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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 John DOE # 1, et al.,

9 Plaintiffs,

10 v.

11 SAM REED, in his official capacity as
12 Secretary of State of Washington, et al.,

13 Defendants.

CASE NO. C09-5456BHS

ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF
DEFENDANTS AND
INTERVENORS AND DENYING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

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

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

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

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

18 **A. Prior to Remand**

19 In denying relief under Count I of Doe’s Complaint, the Supreme Court of the
20 United States set out the following factual and contextual background, which remains
21 relevant in resolving the instant motions before the Court:
22

1 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%.

2 The PRA, Wash. Rev. Code § 42.56.001 *et seq.*, makes all “public
3 records” available for public inspection and copying. § 42.56.070(1)
4 (2008). The Act defines “[p]ublic record” as “any writing containing
5 information relating to the conduct of government or the performance of
6 any governmental or proprietary function prepared, owned, used, or
7 retained by any state or local agency.” § 42.56.010(2). Washington takes
8 the position that referendum petitions are “public records.” Brief for
9 Respondent Reed 5.

6 By August 20, 2009, the secretary had received requests for copies
7 of the R-71 petition from an individual and four entities, including
8 Washington Coalition for Open Government (WCOG) and Washington
9 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.

10 The referendum petition sponsor and certain signers filed a
11 complaint and a motion for a preliminary injunction in the United States
12 District Court for the Western District of Washington, seeking to enjoin the
13 secretary of state from publicly releasing any documents that would reveal
14 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.

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

17 **B. After Remand**

18 On remand, the parties engaged in discovery. During discovery, Doe identified
19 nineteen witnesses, including John Does Nos. 1 and 2. Discovery closed on October 22,
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1 | 2010. Dkt. 128 (scheduling order).¹ Doe’s witnesses include individual plaintiffs and
2 | declarants that are each already known to the public as being supporters of R-71 and none
3 | have testified by declaration that they would be seriously concerned if their personal
4 | identifying information related to R-71 (e.g., name, address, etc.) is disclosed pursuant to
5 | the PRA. The planned testimony of these witnesses and the other discovery that was
6 | supplied in preparation for trial is discussed in detail below. These witnesses and other
7 | pieces of documentary evidence comprise the only evidence Doe has offered in direct
8 | relation to actual R-71 signers in support of the instant as-applied challenge to the PRA.

9 | **II. DISCUSSION**

10 | **A. Summary Judgment Standard**

11 | Summary judgment is proper only if the pleadings, the discovery and disclosure
12 | materials on file, and any affidavits show that there is no genuine issue as to any material
13 | fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
14 | The moving party is entitled to judgment as a matter of law when the nonmoving party
15 | fails to make a sufficient showing on an essential element of a claim in the case on which
16 | the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
17 | 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
18 | could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
19 | *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must

21 | ¹Defendant Secretary of State Sam Reed moves the Court to strike any evidence relied
22 | 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.

1 present specific, significant probative evidence, not simply “some metaphysical doubt”).
2 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
3 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
4 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
5 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
6 626, 630 (9th Cir. 1987).

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

18 Applied here, the Court finds that Doe has failed to raise a material question of
19 fact. Because the evidence submitted in support of the parties’ cross-motions is not in any
20 meaningful way controverted, the Court can resolve the issues presented herein as a
21 matter of law.
22

1 **B. Standards**

2 **1. Exacting Scrutiny**

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

5 We have a series of precedents considering First Amendment
6 challenges to disclosure requirements in the electoral context. These
7 precedents have reviewed such challenges under what has been termed
8 “exacting scrutiny.” *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (per
9 curiam) (“Since *NAACP v. Alabama* [357 U.S. 449 (1958),] we have
10 required that the subordinating interests of the State [offered to justify
11 compelled disclosure] survive exacting scrutiny”); *Citizens United, supra*,
12 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)).

13 That standard “requires a ‘substantial relation’ between the
14 disclosure requirement and a ‘sufficiently important’ governmental
15 interest.” *Citizens United, supra*, at ----, 130 S.Ct., at 914 (quoting *Buckley,*
16 *supra*, at 64, 66). To withstand this scrutiny, “the strength of the
17 governmental interest must reflect the seriousness of the actual burden on
18 First Amendment rights.” *Davis, supra*, at ----, 128 S.Ct., at 2774 (citing
19 *Buckley, supra*, at 68, 71).

16 130 S. Ct. at 2818. The Court further noted that “The State’s interest in preserving the
17 integrity of the electoral process is *undoubtedly important*. ‘States allowing ballot
18 initiatives have considerable leeway to protect the integrity and reliability of the initiative
19 process, as they have with respect to election processes generally.’” *Buckley v. ACLF,*
20 525 U.S. 182, 191 (emphasis added).

21 Therefore, exacting scrutiny applies in this case.
22

1 **2. Reasonable Probability**

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

8 To prevail on an as-applied challenge, Doe will have to satisfy this reasonable
9 probability standard with “respect to those who signed the R-71 petition.” *See id.* at 2820-
10 2821 (leaving this narrow issue open on remand); *see Buckley, supra*, at 74 (“minor
11 parties” may be exempt from disclosure requirements if they can show “a reasonable
12 probability that the compelled disclosure of a party’s contributors’ names will subject
13 them to threats, harassment, or reprisals from either Government officials or private
14 parties”); *Citizens United, supra*, at ----, 130 S. Ct. at 915 (disclosure “would be
15 unconstitutional as applied to an organization if there were a reasonable probability that
16 the group’s members would face threats, harassment, or reprisals if their names were
17 disclosed”) (quoting *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 198 (2003)).

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20 ²Doe brings its as-applied challenge based upon Doe’s belief that a reasonable probability
21 exists that disclosure would result in threats, harassment, or reprisals from private parties. Doe
22 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.

1 Additionally, while the majority opinion in *Doe* provides only a minimal
2 discussion as to the ability of Doe to prevail on an as-applied challenge, the concurrences
3 in *Doe* elaborate on this issue and aid the Court in resolving this case. *See* 130 S. Ct. at
4 2822-2837 (concurring opinions).

5 **a. Justice Sotomayor, Concurring**

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

8 Case-specific relief may be available . . . in the rare circumstance in which
9 disclosure poses a reasonable probability of *serious and widespread*
10 *harassment* that the State is unwilling or unable to control. *Cf. NAACP v.*
11 *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Allowing case-specific
12 invalidation under a more forgiving standard would unduly diminish the
13 substantial breathing room States are afforded to adopt and implement
14 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.

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

16 **b. Justice Stevens, Concurring**

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

19 There remains the issue of petitioners’ as-applied challenge. As a
20 matter of law, the Court is correct to keep open the possibility that in
21 particular instances in which a policy such as the PRA burdens expression
22 “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

1 laws either anonymously or not at all.’’ *McIntyre v. Ohio Elections Com’n*,
2 514 U.S., 334, 342.

3 *In my view, this is unlikely to occur in cases involving the PRA.* Any
4 burden on speech that petitioners posit is speculative as well as indirect. For
5 an as-applied challenge to a law such as the PRA to succeed, there would
6 have to be *a significant threat* of harassment directed at those who sign the
7 petition *that cannot be mitigated by law enforcement measures*. Moreover,
8 the character of the law challenged in a referendum does not, in itself, affect
9 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).

10 *Doe*, 130 S. Ct. at 2831-2832 (footnotes omitted) (emphasis added); *see also id.*, n. 4

11 (citing but not agreeing with Justice Scalia’s concurrence at 2832, which concluded that
12 granting relief to *Doe* on its as-applied challenge would amount to establishing a right to
13 anonymous speech).

14 **C. Doe’s As-Applied Challenge**

15 Doe makes an as-applied challenge to the PRA, seeking to prevent the disclosure
16 of the personally identifying information of 137,000 R-71 petition signers. To succeed in
17 this challenge, Doe must establish that such disclosure that is otherwise proper under the
18 PRA would cause the signers to face a reasonable probability of threats, harassment, or
19 reprisals. In opposition, Defendants and Intervenors assert that Doe has not supplied the
20 Court with competent evidence to meet such a showing on an as-applied basis;
21 Defendants and Intervenors also contend that Doe cannot or has not supplied adequate
22

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

3 **1. The Progeny of As-Applied Challenges**

4 The as-applied exemption that Doe seeks has been upheld in only a few cases. *See*
5 *Buckley*, 424 U.S. at 31-35; *Brown*, 459 U.S. at 102 (granting exemption to Socialist
6 Worker Party (“SWP”) deemed to have minor party status due to its 60 members, little
7 success at the polls, and small amount of financial backing); *NAACP*, 357 U.S. at 466
8 (holding that disclosure of rank and file membership of NAACP would restrain members’
9 exercise of freedom of association); *but see ProtectMarriage.com v. Bowen*, 599 F. Supp.
10 2d 1197, 1213 (2009) (rejecting an as-applied challenge for failure to supply adequate
11 evidence and failure to establish minor party status).

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

17 Under these circumstances, we think it apparent that compelled disclosure
18 of petitioner’s Alabama membership is likely to affect adversely the ability
19 of petitioner and its members to pursue their collective effort to foster
20 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.

21 *Id.*

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

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

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

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

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

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

12 Since *Buckley*, as-applied challenges have been successfully raised
13 only by minor parties, . . . having small constituencies and promoting
14 historically unpopular and almost universally-rejected ideas. The parties’
15 “aim [in *Brown*] was the abolition of capitalism and the establishment of a
16 workers’ government to achieve socialism.” The party was historically
17 unsuccessful at the polls though its members regularly ran for public office.
18 Additionally, campaign contributions and expenditures . . . averaged
19 approximately \$15,000 annually.

20 Similarly, in *Hall-Tyner*, a committee supporting the Communist
21 Party successfully sought exemption from state disclosure laws.
22 599 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

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

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

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

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

1 of a small group of rank and file members of the SWP or the NAACP, discussed above.
2 Instead, they are much more akin to the petitioners in *ProtectMarriage.com* who
3 “orchestrated a massive movement to amend the California Constitution. Proponents of
4 the initiative were successful in their endeavor, raising nearly \$30 million, securing
5 52.3% of the vote and convincing over seven million voters to support Proposition 8.”
6 599 F. Supp. 2d at 1215.

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

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

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

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

5 **2. Doe’s Evidence of Threats, Harassment, or Reprisals**

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

12 Indeed, the *Brown* Court was confronted with countless acts of
13 government harassment and retribution against members of the SWP,
14 which are detailed above. Furthermore, in *Hall-Tyner*, the Second Circuit
15 stated, “[t]he evidence relied on by the district judge included the extensive
16 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.

17 599 F. Supp. 2d at 1217.

18 In *Doe*, the Supreme Court accurately and succinctly described the issue now
19 before this Court: whether the PRA “is unconstitutional as applied to the [R-71] petition.”
20 130 S. Ct. at 2817. Doe has provided the Court with a mountain of anecdotal evidence
21 from around the country that offers merely a speculative possibility of threats,
22 harassment, or reprisals. Doe has also provided the Court with numerous examples of

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

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

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

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

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

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

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

20 ³Additionally, even if Doe could rely on evidence from the Proposition 8 experience,
21 such events are now stale and occurred during the “heat of an election battle surrounding a hotly
22 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.

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

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

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

20 Long testified that he experienced harassment related to R-71 when he received a
21 call from a purported transgender woman. *Id.* 20:1-9. Long claims the woman stated that
22

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

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

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

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

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

4 **Viktor Anishenko.** Viktor Anishenko (“Anishenko”) was a public advocate for R-
5 71 and solicited signatures for the petition on five or six occasions. Stafford Decl., Ex. F
6 (Anishenko Dep.) 16:12-23, 23:12-25:6. Anishenko also posted an R-71 sign in the yard
7 of his residence. *Id.* 25:7-8.

8 Although Anishenko claims to have had two or three Post-It notes containing
9 vulgar language placed on his vehicle, he does not know if it was related to R-71. *Id.*
10 28:21-30:24. Anishenko does not allege any other instances of threats, harassment, or
11 reprisals. *Id.* 28:5-14.

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

17 Although Hutcherson points to many examples of phone calls his church has
18 received regarding his stance on gay rights, he does not point to any calls or other
19 methods of contact that relate specifically to R-71. *Id.* at 38:22-39:2, 46:4-22, 63:7-64:10,
20 66:3-13, 71:10-21, 75:22-76:19. Hutcherson is also not aware of any death threats,
21 attacks, or harassment of his congregation as it relates to R-71. *Id.* 64:24-66:2, 48:3-8,
22 69:5-10.

1 **Alexander Kaprian.** Pastor Alexander Kaprian (“Kaprian”) hosted and attended a
2 meeting to support R-71. Stafford Decl., Ex. H (Kaprian Dep.) 8:24-9:7, 14:4-11.

3 Kaprian signed the R-71 petition at his church and posted an R-71 sign in front of his
4 residence. Kaprian testified in his deposition that some woman took photographs of his
5 home and that he felt he was being watched; however, he points to no incident directly
6 attributable to R-71, and he did not report these incidents to the police. *Id.* 42:11-43:2,
7 48:10-50:22, 52:19-53:3, 38:11-22.

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

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

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

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

5 | **Leonid Pisarchuk.** Leonid Pisarchuk (“Pisarchuk”) actively supported R-71 by
6 | publically gathering signatures, waving signs, and placing a bumper sticker on his car and
7 | a sign in his yard. Stafford Decl., Ex. K (Pisarchuk Dep.) 8:25-10:25, 13:17-14:14.
8 | Pisarchuk also interviewed with a reporter who published a story identifying him as an R-
9 | 71 supporter.

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

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

1 83:2-18, 85:10-21. Randall also authorized the FFN’s political action committee to spend
2 funds on R-71 activities, which are disclosed at the Public Disclosure Commission’s
3 website. *Id.* 29:8-31:3.

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

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

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

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

21 ⁴The blog site that Randall relied on for his claims of a death threat is
22 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.

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

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

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

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

1 debates, and spoken in front of approximately 2000 people regarding R-71. *Id.* 22:18-
2 23:15, 35:23-37:15, 38:7-39:20.

3 L. Stickney did not personally experience any physical harassment or violence
4 during the campaign for R-71. *Id.* 48:16-49:9, 73:1-2. He did testify, however, that the
5 PMW campaign received threatening and/or hostile emails. *Id.* 48:16-49:9, 73:1-2. He
6 also testified that he felt threatened by a Bellingham, WA blogger who wrote “[w]hy
7 can’t we go to Arlington and harm his family?” *Id.* 53:2-24, 130:15-131:2. L. Stickney
8 contacted the police who said they would investigate the matter; he never reported any
9 further incidents regarding the blogger. *Id.* 56:20-58:2, 140:21-142:6. L. Stickney also
10 received a “bothersome” phone call from a transgendered individual. *Id.* 86:9-87:15,
11 90:7-91:3, 124:22-125:1.

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

16 Following the R-71 vote, Stickney has remained in the public’s eye and
17 occasionally received emails calling him a “rat” or a “homophobic bigot.” *Id.* 83:17-
18 85:21.

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

1 8:4-13. M. Stickney testified that, although people responded to his comment and made
2 comments about his father, L. Stickney, and their family in general, “[t]hey never said
3 anything about me – you know, they never said, you know, I am a jerk for working on
4 the campaign or whatever.” *Id.* 13:17-23. M. Stickney did not testify about any personal
5 experience of harassment, threats or reprisals due to his involvement with R-71, before or
6 after the vote.

7 **Robert Struble.** Robert Struble (“Struble”) acted as a spokesman for PMW and
8 shared his opinions on R-71 in public debates, on the radio, at a public state legislative
9 hearing, and in a letter to the Kitsap Sun editor. Stafford Decl., Ex. Q (Struble Dep.)
10 11:8-12:8, 13:17-21, 14:4-17, 17:25-18:15. Struble testified that the fact he signed the R-
11 71 petition is “so minuscule compared to the fact that [he’s] a public spokesman, so it’s
12 not really – [his] signature is hardly the issue.” *Id.* 19:1-24; *see also id.* 20:25-21:2
13 (Struble does not believe he would be at risk if the R-71 petitions were publically
14 released).

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

21 **Barbara “Rachel” Whaley.** Rachel Whaley is Hutcherson’s assistant. Stafford
22 Decl., Ex. R. (Whaley Dep.) 5:13-16. Whaley did not testify to any personal experience

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

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

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

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

17 specific documents already in evidence that Plaintiffs believe will establish
18 a material question of fact as to whether disclosure of R-71 signers’
19 identities would result in the reasonable probability of threats, harassment,
20 or reprisals. These documents shall only include the declarations,
21 depositions, and documentary evidence already in the record of actual R-71
22 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.

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

5 **3. Sufficiency of Doe’s Evidence**

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

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

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

6 Further still, PMW secured donations to finance the campaign for R-71. It is
7 undisputed that between May and November of 2009, PMW reported 857 contributions
8 to its cause. The names and other personally identifying information of these donors has
9 been public knowledge for over two years. Doe has had ample time and opportunity to
10 contact these individuals, some of which likely signed the R-71 petition in addition to
11 donating to PMW's R-71 campaign. Even if none of these donors signed the R-71
12 petition, their experiences are far more closely related to the issues at hand than the
13 random "evidence" supplied by Doe based on experiences of individuals around the
14 country and the now stale experiences of those persons involved with Proposition 8.
15 However, Doe has failed to supply sufficient, competent evidence that the publically
16 known donors – as active supporters of R-71 – have experienced sufficient threats,
17 harassment, or reprisals based on the disclosure of their information in connection to R-
18 71 that would satisfy the reasonable probability standard that Doe must meet in this case.
19 The Supreme Court has previously rejected a similar as-applied challenge based on such
20 a failure. *Citizens United*, 130 S. Ct. at 916 (rejecting Citizens United's as-applied
21 challenge because it "has offered no evidence that its members may face similar threats
22 or reprisals. To the contrary, Citizens United has been disclosing its donors for years and

1 has identified no instance of harassment or retaliation.”). The same can be said for
2 PMW’s donors.

3 **D. Widespread Evidence, Strong Evidence, Police Mitigation**

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

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

17 In any event, Justice Sotomayor and those Justices concurring in her opinion
18 would require a showing of “*serious and widespread harassment* that the State is
19 unwilling or unable to control.” *Doe*, 130 S. Ct. at 2829 (emphasis added). To the extent
20 this is a different standard than what is required to satisfy the reasonable probability
21 standard from *Buckley*, it is more stringent. Otherwise, it is merely an explanation as to
22

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

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

15 | **E. Conclusion**

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

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

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

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

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

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III. ORDER

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

- (1) Defendants and Intervenor's 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