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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-016564 02/28/2024

HONORABLE M. SCOTT MCCOY

CLERK OF THE COURT
T. DeRaddo
Deputy

CENTER FOR ARIZONA POLICY INC, et al.

SCOTT D FREEMAN

v.

ARIZONA SECRETARY OF STATE, et al.

ARIZONA SECRETARY OF STATE
1700 W WASHINGTON ST FL 7
PHOENIX AZ 85007

KATHRYN E BOUGHTON
KATIE HOBBS
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BRETT W JOHNSON
JAKE TYLER RAPP
CHANELE N REYES
ALEXANDER WESTBROOK SAMUELS
JAMES DEMOSTHENES SMITH
DAVID KOLKER
NATHAN T ARROWSMITH
CRAIG A MORGAN
ELIZABETH D. SHIMEK
DANIEL J ADELMAN
JUDGE MCCOY

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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UNDER ADVISEMENT RULING

On June 21, 2023, the Court granted Defendants' and Intervenors' Motions to Dismiss Plaintiffs' Verified Complaint. That complaint alleged that Proposition 211, the "Voters' Right to Know Act" (the "Act"), was facially unconstitutional. The Court also denied Plaintiffs' Motion for Preliminary Injunction. (6/21/2023 Ruling ("Ruling") at 8-15).

In the Ruling, the Court found that the disclosure provisions of the Act served important government interests and that the Act was substantially related to, and narrowly tailored to serve, those interests. (*Id.* at 8-12). Accordingly, the Court concluded that the Act was facially constitutional. The Court, however, granted Plaintiffs leave to amend to assert an as applied challenge to the Act.

On July 21, 2023, Plaintiffs filed a Verified Amended Complaint ("Amended Complaint") adding Count 4, asserting that the Act is unconstitutional as applied to them. On November 2, 2023, Plaintiffs filed a Renewed Motion for Preliminary Injunction, seeking to enjoin enforcement of the Act as applied to them. Defendants and Intervenors have moved to dismiss the Amended Complaint and have opposed Plaintiffs' renewed request for injunctive relief.

Having considered the briefing, all related filings, the oral argument of counsel, and the larger record in the case, the Court now grants the motions to dismiss the Amended Complaint and denies the renewed request for injunctive relief. [1]

I. Summary of Relevant Provisions of The Act

The Act requires that any entity spending $50,000 or more on campaign media spending during an election cycle must file a report with the Secretary of State disclosing, among other things, the name, mailing address, occupation and employer of each donor who contributed, directly or indirectly, more than $5,000 for campaign media spending during an election cycle. A.R.S. §§ 16-973(A)(6); 16-971(10). The Act also requires the Secretary of State promptly to make the report public and provide it to the Citizens Clean Election Commission (the "Commission"). A.R.S. § 16-973(H).

[1] Plaintiffs' Amended Complaint restates their facial challenge to the Act. Because the Court has already ruled on that claim, the Court limits this ruling to Plaintiffs' as applied challenge.

The Act allows two paths for donors wishing to avoid disclosure. First, donors may "opt out" of having their donations used for campaign media spending. A.R.S. § 16-972(B)(2).[2] Second, donors can demonstrate to the Commission that there is "a reasonable probability" that public disclosure of the donor's identity would subject the donor or the donor's family to "a serious risk of physical harm." A.R.S. § 16-973(F).

II. As Applied Challenges to Constitutionality

In its earlier ruling, the Court rejected Plaintiffs' claim that the Act was facially unconstitutional – *i.e.*, that the Act was unconstitutional in all applications. The permitted amendments to the Amended Complaint allege, more narrowly, that the Act is unconstitutional as applied to the four Plaintiffs.

To state an as applied challenge to a facially constitutional election disclosure law, a plaintiff must plead facts showing "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *see also Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 367 (2010); *Comm. for Just. & Fairness v. Ariz. Sec'y of State's Off.*, 235 Ariz. 347, 359 ¶ 45 (App. 2014) (applying reasonable probability standard to as applied challenge under United States and Arizona Constitutions).

"The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." *Buckley*, 424 U.S. at 74; *John Doe No. 1 v. Reed*, 561 U.S. 186, 200 (2010). "New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Buckley*, 424 U.S. at 74.

The United States Supreme Court has upheld as applied challenges to disclosure laws in several cases. For example, in *NAACP v. Alabama, ex rel. Patterson*, the United States Supreme

[2] Notwithstanding a donor's effort to "opt out," disclosure may remain a possibility. Any public communications by a covered entity must state the names of its top three largest donors during an election cycle. A.R.S. § 16-974(C). This disclosure may even apply to top donors who "opted out" of having their donations used for campaign media spending under A.R.S.§ 16-972(B). Resolving potential inconsistencies between provisions of the Act is beyond the scope of this ruling, however.

Court upheld an as applied challenge to a disclosure law where the NAACP had "made an uncontroverted showing" that revealing its members' identities "exposed th[ose] members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. 449, 462 (1958). The NAACP also demonstrated that the Alabama Attorney General sought the group's membership lists as "part of an effort to oust the organization from the State . . .." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (discussing *NAACP*).

The NAACP made a similar showing with respect to city disclosure ordinances designed to punish it and ensure harassment of members with threats of bodily harm in *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960) ("There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm. There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw."). In *Brown v. Socialist Workers '74 Campaign Committee (Ohio*), the Supreme Court upheld an as applied challenge to a disclosure law where there was evidence of "threatening phone calls and hate mail, the burning of [the group's] literature, the destruction of [the group's] members' property, police harassment of a party candidate, … the firing of shots at [the group's] office" and the firing of 22 party members because of their party membership. 459 U.S. 87, 94, 99 (1982). In *Brown,* the targeted group was subjected to a campaign of "government harassment" in Ohio and by the FBI and the Civil Service Commission. *Id.* at 99-100.

Thus, among the common threads of the cases sustaining an as applied challenge (that is, *Patterson*, *Bates,* and *Brown*): disclosures affecting minor or dissident parties, where party members historically faced pervasive and severe harassment, involving state action or acquiescence.

Several other as applied challenges with insufficient evidence of threats or reprisals failed, however. For instance, in *Buckley*, the Supreme Court rejected an as applied challenge where the evidence showed that only "one or two persons refused to make contributions because of the possibility of disclosure." 424 U.S. 71. The *Buckley* Court recognized that while it is "undoubtedly true" that disclosure might "deter" some donors from making contributions, the Court upheld the disclosure requirements because of the substantial government interests they serve. *Id.* at 68.

In *Citizens United*, the Supreme Court rejected the as applied challenge because Citizens Untied had offered no evidence that its members might face threats or reprisals. 558 U.S. at 370.

The Court noted that *amici* had cited recent events in which donors to certain causes were "blacklisted, threatened, or otherwise targeted for retaliations" and that such examples were "cause for concern." *Id.* Citizens United, however, had been disclosing the identity of its donors for years and had not identified any instance of harassment or retaliation of is donors. *Id.*

Citing Justice Sotomayor's dissent in *Bonta*, Plaintiffs suggest that the Supreme Court abandoned the "reasonable probability" standard in favor of an approach that presumes disclosure requirements constitute an associational injury. 141 S. Ct. 2373, 2394 (2021) (Sotomayor, J., dissenting). Respectfully, nothing in the majority opinion or concurrences suggests the Supreme Court intended silently to abandon the long-standing "reasonable probability" standard for as applied challenges.

Indeed, the majority in *Bonta* concluded that the blanket demand for Schedule B forms by the California Attorney General was facially unconstitutional.[3] *Id.* at 2385. The *Bonta* Court therefore did not address the alternative as applied challenge. *See id*. Further, the majority in *Bonta* expressly noted that the petitioning charitable organizations had introduced evidence that they and their supporters had been subjected to "bomb threats, protests, stalking, and physical violence. *Id.* at 2388.[4]

Plaintiffs also suggest that a different standard should apply to their as applied challenge because their claims are based exclusively on the Arizona Constitution, which "provides broader protections for free speech than the First Amendment." *See Brush & Nib Studio, LC v. City of Phoenix,* 247 Ariz. 269, 281 ¶ 45 (2019) (Arizona's free speech clause "is a guarantee of the individual right to 'freely speak, write, and publish,' subject only to constraint for the abuse of that right."). Plaintiffs, however, do not address what "broader protections" the Arizona Constitution provides in the context of an as applied challenge to campaign finance disclosure requirements.

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[3] In *Bonta*, the Supreme Court found that "[t]he State's interest in amassing sensitive information for its own convenience is weak." 141 S. Ct. at 2389. Here, in contrast, the Court found that the disclosure of funding sources required under the Act serves important government interests. (Ruling at 8-9).

[4] *Ams. for Prosperity v. Grewal* does not support Plaintiffs' claim that a lower standard should apply to an as applied challenge given the country's current divisive political climate. 2019 WL 4855853, at *20 (D.N.J. 2019). In *Grewal*, the court granted plaintiff's motion for a preliminary injunction "based on AFP's facial challenge" to the statute at issue. *Id*. AFP also supported its argument with declarations from its officers "reporting a litany of threats ranging from personal death threats and actual physical attacks to cyberattacks and other internet based retaliation." *Id*. Here, Plaintiffs allege no death threats or actual physical or cyberattacks.

The only case cited analyzing such an as applied challenge under both the United States and Arizona Constitutions applied the *Buckley* and *Citizens United* "reasonable probability" standard. *See Comm. For Just. & Fairness,* 235 Ariz. at 356 ¶ 35 n.15 (applying "reasonable probability" test to an as applied challenge to election disclosure requirements under the Arizona and United States Constitutions because "plaintiffs had "provide[d] no argument that our analysis of the issues presented here under the Arizona Constitution should differ from that used by courts under the United States Constitution."). The Court will do the same in this matter.

III. DISCUSSION

The Court should dismiss the Amended Complaint only if "plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012). When addressing a motion to dismiss, "courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts*." Id.* at ¶ 9. "Mere conclusory statements are insufficient" to state a claim. *Id. "*[A] complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard." *Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 419, ¶ 7 (2008).

Ordinarily the Court may only consider the allegations in the complaint itself. The Court, however, can consider documents referenced in the Complaint and matters of public record that are central to the Complaint, without converting the motion into one for summary judgment. *Coleman*, 230 Ariz. at 356 ¶ 9 ("A complaint's exhibits, or public records regarding matters referenced in a complaint, are not 'outside the pleading,' and courts may consider such documents without converting a Rule 12(b)(6) motion into a summary judgment motion."); *Strategic Development and Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63 ¶ 10 (App. 2010).

Here, because the Amended Complaint incorporates declarations from the Plaintiffs, the Court will consider the four corners of the complaint separately from the declarations.

A. The Amended Complaint Fails to Allege a Reasonable Probability of Threats, Harassment and Reprisals.

The Center for Arizona Policy ("CAP") alleges that it has been subjected to "harassment and intimidation" because of its communications on matters of public policy. (Amended Complaint at ¶ 39). CAP claims that its donors, if disclosed, "may" experience similar

harassment and intimidation because of their donations to CAP. (*Id*.). CAP claims that the Act's disclosure requirement will cause it to lose much of its donor support. (*Id.* at ¶ 44).

The Arizona Free Enterprise Club ("AFEC") alleges its donors have expressed concern about having their donations and identities exposed. (*Id*. at ¶ 50). The AFEC claims that it has been subjected to "harassment and intimidation" because of its public positions on policy and issue advocacy. (*Id*. at ¶ 52). AFEC is concerned that its donors, if disclosed, will face similar treatment, and that several donors have expressed fear of "harassment or reprisal" if their identities become known. (*Id*.). The AFEC alleges that because it has opposed the Commission on certain ballot initiatives and has been adverse to the Commission in "extensive litigation," it is concerned that the Commission will "harass or retaliate" against it. (*Id*. at ¶ 53).

CAP and AFEC both claim that the Act will curtail donations. (*Id.* at ¶ 97(b)). Both assert that they have experienced "harassment and other harms because of their public communications" and that their donors will be exposed "to the same or worse harms, including physical harm, vandalism and property damage, harassment, obscenity, retaliation, false light, 'doxxing,' and other forms of social and economic harm." (*Id*. at ¶ 97(c)). They claim their donors will also be exposed to "retaliation and manipulation by government bodies and officials." (*Id*.).

In the Amended Complaint itself, CAP and AFEC allege no facts to support their allegations of harassment and intimidation. Although the AFEC alleged that it has been adverse with the Commission on policy and in litigation, the Amended Complaint is devoid of any facts suggesting a reasonable probability that the Commission or any other government or private entity will harass or retaliate against AFEC's donors if disclosed.

CAP's and AFEC's allegations in the Amended Complaint itself thus fail to state a claim for an as applied challenge. Their conclusory allegations, without any supporting facts, are insufficient to state a claim. *See Cullen*, 218 Ariz. at 419 ¶ 7.

The Doe Plaintiffs' claims are also deficient. Both Doe Plaintiffs claim they are concerned they will be subject to "harassment and retaliation" if their donations are disclosed, including the risk of "serious physical harm" and "economic, reputational, and other forms of harassment and retaliation." (*Id*. at ¶¶ 64, 70). The Doe Plaintiffs further claim that the Act will curtail their speech because they will no longer donate to organizations in amounts that would trigger disclosure of their identities. (*Id.* at ¶ 98(a)). They allege that disclosure of their identities will expose them to "known and recognized harms, including physical harm, vandalism and property damage, harassment, obscenity, retaliation, false light, 'doxxing,' and other forms of social and economic harm." (*Id.* at ¶ 98(b)).

Yet, the Doe Plaintiffs' allegations also are conclusory. They fail to state a claim because they have not alleged any facts demonstrating that they face a reasonable probability that disclosure of their donations will subject them to threats, harassment or reprisals.

The *Buckley* Court recognized that in making an as applied challenge, a Plaintiff is accorded "sufficient flexibility in the proof of injury to assure a fair consideration of their claim." 424 U.S. at 74. This "flexibility in the proof," however, does not relieve Plaintiffs of their obligation to plead facts supporting their claim. *See* Ariz. R. Civ. P. 8(a)(2).

B. Plaintiffs' Declarations Also Do Not Allege a Reasonable Probability of Threats, Harassment and Reprisals.

Each of the Plaintiffs submitted declarations in support of the Amended Complaint and the Motion for Preliminary Injunction. For the reasons discussed below, Plaintiffs' declarations also fail to allege sufficient facts to support their claims. For these reasons, the Court will grant the Motions to Dismiss and deny the Renewed Motion for Preliminary Injunction.

1. Center for Arizona Policy

Cathi Herrod submitted two declarations as the President of CAP. Since its formation in 1996, CAP has taken policy positions on a variety of controversial issues, including opposing the legalization of recreational marijuana, debating the marriage amendment, opposing the placement of ESAs[5] on the ballot, and weighing in on a possible abortion-related initiative in 2022. (Herrod Decl. 2 at ¶ 16).

Herrod states that she and CAP's staff have endured threats of physical harm (including some that resulted in local police and FBI involvement), protests outside CAP's office, and harassing and threatening emails. (Herrod Decl. 1 at ¶ 19). CAP and its staff have been called names in "extremely negative and repugnant ways" in emails and other communications. (*Id.* at ¶¶ 19-21). Examples of offensive emails and remarks include:

- "Sooner or later, you will die, and some of us pray it is sooner…."
- "Go f*** yourself and I hope you die of cancer. RIP b****"
- "I know that I, and many, many others, will do everything it takes to marginalize your vulgar and loathsome organization from affecting any more lives."
- "You are a cancer that will soon be sliced out of our nation's sick body. I will make it my personal mission to bury every single one of you.… The great people of this state will make sure that you burn so that we can rebuild this state from the ashes of all you

[5] "ESA" refers to the Empowerment Scholarship Account program.

dead white zombies. I'm sure going to have a lot of fun ripping you apart and burying your legacy of hate."

- "You both [referring to Herrod and former Senator Nancy Barto] deserved to be sued until you have to live like homeless twits in the AZ desert."
- "It would be great if you, Cathy and the other kooks in your crazy cult pack up and leave our state."
- "Get the f*** out of Arizona."
- "I love to watch people like you squirm."

(*Id.* at ¶ 20).

CAP staff has also been called various names, such as "ignorant fascist[s]," "race baiters" and "medieval throwback horrible anti-woman garbage." (*Id.* at ¶ 21). Herrod claims she has been personally disparaged as being "no better than the Taliban" and a "zealot tyrant," and has been criticized for pursuing only "half-measures" on abortion issues. (Herrod Decl. 2 at ¶ 19). CAP and its staff also have been criticized for "making money from hate and bigotry" and "turning us into a religious autocracy." (Herrod Decl. 1 at ¶ 21).

Such name calling, offensive comments and criticism are certainly rude. Many of the comments themselves, however, are protected speech. And twenty or so nasty comments in nearly thirty years of public advocacy does not demonstrate that CAP itself has been subjected to threats, harassment, and reprisals. CAP has not demonstrated that it has been subjected to the kind of pervasive harassment and intimidation seen *in Brown, Bates,* and *Patterson,* above.

Moreover, CAP has not asserted any facts suggesting that its donors will be subjected to similar name calling and nasty comments if their donations to CAP are disclosed. Indeed, CAP has not identified a single donor or supporter who has been subjected to harassment, reprisals, or threats of violence due to their association with CAP.

CAP board members are identified by name on its public website and in Corporation Commission filings. Aside from Herrod, there is no allegation that any CAP board member has been subjected to harassment or threats, even though their identity is publicly disclosed.[6]

[6] Herrod acknowledges that no CAP board member had told her that he/she was harassed or threatened because of the affiliation with CAP. (Def. Ex. 22, Herrod depo. Vol. 1 at 28:18-24, 29:8-23, 30:10-31:3). CAP also holds annual or semiannual family dinners, in-person events with 600 or so attendees. Out of all these dinners, Herrod could recall only two instances where protesters showed up. (Def. Ex. 23, Herrod depo. Vol. 2 at 68:21-69:10). She does not claim that the protestors at these events were harassing or threatening to CAP or the attendees.

CAP also established a political action committee ("PAC") in 2022. CAP's PAC publicly discloses its donors' names, addresses and occupations in reports filed with the Arizona Secretary of State.[7] CAP does not allege that any of these donors have been subjected to or are concerned about threats or reprisals because of disclosure of their donations to CAP's PAC.

Herrod states that CAP hired private security guards on two occasions. In 2014, CAP hired private security when there was a protest involving a religious freedom bill outside of CAP's office. (Herrod Decl. 2 at ¶ 19). There is no allegation that the protest was harassing or threatening.[8] Indeed, this protest suggests that other people simply were expressing their First Amendment right to disagree. *See ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 932 (E.D. Cal. 2010) ("Just as contributors to Proposition 8 are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.").

Herrod also hired private security when she testified before the Phoenix City Council on "the sexual-orientation-and-gender-identity" ordinance because the protesters supporting the ordinance were "intens[e] and vociferous[]." (Herrod Decl. 2 at ¶ 19). Herrod, however, does not claim that these protestors were threatening, harassing or violent in any way. *See ProtectMarriage.com*, 830 F. Supp. 2d at 934 ("[P]icketing, protesting, boycotting, distributing flyers, destroying yard signs, and voicing dissent do not necessarily rise to the level of 'harassment' or 'reprisals,'…. Moreover, a good portion of these actions are themselves forms of speech protected by the United States Constitution.").

Herrod recalled calling the police about a person saying vile things about her and CAP on Twitter. (Def. Ex. 23, Herrod depo. Vol. 2 at 90:14:91:3). The police and FBI were involved, and a security audit was conducted at her home. (*Id.*). Herrod makes no claim that CAP's donors, if disclosed, will be subjected to similar treatment on Twitter (now X). Moreover, the fact that law enforcement responded to this and other incidents reported by CAP undercuts its claim. *See ProtectMarriage.com*, 830 F. Supp. 2d at 933-34 (Plaintiffs were unsuccessful in making an as applied challenge where the "evidence indicate[d] law enforcement was not only responsive, but diligent in undertaking investigations into some of the more heinous acts alleged here.").

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[7] The Center For Arizona Policy Political Action Committee disclosures can be found on the Arizona Secretary of State's "Election Funds Portal." https://seethemoney.az.gov/Reporting/Explore#JurisdictionId=0|Page=11|startYear=2023|endYear=2025|IsLessActive=false|ShowOfficeHolder=false|View=Detail|Name=2~101275|entityId=101275|TablePage=1|TableLength=10 (last visited Jan. 30, 2024).

[8] Herrod testified that the protest lasted about 30 minutes to an hour. (Def. Ex. 23, Herrod depo. Vol. 2 at 88:7-17). The protestors did not harass or threaten any CAP staff. (*Id*. at 89:9-13).

The only specific incidence of attempted violence CAP cites involved a firebombing attempt at the office of an unrelated pro-life organization in Wisconsin. (Herrod Dec. 2 at ¶ 19). CAP, however, has not established any connection between the incident in Wisconsin and CAP. Herrod does not claim that CAP has in its 27 years of advocacy on controversial issues has ever experienced similar violence or threats of violence.[9] Nor can established organizations such as CAP cannot rely solely on evidence of reprisals and threats directed against an unrelated organization. The Supreme Court permits this approach only for "[n]ew [groups having] no history upon which to draw." *Buckley*, 424 U.S. at 74; *see also Citizens United*, 558 U.S. at 370 (rejecting evidence of "recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted" because Citizens United itself "offered no evidence that its members may face similar threats or reprisals").[10]

The Court assumes the truth of Herrod's declarations, as the rules require in this procedural context. Nonetheless, the Court finds CAP has failed to state a claim establishing an as applied challenge to the Act. CAP has not sufficiently alleged the type of pervasive, persistent, or government-sanctioned harassment of its members present in successful challenges. Nor does CAP fit the description of a minor or dissident party. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009) (Rejecting as applied claim, while noting "the 'minor party' requirement articulated in *Buckley* is very much relevant and intact. As applied challenges have been 'successfully raised only by minor parties, specifically those parties . . . having small constituencies and promoting historically unpopular and almost universally-rejected ideas.").

Like the unsuccessful challengers in *Citizens United*, it is speculative that CAP's members will face threats or reprisals. For these reasons, the Court will grant the Motions to Dismiss the Amended Complaint with respect to CAP and deny CAP's request for a preliminary injunction.

2. Arizona Free Enterprise Club

Scot Mussi, the President and Executive Director of AFEC, provided two declarations. AFEC is engaged in a variety of public policy issues, including tax policy, elections, "green new deal," regulatory reform, education reform, initiative reform, the "culture wars," motion picture tax credits and transportation tax policy.

[9] Herrod testified that she could not recall any instance of actual physical violence directed at her or CAP's staff. (Def. Ex. 23, Herrod Dep. Vol. II at 91:19-92:3).

[10] Similarly, the alleged harassment in 2006 and 2008 involving the marriage amendment campaigns occurred "in other states," not Arizona. (Herrod Dec. 2 at ¶¶ 16, 19).

Mussi states that he and other AFEC staff members have been subjected to "numerous phone calls and voicemails from individuals threatening violence or harassing or trying to intimidate" AFEC. (Mussi Decl. 1 at ¶ 16). He further states that one staff member had her car vandalized at the legislature, he believes in retaliation for her public comments on AFEC's behalf. (Mussi Decl. 2 at ¶ 16).[11] Another staff member allegedly received threatening and obscene telephone calls and messages directed toward her and her family, which she reported to the police. (*Id*.). Mussi acknowledged that no "menacing conduct" has been directed at any of its donors. (*Id.* at ¶ 17).

AFEC's claim that its donors will face harassment and reprisals is highly speculative. These few isolated incidents are insufficient to show that AFEC's donors face a reasonable probability of threats and harassment if their donations are disclosed.

Even if these incidents were connected to AFEC's positions, the supporting facts are insufficient to justify extrapolating to AFEC's donors. AFEC's website posts photos of staff and gives identifying information, including the cities in which they live and their spouse's first name.

Since 2006, AFEC's affiliated PAC also has filed regular reports disclosing information about its individual donors with the Arizona Secretary of State.[12] The reports disclose the names, address and occupation of individuals contributing $100 or more. AFEC has not identified an instance of harassment or retaliation against a PAC donor.[13] *See Citizens United*, 558 U.S. at 370 (rejecting an as applied challenge where the organization had "been disclosing its donors for years and had identified no instance of harassment or retaliation").

Mussi's fears that Commission will retaliate against AFEC given the adversarial relationship between AFEC and the Commission is also unsupported by any factual allegations.

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[11] Mussi admitted that because there were no eyewitnesses, meaning he has only a speculative basis for connecting the "keying" of the staff member's car in the parking lot near the state Capitol with her work on behalf of AFEC at the legislature. (Def. Ex. 21, Mussi Depo. at 116:8-117:3).

[12] The Freedom Club PAC's disclosures can be found on the Arizona Secretary of State's "Election Funds Portal." https://seethemoney.az.gov/Reporting/Explore#JurisdictionId=0|Page=11|startYear=2023|endYear=2025|IsLessActive=false|ShowOfficeHolder=false|View=Detail|Name=2~200602784|TablePage=1|TableLength=50 (last visited Jan. 30, 2024).

[13] Mussi stated that he did not think that any contributors to the Freedom Club PAC had been threatened or harassed because information about their donations had been disclosed to the public. (Def. Ex. 21, Mussi Depo. at 104:7-105:11).

(*See* Mussi Decl. 2 at ¶ 20). There is no evidence the Commission has harassed or retaliated against AFEC or will harass and retaliate against AFEC's donors because of disagreements on policy or litigation disputes.[14]

Mussi's allegations, assumed to be true, fail to allege that AFEC's donors, if disclosed, face a reasonable probability of being subjected to threats, retaliation, or harassment. As such, AFEC has failed to state a claim for an as applied challenge to the Act.

For these reasons, the Court will grant the Motions to Dismiss the Amended Complaint with respect to AFEC and deny AFEC's request for a preliminary injunction.

3. Doe I

Doe I is a public figure in Arizona. (Doe I Decl. 1 at ¶ 4). He makes donations to charitable organizations that are reportable under the Act.[15] (*Id*. at ¶ 8). Doe I is concerned that public disclosure of his donations will "lead to harassment, retaliation, and other harms to [him] and possibly [his] employer." (*Id.* at ¶ 13). Because of these concerns, he plans to limit his giving to nonprofit organizations that engage in campaign media spending. (*Id*. at ¶ 14). He states that he is generally concerned about physical harm, harassment, and retaliation. (*Id*. at ¶ 15).

Doe I states that he is aware of retaliatory tactics to which groups and individuals involved in controversial issues such as abortion, transgenderism, same-sex marriage, expanded school choice and other "hot-button" social issues have been subjected. (Doe I, Dec. 2 at ¶ 6). These tactics include "harassment, vandalism, retaliation, obscenities, [] violence" and exposing the identities of confidential donors for the purpose of intimidation of the donor and the donors' employer. (*Id*.). He is also aware of alleged harassment of employees of Arizona charitable organizations to which he has donated. (*Id* at ¶ 7). Other than the unrelated attempted firebombing in Wisconsin, however, Doe I does not cite any specific instance of harassment, retaliation, or violence. He does not cite any instance of harassment or threats connected to any organization to which he donates. (*See Id*. at ¶ 6).

Doe I, who supports school choice, states that he has seen "firsthand the tactics [the] opposition groups have used against the supporters of school choice." (*Id*. at ¶ 9). The tactics include "voicing political opposition or (sic) to numerous bills they have had introduced at the legislature seeking to harm and undermine school choice" and organizations that promote school

[14] Mussi admitted that the Commission has never sued or taken any enforcement action against AFEC. (Def. Ex. 21, Mussi Depo. at 48:12-49:11).

[15] The Court uses masculine pronouns to refer to the Doe Plaintiffs for ease of reference, not to suggest the gender of the Doe Plaintiffs.

choice. (*Id*.). According to Doe I, school choice opponents seek to expose donors, particularly large corporate donors, "to pillory and intimidate them publicly, or to leave them exposed for 'punishment' or manipulation by government officials sympathetic to their anti-school choice message." (*Id.*). Doe I is concerned that the "retaliatory tactics" of school choice opponents will cause donors to stop giving to various nonparty school choice organizations. (*Id.* at ¶ 10).

Doe I acknowledges that he has not personally experienced any harassment or retaliation for supporting positions taking by the charitable organizations to which he donates. (Def. Ex. 24, Doe I depo. at 32:6-20). He states that he received a death threat over eight years ago while working as a public figure. (*Id*. at 14:12-16:11). He did not identify any other instance of harassment or threats in his many years as a public figure working on public policy issues. Doe I conceded that his concerns about harassment or retaliation were not about harm to himself, but to the "nonparty organizations" with which he works. (*Id.* at 56:17-25, 59:1-11, 62:6-63:4).

In short, Doe I has failed to allege sufficient facts to support his as applied claim. For all these reasons, the Court will grant the Motions to Dismiss the Amended Complaint with respect to Doe I and deny Doe I's request for a preliminary injunction.

4. Doe II

Doe II submitted a single declaration. Doe II is concerned that public disclosure of his identity and donations will "lead to harassment, retaliation, and other harms to [him] and possibly [his] employer because of [his] contributions." (Doe II Decl. at ¶ 12).

Doe II does not provide sufficient factual allegations to supporting his claim. For this reason, Doe II has also failed to state a claim for an as applied exception.[16]

[16] Defendants argue that Plaintiffs cannot assert an as applied challenge because CAP and AFEC are not minor or disfavored parties. *See Buckley*, 424 U.S. at 71 ("[t]hese movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions."). According to Defendants, as applied challenges have only been successfully made by "weak, unpopular, and disadvantaged groups." *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009) ("[T]he 'minor party' requirement articulated in *Buckley* is very much relevant and intact. As applied challenges have been 'successfully raised only by minor parties, specifically those parties . . . having small constituencies and promoting historically unpopular and almost universally-rejected ideas."). Defendants argue that CAP and AFEC are too influential and established to be considered "minor" parties. Because Plaintiffs have failed to allege sufficient facts that their donors will be subjected to threats and harassment, the Court need not decide whether CAP and AFEC are minor parties or if they could otherwise assert an as applied challenge.

For these reasons, the Court will grant the Motions to Dismiss the Amended Complaint with respect to Doe II and deny Doe II's request for a preliminary injunction.

VII. Disposition

For all these reasons, the Court finds that Plaintiffs' as applied challenge to the Act fails. Accordingly,

IT IS ORDERED granting the Motions to Dismiss the Amended Complaint.

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Preliminary Injunction.

IT IS FURTHER ORDERED directing Defendants to submit a proposed form of judgment on or before March 12, 2024.