

Nos. 19-251, 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

*On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**BRIEF OF AMICUS CURIAE
PROPOSITION 8 LEGAL DEFENSE FUND
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae Proposition 8 Legal Defense Fund (the “Defense Fund”) is a 501(c)(3) nonprofit charity established shortly after California voters passed Proposition 8 (“Prop 8”) in the 2008 general election.² It was formed primarily to provide for the legal defense of Prop 8 through public interest litigation.³ Just like Petitioners Americans for Prosperity Foundation (“AFPF”) and Thomas More Law Center (the “Law Center”), the Defense Fund is also prohibited from undertaking any election-related advocacy.

The Defense Fund’s financial contributors naturally include donors who had previously and

¹ No party’s counsel authored this brief in whole or in part; and no party, party’s counsel, or any person other than the Defense Fund contributed money that was intended to fund preparing or submitting this brief. At least 10 days prior to the due date, counsel of record for all parties received timely notice of intention to file this brief of amicus curiae. All parties have consented to the filing of this brief of amicus curiae; Petitioners filed blanket consents and Respondent consented by email.

² California Proposition 8 (2008) amended the California Constitution to provide that “[o]nly marriage between a man and a woman is valid or recognized in California.” Cal. Const. art. I, §7.5. The U.S. Supreme Court declined to address the merits of Prop 8’s constitutionality, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), allowing the district court’s injunction against Prop 8 to stand.

³ The defense of Prop 8 was itself controversial and positioned the California Attorney General adversely to the Defense Fund. The Attorney General not only declined to defend the voter-passed initiative, but went further to actually litigate against its constitutionality. See *Perry v. Brown*, 52 Cal.4th 1116, 1129 (Cal.2011).

publicly supported the Prop 8 campaign. But as relevant to the present cases, the Defense Fund also received post-election *charitable* contributions from other donors who had been too fearful of the risks of public disclosure to contribute to Prop 8's earlier election campaign. These non-political donors agreed to financially support the Defense Fund's work solely on the solemn assurance that their charitable contributions would never be publicly disclosed.

Much like Petitioners, the Defense Fund is facing the California Attorney General's demands for unredacted Schedule B information revealing the Defense Fund's confidential listing of its largest donors. This puts the Defense Fund—and apparently all other charities operating in California—in a quandary. If the Defense Fund refuses to disclose its donors' protected identities, it faces harsh enforcement action including penalties and revocation of its tax-exempt status. On the other hand, if the Defense Fund releases the information, it violates its obligation to those donors who were promised the once-dependable privacy protections afforded charitable gifts, and newly exposes them to the threats, harassment, and retaliation they originally sought to avoid.

The Defense Fund offers this brief of amicus curiae to illustrate in greater detail the real-world threats, intimidation, and harassment that many donors suffer upon disclosure of their identities, and which are reasonably *certain*—not just probable—to befall the Defense Fund's nonprofit donors, in particular, who have until now been able to rely on the privacy protections traditionally afforded supporters of charitable organizations.

SUMMARY OF THE ARGUMENT

While “civic courage” may be required to exercise First Amendment rights through public acts affecting elections and the legislative process, it is not a requirement imposed upon nonprofit charities and their financial supporters.

Recent events in which donors, whose identities have been publicly disclosed, have suffered violence, death threats, ruined careers, property damage, and other serious consequences show how the evolution of information technology has created new and serious risks of harm today that were not even conceived of in the days of *NAACP v. Alabama*.

The well-documented and judicially acknowledged history of severe harm suffered by supporters of California’s Proposition 8 whose identities were publicly disclosed illustrates the real and serious risks of harassment, intimidation, and retaliation facing donors of other controversial nonprofit charities.

ARGUMENT

I. The “Civic Courage” Required to Exercise First Amendment Rights Affecting the Integrity of the Legislative Process and the Election of Public Officials Is Not a Burden Imposed Upon Charities and Their Donors.

“Civic courage” in the face of public disclosure may indeed be the price for exercising one’s right to influence elections and legislative processes, but such a tax has never been levied upon the charitable work

of nonprofit organizations and their financial supporters.

There seems to be little disagreement that a donor's desire for anonymity, itself, stems from rational fears of retaliation, social ostracization, and even economic ruin. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). In assessing government impairment of First Amendment rights, these considerations are balanced against the type and strength of the countervailing public or governmental interest. Where the public interest at stake is fundamental to the integrity and functioning of government itself, more interference with individual First Amendment rights is tolerated. Where no such interest is at stake, the individual is entitled to full constitutional protection, including the requirement of narrow tailoring.

The extent to which an individual is expected to tolerate "harsh criticism" and other reprisals in exercising First Amendment rights has been described as "civic courage." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). Such courage is required where the important government interest at stake is "protect[ing] the integrity and reliability of the initiative process," *id.* at 197, especially in light of its "traditionally public nature." *Id.* at 214 (Sotomayor, J., concurring). So also are political donors expected to bear the consequences of public disclosure in order to further the substantial public interest in "providing the electorate with information about the sources and recipients of funds used in political campaigns in order to deter actual corruption and avoid the appearance of corruption." See Ninth Circuit Order Denying Petitions for Rehearing En

Banc (Ikuta, S., dissenting), AFPP App. 82a, citing *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976). In sum, greater latitude is given to regulations that infringe on First Amendment rights in electoral and legislative contexts because “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Doe v. Reed*, 561 U.S. at 228 (Thomas, J., dissenting), quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

As such, the potential for “harsh criticism . . . 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.” *Doe v. Reed*, 561 U.S. at 228 (Scalia, J., concurring). By contrast, no authority supports the notion that the public interest in regulating charitable organizations rises to anywhere near the same importance as ensuring the integrity of the legislative process and avoiding corruption in the election of public officials, matters essential to the very “functioning of our participatory democracy.” Nor has charitable giving ever been recognized as “traditionally public” in nature.⁴ The amicus Defense Fund can find no published case in which supporters of charitable causes have been burdened with a “civic courage” requirement. Thus, the Ninth Circuit’s application of a relaxed version of

⁴ In fact, federal, civil, and criminal statutes proactively shield charitable donors’ identities from public disclosure, not only to ensure the rights of anonymity, but also to avoid financial harm to charities caused by chilling effects that “might prevent [charitable] gifts.” S. Rep. No. 91-552, at 53 (1969), *as reprinted in* 1969 U.S.C.C.A.N. 2027, 2081.

exacting scrutiny, under which narrow tailoring is excused and the burden of “civic courage” is heaped upon nonprofit charities and their supporters, clearly collides with this Court’s precedents.

II. The Internet Has Created New Ways to Inflict Serious and Permanent Harm Upon Donors That Simply Didn’t Exist in the Days of *NAACP v. Alabama*.

The advent of the Internet and our evolution into a high-information society have created new and serious risks of harm today that were not even conceived of in the days of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The need for the courts to grasp the constitutional import of these “recent events” in which donors have been “blacklisted, threatened, or otherwise targeted for retaliation” is illuminated in Justice Thomas’s concurring and dissenting opinion in *Citizens United v. FEC*, 558 U.S. 310, 480-485 (2010). Recounting the many examples of harm suffered by Prop 8 supporters as a result of their donations being publicly reported (including Internet maps targeting the locations of homes and businesses of Prop 8 supporters, property damage, threats of physical violence or death, forced resignations, boycotts, angry mobs, etc.), Justice Thomas observed that “[t]he success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens’ exercise of their First Amendment rights,” *id.* at 482, including the formation of organizations dedicated to confronting donors, “hoping to create a chilling effect that will dry up contributions.” *Ibid.* (citing Michael Luo, *Group*

Plans Campaign Against G.O.P. Donors, N.Y. Times (Aug. 8, 2008), <https://www.nytimes.com/2008/08/08/us/politics/08donate.html>). One group even detailed its plan to send a “warning letter . . . alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives.” *Id.* at 482-483.

In other words, the forced disclosure of donor information ultimately operates to prevent people from speaking, because they “enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail [protected speech] and prevent the lawful, peaceful exercise of First Amendment rights.” *Id.* at 483. And the “promise that as-applied challenges will adequately protect speech is a hollow assurance. . . . because—as California voters can attest—the advent of the Internet enables prompt disclosure of expenditures, which provide[s] political opponents with the information needed to intimidate and retaliate against their foes.” *Id.* at 484 (cleaned up). “Thus, disclosure permits citizens . . . to react to the speech of [their political opponents] in a proper—or undeniably *improper*—way long before a plaintiff could prevail on an as-applied challenge.” *Ibid.* In the absence of relief from unconstitutional disclosure requirements, our citizens remain subjected to “death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection.” *Id.* at 485 (cleaned up).

III. Valuable Insight to the Risks of Public Disclosure Faced by Donors Can Be Found in the Examples of Harm Suffered by Prop 8 Supporters.

The story of harms suffered by Prop 8 supporters has been told in various contexts, including the protection of witnesses at trial, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (per curiam), disclosure of referendum petition signatures, *Doe v. Reed*, 561 U.S. 186, 205 (2010), and disclosure of political contributions under campaign finance laws, *Citizens United v. FEC*, 558 U.S. 310 (2010). While relief was granted in some cases and not others, the courts have consistently recognized the seriousness of the reprisals and other harm suffered by publicly identified Prop 8 supporters.

In 2010, the Supreme Court was asked to stay the broadcast of the federal trial over Prop 8. In evaluating the likelihood whether irreparable harm would result from the denial of a stay, the Court looked to the apparently uncontroverted evidence that Prop 8's advocates "have been subject to harassment as a result of public disclosure of their support." *Perry, supra*, at 185. The Court observed that donors supporting Proposition 8 have received death threats, envelopes containing a powdery white substance, and confrontational phone calls and e-mail messages from opponents of Proposition 8, while others "have been forced to resign their jobs after it became public that they had donated to groups supporting the amendment." *Ibid.* The Court addressed "Internet blacklists" identifying pro-Proposition 8 businesses and urging others to boycott

them in retaliation, *ibid.*, and numerous instances of vandalism and physical violence against those identified as Proposition 8 supporters. *Id.* at 185-186. Noting that the fears of the pro-Prop 8 witnesses had been “substantiated . . . by citing incidents of past harassment” of known Prop 8 supporters, *id.* at 195, the Court concluded that a threat of irreparable harm had been demonstrated, in favor of granting the stay. *Id.* at 195-196.

IV. The Public Threats, Harassment, Intimidation, and Retaliation Faced by Donors of Controversial Organizations Are Real, Not Speculative.

Especially in this age of high information, the vilification of individuals who take a public stand on controversial issues can be severe. The events surrounding Prop 8, in particular, created new awareness in the minds of many Americans about the genuine risk of harassment and reprisals faced by people and groups publicly identified with controversial social and political issues.

Of course, unfounded speculation, conclusory statements, fear, and uncertainty are insufficient. *Buckley*, 424 U.S. at 71-72. But, as shown by a substantial body of evidence, significant hostility, harassment, and reprisals frequently arise against those people and groups publicly identified with controversial issues. Although many incidents likely have gone unreported,⁵ available sources help

⁵ See Declaration of Sarah Troupis in Support of Defendant-Intervenors’ Motion for a Protective Order at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-

illustrate what the New York Times has called the “ugly specter of intimidation” experienced by people who supported Prop 8,⁶ as well as harassment and reprisals experienced by others outside California and in contexts other than Prop 8.

The Supreme Court has recognized that harassment and reprisals against donors are “cause for concern.” *Citizens United*, 558 U.S. at 370 (referring to examples of “recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation.”). *See also* Reply Brief for Appellant at 28-29, *Citizens United*, 558 U.S. 310 (No. 08-205) (describing “widespread economic reprisals against financial supporters of . . . Prop 8” as an “unsettling consequence[] of disseminating contributors’ names and addresses to the public through searchable websites”).

Donors and other supporters of Prop 8 were “subject to wide-spread political reprisal, stalking, assault, intimidation, employment discrimination, economic and other forms of retaliation” and “organizations, including churches, that had supported the measure were attacked, vandalized, and targeted for revenge.” Lynn D. Wardle, *The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage*, 50 Washburn L.J. 79, 105 (2010). These real-world harms are well documented.

cv-2292-VRW) (asserting that fear of “further threats and harassment” deterred some individuals from submitting declarations in litigation).

⁶ Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times, Feb. 8, 2009, at BU3.

See, e.g., Brief of Amicus Curiae Institute for Marriage and Public Policy in Support of Defendant-Intervenors, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (entire brief devoted to documenting harassment against people and groups that supported Prop 8); Petitioners' Brief at 2-7, 10-11, *Doe v. Reed*, 561 U.S. 186 (No. 09-559); Reply Brief for Appellant at 28-29, *Citizens United*, 558 U.S. 310 (No. 08-205); Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners at 17-18, *Doe v. Reed*, 561 U.S. 186 (No. 09-559); Brief of Amicus Curiae Alliance Defense Fund in Support of Appellant at 17-22, *Citizens United*, 558 U.S. 310 (No. 08-205); Cleta Mitchell, *Donor Disclosure: Undermining the First Amendment*, 96 Minn. L. Rev. 1755, 1760-61 (2012) (stating that "evidence of the harassment campaign against donors to Proposition 8" was "extensive" and "widespread").

1. Vandalism

Harassment against Prop 8 supporters included acts of vandalism to their homes and other property, see, e.g., Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328, at 3-4 & nn.8, 12, 15, 17-18 (Oct. 22, 2009), http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf; as well as to cars and other vehicles, see *id.* at 3 & nn.9-12, 15-16. In one example, a household that supported Prop 8 had the words "Bigots live here" painted on the window of an SUV parked in front of their home. See Matthai Kuruvila, *Mormons Face Flak for Backing Prop. 8*, S.F. Chron. (Oct. 27, 2008), <https://www.sfgate.com/bayarea/article/Mormons-face-flak-for-backing-Prop-8-3264077.php>.

In the days after Prop 8 passed, many houses of worship, including Mormon Church buildings, were also vandalized. See Jennifer Garza, *Feds Investigate Vandalism at Mormon Sites*, Sacramento Bee (Nov. 14, 2008). See also Chelsea Phua, *Mormon Church in Orangevale Vandalized in Wake of Prop. 8 Vote*, Sacramento Bee (Nov. 9, 2008).

2. Death Threats

Prop 8 supporters have also been targeted with death threats. One such email threat against the mayor of Fresno stated, “Hey Bubba, you really acted like a real idiot at the Yes of [sic] Prop 8 Rally this past weekend. Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter.” The email continued, “Anybody who had a yes on Prop 8 sign or banner in front of their house or bumper sticker on the car in Fresno is in danger of being shot or firebombed.” John-Thomas Kobos, *Proposition 8 Email Threats*, KFSN-TV (Nov. 7, 2008), <https://abc30.com/archive/6494921>. See also Complaint, *ProtectMarriage.com — Yes on 8 v. Bowen*, Case No. 2:09-cv-00058-MCE-DAD (E.D. Cal. 2009), ¶ 31.

The New York Times also reported that donors to groups supporting Prop 8 received death threats. Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times, Feb. 8, 2009, at BU3. An official proponent of Prop 8 reported he was “threatened to be killed” and “told to leave the country.” Declaration of Hak-Shing William Tam in Support of Defendant-Intervenors’ Motion for a Protective Order at 4, *Perry v. Schwarzenegger*, 704

F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-2292-VRW).

Newsweek, in a story about harassment involving Referendum 71 (a controversial Washington State ballot measure), described an Internet post that stated, “I advocate using violence against the property of ALL of those who are working tirelessly to HURT my family; starting with churches and government property . . . any NORMAL man would be driven to get a gun and kill those who tried such evil cruelty against his loved ones.” Krista Gesaman, *Threats, Legal Action in Washington’s Gay-Marriage Debate*, Newsweek (Sept. 8, 2009), <https://www.newsweek.com/threats-legal-action-washingtons-gay-marriage-debate-211642>. The posting specifically named the campaign manager for one of the groups supporting Referendum 71, who then “received many harassing and threatening emails,” Plaintiffs’ Renewed Notice of Motion and Motion for Protective Order at 8, *Doe v. Reed*, 823 F. Supp. 2d 1195 (No. 3:09-cv-05456-BHS), including one email from an individual who “stated that he hoped that [the campaign manager and his wife] would have to watch [their] daughters being molested and raped,” Plaintiffs’ Response to Defendants’ Motion for Summary Judgment Ex. 13, at ¶ 4, *Doe v. Reed*, 823 F. Supp. 2d 1195 (No. 3:09-cv-05456-BHS).

In 2009, shortly after Maine voters approved a ballot measure to overturn same-sex marriage legislation adopted by the state legislature, the headquarters of a group that had supported the ballot measure received a voicemail stating, “‘You will be dead. Maybe not today, not tomorrow. But soon you’ll be dead.’” *Threats Made Against Gay Marriage*

Opponents in Maine, Bangor Daily News (Nov. 9, 2009), <https://bangordailynews.com/2009/11/09/politics/threats-made-against-gay-marriage-opponents-in-maine>.⁷

3. Physical Violence

Other incidents of retaliation against Prop 8 supporters involved actual, personal physical violence. For example, a Prop 8 supporter who was distributing campaign signs was taken to the hospital for 16 stitches after being punched in the face by someone attempting to take and destroy the signs. *Attack Outside of Catholic Church Part of 'Wave of Intimidation,' Says Yes on 8*, Catholic News Agency (Oct. 15, 2008), https://www.catholicnewsagency.com/news/attack_outside_of_catholic_church_part_of_wave_of_intimidation_says_yes_on_8.⁸

Supporters holding signs and distributing materials were “victims of physical assaults such as being spat upon and having hot coffee thrown on them by passengers in passing automobiles.” Declaration of

⁷ See also, *Question 1 Backers Receive Death Threats, Former Homosexual Leader Says They Should Not Live in Fear*, Catholic News Agency (Nov. 16, 2009), https://www.catholicnewsagency.com/news/question_1_backers_should_not_live_in_fear_after_death_threats_former_homosexual_leader_says (reporting same death threat with slightly different wording and also reporting second death threat).

⁸ See also Seth Hemmelgarn, *Prop 8 Fight Gets Ugly on Both Sides*, Bay Area Reporter (Oct. 16, 2008), <https://www.ebar.com/index.php?ch=news&sc=&sc3=&id=239406&pf=1>; and *Prop. 8 Supporter Allegedly Attacked in Modesto*, KCRA TV (Oct. 15, 2008), https://www.nbcbayarea.com/news/politics/Prop_8_Supporter_Allegedly_Attacked_In_Modesto.html.

Ronald Prentice in Support of Defendant-Intervenors' Motion for a Protective Order at 4, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv- 2292-VRW). In another incident, an elderly woman was spit at while protestors knocked out of her hands and stomped on a cross she carried. *The Price of Prop 8, supra*, at 10 & nn.80-83. And a small group of Christians were harassed to the point of requiring police protection when an angry crowd apparently took them for Prop 8 supporters. *The Price of Prop 8, supra*, at 10 & nn.84-88.

4. Destruction of Livelihood

In addition, there have been numerous reports of “widespread economic reprisals.” Reply Brief for Appellant at 28-29, *Citizens United*, 558 U.S. 310 (No. 08-205). Employers of Prop 8 supporters have been targeted, resulting in some of them having to resign, take a leave of absence, or otherwise lose professional opportunities. See Opinion, *Prop. 8 – Boycott, or Blacklist?*, L.A. Times (Dec. 10, 2008), <https://www.latimes.com/news/opinion/editorials/la-ed-boycott10-2008dec10,0,2703213.story> (stating that “postelection boycott efforts” by “defenders of same-sex marriage” escalated into “a vengeful campaign against individuals who donated” in support of Prop 8, “usually in the form of pressure on their employers”).⁹

⁹ See additional sources in *The Price of Prop 8, supra*, at 11 & nn.89-97, and incidents occurring long after Prop 8 vote at Phillip Matier and Andrew Ross, *Prop. 8 Aid Puts Paramount Board Member on Hold*, S.F. Chron. (Jan. 20, 2010), <https://www.sfgate.com/bayarea/matier-ross/article/Prop-8-aid-puts-Paramount-board-member-on-hold-3202211.php> (report-

In another example, a high-level staff member of the U.S. Olympic Team was pressured to resign based on criticism involving his support of Prop 8. Juliet Macur, *Facing Criticism, U.S. Official Quits*, N.Y. Times (May 6, 2011), <https://www.nytimes.com/2011/05/07/sports/olympics/07usoc.html>. The director of the nonprofit California Musical Theater gave \$1,000 to support the initiative; he was forced to resign after artists complained to his employer. John R. Lott Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides*, Wall Street Journal (Dec. 26, 2008), <https://web.archive.org/web/20150105005625/www.wsj.com/articles/SB123025779370234773>. And the director of the Los Angeles Film Festival was forced to resign after it was reported he gave \$1,500 to Prop 8 and opponents threatened to boycott and picket the next festival. *Ibid.*

In Washington, D.C., a university placed one of its top employees on administrative leave simply for signing a petition to allow Maryland voters to vote on the question of marriage directly. See, e.g., Angela McCaskill, *Gallaudet University Chief Diversity Officer, Placed on Leave for Signing Anti-Gay Marriage Petition*, Huffington Post (Oct. 18, 2012), https://www.huffpost.com/entry/angela-mccaskill-gallaudet-gay-marriage-petition_n_1955814.html. After the petition signatures were posted online, a faculty colleague reportedly saw the signature and submitted a complaint to the university's president asking for disciplinary action against the employee.

ing that donation to Prop 8 “appears to have cost” the donor “his seat on the board that oversees Oakland’s historic Paramount Theatre”).

See Dominique Ludvigson, Opinion, *Marriage Debate: Reason to Worry About Free Speech and Religious Freedom*, St. Paul Pioneer Press (updated Nov. 11, 2015), <https://www.twincities.com/2012/10/28/dominique-ludvigson-marriage-debate-reason-to-worry-about-free-speech-and-religious-freedom>. The employee was later vindicated, but the university took nearly three months to reinstate her employment. *Angela McCaskill Reinstated: Gallaudet University Diversity Officer Returns Three Months After Signing Anti-Gay Marriage Petition*, Huffington Post (Jan. 8, 2013), https://www.huffpost.com/entry/angela-mccaskill-reinstated-gallaudet_n_2432838.

Evidence of harm to those who supported Prop 8 has persisted, even years after its adoption: “Just days after taking the job, Brendan Eich has resigned as chief executive of Mozilla, the maker of Firefox, after coming under fire for his 2008 support of Proposition 8.” Salvador Rodriguez, *Mozilla CEO Brendan Eich resigns under fire for supporting Prop. 8*, L.A. Times (Apr. 3, 2014), <https://articles.latimes.com/2014/apr/03/business/la-fi-tn-mozilla-ceo-resigns-under-fire-prop-8-20140403>. The JavaScript founder was forced to resign “after he came under sharp criticism for donating \$1,000 to a campaign that supported Proposition 8.” *Id.*

5. Harassment in the Workplace

“[S]everal donors” to Prop 8 allegedly “had . . . their employees harassed, and . . . received hundreds of threatening emails and phone calls.” Declaration of Frank Schubert in Support of Defendant-Intervenors’ Motion for a Protective Order at 6, *Perry v.*

Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292VRW).

For example, a woman who had managed her popular, family-owned restaurant for 26 years was forced to resign after it was made public that she gave \$100 to Prop 8, because “throng[s] of [angry] protesters” repeatedly arrived at the restaurant and “shout[ed] ‘shame on you’ at customers.” Steve Lopez, *Prop. 8 Stance Upends Her Life*, Los Angeles Times (Dec. 14, 2008), <https://articles.latimes.com/2008/dec/14/local/me-lopez14>. The police even had to “arriv[e] in riot gear one night to quell the angry mob” at the restaurant. “I’ve almost had a nervous breakdown. It’s been the worst thing that’s ever happened to me,” she said. *Ibid.*

While boycotting businesses over corporate practices or positions is an accepted and time-honored American political tactic, punishing employers because of their employees’ personal political viewpoints is a very different, troubling tactic that betrays a raw desire to suppress a particular viewpoint under threat of losing one’s very livelihood.

V. The Ninth Circuit Failed to Consider the Severe Harm Suffered by Prop 8 Supporters in Assessing the Grave Risks of Disclosure Facing Petitioners and Their Donors.

All of the above examples of retaliation and harm inflicted upon supporters of Prop 8 were provided to the Ninth Circuit by way of amicus briefs filed by the Defense Fund in those proceedings. Notably, in addressing the “actual burden” on First Amendment

rights created by mandated blanket disclosure of unredacted Schedule B donor information to the Attorney General, the Ninth Circuit acknowledged that the plaintiffs were not necessarily limited to their own experiences in producing evidence to show “a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties,” and confirmed that evidence of retaliation suffered by supporters of “similar organizations” can also be probative as well. AFPP App. 24a, n.4.

But on the question of whether disclosure of confidential Schedule B information to the Attorney General is likely to subject the Petitioners’ donors to threats, harassment, and reprisal, the panel’s review of the evidence was quite narrow and certainly did not reach beyond Petitioners’ first-hand experiences. Also, although the panel conceded that the “evidence undeniably shows that some individuals publicly associated with the Foundation have been subjected to threats, harassment or economic reprisals,” AFPP App. 31, that evidence was largely discounted on grounds that it “pertains to individuals who are publicly identified with a number of controversial activities or organizations, making it difficult to assess the extent to which the alleged harassment was caused by a connection to the Foundation... in particular.” AFPP App. 31, n.6. Finding those uncertainties to be insurmountable, and considering *none* of the examples (both presented at trial and via amicus briefs) regarding the experiences of financial supporters of other similar organizations, the panel found no evidence that public disclosure of Schedule

B information would likely subject Petitioner's contributors, in particular, to retaliation. AFPF App. 34.

CONCLUSION

The real harms suffered by AFPF and the Law Center (as well as amicus Defense Fund) and their donors are not unique or isolated. The testimony of experts at trial, the shared experiences of other charities, and common sense inform the conclusion that all nonprofit organizations who maintain confidential donor information (especially those that engage in controversial public issues, no matter what end of the political spectrum) are exposed to the same public threats, harassment, intimidation, and retaliation, much of which is today enabled by information technology that wasn't even imagined at the time of *NAACP v. Alabama*.

The outcome of this case has real consequences. It is inevitable that people *will* suffer tangible harm if the California Attorney General's unlawful practice is allowed to stand. The petitions for writs of certiorari should be granted on this issue of exceptional importance.

Respectfully submitted,

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