No. 09-559

IN THE

Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2,
AND PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, AND BRENDA GALARAZA, PUBLIC RECORDS OFFICER FOR THE SECRETARY OF STATE'S OFFICE,

Respondents.

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

BRIEF FOR AMICUS CURIAE CATO INSTITUTE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, DC 20001
(202) 842-0200

GLENN M. WILLARD
Counsel of Record
CORDELL A. HULL
JOHN C. HILTON
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6559
gwillard@pattonboggs.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. EVEN IF THE REASONS FOR PUBLIC DISCLOSURE ARE COMPELLING, EXEMPTIONS ARE CONSTITUTIONALLY REQUIRED WHEN DISCLOSURE EQUATES TO RESTRAINT..... 3

A. Groups Supporting Controversial Positions Must Be Protected. 4

B. Publicly Disclosing a Group's Members or a Citizen's Affiliations Can Equate to Restraining Their First Amendment Rights, Particularly for Those Speaking on Contentious Issues or Espousing Controversial Viewpoints. 6

II. DISCLOSURE EXEMPTIONS ARE NOT A SUBSTITUTE FOR STRICT SCRUTINY AND PROVIDE INADEQUATE PROTECTION WHERE DISCLOSURE IS NOT JUSTIFIED BY COMPELLING STATE INTERESTS. 10

A. The Government Is Ill-Suited to Identify Which Groups Should Be Exempt From Disclosure. 11

B. In the Federal Election Context, the Process for Requesting a Reporting Exemption Is Onerous and Devoid of Standards. 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Bates v. City of Little Rock,
361 U.S. 516 (1960) 9

Boos v. Barry,
485 U.S. 312 (1988) 6

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 7

Brandenburg v. Ohio,
395 U.S. 444 (1969) 11

Brown v. Socialist Workers '74 Campaign Comm.,
459 U.S. 87 (1982) 3, 4, 10

Buckley v. Valeo,
424 U.S. 1 (1976) 3, 4, 10

Citizens United v. FEC,
130 S. Ct. 876 (2010) 11

District of Columbia v. Heller,
128 S. Ct. 2783 (2008) 8

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 4

FEC v. Nat'l Conservative PAC,
470 U.S. 480 (1985) 4

Healy v. James,
408 U.S. 169 (1972) 7-8

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951) 9-10

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 8

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 7, 8, 9

NAACP v. Button,
371 U.S. 415 (1963) 4, 7

R.A.V. v. City of St. Paul,
505 U.S. 377 (1992) 8, 11

Schacht v. United States,
398 U.S. 58 (1970) 11, 12-13

Shelton v. Tucker,
364 U.S. 479 (1960) 9

Spence v. Washington,
418 U.S. 405 (1974) 11

Sweezy v. New Hampshire,
354 U.S. 234 (1957) 4

Texas v. Johnson,
491 U.S. 397 (1989) 4-5, 11, 12, 13

United States v. Eichman,
496 U.S. 310 (1990) 12, 13

United States v. Schwimmer,
279 U.S. 644 (1929) 5

W. Va. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 6, 11

Whitney v. California,
274 U.S. 357 (1927) 5

STATUTES, REGULATIONS AND ADMINISTRATIVE MATERIALS

Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989) (codified at 18 U.S.C. § 700(a) (1988 ed. & Supp. I)) 12

11 C.F.R. § 112.1(b) 15

11 C.F.R. § 112.1(c) 15

11 C.F.R. § 112.1(d) 15

11 C.F.R. § 112.2(a) 15

11 C.F.R. § 112.4(c) 15

FEC Advisory Op. 1990-13 14

FEC Advisory Op. 1996-46 14

FEC Advisory Op. 2003-02 14

FEC Advisory Op. 2009-01 ..... 14, 16, 17-18

BOOKS AND ARTICLES

Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Against Disclosure*, 53 DUKE L.J. 967 (2003) 6-7

INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it addresses the freedom of association, which ensures the effective exercise of our First Amendment rights.

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

The freedom of association ensures the effective exercise of the rights guaranteed by the First Amendment, especially with regard to controversial issues or viewpoints. For this reason, the right to associational privacy cannot be abrogated without a compelling state interest. Here, unlike in the campaign finance context, the state interests fall far short of compelling, and can easily be satisfied without mandatory full disclosure of the identity and contact information of every citizen who signs a petition. Further, as illustrated in campaign finance law, exemption from full disclosure—which is a constitutionally mandatory remedy, not a substitute for strict scrutiny—is not a reliable mechanism. Exemption rules chill speech by their very nature as an ad hoc process untethered from any fixed standards. Consistent with the right to private association undergirding the First Amendment, the Court should establish a bright-line rule prohibiting the mandatory full disclosure of petition signers' identities and contact information.

ARGUMENT

The issue before the Court in this case is a familiar one: the right to private association. Faced with far more persuasive state interests supporting the disclosure of federal campaign contributions, this Court has nonetheless made clear that minor political parties must be exempt from reporting requirements. An analogous exemption would be required if the Court accepts that Respondents have a compelling interest.

But therein lies the problem. While creating and administering a constitutionally mandated disclosure exemption sounds straightforward in theory, in practice it is anything but. Permitting legislative and executive officers to pick and choose which groups deserve an exemption quickly devolves into a standardless exercise, thereby chilling the exercise of First Amendment rights.

We urge the Court to refrain from creating yet another disclosure system with yet another obligatory—but wholly standardless—exemption. Because the state interests here are far from compelling, under traditional strict scrutiny principles the Court should establish a bright-line rule prohibiting full, involuntary disclosure of all petition signers' identities and contact information.

I. EVEN IF THE REASONS FOR PUBLIC DISCLOSURE ARE COMPELLING, EXEMPTIONS ARE CONSTITUTIONALLY REQUIRED WHEN DISCLOSURE EQUATES TO RESTRAINT.

In circumstances where a sufficiently compelling state interest otherwise overcomes public disclosure provisions' burdens on First Amendment rights, for example in the campaign finance arena, this Court requires exemptions for minor political parties and other groups if they can show an objectively reasonable fear of intimidation. *See Buckley v. Valeo*, 424 U.S. 1, 71 (1976); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). In making this determination, the Court endorsed a balancing test of sorts, ul-

timately concluding in *Socialist Workers* that the First Amendment prohibits a state "from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment or reprisals," because "[s]uch disclosures would infringe the First Amendment rights of the party and its members and supporters." *Id.* at 101-02. Mandatory disclosure always burdens associational rights; an exemption, however, is constitutionally mandatory when disclosure equates to silence or restraint.

A. Groups Supporting Controversial Positions Must Be Protected.

The rule initially articulated in *Buckley* and amplified in *Socialist Workers* is well founded, especially for citizens supporting controversial positions or candidates. *See, e.g.*, *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 498 (1985) ("[O]ne of the essential features of democracy is the presentation to the electorate of varying points of view."). "History has amply proved the virtue of political activity by minority, dissident groups[.]" *NAACP v. Button*, 371 U.S. 415, 431 (1963) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957) (plurality opinion)). Thus, "no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004).

The Court has articulated this "bedrock principle underlying the First Amendment" in no uncertain terms: "[T]he government may not prohibit the expression of an idea simply because society finds the idea

itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (collecting authorities); *see also id.* at 420-21 (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."). "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting). The constitutionally proper remedy for speech one finds reprehensible is to engage it directly:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

Put another way, our First Amendment freedoms must be protected by more than temporarily prevailing

political winds. *See, e.g.*, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."). Americans "must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted). As shown below, for groups speaking on highly charged issues or advocating controversial opinions, those absolute protections are all the more crucial because uncertainty discourages association in the first place.

B. Publicly Disclosing a Group's Members or a Citizen's Affiliations Can Equate to Restraining Their First Amendment Rights, Particularly for Those Speaking on Contentious Issues or Espousing Controversial Viewpoints.

Where controversial issues are concerned, the need for *private* association is acute. The fear of public censure chills individuals from associating, hamstringing their other First Amendment freedoms. As one scholar has noted, in these situations associational privacy gives "groups freedom for self-development and group

interaction without undue impingement by the norms of the majority." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Against Disclosure*, 53 DUKE L.J. 967, 995 (2003).

The freedom of association enables groups and citizens to participate meaningfully in public life. It "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *see also* Solove, 53 DUKE L.J. at 995 ("Freedom of association guards against the 'tyranny of the majority,' for it allows those with minority viewpoints to form into groups to achieve greater social power."). The Court has observed, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association[.]" *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Thus, courts often must safeguard associational rights. *Cf. Button*, 371 U.S. at 429 ("Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."). The "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Patterson*, 357 U.S. at 462.

In the United States, governmental actors are not responsible for coercively promoting or denigrating certain viewpoints. It is axiomatic that "the State may not restrict speech or association simply because it finds the views expressed by any group to be abhor-

rent." *Healy v. James*, 408 U.S. 169, 187-88 (1972) (overturning college's refusal to allow Students for a Democratic Society to use campus facilities). The First Amendment certainly does not contain an exception "for the expression of extremely unpopular and wrong-headed views." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). On the contrary, advocating a "politically controversial viewpoint [ ] is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

Clearly, Respondents may not bluntly prohibit Petitioners from exercising their rights to associate or petition their government on this issue of tremendous public interest. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."). But public disclosure by the State of citizens' organizational affiliation would be tantamount to governmental suppression of the viewpoint when, as here, threat of disclosure causes citizens to abstain from associating, for example because of a fear of ensuing public reprobation and censure. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved." *Patterson*, 357 U.S. at 462.

Hence, the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.*; *see also Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960) ("Public exposure [of a public school teacher's organizational affiliations], bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty."). The Court thus has held that a state cannot force its citizens to divulge their organizational affiliations, or force groups to divulge their members, when doing so would impair associational freedom, and when, as here, the state's regulatory or administrative interests easily can be satisfied short of full disclosure. *See, e.g.*, *Shelton*, 364 U.S. at 490; *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (NAACP membership lists exempt from ordinance requiring corporations to identify all persons paying dues, assessments, and contributions); *Patterson*, 357 U.S. at 466.

Although the analysis in these sorts of cases is necessarily fact-based, the underlying principles are timeless. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 145 (1951) (Black, J., concurring) ("[S]ince prejudice manifests itself in much the same way in every age and country and since what has happened before can happen again, it surely should not be amiss to call attention to what has occurred when dominant governmental groups have been left free to give uncontrolled rein to their prejudices

against unorthodox minorities."). Even in the face of compelling state interests, a public disclosure rule must have an exemption for reasonable fear of intimidation lest the regulation cross the line from lawful disclosure to illicit restraint. But this begs the question whether the exemption is adequate without a compelling state interest to justify public disclosure in the first instance.

II. DISCLOSURE EXEMPTIONS ARE NOT A SUBSTITUTE FOR STRICT SCRUTINY AND PROVIDE INADEQUATE PROTECTION WHERE DISCLOSURE IS NOT JUSTIFIED BY COMPELLING STATE INTERESTS.

The Constitution requires disclosure exemptions in certain circumstances, even when a compelling state interest justifies mandatory disclosure. *See Socialist Workers*, 459 U.S. at 93-94 (quoting *Buckley*, 424 U.S. at 74). But those exemptions are a consequence of strict scrutiny, not a substitute for it; a headlong rush to the exemption, without first weighing the state interests, puts the cart before the horse. Where, as here, no compelling state interest justifies disclosure, the right to private association remains absolute. Moreover, administering these exemptions further burdens the right to association in a way that—while tolerable to combat corruption in the campaign finance context, for example—is decidedly intolerable in the absence of any compelling state interest that could justify disclosing the identities *and contact information* of citizens petitioning their government.

A. The Government Is Ill-Suited to Identify Which Groups Should Be Exempt From Disclosure.

A group espousing one point of view on a controversial issue may not harness the power of the state to silence its opponents. Examples abound in this Court's jurisprudence of overreaching by executive or legislative actors to suppress expression, so it is doubtful that these same officials can be trusted to enforce a disclosure exemption in this context or in any other. *See, e.g.*, *R.A.V.*, 505 U.S. 377 (overturning Minnesota law against cross burning); *Johnson*, 491 U.S. 397 (overturning Texas law prohibiting flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam) (overturning a Washington flag law where petitioner expressed opposition to the Vietnam War and events at Kent State University); *Schacht v. United States*, 398 U.S. 58 (1970) (overturning portion of a federal law prohibiting criticism of the armed forces); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (overturning state criminal syndicalism statute used to prosecute a participant at a Ku Klux Klan meeting at which there was no incitement to violence); *Barnette*, 319 U.S. 624 (war-time decision overturning state law compelling recitation of the Pledge of Allegiance). As these cases demonstrate, the states and the federal government at best have a questionable track record when determining which expression should and should not be permitted, as the Court recently recognized. *See Citizens United v. FEC*, 130 S. Ct. 876, 896-97 (2010). And the greater includes the lesser: if the associational rights of the above persons and groups are

fully protected, then Petitioners are entitled to nothing less.

For example, the federal government began its quest to outlaw flag burning because of the effect on the morale of the soldiers fighting in Vietnam. *See, e.g.*, *Johnson*, 491 U.S. at 426-27 (Rehnquist, C.J., dissenting) (outlining legislative background). But the issue remained long after the Vietnam War had ended. The Court eventually overturned Texas' flag-burning prohibition on First Amendment grounds. *Id.* at 420.

Undeterred, Congress promptly passed the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (1989) (the "FPA"). The FPA prescribed criminal penalties for whomever "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States." 18 U.S.C. § 700(a) (1988 ed. & Supp. I). This was the same conduct *Johnson* held is constitutionally protected.

Invalidating the FPA shortly after its enactment, the Court relied in large part on the previous Term's decision in *Johnson*. *See United States v. Eichman*, 496 U.S. 310, 317-19 (1990). Rejecting the notion that even a national consensus can trump the First Amendment, the Court in *Eichman* concluded, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *Id.*; *see also Schacht*, 398 U.S. at 63 ([A] law "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison

for opposing it, cannot survive in a country which has the First Amendment."). If the national consensus against flag burning could not trump the First Amendment in *Johnson*, then surely Petitioners' freedom of association should remain untrammeled in petitioning their government on a polarizing, hotly-debated issue.

The Court's decisions in *Johnson* and *Eichman* illustrate the need for absolute First Amendment protections. The government's history of erroneously suppressing controversial or unpopular expression—notwithstanding a decision of this Court rejecting a nearly identical proscription—shows it is ill-suited to grant or reserve a group's First Amendment rights based on its subjective judgment regarding a nebulous exemption. It is easy to say that an exemption to the general rule would be required; it is much harder to determine who would make such decisions and to trust their determinations would be unbiased. More importantly, the exemption does not eliminate or lessen the burden public disclosure places on First Amendment rights, thereby inviting intermediate scrutiny or even rational basis review. To the contrary, even when an underlying state interest is sufficiently compelling to justify disclosure, the exemption is nevertheless constitutionally necessary when disclosure amounts to restraint. The exemption does not replace strict scrutiny; indeed, it is wholly inapplicable where, as here, no compelling state interest exists in favor of full disclosure.

B. In the Federal Election Context, the Process for Requesting a Reporting Exemption Is Onerous and Devoid of Standards.

The process developed by the FEC to administer the constitutionally mandated disclosure exemption in the campaign finance context highlights the attendant chilling effects, and illustrates why a similar exemption for petition signers cannot replace strict scrutiny. Four times between 1990 and 2009, the Socialist Workers Party ("SWP") has received an exemption from disclosing the "names, addresses, and other identifying information of contributors to and vendors doing business with the SWP and committees supporting SWP candidates in connection with Federal elections." *See* FEC Advisory Ops. 1990-13, 1996-46, 2003-02 & 2009-01. "The [FEC] granted these renewals after examining the evidence presented in affidavits and other documents describing the continuing harassment of the SWP and its supporters during the six years preceding each request." Advisory Op. 2009-1. The FEC did so, in part, based upon its unilateral judgment that the SWP was electorally ineffective, poorly funded, and therefore a politically irrelevant speaker.[2]

---

[2] See the following statements from Advisory Opinion 2009-1:

> [N]o SWP candidate has ever been elected to public office in a partisan election. Data from the 2004, 2006, and 2008 elections show very low vote totals for SWP presidential and other Federal candidates. Information presented in the request and available on the Commission's website indicates a low level of financial activity

But the advisory opinion process comes with significant administrative burdens and provides no guarantees for minor parties seeking an FEC exemption. To begin with, a requestor cannot expect a speedy decision. Commissioners are not required to issue an opinion until 60 days after a "qualified and complete" request has been submitted. 11 C.F.R. § 112.4(c). Requestors must "set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future" and give a "complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." *Id.* § 112.1(b), (c). This enables the FEC routinely to delay the issuance of opinions as its General Counsel seeks ever-more-relevant facts, by ten days per round of questions. *Id.* § 112.1(d). Consequently, the delay itself deters speaking—as it would in any similar proceeding overseen by a court or state administrative body.

In addition, a requestor for an exemption may not seek it from the FEC in private. Instead, requests for advisory opinions are "made public at the Commission promptly upon their receipt," *id.* § 112.2(a), including on the FEC's website. Written comments in response to the request for an opinion are also made public. Consequently, someone who faces a reasonable prob-

---

by SWP political committees. Further, unlike committees of several other minor parties, the SWP National Campaign Committee has never applied or qualified for national committee status.

(Citations omitted.)

ability of threats, harassment or reprisal only exacerbates the risk by asking the FEC for an exemption from disclosure. This entirely public forum provides cold comfort to the controversial political speaker, even if the exemption is eventually granted. In the petition-signing context, any similar requirement would swallow the exemption entirely, rendering it moot.

Finally, and most important, there are no objective minimum regulatory standards or thresholds by which the FEC decides whether a requestor faces an objective risk of threats, harassment or reprisal. It is an entirely ad hoc and subjective decision-making process. Indeed, the FEC, granting the SWP its most recent waiver in Advisory Opinion 2009-01, characterized the evidence of harassment as waning and ominously warned that this may be SWP's last exemption:

> Although the evidence presented by the requestor demonstrates some continued incidents of violence and harassment, *those incidents appear to be of lesser magnitude* than those referenced in court opinions and prior AOs granting the exemption. The interest of disclosure, however, is weighed against both the historical and present day evidence of violence and harassment. As the number of severe incidents decline, *it may become more difficult for the requestor to demonstrate* a "reasonable probability that compelled disclosure" will result in "threats, harassment, or reprisals from either Government officials or private parties. [Emphasis added.]

This is a troubling forecast and certainly not encouraging to those would-be individual or entity speakers who may consider seeking an exemption from the FEC, especially in light of only part of the extensive evidentiary record set forth by the SWP describing threats of violence from private parties:

> The SWP submitted approximately fifty exhibits consisting of attestations as to incidents of harassment, threats, or violence by private individuals or businesses . . . .
>
> Thirteen exhibits described acts of violence or vandalism against SWP workers, property, or materials, including an incident in 2004 when a brick wrapped in incendiary material was thrown through the window of a local SWP headquarters early in the morning, setting the front part of the building on fire and causing considerable damage. Other exhibits described other incidents of violence or vandalism, including pouring paint over an SWP vehicle; racist, anti-gay, or anti-immigrant graffiti on the windows of SWP campaign offices; a threat of imminent bodily harm to SWP campaigners; a physical assault on an SWP worker at a campaign literature table; a piece of concrete thrown through the window of an SWP office in an attempted break-in; extensive egg-throwing at an SWP headquarters on a street where no other businesses or offices were vandalized; and a former head of personnel at a

> company engaged in disputes with SWP personnel racing his car at an SWP campaigner.
>
> Several exhibits described more generalized threats of harm made in person to SWP campaigners, such as a statement by an individual to SWP supporters seeking ballot signatures that he wished to "put a bullet in every one of your heads." Eleven exhibits allege threatening or hostile statements made by mail or by phone. Some of these examples merely involve insulting messages containing harsh language or questioning the SWP's loyalty to the U.S. They are not out of the ordinary experience of campaigns today. However, there are more alarming allegations, such as a threatening letter containing a syringe mailed to an SWP office. There was also a declaration describing a threat by an individual to shoot SWP workers who came to his door. [Exhibit number omitted.]

Id. Common sense dictates that this level of harassment and abuse clearly tips the scales in favor of the SWP's right to private association. But the fact that the FEC considers this evidence of waning harassment that just barely justifies the constitutionally mandatory disclosure exemption highlights the standardless, ad hoc nature of the entire exercise—and would alarm groups hoping for disclosure exemptions in the present circumstances as well.

In sum, the process by which prospective speakers seek an exemption from the campaign finance disclo-

sure requirements—even where the Court has found a compelling state interest—is riddled with stifling delay, counterintuitive and self-defeating publicity, and tremendous potential for arbitrariness. Consequently, there is no real basis for any kind of confidence that the FEC will review the allegations with objectivity. Respondents' invitation to bypass strict scrutiny in favor of a similar exemption here would result in states developing equally vague processes to determine when petition signers' names and identifying information should be exempt from disclosure.

The point here is not to challenge the campaign finance disclosure provisions this Court very recently upheld, but rather to emphasize that public disclosure carries significant burdens and manifestly chills the exercise of First Amendment rights in a way that is unconstitutional where not outweighed by a compelling state interest. Undoubtedly, citizens presented with a petition on a controversial issue would not even consider signing it if faced with the uncertainty of proving an objectively reasonable fear of intimidation or retaliation to the government's satisfaction. Participation would be weakest on the most controversial or contested issues—precisely the context in which it should be most robust—and petitioning would lose value as a tool for citizens to participate directly in their government and for government to gauge public support for policies. That chilling effect, even if tolerable to combat actual and apparent corruption in the campaign finance context, nevertheless unconstitutionally infringes petitioners' First Amendment rights when no compelling state interests exist in favor of

publicly disclosing the identities and contact information of citizens signing particular petitions.

CONCLUSION

In addition to being burdensome and standardless, the intimidation exemption is irrelevant because there is no compelling state interest in full disclosure of all petition signers' names and identifying information. Further, there are many less intrusive ways to verify that petitions meet state law ballot access requirements. The Court thus should adopt a bright-line rule protecting petition signers' right to private association.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200

GLENN M. WILLARD
Counsel of Record
CORDELL A. HULL
JOHN C. HILTON
PATTON BOGGS LLP
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6559
gwillard@pattonboggs.com

Counsel for Amicus Curiae *Cato Institute*

March 4, 2010