No. _____

In The
Supreme Court of the United States

ProtectMarriage.com–Yes on 8 et al., *Petitioners*

v.

Debra Bowen et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented

Because of events experienced by supporters of California's Proposition 8 who were publicly identified by government-mandated, campaign-finance disclosure, *see, e.g.*, Cal. Gov't Code §§ 84200, 84211, Petitioners sought a First Amendment exemption from disclosure based on "a reasonable probability that ... disclosure ... will subject [identified persons] to threats, harassment, or reprisals." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). They also sought expungement of past disclosure records or no further release of those records. The Ninth Circuit dismissed the challenge as moot regarding past records and unripe regarding future disclosure. Four issues result.

1. Whether Petitioners' First Amendment exemption challenge is moot regarding (a) expunging past records or (b) preventing further release of those records where the "court can fashion *some* form of meaningful relief" by (a) "ordering the Government to destroy or return any and all copies it may have in its possession." *Church of Scientology of California v. United States*, 506 U.S. 9, 12-13 (1992) (emphasis in original) ("*Scientology*"), or (b) "preventing further [government] disclosure," *United States v. Sells Engineering*, 463 U.S. 418, 422 n.6 (1983) ("*Sells*").

2. Whether, if moot, the exemption challenge is "within the ... exception for cases capable of repetition, yet evading review," *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007) ("*WRTL-II*").

3. Whether the exemption challenge is ripe regarding future disclosure.

4. Whether Petitioners are entitled to an exemption from challenged disclosure provisions.

Parties to the Proceeding Below

Plaintiffs-appellants below were: **(a)** ProtectMarriage.com–Yes on 8[1]; **(b)** National Organization for Marriage California, Yes on 8, sponsored by National Organization for Marriage; **(c)** National Organization for Marriage California PAC; and **(d)** John Doe # 1, an individual. *See* No. 11-17884, General Docket (9th Cir.).

Defendants-appellees below were: **(1)** Debra Bowen; **(2)** Ross Johnson; **(3)** California Secretary of State; **(4)** Kamala Harris, in her official capacity as Attorney General of the State of California; **(5)** Eugene Huguenin, Jr.; **(6)** Lynn Montgomery; **(7)** Ronald Rotunda; **(8)** Ann Miller Ravel, in her official capacity as Chair of the Fair Political Practices Commission; **(9)** Sean Eskovitz, in his official capacity as Commissioner of the Fair Political Practices Commission; **(10)** Department of Elections City and County of San Francisco; **(11)** Dennis J. Herrera, City Attorney for the City and County of San Francisco; **(12)** Dean C. Logan; **(13)** Jan Scully. *See id.*

Corporate Disclosure

No petitioner is incorporated.

[1] ProtectMarriage.com–Yes on 8, was known below as "ProtectMarriage.com–Yes on 8, a Project of California Renewal," but it has since amended its Statement of Organization (Fair Political Practices Commission Form 410) to indicate that it is no longer sponsored by California Renewal.

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Petition

Petitioners (Plaintiffs-Appellants below) request review of *ProtectMarriage.com–Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. 2014) ("*ProtectMarriage*") (App. 1a).

Opinions and Orders Below

Relevant opinions and orders below are:

ProtectMarriage.com–Yes on 8 v. Bowen, 599 F.Supp.2d 1197 (E.D. Cal. 2009) (preliminary injunction) (App. 143a);

ProtectMarriage.com–Yes on 8 v. Bowen, 830 F.Supp.2d 914 (E.D. Cal. 2011) (summary judgment) (App. 58a);

ProtectMarriage, 752 F.3d 827 (9th Cir. 2014) (decision below) (App.1a);

ProtectMarriage.com–Yes on 8 v. Bowen, No. 11-17884 (9th Cir. July 16, 2014) (rehearing denial) (App. 205a); and

ProtectMarriage.com–Yes on 8 v. Bowen, No. 09-058 (E.D. Cal. filed Aug. 19, 2014) (vacating exemption decision and judgment) (App.54a).

Jurisdiction

The decision and judgment below were filed May 20, 2014. Appellants' panel-rehearing motion was denied July 16, 2014. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutions, Statutes & Regulations

Appended are relevant parts of the First and Fourteenth Amendments (App.207a) and California Government Code ("CGC") §§ 81008, 84102, 84200, 84211, 84602, 91000, 91004, 91005.5 (App.208a-223a).

Statement of the Case

Due to events experienced by California Proposition 8 supporters publicly identified by government-mandated disclosure, Petitioners sought a First Amendment exemption from provisions requiring public disclosure of identifying information about committee officers, contributors, expenditure recipients, and Major Donors, *see, e.g.*, CGC §§ 84200, 84211, based on "a reasonable probability that ... disclosure ... will subject [identified persons] to threats, harassment, or reprisals." *Buckley*, 424 U.S. at 74, and expungement of past disclosure records or no further release of them.

ProtectMarriage.com–Yes on 8 ("*ProtectMarriage*") is a "committee" and a "primarily formed committee" under California law (i.e., it received contributions of $1,000 or more and was formed to support one or more statewide ballot measures in the same election). Protect Marriage was formed to support Proposition 8, but still files committee reports as required.

John Doe #1 is an individual and representative of the Class of Major Donors, i.e., those contributing over $10,000 to a committee. Major donors are deemed committees, required to file reports with identifying information, and named in advertisements.

NOM-California, Yes on 8, is a "primarily formed committee," initially formed to support Proposition 8, that continues to file reports as required by law.

NOM-California PAC is a general-purpose committee under California law. "General-purpose committees" are "formed or exist[] primarily to support or oppose more than one candidate or ballot measure." CGC § 82027.5(a). As stated in the complaint, NOM-California PAC has clear future plans, i.e., it "intends to support candidates that share its view of marriage as be-

tween one man and one woman. NOM-California PAC also intends to support any ballot measure similar to Proposition 8 and oppose any measure that would overturn Proposition 8." (Dkt. 106, ¶ 33.) *See also* App.44-45a (dissent's summary of future plans).

Respondents (collectively "California") are officials with enforcement authority over challenged provisions.

Petitioners filed a complaint, on January 7, 2009, seeking a disclosure exemption. They moved to enjoin preliminarily California from (1) enforcing disclosure provisions as applied, (2) commencing criminal or civil actions against plaintiffs for not complying with those provisions, and (3) publishing or making available plaintiffs' filed records disclosing identifying information about Proposition 8 supporters, but the injunction was denied. App.143a.

On June 3, 2009, plaintiffs moved for summary judgment, which was denied without prejudice for defendant discovery. After discovery, plaintiffs moved for summary judgment, and California cross-moved.

Plaintiffs' extensive evidence of threats, harassment, and reprisals was set out in 59 pages in Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment (Dkt. 251), based in part on 58 John Doe Declarations. The evidence was distilled in plaintiffs' summary-judgment memorandum to four pages (Dkt. 246 at 7-11), with the following opening paragraph:

> There have been death threats; physical assaults and threats of violence; vandalism and threats of destruction of property; arson and threats of arson; angry protests; lewd demonstrations; intimidating emails and phone calls; hate mail (the old-fashioned kind); mailed enve-

> lopes containing white suspicious powder; multiple web sites dedicated to blacklisting those who support traditional marriage and similar causes; loss of employment and job opportunities; intimidation and reprisals on campus and in the classroom; acts of intimidation through photography; economic reprisals and demands for "hush money"; and gross expressions of anti-religious bigotry, including vandalism and threats directed at religious institutions and religious adherents. There is also ample evidence that protected speech and association has been chilled because of the prospect of reprisals.

(*Id.* at 7-8 (citations and footnote omitted).) *See also* App.61-72a (district court's evidence summary).[2, 3]

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[2] Evidence of harm to Proposition 8 contributors continues: "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, http://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. Several Mozilla board members resigned to protest his appointment." *Id.*

[3] Because this Court and its members have cited and acted on the evidence in this case, this is the quintessential recent example of a case warranting an exemption. In *Doe v. Reed*, 561 U.S. 186 (2010) (re harassment of traditional-marriage supporters), this Court rejected a facial challenge to Washington's petition-signer disclosure but remanded for a possible exemption, *id.* at 200, and, concurring, Justice

(continued...)

On November 4, 2011, the court granted California summary judgment. App.58a.

Plaintiffs appealed. California's briefs suggested neither mootness nor unripeness. (*See* Dkt. 13 & 14.) California filed supplemental authority (Dkt. 31-1) about *Doe v. Reed*, 697 F.3d 1235 (9th Cir. 2012), noting that the Ninth Circuit had dismissed that case as moot, but California neither referenced the jurisdictional analysis nor suggested mootness in this case. Rather, California argued that Judge Smith's concurrence supported arguments against the exemption. On September 30, 2013, before the October 11 argument,[4] the court ordered that

> [t]he parties should be prepared to discuss at oral argument whether this case, or any issue ..., is moot in light of ... *Doe v. Reed*, [concluding] that "once a fact is widely available to the public, a court cannot grant any 'effective relief' to a person seeking to keep that fact a secret."

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[3] (...continued)
Alito said "widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case." *Id.* at 205. In *Hollingsworth v. Perry*, 558 U.S. 183 (2010), this Court relied on the record here in staying broadcast of the Proposition 8 trial. *Id.* at 185-86. In *Citizens United v. FEC*, this Court cited amici briefs about harassment of Proposition 8 supporters and said it was "cause for concern," 558 U.S. 310, 370 (2010), and Justice Thomas relied on the record in this case in dissenting from upholding contributor disclosure, *id.* at 480-85.

[4] Audio of Oral Argument ("Oral Argument") is at http://cdn.ca9.uscourts.gov/datastore/media/2013/10/11/11-17884.wma.

(Dkt. 56 (quoting 697 F.3d at 1240).) Petitioners only briefed mootness in their rehearing petition (Dkt. 65).

The decision below holds the exemption challenge to disclosure requirements of the Political Reform Act ("PRA"), CGC § 81000 et seq., non-justiciable:

> To the extent that Appellants seek an injunction requiring the State to purge records of their past PRA disclosures, any claim for such relief is moot. To the extent that Appellants seek a forward-looking exemption from California's PRA requirements, such a claim is not ripe.

App.12a. The court decides that neither expunging records nor barring their further public release provides Petitioners a significantly effective remedy because portions of the disclosure records have been published on the Secretary of State's website and were obtained by third parties. App.15a. It holds the case is not within the exception for cases capable of repetition yet evading review because (a) it lacks an "inherent limit" time-frame, App.20-21a, and (b) Petitioners did not obtain an appellate stay in the single day between the order denying preliminary-injunction relief from reporting and the report deadline, App.21a.

Dissenting Circuit Judge Wallace disagrees, finding the exemption challenge not moot, within the mootness exception, and ripe. Regarding mootness, he argues that the majority opinion conflicts with *Scientology*, 506 U.S. 9, by lowering the mootness standards and ignoring available meaningful relief:

> [*Scientology*] teaches that courts should not declare a case moot if "*any* effective relief may be granted." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) (citation omitted). As [the Third Circuit] explain[s], this is a "high

> threshold ...," insofar as it requires that we find an appeal "moot ... only if events ... make it impossible for the court to grant any effectual relief whatever." *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 226 (3d Cir. 2003) (internal quotation marks and citation omitted). Both *Reed*[, 697 F.3d 1235,] and the majority ... err by effectively lowering this standard, in contravention of [*Scientology*]. That opinion tells us that we should find a case moot only if it is "impossible" for us to grant "any effectual relief whatever." [*Scientology*], 506 U.S. at 12. By contrast, the majority holds that this case is moot because it is *unlikely* that we will be able to provide *significant* effective relief. But that is not the standard set by [*Scientology*].

App.33-34a (emphasis in original).

Regarding the mootness *exception*, the dissent rejects, as inconsistent with precedent, the majority's holdings that (1) the evading-review prong applies only to "inherent limit" cases (where the inability to fully litigate a case before mootness "is clear at the action's inception") and (2) Petitioners are not entitled to the exception because they did not obtain an appellate stay in the "*single day*" available. App.35-45a (emphasis in original).

Regarding ripeness, Judge Wallace rejected the majority's holding that Petitioners' future plans were nonconcrete, listing articulated plans. App.45-52a.

Appellants' panel-rehearing motion was denied July 16, 2014, with Judge Wallace dissenting for the reasons noted in his prior dissent. App.205-06a.

The district court had jurisdiction, 28 U.S.C. 1331, 1343(a), as did the appellate court, 28 U.S.C. 1291.

Reasons to Grant the Petition

I.

The Mootness Analysis of the Decision Below Conflicts with Decisions of this Court and Other Circuits.

The first question for which review is sought is whether the exemption challenge is moot regarding (a) expunging past records or (b) preventing further record release where the "court can fashion *some* form of meaningful relief" by (a) "ordering the Government to destroy or return any and all copies it may have in its possession," *Scientology*, 506 U.S. at 12-13, or (b) "preventing further [government] disclosure," *Sells*, 463 U.S. at 422 n.6.

The decision below: (A) conflicts with decisions of this Court, (B) conflicts with other circuit decisions, and (C) deals with an important federal question.

A. The Decision Below Conflicts with Decisions of this Court.

The decision below conflicts with the high standards for mootness and meaningful relief in *Chafin v. Chafin*, 133 S.Ct. 1017, 1023-24 (2013), *Knox v. Service Employees*, 132 S.Ct. 2277, 2287 (2012), *Scientology*, 506 U.S. at 12-13, and *Sells*, 463 U.S. at 422 n.6. Based on lowered standards, the Ninth Circuit finds this case moot, App.13-16a, while the dissent disputes mootness, noting specifically that the majority had articulated lower mootness and meaningful-relief standards than this Court requires, App.29-34a. *See also supra* at 6-7.

In *Chafin*, this Court reaffirmed its rule that "a case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" 133 S.Ct. at 1023 (quoting *Knox*, 132

S.Ct. at 1023). "'As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.'" *Id.* (quoting *Knox*, 132 S.Ct. at 1019). It also cited *Scientology* for "impossible" and "any effectual relief whatever" mootness standards. *Id.* (quoting *Scientology*, 506 U.S. at 12).

Scientology is particularly apt here. This Court considered a case where the Ninth Circuit had held a case moot because tapes of conversations between church officials and their attorneys had been provided by a court clerk to the IRS in response to a court order enforcing an IRS summons while that court order was being appealed. 506 U.S. at 10-12. This Court unanimously reversed, holding that, while a case becomes moot "if an event occurs while a case is pending on appeal that makes it *impossible* for the court to grant '*any* effectual relief *whatever*' to a prevailing party." 506 U.S. at 12 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)) (emphasis added), it would not become moot if "a court can fashion *some* form of meaningful relief," *id.* (emphasis in original). Those standards are high: (1) "impossible," (2) "any effectual relief whatever," and (3) "*some* form of meaningful relief." And *Scientology* made clear what constitutes "*meaningful* relief." *Id.* (emphasis added). It need not reestablish "the *status quo ante*." *Id.* Rather it could involve the "partial remedy [of] ordering the Government to destroy or return any and all copies [of disputed documents] it may have in its possession." *Id.* at 13. "The availability of this possible remedy is sufficient to prevent this case from being moot" because, "even if the Government retains only copies of the disputed materials, a taxpayer still suffers injury by the Government's continued possession of those materials, namely, the affront to the

taxpayer's privacy." *Id.*

In *Sells*, 463 U.S. 418, this Court earlier established what is meaningful relief. The case involved grand-jury materials improperly in the hands of Department of Justice lawyers and staff. *Id.* at 421. This Court noted approvingly the Ninth Circuit's rejection of the Government's argument "that the case was moot because the disclosure sought to be prevented had already occurred," and the Ninth Circuit's reasoning:

> "The controversy here is still a live one.... [T]he ... order grants access to all attorneys for the Civil Division, their ... staff, and ... assistants. Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and ... continued access .... *We cannot restore the secrecy that has already been lost* but we can grant partial relief by *preventing further disclosure*." *In re Grand Jury Investigation No. 78-184 (Sells, Inc.),* 642 F.2d 1184, 1187-1188 (CA9 1981).

463 U.S. at 422 n.6 (emphasis added). So no case is moot because complete "secrecy" (the *status quo ante*) cannot be restored if a court may prevent "further disclosure."

The decision below (1) mis-frames the issue as being about secrecy and (2) applies lowered standards and ignores such examples of meaningful relief.

(1) The majority's mis-framing of the issue as about restoring secrecy (the *status quo ante*) is first evident in its order for the parties to address mootness at oral argument. *See supra* at 5. The court recited *Reed* for the proposition that "once a fact is widely available to the public, a court cannot grant any 'effective relief' to a person *seeking to keep that fact a secret*.'" 697 F.3d at

1240 (emphasis added).[5] The decision below repeats this formulation by quoting *Reed* under "Legal Standard," App.14a, and holding there is no "effective relief" because "[t]he information that Appellants *seek to keep private* has been publicly available on the Internet and in hard copy for nearly five years." App.16a (emphasis added).[6]

That keep-it-secret formulation of the issue fails to follow *Sells*'s holding that, even without the ability to restore privacy, i.e., "the secrecy that has already been lost[,] ... [a court] can grant partial relief by preventing further disclosure." 463 U.S. at 422 n.6. And the available remedy in *Sells*—not restoring absolute secrecy but preventing further disclosure—is what Petitioners seek. Because Petitioners filed disclosure reports with identifying information about Proposition 8 supporters, they do not seek the impossibility of returning to the *status quo ante* of secrecy, but only to have the government expunge the disclosure records or cease their further public release. By re-framing what Petitioners seek as being about complete secrecy, the majority can assert an inability to provide that remedy. But that reframing is erroneous and inconsistent with *Sells* and this Court's mootness standards.

Moreover, the majority overstates the privacy loss from *some* identifying information being on the Internet. As Petitioners explained in oral argument and their rehearing petition (Dkt. 65), *some* disclosed information remains available on the Secretary's website—

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[5] As the dissent argues, *Reed* was wrongly decided on this issue. App.30-34a.

[6] Of course the "five years" is a result of the ongoing denial of relief Petitioners early sought, but the actual relief Petitioners *now* seek is unaffected by this time-span.

likely the first place searchers would consult—but not *all* donor information is there. Donor street addresses are unavailable on the website but are available on printed reports available from the Secretary. Printed versions apparently have not been obtained, based on evidence in the record of what is on websites. In their rehearing petition, Petitioners identified the following key facts, presented at oral argument but overlooked in the decision (Dkt. 65 at 4-5):

(a) Contributors' street addresses are unavailable on reports published at the Secretary's website, but are available in hard-copy reports at the Secretary's office. (Oral Argument at 05:58-06:17.);

(b) Unlike in *Reed*, 697 F.3d 1235, there is no record evidence that such hard copies are available on the Internet or widely disseminated. (Oral Argument at 11:35-11:42; 12:05-12:41.); and

(c) The principal mapping website referenced by the decision below, App.15a, no longer functions (Oral Argument at 11:53-11:59) and when it did, many contributors were listed only by city (*id.* at 12:42-13:00).

And as stated in Petitioners' Reply Brief, the *Los Angeles Times* hosts a database of contributors listing only city and state, citing the Secretary's website as the source. (Dkt. 24 at 30 n.5.) Those seeking donor information likely would start at that same source, which redacts street addresses. (Oral Argument at 11:43-11:54.) So the decision below erroneously asserts that *all* secrecy likely had been lost as it erroneously mis-frames this case as being about restoring the total privacy of the *status quo ante*.

(2) The decision below applies lowered mootness standards, as described by the dissent: "[T]he majority

holds that this case is moot because it is *unlikely* that we will be able to provide *significant* effective relief. But that is not the standard set by [*Scientology*]." App.34a (emphasis in original). *Scientology* requires that cases not be found moot unless it is "*impossible* ... to grant '*any* effectual relief *whatever*.'" 506 U.S. at 12 (citation omitted; emphasis added).

The majority's substitution of an "unlikely" standard for *Scientology*'s "impossible" standard is clear in its recitation that "[e]ach PRA disclosure that Appellants have submitted is published on the Secretary's website, and is publicly available in hard copy," App. 15a, and those "disclosures have been accessed and republished by third parties," App.15a, "[i]n light of" which, "we can no longer provide Appellants with effective relief," App.16a. The opinion continues,"we have no way of knowing how many individuals have ... viewed; ... retained copies of ...; or ... reproduced the disclosures." App.16a.

But having "no way of knowing" proves neither that it is "*impossible* to grant '*any* effectual relief *whatever*,'" 506 U.S. at 12 (emphasis added), nor the inability to "fashion *some* form of meaningful relief," *id.* (emphasis in original), where Petitioners seek an exempt-status declaration and an injunction requiring record expungement or no further public distribution.[7] Rather,

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[7] Similarly erroneous are the majority's assertions that "[i]t is now impossible to [(a)] identify how many people have viewed this information, [(b)] locate every reproduction of this information, and [(c)] prevent the information's continued disclosure." App.16a n.3. Regarding (a), the impossibility of knowing this does eliminate some meaningful relief. Regarding (b) and (c), no one asks the court to so "lo-

(continued...)

the decision below makes the judgment that the court is *unlikely* to be able to provide what it deems *significant* effective relief. But that formulation is impermissible because this Court's standards are "impossible," not *unlikely*, and "*some* form of meaningful relief," not *significant* effective relief. *Scientology*, 506 U.S. at 12. Expungement and non-publication have been held sufficiently meaningful relief to prevent mootness. *See Scientology*, 506 U.S. at 13; *Sells*, 463 U.S. at 422 n.6.

Rather than following *Scientology*, the decision below distinguishes *Scientology* as "involv[ing] a finite set of tangible records that had only been disclosed to a party to the action," and not "in the hands of third parties over whom we lack jurisdiction, and [that] has been widely available on the Internet for several years." App.16a n.3. While a factual distinction exists (as in any two cases), the distinction neither warrants lowering *Scientology*'s mootness standards nor eliminates the fact that expungement or non-publication are, as a matter of law, meaningful relief, *Scientology*, 506 U.S. at 12-13; *Sells*, 463 U.S. at 422 n.6.

Applying *Scientology*'s standards here shows that *some* meaningful relief is available. Petitioners seek exemption from "PRA's compelled disclosure requirements" (Complaint, Dkt. 106, at ¶¶ 72-85), i.e., protection of their First Amendment right not to publicly disclose identifying information about committee officers, contributors, expenditure recipients, and Major Donors, for whom there was, and remains,[8] a reasonable probability of threats, harassment, or reprisals.

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[7] (...continued)
cate" or "prevent," and the inability to do so proves no impossibility of providing some meaningful relief.

[8] *See supra* at n.2 (Eich forced out as Mozilla CEO).

Petitioners seek a *declaration* that the challenged "registration, reporting, and disclaimer requirements[9] [are] unconstitutional as applied." (Dkt. 106 at ¶ 86(a)) They seek to be declared entities protected from disclosing identifying information on those involved with them under *Buckley*'s exemption. (Dkt. 106 at ¶¶ 72-85.)[10] Plaintiff committees still retain committee status, file required reports, have an interest in traditional-family (and related) issues and in ballot initiatives regarding such issues (some are currently circulating), and intend to file amended statements to participate in such initiatives as the need arises. *See supra* at 2-3. Declaring them exempt entities is meaningful relief.

Regarding *injunctive* relief, Petitioners seek to prevent California from enforcing disclosure provisions against them and to "[e]xpunge all records" containing identifying information about those involved with them. (Dkt. 106 at ¶ 86(b)-(c).) Records expungement or non-release constitutes meaningful relief *as a matter of law*. *See supra* at 8-10. And as Petitioners explained at oral argument and in their rehearing petition (Dkt. 65), there are specific factual reasons why expungement or non-release would provide meaningful relief. *See supra* at 12. These include the fact that not all information on hard copies is on the Secretary's website,

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[9] Petitioners do not object to disclaimers merely stating which organization paid for particular advertisements, only the requirement that disclaimers provide identifying information about Major Donors.

[10] For example, Socialist Workers Party obtained exempt status by consent decree in 1979, then renewed exempt status by advisory opinion. *See* FEC, AO 2012-38 (contributors reported by code number on reports).

the likely place searchers would seek identifying information.[11] Thus, it is clear that—as a matter of law and in light of these facts—expungement and non-publication will provide meaningful relief and the decision below conflicts with this Court's *Scientology* and *Sells* decisions, warranting certiorari review.

B. The Decision Below Conflicts with Other Circuit Decisions.

The decision below conflicts with decisions from the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits.[12]

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[11] Because expungement and non-release are meaningful relief, as a matter of law, this case does not turn on key facts the panel overlooked, but the facts provide further reasons why the requested relief is meaningful.

[12] *See Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 36 (1st Cir. 2011) ("even ... 'partial remedy' is 'sufficient to prevent ... moot[ness].'" (citation omitted)); *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 589 F.3d 458, 468 (1st Cir. 2009) (standard is when intervening event "makes it impossible for the court to grant any effectual relief"); *Isidor Paiewonsky Associates, Inc. v. Sharp Properties, Inc.*, 998 F.2d 145, 151 (3d Cir. 1993) (case not moot if "'some sort of meaningful relief,'" "even if it only partially redresses the grievances of the prevailing party," and "even if the remedies were not initially requested in the pleadings" (citation omitted)), *accord*, *Reschini v. First Fed. Sav. & Loan Ass'n of Indiana*, 46 F.3d 246, 249 (3d Cir. 1995); *Reich v. Nat'l Eng'g & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (privacy interest in delivered copies of government-required forms "benefitted by ... order requiring [government] to return or destroy" copies (citation omitted)); *Williams v. Ozmint*, 716 F.3d 801, 809 (4th Cir. 2013) (mootness only when it is "impossible ... to

(continued...)

[12] (...continued)
grant any effectual relief"); *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487, 490 (5th Cir. 1998) (possible return or destruction of documents responsive to grand-jury subpoena prevents motion-to-quash mootness), *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (same); *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004) ("'any effectual relief'" (citation omitted)); *Killian v. Concert Health Plan*, 742 F.3d 651, 660 (7th Cir. 2013) (plaintiff "must assert ... a cognizable injury and demonstrate that it is possible for the court, ... 'to "fashion some form of meaningful relief,"'" (citations omitted)); *Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995) (test is not whether parties can be "return[ed ... to the status quo ante, but rather, whether it is still possible to 'fashion some form of meaningful relief' to the appellant in the event he prevails on the merits" (citation omitted)); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1311 (8th Cir. 1996) ("any effectual relief whatever" was not "impossible," given improperly-issued subpoenas, because document "return or destruction" "benefits" "privacy interest" (citation omitted)); *In re W. Pac. Airlines, Inc.*, 181 F.3d 1191, 1195 (10th Cir. 1999) (not moot if "some form of meaningful relief, even if it only partially redresses ... grievances" (quotation marks and citation omitted)); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1040 (10th Cir. 1998) (when disputed documents viewed, case moot if "'impossible for ... "any effectual relief whatever."'" (citation omitted)); *Grand Jury Subpoenas Dated Dec. 7 & 8, Issued to Bob Stover, Chief of Albuquerque Police Dep't v. United States*, 40 F.3d 1096, 1099-100 (10th Cir. 1994) (same); *United States v. Florida Azalea Specialists*, 19 F.3d 620, 622 (11th Cir. 1994) (ordering return or destruction of documents is partial remedy that, "[a]s in *Scientology*," precludes mootness), *but see In re Grand Jury Proceedings (John Roe),* 142 F.3d 1416 (11th (continued...)

The Third Circuit's decisions in *United Artists*, 315 F.3d 217, and *Smith*, 123 F.3d 140, are instructive.

As the dissent below notes, App.34a, the Third Circuit in *United Artists* recognized that *Scientology* "sets a high threshold for judging a case moot," making appeals moot "only if events ... make it 'impossible for ... any effectual relief whatever.'" 315 F.3d at 226 (quoting *Scientology*, 506 U.S. at 12). The *unlikely* and *significant* standards of the decision below, *see supra* at 7, conflict with *United Artists*' "impossible" and "any" standards. And *United Artists* explained that "[a]n appeal is not moot 'merely because a court cannot restore the parties to the *status quo ante* .... Rather, when a court can fashion *some* form of meaningful relief, even if it only partially redresses ... grievances ..., the appeal

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[12] (...continued)
Cir. 1998) (distinguishing returning tangible property from "intangible witness testimony"); *In re Navy Chaplaincy*, 850 F.Supp.2d 86, 107-08 (D.D.C. 2012) ("[D]eclaration that ... [government] violated ... Constitution by applying [its] procedures in a discriminatory fashion [and] ... injunction requiring [it] to reevaluate the ... decisions ... with respect to ... plaintiffs and to prevent such alleged future ... discrimination" would "alleviate the alleged past injury ... even if ... [the] challenged policies no longer exist, and the availability of this as a possible remedy is sufficient to prevent the case from being moot under *Church of Scientology* (*relying* on *United States v. Chrysler Corp.*, 158 F.3d 1350, 1353 (D.C. Cir. 1998))."). *See also Detroit International Bridge*, 666 F. Supp. 2d 740, 745 (E.D. Mich. 2009) (could provide "*some* form of meaningful relief" by enjoining "any further disclosure" even where third party received copy of disputed report and "there is nothing to stop [him] from independently disclosing the report.").

is not moot.'" 315 F.3d at 226. (citation omitted). This conflicts with the decision below, which holds that no significant effective relief is available because the court cannot restore the *status quo ante* of "secrecy" or "privacy." *See supra* at 10-12.

Smith held that public disclosure of grand-jury secrets is not a moot issue where the court can prevent further disclosure by the government: "Even if the dissemination by members of the public continues, the order barring further disclosure of any secret grand jury material will at least narrow that dissemination." 123 F.3d at 155. This conflicts with the decision below, which decides that if government-held information was disseminated to members of the public, preventing further government dissemination would not be meaningful relief. *See supra* at 6.

These circuit splits warrant certiorari review.

C. This Is an Important Federal Question.

Question 1 presents an important question because this Court's mootness standards and holdings (1) should be followed; (2) specially protect First Amendment rights; and (3) are vital to persons seeking exemptions due to a reasonable probability of harm.

This is also an important First Amendment *case*. This Court's mootness holdings should be reasserted so the merits may be reached and this Court's reasonable-probability test reasserted. As set out above, *see supra* n.3, this Court and its members have acted on the record of this case and cited it as the current quintessential example of a case likely meriting an exemption under *Buckley*'s reasonable-probability test, reiterated repeatedly without elaboration by this Court, *see, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 198 (2003); *Citizens United*, 558 U.S. at 367; *Reed*, 561 U.S. at 200. Yet the

district courts in *Doe v. Reed*, 823 F.Supp.2d 1195 (W.D. Wash. 2011), and below, App.58a, employed an *expanded* version of that test to reject exemptions. That expansion cannot be reviewed here or below unless the mootness holding below is reversed.

Because this issue and case present important federal questions where the decision below conflicts with decisions of this Court and circuit courts, certiorari should be granted.

II.

The Mootness-Exception Analysis of the Decision Below Conflicts with Decisions of this Court and Other Circuits.

The second question for which review is sought is whether the exemption challenge, if moot, is "within the established exception for cases capable of repetition, yet evading review," *WRTL-II*, 551 U.S. 449.

The decision below (A) conflicts with a decision of this Court, (B) conflicts with other circuit decisions, and (C) deals with an important federal question.

A. The Decision Below Conflicts with a Decision of this Court.

The decision below holds this case does not "evade review" because (a) cases such as this lack an "inherent limit" time-frame and (b) plaintiffs did not obtain an appellate injunction in the single day between preliminary-injunction denial and the due-date for contributor reports. App.18-23a.

That conflicts with *WRTL-II*, where this Court held, in an election context, that the mootness exception, "applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation

that the same complaining party will be subject to the same action again.'" 551 U.S. at 462 (citation omitted).

Regarding time-frame, this Court held "it would be 'entirely unreasonable ... to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads' during the [Bipartisan Campaign Reform Act] blackout periods." *Id.* (citation omitted). An election cycle was not enough litigation time because groups might know only near elections that they want to run ads, and anyway, despite mandated expedition, "*two* BCRA blackout periods have come and gone during the pendency of this action." *Id.* (emphasis in original).

The repetition prong is met "when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality' ... or 'will be subject to the threat of prosecution' under the challenged law." *Id.* at 463 (citations omitted). This Court rejected FEC's argument that "WRTL must establish that it will run ads in the future sharing all 'the characteristics that the district court deemed legally relevant.'" *Id.* (citation omitted). "Requiring repetition of every 'legally relevant' characteristic ... mak[es] this exception unavailable for virtually all as-applied challenges." *Id.* It is enough if persons intend "materially similar" future acts and enforcement is likely. *Id.* "History repeats itself, but not at the level of specificity demanded by the FEC." *Id.* Thus, this Court requires *practical* application of its mootness exception, rejecting formalistic formulae, and requires no "inherent limit" time-frame.

The decision below says this case does not fit the mootness exception based on the evading-review criterion (not reaching the capable-of-repetition criterion). App.17-23a. It limits the exception to cases "'inherently

limited in duration,' because they will only ever present a live action until a particular date, after which the alleged injury will either cease or no longer be redressible." App.18-19a. "The limited duration of such controversies is clear at the action's inception." App.19a. The court holds that "[l]awsuits seeking to enjoin the disclosure of sensitive information do not fall into the mootness exception ... because there is no inherent limit on the duration of such controversies." App.20a.

Rather, to maintain a live controversy a court would have to issue a temporary order excusing disclosure reports or preventing public disclosure of them. App.20a.[13] But "Appellants simply failed to obtain such an order." App.21a. "After the district court denied ... a temporary restraining order, Appellants did not file an interlocutory appeal, nor ... seek an injunction pending appeal." App.21a. So "the information ... Appellants seek to keep private" became "publicly available" and there is no live controversy. App.21a. The court "advise[s] courts to exercise the utmost caution at the early stages of actions concerning the disclosure of sensitive information, and to consider this 'mootness Catch-22' when assessing ... irreparable harm." App. 23a.

The dissent argues that both *WRTL-II* exception criteria are met. App.35-45a. Regarding evading review, it notes that Appellants filed their complaint on January 7, 2009, seeking relief from report filing on January 31. On January 30, the district court denied a temporary injunction, so Plaintiffs filed their January 31 reports, but sought expungement and no further public release. This one-day time span, the dissent as-

[13] This assertion continues to rely on the majority's erroneous keep-it-secret issue mis-framing. *See supra* at 10-12.

serts, was "'too short'" for full litigation. App.35-36a (quoting *WRTL-II*, 551 U.S. at 462). But, the dissent continues, "[t]he majority does not contend that this claim could have been 'fully litigated' in so brief a time. Rather, it faults Appellants for failing to seek preliminary injunctive relief, and concludes that their failure to do so precludes this claim from falling under the [mootness exception]." App.36a. The dissent responds that "the abstract proposition ... that if a party 'fail[s] to seek and obtain a stay,' that party may not avail itself of the [mootness exception] ... does not speak to the particular facts of *this* case." App.36-37a (emphasis in original). In this case, "Appellants would have had a *single day* to 'seek and obtain a stay' from our court" to fit the mootness exception. App.37a (emphasis in original). Citing a concrete, expedited case that took two weeks to get an appellate stay, the dissent concludes, "it is simply not realistic to expect a party to 'seek and obtain a stay' ... [in] a single day." App.37-38a.

Returning to the majority's time-frame analysis, the dissent describes "the majority's discussion of an 'inherently limited" controversy [a]s somewhat metaphysical." App.38a. He notes that "the present controversy unquestionably had an 'inherent limit': namely January 31, 2009, when Appellants were required ... to make their disclosures," just as a "controversy involving a law that 'inhibits a political candidate or party's ability to win an election' has, as *its* 'inherent limit,' the date of that election." App.38a (citation omitted). The dissent concludes, "[w]hatever distinction might be drawn between those two scenarios, it cannot be that only the latter has an 'inherent limit.'" App.38-39a.

The dissent describes the majority's "new test"—which it says is contrary to precedents[14]—as creating "a distinction between controversies whose 'inherent limit' is a real-world event and those whose 'inherent limit' is an artificial creation of the legal system." App.39a. In the latter, e.g., "the disclosure deadline mandated by California law," App.39a, the "exception will *never* apply" because the limit "may be delayed via court order," App.39a (emphasis in original), e.g., an injunction relieving the duty to file or barring public report disclosure.

The dissent concludes its extensive analysis by citing *Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153 (9th Cir. 2011), for the point that the exception is based on "whether a party could 'practically obtain appellate review.'" App.42a (quoting 630 F.3d at 1160). "[T]he relevant inquiry ... is a *pragmatic* one— namely, whether it is practically possible for a party to obtain the appellate relief it needs—rather than the *metaphysical* one mandated by the majority." App.42a (emphasis in original). The dissent concludes, "it was practically impossible ... for Appellants to obtain appellate review," so this case satisfies the "evading review" criterion. App.42-43a.

Though the majority does not address it, the dissent decides that Appellants also met the capable-of-repetition criterion. App.43-45a. It notes, inter alia, that initiatives are being circulated in which the committees are prepared to participate, requiring solicitations, and the ongoing chill on contributors. App.44-45a. And the dissent cites *Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010), where it was sufficient to defeat moot-

[14] *See infra* at 24-25 (9th Circuit inconsistencies). *See also* Part II.B (other circuit inconsistencies).

ness that the plaintiff-appellant, a political candidate, recited his intention to again be a candidate. App.44a. This agrees with *WRTL-II*, where an intent to engage in "materially similar" future actions sufficed for this Court to hold, "there exists a reasonable expectation that the same controversy involving the same party will recur." 551 U.S. at 463-64.

Certiorari should be granted because the decision below creates a novel test for the mootness exception that conflicts with this Court's formulation of the test in *WRTL-II*.

B. The Decision Below Conflicts with Other Circuit Decisions.

The decision below holds that (1) only inherent-limit time-frames, ascertainable at case initiation, meet the escaping-review prong, and cases like this don't qualify, and (2) in cases lacking such time-frames, plaintiffs lose standing by failure to maintain a stay even where impractical. App.17-23a.

The dissent characterizes the inherent-limit time-frame test as "a new test," App.39a, "the newly invented test," *id.*, "new law," App.40a, and "the novel test that the majority has invented," App.41a. The novelty of the test is confirmed by Petitioners' inability to find (by various WestLaw searches) any other court imposing an inherent-limit time-frame test on the "escaping review" prong of the mootness-exception test. Thus, this holding conflicts with all other circuits, which do not impose this requirement. If the test is wrong, as Petitioners assert, then their case is not precluded from the escaping-review prong for failure to have an inherent-limit time-frame ascertainable from the beginning.

Regarding the keep-a-stay requirement (if it applies at all absent an inherent-limit time-frame requirement), the dissent notes that the majority's approach is inconsistent with Ninth Circuit cases, *see supra* at 24-25, and Petitioners again can find no court in any circuit requiring the impracticality of obtaining an appellate stay in one day under circumstances such as happened here. So this requirement conflicts with all other circuits, which do not impose this requirement.

But the real problem here goes back to the majority's mis-framing of the core issue here as being about maintaining the *status quo ante* of secrecy or privacy. Only if that is the goal does retaining a stay in place matter. But that is not the relief Petitioners seek. Rather, they seek a declaration of exempt status and expungement or non-release of records filed. No ongoing stay is required to protect the availability of that valuable relief.

Certiorari should be granted based on these circuit conflicts.

C. This Is an Important Federal Question.

As stated in Part I.C, this case is important to protect this Court's important high mootness standards, its reasonable-probability test for an exemption, and, thereby, speakers and their First Amendment liberties. The same applies to the mootness *exception*, in the event this Court finds this case moot. Because this issue presents an important federal question where the decision below conflicts with decisions of this Court and circuit courts, certiorari should be granted.

III.

The Ripeness Analysis of the Decision Below Conflicts with Decisions of this Court and Other Circuits.

The third question for which review is sought is whether the exemption challenge is ripe regarding *future* disclosure of identifying information. The decision below dismisses Petitioners' exemption challenge as unripe regarding "forward-looking" disclosure:

> To the extent that Appellants seek an injunction requiring the State to purge records of their past PRA disclosures, any claim for such relief is moot. To the extent that Appellants seek a forward-looking exemption from California's PRA requirements, such a claim is not ripe.

App.12a.

That decision (A) conflicts with decisions of this Court, (B) conflicts with other circuit decisions, and (C) presents an important federal question.

A. The Decision Below Conflicts with Decisions of this Court.

By denying "a forward-looking exemption," the decision below conflicts with this Court's analyses in *Buckley*, 424 U.S. 1, *WRTL-II*, 551 U.S. 449, and *Reed*, 561 U.S. 186.

Petitioners' core claim is for *declaratory* relief establishing exempt-entity *status*, based on voluminous evidence of "a reasonable probability that ... disclosure ... will subject [identified persons] to threats, harassment, or reprisals." *Buckley*, 424 U.S. at 74. Because that status entitles them to injunctive relief, Petitioners *also* seek to stop California from (1) enforcing disclosure provisions (as applied), (2) commencing criminal

or civil actions against Petitioners for noncompliance with those provisions, and (3) further publishing or making available disclosure records filed by plaintiffs (or requiring California to expunge those records).

Petitioners' exemption claim was ripe when filed. So the district court was required to apply the reasonable-probability test from *Buckley*, 424 U.S. at 74, and *Reed*, 561 U.S. at 201. Then, if plaintiffs were declared exempt committees, that status would be ongoing for these ongoing committees. If they were denied exempt status, the question about future plans would not be whether those are *ripe*, but whether plaintiffs intend to do "materially similar" future activities so as to fit the *mootness* exception. *WRTL-II*, 551 U.S. at 463. The decision below conflated these questions about future plans in a manner inconsistent with *WRTL-II*, treating the case as if plaintiffs wanted to do some vague future activities apart from their core challenge. That is erroneous under *WRTL-II* and inconsistent with *Buckley* and *Reed*, which required the court to apply the reasonable-probability test for exempt status, not evade it. And it is inconsistent with the requirement, implicit in *Buckley*, that "speakers can obtain the exemption quickly and well in advance of speaking" without which an exemption "becomes practically worthless." *Reed*, 561 U.S. at 203 (Alito, J., concurring). *See also id.* at 203-04 (need for early exemptions).[15]

B. The Decision Below Conflicts with Other Circuit Decisions.

The decision below conflicts with other circuits and

[15] Even applying the majority's erroneous analysis, Petitioners' future plans were sufficiently concrete to be ripe, as the dissent explains at length. App.45-52a.

Ninth Circuit opinions regarding ripeness standards. Its over-high ripeness standard conflicts with cases holding that First Amendment contexts require a relaxed ripeness standard.[16] It conflicts with *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003), finding ripeness where, as in the present case, an "intended communication" would be "arguably subject" to PRA disclosure requirements. And it conflicts with *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1497, 1500-02 (10th Cir. 1995),[17] which found ripeness where, as here, plaintiffs complained that a state campaign-finance law reduced the likelihood that past contributors would again contribute. *Richardson* held the case ripe because there was "nothing speculative or uncertain about the harm to [the plaintiff's] fund raising activities brought about by [the law]." *See also* App.45-52a (dissent's discussion of ripeness and conflicts).

C. This Is an Important Federal Question.

As stated in Part I.C, this case is important to protect this Court's high standards for justiciability in cases where citizens seek First Amendment protection under the reasonable-probability test for a disclosure exemption. Because this issue presents an important federal question where the decision below conflicts

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[16] *See Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007); *Peachlum v. City of New York*, 333 F.3d 429, 534-35 (3d Cir. 2003); *Wolfson*, 616 F.3d at 1058; *U.S. West v. Tristani*, 182 F.3d 1202, 1209 (10th Cir. 1999).

[17] *Richardson* was decided after *Renne v. Geary*, 501 U.S. 312 (1991), on which the decision below relied to find unripeness for non-concreteness (App.25-28a), and decided *Renne* does not control, as the dissent below explains (App.47-51a).

with decisions of this Court and circuit courts, certiorari should be granted.

IV.

This Court Should Grant Certiorari on Whether Petitioners Are Entitled to a Disclosure Exemption.

The fourth question for which Petitioners seek review is whether they are entitled to a disclosure exemption based on "a reasonable probability that ... disclosure ... will subject [identified persons] to threats, harassment, or reprisals." *Buckley*, 424 U.S. at 74. Petitioners ask this Court go to the merits though the Ninth Circuit did not.

Petitioner committees are ongoing entities who remain interested in promoting pro-traditional-marriage and related issues, have an ongoing chill on their contributors, want to participate in the public sphere without that chill, and still want declaratory relief establishing their First Amendment protection under a *Buckley* exemption. This Court and its members have acted based on the record of this case and have pointed to this case as the quintessential current example of entities likely exempt under *Buckley*'s reasonable-probability test. *See supra* at n.3. Petitioners have waited since January 7, 2009, for an exempt-status declaration. As voluminous evidence shows, their contributors have experienced the harm *Buckley* described as warranting an exemption and remain chilled.

Under the reasonable-probability test, the evidence readily available in the district-court record establishes that Petitioners are entitled to an exemption. The district court layered numerous extra requirements on this Court's test, App.77-103a, as did the district court

in *Reed* on remand, 823 F.Supp.2d 1195.[18] By going to the merits, this Court can reassert the *Buckley* test, without the erroneous embellishments, and resolve this straightforward issue. As explained in *Citizens United*, there are important First Amendment reasons not to delay a decision in cases involving important First Amendment rights. *See* 558 U.S. at 326-27, 329, 333-36.

Because this issue presents an important federal question where the district-court and appellate-court decisions below conflict with decisions of this Court and circuit courts, certiorari should be granted.

[18] For example, the district court below held that the exemption only applies to minor parties or fringe groups and those with a reviled cause, App.84-91a, which is inconsistent with *Buckley*. And instead of allowing *Buckley*'s "flexibility in the proof of injury," 424 U.S. at 74, the court required threats highly proportional to a group's size, criminal harassment, a direct link between the chill and the disputed disclosure, and so on, App.91-103a, all of which conflicts with *Buckley*.

Conclusion

The Court should grant this petition.

Respectfully submitted,

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