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 Coalition for Open Government's Response to Plaintiffs' Motion for Summary Judgment** NOTED ON MOTION CALENDAR: July 22, 2011 ORAL ARGUMENT REQUESTED

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Come now Plaintiffs in reply to Intervenor-Defendant Washington Coalition for Open Government's ("WCOG") Response to Plaintiffs' Motion for Summary Judgment, and make the following rebuttal.[1]

Argument

As a general proposition, 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). However, the First Amendment demands that 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). This case is about that very exception.[2] 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.

I. Plaintiffs Have Shown that There Is a Reasonable Probability that the Exposure of the Names of the Petition Signers Will Lead to Threats, Harassment, or Reprisals

WCOG states that "Plaintiffs cannot meet their required burden of proof to establish that disclosure of the [R-71] petitions will subject them to threats or harassment that cannot be addressed through law enforcement channels." (WCOG's Response 1-2.) Notably, WCOG relies on Justice Sotomayor's concurrence in *Doe v. Reed* as "instructive" on the "high burden" that Plaintiffs face (WCOG's Response at 3). However, as stated above, the majority opinion in *Doe v. Reed* reiterates

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[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 WCOG 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 this brief Plaintiffs contend that the evidence they submit is properly authenticated and admissible.

[2] A reiteration of the statement of the case is important as WCOG claims that "Plaintiffs ask the Court to rule that Washington's PRA...should be struck down as to its requirement that the proposed adoption of laws by referendum be an open and public process." (WCOG's Response to Pls.' Mot. for Summ. J. (hereinafter "WCOG's Response") 2.) This statement suggests that WCOG misunderstands the nature of this as-applied challenge.

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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 "only a reasonable probability," *id.*, that exposure will lead to threats, harassment, or reprisals. A stricter standard would impose a "heavy," unconstitutional burden on speech. *Id.*[3]

A. Plaintiffs' Have Met Their Evidentiary Burden.

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. WCOG's primary response to this volume of evidence is to attempt to downplay its significance in order to render it meaningless.[4]

WCOG also argues that Attorney Jared Haynie's Declaration and attached exhibits should be excluded because he was "not named as a witness in the case." (WCOG's Response at 8.)[5] However, all of Plaintiffs' exhibits are properly authenticated pursuant to Federal Rule of Evidence 901 by "competent witness[es] with personal knowledge of their authenticity." *Las Vegas Sands, LLC v.*

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[3] WCOG argues that Plaintiffs must show that "any threats or harassment...cannot be addressed through ordinary law enforcement means." (WCOG's Response at 5). The police can (and should) offer what reassurance is in their power, but after the threat has been made, the damage has been done insofar as the threat itself is concerned. 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' have received death threats over the phone. 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. 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, threatening telephone calls.

[4] For example, WCOG claims that "[Plaintiffs] produced some limited material concerning the vocal advocates of the referendum who took very public and outspoken stances" (WCOG's Response at 4) and "Plaintiffs allege random harassment purportedly directed at very public figures." (WCOG Response at 7).

[5] Interestingly, WCOG does not complain about the State relying on a declaration of Attorney Anne Egeler, who was not listed on the witness list provided to Plaintiffs by the State.

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Nehme, 632 F.3d 526, 533 (9th Cir. 2011). Furthermore, the news articles contained in Exhibit 4 are self-authenticating under Federal Rule of Evidence 902(6) and contain "sufficient indicia of authenticity."

Authentication is a "condition precedent to admissibility." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). "[T]his condition is satisfied by 'evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Id*. (quoting Fed. R. Evid. 901(a)). The threshold for the court's determination of authenticity is not high. *See Orr*, 285 F.3d at 784. *See also, e.g., United States v. Reilly,* 33 F.3d 1396, 1404 (3d Cir. 1994); *United States v. Holmquist,* 36 F.3d 154, 168 (1st Cir. 1994) ("the standard for authentication, and hence for admissibility, is one of reasonable likelihood"); *United States v. Coohey,* 11 F.3d 97, 99 (8th Cir. 1993) ("the proponent need only demonstrate a rational basis for its claim that the evidence is what the proponent asserts it to be"). Plaintiffs have provided such testimony by way of declarations from Jared Haynie and Larry Stickney, who have personal knowledge that the documents attached to their declarations are what they claim them to be.

B. Plaintiffs' Evidence is Not Hearsay and Is Properly Before the Court.

WCOG argues that the exhibits that Plaintiffs offer are inadmissible hearsay. To the contrary, such evidence is not hearsay (because of the purpose for which it is offered). But even if it were hearsay, it would be admissible under Federal Rule of Evidence 807.

In making its argument, WCOG misapprehends the purpose for which Plaintiffs' evidence is offered. Hearsay is an out-of-court statement used "to prove the truth of the matter asserted." Fed. R. Evid. 801(c). However, the articles are not being presented for the truth of the matter contained within each article. For Plaintiffs' purposes, it makes little difference whether the accounts of harassment discussed in newspaper editorials or portrayed on the six o'clock news are factually accurate, because reasonable persons viewing such reports are likely to come to the conclusion, not unreasonably, that if they (the readers and the viewers) choose to speak up for traditional marriage, they too risk facing (like the people in the news reports) threats, harassment, and reprisals. Thus, Plaintiffs' proffering of the evidence does not hinge on "prov[ing] the truth of the matter asserted"

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in each and every news report, magazine article, and video clip but rather, it goes to the natural and probable effect that such reports have on the listener, which is to chill protected expression. Therefore, the news reports and videos are not hearsay, and are admissible. And therefore the news reports and videos are not hearsay, and are admissible.

C. Even if Plaintiffs' Evidence Is Hearsay, It Is Still Admissible Under a Hearsay Exception.

But even if the news reports and videos were hearsay, they are still be admissible under Federal Rule of Evidence 807. Hearsay evidence may be admitted under Rule 807 if (a) it has circumstantial guarantees of trustworthiness equivalent to the listed exceptions to the hearsay rule, (b) it serves as evidence of a material fact, and (c) it is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. The hearsay must serve the general purposes of the Rules of Evidence and the interests of justice by its admission into evidence. Fed. R. Evid. 807. *See also United States v. Fowlie*, 24 F.3d 1059, 1069 (9th Cir. 1994). The hearsay evidence used in this action meets the requirements for admission under Rule 807.[6]

The articles used as evidence in the case at bar have circumstantial guarantees of trustworthiness equivalent to the listed exceptions of the hearsay rule. First, the sheer volume of news reports relating to harassment of traditional marriage supporters is itself a strong circumstantial guarantee of trustworthiness. Given the number of stories on this issue, one must only conclude that, (a) these threats and reprisals are actually occurring across the country or (b) there is a vast conspiracy in the media to portray these incidents as arising across the country. The second circumstantial guarantee of trustworthiness is the broad range of political perspectives that reported, discussed, and editorialized about the threats and reprisals. The fact that many news sources who were unabashedly pro-same sex marriage ran stories covering these instances is a strong indicator that these incidents did in fact occur as recorded. (*See, e.g.,* Exs. 4-13 (Newsweek); 4-61 (New York Times); 4-63, 4-115, 4-116 (L.A. Times); 4-186 (Associated Press).)

Courts have held that where multiple independent newspapers attribute the same quotations or

[6] Rule 807 provides judges latitude and flexibility to admit statements that would otherwise be hearsay. *See U.S. v. Valdez–Soto,* 31 F.3d 1467, 1471 (9th Cir. 1994); *United States v. Bonds*, 608 F.3d 495, 501 (9th Cir. 2010).

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details to the same individual or set of events, the statements may have "circumstantial guarantees of trustworthiness" at least equivalent to those of the other hearsay exceptions when the statements, and can be used as evidence of a material fact. *Larez v. City of Los Angeles*, 946 F.2d 630, 643-44 (9th Cir. 1991). In *Larez*, for example, the Ninth Circuit recognized that newspaper articles meet the trustworthiness requirement. 946 F.2d at 643.[7] In that case, however, the court ultimately turned to the "best evidence" requirement and concluded that articles are nonetheless inadmissible if the declarant is able to testify about the statements. In support of this conclusion, the court noted that Rule 803(24)(b)[8] requires that the hearsay evidence be *more probative* than any other evidence that could be reasonably obtained. *Larez,* 946 F.2d at 644. In failing to meet the "best evidence" requirement, however, *Larez* is clearly distinguished from the facts of our case.

The amount of evidence provided by the news articles cannot be reasonably obtained in any other manner. The evidence used in this case seeks to establish a pattern of harassment and necessarily spreads across dozens of individuals across hundreds of miles. The evidence also includes anonymous Internet postings (available for anyone to access) whose authors' identities are unknown.[9] 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 procure and call to the witness stand each and every one of these people individually through "reasonable" efforts.

The news reports and videos contained in Exhibits 4 and 5 are admissible under Rule 807 because the they are the most probative evidence Plaintiffs can procure through reasonable efforts.

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[7] WCOG's assertion that Plaintiffs' evidence comes from "admittedly biased sources lacking in credibility" is not persuasive both as to its admissibility or its weight on Plaintiffs' claims. (WCOG's Response at 10.) While there is no legal standard as to which news sources are sufficiently "credible" so as to be trustworthy — and reasonable minds could differ on the credibility of even major national news sources — that discussion misses the point. As explained above, Plaintiffs' exhibits succeed in showing a pattern of threats and harassment.

[8] Two residual exceptions were contained in the Federal Rules as initially adopted. In 1997, the residual exceptions were transferred out of Rules 803 and 804, and combined in the a single exception in Rule 807. No change in meaning was intended. The cases decided under old rules 803(24) and 804(b)(5) remain pertinent in deciding whether hearsay is admissible under Rule 807.

[9] Notably, WCOG filed its briefs under seal as it found redacting a handful of names over the course of a few pages in a 24-page brief to be too burdensome and onerous, yet it expects Plaintiffs to produce witnesses for every newspaper article.

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Larez, 946 F.2d at 644. The circumstances in this case warrants their admission. The existence of a catch-all hearsay exception was meant precisely for a case like this. Rule 807 exists to provide courts with flexibility in admitting statements traditionally regarded as hearsay but not falling within any of the conventional exceptions. *United States v. Valdez-Soto,* 31 F.3d 1467, 1471 (9th Cir. 1994). In this case, the use of Rule 807 serves to forward the general purposes of the Rules and the interests of justice by allowing the exhibits to be admitted into evidence.

WCOG claims that "Plaintiffs' Exhibits 2-5 should be excluded because they exceed the scope of the Court's pretrial discovery order." (WCOG Response at 7).[10] In a case with evidence as voluminous as this one---and where the object of the admission of the evidence is not to incarcerate or impose financial liability---it is unreasonable to expect that Plaintiffs would actually call, as witnesses on the witness stand, each and every newspaper reporter, editorial board member, magazine writer, news anchor, and video editor who ran stories or produced videos relating to harassment of pro-traditional-marriage supporters (not to mention the hundreds of victims who those reporters, board members, writers, anchors, and editors interviewed, quoted, and filmed for their stories). To do so, Plaintiffs would literally have to call hundreds upon hundreds of witnesses. Not only is such a result counterintuitive, but it also flies in the face of what the Supreme Court promised to groups seeking an exposure exemption, namely, "flexibility in the proof of injury." *Buckley*, 424 U.S. at 74. Each and every instance of intimidation could easily comprise an entire trial of its own. Surely, the "flexibility" the Court promised was not the promise of one trial (for an exemption) that in itself comprised hundreds of mini-trials, each with their own intricacies.

D. Each of Plaintiffs' Exhibits Is Admissible and Relevant.

WCOG broadly claims that "Plaintiffs' exhibits are replete with...examples of inadmissible hearsay far too numerous to address on an exhibit-by-exhibit basis." (WCOG's Response at 10.) This sweeping claim misunderstands the purpose for which Plaintiffs' evidence is offered and fails to

[10] WCOG fails to adequately explain why Exhibit 2, a redacted declaration from a named witness, should be excluded.

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recognize the authentic nature of the evidence.[11]

While Plaintiffs have explained above why each piece of evidence is not hearsay and, even if it was, it is admissible, Plaintiffs herein provide specific rebuttals to WCOG's evidentiary attacks. For example, WCOG argues that Exhibit 4-100 constitutes "triple hearsay" and, at best, "says nothing as to how disclosure of Referendum 71 petition information would lead to harm." (WGOC's Response at 9). This Exhibit, however, is not attempting to prove that one student received intimidation and reprisal in his classroom; it demonstrates, rather, that a news source has widely publicized an incident that is likely to chill speech. Reasonable persons viewing such a report are likely to come to the conclusion, not unreasonably, that if they choose to speak up for traditional marriage in a classroom, they too risk facing (like the student in the news report) threats, harassment, and reprisals. The same is true of Exhibit 4-12, which WCOG criticizes for its alleged "triple hearsay" and Exhibit 4-7, for its "two layers of hearsay." (WCOG's Response at 9.) Exhibit 4-12 bears witness to a report by the Catholic News Network that describes a man threatened by self-described "gay guy who owns guns" and Exhibit 4-7 demonstrates an article from a Christian website that describes churchgoers fearful of how they "might be killed" during a prayer walkthrough of the Castro District. Neither of these articles are included as exhibits in an attempt to prove the factual accuracy of these threats, rather these documents illuminate two of the hundreds of examples of incidents that chill speech merely by being made public, rendering others fearful of taking the risk of speaking out in the face of threats, harassment, and reprisals.[12]

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

WCOG questions the relevancy of Plaintiffs' evidence that does not directly relate to events in

[11] WCOG has taken it upon itself, with no supporting evidence, to judge which evidence "constitutes threats or intimidation" to the reasonable person versus simply "juvenile behavior." (WCOG's Response at 20). However, Plaintiffs have pointed to Washington's own laws regarding what is considered threats and intimidation. Footnote 3, supra.

[12] WCOG notes that "taking a position *in favor* of same-sex marriage might very well subject an individual to private threats or harassment." (WCOG's Response at 17.) If that is a case, then such a group should also be entitled to present evidence to obtain a similar exemption.

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Washington stemming out of the R-71 debate.[13] However, the Supreme Court has stated 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, the precise argument raised by WCOG here. The Court flatly rejected that argument. *Id.*

Further, WCOG claims that Plaintiffs' evidence lacks a nexus with the instant case because it "ignores the fact that people may have supported [R-71] for any number of reasons" (WCOG's Response at 13). However, the Supreme Court has stated that:

> [a]n individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

Doe v. Reed, 130 S. Ct. 2811, 2817 (2010).

While WCOG claims there "may have been 138,000 different reasons people signed" (WCOG's Response at 16), it does not point to any evidence that this is the case. Notably, the petition itself had the words "Preserve Marriage, Protect Children" in large, bold font across the top of the form (Dkt. 27, page 5.)

WCOG also claims that Plaintiffs' argument fails because "Plaintiffs are not part of an unpopular minority group." (WCOG's Response at 13.) The argument that Plaintiffs are, as a matter of law, precluded from access to an exposure exemption because they are not an acute minority of the population—fails because the exposure exemption test is not something that is available

[13] While arguing that Plaintiffs' evidence must come out of Washington and directly relate to R-71, WCOG continues to rely, when convenient, on a non-binding decision out of a district court in California, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009). That case is not dispositive here and the district court's fact-finding does not bear on the case before this Court.

exclusively to "minor parties." *See, e.g.*, *Doe*, 130 S. Ct. at 2820–21.

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.

Dated this 22nd day of July, 2011.

Respectfully submitted,

/s/ Jared Haynie

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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' Reply to Intervenor Washington Coalition for Open Government's Response to Plaintiffs' Motion for Summary Judgment, with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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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
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