No. 11-17884

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ProtectMarriage.com, et al.,

Plaintiffs-Appellants,

v.

Debra Bowen, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California,
Case No. 2:09-CV-00058-MCE-DAD

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 *California Pro-Life Council v. Randolph (CPLC II)*, 507 F.3d 1172 (9th Cir. 2007), *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *FEC v. Wis. Right to Life (WRTL)*, 551 U.S. 449 (2007), *McConnell v. FEC*, 540 U.S. 93 (2003) and, most recently, *Doe v. Reed*, No. 11-35854 (9th Cir. filed Oct. 18, 2011) (*amicus* brief filed March 28, 2012). *Amicus* thus has a longstanding, demonstrated interest in the laws at issue here.

SUMMARY OF ARGUMENT

California's Political Reform Act (PRA) requires political committees to disclose identifying information for all individuals and entities that contribute $100 or more to the committee. Cal. Gov. Code §§ 84200, 84211(f). The PRA was enacted by California voters more than three decades ago to effectuate the electorate's interest in political transparency and electoral integrity. Cal. Gov. Code § 81002. Appellants ProtectMarriage.com, *et al.* (collectively,

[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.

"ProtectMarriage"), political committees whose advocacy in support of Proposition 8 was overwhelmingly successful by all objective measures, now challenge the PRA on the basis of their experience during the campaign. They allege that disclosure under the PRA is unconstitutional, as applied to them, because it subjects campaign contributors to "threats, harassment or reprisals" and thus abridges their First Amendment associational rights. They further assert that the PRA's $100 disclosure threshold is unconstitutional both facially and as applied to them. Appellants' claims are meritless.

Because disclosure laws promote core First Amendment goals, any burdens they place on individual rights must be weighed against the competing democratic values and governmental interests that they protect. Disclosure laws guarantee a transparent and responsive government, as well as "robust" and "wide-open" 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). Transparency is an essential aspect of any democracy; after all, in the words of Justice Scalia, "requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

In rare circumstances compelled disclosure can place such a severe

burden on the freedom to speak and associate, as applied to a particular group, that an exemption is warranted. *See Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (per curiam). This is not such a case. When the exemption has been granted in the past—and it has seldom been granted—organizations offered overwhelming and generally uncontroverted evidence that disclosure would create "a reasonable probability of threats, harassment or reprisals." However, the First Amendment has never shielded citizens from "harsh criticism," especially when they express a view that is in the political mainstream. In large measure due to Appellants' successful advocacy, Proposition 8 passed with more than seven million votes, 52.3% of the votes cast.[2] Moreover, Appellants reported more than $42 million in contributions from over 46,000 individuals. *See* Appellees' Br. at 4. Appellants clearly advocate a view supported by a majority of California voters in 2008—a view polling suggests had majority support nationwide until recently and continues to be supported by 45% of the population.[3] Appellants' supporters are a long way from the isolated and

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[2] Cal. Sec'y of State, *Statement of Vote: November 4, 2008, General Election* 7 (2008), *available at* http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf.

[3] According to a May 2011 nationwide Gallup poll, opposition to marriage between same-sex couples—the view espoused by Appellants—dipped below 50% in 2011 for the first time in Gallup's tracking of the issue and remained at 45% in 2011. *See* Frank Newport, *For First Time, Majority of Americans*

vulnerable political fringe.

The exemption Appellants seek was created for politically and socially marginalized groups like the 60-member Socialist Workers' Party of Ohio (SWP), not dominant and electorally successful organizations like ProtectMarriage. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982). If this Court holds otherwise, the exception will engulf the rule and all but eviscerate campaign finance disclosure laws. Without meaningful campaign disclosure, voters will be left in the dark, unable to "make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 130 S. Ct. at 916.

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.

Support Gay Marriage, Gallup Politics (May 20, 2011), http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx.

ARGUMENT

I. Disclosure Laws Are A 'Cornerstone' To Effective Campaign Finance Regulation.

A. Because They Represent The 'Least Restrictive' Means Of Promoting Open And Effective Government, Disclosure Laws Are Routinely Upheld.

The Supreme Court has repeatedly acknowledged that political disclosure laws both reflect and advance important First Amendment precepts. Indeed, disclosure has been called a "cornerstone" to campaign finance regulation. *See Buckley v. Am. Const. Law Found. (Buckley II)*, 525 U.S. 182, 222–23 (1999) (O'Connor, J., dissenting). As Justice Brandeis famously recognized nearly a century ago, "Sunlight is . . . the best . . . disinfectant," and "electric light the most efficient policeman." Louis Brandeis, *Other People's Money* 62 (Nat'l Home Library Found. ed. 1933), *quoted in Buckley*, 424 U.S. at 67. Disclosure also secures broader access to the information that citizens need to make political choices, thereby enhancing the overall quality of public discourse.

When evaluating 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. Although disclosure laws can implicate the First Amendment rights to speak and associate freely, they also advance the public's interest in maintaining an

informed electorate and open government. Because disclosure is considered a "less restrictive alternative to more comprehensive regulations of speech" that advance these interests, the Court has traditionally reviewed disclosure laws under a more relaxed standard than other electoral regulations. *Citizens United*, 130 S. Ct. at 915; *see also Buckley*, 424 U.S. at 68.[4] As the Court noted in *Citizens United*, disclosure requirements "do not prevent anyone from speaking." 130 S. Ct. at 918 (internal citations omitted).

The Court in *Buckley* upheld disclosure provisions contained in the Federal Election Campaign Act Amendments of 1974 (FECA), 88 Stat. 1263 (1974), even as it invalidated the Act's expenditure limitations, because disclosure represented the "least restrictive means of curbing the evils of campaign ignorance." 424 U.S. at 68. Ultimately, the fact that disclosure laws

[4] By comparison, campaign contribution and expenditure limitations are subject to more searching review because they are considered more "restrictive" of First Amendment rights. As the "most burdensome" campaign finance regulations, expenditure restrictions 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*, 424 U.S. at 44–45. Contribution limits are deemed less burdensome of speech, and are constitutionally "valid" if they "satisf[y] the lesser demand of being 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). Finally, disclosure requirements are the "least restrictive" campaign finance regulations and are subject only to "exacting scrutiny." *Buckley*, 424 U.S at 68.

can have an appreciable effect on individual rights does not end the constitutional inquiry, because "important First Amendment-related interests lie on both sides of the constitutional equation."[5] Although disclosure requirements may burden constitutionally protected rights, such requirements have reliably been upheld as constitutionally valid because they serve the First Amendment's overall purpose of promoting open and responsive democratic governance.

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).

Since *Buckley*, the Supreme Court has consistently applied "exacting scrutiny" and has consistently upheld disclosure laws against constitutional

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[5] *See* Justice Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 253 (2002). 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." *Id.*

challenge. Indeed, the Court has upheld challenged disclosure laws three times by 8 to 1 votes in the past decade alone.

In *McConnell*, the Court by an 8 to 1 vote upheld the "electioneering communication" reporting and disclosure requirements of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81 (2002). *McConnell*, 540 U.S. at 194–99 (opinion of the Court); *id*. at 321–22 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also* 2 U.S.C. §§ 434(f)(2)(A), (B), and (D). All members of the Court except for Justice Thomas found the BCRA disclosure requirements justified solely on the basis that they informed voters of the identity of those making electioneering communications. Quoting the district court, the Court held:

> *BCRA's disclosure provisions require these [entities] to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections.* Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First

> Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

Id. at 196–97 (internal citations omitted and emphasis added). BCRA's disclosure requirements, the Court found, vindicated rather than violated the truly relevant First Amendment interest: that of "individual citizens seeking to make informed choices in the political marketplace." *Id*. at 197.

In *Citizens United*, the Court again by an 8 to 1 vote upheld federal law disclosure requirements and reiterated 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. Importantly, with respect to this case, the *Citizens United* Court explicitly rejected the argument that disclosure requirements must be confined to speech that is express candidate advocacy, noting, for example, that the "Court has upheld registration and disclosure requirements on lobbyists." *Id.* at 915, *citing U.S. v. Harriss*, 347 U.S. 612, 625 (1954).

The Supreme Court continued its strong support of disclosure laws most recently in *Doe*, where the Court upheld by an 8 to 1 vote a Washington State law providing disclosure of ballot measure petition signatories, reasoning that "[p]ublic disclosure . . . promotes transparency and accountability in the

electoral process to an extent other measures cannot." *Doe*, 130 S. Ct. at 2820. Justice Scalia explained in concurrence:

> There 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. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) 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.

Id. at 2837 (Scalia, J., concurring).

B. Disclosure Laws Effectuate The State's Informational Interest, Which Is Of 'The Utmost Importance' In The Ballot Measure Setting.

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 repeatedly recognized the same in the context of disclosing ballot measure campaign contributions. *See, e.g.*, *Family PAC v. McKenna*, No. 10-35832, 2012 WL 266111, at *6 (9th Cir. Jan. 31, 2012) (noting that challenged disclosure requirements "impose only modest burdens on First Amendment rights" but serve "a governmental interest in an informed electorate that is of the utmost importance"); *Human Life of Wash. v. Brumsickle*, 624 F.3d. 990, 1005–06 (9th Cir. 2010), *cert. denied*, 131 S. Ct.

1477 (2011) ("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."). In California ballot measure elections, voters "decide the fate of complex policy proposals of supreme public significance." *Cal. Pro-Life Council v. Getman (CPLC I)*, 328 F.3d 1088, 1105 (9th Cir. 2003). Having an informed and active citizenry is plainly essential to that process. *See, e.g.*, *Doe*, 130 S. Ct. at 2828 (Sotomayor, J., concurring), *quoting First Nat'l Bank v. Bellotti*, 435 U.S. 765, 788–89 (1978) (stating that disclosure advances the vital interest in "sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government").

However, Appellants assert that the "informational interest" does not apply with sufficient force in the ballot measure context to justify compelled disclosure. *See* Appellant's Br. at 43. They effectively ask this Court to repudiate a long line of Ninth Circuit authority holding that the informational interest is not only sufficient, but is "compelling" and "of the highest order" in ballot measure elections. *See, e.g.*, *CPLC I*, 328 F.3d at 1105 (noting that initiative and referendum elections produce a "cacophony" of information, so "being able to evaluate who is doing the talking is of great importance"); *see also CPLC II*, 507 F.3d at 1178–80; *Human Life*, 624 F.3d at 1008. Just this

year, the Ninth Circuit once again reaffirmed the vitality of the "informational interest" as a justification for disclosure in ballot measure contests. *See Family PAC*, 2012 WL 266111, at *3 ("We have repeatedly recognized an important (and even compelling) informational interest in requiring ballot measure committees to disclose information about contributions.").

No matter the electoral context, campaign finance disclosure channels important 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. As the Court pointed out in *Buckley*, "informed public opinion is the most potent of all restraints upon misgovernment." *Id.* 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, the Supreme Court in *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. The Court's reasoning in *Buckley II* rested on similar grounds. There, the Court upheld a Colorado regulation requiring ballot initiative sponsors to disclose "the source and amount of money paid by proponents to get a measure

on the ballot," even though it struck down other requirements relating to Colorado's petition process. 525 U.S. at 203.

Notwithstanding Appellants' assertions to the contrary, the Supreme Court has demonstrated approval of the informational interest in a variety of electoral contexts. In *Buckley*, the Court 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 Bellotti*, 435 U.S. at 791. While the risk of campaign finance-related corruption present in candidate elections does not apply in the ballot measure setting, *see id.* at 790, the informational and enforcement interests are more pronounced where citizens legislate directly by public initiative.

Appellants may endeavor to show otherwise, but the Supreme Court has never rejected the "informational interest" as a sufficient justification for compelled disclosure in ballot measure elections. Indeed, the Court again invoked the state "informational interest" shortly after *Bellotti*, in *Citizens Against Rent Control v. City of Berkeley (CARC)*, 454 U.S. 290 (1981), which involved a challenge to the City's ordinance limiting 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 language in *CARC* supporting disclosure may be dictum, but, as this Court recognized mere months ago, it "certainly suggests that the Court would have upheld the requirement had the question been raised." *Family PAC*, 2012 WL 266111, at *7.

While the Supreme Court's latest ruling on ballot measure disclosure did not explicitly rely on the State's informational interest, neither did it discount that interest's continuing validity. *See Doe*, 130 S. Ct. at 2819. Instead, the Court simply did not reach Washington's second asserted justification for disclosure. *See id.* ("Because we determine that the State's interest in preserving the integrity of the electoral process [is sufficient to defeat Doe's challenge] . . . we need not, and do not, address the State's 'informational' interest."). If anything, *Doe* supports a conclusion that the political transparency attained through disclosure is even more necessary in direct democracy elections. The opinion suggests that transparency functions dually in this context, advancing both electoral integrity and informational interests. *See id.* at 2819–20 (tying the

"transparency" traditionally associated with the informational interest to the State's "undoubtedly important" interest in electoral integrity).

Tellingly, the Court has also evinced approval for the "informational interest" in different, though related, contexts. For instance, the informational interest has supported a line of Supreme Court and lower court decisions approving disclosure relating to lobbying. In *Harriss*, 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. 347 U.S. at 615 & n.1.

Lower courts have uniformly followed *Harriss* and 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).

Like lobbying, ballot measure advocacy constitutes a direct effort to intervene in the legislative 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." *CPLC I*, 328 F.3d at 1106; *see also Chula Vista Citizens For Jobs and Fair Competition v. Norris*, No. 3:09-CV-0897-BEN-JMA, 2012 WL 987294, at *10–*11 (S.D. Cal. Mar. 22, 2012) (informational interest in ballot measure advocacy outweighed claim for anonymity).

As the district court recognized in this 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 California's 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) (internal citations omitted); *see also* Appellees' Br. at 43–46. Indeed, "information entrepreneurs" in the media and elsewhere, along with academics, campaign committees, and countless others, rely on historical election data for a range of valuable pursuits.[6] For example, if an analysis of past contributor information shows that a ballot measure was

[6] *See generally* Elizabeth Garrett and Daniel Smith, *Veiled Political Actors and Campaign Disclosure Laws*, 4 Elec. L.J. 295, 305 (2005).

largely funded by out-of-state interests, Californians who voted in its favor may change their views. *See CPLC I*, 328 F.3d at 1106 n.25.

Appellants urge this Court to ignore Ninth Circuit precedent and instead follow the Tenth Circuit's decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). However, "*Sampson* did not ultimately reject the longstanding principle that the public has an interest in learning who supports and opposes ballot measures." *Family PAC*, 2012 WL 266111, at *3 (reasoning that the *Sampson* decision was based on unique circumstances and did not purport to reject the interest in all applications). Of course, even if *Sampson* had ruled as Appellants suggest, their argument "would be foreclosed by circuit precedent." *Id.* Accordingly, the district court was right to conclude that "[i]f ever disclosure was important, indeed vital, to the public discourse, it is in the case of ballot measures." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1211 (E.D. Cal. 2009).

II. ProtectMarriage Has Not Met *Buckley*'s Limited 'Harassment' Exemption Standard.

A. The 'Harassment' Exemption Is Narrowly Drawn To Protect Pervasively Maligned And Unorthodox Viewpoints.

As relevant authority makes clear, *Buckley*'s standard for "threats, harassment or reprisals" exemption is exceedingly narrow. Groups that claim it must satisfy a high evidentiary burden to prevail. Accepting Appellants'

invitation to relax the standard would be inconsistent with precedent and with the facts of this case. Under the formulation articulated in *Buckley*, the exemption is only available when 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. Unsurprisingly, exemptions have been difficult to obtain from the Court under this demanding standard. *Compare Brown*, 459 U.S. at 101–02 *with Citizens United*, 130 S. Ct. at 916 (rejecting claim for exemption 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").

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. It is illogical to argue otherwise. Nevertheless, Appellants insist that issues of "proportionality and magnitude" should have no bearing on their claim. *See* Appellant's Br. at 16; *see also ProtectMarriage.com*, 2011 WL 5507204, at *17. If that were so, the exemption would have no limiting principle; as the State

points out, it would make the "exception" available in every case. *See* Appellees' Br. at 14. The district court's interpretation of relevant authority is in line with the narrow scope of the exemption remedy; the few cases applying the standard make clear that it is reserved for groups facing severe societal hostility, state-sanctioned animus, and the real prospect of physical harm.

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. 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.

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. The SWP, for example, had a total of 60 members, yet supported its claim for

exemption with evidence of pervasive 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 by the district court below, massive ballot measure campaigns of the sort Appellants successfully mounted are "a far cry from the sixty-member SWP . . . [which was] repeatedly unsuccessful at the polls, and incapable of raising sufficient funds." *ProtectMarriage.com*, 2011 WL 5507204, at *13 (internal citations omitted).

Likewise, the Second Circuit Court of Appeals granted an exemption to a group specifically identified as "unpopular or unorthodox" in *FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 420 (2d Cir. 1982). The degree of a group's unpopularity is also significant; after all, practically any viewpoint will inspire some opposition in a pluralistic society. To that end, the district court in *McConnell* 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.

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

Fundamentally, the exemption carves out a protected space for viewpoints that would otherwise be forced to retreat from the "marketplace of ideas." To qualify for the exemption, a group 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.

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

Whereas the "harassment" exemption protects viewpoints that would otherwise be forced to retreat from the "marketplace of ideas," groups whose views are widely and historically accepted, like Appellants, have little need for such protection.[7] To prevail on their claim, Appellants would have to show

[7] Currently, 39 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.

"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). As California's brief exhaustively demonstrates, the evidence here falls far short of the exemption standard. *See* Appellees' Br. at 12–27.

Appellants presented little admissible evidence in the court below. The district court recognized "that most of the exhibits are indeed hearsay." *ProtectMarriage.com*, 2011 WL 5507204, at *37 n.3. Appellants' proffered evidence consisted mainly of media reports—inadmissible out-of-court statements offered for their truth. *See* Appellees' Br. at 15.

Appellants' media accounts paint a picture of a situation far less hostile than those that have warranted "harassment" exemptions from disclosure requirements in the past. The district court noted: "Indeed, it became abundantly clear during oral argument that Plaintiffs could not in good conscience analogize their current circumstances to those of either the SWP or the Alabama NAACP circa 1950." *ProtectMarriage.com*, 2011 WL 5507204, at *13. Appellants have suffered none of the violence, threats, harassment or reprisals suffered by the SWP or NAACP. Instead, Appellants adhere to an undeniably mainstream political view and have experienced little more than

"uncivil behavior and unpleasant but harmless political disagreements" (*e.g.*, criticism, insults, damage to yard signs and bumper stickers, etc.). *See* Appellees' Br. at 20–21.

To the extent Appellants' present hearsay media reports describing a few more serious incidents—"unsavory acts committed by extremists or criminals"—"these acts are so small in number, and in some instances their connection to [Appellants'] supporters so attenuated, that they do not show a reasonable probability [Appellants'] contributors will suffer the same fate." *ProtectMarriage.com*, 2011 WL 5507204, at *20. These unfortunate incidents, even if true, do not amount to "a pattern of threats or specific manifestations of public hostility," which is required to warrant an exemption from disclosure requirements. *See Doe*, 130 S. Ct. at 2823.

For all of these reasons, this Court should conclude that ProtectMarriage's "evidence" of harassment falls far short of standard for exemption.

III. California's $100 Disclosure Threshold Is Constitutional Because It Is Not 'Wholly Without Rationality.'

Appellants further assert that the PRA's $100 disclosure threshold is unconstitutional, both on its face and as applied to ProtectMarriage. As the district court correctly found, this claim is squarely at odds with settled authority.

It is well-established that the determination of disclosure thresholds, which necessarily involve difficult line-drawing, is best left to the legislative branches. *See Buckley*, 424 U.S. at 83. As with other issues that demand complex policy judgments, courts cannot substitute their policy preferences for those of the legislature. Accordingly, disclosure thresholds are upheld so long as they are "within the reasonable latitude given the legislature as to where to draw the line." *Id.* The standard is highly deferential; courts must uphold disclosure thresholds unless they are "wholly without rationality." *Id.* As *Buckley* itself made clear, even apparently "low" thresholds pass constitutional muster under this forgiving standard. *See id.* (noting that although FECA's disclosure threshold was "low" and there was "little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure," the requirement was not "wholly without rationality"). The Supreme Court's subsequent decision in *CARC* suggests that even zero-dollar disclosure thresholds could be constitutionally sound. *See* 454 U.S. at 300 ("[I]f it is thought wise, legislation can outlaw anonymous contributions.").

In *Family PAC*, this Court rejected a similar challenge. There, the Court upheld a Washington provision requiring ballot advocacy committees to disclose the name and address of contributors giving more than $25, as well as the

employer and occupation of contributors giving more than $100. *See* 2012 WL 266111, at *6. The decision acknowledged that, in theory, there could be a point at which "contributions are so small that disclosure may provide voters with little relevant information," and therefore "applying disclosure requirements to smaller and smaller contributions eventually risks tipping the constitutional balance against disclosure." *Id.* at *6 & n.7. However, that hypothetical "tipping point" was emphatically not reached in the case of Washington's $25 and $100 thresholds. Indeed, the court observed that "it is far from clear . . . that even a zero-dollar disclosure threshold would succumb to exacting scrutiny." *Id.* at n.7, *citing CARC*, 454 U.S. at 300.

Notably, the court in *Family PAC* reasoned that its decision was reinforced by the lack of "*any* judicial decision invalidating a contribution disclosure requirement," whether "facially or as applied to a particular actor," or holding that a "contribution disclosure threshold was impermissibly low." *Id.* at *7 & n.10 (emphasis added). As the court explained, other cases have examined *reporting* requirements—"i.e., when an organization is required to file contribution and expenditure reports with state election regulators—rather than *contribution* disclosure requirements." *Id.* at *7 n.10 (emphasis in original). In addition, the Court echoed the longstanding recognition that "disclosure

thresholds . . . are inherently inexact[,]" and "courts therefore owe substantial deference to legislative judgments fixing these amounts." *Id.* at *7.

Other courts have recognized that *Buckley* is controlling on this point. In *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), the First Circuit Court of Appeals reiterated the "wholly without rationality" standard to uphold Maine's $100 disclosure threshold. The *McKee* decision noted that "NOM's argument operates from a mistaken premise" because reporting thresholds are not subject to "exacting scrutiny" review. *Id.* at 60. Instead, the court restated *Buckley*'s "wholly without rationality" standard as one requiring "judicial deference to plausible legislative judgments." *Id.* (internal citations omitted).

Appellants further assert that mandating particular *categories* of contributor information is unconstitutional, both facially and as applied. *See* Appellants' Br. at 47–54. They first contend that "small donor" information, including contributors' names and addresses, is not justified by a "sufficiently important" state interest. This merely rearticulates their general challenge to California's $100 disclosure threshold, and is likewise without merit. Furthermore, the information required under California law—name, address, occupation, and employer—is a common feature of disclosure statutes, and is

hardly considered intrusive in other contexts.[8] Having failed to adduce sufficient evidence to justify an as-applied exemption, Appellants cannot simply reargue the same challenge in the context of disclosure thresholds. In effect, they aim to elide the distinction between two separate inquiries with two different standards of review.

The disclosure threshold at issue here is plainly within the realm of rational threshold values. As the district court recognized, California's $100 threshold "falls wells within the spectrum of those mandated by its sister states, which range from no threshold requirement to $300." *ProtectMarriage.com*, 2011 WL 5507204, at *30. This Court upheld an even more lenient threshold mere months ago. *See Family PAC*, 2012 WL 266111, at *6 (upholding $25 and $100 disclosure thresholds). However, Appellants steadfastly refuse to acknowledge the import, let alone the weight, of this authority. They ask this Court to ignore settled Ninth Circuit precedent and instead follow the Tenth Circuit's decision in *Sampson*, but provide no basis for such a departure. This

[8] To the extent that Appellants seek anonymity on the basis that online disclosure is more invasive of their rights than less replicable methods of disclosure, they will find no support from the Supreme Court. 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").

Court should reject Appellants' challenge and uphold the PRA's $100 disclosure threshold.

IV. Extending The 'Harassment' Exemption to ProtectMarriage Will Undermine A Broad Spectrum Of Campaign 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 most recent disclosure decision in *Doe* 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).

Since *Doe*, litigants have increasingly looked to the as-applied exemption in their attempts to evade federal and state money-in-politics disclosure laws. For instance, 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). Indeed, California ballot measure proponents claiming the exemption actually admitted that they did so not because they feared reprisals, but for strategic reasons. *See Chula Vista*, 2012 WL 987294, at *13–*14 (finding Plaintiffs' "scant" evidence insufficient to meet the standard).

At the federal level, plaintiffs challenging FECA's contribution disclosure requirements amended their initial complaint almost two years after the original date of filing to claim that disclosure would now subject them to "threats, harassment or reprisals." *See Koerber v. FEC*, 2:08-cv-39-H, at ¶ 44 (E.D.N.C. May 21, 2010) (amended complaint). Opponents of campaign finance restrictions have clearly taken note that a broadened exemption will present yet another loophole for them to exploit.[9]

[9] For further evidence that such claims are little more than political strategy, consider Karl Rove's recent statement analogizing challenges to the

In sum, the wide-ranging circumstances that have recently given rise to unproven claims of harassment are part of a coordinated assault on political disclosure laws. If this Court accepts Appellants' invitation to broaden the 'harassment' exemption, shrewd 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 and seek to undermine disclosure laws from coast to coast.

CONCLUSION

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

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tax-exempt status of 501(c)(4) groups like Crossroads GPS to the "harassment" discussed in *Patterson*. Crossroads GPS has raised more than $27 million this election cycle; it is difficult to see how groups such as these are in any way comparable to the NAACP in 1950s Alabama. *See* Ryan J. Reilly, *Karl Rove: They're Trying To Intimidate Us, Just Like They Did With The NAACP*, Talking Points Memo (Apr. 2, 2010), http://tpmmuckraker.talkingpointsmemo.com/2012/04/karl_rove_compares_american_crossroads_to_naacp_video.php.

RESPECTFULLY SUBMITTED this 17th day of April 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 6,559words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in Times New Roman 14 point font.

/s/ Paul S. Ryan
Paul S. Ryan

Dated: April 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 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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