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PRESS RELEASE
October 13, 2014
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U.S. Supreme Court Asked to Review Case Seeking to Protect Traditional-Marriage Supporters from Harm Due to Disclosure

On October 10, committees supporting California's Proposition 8 (defining marriage as between a man and a woman) asked the Supreme Court to review a case seeking to prevent further public disclosure of Prop. 8 supporters. They sought the protection because many supporters experienced threats, harassment, and reprisals when disclosed and the committees are ongoing with plans for future activity. The risk of harm continues, as evidenced by Brendan Eich being forced out as Mozilla CEO for making a $1,000 contribution to a Prop. 8 committee in 2008, which was publicly disclosed on a government website.

The committees sought a disclosure exemption based the "reasonable probability" test established by the Supreme Court in *Buckley v. Valeo* (1976). The Court decided that groups could avoid reporting supporters by "show[ing] only 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." The Court held that groups "must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim."

The committees provided 59 pages of distilled facts describing harms to their supporters, based in part on 58 John Doe Declarations, summarized in the following paragraph of their summary-judgment memorandum (citations and footnotes omitted):

> There have been death threats; physical assaults and threats of violence; vandalism and threats of destruction of property; arson and threats of arson; angry protests; lewd demonstrations; intimidating emails and phone calls; hate mail (the old-fashioned kind); mailed envelopes containing white suspicious powder; multiple web sites dedicated to blacklisting those who support traditional marriage and similar causes; loss of employment and job opportunities; intimidation and reprisals on campus and in the classroom; acts of intimidation through photography; economic reprisals and demands for "hush money"; and gross expressions of anti-religious bigotry, including vandalism and threats directed at religious institutions and religious adherents. There is also ample evidence that protected speech and association has been chilled because of the prospect of reprisals.

Though the committees produced voluminous evidence of a reasonable probability of harm, the federal trial court denied an exemption. In doing so, it used a restricted version of *Buckley*'s reasonable-probability test, holding, for example, that an exemption could only be obtained by minor parties or fringe groups who advocated a despised cause. Because the trial court denied a preliminary injunction on January 30, 2009, the committees filed the disclosure reports due on January 31, 2009, and then sought expungement or no further public release of the reports.

The committees appealed to the Ninth Circuit, seeking an exempt-status declaration and expungement or non-disclosure of prior reports. But instead of addressing the exemption-status claim, the Ninth Circuit decided that the case was moot as to expungement or non-disclosure of past reports (because some contributor information had been disclosed on the Internet) and unripe as to any future activity. So it

dismissed the case and ordered the trial court to vacate its opinion and judgment on the exempt-status claim.

The dissenting judge on the Ninth Circuit's three-judge panel deciding the case disputed that the case is moot or unripe, and if it were moot it would be subject to the mootness exception for "cases capable of repetition, yet evading review." He noted that the Supreme Court's test for mootness required that it be "impossible" for a court to offer "some form of meaningful relief," and that the ability to expunge past records or prevent their further disclosure was enough to prevent mootness. Instead of following the Supreme Court's test, he argued, the majority had substituted a more stringent test, namely, whether a court would be "*unlikely* ... to be able to provide *significant* effective relief" (emphasis in original).

In seeking Supreme Court review of the Ninth Circuit decision, the committees noted that the appellate court had employed tests for mootness, the mootness exception, and ripeness that were inconsistent with Supreme Court decisions and those of other federal circuit courts. The committees also asked the Supreme Court to grant them the exemption they seek and order expungement or non-release of filed reports, even though the Ninth Circuit had not decided the case on the merits. The committees pointed to past decisions where the Supreme Court decided the merits of a case, though the lower court had not, because the case involved important First Amendment rights, such as those at issue here.

James Bopp, Jr., lead attorney for Plaintiffs comments: "Citizens supporting groups engaged in controversial ballot initiatives should not be subject to harm for exercising their First Amendment rights of association and speech. The Supreme Court provided protection with a test excluding such groups from publicly identifying supporters where there is "a reasonable probability of threats, harassment, or reprisals." In several opinions, the U.S. Supreme Court and its members have pointed to the evidence in this case as the quintessential current example of a situation where an exemption is required. Yet the district court employed a restricted version of the reasonable-probability test and the Ninth Circuit declared the case moot based on a different mootness test from that of the Supreme Court or other appellate courts. The Supreme Court should accept this case to reassert its own tests and provide the relief for which these groups have waited since 2008."

The certiorari petition and other case materials in *ProtectMarriage.com--Yes on 8 v. Bowen* are available here.

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