United States District Court
Western District of Washington
Tacoma Division

John Doe #1, et al., Plaintiffs, v. **Sam Reed**, et al., Defendants.	No. 3:09-CV-05456-BHS The Honorable Benjamin H. Settle **Plaintiffs' Reply to Intervenor Washington Families Standing Together's Response to Plaintiffs' Motion for Summary Judgment** NOTED ON MOTION CALENDAR: July 22, 2011 ORAL ARGUMENT REQUESTED

BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434

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1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434

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Terre Haute, Indiana 47807
(812) 232-2434

Come now Plaintiffs in reply to Intervenor-Defendant Washington Families Standing Together's ("WAFST") Response to Plaintiffs' Motion for Summary Judgment, and make the following rebuttal.[1]

Argument

While a state may publicize the names and addresses of citizens who have signed a referendum petition, *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010), the First Amendment requires an exception be made if a group can show "'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Id.* (internal brackets omitted) (*quoting Buckley v. Valeo*, 424 U.S. 1, 74 (1976)); *see also Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010); *McConnell v. FEC*, 540 U.S. 93, 198 (2003). Plaintiffs are entitled to summary judgment on their claim that Washington's Public Record Act is unconstitutional as applied to R-71 petition signers because Plaintiffs have shown that there is a reasonable probability of threats, harassments, and reprisals.

The evidence compiled in Plaintiffs' 13 summary judgment exhibits overwhelmingly demonstrates a "pattern of threats" and "specific manifestations of public hostility," *Buckley*, 424 U.S. at 74, against those who have, often out of a sense of religious conviction, voiced opposition to the homosexual movement. WAFST's primary response to this volume of evidence is to attempt to have it stricken from the record or, alternatively, down-play its significance in order to render it meaningless.

I. Plaintiffs Have Shown a Reasonable Probability that Exposure of the R-71 Petition Signers Will Lead to Threats, Harassment, or Reprisals.

WAFST claims that "Plaintiffs' burden is to establish by preponderance of the evidence that there is (a) a substantial likelihood of significant threats to R-71 petition signers if R-71 petitions are

[1] In replying, Plaintiffs rely on all the evidence Plaintiffs relied on in support of their own motion for summary judgment (Exhibits 1 through 6) and in its response to the State's motion for summary judgment (Exhibits 7 through 13).

Plaintiffs anticipate WAFST will make similar evidentiary objections to evidence submitted in support of Plaintiffs' Response to Defendant's Motion for Summary Judgment. For the same reasons articulated in Plaintiffs' Reply to Defendants' Response to Motion for Summary Judgment and Response to Motion to Strike, Plaintiffs contend that all the evidence they submit is properly authenticated and admissible.

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1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434

disclosed, and (b) that law enforcement is or will be unable or unwilling to control or address those threats." (WAFST's Response to Pls.' Mot. for Summ. J. at 5 ("WAFST's Response").) WAFST argues that "Plaintiffs' Motion...fails at every level" in part because it "provides no evidence that individuals refused to sign [R-71] out of fear that their identities would be revealed or that mere signers are likely to face harassment today." (WAFST's Response at 3.) However, WAFST misunderstands the test that is at issue in this case. When the Supreme Court announced the exposure exemption test in *Buckley*, 424 U.S. at 74, it was concerned that "unduly strict requirements of proof" could impose an unworkable, "heavy burden" on speech. It therefore based the exposure exemption test on this foundational principle: *Groups must be allowed* "*sufficient flexibility in* [*their*] *proof of injury to assure a fair consideration of their claim*." *Id.* (emphasis added). "Flexibility" is the rule. And therefore, to obtain an exemption, groups "need show *only* a reasonable probability" that exposure will lead to reprisals. *Id.* (emphasis added); *see also Doe v. Reed,* 130 S. Ct. 2811, 2820 (2010).

And, like the State, WAFST claims that Plaintiffs should lose because they cannot link any of their countless accounts of threats, harassment, and reprisals specifically to the State's publication of named financial donors to Protect Marriage Washington ("PMW"). (WAFST's Response at 1). However, the Supreme Court has already unanimously rejected this argument. There is no "strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." *Buckley*, 424 U.S. at 74. The Supreme Court expressly re-affirmed that view in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

A. Plaintiffs Have Met Their Evidentiary Burden.

WAFST relies on Justice Sotomayor's concurrence in *Doe v. Reed* to impose a heightened "test" on Plaintiffs. (WAFST's Response at 6). WAFST cites her concurring opinion, in which she held that Plaintiffs must show a "reasonable probability of serious and widespread harassment that the State is unwilling or unable to control." *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring). However, the majority opinion in *Doe v. Reed* reiterate the standard from *Buckley v. Valeo*: that the burden of proof here is one of "flexibility," *Buckley*, 424 U.S. at 74, and Plaintiffs need demonstrate

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Terre Haute, Indiana 47807
(812) 232-2434

"only a reasonable probability," *id.*, that exposure will lead to threats, harassment, or reprisals. WAFST's standard is a "heavy" (WAFST's Response at 2), unconstitutional burden on speech. *Id.*

WAFST downplays Plaintiffs' argument by pointing out that almost two years have passed since the election in question. (WAFST's Response at 1). Nevertheless, as evidenced by the fact that the State and both Intervenors continue to litigate this case with vigor and at great expense, the controversy is far from over.

There is ample evidence that protected speech and association has been chilled because of the prospect of reprisals. (E.g., Ex. 1-1, at 48:5–9, 56:16–23.) Plaintiffs have also provided evidence of death threats (e.g., Ex. 1-3, at 18:9–10); physical assaults and threats of violence (e.g., Ex. 4-23; Ex. 1-8, at 16:18–19:24); vandalism and threats of destruction of property (e.g., Exs. 4-49; 4-195); arson and threats of arson (e.g., Exs. 4-83; 4-86); angry protests (e.g., Exs. 4-58, 4-73); lewd and perverse demonstrations (e.g., Ex. 1-8, at 22:24–24:14); intimidating emails and phone calls (e.g., Ex. 8-2, pg. 25; Ex. 1-11, at 58:19–59:5); hate mail (the old-fashioned kind) (e.g., Ex. 4 to Ex. 1-7); mailed envelopes containing white suspicious powder (e.g., Ex. 4-75); multiple web sites dedicated to blacklisting those who support traditional marriage and similar causes (e.g., Exs. 4-164; 4-190); loss of employment and job opportunities (e.g., Ex. 2 ¶¶ 36–44; Ex. 4-107); intimidation and reprisals on campus and in the classroom (e.g., Exs. 4-100; 4-110); acts of intimidation through photography (e.g., Ex. 10-3, ¶¶ 9–10); economic reprisals and demands for "hush money" (e.g., Ex. 4-58); and gross expressions of anti-religious bigotry, including vandalism and threats directed at religious institutions and religious adherents (e.g., Exs. 4-7; 4-84).

Plaintiffs have provided more than enough evidence to show that a reasonable person would conclude that if he speaks up about traditional marriage in Washington, he will risks facing a reasonable probability of threats, harassment, and reprisals. WAFST mischaracterizes Plaintiffs' burden and in doing so attempts to downplay the significance of Plaintiffs' evidence. However, under the standard articulated by the Supreme Court, Plaintiffs should qualify for and should receive the requested exemption.

Again citing to concurring opinions in *Doe*, WAFST contends that Plaintiffs also bear the

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1 South Sixth Street
Terre Haute, Indiana 47807
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burden of proving that law enforcement is unwilling or unable to control any threats, harassment and reprisals. (WAFST's Response at 5.) Plaintiffs do not bear this burden under the appropriate legal standard. But even if they did, the evidence is self-explanatory. Despite laws to the contrary, it is clear that threats and harassment have occurred, are occurring, and will continue to occur. For example, in Washington, it is it is a felony, punishable by up to five years' imprisonment, to make a death threat over the telephone. Wash. Rev. Code §§ 9.61.230, 9A.20.021. Yet Plaintiffs received death threats over the phone. (*e.g.*, Ex. 1-3, at 18:9–10.) In Washington, it is it is a felony, punishable by up to five years' imprisonment, to make a death threat over the Internet. Wash. Rev. Code §§ 9.61.260, 9A.20.021. Yet Plaintiffs received death threats over the Internet. (Ex. 1-3, at 54:1–7; Ex. 4-188.) In Washington, it is a crime to make an 'electronic communication' with intent to harass, intimidate, torment, or embarrass any other person, if the communication (1) uses any lewd, lascivious, indecent, or obscene words, images, or language, or suggests the commission of any lewd or lascivious act; (2) occurs anonymously or repeatedly; or (3) threatens to inflict injury on the person or property of the person contacted or on any member of his or her family or household. Wash. Rev. Code § 9.61.260(1). Yet Plaintiffs received countless lewd, repeated, threatening communications electronically. In Washington, it is a crime to make a telephone call with intent to harass, intimidate, torment, or embarrass any other person, if the call (1) uses any lewd, lascivious, profane, indecent, or obscene words or language, or suggests the commission of any lewd or lascivious act; (2) is made anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or (3) threatens to inflict injury on the person or property of the person called or any member of his or her family or household. Wash. Rev. Code § 9.61.230(1). Yet Plaintiffs received countless lewd, repeated, and threatening telephone calls.

Plaintiffs do not advocate that law enforcement can never be sufficient to protect against threats and harassment as WAFST suggests. (WAFST's Response at 7.) Rather, Plaintiffs state that such an analysis is not the proper test and offer evidence showing that those supporting traditional marriage have and will continue to face threats, harassment, and reprisals. The police can (and should) offer what reassurance is in their power, but after threats have been made, the damage has

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1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434

been done insofar as the threats themselves are concerned. In this case, the exposure exemption serves to prevent those threats and harassment from occurring in the first instance, thereby assuring that those who signed the R-71 petition are free to associate without fear.

B. Plaintiffs Are a Group That May Receive an Exemption.

WAFST argues that Plaintiffs cannot receive an exemption because they are not a party and, if they were, they are not a minor party. (WAFST's Response at 10.) By arguing both points, WAFST again shows that it misunderstands the purpose of the exposure exemption itself. The exemption is available as a safeguard to liberty and to free speech *regardless of who stands in need of its protection*.

Interestingly, in *Doe v. Reed*, 130 S. Ct. 2811 (2010), the Court never so much as hinted that the exposure exemption would not be available to Plaintiffs. To the contrary, a clear majority of the Court agreed that an exemption was indeed available to Plaintiffs (although the Justices differed widely as to the threshold showing of threats, harassment, or reprisals that would be required to grant an exemption).

II. Plaintiffs' Evidence Satisfies the Supreme Court's Test of "Reasonable Probability."

WAFST criticized Plaintiffs for relying on evidence outside of their 19 named witnesses. (WAFST's Response at 3.)[2] However, this case is unique in that Plaintiffs seek to establish a pattern of harassment and the evidence necessarily spreads across countless individuals across hundreds of miles. The amount of evidence provided by news sources, for example, cannot be reasonably obtained in any other manner. The evidence also includes anonymous Internet postings (available for anyone to access) whose authors' identities are unknown. In contrast to the more typical case involving a single incident documented by a small number of reports, this case involves authors, victims, incidents, and news reports that are virtually limitless in number and variety. Plaintiffs cannot, through "reasonable efforts," procure and call to the witness stand each and every one of

[2] WAFST also argues that Plaintiffs rely on a statement by Eugene Volokh in their Motion without naming him as an expert witness. (WAFST's Response at 7.) However, there Plaintiffs adopt a legal argument, not an expert opinion, and merely attribute it to its source. WAFST is unable to combat this legal analysis so it attempts to discredit the source.

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1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434

these individuals.

Furthermore, the Supreme Court has said that there is no "strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought." *Buckley*, 424 U.S. at 74. The Supreme Court expressly re-affirmed that view in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), where the Court granted an exposure exemption despite the absence of such evidence. In *Brown*, the government argued that an exposure exemption was improper because of the "lack of direct evidence linking the Ohio statute's disclosure requirements to the harassment of campaign contributors," *Brown*, 459 U.S. at 101 n.20, an argument which the Court flatly rejected. *Id*.

In regards to Plaintiffs' evidence, WAFST categorically dismisses it as merely "unwelcome and sometimes illegal conduct." (WAFST's Response at 16.)[3] WAFST acknowledges and admonishes groups like KnowThyNeighbor.org's desire to have "uncomfortable" conversations with people of opposing viewpoints. (WAFST's Response at 18.) WAFST also claims it "sought to reach out to those who might disagree with it" during the R-71 campaign. (WAFST's Response at 18.) It is difficult to see how WAFST can look at Plaintiffs' evidence and come to the conclusion that such incidents are acceptable civic behavior. In addition to death threats (*e.g.*, Ex. 1-3, at 54:1–7), threats of violence (*e.g.*, Ex. 4-189), and actual instances of violence (*e.g.*, Ex. 4-24), there is a mountain of other evidence that does not even remotely resemble benign, civil-but-"uncomfortable" conduct.

Conclusion

The evidence Plaintiffs have presented demonstrates that there is a reasonable probability that, if exposed, those who signed the R-71 petition will be subject to threats, harassment, and reprisals, resulting in a profound chill on protected expression. Accordingly, Plaintiffs motion for summary judgment should be granted.

[3] WAFST continuously points to a non-binding decision out of a district court in California, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) as if it is dispositive here. That is not the case. That district court's fact-finding does not bear on the case before this Court.

BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434

Dated this 22nd day of July, 2011.

Respectfully submitted,

/s/ Jared Haynie

James Bopp, Jr. (Ind. Bar No. 2838-84)*
jboppjr@aol.com
Joseph E. La Rue (Ohio Bar No. 80643)*
jlarue@bopplaw.com
Jared Haynie (Colo. Bar No. 41751)*
jhaynie@bopplaw.com
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434
Counsel for All Plaintiffs
**Pro Hac Vice Application Granted*

Stephen Pidgeon
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, Washington 98201
(360) 805-6677
Counsel for All Plaintiffs

Certificate of Service

I, Jared Haynie, am over the age of eighteen years and not a party to the above-captioned action. My business address is 1 South Sixth Street, Terre Haute, Indiana 47807.

On July 22, 2011, I electronically filed the foregoing document, described as Plaintiffs' Response to Intervenor Washington Families Standing Togethers' Motion for Summary Judgment, with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

(1) Counsel for Defendants Sam Reed and Brenda Galarza:
Anne E. Egeler — annee1@atg.wa.gov
Jay Geck — jayg@atg.wa.gov
William G. Clark — billc2@atg.wa.gov

(2) Counsel for Intervenor Washington Coalition for Open Government:
Steven J. Dixson — sjd@wkdlaw.com
Duane M. Swinton — dms@wkdlaw.com
Leslie R. Weatherhead — lwlibertas@aol.com

(3) Counsel for Intervenor Washington Families Standing Together
Ryan McBrayer — rmcbrayer@perkinscoie.com
Kevin J. Hamilton — khamilton@perkinscoie.com
William B. Staffort — wstafford@perkinscoie.com
Rhonda L. Barnes — rbarnes@perkinscoie.com

I declare under the penalty of perjury under the laws of the State of Indiana that the above is true and correct.

Executed this 22nd day of July, 2011.

/s/ Jared Haynie
Jared Haynie
Counsel for All Plaintiffs

BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807
(812) 232-2434