

Nos. 16-55727 & 16-55786

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,
Plaintiff-Appellee/Cross-Appellant

v.

XAVIER BECERRA,
in his official capacity as the Attorney General of California,
Defendant-Appellant/Cross-Appellee

Appeal from the U.S. District Court for the Central District
of California, No. 2:14-cv-09448-R-FFM, Judge Manuel L. Real

**BRIEF OF *AMICUS CURIAE* PROPOSITION 8
LEGAL DEFENSE FUND IN SUPPORT OF
PLAINTIFF-APPELLEE/CROSS-APPELLANT
AMERICANS FOR PROSPERITY FOUNDATION**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Proposition 8 Legal Defense Fund is a 501(c)(3) nonprofit corporation organized under the laws of the State of California. It has no parent corporation and does not issue stock.

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STATEMENT OF INTEREST¹

Amicus curiae Proposition 8 Legal Defense Fund (“Fund”) is a nonprofit organization that was formed shortly after the passage of Proposition 8 (“Prop 8”) in the 2008 general election.² The Fund was founded primarily to provide for the legal defense of Prop 8 through public interest litigation.³ The Fund’s financial contributors naturally included donors who had supported the Prop 8 campaign, many of which had suffered as victims of the widespread threats, harassment and reprisals addressed in this brief. But the Fund also received

¹ All parties have consented to the filing of this brief of *amicus curiae*. No party’s counsel authored this brief in whole or in part; and no party, party’s counsel, or any person other than the Fund contributed money that was intended to fund preparing or submitting this brief.

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 Fund. The Attorney General not only declined to defend the initiative, but went further and affirmatively litigated against its constitutionality. *See Perry v. Brown*, 52 Cal.4th 1116, 1129 (Cal.2011).

nonpolitical post-election donations from additional supporters who had been too fearful of retaliation to donate during the campaign, yet were willing to financially support the Fund with the solemn assurance that their charitable contributions would never be publicly disclosed.

Much like appellee/cross-appellant Americans for Prosperity Foundation (“AFPF”), the Fund is currently facing demands by the Attorney General for un-redacted Schedule B information revealing the Fund’s confidential listing of its largest donors. This puts the Fund—like many other nonprofit charities—in a quandary. If the Fund refuses to disclose the protected donor identities, it faces harsh enforcement action including penalties and revocation of its tax-exempt status. On the other hand, if the Fund releases the information, it violates its obligation to donors who were promised that their privacy would be protected, newly exposing them to the threats, harassment, and retaliation described in this brief.

INTRODUCTION

The Fund offers this brief to illuminate the real-world threats, intimidation and harassment that its political donors have suffered (whose identities were made public during the Prop 8 campaign), and which are reasonably *certain*—not just probable—to befall its nonprofit donors who have, until now, been able to rely on the privacy protections otherwise afforded supporters of charitable organizations.

In the principal briefing, the parties have addressed the critical interests of nonprofit organizations and the constitutional harm they suffer when their donors' private information is made public or needlessly handed over to government agencies that are institutionally incapable of assuring their confidentiality. But there are also the important First Amendment interests of the individual donor whose privacy—not to mention safety and livelihood—is at risk of harm. Those risks are not speculative. From personal experience those donors can vouch they are real and serious. To assist this Court in assessing the “seriousness of the *actual* burden” on donors' individual First Amendment rights, AG Brief 25, this brief focuses on the personal

experiences of the Fund's donors and others who have been publicly-identified with related controversial issues.

ARGUMENT

I. The Public Threats, Harassment, Intimidation And Retaliation Faced By Donors Of Controversial Organizations Are Real, Not Speculative.

The vilification of individuals who take a public stand on controversial issues can be severe. Especially in this age of high information, standing up in public for one's political or religious views in the face of "harsh criticism" requires a great deal of "civic courage." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). 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 v. Valeo*, 424 U.S. 1, 64, 69, 71-72 (1976). But, as shown by a substantial and growing 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,⁴ available sources help illustrate what the New York Times has called the “ugly specter of intimidation” experienced by people who supported Prop 8,⁵ as well as harassment and reprisals experienced by others outside California and in contexts other than Prop 8.

To be fair, some opponents of Prop 8 condemned certain instances of harassment and reprisals. *See, e.g.*, Thomas M. Messner, *The Price of Prop 8*, at 13 n.111 (2009) (“*Price of Prop 8*”) (collecting examples).⁶ In many cases, however, opponents of Prop 8 responded by soft pedaling, downplaying, and generally disparaging the real and serious harm suffered by Prop 8 supporters. The Supreme Court, in contrast, has recognized that such harassment and reprisals are “cause for concern.”

⁴ *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-cv-2292-VRW) ECF No. 187-13 (asserting that fear of “further threats and harassment” deterred some individuals from submitting declarations in litigation).

⁵ Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009), BU3.

⁶ *Available at* <http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8>.

Citizens United v. FEC, 558 U.S. 310, 370 (2010) (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 disclosing donor information on searchable websites).

II. Supporters Of California’s Prop 8 Experienced Severe Harm, Not Just Harsh Criticism.

Donors and other supporters of Prop 8 were “subject to widespread 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. *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., Price of Prop 8, supra*, at 3-4 & nn.8, 12, 15, 17-18, as well as to cars and other vehicles, *see id.* at 3 & nn.9-12, 15-16. In one example, a household that had supported Prop 8 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), B1.

Houses of worship also were vandalized. In the days after Prop 8 passed, many Mormon Church buildings were also vandalized. *See* Jennifer Garza, *Feds Investigate Vandalism at Mormon Sites*, Sacramento Bee (Nov. 14, 2008).⁷ *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 threat against the mayor of Fresno via email 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

⁷ *Available at* <http://www.freerepublic.com/focus/news/2132446/posts>.

shot or firebombed.” John-Thomas Kobos, *Proposition 8 Email Threats*, KFSN-TV (Nov. 7, 2008).⁸ See also Complaint in *ProtectMarriage.com —Yes on 8 v. Bowen*, Case No. 2:09-cv-00058-MCE-DAD (ED 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), 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

⁸ Available at <http://abc30.com/archive/6494921/>

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 (Sep. 8, 2009).⁹ 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*

⁹ Available at <http://www.newsweek.com/threats-legal-actionwashingtons-gay-marriage-debate-211642>.

Marriage Opponents in Maine, Bangor Daily News (Nov. 9, 2009, 10:28 AM).¹⁰

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).¹¹

¹⁰ Available at <http://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. 16, 2009), available at http://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).

¹¹ Available at http://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), <http://www.ebar.com/news/article.php?sec=news&article=3403>; and *Prop. 8 Supporter Allegedly Attacked In Modesto*, KCRA TV (Oct.

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.” Decl. 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. *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. *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

15, 2008),
http://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. *See* Editorial, *Prop. 8 – Boycott, or Blacklist?*, L.A. Times (Dec. 10, 2008) (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”).¹²

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).¹³ The director of the nonprofit California Musical Theater gave \$1,000 to support the initiative; he was forced to resign

¹² Available at <http://www.latimes.com/news/opinion/editorials/la-ed-boycott10-2008dec10,0,2703213.story>. *See* additional sources in *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) (reporting that donation to Prop “appears to have cost” the donor “his seat on the board that oversees Oakland’s historic Paramount Theatre”), <http://www.sfgate.com/bayarea/matier-ross/article/Prop-8-aidputs-Paramount-board-member-on-hold-3202211.php#ixzz2IF0AHhbw>.

¹³ Available at <http://www.nytimes.com/2011/05/07/sports/olympics/07usoc.html>.

after artists complained to his employer. Lott & Smith, *Donor Disclosure Has Its Downsides*, Wall Street Journal (Dec. 26, 2008), A13.¹⁴ 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 (Nov. 18, 2012).¹⁵ 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. *See* Dominique Ludvigson, *Op., Marriage Debate: Reason to Worry About Free Speech and Religious Freedom*, St. Paul Pioneer Press

¹⁴ Available at <http://www.wsj.com/articles/SB123025779370234773>.

¹⁵ Available at http://www.huffingtonpost.com/2012/10/10/angelamccaskill-gallaudet-gay-marriage-petition_n_1955814.html.

(Oct. 29, 2012).¹⁶ 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).¹⁷

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).¹⁸ The Java-Script founder was forced to resign “after he came under sharp criticism for donating \$1,000 to a campaign that supported Proposition 8.” *Id.*

¹⁶ *Available at* http://www.twincities.com/opinion/ci_21882345/dominique-ludvigson-marriage-debate-reason-worry-about-free.

¹⁷ *Available at* http://www.huffingtonpost.com/2013/01/08/angelamccaskill-reinstated-gallaudet_n_2432838.html.

¹⁸ *Available at* <http://articles.latimes.com/2014/apr/03/business/la-fi-tn-mozilla-ceo-resigns-under-fire-prop-8-20140403>.

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.” Decl. 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), B1.¹⁹ 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

¹⁹ Available at <http://articles.latimes.com/2008/dec/14/local/me-lopez14>.

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.

III. The Judiciary Has Acknowledged The Severity Of The Harm Suffered By Prop 8 Supporters.

The story of harm 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*, 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.” *Hollingsworth v. 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.” 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.

In *Doe v. Reed, supra*, the Supreme Court rejected a facial challenge to the constitutionality of a state law making petition signatures accessible to the public, while leaving open the door to an as-applied challenge in connection with a particular initiative petition. In

his concurring opinion, Justice Alito acknowledged the “widespread harassment and intimidation suffered by supporters of California’s Proposition 8.” *Id.* at 205 (Alito, J., concurring). Citing references by other members of the Supreme Court to the harassment of Proposition 8 donors in earlier cases, Justice Alito observed, “[i]ndeed, if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions.” *Ibid.*

IV. The Serious Concerns Raised By The Harm Inflicted On Individuals Publicly Identified With Controversial Issues Is Often Unjustly Downplayed.

Just like the Attorney General and *amicus* Campaign Legal Center have done in this this case, many groups often respond to clear instances of harassment directed against publicly-disclosed supporters of controversial causes by disparaging the claim that those people face a real risk of harassment. In responding to reports of hostility and harassment against publicly-identified supports of traditional marriage, for example, some proponents of same-sex marriage have dismissed

them as “outlandish” and “cynical[],” Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al. in Support of Respondents, *Doe v. Reed*, 561 U.S. 186 (No. 09-559) (“Lambda Br.”) at 39, a “diversion strategy,” Bret Evans & Jeff Krehely, *Voters as Victims: A Right-Wing Sleight of Hand*, Center for American Progress (Apr. 27, 2010),²⁰ a “side issue” *id.*, “feint of victimization,” Lambda Br. at 4, “sleight of hand” and “hypocritical shamelessness.” Evans & Krehely, *supra*.

For example, a violent attack against a Prop 8 supporter who was reportedly taken to the hospital for medical treatment, *supra* at 11, was downplayed simply as “someone threw a punch in a scuffle,” Lambda Br. at 25. Elsewhere, the “extensive media coverage” of certain harassment surrounding Prop 8 is attributed to the “exotic” nature of the harassment, *id.* at 22, rather than to widespread concerns about breakdown of political discourse or the “unsettling consequences” of “disseminating contributors’ names and addresses to the public through searchable websites,” Reply Brief for Appellant at 29, *Citizens United*,

²⁰ Available at <http://www.americanprogress.org/issues/lgbt/news/2010/04/27/7683/voters-as-victims-a-right-wing-sleight-ofhand/>.

558 U.S. 310 (No. 08-205); *see* Dick Carpenter, *Neighbor Against Neighbor*, Wall St. J. (Apr. 28, 2010) (stating that posting personal information about Prop 8 donors on Internet “led to death threats, physical violence, vandalism and economic reprisals”).²¹

The destruction and theft of pro-Prop 8 signs have been disregarded because they, theoretically, caused no “personal physical harm.” Evans & Krehely, *supra*. But many types of harassment – such as death threats or loss of professional opportunities – involve no “physical” harm. Similarly, another source explains that threats against “visible advocates” on “hotly-contested issues” are an “unfortunate reality.” Lambda Br. at 27 (stating that people “who assume leadership in political campaigns” should not be “subjected to such threats” but it is “unfortunately not uncommon”). Even if true, this hardly makes exposing such threats “cynical[],” Lambda Br. at 39, “feint of victimization,” *id.* at 4.

²¹ Available at <http://www.wsj.com/articles/SB10001424052748703465204575208453830203396>.

These arguments are not unlike some of those made even in this case. For example, it is argued that “AFPF’s purported evidence of injury suffered in online forums and on social media is particularly unavailing since online harassment has become increasingly commonplace for many internet users.” (Brief for *Amicus Curiae* Campaign Legal Center, at 23.) This argument calls to mind the “everyone’s doing it” excuse, which is unfamiliar as a valid justification for tolerating harm to First Amendment rights.

In other cases, attempts to soft pedal violence and other hostilities come in the classic form of blaming the victim. Some for example, state that such people who suffer harassment “thrust themselves into a position where an unfriendly reaction was foreseeable.” *Lambda Br.* at 25. Similarly, the fact that threats and intimidation aimed at Prop 8 supporters took place while they were holding Prop 8 signs in public places is said to “evidenc[e]” those individuals’ “own actions” in directing their speech at a “potentially unfriendly audience,” *id.* at 35. Acts of violence simply can’t be excused by accusing the victim who exercises her First Amendment rights of “asking for it.”

V. The Schedule B Disclosure Requirement In This Case Is Facially Unconstitutional.

Because the Schedule B disclosure requirement is institutionally flawed and exposes donors of all nonprofit organizations to the real risks of serious harm raised by AFPP and the Fund, the blanket policy of collecting such confidential information is facially unconstitutional.

A. The Attorney General's Process For Collecting Confidential Schedule B Information Is Institutionally Flawed, Putting All Public Charities At Equal Risk Of Erroneous Disclosure.

The trial court found the Attorney General's "pervasive, recurring patten of uncontained Schedule B disclosures" to be "indefensible" and irreconcilable with assurances of confidentiality. (ER8, ln.15-21.) It is really not so shocking that inadvertent disclosures commonly occur when one considers the physical process by which the information is collected. As explained by the Attorney General, Schedule B information is not requested by, nor sent to, the Charitable Trusts Section for investigative or enforcement purposes. Rather, it is sent instead to the Registry, whose "different role" is as a "depository and custodian of documents," all of which are presumed public and systematically posted to the Registry's public-facing website. (AG Brief

8-9.) While opening and processing tens of thousands of submissions of presumed-public documents, only if clerical workers happen to notice a confidential Schedule B near the rear of an organization's annual filing, is it flagged for different treatment. *Ibid.* In other words, the *default* procedure is to systematically open, scan *and publicly post* each organization's filing. No wonder the error rate of inadvertent disclosure is so high.

Notably, those risks would be virtually non-existent if, as suggested by AFPPF, the information were individually requested by enforcement personnel of the Charitable Trusts Section—whose job does *not* involve posting documents online for the world to see. In any event, the Attorney General's blanket demand for confidential Schedule B information remains institutionally flawed, such that all nonprofit organizations—not just AFPPF or the Fund—remain at equal risk of improper public disclosure.

B. Because All Public Charities Face The Same Risk Of Improper Disclosure, And All Donors Face The Same Real-World Risks Of Harm Due To Disclosure, The Blanket Schedule B Requirement Should Be Held Facially Unconstitutional.

The real harms suffered by AFPP (and, for that matter, the Fund and its donors) are not unique or isolated. Both common sense and the testimony of experts at trial, ER519-521, 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 ex rel. Patterson*, 357 U.S. 449 (1958) and *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).

Thus, the court's analysis of AFPP's as-applied challenge should bear a strong resemblance to the analysis of the claim of facial invalidity, in the sense that the challenged requirement is not only "applied" to all charities in the same way, but also with the same serious risks of harm.

VI. The Internet Has Created New Ways To Inflict Serious And Permanent Harm That Simply Didn't Exist In The Days Of *NAACP v. Alabama* And *Socialist Workers*.

It is argued in this case that constitutional protection is warranted only where groups and their supporters can claim the same forms of harm that warranted exemptions in *Socialist Workers* and *NAACP v. Alabama* almost 70 years ago. For example, it is argued that there is “simply no comparison between AFPF and the groups that have historically qualified for exemption” because AFPF does not face an “atmosphere of violent hostility” including bombing, shootings, cross burnings and other “major acts of violence.” Brief for *Amicus Curiae* Campaign Legal Center, at 16-17. *See also* AG Brief at 38 (suggesting that only “government-sponsored hostility and brutal, pervasive private violence” is sufficient).

At some point, the courts will need to come into the 21st century on this issue. It is a different world now. 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 *Socialist Workers* and *NAACP v. Alabama*.

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’ concurring and dissenting opinion in *Citizens United*, 558 U.S. at 480-483. 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 (italics in original), 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), A15.²² One group even detailed its plan to send a

²² Available at <http://www.nytimes.com/2008/08/08/us/politics/08donate.html>.

“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, these disclosure requirements do, in fact, ultimately operate 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 provides political opponents with the information needed to intimidate and retaliate against their foes.” *Id.* at 484 (quotations and citations omitted). “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 facially unconstitutional disclosure requirements, our citizens remain subjected

to “death threats, ruined careers, damaged or defaced property, or preemptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection.” *Id.* at 485 (quotations and citations omitted).

CONCLUSION

Today, those supporters of Prop 8 whose identities have already been made public under the campaign finance laws continue to suffer ongoing, real-world threats, harassment and intimidation in retaliation for exercising their First Amendment rights. Tragically, a large segment of our citizens has thus been sidelined out of fear. Now, thanks to the Attorney General’s facially unconstitutional collection of confidential Schedule B information, an additional class of nonprofit donors—who have detrimentally relied on the protections of federal tax law to speak anonymously—now face a reasonable *certainty* that they will suffer many of the same measurable harms that have befallen those already publicly identified.

The outcome of this case has real consequences. It is inevitable that people *will* suffer tangible harm if the Attorney General’s unlawful

practice is allowed to stand. This Court should affirm the permanent injunction in Case No. 16-55727, and reverse and remand Case No.16-55786 to the district court with instructions to permanently enjoin the blanket Schedule B submission requirement for all charities.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(c), *Amicus Curiae* is aware of one related case pending before this Court: *Thomas More Law Center v. Harris*, Ninth Circuit Case No. 16-56855, challenges the constitutionality of the same disclosure requirement and raises issues closely related to this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a) and Rule 32(a)(5), (a)(6), and (a)(7)(C), I certify that the foregoing brief is proportionately spaced using Century Schoolbook 14-point font and contains 5,154 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/Andrew P. Pugno _____
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CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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