," received vulgar notes, were pushed and yelled at with expletives in public, had garbage thrown on them, had their children threatened, were called "fascists," and some even received death threats. *Doe v. Reed*, 2011 WL 4943952 at *11-16 (W.D. Wash.). As the Supreme Court did not specifically address the standard for an as-applied challenge to the appellants, there exists a serious question as to what the standard should be and whether the appellants demonstrated sufficient evidence to meet this standard, especially in a situation where there is likely no minor party status.

3. An injunction is in the public interest.

The public interest also lies in favor of an injunction to prevent the dissemination of the petitions, before there has been a full chance for an appeal that may provide relief to appellants on this issue. Certainly, the public has a strong

interest in ensuring that free speech is not allowed to be chilled under incorrect legal standards.

Subject: Activity in Case 3:09-cv-05456-BHS John Doe #1 et al v. Reed et al Scheduling Conference
From: ECF@wawd.uscourts.gov
Date: Tue, 16 Nov 2010 12:21:23 -0800
To: ECF@wawd.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

United States District Court for the Western District of Washington

Notice of Electronic Filing

The following transaction was entered on 11/16/2010 at 12:21 PM PST and filed on 11/15/2010
Case Name: John Doe #1 et al v. Reed et al
Case Number: 3:09-cv-05456-BHS
Filer:
Document Number: 181(No document attached)

Docket Text:
MINUTE ENTRY for proceedings held on 11/15/2010 before Judge Benjamin H. Settle - Dep Clerk: *G. Craft*; Pla Counsel: *Scott Bieniek*; Def Counsel: *Anne Egeler, Kevin Hamilton, Ben Stafford, Steven Dixon*; CR: *Teri Hendrix*; Time of Hearing: *2:00*; Courtroom: *E*; Court grants [163] Motion for Protective Order, but the issue may be revisited closer to the trial date; Court sets this matter for a bench trial on 5/31/2011 at 9:00 am; the clerk will issue a new scheduling order consistent with the new trial date and as discussed on the record. (MGC)

3:09-cv-05456-BHS Notice has been electronically mailed to:

William Berggren Collins (Terminated) wbcollins@comcast.net

James Kendrick Pharris jamesp@atg.wa.gov, sgoolyef@atg.wa.gov

Leslie R. Weatherhead lwlibertas@aol.com, emilyr@wkdtlaw.com, janetj@wkdtlaw.com

Kevin J Hamilton KHAMILTON@PERKINSCOIE.COM, CANDERSON@PERKINSCOIE.COM, docketsea@perkinscoie.com

Jay Douglas Geck JayG@atg.wa.gov, sgoolyef@atg.wa.gov

Anne Elizabeth Egeler annee1@atg.wa.gov, sgoolyef@atg.wa.gov

Stephen Walter Pidgeon Stephen.pidgeon@comcast.net

Duane M Swinton dms@wkdtlaw.com

Ryan McBrayer RMcBrayer@perkinscoie.com, NReynolds@perkinscoie.com, docketsea@perkinscoie.com

Steven Joseph Dixson sjd@wkdtlaw.com, collettr@wkdtlaw.com

James Bopp, Jr jboppjr@aol.com

William B. Stafford WStafford@perkinscoie.com, dburge@perkinscoie.com, docketsea@perkinscoie.com

Scott F Bieniek sbieniek@bopplaw.com

Joseph E La Rue jlarue@bopplaw.com

Rhonda L Barnes rbarnes@perkinscoie.com, kleach@perkinscoie.com

Arthur S West (Terminated) awestaa@gmail.com

3:09-cv-05456-BHS Notice will not be electronically mailed to: