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

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly dismissed petitioners' challenge as moot when it determined that no effective relief could be granted.

2. Whether the court of appeals correctly determined that petitioners' challenge was not within the mootness exception for cases "capable of repetition, yet evading review" because a court order preventing disclosure could have maintained a live controversy until the case was resolved.

3. Whether the court of appeals correctly determined that petitioners' request for a future exemption from campaign finance disclosure requirements was not ripe because petitioners did not allege a specific plan for future campaign activity.

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

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STATEMENT OF THE CASE

1. In 1974, the people of California enacted the Political Reform Act ("PRA"), an initiative measure that requires public officials, lobbyists, and political campaign committees to publicly disclose certain financial information. As relevant here, the PRA mandates that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Cal. Gov't Code § 81002(a). To further this goal, campaign committees are required to submit periodic campaign finance reports to the California Secretary of State.[1] *See id.* §§ 82013 (defining "committee"), 84101-84108 (listing requirements for organization statements), 84200-84252 (listing requirements for campaign statements). These reports must include the name and address of any person who contributes $100 or more. *Id*. § 84211(f). Because the legislature found that "[p]ublic access to campaign and lobbying disclosure information is a vital and integral component of a fully informed electorate," the Secretary of State makes these reports publicly available on the internet. *Id*. §§ 84601(b), 84602. The street addresses of contributors are omitted from the reports published on the Secretary of State's website, but they are

[1] Pursuant to Rule 35.3 of this Court's Rules, Secretary of State Alex Padilla is automatically substituted as a respondent in this matter in place of his predecessor, Debra Bowen.

included in hard copy reports available on request. *Id*. §§ 81008, 84602(d).

2. Petitioners are three campaign committees and a class of individuals who donated $10,000 or more to committees supporting Proposition 8, a California ballot measure passed in November 2008. Pet. 2. Two of the committees—National Organization for Marriage California – Yes on 8 ("NOM-California") and ProtectMarriage.com – Yes on 8 ("ProtectMarriage")—were formed to advocate for Proposition 8. Pet. App. 59a. The third committee—National Organization for Marriage California PAC ("NOM-California PAC")—was formed after the 2008 election to raise and spend money on ballot measures and candidates in future elections. *Id*. at 60a. Like all campaign committees, petitioners were required to identify contributors of $100 or more. Cal. Gov't Code § 84211(f). Petitioners did not challenge this requirement before the November 2008 election. They submitted numerous pre-election reports, which the Secretary of State published on its website and made available in hard copy. Pet. App. 6a. Newspapers and other websites republished this information, with the result that contributors' names and addresses were widely available from multiple sources. *Id*. at 15a-16a.

After the election, in January 2009, petitioners filed a complaint in the United States District Court for the Eastern District of California challenging the constitutionality of the PRA's disclosure requirements both facially and as applied to them. *Id*. at 6a-7a, 72a.

They sought (1) an injunction exempting them from future reporting requirements, and (2) declaratory and injunctive relief requiring the State to purge all records of petitioners' past disclosures. *Id*. at 7a. Shortly thereafter, petitioners moved for a preliminary injunction on all counts, which the district court denied. *Id*. at 7a, 72a. Petitioners did not appeal the order denying a preliminary injunction or seek an injunction pending appeal. *Id*. at 72a. Instead, petitioners complied with post-election reporting requirements and submitted additional contributor information to the Secretary of State, who duly published this information.

3. The district court granted respondents' motion for summary judgment and denied petitioners' cross-motion. Applying *Buckley v. Valeo*, 424 U.S. 1 (1976), the court denied petitioners' request for an as-applied exemption from disclosure requirements. *Buckley* states that "minor parties" are entitled to an exemption from disclosure requirements if the evidence shows "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id*. at 74. The court found that petitioners were a politically and financially successful majority movement, unlike the "minor parties" who had received disclosure exemptions in past cases such as *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958), and *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99 (1982). Pet. App. 84a-91a. The court

further found that even if the exemption could apply to a majority movement, petitioners' evidence fell far short of establishing a reasonable probability that disclosure of Proposition 8 contributors would subject them to threats, harassment, or reprisals. *Id*. at 91a-103a. The court also rejected petitioners' facial challenges to the PRA's $100 disclosure threshold and post-election disclosure requirements.

4. The Ninth Circuit Court of Appeals affirmed regarding petitioners' facial challenge, a result that is not challenged by this petition. Pet. App. 8-12a. The court of appeals then dismissed the as-applied challenge as non-justiciable, finding that the case was moot, not subject to any mootness exception, and unripe with respect to future disclosures. *Id*. at 16a, 20a-22a, 26a-28a.

a. The court concluded that petitioners' request to have the State purge all past filings was moot because the court could not provide effective relief. The record showed that petitioners' filings had been widely available on the internet for years, and that an unknowable number of third parties had accessed contributor information, and in some cases had republished it. *Id*. at 15a-16a.

> [Petitioners] themselves provided detailed documentation of several websites that have published their contributors' names, employers, and addresses. [Petitioners] also represent that: (1) one site allows individuals to search for "any city and print a map graphically illustrating the name, address, [contribution]

> amount, occupation, and employer of each individual in that city who contributed to Prop 8"; (2) "at least two major California newspapers have compiled searchable databases . . . that enable easy access to look up Prop. 8 contributors"; and (3) Time Magazine directed its readership to a website that publishes the information contained in [Petitioners'] PRA disclosures.

Id.

b. The court of appeals also determined that this controversy did not fall within the mootness exception for cases "capable of repetition, yet evading review" because "there is no risk that future repetitions of the same controversy will necessarily evade review." Pet. App. 19a. The court reasoned that controversies about disclosure requirements do not have an "inherent limit" and a court can maintain a live controversy by issuing a temporary order that prevents disclosure. *Id*. at 20a. Here, petitioners could have filed an interlocutory appeal after the district court denied the preliminary injunction, and they could have sought an injunction pending appeal. *Id*. at 21a. They did neither. "If [petitioners] were to bring a similar action in the future, their claims would not, by their nature, again evade review, because a different litigation strategy could maintain a live controversy until the action's final resolution." *Id*.

c. Finally, the court of appeals determined that petitioners' request for forward-looking relief was not ripe. Pet. App. 23a-28a. Petitioners stated

that they expected to participate in future campaigns similar to Proposition 8, but they did "not offer[ ] any information regarding when they may next support a campaign opposing same-sex marriage, what type of campaign they will support, where they will support it, what their involvement will entail, or whether their donors will likely face personal harassment." *Id*. at 27a. The court found that petitioners' intentions regarding future campaigns were speculative and hypothetical and there was no "immediate threat of self-censorship." *Id*.

d. The court of appeals remanded the as-applied claims to the district court with instructions to vacate the as-applied portion of its opinion. *Id*. at 28a.

e. Dissenting in part, Judge Wallace disagreed with the majority's determination that petitioners' as-applied challenges were non-justiciable. *Id*. at 29a-53a.

5. Petitioners filed a motion for rehearing on July 16, 2014, which the panel denied, with Judge Wallace dissenting for the reasons stated in his prior dissent. *Id*. at 205a-206a. The district court vacated its decision on the as-applied challenge on August 18, 2014. *Id*. at 54a-55a. Petitioners timely petitioned for certiorari based only on the as-applied challenge.

ARGUMENT

The petition should be denied because the court of appeals' decision does not conflict with any decision

from this Court or other circuit courts and is correct. The decision rests on the court of appeals' largely factbound determinations that 1) this case is moot because the contributor information petitioners want purged has already been publicly disclosed and widely disseminated by third parties, 2) this case is not within the mootness exception for cases "capable of repetition, yet evading review" because interim relief could have maintained a live controversy until the case was resolved, and 3) petitioners' claim for a future exemption is not ripe because petitioners did not allege a specific plan for future campaign activity. The court of appeals did not reach the merits of petitioners' as-applied challenge, and further review of that claim is not warranted.

I. THE COURT OF APPEALS' DECISION IS CORRECT AND CREATES NO CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OR THIS COURT.

A. The court of appeals' mootness decision is correct and creates no conflict.

1. The Constitution restricts the jurisdiction of federal courts to adjudicating "Cases" and "Controversies." U.S. Const. art. III, § 2. "Federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them' or give 'opinion[s] advising what the law would be upon a hypothetical state of facts.'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494

U.S. 472, 477 (1990)). This Article III "'case-or-controversy requirement subsists through all stages of federal judicial proceedings. . . . [I]t is not enough that a dispute was very much alive when suit was filed.'" *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 461 (2007) ("*WRTL-II*") (quoting *Lewis*, 494 U.S. at 477). A case becomes moot when an event occurs while the case is pending "that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Petitioners argue that the court of appeals applied the wrong standard and held the case moot because it was "*unlikely*" that the court could "provide *significant* effective relief." Pet. 13. (emphasis in original) But the quoted language appears only in the dissenting opinion and nowhere in the majority opinion. The majority properly focused on whether the court could "effectively remedy a present controversy between the parties." Pet. App. 14a. This is the same standard as the "effectual relief" standard articulated by this Court in *Mills* and *Church of Scientology*.

Applying this standard, the court of appeals determined that the case was moot because it could "no longer provide Appellants with effective relief." Pet. App. 16a. Petitioners sought to prevent public disclosure of contributor information, but they filed numerous reports with this information before bringing suit, and they filed additional reports after their request for preliminary relief was denied. By the time

this case reached the court of appeals, the contributor information petitioners sought to keep confidential had been released to the public and widely published on the Internet. *Id*. Specifically, the court found:

> [T]he challenged information is in the hands of third parties over whom we lack jurisdiction, and it has been widely available on the Internet for several years. It is now impossible to identify how many people have viewed this information, locate every reproduction of this information, and prevent the information's continued disclosure.

Id. at 16a n.3. As a result, the court concluded that it could not effectively limit public disclosure because "vast dissemination" of the information had already occurred and could not be undone. Pet. App. 16a.

2. This decision does not conflict with the circuit court decisions cited by petitioners. Pet. 16-19. *United Artists Theatre Company v. Walton*, 315 F.3d 217 (3d Cir. 2003) merely restates the *Church of Scientology* standard and applies it to a set of facts different from both *Church of Scientology* and this case. *United Artists* concerned a challenge to a bankrupt debtor's retention agreement with a financial advisor. *Id*. at 221. The Third Circuit held that the case was not moot because there were potential claimants who would benefit from reforming the agreement. *Id*. at 228. This ruling says nothing about whether widespread publication of contributor information renders petitioners' claim moot. In *United States v. Smith*, 123 F.3d 140 (3d Cir. 1997),

newspapers requested access to a sentencing memorandum, briefs about the extent to which the memorandum contained secret grand jury materials, and a hearing about whether the government had violated grand jury secrecy by providing the memorandum to the press and the public. *Id*. at 143. The Third Circuit held that the request for the sentencing memorandum was moot because the newspapers already had it, *id*., and that the district court properly denied access to the briefs and hearing because they would disclose additional confidential material. *Id*. at 154. It also noted in passing that "[e]ven 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." *Id*. at 155. Petitioners focus on this language, but it is dicta and is not relevant to this case, where contributor information was never confidential and has now been publicly available for years and republished on the internet by numerous third parties. Under these circumstances, an order barring continued government disclosure would not narrow public dissemination. *See Doe v. Reed*, 697 F.3d 1235, 1239-40 (9th Cir. 2012) (distinguishing *Smith*, and noting 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").

The court of appeals' decision similarly does not conflict with the other eighteen cases petitioners cite in a footnote. Pet. 16-18 n.12. These cases use the same "meaningful relief" or "effective relief"

standard applied below, and application of this standard to significantly different facts creates no conflict. Those cases that bear some similarity to the present case—in that the remedy sought was return or expungement of documents—are distinguishable because the documents at issue were released only to a limited number of persons, all subject to the jurisdiction of the court.[2] *See Reich v. Nat'l Eng'g & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993) (subpoenaed documents provided to OSHA); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999) (documents turned over to the Inspector General subject to a protective order); *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487, 490, 493 (5th Cir. 1998) (documents turned over to grand jury, so grand jury secrecy requirements

[2] Petitioners cite one district court case in which documents were released to a third party not before the court. *See Detroit Int'l Bridge Co. v. Fed. Highway Admin.*, 666 F. Supp. 2d 740, 745 (E.D. Mich. 2009). The third party was a United States congressman, and the court "remain[ed] doubtful of its ability to offer an effective or meaningful remedy" because the congressman was not subject to the court's jurisdiction. *Id.* at 744. The court "cautiously . . . consider[ed]," *id.* at 745-46, the possibility of issuing a temporary restraining order in order to provide "'s*ome* form of meaningful relief'" (emphasis in original), but ultimately did not do so because it found it unlikely that plaintiffs would succeed on the merits. *Id.* at 745 (quoting *Church of Scientology*, 506 U.S. at 12). The district court's hypothesizing about a possibility of meaningful relief in *Detroit International Bridge*, where there was disclosure to only a single person, does not speak to this case, where there has been vast public disclosure. Nor does a single district court's equivocal dicta create a conflict of authority requiring review in this Court.

prevented further disclosure); *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1311 (8th Cir. 1996) (same); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1040 (10th Cir. 1998) (same); *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. Fla. Azalea Specialists*, 19 F.3d 620, 622 (11th Cir. 1994) (subpoenaed documents produced to Office of Special Counsel of the Immigration Related Unfair Employment Practices).

3. There is also no conflict with this Court's reasoning in *Church of Scientology*, 506 U.S. at 12, and *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). In both of those cases, documents were improperly disclosed to a party to the case, and the Court found that it could grant effective relief by ordering the party to expunge or return the documents. In *Church of Scientology*, the Internal Revenue Service ("IRS") obtained attorney-client communications through a possibly unlawful summons. *Id.* at 10-11. The Court held that the IRS's acquisition and possession of these documents implicated the plaintiff's possessory interests and Fourth Amendment rights, and it found that it could grant meaningful relief by ordering the IRS to return the documents. *Id.* at 13. In *Sells*, attorneys and staff in the Civil Division of the Justice Department obtained grand jury materials. *Id.* at 420. The Court held that this infringed on the secrecy of grand jury proceedings and that it could grant effective relief by ordering

return of the materials. *Id*. at 422 n.6, 427. In neither *Sells* nor *Church of Scientology* was there any allegation that the materials had already been further disseminated to those beyond the court's power to control.

Petitioners contend that the court of appeals erred in understanding the requested relief "as being about secrecy" (Pet. 10) and that this "keep-it-secret formulation" conflicts with *Sells*'s holding that a court "can grant partial relief by preventing further disclosure." Pet. 11 (quoting *Sells*, 463 U.S. at 422 n.6). There was no misunderstanding and there is no conflict. The court of appeals correctly understood that petitioners sought to have their contribution records expunged in order to limit further *public disclosure* of contributor information. This contrasts with *Sells*, in which plaintiffs sought to keep information from civil attorneys and staff in the DOJ—a party to the case—and an order directed at the DOJ could provide that relief by preventing further disclosure within the DOJ. Here, an order directed at the State cannot provide effective relief because the information at issue has already been released to the public and republished by third parties.

Petitioners also argue that the court of appeals erred in its factual determination about the extent of public disclosure, contending that at least some information is not public because the Secretary of State did not provide contributor addresses on its website, but only in hard copy reports available on request. Pet. 11-12. Such a factual dispute does not

warrant this Court's review. Furthermore, the record demonstrates that third parties were easily able to acquire address information, either from the Secretary of State or from other sources.[3] To purge the Secretary of State's records after this information is already in the public domain would not prevent further disclosure.

Finally, petitioners argue that the Court could grant meaningful relief through a declaration that the challenged statutes are unconstitutional as applied to them. Pet. 15. They assert this would be meaningful because they "intend to file amended statements to participate in [traditional-family and related] initiatives as the need arises." *Id*. To the extent this is a request for forward-looking relief, the court of appeals correctly determined that it is not ripe for review. *See* Section I(C), *infra*. To the extent petitioners seek a mere declaration about the law,

[3] Petitioners are correct that the Secretary of State does not publish contributors' street addresses on its website, but contributor addresses were posted online by third parties. As petitioners explained in prior briefing, third parties created websites that "combine[d] information available in the public reports released by the Secretary of State with other publicly available information, such as addresses. . . ." Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment (Dkt. 251). Contributor addresses may have also have been obtained from hard copy reports available from the Secretary of State. The Secretary of State's office is not permitted to request the identity of persons requesting records, nor is it required to keep records of requests for printed copies of campaign finance records. *See* Cal. Gov't Code § 81008.

without a nexus to past or future disclosures, this request is not enough to confer Article III jurisdiction. A "dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words 'Cases' and 'Controversies.'" *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

B. The court of appeals' application of the test for cases "capable of repetition, yet evading review" is correct and creates no conflict.

1. A case that is otherwise moot may be heard if it is "capable of repetition, yet evading review." *Lewis*, 494 U.S. at 481. This exception applies when "(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." *WRTL-II*, 551 U.S. at 462 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Because mootness limits a court's power to hear a case, the exception should be applied only in "exceptional situations." *Lewis*, 494 U.S. at 481 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)).

Applying this test, the court of appeals properly concluded that this is not the type of case that necessarily evades review. Pet. App. 17a-23a. The court recognized that unlike in cases when a woman seeks an abortion or a candidate challenges a direct speech

restriction that could affect the outcome of an election, a disclosure dispute can be maintained as a live controversy by a court order preventing disclosure until the resolution of the case. *Id*. at 18a-20a. In this case, petitioners did not seek such an order after their request for a preliminary injunction was denied. "If Appellants were to bring a similar action in the future, their claims would not, by their nature, again evade review, because a different litigation strategy could maintain a live controversy until the action's final resolution." *Id*. at 21a. The court of appeals did not reach the "capable of repetition" prong.

2. This decision does not conflict with decisions of the other courts of appeal. Petitioners contend that the court of appeals invented a new test when it observed that "[f]or a controversy to be 'too short to be fully litigated prior to cessation or expiration,' it must be of '*inherently* limited duration.'" Pet. App. 18a (quoting *Doe v. Reed*, 697 F.3d 1235, 1240 (9th Cir. 2012) (emphasis added)). Contrary to petitioners' assertion, this observation does not impose a new test. The phrase "inherently limited duration" is simply shorthand for the unremarkable proposition that a case does not evade review if it is possible for a court to issue interim relief that will preserve a live controversy. Petitioners cite no contrary cases to establish a circuit conflict, instead claiming that the conflict is evidenced by their "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." Pet. 25.

In fact, at least eight other circuits have phrased the test similarly. *See Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (noting that undeclared wars of aggression are not capable of repetition yet evading review because "unlike elections, trials, pregnancies, or public school years, [they] are not inherently short in duration"); *Marek v. Rhode Island*, 702 F.3d 650, 655 (1st Cir. 2012) ("To establish that a claim is likely to evade review, the claim must be 'inherently transitory' or there must be 'a realistic threat that no trial court ever will have enough time to decide the underlying issues' before mootness attaches.") (quoting *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001)); *Dow Chem. Co. v. EPA*, 605 F.2d 673, 678 n.12 (3d Cir. 1979) ("Most cases utilizing this [exception] have involved official action that *by its very nature* could not, or probably would not be able to be adjudicated while fully 'live.'") (emphasis added); *Kennedy v. Block*, 784 F.2d 1220, 1222-23 (4th Cir. 1986) (the "capable of repetition, yet evading review" exception is designed to allow "judicial review of all controversies that are inherently short-lived"); *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Engin'rs*, 217 F.3d 393, 398-99 (5th Cir. 2000) (finding dispute moot, because the challenged action was not of the type "inherently capable of evading review"); *Bd. of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464, 467 (7th Cir. 1996) ("To fall within this exception, the alleged injury must be of inherently limited duration and likely to happen again to the same complaining party."); *Clark v. Brewer*, 776 F.2d 226, 229 (8th Cir. 1985) (the "proper inquiry is

whether 'the [challenged] activity is *by its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live'") (quoting *Conyers*, 765 F.2d at 1128 (D.C. Cir. 1985) (emphasis in original)); *Wyoming v. U.S. Dep't of Interior*, 674 F.3d 1220, 1229 (10th Cir. 2012) ("[T]he inquiry should turn on whether something inherent exists in the [challenged] action that makes it necessarily of short duration."). As these cases demonstrate, the concept of "inherently limited duration" is not new and the decision below is consistent with other circuits' descriptions of the mootness exception.

3. There is no conflict with this Court's decision in *WRTL-II*. The decision below applied the same standard as *WRTL-II*, and the different outcomes reflect factual differences between the two cases. *WRTL-II* concerned an as-applied challenge to a federal law that prohibited corporations from using general treasury funds to pay for "electioneering communications" shortly before federal elections. 551 U.S. at 460. Before the 2004 election, a corporation that sought to broadcast such ads filed a lawsuit challenging the law, but the election was held before the case reached the appellate courts. *Id.* at 462. This Court concluded that the "evading review" prong was met because the corporation could not have obtained complete review of its claims in time to broadcast ads before the election. *Id*. In contrast, the present case did not need to be resolved before an election in order to afford effective relief. Petitioners did not even file suit until two months after the 2008 election, and

they sought an exemption from filing post-election reports. Under these circumstances, interim relief could have prevented disclosure and maintained a live controversy during appellate review.[4]

C. The court of appeals' ripeness decision is correct and creates no conflict.

1. To be ripe for adjudication, an injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An alleged future injury is sufficiently imminent if it is "'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147, 1150

[4] The petition quotes extensively (Pet. 22-25) from the dissent, which asserts that "the particular facts of *this* case" evade review because the preliminary injunction was denied the day before the January 31 reporting deadline, thus requiring quick action if the petitioners wished to apply for a stay. Pet. App. 36a-38a. The factbound question of whether petitioners could have managed their litigation so as to ensure the possibility of a stay does not warrant review. In large part, the short timeframe was a consequence of petitioners' decision not to challenge the disclosure requirements until two months after the election, and only a few weeks before the January reporting deadline—which necessarily compressed the district court's decision-making window. Even with this compressed schedule, moreover, petitioners had several days to request appellate relief, because January 31 fell on a weekend and the reporting deadline moved to Monday, February 2.

n.5 (2013)). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes." *Clapper*, 133 S. Ct. at 1147 (quoting *Defenders of Wildlife*, 504 U.S. at 565 n.2).

The decision below used an established Ninth Circuit test in determining that petitioners' alleged future injury was too speculative to present a ripe controversy. *See* Pet. App. 24a-26a (citing *Wolfson v. Brammer*, 616 F.3d 1045, 1059 (9th Cir. 2010); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc)). First, the court found that petitioners had not articulated a concrete plan to engage in protected conduct. *Id*. at 27a. As it noted, they "have not offered any information regarding when they may next support a campaign opposing same-sex marriage, what type of campaign they will support, where they will support it, what their involvement will entail, or whether their donors will likely face personal harassment." *Id*. Second, it found that petitioners' "hypothetical plans and fears do not create an immediate threat of self-censorship." *Id*. Third, it observed that there is no history of state enforcement actions against those who fail to comply with disclosure requirements. *Id*. Based on these factors, the court concluded that petitioners' allegations of future harm were not ripe for review. In reaching this conclusion, the court of appeals also relied on this Court's decision in *Renne v. Geary*, 501

U.S. 312 (1991), which held there was no ripe controversy about an endorsement restriction where the challengers did "not allege an intention to endorse any particular candidate." *Id*. at 321.

2. The decision below does not conflict with *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995). In that case, the Tenth Circuit considered a pre-enforcement challenge to a state statute that prohibited using federal campaign funds for state elections. New Mexico argued that a facial challenge by then-Congressman Bill Richardson was not ripe because he had not announced an intention to run for state elective office. *Id*. at 1497. The Tenth Circuit rejected that argument, finding that the challenged statute had "a direct and immediate effect" on Congressman Richardson's current fund raising and "caused Congressman Richardson to engage in the activity of fund raising differently than he has in the past." *Id*. at 1500. The "immediate effect" underlying the Tenth Circuit's ripeness decision stands in sharp contrast with this case, because petitioners are not engaged in any current campaign and cannot show any impact on their present activities.[5] Further, this case does not create

[5] While *Richardson* describes the ripeness test differently than the decision below, the tests are entirely compatible. In *Richardson*, the Tenth Circuit did not distinguish between constitutional and prudential ripeness:

> Thus, our ripeness inquiry in the context of this facial challenge to New Mexico's election law statute focuses on three elements: (1) hardship to the parties by

(Continued on following page)

an intra-circuit conflict with other decisions of the Ninth Circuit, and even if it did, that would not be grounds for review by this Court.[6] *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. Petitioners fail to demonstrate a conflict between the court of appeals' decision and decisions of this Court. In *WRTL-II*, 551 U.S. at 462-63, the Court held that the case fell within the mootness exception for cases "capable of repetition, yet evading review," rendering unnecessary a separate ripeness inquiry about allegations of future harm. In *Buckley*, 424 U.S. at 74, and *Doe v. Reed*, 561 U.S. at 201, the Court

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> withholding review; (2) the chilling effect the challenged law may have on First Amendment liberties; and (3) fitness of the controversy for judicial review.

64 F.3d at 1500. The "hardship to the parties" and "fitness . . . for judicial review" factors are aspects of prudential ripeness. *See Driehaus*, 134 S. Ct. at 2347. The decision below had no reason to evaluate those factors because it concluded that the case did not meet the constitutional baseline for ripeness. The Tenth Circuit's second factor—"the chilling effect the challenged law may have on First Amendment liberties"—goes to constitutional ripeness, and asks the same question the Ninth Circuit's three-prong inquiry is designed to answer.

[6] Contrary to petitioners' assertion (Pet. 29), this case does not conflict with *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003). There, the Ninth Circuit applied the same three-part test as the decision below. *Id*. at 1094-95. The different outcome reflected a key factual difference: CPLC introduced evidence of a concrete plan to spend funds on future campaign activity. *Id*. at 1093.

simply stated the test for when a party is subject to an exemption from disclosure laws. There is no indication in either case that the Court intended to lower the ripeness standard.

Renne further demonstrates that the decision below is in harmony with this Court's rulings. In *Renne*, political parties challenged a California law that prohibited them from endorsing candidates for nonpartisan offices. 501 U.S. at 314. The political parties made general allegations that the law had been enforced in previous elections and that they wished to make endorsements in future elections. *Id*. at 320-22. The Court found that the allegations regarding past elections were moot and did not fall within the exception for cases "capable of repetition, yet evading review." *Id*. at 320. It then found that the allegations regarding future elections were not ripe. *Id*. at 321-22. The decision below followed *Renne*'s two-step inquiry. It first determined that petitioners' request for an exemption from filing reports related to the November 2008 election was moot and not "capable of repetition, yet evading review." It then considered whether it could hear petitioners' request for an exemption in future elections and concluded it could not because this request was not ripe for review.

4. Nothing in the decision below precludes petitioners from seeking an exemption in the future, once they develop concrete plans to participate in an actual campaign. Indeed, a court tasked with determining whether there is a "reasonable probability of threats, harassment or reprisals" would benefit from a record that is less stale. As-applied challenges to

disclosure requirements are necessarily fact-specific in nature, and depend upon the size of the group seeking the exemption, the nature of the campaign at issue, public attitudes, the political tenor, and the actions of third parties and the government. The claim at issue below arose in the unique context of an election on a specific ballot measure. Petitioners' identity and the alleged harassment was tied to their support for this ballot measure, not to a more enduring party affiliation. If petitioners were to seek an exemption in the future, a court hearing that request would benefit from a fresh record reflecting the actual campaign at issue and more current political realities.

II. THE COURT OF APPEALS DID NOT REVIEW THE MERITS OF PETITIONERS' AS-APPLIED CHALLENGE, AND THIS COURT SHOULD NOT CONSIDER THAT CLAIM IN THE FIRST INSTANCE.

1. Petitioners also urge this Court to go beyond questions of justiciability and decide the merits question of whether petitioners are entitled to an exemption from California's disclosure laws. Pet. 30-31. Review of this question is unwarranted because even if petitioners' as-applied challenge presented a justiciable dispute, the lower courts should decide the merits of that controversy in the first instance. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012). Here, the court of appeals did not reach the merits of petitioners' as-applied

challenge because it determined that the case was moot and unripe. The district court did analyze the merits of petitioners' claims (Pet. App. 58a-103a), but that portion of the district court opinion has been vacated (Pet. App. 54a-55a).

2. Moreover, the district court decision was correct and does not conflict with any decision of this Court or any court of appeals. The decision was based on a detailed review of the record and tethered to the specific facts of this case. Petitioners seek an exemption that is available to "minor parties" who demonstrate "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. This exemption has been granted sparingly and only to groups whose supporters would have faced real danger if their identities were disclosed. *See Brown*, 459 U.S. at 99; *NAACP*, 357 U.S. at 462-63. In denying petitioners' request for an exemption, the district court found that the evidence of "threats, harassment and reprisals" consisted largely of minor annoyances such as vandalized yard signs and bumper stickers. Pet. App. 62a. It also included acts of First Amendment expression, such as boycotts and statements of political disagreement. Pet. App. 61a-62a. The few more serious sounding incidents were documented only in hearsay and never through admissible evidence. Pet. App. 63a n.3. The district court observed about petitioners' evidence that "in many instances the same events are reported repeatedly in

multiple articles, creating the false impression that there is more here than closer inspection reveals." Pet. App. 64a n.4. Petitioners object to the district court's analysis of the evidence—an analysis that was never evaluated on appeal and has now been vacated. The district court's factbound determinations do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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