No. 14-434

In The
Supreme Court of the United States

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

v.

Alex Padilla et al., *Respondents*

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

Reply Brief

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Corporate Disclosure

No Petitioner is incorporated.

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Reasons to Grant Certiorari

This is the quintessential recent example of a case warranting disclosure exemption because (a) this Court and its members have cited and acted on the evidence in this case (Pet. 4 n.3), and (b) the voluminous evidence[1] more than meets this Court's reasonable-probability-of-harm test for a disclosure-exemption in *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), especially given *Buckley*'s requirement of "sufficient flexibility in the proof of injury," *id.* (Pet. 3-4 & n.2, 30-31 & n.18.)

But after summary-judgment briefing and a merits decision on a disclosure-exemption, the court below decided that this case is non-justiciable. In their Petition and here, Petitioners explain that the non-justiciability holdings should be reviewed because they conflict with decisions of this and other courts. And because Respondents ("California") also assert the same flawed versions of *Buckley*'s disclosure-exemption test and flexible-proof requirements that the district court employed (Opp'n 3-4, 23-26), certiorari should be granted also to reassert *Buckley*'s test and proof requirements for a disclosure-exemption.

I.

The Mootness Analysis Below Conflicts with this Court's Standards and Creates Circuit Conflicts.

Petitioners *still* await

- a declaration of exempt status (for which they have *already* provided sufficient evidence),

[1] The evidence is distilled in summary-judgment Undisputed Facts and exhibits available at www.jamesmadisoncenter.org/cases/52-protect-marriage-v-bowen.html.

- non-release of state-held records, and
- expungement of state-held records.

(Pet. 14-16.)[2] That is "effective relief," as a matter of law, making this case not moot. (Pet. 8-10, 15-16.)

The dissent below showed that the majority lowered this Court's standards and ignored available relief:

> [*Church of Scientology of California v. United States*, 506 U.S. 9 (1992) ("*Scientology*"),] tells us that we should find a case moot only if it is "impossible" for us to grant "any effectual relief whatever." [*Id.*] 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.

App. 33-34a (emphasis in original). Petitioners demonstrated that the dissent was correct. (Pet. 12-14.)

California responds (Opp'n 8):

- the "unlikely"-"significant" "language appears only in the dissenting opinion" and
- the majority used "effectively remedy," which "is the same standard as the 'effectual relief' standard [of] ... *Scientology*."

Both responses employ labeling. One says the majority does not use the dissent's *language*, so the dissent is wrong. The second equates *part* of *Scientology*'s test with the whole. Both evade whether the dissent is analytically correct. Both ignore that expungement and non-release are effective relief *as a matter of law*. (Pet. 8-10, 15-16.) So California does not rebut the demon-

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[2] The decision below erroneously bisected this relief that Petitioners *still* await into past and future elements (Pet. 27-28), with the former moot, the latter unripe (App. 12a).

stration that the decision below employed lowered standards for mootness and effective relief, in conflict with decisions of this Court and circuit courts.

California also relies on factually distinguishing cases of this and other courts[3]—especially relying on the fact that this case involves publicly released records. (Opp'n 8-13.) But *all* cases have factual variants, and the cases cited establish the *legal* principles for which they are cited. Vitally, factual distinctions cannot alter the *legal* fact that expungement and non-release are effective relief. (Pet. 8-10, 15-16.) Even given public release, mootness would occur only were it "*impossible* ... to grant '*any* effectual relief *whatever*.'" *Scientology*, 506 U.S. at 12 (citation omitted; emphasis added). And it is *possible* here to provide 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. Given that possibility of effective relief as a matter of law, California's emphasis on prior public document release is exposed as being about the *likelihood* that the effective relief will be *significant*, which is exactly the error of a lowered mootness standard that the dissent identified in the decision below.

Moreover, Petitioners explained that the decision below overstates the scope of public release—especially because the Secretary of State's website (the most likely place to which a searcher would turn) lists no

[3] For example, California distinguishes (Opp'n 9-12) circuit decisions that Petitioners recited as requiring high mootness standards (Pet. 16-19 & n.12), in contrast with the lowered standards of the decision below, but the factual distinctions do not alter the high mootness standards for which the cases are cited.

street addresses and there is no evidence that printed copies from the Secretary are available online. (Pet. 11-12.) California concedes that the website provides no street addresses, but insists "third parties were easily able to acquire address information" (which were posted online), so purging state records "would not prevent further disclosure." (Opp'n 13-14.) That assertion is erroneous in at least four ways.

First, it ignores the fact that street addresses are not readily available online (let alone for *all* Proposition 8 supporters). (Pet. 11-12.)

Second, it ignores the fact that what is at issue in exemption cases is First Amendment protection against *government* enablement of retaliation by disclosure, so public disclosure of supporter information developed solely by third parties is beside the point. *See NAACP v. Alabama*, 357 U.S. 449, 463 (1958) ("The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.").

Third, California's assertion ignores its earlier assertion that government-website publication *alone* "is a 'vital and integral component of a fully informed electorate'" (Opp'n 1 (citation omitted)), so just shutting it down (apart from what third parties do) is *some* effective relief.

Fourth, as the dissent below explains, "a significant percentage of the public ... lacks access to the Internet," would not know how to search online, or would not be interested in downloading information from non-governmental sites, so stopping Internet and paper publication of state-held information about Proposition 8 supporters would inhibit dissemination of

that information. App. 31a (citation omitted).

Anyway, expungement and non-publication have been held sufficiently meaningful relief to prevent mootness as a matter of law, so California's quibbles about the significance of the effective relief are beside the point. *See Scientology*, 506 U.S. at 13; *United States v. Sells Engineering*, 463 U.S. 418, 422 n.6 (1983) ("*Sells*").

The decision below mis-frames the issue as being about restoring the "secrecy" status quo. (Pet. 10-12.) It relies on *Doe v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012), 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*." (Pet. 5 (emphasis added).). It holds there is no "effective relief" because "[t]he information that Appellants seek to keep *private* has been publicly available." App.16a (emphasis added). Petitioners showed how this keep-it-secret formulation conflicts particularly with *Sells*, 463 U.S. 418, which held that even where courts "'cannot restore the secrecy that has already been lost,'" they "'can grant partial relief by preventing further disclosure,'" *id.* at 422 n.6 (citation omitted). (Pet. 10-12.)

California re-frames this secrecy-framing problem as whether the court below *misunderstood* the relief sought, insisting that the "court ... understood that petitioners sought to have their ... records expunged ... to limit further *public disclosure* ...." (Opp'n 13.) Here, California continues, no "effective relief" is possible "because the information ... has already been released to the public and republished by third parties." *Id.*

But California's effort to re-frame the court's reliance on a keep-it-secret formulation of the issue is

wrong. The decision below expressly relied on this keep-it-"secret" (or "private") formulation. (Pet. 10-11.) This mis-framing is not a peripheral question of misunderstanding. It is a flawed analysis at the core of the Ninth Circuit's reasoning both in *Reed*, 697 F.3d 1235, and here that directly conflicts with *Sells*, 463 U.S. at 422 n.6. (Pet. 11.)

Finally, Petitioners seek to be declared entities protected from disclosing identifying information about those involved with them under *Buckley*'s exemption for groups showing a reasonable probability of harm from the disclosure. (Pet. 15.) Petitioners have awaited this declared status (along with resultant expungement and non-release) for over six years. And they have already provided more-than-adequate evidence of a reasonable probability of harm under this Court's standards in *Buckley*, 424 U.S. at 72-74, which evidence was considered by a federal district court and (erroneously) held inadequate for an exemption. Declaring them exempt entities would be meaningful relief, making this case not moot. (Pet. 15.)

California implies that Petitioners were somehow too slow in seeking an exemption: "Petitioners did not challenge this requirement before the December 2008 election." (Opp'n 2.) "They submitted numerous pre-election reports," and only "[a]fter the election," did they seek a disclosure-exemption. (Opp'n 2.) But an exemption is only possible when evidence arises showing a reasonable probability of harm.

California recites that, after preliminary injunction denial, "petitioners complied with post-election reporting requirements and submitted additional contributor information." (Opp'n 3.) Of course Petitioners complied. They were legally required to do so and did not want

penalties for non-compliance. But they promptly sought effective relief in the form of exempt status with concomitant expungement and non-release of state-held records to limit the ongoing harm.

California argues that, in seeking exempt status (with concomitant expungement and non-release), Petitioners merely seek unripe "forward-looking relief" or "a mere declaration about the law." (Opp'n 14.) But California and the district court did not consider this case unripe or abstract when that court heard the evidence, applied it to the court's interpretation of *Buckley*'s reasonable-probability-of-harm test, and decided that Petitioners were not entitled to the exemption. That was all normal First Amendment exemption analysis under *Buckley*, 424 U.S. at 72-74. The legal error, for which certiorari should be granted, is the Ninth Circuit's bisection of this straightforward exemption-claim case into a moot past part and an unripe future part, thus finding it non-justiciable, rather than deciding it under *Buckley* as a standard exemption case. (Pet. 27-28.) The declaration of exempt status was the *basis* for the requested remedies of non-release and expungement, so the declaration and remedies are part of a package not properly subject to being divided and conquered piecemeal.

The fact that Petitioners have awaited their requested relief for over six years now argues for urgency in providing requested relief, not a finding that the request is unripe or a mere abstract question. The sought declaration is based on a real, present controversy supported by voluminous facts already put in evidence. That declaration of exempt status would be the justification for the requested injunction requiring expungement and non-release of state-held records.

In sum, this case is not moot as to any sought relief, and the decision below conflicts with decisions of this Court and other circuits, so review should be granted.

II.

The Mootness-Exception Analysis Below Conflicts with this Court's Standards and Creates Circuit Conflicts.

For the reasons stated in Part I, *supra*, this case is not moot, so no mootness exception is needed. But as the dissent below explained, App. 35a-43a, the majority was creating novel law when it denied a mootness exception, in conflict with precedent, because under controlling precedent this case would fit the mootness exception for cases capable of repetition yet evading review. (Pet. 20-26.)

For example, the dissent below argues that the short time between the denial of a preliminary injunction and the due date for post-election reporting was "clearly 'in its duration too short' for a claim of this nature to be 'fully litigated.'" App. 36a (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 462 (2007) ("*WRTL-II*")).[4] The dissent also notes that the majority

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[4] California says Petitioners had three days, not one, to get a preliminary injunction or stay (Opp'n 19 n.4), which would make *no* difference, especially since *WRTL-II* held that it was impossible to "'obtain[] complete judicial review'" during *sixty-day* blackout periods, 551 U.S. at 462 (citation omitted). In *WRTL-II*, this Court rejected the sort of always-moot-never-ripe approach of the decision below. *Id.* at 461-64.

But what *is* analytically important is that the debate about whether Petitioners needed injunctive relief within

(continued...)

erroneously

> appears to posit 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. An example of the former ... is pregnancy .... [T]he limit in this case was the disclosure deadline mandated by California law.

App. 39a. And regarding the majority's requirement of an injunction in cases involving a limit that is an "artificial creation of the legal system," the dissent notes that, under the majority's erroneous analysis, the mootness "exception will *never* apply" (because a court order is theoretically always possible). App. 39a. Moreover, the dissent notes that the short time-frame between the preliminary injunction denial and the filing due date made getting an injunction (assuming a court *might* grant one) *practically* impossible, and precedents did not mandate the impractical. App. 42a. Thus, the dissent demonstrates that the decision below conflicts with decisions of this and other courts. Petitioners recited these and other dissent arguments at length, relying on them in large part for reasons why certiorari should be granted. (Pet. 20-26.)

California makes no effort to address the dissent's

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[4] (...continued)
that short time-frame to avoid mootness is premised on the majority's erroneous bisection of this case to give that time-frame freestanding significance. But Petitioners' suit was for an exempt-status declaration, from which would flow the remedies of non-release and expungement, whether or not those reports were filed. That exempt-status suit is not moot despite no interim relief forestalling the filing of post-election reports.

arguments. (Opp'n 15-19.) Rather, California merely recites as "correct" a summary of what the decision below held (Opp'n at 15-16); says there is no conflict with *WRTL-II*'s statement of the mootness-exception test (based solely on factual distinctions, not the differing statements of the test) (Opp'n 18-19); and recites cases requiring that there be an "inherent limit" (or some similar formulation) (Opp'n 16-18).

But the quotations from California's cited cases do not support what the dissent called "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, including the notions

> 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.

(Pet. 25.)

In sum, if this Court finds this case moot, certiorari should be granted because the decision below conflicts with decisions of this and other courts regarding the standards for the mootness exception for cases capable of repetition yet evading review.

III.

The Ripeness Analysis Below Conflicts with this Court's Standards and Creates Conflicts.

Petitioners seek a disclosure-exemption under this Court's reasonable-probability-of-harm test, *Buckley*, 424 U.S. at 72-74, which would entitle them to certain remedies, including non-release and expungement of

state-held data. This is what they have sought from the beginning and still await over six years later.

The decision below bisected that unified claim, treating the claim for exempt status as an unripe request for future relief and the derivative request for non-release and expungement as a moot request for past relief. (Pet. 28.) But that analysis conflicts with this Court's analysis under *Buckley* and other precedents of this Court, which require that such a case be decided as a unified whole. (Pet. 27-28.)

California never addresses this fundamental argument. Rather California recites what the Ninth Circuit did, distinguishes some cases factually, recites that Petitioners might renew its six-year-old claim for a disclosure-exemption, and recites some of the features of the district court's erroneous interpretation of the reasonable-probability-of-harm test. (Opp'n 19-24.)

But the erroneous bisection cannot be simply brushed aside. A claim for a disclosure-exemption and the remedies sought pursuant to that determination are part of a unified, interlocking whole. The core claim is for a disclosure-exemption. When that claim was brought, in the midst numerous accounts of harm to Petitioners, it was ripe. Had Petitioners prevailed on that ripe claim, they would have been entitled to non-release and expungement of documents. If they prevail on that claim now, they will be entitled to non-release and expungement. This is not like a case where there is some other ground for non-release or expungement of the documents. The documents at issue are otherwise public records, subject to non-disclosure only if there is a disclosure-exemption. Because the analysis of the decision below conflicts with decisions of this and other courts, certiorari should be granted.

IV.

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

Petitioners asked this Court to decide its disclosure-exemption claim on the merits, explaining why this is appropriate. (Pet. 30-31.)

California responds that the Ninth Circuit should first consider the merits and that the district-court decision on disclosure-exemption status is vacated. (Opp'n 24-25.) California then claims that the district-court decision was correct, reciting that court's flawed interpretations of both the reasonable-probability-of-harm test and the required proof to establish exempt status that are at the core of this case. (Opp'n 25-26.)

Of course, lower courts usually make merits decisions first. But it has been six years and Petitioners seem no closer to establishing their exempt status (and receiving the concomitant relief of non-release and expungement). Moreover, the district-court opinion was at odds with how this Court has stated the disclosure-exemption (requiring only the demonstration of a reasonable probability of harm) and the flexible-proof requirement of this Court. (Pet. 31 n.18.) This case at its core, then, is about whether *Buckley*'s standards for a disclosure-exemption remain viable, and if so whether those standards require a disclosure-exemption in a case like this, where there is voluminous evidence that citizens have been placed at substantial risk of harm for exercising their First Amendment rights to free political speech and association. By going to the merits, this Court can reassert *Buckley*'s disclosure-exemption standards, which is vital in light of the new capabilities and willingness to impose harm revealed by the

record in this case.

Conclusion

The Court should grant this petition.

Respectfully submitted,

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