

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 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**

ANDREW P. PUGNO
Counsel of Record
LAW OFFICES OF ANDREW P. PUGNO
8261 Greenback Lane, Suite 200
Fair Oaks, California 95628
(916) 608-3065
andrew@pugnolaw.com

*Counsel for Amicus Curiae
Proposition 8 Legal Defense Fund*

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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 a legal defense of Prop 8 through public interest litigation.³ Just like Petitioners Americans for Prosperity Foundation (“AFPF”) and Thomas More Law Center, the Defense Fund is also prohibited from undertaking election-related advocacy.

The Defense Fund’s financial contributors naturally include some donors who had publicly supported the Prop 8 election campaign. But as relevant to the issues presented in these cases, the

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. 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).

Defense Fund also received post-election *charitable* contributions from other donors who had not contributed to the political campaign for fear of the risks of public disclosure. These non-political donors agreed to financially support the Defense Fund's work on the solemn assurance that their charitable contributions would not be publicly disclosed.

Much like Petitioners, the Defense Fund is facing the California Attorney General's demands for unredacted Schedule B information that reveals the identities of its largest donors. This puts the Defense Fund—and apparently all other charities that fundraise in California—in a quandary. If the Defense Fund refuses to disclose its donors' protected identities, it faces harsh enforcement action and penalties including revocation of its California tax-exempt status. On the other hand, if the Defense Fund releases the information, it betrays 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 highlight 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 when publicly exercising First Amendment rights to influence elections and the legislative process, it is not a requirement imposed upon donors when financially supporting nonprofit charities.

Recent events in which publicly identified donors 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 that were not even imagined in the days of donor disclosure cases like *NAACP v. Alabama*.

The well-documented and judicially acknowledged history of severe harm caused by publicly disclosing the identities of supporters of California’s Prop 8 illustrates the real and serious risks of harassment, intimidation, and retaliation that donors face when supporting controversial causes.

ARGUMENT

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

“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 it has never been required of donors to financially

support the charitable work of nonprofit organizations.

A donor's understandable 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.

An individual's willingness to tolerate "harsh criticism" and other reprisals for 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 to advance 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*, 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 importance of 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 exacting scrutiny, under which narrow tailoring is excused and the burden of civic courage is heaped

⁴ To the contrary, civil and criminal statutes normally shield charitable donors’ identities from public disclosure to ensure their rights of anonymity and 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.

upon nonprofit charities and their supporters, remains unsupported.

II. The Rise of the Internet Has Created New Ways to Inflict Serious and Irreparable Harm Upon Donors Since the Days of Donor Disclosure Cases Like *NAACP v. Alabama*.

The rise of the Internet and our evolution into a high-information society have created new and serious risks of harm today that were not even imagined in the days of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Many public disclosure policies, originally based on ideas of transparency and accountability, now have insufficient safeguards for privacy, “given that today’s data analysis and computation capabilities could not have been predicted to reach the current level even throughout the late 1990s and early 2000s.”⁵

Donor disclosure laws largely originated before the Internet, when donors’ information resided “in government filing cabinets and would largely be inaccessible to many people.” Graft et al., *supra* note 5, at 14. As explained by Kim Alexander, president of the California Voter Foundation and a pioneer of electronic donor disclosure laws: “‘Nobody anticipated when the laws were initially written that reports were going to be widely accessible to everybody in the world.’ . . . ‘Identity theft was not an

⁵ Auralice Graft, Stefaan Verhulst & Andrew Young, *EIGHTMAPS.COM: The Unintended Negative Consequences of Open Data 4* (January 2016), <https://odimpact.org/files/case-studies-us-eightmaps.pdf>.

issue at the time. It didn't matter so much if people knew your address – there was not much they could do with it. Now you can do things like mash it up with other data – which is what happened with Eightmaps,'” *ibid.*, referring to the online maps targeting the locations of homes and businesses of Prop 8 supporters.

This “mashing up of publicly accessible and manually collected data” from other sources to create online tools targeting donors for retaliation creates a whole new “chilling effect.” *Id.* at 11. “While individual-level voter and political donor data has been available to the public for years, mashups were far from the norm even late into the [20]00s.” *Ibid.* As Alexander said: “This idea of giving people a map to someone’s home is a way of inviting widespread attack on that person. When you put that on the Internet, you are literally providing an invitation or suggestion that people go to this person’s home and confront them. This was threatening on an exponential level.’” *Ibid.*

The early signs of the new and dangerous ways in which the “mashing up” of publicly disclosed donor information with other data sources can lead to donors being “blacklisted, threatened, or otherwise targeted for retaliation” are described in *Citizens United v. FEC*, 558 U.S. 310, 480-85 (2010) (Thomas, J., concurring in part and dissenting in part). Recounting the many examples of harm suffered by Prop 8 supporters whose donations were publicly reported (including online maps targeting their homes and businesses, 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 individual donors, “hoping to create a chilling effect that will dry up contributions.” *Ibid.*⁶

This chilling effect flows from the abuse of publicly disclosed donor data to prevent people from speaking, in that it “enable[s] 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.* That is why the highest form of proactive judicial scrutiny should apply to aggressive disclosure mandates that tolerate “death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening

⁶ Citing Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. Times (Aug. 7, 2008), <https://www.nytimes.com/2008/08/08/us/politics/08donate.html>.

warning letters as the price for engaging in core political speech, the primary object of First Amendment protection.” *Id.* at 485 (cleaned up).

III. The Harms Suffered by Prop 8 Supporters Show That Public Threats, Harassment, Intimidation, and Retaliation Against Publicly Identified Donors Are Real, Severe, and Effective.

The vilification of individuals who take a public stand on controversial issues can be severe. Without doubt, 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”). In particular, the events surrounding Prop 8 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 issues.

In what the New York Times called the “ugly specter of intimidation,”⁷ publicly identified donors

⁷ Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times, Feb. 7, 2009, <https://www.nytimes.com/2009/02/08/business/08stream.html> [<https://web.archive.org/web/20201211201429/https://www.nytimes.com/2009/02/08/business/08stream.html>].

and other supporters of Prop 8 were “subject to widespread political reprisal, stalking, assault, intimidation, employment discrimination, economic and other forms of retaliation.” 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). “[O]rganizations, including churches, that had supported the measure were attacked, vandalized, and targeted for revenge.” *Ibid.* These real-world harms are well documented. 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”).

The end goal of these widespread attacks on Prop 8 supporters was to create sufficient *fear* to suppress their continued exercise of First Amendment rights. Fred Karger, who launched Californians Against Hate to organize boycotts and other retaliation

against Prop 8 donors, openly acknowledged that the strategy was “intimidation.”⁸ “‘One of my goals was to make it socially unacceptable to make these mega-donations.’ . . . ‘I want them to think twice before writing that check.’” Richardson, *supra* note 8. Sadly, Mr. Karger’s zeal for this tactic appears to be payback for the intimidation *he* suffered when public disclosure of his \$100 donation against a controversial ballot measure in 1978 “nearly cost him his job.” *Ibid.* He said: “‘It was a very scary time. Gay people have been going through this for decades. Now our opponents are getting a taste of what it’s like.’” *Ibid.*

The targeting of Prop 8 supporters for retaliation and intimidation proved to be effective. In the wake of the backlash against Prop 8 donors, organizations that had supported the measure suffered steep drops in donations. “This reflected a growing concern that contributors . . . would encounter pushback, shaming, intimidation, and even retaliation . . .” William N. Eskridge Jr. & Christopher R. Riano, *Marriage Equality: From Outlaws to In-Laws* 489-90 (2020).

Further detail of the harassment and reprisals experienced by Prop 8 donors include:

1. Vandalism

Many Prop 8 supporters were targeted for vandalism to their homes and property,⁹ as well as to

⁸ Valerie Richardson, *Pestered Prop 8 Donors File Suit*, Wash. Times (March 23, 2009), <https://www.washingtontimes.com/news/2009/mar/23/pestered-prop-8-donors-file-suit>.

⁹ See, e.g., Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328, at 3-4 & nn.8, 12, 15,

cars and other vehicles. *See* Messner *supra* note 9, 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.¹⁰

After voters approved Prop 8, many houses of worship were also targeted.¹¹ In just the ten days after the election, at least seven Mormon houses of worship in Utah and ten in California were vandalized. *See* Eskridge & Riano, *supra* at 679.

2. Death Threats

Prop 8 supporters were also targeted with death threats. One such threat was made by email against the mayor of the City of Fresno stating, “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

17-18 (Oct. 22, 2009), http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf

¹⁰ *See* Matthai Kuruvila, *Mormons Face Flak for Backing Prop. 8*, S.F. Chron. (Feb. 10, 2012), <https://www.sfgate.com/bayarea/article/Mormons-face-flak-for-backing-Prop-8-3264077.php>.

¹¹ *See* Jennifer Garza, *Feds Investigate Vandalism at Mormon Sites*, Sacramento Bee (Nov. 14, 2008), <http://www.sacbee.com/crime/story/1399018.html> [<https://web.archive.org/web/2020112021134/https://web.archive.org/web/20090222214402/http://www.sacbee.com/crime/story/1399018.html>]. *See also* Chelsea Phua, *Mormon Church in Orangevale Vandalized in Wake of Prop. 8 Vote*, Sacramento Bee (Nov. 9, 2008), <http://www.sacbee.com/101/story/1382472.html> [<https://web.archive.org/web/2008112043118/http://www.sacbee.com/101/story/1382472.html>].

banner in front of their house or bumper sticker on the car in Fresno is in danger of being shot or firebombed.”¹²

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). The New York Times also reported that even donors to other groups supporting Prop 8 also received death threats. Stone, *supra* note 7.

Newsweek, in a story about harassment involving Referendum 71 (a controversial Washington State ballot measure like Prop 8), 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.”¹³ 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

¹² ABC30, *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.

¹³ 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>.

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 ¶ 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 that state’s legislature, the headquarters of a group that supported the ballot measure received a voicemail stating: “‘You will be dead. Maybe not today, not tomorrow. But soon you’ll be dead.’”¹⁴

3. Physical Violence

Other incidents of retaliation against Prop 8 supporters involved personal physical violence. For example, a Prop 8 supporter who was distributing campaign signs was taken to the hospital for 16

¹⁴ Associated Press, *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>. See also, *Question 1 Backers Receive Death Threats, Former Homosexual Leader Says They Should Not Live in Fear*, Catholic News Agency (Nov. 14, 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).

stitches after being punched in the face by an attacker attempting to take and destroy the signs.¹⁵

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 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. Messner, *supra* note 9, 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. *Id.* at 10 & nn.84-88.

4. Economic Reprisals

Publicly identified Prop 8 supporters also suffered “widespread economic reprisals.” Reply Brief for Appellant at 28-29, *Citizens United*, 558 U.S. 310 (No. 08-205). Employers of Prop 8 supporters were

¹⁵ *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. 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 KCRA TV, *Prop. 8 Supporter Allegedly Attacked in Modesto*, NBC Bay Area (Oct. 15, 2008), https://www.nbcbayarea.com/news/politics/Prop_8_Supporter_Allegedly_Attacked_In_Modesto.html.

targeted, resulting in some of them having to resign, take a leave of absence, or otherwise lose professional opportunities.¹⁶

In another example, a high-level staff member of the U.S. Olympic Team was pressured to resign after criticism involving his support of Prop 8.¹⁷ The director of the nonprofit California Musical Theater gave \$1,000 to support the initiative; he was forced to resign after other artists complained to his employer.¹⁸ And the director of the Los Angeles Film Festival was forced to resign after it was reported he gave \$1,500 to Prop 8, causing opponents to threaten to boycott and picket the next festival. Lott & Smith, *supra* note 18.

¹⁶ See Opinion, *Prop. 8 – Boycott, or Blacklist?*, L.A. Times (Dec. 10, 2008), <https://www.latimes.com/news/opinion/editorials/la-ed-boycott10-2008dec10-story.html> (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”). See additional sources in Messner, *supra* note 9, 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. (June 25, 2012), <https://www.sfgate.com/bayarea/matier-ross/article/Prop-8-aid-puts-Paramount-board-member-on-hold-3202211.php> (reporting that donation to Prop 8 “appears to have cost” the donor “his seat on the board that oversees Oakland’s historic Paramount Theatre”).

¹⁷ 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>.

¹⁸ John R. Lott Jr. & Bradley Smith, *Donor Disclosure Has Its Downsides*, Wall St. J. (Dec. 26, 2008), www.wsj.com/articles/SB123025779370234773.

Even years later, donors who supported Prop 8 continue to suffer economic reprisals. In 2014, Brendan Eich, chief executive of Mozilla (the maker of Firefox), was forced to resign just days after taking the job, under sharp criticism for making a \$1,000 donation in 2008 to support Prop 8.¹⁹ Even some in the lesbian, gay, bisexual, and transgender community criticized such unfair punishment, calling the affair a “witch hunt.”²⁰

Andrew Sullivan, an influential gay activist and commentator, slammed the attacks on Mr. Eich. Wildermuth, *supra* note 20. “Will he now be forced to walk through the streets in shame? . . . The whole episode disgusts me – as it should disgust anyone interested in a tolerant and diverse society.”²¹ He rightly observed that “hounding our opponents” with “fanaticism” is all “about intimidating the free speech of others.” Sullivan, *supra* note 21. “When people’s lives and careers are subject to litmus tests, and fired if they do not publicly renounce what may well be

¹⁹ 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> [<https://web.archive.org/web/20180308113812/https://articles.latimes.com/2014/apr/03/business/la-fi-tn-mozilla-ceo-resigns-under-fire-prop-8-20140403>].

²⁰ John Wildermuth, *Mozilla’s Prop. 8 Uproar Reveals Much About Tech, Gay Rights*, SFGate (Apr. 11, 2014), <https://www.sfgate.com/politics/article/Mozilla-s-Prop-8-uproar-reveals-much-about-tech-5393875.php>.

²¹ Andrew Sullivan, *The Hounding of a Heretic*, The Dish (April 3, 2014, 5:03 PM), <http://dish.andrewsullivan.com/2014/04/03/the-hounding-of-brendan-eich>.

their sincere conviction, we have crossed a line. This is McCarthyism applied by civil actors.”²²

5. Harassment in the Workplace

Many of Prop 8’s publicly identified supporters who run businesses “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 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.”²³ 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. Lopez, *supra* note 23.

²² Andrew Sullivan, *Dissents of The Day*, The Dish (April 4, 2014, 12:05 PM), <http://dish.andrewsullivan.com/2014/04/04/dissents-of-the-day-63>.

²³ Steve Lopez, *Prop. 8 Stance Upends Her Life*, L.A. Times (Dec. 14, 2008), <https://www.latimes.com/archives/la-xpm-2008-dec-14-me-lopez14-story.html> [<https://web.archive.org/web/20201210222702/https://www.latimes.com/archives/la-xpm-2008-dec-14-me-lopez14-story.html>].

IV. 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.

In 2010, this Court was asked to stay the broadcast of the federal trial in San Francisco over Prop 8. In evaluating the likelihood that irreparable harm would result from the denial of a stay, the Court looked to the uncontroverted evidence that Prop 8's advocates "have been subject to harassment as a result of public disclosure of their support." *Hollingsworth v. Perry*, 558 U.S. 183, 185 (2010) (per curiam). Donors supporting Prop 8 had received death threats, envelopes containing white powder, and confrontational phone calls and e-mail messages from opponents of Prop 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-Prop 8 businesses and urging others to boycott them in retaliation, *ibid.*, and numerous instances of vandalism and physical violence against those identified as Prop 8 supporters. *Id.* at 185-86. 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, warranting a stay of the broadcast. *Id.* at 195-96.

Before the instant consolidated cases reached this Court for review, the detailed information above (and more) about the retaliation and harm inflicted upon supporters of Prop 8 was provided to the Ninth Circuit

by the parties and amici alike. Notably, in addressing the “actual burden” on First Amendment rights imposed by 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. AFPF App. 24a & n.4.

Despite this, on the question whether disclosure of confidential Schedule B information may expose the Petitioners’ donors to threats, harassment, and reprisals, the panel’s *de novo* review of the evidence was actually 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,” AFPF App. 31a, 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 or the Law Center in particular.” AFPF App. 31a 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 donors to other similar organizations, the panel

side-stepped the issue and stopped short of concluding that public disclosure of Schedule B information would likely subject Petitioners' contributors, in particular, to retaliation. AFPP App. 34a.

The Ninth Circuit's discounted treatment of this issue contributes heavily to the overall error warranting reversal. Its refusal to acknowledge the strong likelihood of retaliation facing Petitioners and their donors stands starkly against both the evidence at trial and this Court's unequivocal recognition of the grave risks faced by donors to controversial causes, including Prop 8 supporters, *Hollingsworth v. Perry*, *supra*.

CONCLUSION

The real harms suffered by AFPP and the Thomas More Law Center (as well as the 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 nonprofits that maintain confidential donor information (especially those engaged in controversial 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 donor disclosure cases like *NAACP v. Alabama* were decided. The outcome of these consolidated cases will create real consequences. Donors and the charities they support *will* suffer tangible harm if the California Attorney General's unlawful practice is allowed to stand. The decisions of the Ninth Circuit should be reversed.

Respectfully submitted,

ANDREW P. PUGNO

Counsel of Record

LAW OFFICES OF ANDREW P. PUGNO

8261 Greenback Lane, Suite 200

Fair Oaks, California 95628

(916) 608-3065

andrew@pugnolaw.com

Counsel for Amicus Curiae

Proposition 8 Legal Defense Fund

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