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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

ProtectMarriage.com, et al.,

Plaintiffs,

vs.

Debra Bowen, Secretary of State for the State of California, in her official capacity; **Kamala D. Harris**, Attorney General for the State of California, in his official capacity; **Dean C. Logan**, Registrar-Recorder of Los Angeles County, California, in his official capacity; **Department of Elections – City and County of San Francisco**; **Jan Scully**, District Attorney for Sacramento County, California, in her official capacity and as a representative of the Class of District Attorneys in the State of California: **Dennis J. Herrera**, City Attorney for the City and County of San Francisco, California, in his official capacity and as a representative of the Class of Elected City Attorneys in the State of California; **Ann Ravel**, **Sean Eskovitz, Elizabeth Garrett**, **Lynn Montgomery** and **Ronald Rotunda**, members of the California Fair Political Practices Commission, in their official capacities,

Defendants.

Case No. 2:09-CV-00058-MCE-DAD

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Date: October 20, 2011
Time: 2:00 p.m.
Location: Courtroom 7
Before: Judge Morrison C. England, Jr.

Trial Date: March 26, 2012

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INTRODUCTION

Plaintiffs' case relies almost entirely on hearsay and conjecture, and in their Reply in Support of Summary Judgment and Opposition to Defendants' Motion for Summary Judgment (Dkt. 275) ("Plaintiffs' Opposition" or "Opp."), Plaintiffs do not justify or even explain their failure to present admissible evidence in support of their claims. Instead, they ask the Court for a free pass from the rules of evidence and discovery, all in aid of their request for an exemption from the State's disclosure laws. The Court should reject these extraordinary requests and hold that Plaintiffs are subject to the same rules that apply to other litigants and to the same laws that apply to other citizens.

Plaintiffs' as-applied challenge depends on an unprecedented interpretation of the "reasonable probability of threats, harassment and reprisals" test that is so broad it is boundless. It is unclear whether Plaintiffs think *any* evidentiary showing is required, and indeed, Plaintiffs' admissible evidence is so minimal that they do not even argue that it meets the "reasonable probability" standard. Instead, Plaintiffs continue to rely on hearsay and other evidence that is inadmissible for the numerous reasons discussed in Defendants' Motion to Strike (Dkt. 271) and Reply.

Plaintiffs are no more successful in their facial challenge, which mischaracterizes both the law and the facts. There is no support for Plaintiffs' argument that "exacting" scrutiny is synonymous with "strict" scrutiny, and Plaintiffs ignore clear precedent establishing rational basis review of disclosure thresholds and the state's broad informational interests supporting post-election reporting and disclosure. Finally, as discussed in detail in Defendants' Motion for Summary Judgment (Dkt. 260) ("Defs MSJ"), the campaign disclosure laws that Plaintiffs seek to evade serve important and compelling interests, which Plaintiffs hardly attempt to contest.

ARGUMENT

I. PLAINTIFFS FAIL TO MEET *ANY* OF THE CRITERIA FOR AN AS-APPLIED EXEMPTION TO DISCLOSURE LAWS.

Plaintiffs are not eligible for an as-applied exemption as a minor party whose members face a reasonable likelihood of threats, harassment or reprisals. No court has ever granted the "minor party" exemption to a group that represents a majority position, with a record of success in the very campaign at issue and similar campaigns nationwide. Plaintiffs submit no evidence of a history of harassment,

government hostility, a risk of actual harm, or chill to their speech or association. The "threats" and "harassment" cited by Plaintiffs in California, where they raised more than $40 million and garnered over seven million votes in support of Proposition 8, bear no resemblance to the evidence of pervasive threats and violence that the Supreme Court found warranted a special exemption in *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Brown v. Socialist Workers Party*, 459 U.S. 87 (1982).

A. The flexible "reasonable probability" standard applies only to minor parties, not to successful majority groups like Plaintiffs.

Plaintiffs appear to concede that they are not a minor party; they do not dispute their majority status, political success, or extraordinary fundraising success. Instead, Plaintiffs argue that minor party status is not required, asking the Court to ignore clear language in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Brown*, 459 U.S. 87, that limits application of the flexible "reasonable probability" standard to minor parties. *See Buckley*, 424 U.S. at 74 ("*Minor parties* must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim.") (emphasis added); *Brown*, 459 U.S. at 101 ("The First Amendment prohibits a state from compelling disclosures by a *minor party* that will subject those persons identified to the reasonable probability of threats, harassment or reprisals.") (emphasis added). In developing and applying this standard, the Supreme Court took into account the unique balance of interests for minor parties, reasoning that "the government interests supporting disclosure are weaker in the case of minor parties, while the threat to First Amendment values is greater." *Brown*, 459 U.S. at 95 (discussing *Buckley*).[1]

Plaintiffs suggest that the Court should rely on off-point *dicta* in *Doe v. Reed*, 130 S. Ct. 2811 (2010), where the Supreme Court left open the possibility that a group similar to Plaintiffs could pursue an as-applied challenge in district court. In that case, ProtectMarriage Washington and other

[1] Because the balance of interests in disclosure is different for major parties and minor parties, the showing required to obtain an exemption from disclosure requirements is also different. The flexible standard of proof announced in *Buckley* was carefully tailored to reflect the reduced governmental interests and increased risk of chilling speech that attends disclosure of minor party contributors. *See* 424 U.S. at 70-71. By contrast, there is a heightened government interest in disclosure of major party contributors, and less concern that "harassment" will lead to a reduction in contributions that would silence that major party. There may be extraordinary circumstances where a major party could show that the burden of disclosure is so severe that it is entitled to an as-applied exemption, but Plaintiffs fall far short of making this showing. Indeed, as discussed in Section C, *infra*, and on pages 9-26 of Defendants' opening brief, Plaintiffs' evidence does not even satisfy the "reasonable probability" standard that applies to minor parties.

plaintiffs brought a facial and as-applied challenge to a Washington State law requiring public disclosure of referendum petitions. As here, the as-applied challenge sought an exemption from generally applicable disclosure laws based on allegations of threats, harassment and reprisals. *Id*. at 2816. But the Supreme Court considered only the plaintiffs' facial challenge, holding that disclosure of petition signers does not violate the First Amendment. *Id*. at 2821. The question of whether the plaintiffs qualified as a minor party meriting an as-applied exemption was not an issue before the Court. Contrary to Plaintiffs' suggestion, Opp. at 4, the Court did not "agree that an exemption was available" to the *Doe* plaintiffs or reach *any* holding regarding the as-applied challenge. It simply acknowledged that Plaintiffs could continue to litigate their as-applied claim by presenting relevant evidence in the district court after their facial challenge was rejected. *Doe*, 130 S. Ct. at 2821.

B. Past harassment and government hostility are relevant factors, and Plaintiffs demonstrate neither.

Under *Buckley*, past and present harassment from the government or private parties are relevant factors in determining whether a group is entitled to an exemption based on a reasonable probability of threats, harassment or reprisals. *Buckley*, 424 U.S. at 74. Contrary to Plaintiffs' assertion, Opp. at 6, Defendants do not argue that government hostility or a history of harassment is *required* to grant the exemption. Instead, these are factors that the Supreme Court has considered—and that this Court should consider—in determining whether there is a reasonable probability of present harassment. And, as Plaintiffs effectively concede, those factors are completely absent here. Plaintiffs offer no response to expert testimony describing the history of violence and oppression suffered by the National Association for the Advancement of Colored Persons (NAACP) and the Socialist Workers Party (SWP) and contrasting it with the dearth of violence against persons who share Plaintiffs' views regarding marriage. *See* Defs MSJ at 10-13. Plaintiffs make the weak observation that there are parts of the country where their views are "extremely unpopular," Opp. at 7, but they do not and cannot show that this puts them anywhere close to the experience of the NAACP or SWP. Plaintiffs may disagree with court decisions invalidating Proposition 8 and other anti-gay legislation, *see* Opp. at 7, but they cannot credibly suggest that courts' reasoned opinions about questions of constitutional law, delivered after a full and fair judicial process, demonstrate state

hostility to Plaintiffs remotely comparable to the systematic oppression suffered by the NAACP and SWP and their allies.

C. Plaintiffs' minimal evidentiary showing does not demonstrate that their contributors face a reasonable probability of threats, harassment or reprisals.

As described in detail in Defendants' opening brief, see Defs MSJ at 9-26, Plaintiffs' evidence of harm does not establish a reasonable probability that an ordinary contributor to Plaintiffs would face "threats, harassment or reprisals" as a result of disclosure.[2] Most of Plaintiffs' evidence is inadmissible hearsay or violates the parties' stipulation, including descriptions of a number of out-of-state incidents with no apparent link to Proposition 8 or views concerning marriage. And the 58 Doe declarations that make up the entirety of Plaintiffs' admissible evidence consists largely of damage to yard signs and bumper stickers and statements of disagreement.

Notably, Plaintiffs do not argue that the Doe declarations—their only admissible evidence—suffice to meet their evidentiary burden. *See* Opp. at 6 n.9. This is a wise concession, because nothing in the Doe declarations is comparable to the record evidence presented in *NAACP*, *Brown*, and other cases granting the exemption. Indeed, Defendants' experts testified that the level of "harassment" described in the Doe declarations is within the normal levels for a heated campaign in California. *See* Defs MSJ at 16, Declaration of Paul Mandabach ¶ 6 ("Mandabach Decl.") (Dkt. 267), Declaration of Daniel Martinez HoSang ¶ 25 (Dkt. 266). Plaintiffs offer no evidence to the contrary.

Plaintiffs' disregard for evidence extends to suggesting that the Court should ignore the sworn testimony of Plaintiffs' own witnesses, *see* Opp. at 3 n.4 and 5 n.8, as well as the expert testimony of Defendants' witnesses—even though Plaintiffs do not dispute those witnesses' qualifications as experts and present no evidence challenging the substance of their opinions. While Plaintiffs might prefer to rely on internet postings, media articles, and dictionary definitions, this does not satisfy their

[2] Plaintiffs contend that because the Supreme Court did not expressly define "threats, harassment or reprisals," these terms must be given the full range of meaning found in any dictionary, to include such actions as vocal disparagement by campaign opponents. The Supreme Court took pains to describe the range of misbehavior in the record before it, and used the shorthand label "threats, harassment or reprisals" in its discussion of the record actually at bar. Plaintiffs' willful blindness to the facts of these prior cases contravenes the principle of *stare decisis*, under which a case is binding "for the detailed legal consequence *following a detailed set of facts*." *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996) (emphasis added). It is these facts, not a dictionary definition, that give meaning to the standard adopted by the Supreme Court.

burden of proof. *See* Fed. R. Civ. P. 56(c) (evidence submitted in support of summary judgment must be admissible); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment against a party is appropriate when the party "fails to make a showing sufficient to establish the existence of an element essential to that party's case"). The *Buckley* standard is flexible, but it requires actual evidence and places the burden of proof squarely on the party seeking an exemption. *See Buckley*, 424 U.S. at 74 (rejecting a blanket exemption for minor parties and requiring those seeking an exemption to present evidence showing proof of injury).

Plaintiffs' argument that a negligible evidentiary showing is sufficient relies heavily on *Averill v. City of Seattle*, 325 F. Supp. 2d 1173 (W.D. Wash. 2004), but the *Averill* plaintiffs presented substantial evidence in support of their claims. In *Averill*, the minor party plaintiffs represented views similar to the Socialist Workers Party in *Brown*, and they "submitted evidence showing that individuals and entities espousing views that are virtually identical to those advocated by plaintiffs have been subjected to threats and harassment due to their beliefs." *Id*. at 1174. This included evidence of threats worse than anything documented in this case. In *Averill*, even the State's expert acknowledged that the plaintiffs made "'a compelling case of victimization' based on their political beliefs." *Id*. at 1177. Thus, while the *Averill* plaintiffs were allowed a flexible standard of proof, they were required to make a real evidentiary showing of harassment in support of their allegations.[3]

Plaintiffs' Opposition also reveals the disingenuousness of their position. For instance, Plaintiffs claim that they are not offering media articles for their truth, but instead "to show the natural and probable effect that such reports have on the listener, which is to chill protected expression." Opp. at 11. This claim is belied by Plaintiffs' use of the media articles and internet postings elsewhere in the brief, where Plaintiffs cite them as the *only* support for allegations of death threats, physical assaults and threats of violence, vandalism and threats of destruction of property, arson and threats of

[3] Furthermore, *Averill*'s focus on the likelihood of threats—and that court's decision not to require any showing of actual harm—is not binding on this Court. *See American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 2540 (2011) (district court decisions are not binding precedent). Nor is it persuasive when considered in light of *NAACP* and *Brown*, both of which focused on evidence of actual harm rather than empty threats.

arson, angry protests, lewd demonstrations, and blacklists.[4] *See* Opp. at 6. More fundamentally, Plaintiffs' assertion that reports of harassment have a chilling effect raises the question of why Plaintiffs themselves publicized stories of harassment to the media and to their supporters. *See* Defs MSJ at 15, Defs. Statement of Undisputed Facts at 28-29.

In short, Plaintiffs' Opposition raises more questions than it answers. Plaintiffs do not explain how their Doe declarations could ever meet the "reasonable probability" standard of "threats, harassment or reprisals," as the Supreme Court employed these terms. They seem to suggest that the mere publication of media articles meets this standard, but they cite no authority for that position. Plaintiffs are silent on the factual question of whether the alleged harassment here is out of the ordinary for a heated campaign in California, in the face of significant evidence submitted by Defendants that it is not. They simply insist, without any legal basis, that anyone who engages in the rough and tumble of politics is entitled to an exemption.

II. THE $100 DISCLOSURE THRESHOLD IS CONSTITUTIONAL.

Plaintiffs' facial challenge to the State's $100 disclosure threshold also ignores binding precedent and the factual record. Plaintiffs understand that they cannot prevail under existing law, which requires a fact-based balancing of their First Amendment claims. Accordingly, they begin the substantive discussion of those claims in their Opposition by mischaracterizing the standards of review, beginning from two demonstrably false premises. They then proceed to ignore all relevant facts, including the compelling state interest in disclosure, the legislative history of the disclosure statute, and the record evidence establishing a rational basis for the $100 disclosure threshold.

Plaintiffs' first false premise is that all campaign disclosure provisions must survive "strict" scrutiny because "exacting" scrutiny is merely a synonym for "strict" scrutiny. *See* Opp. at 12. This is an extraordinary conflation supported by no reported decision, and it is at odds with a long and productive debate within the Ninth Circuit over which of these two standards it should apply. *Compare Cal. Pro-Life Council, Inc. v. Getman*, 328 F. 3d 1088 (9th Cir. 2003) ("*Cal Pro-Life I*"),

[4] Plaintiffs' misuse of hearsay evidence is discussed in more detail in Defendants' Reply In Support Of Their Motion to Strike, filed concurrently. Defendants incorporate by reference all of the arguments made in that Reply.

Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172 (9th Cir. 2007) ("*Cal Pro-Life II*"); *with Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (cert. den. 131 S. Ct. 1477). In the latter opinions, the Ninth Circuit expressly stated that "strict" scrutiny is too high a bar, and that "exacting" scrutiny presents an appropriately lower burden. *Human Life*, 624 F.3d at 1013; *Canyon Ferry*, 556 F.3d at 1033-34. The Ninth Circuit in *Human Life* explicitly stated that the more relaxed standard of review was mandated by recent Supreme Court decisions. Plaintiffs cannot reduce these carefully reasoned and binding opinions to a meaningless exercise.

Plaintiffs' second fundamental error is one of omission, a failure to confront the fact that every reported decision to consider a campaign disclosure threshold employed a still lower standard of review, the deferential "rational basis" standard used by *Buckley*, 424 U.S. at 83, and more recently by the Ninth Circuit and the First Circuit. *See* Defs MSJ at 34-36 (discussing *Canyon Ferry*, 556 F.3d at 1033-34 and *National Organization for Marriage et al. v. McKee*, 649 F.3d 34, 60-61 (1st Cir. 2011)). Plaintiffs have offered no evidence on which this Court could base a conclusion that the California Legislature lacks a rational basis for the state's $100 disclosure threshold. California's threshold is similar or identical to those current in many states, and Defendants have shown not only that California's Legislature regularly reviews this provision, but also that during the thirty-year period in which this threshold has been in effect, ballot measure spending has risen by 1,000 percent, an increase far exceeding the rate of inflation. *See* Defs MSJ at 36-37. Maintaining the $100 disclosure threshold has not diminished speech in ballot measure contests.

Plaintiffs also ignore three Ninth Circuit opinions affirming a broad view of California's compelling interest in voter information. Plaintiffs prefer their own unsupported assertion that "everything the voter needs to know about a ballot measure is contained in the text of the measure itself." Opposition at 13. The Ninth Circuit has repeatedly rejected any such contention, however, and affirmed the opposite in the very cases cited by Plaintiffs. *See Human Life*, 624 F.3d at 1007; *Cal. Pro-Life II*, 507 F.3d at 1179 n.8; *Cal. Pro-Life I*, 328 F.3d at 1106. Plaintiffs' supporters certainly attached great importance to publicly announcing their views on Proposition 8 by displaying yard signs and bumper stickers, recognizing that such displays are a popular form of political speech

by "everyday people" that would "legitimize" the measure to friends and neighbors. *See* Declaration of Paul Mandabach ¶ 28 ("Mandabach Decl.") (Dkt. 267).[5] Plaintiffs themselves, however, ignore this widely accepted public interest when they ask this Court to make it impossible for anyone to learn whether "everyday people" are donating $100 to support or oppose a measure that attracts controversy.

Ultimately, Plaintiffs offer no reason to credit their argument for a "disconnect" between the State's informational interest and "the First Amendment burdens that result from such a low disclosure threshold." Opp. at 15. Defendants, meanwhile, have shown that the California Legislature has kept a watchful eye on the disclosure threshold and that the existing level has not had any negative effect on spending in ballot measure campaigns, which has grown enormously for decades under the existing statute. Like the plaintiffs in *Buckley* and *National Organization for Marriage v. McKee*, Plaintiffs fail to adduce any evidence to the contrary, and the record evidence before this Court confirms that there is a rational basis for the $100 disclosure threshold. This is the only "tailoring" required for threshold statutes, which are otherwise left to the judgment of elected officials with practical, personal interest and experience in state election campaigns.

III. POST-ELECTION CAMPAIGN REPORTING REQUIREMENTS ARE CONSTITUTIONAL.

Plaintiffs read the generic term "voter information" with a wooden literalism not accepted by the Supreme Court or the Ninth Circuit. As Defendants have established, well-established case law that recognizes California's broad-based and compelling interests in campaign finance information regarding ballot measure campaigns. *See* Defs MSJ at 26-31.

Defendants note a further point suggested by Plaintiffs' response. In addition to other groups with an interest in the conduct of state elections, the present case illustrates how courts have a pressing need for donor information reported by campaign committees after an election is over. The declaration of Lynda Cassady (Dkt. 265) ("Cassady Decl."), based on campaign reports filed months after the election, presents the only accurate information in the record regarding Plaintiffs' fundraising. *Compare* Plaintiffs' Statement of Undisputed Facts ¶ 28 (Dkt. 251) (claiming Yes on 8 campaign

[5] A unanimous Supreme Court recognized the peculiar value of "yard signs" in political campaigns, where they both identify the speaker (typically of modest means) and persuasively communicate his or her position directly to neighbors. *Ladue v. Gilleo*, 512 U.S. 43, 55-57 (1994).

received over 36,000 individual contributions totaling nearly $30 million) *with* Cassady Decl. ¶ 15 and attached chart (Yes on 8 campaigns received over 46,000 individual contributions totaling over $42 million). This is also the only empirical evidence regarding the presence or absence of a perceptible fundraising "chill" that might be attributed to reports in the media—and in Plaintiffs' fundraising materials—of threats to potential contributors. As described in the Cassady declaration, campaign reports establish that Plaintiffs enjoyed a dramatic surge in fundraising, especially from small donors, in the days and weeks leading up to Election Day. *See id*. ¶ 24.

This evidence has obvious value to a court faced with a claim that controversies surrounding a ballot measure had adverse effects on Plaintiffs' campaign speech. Absent such data, courts would be forced into subjective decisions on when the *Buckley*/*Brown* exception justifies shutting down state disclosure laws. In cases like those involving the SWP or the NAACP, surrounding facts and circumstances may be so egregious that such an early determination can be reliable. Plaintiffs were unable to come close to making such an extraordinary showing here, and this Court properly waited for a complete picture of the campaign to develop after the committees submitted their year-end campaign reports in February, 2009. The evidence from these reports reinforces the principle that the First Amendment is seldom offended by open and vigorous campaign debate. Conflict is a *feature* of democracy, not a flaw that must be suppressed when the electorate is divided over a controversial ballot measure. Plaintiffs' fundraising success in the face of a widely publicized threat narrative is not surprising, because campaigns exploit such devices to raise money from donors energized by reports of determined opposition. *See* Cassady Decl. ¶ 26, Mandabach Decl. ¶ 24.

The critical facts are undisputed. Plaintiffs' essential claim of a fundraising chill attributable to donor intimidation during the course of 2008 cannot be supported from a record of contributions multiplying as the election grew near. That evidence was made available in public records through the agency of California's post-election reporting laws.

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CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to grant Defendants' Motion for Summary Judgment and deny Plaintiffs' Motion for Summary Judgment.

Dated: October 13, 2011

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**Pursuant to GO 45, the electronic signatory obtained approval from this signatory on October 13, 2011.