

No. 09-559

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IN THE  
*Supreme Court of the United States*

JOHN DOE #1, et al.,  
*Petitioners,*

v.

SAM REED, et al.,  
*Respondents.*

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

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Brief of *Amici Curiae* Lambda Legal Defense and  
Education Fund, Inc., Gay & Lesbian Advocates &  
Defenders, National Center for Lesbian Rights, the  
Human Rights Campaign, and National Gay and  
Lesbian Task Force In Support of Respondents

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... iii  
INTEREST OF AMICI.....1  
SUMMARY OF ARGUMENT.....3  
ARGUMENT .....5  
I. LESBIAN AND GAY AMERICANS  
CONTINUE TO FACE DISCRIMINATION  
AND VIOLENCE. ....5  
A. Discrimination, Harassment, and Violence....5  
B. Political Attacks Using the Ballot Initiative  
Process. ....7  
1. The Ballot Initiative Process Deprives  
Lesbian and Gay People of  
Conventional Political Protections. ....9  
2. Hostile Ballot Initiatives Are Commonly  
Associated with Increased Violence and  
Harassment Against Lesbians and Gay  
Men. ....11  
II. Public Access to Petition Records Provides a  
Much-Needed Procedural Check on Anti-  
Minority Initiatives.....12  
1. Opportunity to Prevent Fraudulent  
Certification.....13  
2. Opportunity to Lobby Sponsors Who  
Legislate Using the Initiative Process. ....15  
III. THE FACTS DO NOT SUPPORT  
ALLEGATIONS OF SYSTEMATIC  
“HARASSMENT” AND “INTIMIDATION” OF  
GAY-RIGHTS OPPONENTS. ....17

- A. The Record Does Not Support The Existence of a Chilling Effect on Petition Signers. ....20
- B. Petitioners’ Isolated Allegations of Criminal Misconduct Targeting Advocates Lack Any Nexus to Signing Petitions. ....22
  - 1. Reported Physical Violence Was Minor and Reported Threats of Physical Violence Were Rare. ....23
  - 2. Alleged Vandalism Incidents Overwhelmingly Targeted Visible Symbols of Political Advocacy. ....28
- C. The Vast Majority of the “Incidents” Reflect Mere Discomfort With Constitutionally Protected Disagreement, Criticism, and Advocacy. ....29
  - 1. Feelings Hurt by Mere Disagreement. ....29
  - 2. Feelings Hurt by Nonthreatening Incivility. ....32
    - a. Much of Petitioners’ Evidence Is Exaggerated. ....33
    - b. Even Taken at Face Value, Many Incidents Allege Nothing More Than Vigorous Advocacy. ....34
  - 3. Dislike of Constitutionally Protected Boycotts. ....35
  - 4. Exaggerated Threats to Supporters’ Employment. ....37
- CONCLUSION .....40

## TABLE OF AUTHORITIES

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## INTEREST OF AMICI<sup>1</sup>

*Amici* are the nation's leading organizations committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

Lambda Legal Defense and Education Fund, Inc. has appeared as counsel in hundreds of cases involving deprivation of rights based on sexual orientation and gender identity, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and numerous legal challenges to the adequacy of signatures gathered to qualify measures for the ballot and to the constitutionality of such measures. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *Protect Marriage Illinois v. Orr*, 458 F. Supp. 2d 562 (N.D. Ill.), *aff'd*, 463 F.3d 604 (7th Cir. 2006), and *Doe v. Montgomery County Board of Elections*, 962 A.2d 342 (Md. 2008).

Gay & Lesbian Advocates & Defenders (“GLAD”) has been involved for more than 20 years in various legal aspects of initiative and referenda, including *Schulman v. Attorney General*, 850 N.E.2d 505 (Mass. 2006); *Albano v. Attorney General*, 769 N.E.2d 1242 (Mass. 2002); *Wagner v. Secretary of State*, 663 A.2d 564 (Me. 1995); and *Collins v.*

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<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

*Secretary of the Commonwealth*, 556 N.E.2d 348 (Mass. 1990).

The National Center for Lesbian Rights (“NCLR”) has sought to achieve equality for lesbian, gay, bisexual, and transgender people for more than 30 years, including opposing and challenging ballot measures that target minorities. NCLR strongly supports laws such as Washington’s Public Records Act that protect the openness and integrity of the legislative process.

Human Rights Campaign (“HRC”), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. HRC has over 750,000 members and supporters nationwide committed to making this vision of equality a reality. HRC strongly supports the ability of all people, and particularly LGBT individuals, to advocate through lawful and nonviolent means against ballot initiatives that would subject them to unequal treatment under the law.

The National Gay and Lesbian Task Force (“Task Force”) is the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender people. The Task Force strongly supports laws ensuring transparency in the ballot initiative process and giving all people the ability to advocate for their interests through lawful, peaceful means.

**SUMMARY OF ARGUMENT**

When subjecting a minority group to political attack, a common tactic is to claim that the minority is itself the aggressor from whom protection is required. Petitioners and certain like-minded groups are engaged in precisely such an effort by here and elsewhere accusing the lesbian and gay community and its supporters of subjecting opponents of legal protections for same-sex couples to a systematic and coordinated “intimidation campaign.” Pet’r Br. at 3; *see generally* Pet’r Br. at 2-7 & at 10-11; Brief of Alliance Defense Fund (“ADF”) as *Amicus Curiae* at 10-19; Brief of ADF as *Amicus Curiae*, *Citizens United v. Federal Election Commission*, No. 08-205 (“*Citizens United*”) at 16-22, 130 S. Ct. 876 (2010); *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) (per curiam) (noting “news articles” presented by applicants for stay alleging “incidents of harassment related to people who supported Proposition 8”).

This tale is false and unsupported by the record. Because of this case’s procedural posture, as well as the procedural posture in other cases where this narrative has been presented, the Court has not been provided with a complete and accurate presentation of facts so much as a series of one-sided accusations and hearsay never subjected to adversarial testing. Petitioners and their *amici* rush to characterize a handful of alleged incidents during the Proposition 8 and Referendum 71 campaigns as representing a systematic victimization crusade. A closer look reveals but a handful of allegations which, although serious if true, are of the sort endemic to many hard-fought political contests. A closer look also shows



that Petitioners' and their *amici's* hyperbolic story of a systematic campaign of "intimidation" and "reprisal" marries these incidents to a pool of trivial grievances and mere discomfort at the zealous but constitutionally protected speech used by some individuals to respond to the attack leveled at lesbians and gay men by the discriminatory initiatives. Moreover, not a single allegation on which Petitioners rely involves the signing of a petition. In effect, Petitioners and their supporters are trying to demonize and silence vigorous advocacy in support of equal rights that they disagree with – not protect their own right to speech.

Lesbian and gay individuals continue to face overwhelming violence, harassment, and discrimination. The petition process is a favored tool for subjecting such individuals to further discrimination – a tool against which lesbian and gay people, given their small numbers and disadvantages in the ballot initiative process, have few meaningful defenses. Petitioners seek, through their feint of victimization, to take away one of the few defenses that lesbian and gay individuals have to defend against hostile initiatives: the use of public records to stop the fraudulent qualification of such measures in the first place, and to lobby, through personal advocacy, the people who legislate using such measures. The Court should decline the invitation to scrap these protections based on a poorly-supported and largely fictitious tale that those who seek to deprive lesbian and gay Americans of rights are the ones being victimized.

**ARGUMENT****I. LESBIAN AND GAY AMERICANS CONTINUE TO FACE DISCRIMINATION AND VIOLENCE.**

At the outset, it is important to contrast Petitioners' accusations that that they are being victimized for opposing rights for same-sex couples with the reality that lesbian and gay individuals continue to face violence, harassment, and discrimination that dwarfs such allegations.

**A. Discrimination, Harassment, and Violence.**

Lesbian and gay individuals remain a frequent target for criminal attacks, both during contentious election campaigns and at other times. According to the most recent statistics collected by the FBI, 1,706 of 9,601 hate crimes reported in 2008 were motivated by sexual orientation. *See* FBI, *2008 Hate Crimes Statistics*.<sup>2</sup> Virtually all (98%) were directed against lesbians, gay men, and bisexuals. *Id.* In 2008, reports of hate crimes based on sexual orientation increased nearly eleven percent. *More Reported Hate Crimes in '08*, L.A. Times, Nov. 24, 2009, at A-16. These included at least twenty-nine known murders. *See* National Coalition of Anti-Violence Programs, *NCAVP Releases 2008 Hate Violence Report* (June 16, 2009).<sup>3</sup> Reported hate crimes are directed against gay people more than any other group per capita, and likely to be undercounted. *See* William B. Rubenstein, *The Real Story of U.S. Hate*

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<sup>2</sup> Available at <http://www.fbi.gov/ucr/hc2008/victims.html>.

<sup>3</sup> Available at <http://www.ncavp.org/media/MediaReleaseDetail.aspx?p=2321&d=2454>.

*Crimes Statistics: An Empirical Analysis*, 78 Tulane L. Rev. 1213, 1215, 1219 (2004). Youth overwhelmingly remain prey for abuse as well; more than eighty-six percent of LGBT middle and high school students experienced harassment at school the previous year based on their sexual orientation or gender identity, and more than thirty-six percent suffered serious physical assaults on that basis. See Joseph G. Kosciw, et al., *The 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, at xii – xiii (2008).<sup>4</sup> There is also significant evidence that the number of such attacks on lesbian and gay victims increases during and after referendum campaigns involving lesbian and gay issues. See Part I.B.2 *infra*.

Employment and public accommodations discrimination based on sexual orientation or gender identity also remains “a common occurrence” across the country. M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Executive Summary at 2 (June 2007).<sup>5</sup> Public employment is no exception. See Brad Sears, et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, Executive Summary at 1 (Sept. 2009) (documenting a “widespread and persistent pattern

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<sup>4</sup> Available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/000/001/1290-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf).

<sup>5</sup> Available at <http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf>.

of unconstitutional discrimination on the basis of sexual orientation and gender identity against state government employees”<sup>6</sup>; *see also For Love of Country; Gays and Lesbians Should be Allowed to Serve Openly in the Military*, Wash. Post, Dec. 28, 2009, at A14 (more than 13,500 lesbian and gay members of the armed forces have been fired since 1994).

### **B. Political Attacks Using the Ballot Initiative Process.**

Most relevant to the present case, lesbian and gay persons have been targeted by scores of ballot measures designed to treat them unequally to others. After a comprehensive study, University of Michigan political scientist Barbara S. Gamble concluded that “[g]ay men and lesbians have seen their civil rights put to a popular vote more often than any other group.” Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-58 (1997). Between 1974 and 2009, one hundred fifteen ballot measures in eighteen states sought to repeal prohibitions of discrimination against LGBT people in the workplace, prevent or inhibit such prohibitions from being passed, or mandate discriminatory or stigmatizing conduct or speech towards LGBT people. *See* Brad Sears et al., *Voters’ Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination Against LGBT People, 1974-Present* at 15-1 – 15-2 (2009) (“*Voters’ Initiatives*”).<sup>7</sup> Such

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<sup>6</sup> Available at [http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports\\_ENDA.html](http://www.law.ucla.edu/williamsinstitute/programs/EmploymentReports_ENDA.html).

<sup>7</sup> Available at <http://www.escholarship.org/uc/item/58j4w7k3>.

measures included Colorado's Amendment 2, which repealed existing sexual orientation anti-discrimination protections statewide and prohibited them from being adopted in the future, and which this Court held unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). Notwithstanding *Romer*, almost two dozen similar initiatives were subsequently introduced at local levels, including some as recently as last year. *Voters' Initiatives* at 15-8. Measures seeking to repeal laws prohibiting gender identity discrimination have now joined the fray. See *Doe v. Montgomery County Bd. of Elections*, 962 A.2d 342 (Md. 2008).

Initiatives seeking to withdraw equal rights from lesbian and gay people have not been limited to antidiscrimination laws. For example, Oregon's Measure 9 sought also to require all arms of government in the state to "assist in setting a standard for Oregon's youth that recognizes homosexuality . . . as abnormal, wrong, unnatural, and perverse." *Voters' Initiatives* at 15-4, 15-10. And in 2008, voters in Arkansas approved a measure prohibiting lesbians and gay men from adopting children or becoming foster parents. See *The Best Interests of the Child*, N.Y. Times, Jan. 6, 2009, at 24.

In recent years, many measures, like Referendum 71, have sought to overturn or block legislation and court decisions affording rights to same-sex couples. Over the last ten years, state initiatives or referenda barring same-sex couples from marrying and, in some instances, from obtaining civil unions, domestic partnerships or any rights at all have been on the

ballot in Arizona, Arkansas, California, Florida, Maine, Michigan, Montana, Nebraska, Nevada, North Dakota, Ohio, and Oregon. All of those measures passed except an initial initiative in Arizona that would have barred domestic partner benefits. *See* Initiative and Referendum Institute, Ballotwatch, *Same-Sex Marriage: Breaking the Firewall in California?* at 3 (Oct. 2008)<sup>8</sup>; Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. Times, Nov. 5, 2008, at A1; Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, Boston Globe, Nov. 4, 2009, at 1. Initiative or referendum campaigns also led to the repeal of existing domestic partnership policies in Austin, Texas; Columbus, Ohio; Northampton, Massachusetts; and Santa Clara County, California. *See* Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 Law & Soc'y Rev. 151, 181 n.10 (2009).

***1. The Ballot Initiative Process Deprives Lesbian and Gay People of Conventional Political Protections.***

The pervasive use of the ballot initiative as a tool for attacking the lesbian and gay community is no accident. The ballot initiative process bypasses all of the “political processes ordinarily to be relied upon to protect minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). It eliminates bicameralism and presentment, removing veto points at which persuadable representatives or executives

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<sup>8</sup> Available at [www.iandrinstute.org](http://www.iandrinstute.org) (click “Ballotwatch report on same-sex marriage measures”)

might be willing to prevent enactment of hostile measures. It lacks a deliberative process or opportunity to propose amendments, thereby depriving minority members of opportunities to identify and persuade potential supporters or to engage in coalition-building. And it disconnects the fate of proposed legislation from other proposals, eliminating any opportunity for minorities to engage in bargaining through which they might secure temporary, situational majorities in their favor. *See generally* Akhil R. Amar, *Choosing Representatives by Lottery Voting*, 93 Yale L.J. 1283, 1304 (1984) (“Because of the structure of legislatures, minorities command more respect from majorities in a legislature than in the polity at large.”); *Julian N. Eule, Judicial Review of Direct Democracy*, 99 Yale L.J. 1503, 1555 (1990) (“Group representation ensures that diverse views are continually expressed, increasing ‘the likelihood that political outcomes will incorporate some understanding of the perspectives of all those affected’”).

In addition, voters, unlike legislators, take no oath to uphold the Constitution, nor do they engage in the same deliberative process that helps steer legislative action toward constitutional outcomes. *Compare Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions”). The absence of a deliberating mechanism in ballot initiatives allows popular “bare . . . desire to harm a politically

unpopular group” more easily to find political expression and to infect legislation. *Romer*, 517 U.S. at 634-35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (ellipses in original). These structural features leave minorities with few defenses against discriminatory initiatives.

***2. Hostile Ballot Initiatives Are Commonly Associated with Increased Violence and Harassment Against Lesbians and Gay Men.***

Given the use of initiatives to subject lesbian and gay Americans to unequal treatment, it is unsurprising that they tend to be accompanied by increases in violence against lesbian and gay people. Several California counties reported a spike in such crimes during the Proposition 8 campaign and immediate aftermath. *See, e.g.*, Tracey Kaplan, *Surge in Anti-Gay Hate Crime Cases, San Jose Mercury News*, March 16, 2009 (threefold increase in anti-gay hate crimes in Santa Clara County); Raja Abdulrahim, *L.A. County Hate Crimes Drop 4%*, L.A. Times, Nov. 20, 2009,<sup>9</sup> (20% spike in Los Angeles County, and hate crimes based on sexual orientation “were more likely to be violent than hate crimes motivated by race or religion”); Edmund G. Brown, Jr., Cal. Dep’t of Justice, *Hate Crime in California 2008* at ii (Aug. 2009)<sup>10</sup> (16.7% spike statewide for

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<sup>9</sup> Available at <http://articles.latimes.com/2009/nov/20/local/la-me-hate-crimes20-2009nov20>.

<sup>10</sup> Available at <http://www.ag.ca.gov/cjsc/publications/hatecrimes/hc08/preface08.pdf>.



2008, with 403 victims).<sup>11</sup> In Los Angeles County *alone*, there were nine hate crimes against LGBT individuals that the County found to have been expressly connected to and “prompted by Proposition 8,” four of them violent. Los Angeles County Committee on Human Relations, *Hate Crime Report 2008*, at 14 (2008).<sup>12</sup>

This phenomenon is hardly unique to California. The same spike in hate crimes occurred in Massachusetts during consideration of a ballot measure to repeal marriage rights for same-sex couples. See Press Release, Fenway Health, *Fenway Community Health’s Violence Recovery Program Releases 2004 Anti-LGBT Hate Crime Statistics at April 26 Press Conference* (April 26, 2005).<sup>13</sup>

## **II. Public Access to Petition Records Provides a Much-Needed Procedural Check on Anti-Minority Initiatives.**

State election regulations that provide for public access to petition records provide at least some protection against hostile ballot initiatives. They allow for the detection and prevention of fraud in qualifying such measures for the ballot in the first place. They also provide lesbian and gay individuals

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<sup>11</sup> In stark contrast, there were only three incidents of “anti-heterosexual” crimes statewide and 21 targeting Christian denominations. *Id.* at 20.

<sup>12</sup> Available at [http://www.lahumanrelations.org/hatecrime/data/2008%20Hate%20Crime%20Report%2011-12-09\\_08-09.pdf](http://www.lahumanrelations.org/hatecrime/data/2008%20Hate%20Crime%20Report%2011-12-09_08-09.pdf)

<sup>13</sup> Available at <http://www.fenwayhealth.org/site/News2?page=NewsArticle&id=5061&cmd=display>.

with an opportunity to lobby the persons who legislate using such measures – partially restoring a political protection for minorities that is routine in the representative context but absent in referenda.

***1. Opportunity to Prevent Fraudulent Certification.***

The lack of any other meaningful checks on the initiative process gives the lesbian and gay community a critical interest in rigorous enforcement of requirements to qualify measures for the ballot.

The qualification process does more than “ensur[e] that issues have sufficient support to warrant the cost and effort of placing referenda on the ballot.” Pet’r Br. at 50. It decides whether issues will be resolved through the legislative or initiative process – a question in which minority groups have a vital interest, given the lack of procedural safeguards in the latter. *See* Part I.B.1 *supra*. And in many jurisdictions, including Washington, it suspends laws until after the results of the next general election is certified, which could mean months of delay. *See, e.g.*, Constitution of the State of Washington, Article II Section 1(d). Groups targeted for hostile treatment through the initiative process thus have every interest in ensuring that the procedural requirements for placing an initiative on the ballot are rigorously enforced.

These interests are not merely theoretical. In Montgomery County, Maryland, a newly-enacted ordinance prohibiting discrimination based on gender identity was recently blocked by certification of a repeal petition. *See Doe v. Montgomery County*

*Board of Elections*, No. 293857-V, at 1 (Md. Cir. Ct. July 24, 2008). Only after the involvement of citizens who challenged the signatures was it revealed that many were of “questionable” authenticity, including some that may have been “patently counterfeit.” *Id.* at 17.<sup>14</sup> The Maryland Court of Appeals ultimately held that the petition should not have been certified and that the Board had improperly counted thousands of signatures that failed to meet state requirements. *See Doe v. Montgomery County Board of Elections*, 962 A.2d 342 (Md. 2008). Left to state officials alone this fraud would have gone undetected, and it temporarily succeeded in denying transgender persons the legal protections they had won through the political process.

Public access to petition records also allows the public to detect fraud attributing petition signatures to voters who did not sign or intend to sign the petition in question. Recent elections have, again, shown that this type of fraud is real. In Massachusetts, prosecutors from the State Attorney General’s office launched a criminal investigation after disclosure of records from a petition to prohibit marriage by same-sex couples prompted complaints by “more than 2,000” people who discovered that their signature had been improperly attributed to the petition, either because of forgery or because

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<sup>14</sup> ADF, which argues that oversight by members of the public is unnecessary to preventing fraud, *see* ADF Br. at 19-21, represented the petition sponsors in *Doe*, whom the Court found to have relied on “questionable” and possibly “patently counterfeit” signatures. *Doe*, No. 293857-V, at \*17.

organizers misled them as to which petition they were signing. See Steve LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Boston Globe, Feb. 28, 2006.<sup>15</sup> Groups that find their rights attacked or their hard-fought legislative accomplishments blocked through the ballot initiative process have a clear interest in access to petition records to protect themselves against such abuses.

## ***2. Opportunity to Lobby Sponsors Who Legislate Using the Initiative Process.***

Public access to petition records also provides lesbian and gay people with the opportunity to defend themselves against hostile ballot measures by lobbying sponsors who support such measures at the petition stage to oppose them in the general election.

This interest is heightened by the lack of deliberative process in the initiative context. A group targeted by pending legislation can attempt to persuade, convince, and compromise with legislative representatives or members of the executive branch. For a group threatened by a pending referendum, however, the dispersal and anonymity of the referendum's supporters hampers comparable efforts to avert passage. Since the lesbian and gay

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<sup>15</sup> This type of fraud was documented on video during the Referendum 71 campaign. See DrivingEquality, *Anti-gay Signature Fraud Caught on Tape*, available at <http://drivingequality.com/2009/07/23/anti-gay-signature-fraud-caught-on-tape/> (petition circulator falsely representing that Referendum 71 was initiative to legalize marriage for same-sex couples).

community is perpetually trying to defend itself against hostile referenda and lacks the numbers to defeat them at the polls itself, it depends critically on being able to lobby others to oppose them.

To be effective, such lobbying often requires highly personal communications. In addition to typical campaign tools, such lobbying can involve “coming out” to neighbors, co-workers, friends, and family members, (i.e. identifying oneself as lesbian or gay), as well as explaining how such discriminatory referenda will affect one’s life in practice. Abstract political questions about lesbian and gay rights can take on a new perspective to voters who become aware of how such referenda will impact the lives of people they know. Indeed, decades of polls show that being aware that one has lesbian or gay friends, co-workers, and family members meaningfully increases the likelihood that someone will support legal protections for lesbian and gay people, including through antidiscrimination, partnership, and marriage laws. *See* Gregory B. Lewis, Working Paper 07-10, *Personal Relationships and Support for Gay Rights*, September 1, 2006 at 15-16 (Mar. 2007).<sup>16</sup> Thus, the ability to identify and lobby supporters of hostile petitions can help avert passage.

In this case, Petitioners have tried to caricature websites that identify petition supporters as “enabling . . . harass[ment] . . . at home and work.” *See* Pet’r Br. at 3. But this discounts the role that

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<sup>16</sup> Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=975975](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975975).

such information serves in furthering communication, lobbying, and persuasion. On their face, the websites that Petitioners demonize urge lesbian and gay persons to engage in “neighbor-to-neighbor advocacy” and “face-to-face conversation[s] with someone you know,” which “can sometimes be the most powerful agent of change.” *See* About KnowTheyNeighbor.org, *available at* <http://www.knowthyneighbor.org/national/> (last visited March 24, 2010).<sup>17</sup> Such conversations and opportunities for persuasion both serve a valuable First Amendment interest and operate as one of the few tools the lesbian and gay community has to defend itself.

### III. THE FACTS DO NOT SUPPORT ALLEGATIONS OF SYSTEMATIC “HARASSMENT” AND “INTIMIDATION” OF GAY-RIGHTS OPPONENTS.

Petitioners argue that even these limited protections that lesbian and gay individuals retain against the referendum process should be stripped away to create a new First Amendment right for petition signers to legislate in secret. Although Petitioners have brought a facial challenge, their argument draws heavily upon the story that lesbian and gay persons and their supporters subjected the

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<sup>17</sup> *See also* ER 105 (co-director explaining that “conversations are triggered between people that already have a personal connection like friends, relatives, and neighbors,” and that such conversations are “desperately needed to break down stereotypes and to help both sides realize how much they actually have in common.”).

supporters of Proposition 8 in California to an “intimidation campaign,” Pet’r Br. at 3, causing supporters of such measures to be “intimidated from engaging in political speech,” *id.* at 6, which they assert “would repeat in Washington.” *Id.* at 10. *Amicus* ADF makes similar accusations, claiming “retributive acts” that were “prevalent and widespread” during the Proposition 8 campaign, ADF Br. at 13, “intimidation tactics,” *id.* at 14, “retaliation,” *id.* at 15, “many acts of physical violence,” *id.* at 17, and “harassment [that] has become . . . severe,” *id.* at 18; ADF has previously argued to the Court that such “reprisals are well-coordinated.” ADF Br. as *Amicus Curiae* in *Citizens United* at 20.<sup>18</sup>

These characterizations sound serious. But they misstate the facts. We do not wish to trivialize instances of actual harassment or political violence in any political campaign; indeed LGBT individuals have frequently been on the receiving end of such violence, including during Proposition 8 itself. But while Petitioners have pointed to a few such alleged incidents during Referendum 71 and Proposition 8 – which we condemn if true – there is no basis for claiming that this small number of alleged unlawful incidents were part of any coordinated effort, nor that they differ in magnitude or kind from those that accompany any divisive political contest in this Nation (as the recent health care debate

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<sup>18</sup> See also Brief of the Institute for Justice as *Amicus Curiae* at 17-19; Brief ProtectMarriage.com - Yes on 8 as *Amicus Curiae* at 21-23.

demonstrates). To the contrary, there is every reason to believe that violent attacks on lesbian and gay citizens connected to Proposition 8 outnumbered the alleged instances of harassment against opponents of gay rights. *See* Parts I.A.1 *supra* and III.B *infra*. Nor is there any basis whatsoever for claiming that any person who chose to act in a legislative capacity by signing petitions to place these initiatives on the ballot was harassed. To the contrary, Petitioners' and ADF's allegations primarily involve persons who thrust themselves into the public spotlight.

To create the opposite impression, Petitioners and their *amici* have taken a handful of troubling allegations from the hard-fought Proposition 8 campaign – a campaign in which their side represented the prevailing majority – and married them to a much larger set of accusations that do not withstand any scrutiny. These include misrepresentations and exaggerations, self-serving accounts by supporters whose credibility appears questionable, complaints about problems endemic to hard-fought campaigns generally, and a laundry list of grievances resulting from the lawful exercise of First Amendment freedoms by the minority trying to defend lesbian and gay people from Proposition 8. The Court should not be misled by the false picture painted in this way.<sup>19</sup>

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<sup>19</sup> Petitioners' evidence stems primarily from two sources. The first are declarations and media reports pertaining to Referendum 71. *See* ER 024-43, 63-64, 82-130. The second are declarations from the separate district court litigation in *ProtectMarriage.com v. Bowen*, No. 2:09-CV-00058-MCE-DAD



**A. The Record Does Not Support The Existence of a Chilling Effect on Petition Signers.**

At the outset, Petitioners fail to link the experience of Proposition 8 with the issue presented in this case: there is not a single alleged incident of retaliation based on signing a petition opposing legal protections for same-sex couples. The best Petitioners have been able to come up with is that a lesbian couple “glared” at a woman signing their petition and tried (unsuccessfully) to lobby her not to sign by telling her that “[w]e have feelings too.” See ER 034 ¶ 10.<sup>20</sup> This attempt to dissuade the woman,

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(E.D. Cal.) pertaining to Proposition 8. Petitioners introduced those declarations before the district court and rely on them extensively in their Brief. See Dkt. 4 Exs. 12-13. In *Hollingsworth*, the applicants similarly introduced a handful of declarations from leadership figures in the Proposition 8 campaign along with 72 news reports. See Exs. B & I-L to Defendant-Intervenors’ Motion for Protective Order in *Perry v. Schwarzenegger*, No. 3:09-cv-02292 (N.D. Cal.). Some of petitioners’ *amici* have also cited a Heritage Foundation report cataloging various allegations, most of them redundant. See Thomas Messner, *The Price of Prop 8*, Heritage Foundation, Oct. 22, 2009. The undersigned *Amici* have consolidated and categorized the universe of the allegations presented to the Court in a document available at [www.glad.org/doe-v-reed](http://www.glad.org/doe-v-reed).

<sup>20</sup> ADF alleges that man in Truro, MA was not re-appointed to a volunteer board of fire engineers because he signed a petition supporting the repeal of marriage rights for same-sex couples. See ADF Br. at 12. But the selectmen who voted against the appointment expressly stated that considering his signature would be “out of line” and was not the basis for their vote. See Eric Williams, *Gay Marriage Petition Signature Riles Selectman*, Cape Cod Times, April 22, 2006, available at [http://knowthyneighbor.blogs.com/home/2006/04/petition\\_signer.html?cid=16496447](http://knowthyneighbor.blogs.com/home/2006/04/petition_signer.html?cid=16496447).

acting in her legislative role, was perfectly lawful. The First Amendment directly protects the use of “personal solicitation” and “social pressure” to urge others to join one’s political cause; “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

Petitioners’ inability to come up with any such evidence is telling. They try to excuse its absence by pointing to *Buckley v. Valeo*’s statement that one may instead “offer evidence of reprisals and threats directed against individuals or organizations holding similar views.” Pet’r Br. at 28-29 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). But this alternative means of proof in *Buckley* is explicitly reserved for “[n]ew parties that have no history upon which to draw.” *Buckley*, 424 U.S. at 74. There is ample “history upon which to draw” here. It points in the other direction.

Twenty-four states use ballot initiatives to enact legislation; all except California make petition records publicly available.<sup>21</sup> Between 1997 and 2009 there were eighteen statewide initiatives to deny or repeal legal protections for lesbians and gay men.<sup>22</sup>

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<sup>21</sup> See Ballot Initiative Strategy Center, *Ballot Integrity: A Broken System in Need of Solutions, A State by State Report Card* at 4, 9 (July 2009), available at [http://bisc.3cdn.net/1fb0aa12d865ddd8c6\\_wwm6b9zwc.pdf](http://bisc.3cdn.net/1fb0aa12d865ddd8c6_wwm6b9zwc.pdf).

<sup>22</sup> The data in this paragraph is drawn from the initiative and referendum database of the National Conference of State Legislatures. See <http://www.ncsl.org/programs/legismgt/elect/dbintro.htm> (last visited Mar. 31, 2010).

Hundreds of thousands of people signed petitions supporting the inclusion of such measures on the ballot. And yet with the resources of numerous advocacy groups opposed to rights for same-sex couples, Petitioners and their *amici* have been unable to come up with even a single example of a petition signer who suffered retaliation as a result. The total absence of such evidence belies any necessity of creating the new constitutional protection Petitioners request.

**B. Petitioners’ Isolated Allegations of Criminal Misconduct Targeting Advocates Lack Any Nexus to Signing Petitions.**

Lacking such evidence, Petitioners and their *amici* allege the victimization of supporters of such measures more generally. In particular, they make the serious allegation that such supporters “became death threat targets,” Pet’r Br. at 4; “feared physical harm to self or family,” *id.*; and had their property vandalized. *See id.* at 4 & n.9. These serious allegations are wrong on two counts. First, there is no basis for claiming that such incidents, if true, were pervasive or even common – much less part of a “well-coordinated” campaign. *See* ADF Br. in *Citizens United* at 20-21.<sup>23</sup> They attracted extensive media attention precisely because – unlike such violence or threats against LGBT people – they were so exotic. The small number of such alleged incidents belies Petitioners’ hyperbolic claim of an

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<sup>23</sup> ADF’s charge of “coordinated” reprisals cites to nothing but a website advocating boycotts against businesses that supported Proposition 8. *Id.*; *see also* Part III.C.3 *infra*.

“intimidation campaign,” much less a “great enem[y] of citizen participation in our Republic.” Pet’r Br. at 3, 12. Second, such alleged instances were in large part directed at persons engaged in visible advocacy (or advocacy items, such as yard signs). While this is no excuse, the targeting of leaders and symbols is endemic to many heated campaigns. Such incidents provide no basis for keeping the legislative act of signing an initiative petition secret.

***1. Reported Physical Violence Was Minor and Reported Threats of Physical Violence Were Rare.***

Petitioners do not allege and present no evidence of actual physical violence against Proposition 8 or Referendum 71 supporters. ADF charges there were “many” such incidents but cites only two. ADF Br. at 17.<sup>24</sup> These and the handful of incidents alleged in news reports presented to the Court in *Perry*, while condemnable if true,<sup>25</sup> fall short of severe.

ADF makes much of the allegation that a woman named Phyllis Burgess was shoved, and had her

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<sup>24</sup> Both of ADF’s accusations are based on allegations in a single news report of questionable objectivity. *See Radical Gay Activists Seek to Intimidate Christians*, Charisma News Online, Nov. 19, 2008, available at <http://www.charismamag.com/index.php/news/19444>.

<sup>25</sup> This is a big “if.” Petitioners and their *amici* try to have their cake and eat it too by petitioning the Court to decide this case as a facial challenge, thereby avoiding adversarial testing of their “evidence,” which is mostly inadmissible hearsay, while at the same time relying on that untested hearsay “evidence” to levy serious accusations.

styrofoam cross broken, at an anti-Proposition 8 rally in Palm Springs. *See* ADF Br. at 18. However, Ms. Burgess appears to have deliberately staged the incident for media attention: she was a frequent protester at gay events, informed officials prior to the rally of her intent to attend, and allegedly shoved her way to the front of the crowd in an attempt to get on camera, knocking a disabled man to the ground in the process, before others in the crowd pushed her in response. *See* Nicole C. Branbila, *Prop. 8 Debate Continues to Broil*, *The Desert Sun*, Nov. 16, 2008<sup>26</sup>; *Unfair & Unbalanced Media on Prop 8*, CNN iReport, Nov. 9, 2009.<sup>27</sup> The response to Ms. Burgess's physical disruption of a peaceful rally may not have shown appropriate restraint but is hardly an example of violence "targeting" Proposition 8 supporters.

The other incident alleged by ADF is no more helpful to their "intimidation" narrative. ADF alleges that someone shoved and hit someone with a bible and threw coffee during a "prayer walk" by a group that tries to "convert" gay people to heterosexuality, who decided to hold this walk through a gay neighborhood during the emotionally charged days immediately after the passage of Proposition 8.<sup>28</sup> As with Ms. Burgess, it equally

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<sup>26</sup> *Available at* <http://www.mydesert.com/article/20081116/NEWS01/811160348>.

<sup>27</sup> *Available at* <http://www.ireport.com/docs/DOC-143195>.

<sup>28</sup> *See* KTVU.com, *Anger over Prop. 8 Erupts in San Francisco*, Nov. 14, 2009, *available at* <http://www.ktvu.com/news/17986914/detail.html>; *see also* ADF Br. at 17.

involves people who deliberately thrust themselves into a position where an unfriendly reaction was foreseeable.

ADF also inappropriately suggests that supporters of marriage equality should be blamed for the highly-publicized mailing of suspicious powder to two Mormon temples and a Knights of Columbus printing plant in Connecticut. *See* ADF Br. at 14. Although the churches themselves were quick to blame these incidents on lesbian and gay opponents of Proposition 8, “the FBI had no evidence that linked the threats to Proposition 8 or its opponents.” Ben Winslow, *FBI to run more tests on mystery substance mailed to LDS Church*, Deseret News, Nov. 18, 2008.<sup>29</sup> ADF’s other accusation, of a church service disrupted in Michigan, *see* ADF Br. at 14, alleges no violence but at most a juvenile stunt and possible trespassing – and law enforcement officials dispute ADF’s account.<sup>30</sup>

Other allegations of “violence” from media reports introduced in *Perry* include that someone threw a punch in a scuffle over yard signs,<sup>31</sup> that one high

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<sup>29</sup> Available at <http://www.deseretnews.com/article/1,5143,705263982,00.html>.

<sup>30</sup> *See* Todd A. Heywood, *Cops Contradict Reports of Mount Hope Church Protest*, Michigan Messenger, Nov. 14, 2008, available at <http://michiganmessenger.com/8298/cops-contradict-reports-of-mt-hope-church-protest>.

<sup>31</sup> *See* KCRA.com, *Prop 8 Supporter Allegedly Attacked in Modesto*, Oct. 13, 2008, available at <http://www.kcra.com/news/17708454/detail.html>.

school student slapped another,<sup>32</sup> and that students opposing Proposition 8 threw water balloons at students supporting proposition 8.<sup>33</sup> If true, these three incidents are not hallmarks of high-minded debate, but they are a far cry from the types of systemic political violence implied by ADF or routinely faced by lesbian and gay persons during such campaigns. Los Angeles County *alone* documented four violent hate crimes, including serious assault, targeting LGBT individuals over Proposition 8. *See* Los Angeles County Committee on Human Relations, *Hate Crime Report 2008*, *supra* note 12, at 14.

Petitioners' allegations of *threatened* violence also are about three individuals who occupied leadership or advocacy roles in Proposition 8 and Referendum 71: Fresno Mayor Alan Autry and Pastor Jim Franklin; and the Director of Protect Marriage Washington, Larry Stickney. *See* Pet'r Br. 4 & n.7, 10-11; JA 9.<sup>34</sup> A leader of the Proposition 8

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<sup>32</sup> *See* Jennifer Bonnett, *Galt Attorney - Son Harassed by Teacher over Prop 8*, Lodi News-Sentinel, October 31, 2008, available at [http://www.lodinews.com/articles/2008/10/31/news/7\\_harassment\\_081031.txt](http://www.lodinews.com/articles/2008/10/31/news/7_harassment_081031.txt).

<sup>33</sup> *See* Aaron Bruner, *Prop 8 Supporters Face Sign Theft, Vandalism*, The California Aggie, October 29, 2008, available at <http://theaggie.org/article/2008/10/29/prop-8-supporters-face-sign-theft-vandalism>.

<sup>34</sup> Although one news article claims that a high school student received death threats from classmates, the claim is *triple* hearsay – a newspaper saying what a parent said his son had said other students had said. *See* Jennifer Bonnett, cited *supra* note 32. One of the *Bowen* declarants also conclusorily alleges a threatening Facebook or MySpace message. *See* ER 207 ¶5.

campaign made a similar, conclusory claim in *Perry*. See Declaration of Hak-Shing Tam ¶ 6, Sept. 15, 2009, attached as Exhibit L to Defendant-Intervenors' Motion for Protective Order in *Perry*. While persons who assume leadership in political campaigns should plainly not be subjected to such threats, it is unfortunately not uncommon: leaders of the "No on 8" campaign received them too. See, e.g., Matthew S. Bajko, *South Bay No on Prop 8 Leader Receives Death Threats*, Bay Area Reporter, Nov. 20, 2008.<sup>35</sup> Nor are such threats unique to campaigns involving lesbian and gay rights; several lawmakers have faced death threats because of their positions on recent health care legislation. See, e.g., Jim Abrams, *FBI Investigating Threats to Democrats*, Associated Press, March 24, 2010.<sup>36</sup> Threats against visible advocates on hotly-contested issues are an unfortunate reality, but do not prove that the hundreds of thousands of rank-and-file petition signers are threatened, nor that opponents of gay rights merit special exemptions from rules governing other citizens acting in a legislative capacity.

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However, the declaration fails to provide the alleged message or any context necessary to evaluate the characterization.

<sup>35</sup> Available at <http://www.ebar.com/news/article.php?sec=news&article=3491>

<sup>36</sup> Available at <http://www.google.com/hostednews/ap/article/ALeqM5iNzNTxkoXXj-xOcwAcI2QSXKupwD9EL8FHG2>.



*2. Alleged Vandalism Incidents  
Overwhelmingly Targeted Visible Symbols  
of Political Advocacy.*

There have also been allegations of personal property and churches that were in the forefront supporting Proposition 8 being damaged (usually spraypainted). The records in this case, *Bowen*, and *Perry* appear to contain allegations of maybe 20 such incidents.<sup>37</sup> Such property crimes should have no place in political campaigns, but it is a well-known fact of American political life that these things regularly happen. Churches that publicly opposed Proposition 8, such as Unitarian congregations, experienced similarly vandalism in the other direction. *See, e.g.,* Andres Araiza, *Prop 8 Threat: Fresno Police close to Arrest*, KSFN, Oct. 31, 2008.<sup>38</sup>

While vandalism should never be excused, it is important to note that a huge number of such allegations consist of nothing more than stealing, ripping, or writing on yard signs and bumper stickers. *See, e.g.,* Dkt. 4, Ex. 13 at 52, 55, 61, 137, 146, 149, 152, 155, 158, 161, 164, 167, 170, 173, 176-80, 182, 184-89, 191, 194, 198-99, 202-03, 205-07, 209, 216, 246, 253, 256, 259, 263. Such conduct is endemic to virtually any hard-fought political campaign. Signs for No on 8, Barack Obama, and John McCain were all routinely stolen in the California 2008 election too. *See, e.g.,* James Burger,

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<sup>37</sup> *See* [www.glad.org/doe-v-reed](http://www.glad.org/doe-v-reed).

<sup>38</sup> *Available at* <http://abclocal.go.com/kfsn/story?section=news/local&id=6479879>.

*Polarizing Races Fuel Rampant Sign Thievery*,  
Bakersfield.com, Oct. 22, 2008.<sup>39</sup>

Given a chance to complain about it, either side after any hard-fought political contest will have a laundry list of grievances about such conduct by the other side. There is no basis to claim that such acts were more common in this context than in any other – or warrant legislative secrecy.

**C. The Vast Majority of the “Incidents” Reflect Mere Discomfort With Constitutionally Protected Disagreement, Criticism, and Advocacy.**

Beyond the handful of criminal accusations, Petitioners and their *amici* support their tale of a systematic “intimidation campaign” with a mountain of declarations and media reports. While their list contains a handful of allegations of improper conduct, it is inflated by countless incidents in which opponents of lesbian and gay rights simply felt discomfort at being faced with vigorous but constitutionally protected expressions of disagreement. It is important to understand that when ADF refers to “harassment” and “reprisals” “punish[ing]” persons who supported Proposition 8, *see* ADF Br. at 18, it is mostly referring to such criticism.

***1. Feelings Hurt by Mere Disagreement.***

Many of the complaints Petitioners use to augment their “harassment” narrative involve

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<sup>39</sup> Available at <http://www.bakersfield.com/news/local/x234175235/Polarizing-races-fueling-rampant-sign-thievery>.

hypersensitivity and unwarranted claims of feeling “threatened” by innocuous disagreement. We will let some of these complaints of “intimidation” speak for themselves:

- A declarant complains that “members of the country club have made rude comments to me about my sign [supporting Proposition 8]” and that “[t]he openly gay members of the country club have changed their attitudes toward me. They used to greet me warmly; now, they give me looks of disdain and do not greet me as I pass.” Dkt. 4, Ex. 13 at 52 ¶ 7.
- The business at which one declarant works received an email questioning whether the business’s support for Proposition 8 “will prove true the axiom - any PR is good PR.” Dkt. 4, Ex. 12 at 46 ¶ 5 & 50. The declarant claims to “feel threatened and uneasy” as a result. *Id.*
- Another complains that a “young woman” videotaped her publicly gathering signatures, and stated her intent to post the video on “MySpace and Facebook” so that others could “see what you are doing.” ER 025 ¶¶ 9-10. The declarant “took this comment as a threat.” *Id.*<sup>40</sup>
- Another claims to be upset that some people “pointed and whispered to one another in disapproval,” during trick-or-treating,

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<sup>40</sup> The “young woman[’s]” desire to document the declarant’s public petition-gathering is understandable in light of fraud documented during the campaign. *See* note 15 *supra*.

ostensibly because of a yard sign. ER 226 ¶ 15.

- Petitioners also complain of a supporter whose pastor “told her to find another church.” Pet’r Br. at 6. She is upset that her pastor “was not going to tell [the congregation] how to vote” on Proposition 8, even though she lobbied him to and thought he was required to, and “didn’t think he had any right” to tell her that. Dkt. 4, Ex. 13 at 212 ¶¶ 4-6.
- Another complains that her gay brother “will no longer speak to” her after she told him she might vote for Proposition 8. ER 233 ¶ 8. She accuses the brother’s partner of an “ugly and inflammatory email,” which merely explains that the brother is upset because “[y]our views, among others, on proposition 8 has placed you in the camp of opposition to civil rights.” *Id.* ¶¶ 4-6 & ER 237.
- Another complains [s]he “heard [co-workers] talking about me in ways that are not complimentary” after [s]he published writings advocating Proposition 8. *See* ER 244 ¶ 11.
- Another is upset that a woman at her church expressed disapproval of putting up signs at their church in support of Proposition 8. ER 251 ¶¶ 7-9. The declarant claims that this disagreement “shook [her] to the core.” ER 252 ¶ 12.

The record is filled with these types of allegations. They are not only trivial, they reflect a fundamental refusal to accept the legitimacy of

speech that disagrees with the complainants' viewpoints, deeming it "hateful" or "harassing" simply because they do not like hearing it.

***2. Feelings Hurt by Nonthreatening Incivility.***

Many of the complaints also center around the theme that Proposition 8 opponents were rude – such as by using coarse language or obscene gestures. *See, e.g.*, ER 026-28, 036, 169-76, 204-05, 207, 217, 225, 247; Dkt. 4, Ex. 13 at 67, 87, 90-91, 96, 99, 100-101, 110-11, 122-35. As with their other allegations, Petitioners marry a small handful of possibly legitimate (although minor) complaints to a much larger set of complaints about speech by opponents that, while perhaps impolite, represents protected expression of their viewpoint that Proposition 8 was contemptible.

In the two cases that appear to allege real harassment, the police were notified and/or put an end to the inappropriate behavior. *See* ER 027-28, 032, 036, 208. Such harassment – which is commonly used to victimize lesbians and gay men – is often unlawful, and we expect law enforcement and the civil justice system to handle such cases appropriately. *See, e.g., D.C. v. R.R.*, No. B207869, \_\_\_ Cal. Rptr. 3d \_\_\_, 2010 WL 892204, at \*24-34 (Cal. Ct. App. Mar. 15, 2010) (no First Amendment protection for cyber-bullying based on perceived sexual orientation). But much of is called "harassment" or "hate" in this case is nothing more than the vigorous expression of competing viewpoints.

a. Much of Petitioners' Evidence Is Exaggerated.

Much of Petitioners' evidence on this point is questionable. Many of the allegations turn on self-serving characterizations in declarations filed in this case and in the *Bowen* litigation, which have not been subjected to adversarial testing. Proposition 8 opponents and their calls or emails are alternatively characterized as "aggressive," "rant[ing]," "yelling," "hateful," "upset," "becoming angry," "threatening," "ugly," and so on. *See, e.g.*, ER 134 ¶ 18; ER 225 ¶ 7; ER 251 ¶ 9; Dkt. 4 Ex. 13 at ¶ 7. Where additional details are available, however, those characterizations are contradicted by the documentary evidence. For instance, an email saying that declarant's support for Proposition 8 "has placed you in the camp of opposition to civil rights" is characterized as "ugly and inflammatory." ER 233 ¶¶ 4-6 & 237. A woman's voicemail "[u]sing sarcasm" that "told [declarant] we must be proud of our decision to donate to Proposition 8" is characterized as a "hate call." ER 247 ¶ 6. A letter explaining how Proposition 8 affected the life of the author and civilly criticizing the declarant's choice to support it is characterized as "insulting me personally." ER 184 ¶ 6 & 188. And so forth. The declarants' demonstrably loose use of conclusory and loaded terms in describing the demeanor and conduct of opponents directly undermines their hyperbolic and unfounded claims of coordinated intimidation.

b. Even Taken at Face Value, Many Incidents Allege Nothing More Than Vigorous Advocacy.

Even if the accusations are taken at face value, the accounts of “harassment” in the record are virtually always nothing more than supporters’ taking offense at constitutionally protected criticism of their political efforts.

Many allegations surround some opponents’ use of profanity and harsh language in expressing their political views. Such language may be shocking or embarrassing to the listener. So long as such expression is peaceful, however, it is plainly protected speech. *See Cohen v. California*, 403 U.S. 15, 26 (1971) (“words are often chosen as much for their emotive as their cognitive force”); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“so long as the means are peaceful, the communication need not meet standards of acceptability”).

For instance, a number of supporters received emails that used insulting language to criticize their support for Proposition 8. *See, e.g.*, ER 214, 217 (email calling declarant a “terrible person” for supporting Proposition 8 because it is “unforgivable” to support “tak[ing] away people’s rights”); Dkt. 4 Ex. 13 at 76, 79 (voicemail at work saying “it’s really disheartening to know one of my neighbors supported Proposition 8 so heavily. What a scum-fuck.”); *id.* at 239, 243 (email stating “Someday you will have to account for the fact that you refused to love your neighbor, but in the meantime I hope your

life is full of oppression and injustice as this is the kind of life you wish for others. You're a queer-hating douchebag. Fuck you.”<sup>41</sup>

Such language is not polite. But opponents have every right to express their belief that Proposition 8 was offensive. Moreover, many of the supposedly “harassing” emails were not sent to Proposition 8 supporters personally, but rather were complaints to businesses submitted through public websites. *See, e.g.*, ER 159, 168-76; Dkt. 4 Ex. 13 at 119, 122-35.<sup>42</sup> Similarly, the alleged “obscene gestures” encountered by supporters took place while supporters were out waving signs in support of Proposition 8 on public streets and intersections, evidencing the nonthreatening context as well as the complainants’ own actions in directing their speech at a potentially unfriendly audience. *See, e.g.*, Dkt. 4, Ex. 13 at 64, 249; ER 225.

### ***3. Dislike of Constitutionally Protected Boycotts.***

Petitioners’ *amici* further complain about “retaliation . . . in economic form.” *See* ADF Br. at 15-17; Brief of American Center for Law and Justice

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<sup>41</sup> Because Petitioners brought a facial challenge and relied heavily on evidence from *Bowen*, it is unclear whether these emails or calls were actually from acquaintances rather than strangers.

<sup>42</sup> Some of the declarants engaged in this exact type of vigorous debate before filing a lawsuit asking to be protected from it. *See, e.g.*, Dkt. 4 Ex. 13 at 135 (emailing Proposition 8 opponent that that they “[s]hould be ashamed” for supporting marriage equality and calling it “[d]isgusting”).



as *Amicus Curiae* at 13. But such advocacy lies at the heart of First Amendment protections, with a long tradition in our democracy as a means for minority groups to express dissent. *See Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (recognizing First Amendment right to engaging in picketing for express purpose “to induce . . . customers not to patronize” targeted business); *Claiborne Hardware Co.*, 458 U.S. at 909-15 (right to engage in concerted action advocating boycott). As the district court recognized in *Bowen*, “[t]he decision and ability to patronize a particular establishment or business is an inherent right of the American people,” and “individuals have repeatedly resorted to boycotts as a form of civil protest intended to convey a powerful message without resort to non-violent means.” *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009). Lesbian and gay people have every right not to patronize businesses or individuals who act to deprive them of their rights, and to encourage others to do the same.

Groups opposed to legal protections for lesbian and gay individuals, moreover, routinely boycott companies that they deem too friendly to gay people. Recent examples have included McDonalds and Disney. *See, e.g.*, Frank Ahrens, *Gay-Marriage Opponents to Boycott McDonalds*, Wash. Post, July 4, 2008 at D1<sup>43</sup>; *see also Southern Baptists vote for Disney Boycott*, CNN, June 18, 1997.<sup>44</sup>

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<sup>43</sup> Available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/03/AR2008070303769.html>.

<sup>44</sup> Available at <http://www.cnn.com/US/9706/18/baptists.disney/>.

In fact, many of the allegations do not involve any kind of organized boycott at all – only uncoordinated and/or inchoate statements by individual lesbian and gay persons (or their supporters) that they would stop patronizing businesses or urging others to do the same. *See, e.g.*, Pet'r Br. 11; J.A. 9; ER 172-73, Dkt. 4 Ex. 13 at 46, 50, 122-29, 131. Any chill arising from such perfectly legitimate speech is *de minimis*.

#### ***4. Exaggerated Threats to Supporters' Employment.***

Petitioners also complain that “individuals were fired or forced to resign for supporting traditional marriage.” Pet'r Br. at 5.<sup>45</sup> Here, again, the flood of media reports cited by Petitioners and their *amici* creates the impression of a veritable wave of reprisals, but all report the same three resignations: Scott Eckern (director of the California Musical Theater); Richard Raddon (director of the L.A. Film Festival); and Marjorie Christoffersen, the manager of her parents' restaurant. *See* John R. Lott Jr. & Bradley Smith, *Donor Disclosure Has its Downsides*, Wall St. J. Dec. 26, 2008.<sup>46</sup> All three worked for institutions with substantial patronage by members of the lesbian and gay community. *See, e.g.*, Karen Grigsby Bates, *Backers Of Calif. Gay Marriage Ban*

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<sup>45</sup> Petitioners choose their words carefully, alleging not actual incidents but “*news media report* [sic] that individuals were fired or forced to resign.” Pet'r Br. at 5.

<sup>46</sup> Available at <http://online.wsj.com/article/SB123025779370234773.html>.

*Face Backlash*, NPR, March 5, 2009<sup>47</sup>; *see also* Jim Carlton, *Gay Activists Boycott Backers of Prop 8*, Wall St. Jour. Dec. 27, 2008.<sup>48</sup> News reports also indicate that Ms. Christoffersen “returned to the café when the protest faded.” *Id.*

Reasonable people can disagree as to whether criticism of the institutions headed by these three individuals represented a sensible or worthwhile use of Proposition 8 opponents’ right to criticize and decline to patronize businesses, but, again, there was nothing even remotely illegal about such criticism. *See Claiborne Hardware Co.*, 458 U.S. 886 at 909-15; *Organization for a Better Austin*, 402 U.S. at 419.

Allegations beyond those three cases are contradicted by the facts. The Brookstone manager cited by Petitioners was terminated for treating a colleague unprofessionally by telling her that “your homosexuality, I think it’s bad stuff,” and calling her “lifestyle . . . deviant,” not for any political position. *See* Pet’r Br. at 6-7 n.14 (citing Joshua Rhett Miller, *Massachusetts Man Says He Was Fired for Telling Colleague That Her Gay Marriage Is Wrong*, Fox news.com, Nov. 9, 2009).<sup>49</sup> The fire engineer cited by ADF, *see* ADF Br. at 12, was merely criticized for his support of an anti-marriage petition, not fired for it. *See* n.20 *supra*. And the high school guidance

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<sup>47</sup> *Available at* <http://www.npr.org/templates/story/story.php?storyId=101460517>.

<sup>48</sup> *Available at* <http://online.wsj.com/article/SB123033766467736451.html>.

<sup>49</sup> *Available at* [www.foxnews.com/story/0,2933,572862,00.html](http://www.foxnews.com/story/0,2933,572862,00.html).

counselor who starred in a television ad asking voters to “to prevent homosexual marriage from being pushed on Maine students” faced an ethics complaint by a fellow social worker, not loss of his job or a complaint by the National Association of Social Workers as alleged. *See* Pet’r Br. at 5 n.10 (citing A.P., *Counselor Wants Gay Marriage Complaint Thrown Out*, Bangor Daily News, Nov. 23, 2009).<sup>50</sup> Petitioner’s and ADF’s allegations of supporters’ losing their jobs over their political views, like their other accusations, are mostly hot air.

\* \* \* \* \*

The allegation that a small minority of lesbians and gay men has somehow managed to intimidate the majorities that have successfully targeted them for unequal treatment, in ballot initiative after ballot initiative, is outlandish. A handful of allegations made during the heat of the Proposition 8 campaign may have attracted extensive media attention because claims of ‘pro-gay’ harassment and violence were so novel, but that does not change the fact that the coordinated and sweeping campaign of reprisal painted by Petitioners and their *amici* does not exist and never has. They are telling this story cynically to demonize speech opposing their political efforts and to strip away the few protections that minorities have against the hostile initiatives they sponsor. The Court should decline their invitation.

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<sup>50</sup> Available at [www.bangordailynews.com/detail/130565.html](http://www.bangordailynews.com/detail/130565.html).

**CONCLUSION**

The judgment of the Court of Appeals should affirmed.

Respectfully submitted,

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