

No. 09-559

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In the  
**Supreme Court of the United States**

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JOHN DOE #1, JOHN DOE #2, and PROTECT  
MARRIAGE WASHINGTON,  
*Petitioners,*

v.

SAM REED, WASHINGTON SECRETARY  
OF STATE, 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 FOR RESPONDENT  
WASHINGTON FAMILIES STANDING TOGETHER

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### **QUESTION PRESENTED**

Whether Washington's Public Records Act violates the First Amendment by requiring public disclosure of referendum and initiative petition sheets signed and collected in public and then voluntarily submitted to state government officials for the purpose of (a) temporarily suspending state law and (b) requiring the inclusion of the issue on a general election ballot.

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## **BRIEF FOR RESPONDENT WASHINGTON FAMILIES STANDING TOGETHER**

### **PERTINENT STATUTES AND RULES**

The appendix to Respondent Washington Families Standing Together's Brief in Opposition to Petition for Writ of Certiorari (WAFST App.) contains the full text of article II, Section 1, of the Washington Constitution and certain pertinent statutory provisions. The other pertinent statutes and rules are set forth in the appendix to the Petition (Pet. App.).

### **STATEMENT OF THE CASE**

This case arises from the application of Washington's Public Records Act to petitions submitted to the State by sponsors of a referendum that sought to suspend and ultimately repeal a domestic partnership statute enacted by the Washington Legislature ("Referendum 71").

The sponsors of Washington's Referendum 71 collected signatures in public locations around the State. Under Washington law, only the signatures of lawfully registered voters are eligible to be counted, and protecting the process from fraud and irregularity is an increasingly difficult challenge. Washington law reasonably regulates the referendum process and requires careful scrutiny and canvassing of the referendum petitions to ensure that only eligible signatures are counted toward the qualification threshold.

Washington Families Standing Together ("WAFST") is a coalition of individuals, advocacy and religious groups, businesses, and non-profit entities that support the domestic partnership legislation. WAFST opposed the effort to place the referendum on the ballot and, once Referendum 71 was certified, WAFST advocated for voter approval of the original legislation.

During the canvass of the Referendum 71 petitions, WAFST sought access to the petitions to ensure that a sufficient number of lawful voters had signed the petitions, a step that is not only routine under Washington law, but consistent with the law of virtually every other state with a referendum or initiative process. Before the Referendum 71 petitions could be released to WAFST, however, petitioners filed this lawsuit and obtained a federal court injunction barring the State from disclosing the petitions. WAFST promptly intervened to protect the interest that both it and the public have in the integrity of the initiative and referendum process.

**A. Petitioners Chose to Avail Themselves of Washington State's Referendum Process**

**1. Washington Provides for a Closely Regulated Initiative and Referendum Process**

In 1912, Washington amended its constitution to include the right of the people to legislate directly by initiatives or referenda. Wash. Const.

art. II, § 1 (amended by 1911 H.R. No. 153 (approved Nov. 1912)). The constitution now reads:

The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

Wash. Const. amend. 7 (WAFST App. 1a). The referendum process serves as a limited check on Washington's representative form of government, reserving to the majority of voters the power to overturn legislation. *See, e.g., 1000 Friends of Wash. v. McFarland*, 149 P.3d 616, 618 (Wash. 2006) ("The electorate also plays a vital role in checking the exercise of power by elected officials through the initiative and referendum process.") (citation omitted). Of course, nothing in the federal constitution *requires* a state to provide such a referendum and initiative process, and a state retains the power to reasonably regulate the conduct of the time, place, and manner of not only

its general elections but the initiative and referendum process as well. U.S. Const. art. I, § 4.

Thus, the right to legislate through initiative and referendum is neither constitutionally required nor unlimited. It is subject to specific procedural limitations in Washington's constitution and through state statutes designed to protect the integrity of the referendum, initiative and larger electoral process. Petitioners do not challenge these limitations or procedures, save for Washington's requirement that referendum and initiative petitions, once submitted, are government records subject to public disclosure, allowing interested individuals to ensure the integrity of the process. *See* Petitioners' Brief at 12.

For example, while Washington does not require anything close to a majority of voters to support placing a proposition on the ballot, it does closely regulate the initiative and referendum process to assure a real and meaningful level of support. Petitions must be printed in a certain format. Each petition sheet is to have "lines for not more than twenty signatures," WASH. REV. CODE § 29A.72.100 (WAFST App. 6a), and the petition for Referendum 71 had exactly twenty, Pet. App. 29a-30a. Voters must print and sign their names and state their addresses, including the city and the county in which they are registered to vote. WASH. REV. CODE § 29A.72.130 (WAFST App. 6a-8a). Absence of a signature, a printed name, or an

address renders an individual's signature invalid. *See* WASH. REV. CODE § 29A.72.230 (authorizing the Secretary of State to accept signatures only from legal voters) (Pet. App. 49a).

A measure to approve or disapprove an act of the legislature will not be put to a vote of the people until a "petition *signed* by the required percentage of the *legal voters*" is submitted to the Secretary of State. Wash. Const. art. II, § 1(b) (emphases added) (WAFST App. 3a). A petition seeking to place a referendum on the ballot must have "valid signatures of registered voters" that "equal . . . or exceed[ ] four percent of the votes cast for the office of governor at the last gubernatorial election." *Id.* State workers compare signatures on the petition sheets to voter registration card signatures to confirm that the signatures are genuine, *see* Wash. Admin. Code § 434-379-020, a process that is imperfect at best.

Typically, petition circulators gather signatures in public places where they will find large numbers of citizens, such as community events, county fairs, churches, in front of stores, or shopping malls. *See, e.g.,* John Doe Decl. #4 in Support of Motion for Preliminary Injunction ¶ 8 (Dkt. #53 at 2) (discussing collection of signatures in front of Wal-Mart, Target, and Fred Meyer); John Doe Decl. #5 in Support of Motion for Preliminary Injunction ¶ 5 (Dkt. #54 at 2) (same). All signatures, names, and addresses on the petition sheet are easily viewable not just by the petition circulator or organizer, but

by any other signer or possible signer who stops to review the petition.

Indeed, many more than the other people—up to nineteen—who sign the same sheet may review each signature on a petition. A circulator may show a petition sheet to dozens of individuals before it is full. Petition sheets are sometimes posted or left on a table. Circulators typically clip completed petition sheets behind other blank petition sheets, and thus a potential signer (or someone having no intention of signing or who has already signed the petition) may freely review and record the names on the other sheets.

Petitions voluntarily submitted with a facially sufficient number of signatures are subject to further disclosure as part of the verification process by State officials. WASH. REV. CODE § 29A.72.230 (Pet. App. 49a). State workers canvass the petitions, checking for duplicate signatures, signatures by individuals not registered to vote, or signatures and other required information that do not match voter registration records. For Referendum 71, the Secretary of State rejected more than 10 percent of the more than 137,000 signatures submitted—determining that the measure had just 1,200 more than the minimum threshold. See *Certification of Referendum 71* (Sept. 2, 2009), <http://tinyurl.com/yf9xhej> (last visited Mar. 23, 2010); Second Hamlin Decl. ¶ 2, Ex. 2, filed in *Washington Families Standing Together v. Reed*, No. 09-2-02145-4 (Dkt. #24).

By statute, proponents and opponents of the referendum petition may observe the verification process, including the review of names, signatures, and addresses against the voter registration database. WASH. REV. CODE § 29A.72.230 (Pet. App. 49A). Anyone not satisfied with the end result has the right to appeal the Secretary of State's ultimate determination as to the sufficiency of the number of valid signatures. *Id.* § 29A.72.240 (Pet. App. 50a); see also *Filing Initiatives and Referenda in Washington State, 2009 through 2012*, <http://tinyurl.com/ykrkze7> (last visited Mar. 23, 2010).

The submission of a referendum petition with a sufficient number of lawful signatures has immediate legal effect: it delays implementation of the legislation at issue until after the next general election. See Wash. Const. art. II, §§ 1(b), (d) (WAFST App. 3a, 4a). As a result, the petition does not merely serve as a legal command to State officials to place the measure on the ballot; it *also* suspends the operation of the new law for several months until after the next general election.

## **2. Signature-Gathering Fraud Exists in Washington and Elsewhere**

Initiative and referendum activity in recent years has been marred by incidents of signature-gathering fraud and misconduct—a growing and significant threat to the fair administration of the electoral process.

In Washington, hundreds of forged signatures were discovered on petitions submitted shortly after the State first allowed the use of paid signature-gatherers. See *Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1136 (9th Cir. 2000); see also *Property-Rights Initiative Passes Legal Muster*, Seattle Times, Feb. 13, 1995, available at <http://tinurl.com/ydkr2m6> (discussing discovery of hundreds of forged signatures on an initiative) (last visited Mar. 23, 2010). In October 2002, a single paid signature-gatherer apparently signed multiple signatures on a Washington initiative. See *Fraud Case Turned Over to Prosecutor's Office*, <http://tinyurl.com/ykznych>, Oct. 7, 2002 (last visited Mar. 23, 2010). Most recently, the media reported that a deceased paid signature-gatherer in Washington left behind evidence suggesting forgery of initiative signatures. *Petition Forgeries Spark Legislative Debate*, The Spokesman-Review, Feb. 27, 2010, available at <http://tinyurl.com/yljagbt> (last visited Mar. 23, 2010).

Other areas of the country have experienced similar problems. In 2004, for example, a campaign to legalize slot machines in the District of Columbia halted when the D.C. Board of Elections and Ethics threw out thousands of fraudulent signatures gathered during the petition drive, finding that the petitions contained "a pervasive pattern of fraud, forgeries and other improprieties." Lori Montgomery, *Campaign for Slots in D.C. Crumbles*, Wash. Post, Sept. 29, 2004, at B1.

In Massachusetts, in 2006, after hearing of concerns of potential fraud, opponents of a measure publicly posted online information from signed petitions so that any voter could see whether his or her signature was listed. This generated numerous complaints to the Massachusetts Secretary of State from voters who determined that they were listed as having signed when they had not. In fact, so many voters complained that the Massachusetts Secretary of State referred the matter to state prosecutors for investigation. Steve LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Boston Globe, Feb. 28, 2006, available at <http://tinyurl.com/yj8m3nv> (last visited Mar. 23, 2010); Rebecca Fater, *Trickery is Alleged in Gay Marriage Drive*, The Berkshire Eagle, Jan. 27, 2006, available at <http://tinyurl.com/yzrftthx> (last visited Mar. 21, 2010) ("Next thing I know, someone is telling me I'm on the Internet as having signed a petition against gay marriage."). The authorities were made aware of the irregularities only as a result of the public being able to review petition signatures.

In 2006, the Montana Supreme Court invalidated thousands of signatures, finding that non-resident signature-gatherers had forged false addresses and used deceptive "bait and switch" tactics to collect signatures. See *Montanans for Justice v. Montana*, 146 P.3d 759, 776 (Mont. 2006).

In 2008, the Oregon Supreme Court affirmed the racketeering conviction of a political action

committee for forging signatures to qualify two ballot measures and filing false statements concerning expenditures and contributions with the intent to force the plaintiffs to expend money to defeat the measures. *Am. Fed'n. of Teachers-Or. v. Or. Taxpayers United PAC*, 189 P.3d 9, 24 (Or. 2008).

Even more recently, a Maryland casino developer filed suit against the Anne Arundel County Board of Supervisors of Elections, alleging that board officials had not investigated suspicious practices in the petition-gathering process and the existence of a large number of fraudulent signatures among those collected. Nicole Fuller, *Cordish Attacks Anti-Slots Petitions; Elections Board Failed to Check for Fraud, Other Irregularities, Lawsuit Says*, Balt. Sun, Feb. 4, 2010, at 2A, available at 2010 WLNR 3890107. The allegations were based in part on the opinion of a forensic document analyst, hired to examine the petition signatures, who found "a pattern of insertions, alterations, entries and signatures not signed by the person it purports to be." *Id.* It was the public availability of the petition signatures that allowed the plaintiff to conduct his own investigation when he perceived that the board of supervisors had insufficient safeguards in place.

These examples are not isolated. Signature-gathering fraud is occurring with distressing frequency across the nation. Courts have identified fraudulent signature-gathering activity in

Oklahoma, *In re Initiative Petition No. 379*, 155 P.3d 32, 34 (Okla. 2006); Michigan, *Operation King's Dream v. Connerly*, No. 06-12773, 2006 U.S. Dist. LEXIS 61323, at \*33 (E.D. Mich. Aug. 29, 2006); Ohio, *Nader v. Blackwell*, 545 F.3d 459, 462 (6th Cir. 2008); and Arizona, *Nader v. Brewer*, 531 F.3d 1028, 1032 (9th Cir. 2008); *see also Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So. 2d 553, 561 (Fla. Dist. Ct. App. 2006) (discussing that appellants asserted "substantial fraud occurred in the petition-gathering process" and certifying issues to the Florida Supreme Court), *review granted by* 952 So. 2d 1189 (Fla. 2007).<sup>1</sup> Signature-gathering fraud, in

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<sup>1</sup> *See also* Rebekah Metzler, *Lawmakers weigh fraud, free speech in petition process*, Sun J. (Lewiston, Me.), Feb. 23, 2010, *available at* 2010 WLNR 3782702 (describing a push by Maine lawmakers to further regulate the ballot initiative signature-gathering process to curb fraudulent practices); *Initiative Petitioner Prosecuted for Signature Fraud*, U.S. Fed. News, Mar. 13, 2009, *available at* 2009 WLNR 4814555 (describing the successful prosecution of an Oregon petition-gatherer who submitted three pages of fraudulent signatures for a state referendum campaign); Melissa Lee, *Cries of Fraud Aimed at Initiative; Affirmative Action Opponents Accused of Illegal Activity in Collecting Signatures*, Lincoln J. Star (Neb.), June 26, 2008, *available at* 2008 WLNR 12263142 (describing allegations of fraud in Nebraska ballot initiative signature-gathering process, including petitioners filling out information for signers and the use of false names on signature sheets); Andy Vuong, *Labor Alleges Petition Fraud Right-to-Work Initiative Foes Will Contest Signatures*, Denver Post, May 23, 2008, *available at* 2008 WLNR 9802563 (describing impending Colorado lawsuit arising from alleged

short, is a significant threat to the fair administration of those elements of the electoral system where such petitions are utilized, such as efforts to qualify a candidate for the ballot, recall an elected official, propose legislation be added to a warrant for a town meeting, or implement or repeal legislation at the municipal, county, or state level.

### **3. The Public Has the Right to Access the Signed Petitions for an Initiative or Referendum**

In 1972, Washington voters, by initiative, enacted the Public Records Act, broadly requiring the public disclosure of government records with limited exceptions. The Public Records Act was designed to facilitate the people's insistence "on remaining informed so that they may maintain control over the instruments that they have created." WASH. REV. CODE § 42.56.030 (WAFST App. 9a). The Act declares in its statement of purpose that "[t]he people . . . do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." *Id.* The Washington Public Records Act is a "strongly-worded mandate for open government,

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fraudulent signature-gathering practices for a ballot measure campaign); Alan Johnson, et al., *Strip-club law might miss ballot: Most petition signatures invalid; some fraudulent*, Columbus Dispatch (Ohio), Sept. 21, 2007, available at 2007 WLNR 18554820 (describing attempts of an Ohio ballot initiative campaign to find new petition signers after nearly two-thirds of their signatures were invalidated as either errors or fraud).

requiring broad disclosure." *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 199 P.3d 393, 394 (Wash. 2009).

Although there are some exceptions to the strong and general mandate for public disclosure, the public did not except initiative and referendum petitions. The Public Records Act, however, does provide a mechanism for instances in which public disclosure of a government record is proven to threaten an individual's right to privacy. WASH. REV. CODE § 42.56.050 (exempting documents from disclosure to protect a person's right to privacy); *id.* § 42.56.540 (allowing court to bar public access to any public record where "such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions").

The Secretary of State determined, as he had for prior initiatives and referenda, that Referendum 71 petitions filed with his office were government records covered by the Public Records Act, and that no statutory exemptions to the Act applied.<sup>2</sup>

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<sup>2</sup> See generally Posting of Brian Zylstra to From Our Corner, (Sept. 17, 2009), <http://tinyurl.com/ycb2e2y> (last visited Mar. 23, 2010). In what appears to be an effort to challenge the Secretary of State's judgment, petitioners now assert that the Public Records Act does not require the disclosure of the petitions. See, e.g., Petitioners' Brief at 9 n.18 & at 51 (citing 1938 & 1956 Washington Attorney General Opinions issued prior to adoption of Public Records Act). These are matters of

## **B. Petitioner Protect Marriage Washington Sponsors Referendum 71**

Petitioner Protect Marriage Washington ("PMW") is the sponsor of Referendum 71, which sought to repeal Washington's newly enacted domestic partnership law. Most elements of the legislation were scheduled to become effective July 26, 2009. E.2.S.S.B. 5688, 2009 Wash. Sess. Laws ch. 521. Opponents of the law, however, could delay its effective date by filing a petition for a referendum within 90 days of the end of the legislative session. Wash. Const. art. II, § 1(b), (d) (WAFST App. 3a, 4a). To delay the legislation until after the November 2009 general election, and to put the measure before the voters, PMW needed to submit petitions signed by at least 120,577 legally registered voters by July 26, 2009. *See id.* § 1(b) (App. 3a).

On May 4, 2009, PMW filed its proposed referendum. *See History of Referendum Measures Through 2009, available at <http://tinyurl.com/ya3ae7u>* (last visited Mar. 23, 2010). PMW prepared individual petition sheets with twenty signature lines, the maximum number allowed by statute. *See* WASH. REV. CODE § 29A.72.100 (WAFST App. 6a). It did not seek an advance ruling from the

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state law and therefore not appropriate for resolution by the Court. Moreover, the parties, the district court, *and* the court of appeals all proceeded throughout the course of the litigation from the conclusion that Washington law required the disclosure of these records.

Secretary of State or the state courts that potential harm to signers required that these petitions be exempted from the Public Records Act.

PMW then gathered signatures for the Referendum 71 petitions in public locations across the State of Washington, including churches and outside of major retail stores. *See, e.g.*, John Doe Declarations (Dkt. ## 53 at 2, 54 at 2). Petitioners have offered no evidence that any individuals refused to sign the petitions out of concern that their identities would become known. Indeed, given the preliminary injunction procedural posture of this case, the parties have not yet engaged in any discovery into the circumstances surrounding the John Doe petitioners' signing of the petitions, let alone any other signers. The record, accordingly, does not indicate where petitioners signed or whether they publicly disclosed the fact that they signed.

After PMW submitted petition sheets with approximately 138,000 signatures, the Secretary of State concluded that he needed to conduct a full review of all the signatures because so few signatures above the minimum had been submitted. *See Certification of Referendum 71* (Sept. 2, 2009), *available at* <http://tinyurl.com/yf9g4o6> (last visited Mar. 23, 2010). The Secretary of State therefore canvassed the petitions, checking the names and signatures on the petitions to ensure that PMW had submitted the required number of valid signatures of legally

registered voters. See WASH. REV. CODE § 29A.72.230 (Pet. App. 49a).

Pursuant to statute, both proponents and opponents of the referendum petition, as well as members of the media, were able to observe the verification process. These observers had ready access to individual names, signatures, *and* addresses as they monitored the canvass and sought to assure that the process was fair.

Indeed, an excellent example of the importance of such access can be identified in petitioners' own behavior during the canvass. Proponents of Referendum 71 used information from this process to intervene and correct the Secretary of State's canvassing efforts. The proponent's observers noted the name of an individual who had signed the petition but whose signature had been rejected. Recognizing the name as the daughter of their campaign manager, the observers contacted the campaign manager in order to have the daughter's (initially rejected) signature counted. Beane Decl. in Support of Plaintiff's Motion for Injunctive Relief, Ex. B at ¶ 8, filed in *WAFST v. Reed*, No. 09-2-02145-4 (Wash. Super. Ct. Thurston County Sept. 3, 2009) (Dkt. #7). The Secretary of State considered the additional information, reversed the initial decision, and accepted the signature. *Id.* But for public oversight and access to the signatures and names, that error would have gone uncorrected. That said, it was coincidence that one of the observers happened to recognize a particular

name during the canvassing process. Had a complete set of petitions been released, as they routinely are in Washington and elsewhere, it is likely that a far greater number of such errors would have been identified and corrected.

Early in the signature-gathering process, because of reports about Referendum 71 signature-gatherer tactics (and with knowledge of the history of fraud in other petition drives), WAFST became concerned that potentially fraudulent tactics might affect whether Referendum 71 qualified for the ballot.<sup>3</sup> WAFST's concerns grew when it learned of PMW's widespread failure to have each signature-gatherer sign a declaration on the back of each petition attesting that every signer signed the petition "knowingly and without any compensation or promise of compensation" and "willingly signed his or her true name and that the information provided therewith is true and correct." *See* WASH. REV. CODE § 29A.72.130 (Pet. App. 6a); Handy Decl. ¶ 19, filed in *WAFST v. Reed*, No. 09-2-02145-4 (Wash. Super. Ct. Thurston County Sept. 4, 2009) (Dkt. # 9).

Moreover, during the review process, WAFST observers identified numerous instances where it appeared that State workers accepted signatures

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<sup>3</sup> The Secretary of State initially determined that there were 122,007 valid signatures on PMW's petitions; only 1,430 signatures more than the 120,577 needed to qualify the measure for the ballot. He later revised that number downward to 1,200. *See supra* p. 6.

that did not match registered voters or had other irregularities. Smith Decl. ¶ 7 (Dkt. #44). Ultimately, concerned that the process was tainted despite the Secretary of State's best efforts to oversee and regulate the canvassing, WAFST sought copies of the petitions in order to check for fraud in the signature-gathering process.<sup>4</sup>

### **C. Petitioners Begin Litigation**

Petitioners commenced this action on July 28, 2009, after the deadline for gathering signatures for Referendum 71 had passed and the sponsors had submitted sufficient signatures to commence the signature verification process. The district court granted WAFST's motion to intervene based on WAFST's request for copies of the petitions and related information under the Public Records Act. WAFST had made the request for the records to prepare for a potential legal challenge, pursuant to

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<sup>4</sup> On August 12, 2009, WAFST submitted its first Public Records Act request seeking copies of the petitions. See Defendants' Reply in Support of Motion to Join Additional Parties, Ex. B (Dkt. #30). By then, however, the district court had entered its temporary restraining order ("TRO") in this action barring the Secretary of State from complying with the Public Records Act by releasing the signed petitions. In light of the TRO, the Secretary of State refused to provide *any* of the requested information. (Dkt. # 43 at 1-2). On August 27, 2009, WAFST submitted another request under the Public Records Act, this time seeking additional public records relating to the process for canvassing the signatures on the Referendum 71 petitions, including the signed petition sheets. (Dkt. # 45 at Ex. B).

WASH. REV. CODE § 29A.72.240 (Pet. App. 50a), to certification of the referendum. Dkt. ## 43, 62.

Petitioners' complaint objected to the public disclosure of petitions on two grounds. First, petitioners asserted that it was unconstitutional under the First Amendment for the State to disclose *any* referendum or initiative petitions under any circumstances. Compl., Count II (Dkt. #2); *see also* Pet. App. 24a. Second, petitioners asserted that the disclosure of Referendum 71 petitions was unconstitutional "because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." Compl., Count II (Dkt. #2); *see also* Pet. App. 24a. The complaint was based entirely on federal law. Petitioners did not at any time seek to narrow public disclosure pursuant to the Public Record Act's own protective provisions. Instead, petitioners rushed to federal court to challenge the statute on federal constitutional grounds both facially (Count I) and as it applied to Referendum 71 (Count II). With virtually no notice, and without opposition from the State, petitioners sought and obtained a TRO barring disclosure. Notwithstanding Federal Rule of Civil Procedure 65(b)(2), the district court's order purported to bind the State from July 28 through the date of the preliminary injunction hearing, September 3, 2009, thereby foreclosing WAFST's ability to effectively challenge the Secretary of State's certification of Referendum 71 for the ballot under WASH. REV. CODE § 29A.72.240. (Dkt. #9).

On September 3, 2009, the district court entertained argument on petitioners' motion for preliminary injunction. The district court did not take testimony, and the only factual record before the court was three declarations submitted by John Does, documents attached to the Complaint, and several attorney declarations attaching news reports. There had been no opportunity for discovery, and not a single witness appeared at the hearing.

On this limited record, the district court concluded that petitioners were entitled to relief under Count I of the Complaint and explicitly declined to reach the question—presented only by Count II—whether the alleged threats of harassment justified exempting the petitions from disclosure under the "reasonable probability" of harm standard from *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*Buckley I*); and *NAACP v. State of Alabama*, 357 U.S. 449 (1958). Pet. App. 43a.

The court of appeals reversed, holding that the act of signing a petition was not anonymous and was a mixture of speech and conduct, such that intermediate scrutiny applied. Pet. App. 3a. The court of appeals held that the Public Records Act as applied to the petition sheets served important interests of open government, public disclosure, and protecting against fraud. Pet. App. 19a.

The court of appeals did *not* consider Petitioners' as-applied challenge to the disclosure of the Referendum 71 petitions, because the trial court did not address that second claim. Pet. App. 10a n.6. Nevertheless, petitioners devote the majority of their merits brief to matters relevant only to an as-applied challenge. Rather than focus on the facial challenge that is before the Court, petitioners discuss the "harm" and "intimidation" that allegedly arose during the Referendum 71 campaign and, even more remotely, California's Proposition 8, which was an initiative dealing with marriage rights for same-sex couples. To the extent that such a discussion is material, its relevance is limited to Count II, which petitioners concede is not before the Court. *See* Reply to Opposition to Petition for Writ of Certiorari 8 n.2.

### **SUMMARY OF ARGUMENT**

The Court should reject petitioners' constitutional challenge—an attack on a common, reasonable, and content-neutral public disclosure requirement. States are under no obligation to provide an initiative or referendum process in the first instance and must be free to define that process as a public one and to apply reasonable time, place, and manner regulation to ensure its fair administration. With telling and nearly complete unanimity, states treat referendum and initiative petitions as public records.

Petitioners contend that public disclosure of these government records threatens "harassment"

of those who have signed the petitions, but the record before the Court fails to justify an absolute constitutional rule barring disclosure of petitions on any subject under any circumstances. Citizens of Washington and other states have considered initiative and referenda on a wide variety of issues, including some of the most controversial of our time. Yet petitioners have marshaled but one initiative and one referendum, both on a single subject matter, in which some alleged "harassment" occurred, hardly a widespread historical pattern sufficient to support their request for sweeping intervention by this Court into state governance.

The threat to an initiative or referendum process lies elsewhere, and petitioners would only make it worse. With disturbing frequency, the initiative and referendum process has been plagued with signature gathering fraud, illegal activity that threatens the fair administration of the process and one which the states have struggled to control. In numerous instances only *public disclosure* of the petition signatures revealed the fraud, allowing corrective action and, in some instances, criminal prosecution.

In weighing petitioners' constitutional challenge to Washington's public disclosure statute, the Court at most should apply intermediate scrutiny. The voluntary act of taking advantage of the state-created process for signing and submitting a referendum or initiative petition to the state is an act with significant legal effect

wholly separate from any incidental speech component. Washington's Public Records Act easily passes constitutional muster under this (or any other) standard. The statute is a content-neutral, narrowly tailored, and entirely reasonable commitment to open government and to the regulation of the time, place and manner of the initiative and referendum process.

Washington, like the other states with similar requirements, has a strong and compelling interest in not just open government but detecting and deterring fraud in the administration of the referendum, initiative, and larger electoral process. The Court has frequently recognized that strong government interest, and nowhere is that interest stronger than in combating the increasing threat of signature-gathering fraud. Similarly, public disclosure serves strong and compelling informational interests, generally and as repeatedly recognized and protected by the Court, in the political campaign context. Any chilling effect of Washington's public disclosure requirement on expressive activity is not just unproven but, at most, incidental.

Against these strong government interests, consistent historical practice, and nearly unanimous state disclosure practice, petitioners allege minor acts of misconduct and ask the Court to fashion a sweeping constitutional rule. Passionate or even rude or hostile speech relating to a single referendum in one state is not a basis for

overturning reasonable state regulation of state initiative and referendum process and commitment to open government.

## **ARGUMENT**

### **A. Intermediate Scrutiny Applies to the Public Disclosure of Petitions**

The voluntary act of signing and submitting a petition to the government is an act with significant legal effect wholly separate from any incidental speech component. Moreover, states that have chosen to adopt initiative or referendum processes are free to apply reasonable time, place, and manner regulation of the processes, and *all* such states, save for one, routinely disclose referendum and initiative petitions. Petitioners' constitutional challenge—an attack on a common, reasonable, and content-neutral public disclosure requirement—therefore triggers only an intermediate level of scrutiny.

#### **1. Signing a Petition Is a Voluntary and Public Act**

First, signing a referendum or initiative petition is neither a private nor an anonymous act. Petitioners argue that signing a petition is a "private act" akin to "anonymous" speech, and that public disclosure of the petitions after they have been submitted to the government constitutes "compelled speech" subject to strict constitutional scrutiny. As the court of appeals recognized,

nothing about signing a petition is anonymous or private. Pet. App. 12a.

A citizen who chooses to sign *must* add his or her name to the petition, and *must* intend the petition to be submitted to the government, for the act to have any effect. A voter signing a referendum petition fully expects that the petition, including his or her name, address, and signature, will be disclosed to the government; disclosure is, in fact, the whole point in signing the petition. Moreover, signatures typically are collected at county fairs, on busy city streets, in crowded shopping malls, or in church or retail shopping parking lots. *See, e.g.*, John Doe Declarations (Dkt. ##53, 54). Citizens signing petitions are doing so publicly; their signatures are placed on sheets available for review by every other citizen who signs (or the much larger number who consider *whether* to sign); and those names, addresses, and signatures may be reviewed and recorded by others and used by the petition proponent for other purposes. Pet. App. 12a. In short, there has been "no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." *Id.* In fact, the limited record before the Court is decidedly to the contrary.

Nor is a petition suddenly cloaked in secrecy *after* an individual signs it. A signer intends that his or her signature will be (and must be) submitted to the state for the petition to have any

effect. A petition signer might also reasonably assume that the petition circulator may use his or her name for other purposes. There is no statutory or regulatory provision (nor language in the Referendum 71 petitions themselves) that tells the petition signer that his or her signature will be kept private and not used for any purpose other than submission to the state. To the contrary, Washington law generally provides a right to records such as these petitions through the Public Records Act and more "specifically provides that both proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process." *Id.*

Petitioners' attempt to liken signing a petition to "anonymous speech" fails: the petitions are signed publicly, not anonymously; they are openly displayed; and they are not retained but expressly designed to be delivered to government officials as a legally binding directive. Citizens can speak anonymously in opposition to any legislation, but signing the petition is a legally significant act that is inherently inconsistent with anonymity. Someone can waste one of the lines on the petition by signing as "Anonymous" or by writing in a political statement, but effective support for the petition requires the act of subscribing one's name.

Petitioners largely rely on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), in support of their position. In *McIntyre*, the petitioner distributed anonymous pamphlets

advocating a vote against a school levy, and the State of Ohio fined her for failing to comply with a statute that required her to identify herself on any pamphlet advocating a position in an upcoming election. *Id.* at 338. The Court held that such an attempt to regulate and limit political expression was subject to strict scrutiny and was unconstitutional. *Id.* at 345-46.

The facts in *McIntyre* present nearly the opposite situation from the facts in the instant case. Ms. McIntyre expressed her political viewpoint through an anonymous pamphlet; she jealously protected her anonymity; and she never submitted her name, address, or signature to the government in connection with the anonymous pamphlet. Moreover, Ms. McIntyre's pamphlet had no independent legal effect; it was pure speech.

The referendum process under Washington law could scarcely be more different: a citizen signing a petition must provide his or her name, address, and signature, and typically does so publicly; the petitions are usually displayed for public review during the gathering process; and they must all be submitted to the government for review and verification, which is itself observed by third parties. Submitting the signature and other information to the government and making them part of the process of governance is the entire point of the exercise.

For the same reason, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182

(1999) ("*Buckley II*"), which held that requiring a petition circulator to wear a name tag was unconstitutional, is distinguishable from the act of signing a petition. A circulator of a petition does not have to disclose his or her identity to perform his or her job.<sup>5</sup> That is not true of a petition signer, who by definition must provide his or her full name, signature and the address at which he or she is legally registered to vote for the act of signing to have any legal meaning.

Petitioners' attempt to characterize petition signing as a secret act, like voting, in which the "speech" is disclosed only to the government, is similarly flawed.<sup>6</sup> Voting in federal and in all state elections is done in private; voters have an expectation of privacy; and federal and state laws protect the secrecy and anonymity of the ballot. *Republican Party of Minn. v. White*, 536 U.S. 765, 786-87 (2002) (contrasting the "relatively new" and "still not universally adopted" practice of restricting judicial candidates' speech during elections to the "tradition of prohibiting speech around polling

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<sup>5</sup> In many states, the circulator does need to sign the petition before it is submitted to the government, and the Court upheld such a requirement in *Buckley II*, 525 U.S. at 196.

<sup>6</sup> The more apt analogy is to what legislators do, and the Washington Constitution requires that they be identified by name. Wash. Const. art. II, § 22 ("No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house"); see also *id.* §§ 1(e), 11.

places that began with the very adoption of the secret ballot in the late 19th century, and in which every State participated"); *Burson v. Freeman*, 504 U.S. 191, 206 (1992) ("After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments.").

No such history or expectation is present here. The consistent practice of the states that have adopted initiative and referendum processes is exactly to the contrary: Nearly all states *release* copies of petitions upon public request. See Ballot Initiative Strategy Center, *Ballot Integrity: A Broken System in Need of Solutions, A State by State Report Card* (July 2009) <http://tinyurl.com/yktzoxf> (last visited Mar. 23, 2010). Citizens signing petitions reveal only their participation in the referendum process; they do not reveal their votes.<sup>7</sup>

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<sup>7</sup> In fact, a closer analogy is to the release of voter registration information and voting history, both of which are routinely disclosed by state election officials and which form the basis of get-out-the-vote efforts for political campaigns. See, e.g., ARIZ. REV. STAT. § 16-168(C); COLO. REV. STAT. § 1-2-302; 10 ILL. COMP STAT. 5/1A-25; IOWA CODE ANN. § 48A.39; ME. REV. STAT. ANN. 21-A, § 22; N.H. REV. STAT. ANN. § 654:31-a; TEX. ELEC. CODE § 13.122. Disclosure of such information also serves government interests in detecting and deterring fraud, promoting confidence in the fair administration of elections, and providing relevant information to voters, candidates, and political committees. Cf. *Krislov v. Rednour*, 226 F.3d 851,

Petitioners refer to cases in which courts have held that information privately disclosed to the government is exempt from public disclosure. The precedent is readily distinguishable. Each of these cases either involve private information with no legal effect that was never public (unlike petition signatures) or specific exemptions from public disclosure laws based on interests not at issue here.

Two cases identified by petitioners, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *AFL-CIO v. Federal Election Commission*, 333 F.3d 168 (D.C. Cir. 2003), involve information that—unlike referendum and initiative petitions—was never made public.

In *Reporters Committee*, the Court undertook a detailed analysis of the Freedom of Information Act ("FOIA") to determine that summaries of criminal records of private citizens could not be publicly released, where the summaries had been compiled by the government and were not otherwise public. 489 U.S. at 765-66. The Court did not reach the question of whether disclosure violated an individual's privacy interest under the U.S. Constitution. *Id.* at 762 n.13. In *AFL-CIO*, the D.C. Circuit held that sensitive confidential

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859 (7th Cir. 2000) ("Because elections must be regulated to remain free from fraud and coercion, some latitude is given to regulations designed to serve these purposes.") (citing *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402, 2406-07 (2000)); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 325 (6th Cir. 1998)).

information and documents describing the union's political strategy, provided in response to the Federal Election Commission ("FEC") during the course of an FEC investigation, pursuant to a compulsory process, should not be publicly disclosed. 333 F.3d at 170-71. The information at issue was not collected for purposes of submission to the government, was submitted pursuant to a government subpoena, and had not been otherwise publicly disclosed. *Id.* Such information included membership and volunteer lists and documents revealing the union's political goals, strategy, and tactics. Moreover, the court analyzed the case under the *NAACP* exception, and there was a showing that revealing the information at issue would cause a reasonable probability of harm to the AFL-CIO. *Id.* at 176-77. As discussed above, that issue is not before the Court.

Petitioners also heavily rely on *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000), but in that case, the Eighth Circuit reached only the question of whether the *specific* petition before it should be exempted from disclosure under a FOIA exemption. At issue was whether a petition submitted to the Department of Agriculture was covered by an exception to disclosure under FOIA, which exempts from disclosure files "which would constitute a clearly unwarranted invasion of personal privacy." *Id.* at 1183 (quoting 5 U.S.C. § 552(b)(6)). In holding that the petition was covered by the exemption, the Eighth Circuit noted that the petition required an explicit statement

that the signer supported repeal of a mandatory program and thus the court held that the "strong interest in a secret ballot" required these petitions to be confidential. *Id.* at 1188. Because the court held that an exemption under FOIA applied, the court did not reach the question of whether disclosure violated the First Amendment. *Id.*

No such declaration appears in this case. The only language to which a citizen signing *these* petitions subscribes is the following:

We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. 71, filed to revoke a bill that would expand the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners to be equivalent to those of married spouses, except that a domestic partnership is not a marriage, and was passed by the 61st legislature of the State of Washington at the last regular session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular election to be held on the 3rd day of November, 2009; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington,

in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

Blinn Decl. in Support of Opposition to Motion for Preliminary Injunction, Ex. A (Dkt. #27); *see also* WASH. REV. CODE § 29A.72.130 (WAFST App. 6a).<sup>8</sup>

Moreover, unlike the plaintiffs in *Glickman*, who invoked the statutory exception provided by FOIA, petitioners never attempted to invoke the protections offered under the Public Records Act. *Glickman* is irrelevant and inapplicable to the case at hand.

In sum, signing a referendum or initiative petition is a public act, and the very act of signing

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<sup>8</sup> Petitioners argue that because they added their own political characterization of the legislation at issue to the required content of the petitions, signers *must have* intended to thereby reveal their ultimate vote. Petitioners' Brief at 21 n.26, 13. But this argument is defeated by the very evidence to which petitioners cite: The petitions themselves plainly demonstrate the clear demarcation between (a) the political hyperbole at the top ("If same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal . . . even over objections of parents. Sign R-71 to protect children."), and (b) the much more limited and statutorily required statement to which the signatories subscribed. Blinn Decl. in Support of Opposition to Motion for Preliminary Injunction, Ex. A (Dkt. #27).

requires disclosure. The First Amendment does not require that petitions be secret.

**2. There Is No Historical Record of Anonymity or Harassment with Respect to Referendum or Initiative Petitions**

In *McIntyre*, the Court considered that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent," in rejecting Ohio's self-identification requirement. 514 U.S. at 357. The Court considered the historical practice of allowing anonymous pamphleteering in order to protect minority viewpoints from harassment. *Id.* No such history exists with respect to initiative and referendum petitions. Indeed, the historical record is to the contrary.

Approximately half of the states in the nation have initiative and/or referendum laws. *Ballot Integrity: A Broken System in Need of Solutions, a State by State Report Card*, Ballot Initiative Strategy Center, <http://www.tinyurl.com/yktzoxf> (last visited Mar. 23, 2010) (identifying 24 states, excluding the two states with popular referenda only). Of these, only one—California—exempts initiative and referendum petitions from public disclosure. Cal. Gov't Code §§ 6253.5, 6253.6. Nearly all remaining states provide the public with timely access to such petition sheets. See *Ballot Integrity*, available at <http://tinyurl.com/yktzoxf> (last visited Mar. 23, 2010).

In Washington, as the record below demonstrates, initiative and referendum petitions are subject to public disclosure under the Public Records Act and have been for decades. There is no history of secrecy with respect to initiative or referendum petitions since the passage of the Public Records Act. Indeed, in the decades since the statute was enacted (by citizen initiative), Washington has routinely disclosed petitions upon request and without controversy.

Of course, as petitioners note, *prior* to the adoption of the Public Records Act, Washington did not disclose initiative or referendum petitions. But, then, prior to the Public Records Act, Washington did not disclose a *wide variety of public records*. Indeed, changing that state policy was precisely the point of the statute. Nothing about Washington's history with respect to initiatives or referenda supports petitioners' effort to create a constitutional right precluding the release of those records that exists in neither Washington's constitution nor its statutory law. As Justice Scalia pointed out in his dissent in *McIntyre*, "to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right." 514 U.S. at 373.<sup>9</sup>

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<sup>9</sup> Petitioners argue that a 1973 statement by Washington Secretary of State A. Ludlow Kramer demonstrates that the reasoning of two Washington Attorney General Opinions issued before the passage of the Public Records Act, survived the passage of the Public Records Act. Petitioners' Brief at 9 n.18 (citing Wash. Op. Atty. Gen. 378 (1938) and Wash. Op.

Nor is there evidence in the record remotely suggesting a general threat of harassment for those signing initiative or referendum petitions, in Washington or elsewhere. Such petitions typically concern tax policy, revenue, budget, or other state law issues. *See, e.g.*, I-1033 (state, county, and city revenue), I-960 (state tax and fee increases), I-920 (state estate tax), I-912 (state gasoline tax), I-892 (scratch lottery tickets to reduce state property taxes), I-776 (state charges for automobile license tabs), I-747 (state property tax levies), I-722 (state tax and fee increases), I-695 (state tax increases), I-602 (state collections and expenditures), I-601 (state expenditures), I-559 (state property tax rate); Washington Secretary of State, Yearly Summary of Initiatives to the Legislature, Yearly Summary of Initiatives to the People, Yearly Summary of Referendum Measures, and Yearly Summary of

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Atty. Gen. 55-57 No. 274 (1956)). Petitioners further argue that this position was "confirmed by the state courts." *Id.* (citing *Neal v. Cheney* [sic], No. 48733 (Wash. Super. Ct. Thurston County, Sept. 14, 1973)). The court in that case, however, concluded that it did not have to reach the question of whether the petitions would be publicly disclosed as there was no member of the public before the court seeking disclosure. Order Enjoining Examination of Initiative 282 Petitions and Order of Dismissal, *Chaney v. Kramer*, No. 48733 (Wash. Super. Ct. Thurston County) (Sept. 4, 1973). And, of course, the present Secretary of State *rejected* Secretary Kramer's view, and the present Attorney General supports that rejection. Regardless, these state law issues are not properly before the Court and hardly demonstrate a federal *constitutional* right to secrecy in the initiative or referendum process.

Referendum Bills, <http://tinyurl.com/yz736kk> (last visited Mar. 23, 2010). Even those involving more controversial social policy issues such as the so-called "death with dignity" initiative (Initiative 1000), or those calling for deregulation of marijuana (Initiative 692), have proceeded to the ballot without incident (other than instances of signature-gathering fraud as noted above).

Indeed, the *only* alleged incidents of harassment proffered by petitioners involve two relatively recent initiatives, one in California and one in Washington, both relating to same-sex partnerships.<sup>10</sup> The only court to have considered the California evidence found it insufficient to limit campaign finance disclosure requirements. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1226 (E.D. Cal. 2009). Washington's own Public Disclosure Commission reached the same conclusion. *Minutes of Public Disclosure Commission's Aug. 27, 2009 Meeting*, <http://www.tinyurl.com/ydp7jce> (last visited Mar. 23, 2010) (rejecting PMW's request for an exemption from campaign finance disclosure requirements for Referendum 71 donors). Given that the incidents concerned a different measure, at a different election, hundreds of miles away, their significance is even more attenuated.

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<sup>10</sup> The amicus brief of Common Sense for Oregon, The Oregon Anti-Crime Alliance, and Oregonians in Action discusses two incidents of purported harassment, but the incidents are not only unsupported by evidence, they concern petition circulators, not petition signers.

But whatever else might be said of the limited record before the Court on this point, it does not demonstrate a frequent, consistent, or historical threat of harassment to those pursuing even controversial initiatives or referenda. The right of citizens to propose initiatives and referenda has existed in some states since the late 1800s, *see* Initiative & Referendum Inst., *The History of Initiative and Referendum in the United States*, <http://tinyurl.com/yevfe3t> (last visited Mar. 23, 2010), yet the record before the Court lacks *any* evidence that those signing such petitions have frequently (or, indeed, ever) been subject to harassment beyond the usual give and take of public debate over the long history of such petitions. On this point, petitioners' advocacy far outruns the evidence.

### **3. Initiative and Referendum Petitions Are Subject to Reasonable Time, Place, and Manner Regulation**

Whether a state chooses to provide a right of its citizens to legislate through an initiative or referendum process is entirely a matter of state law. How a state chooses to structure that right—the particular filing, format, or qualification restrictions—are, similarly, subjects of state law and indeed subjects upon which the states differ significantly. *See generally* Ballot Integrity (detailing differences among state initiative and referenda laws), *available at* <http://tinyurl.com/yktzoxf> (last visited Mar. 23, 2010).

The states, moreover, retain broad power to regulate the time, place and manner of elections pursuant to article I, section 4 of the U.S. Constitution. "The Constitution provides that States may prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citations omitted). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The Court has deferred to state regulation that imposes "reasonable, nondiscriminatory restrictions" upon voters' First and Fourteenth Amendment rights. *Id.* at 434 (quoting and citing *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 n.9 (1983)). The broad grant of plenary power to the states over election procedures exists elsewhere in the U.S. Constitution as well, even where the election of the president is at stake. *See McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (holding that article II, § 1, cl. 2, grants states the "broadest power," to define the method" to appoint electors).

In *Burdick*, the Court upheld a state's complete ban on write-in ballots. 504 U.S. at 441-42; *see also*

*Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (upholding voter identification requirement for in-person voting); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding "antifusion" provision). Washington's choice here—to provide a referendum process that permits the public disclosure of the underlying petitions—falls easily within its power to define the referendum process and regulate the time, place, and manner of its exercise.

Indeed, in this sense, even assuming that petition signing is pure speech, petitions are analogous to state-created non-public fora and therefore subject to reasonable restrictions. *See, e.g., Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). The Court has held that the government creates a non-public forum when it "allows selective access for individual speakers rather than general access for a class of speakers." *Forbes*, 523 U.S. at 679-80. Further, "permitting limited discourse" does not transform a non-public forum into a limited one. *United States v. Am. Library Ass'n*, 539 U.S. 194, 206 (2003) (internal quotation marks and citation omitted). Thus, the Court has held that a candidate debate on public-access television was a non-public forum. *Forbes*, 523 U.S. at 676. The Court has also held that Internet access in libraries is a non-public forum. *Am. Library Ass'n*, 539 U.S. at 206.

In fact, two of the courts of appeals have analyzed initiatives as non-public fora subject to reasonable regulation, including removing entire subjects from the initiative process. In *Marijuana Policy Project v. United States*, the D.C. Circuit rejected the plaintiff's argument that the initiative process was a public forum, holding that "[a]lthough places designated for the expression of views about legislation—the grounds of the U.S. Capitol, for example, share these characteristics, the legislative act itself, i.e., the voting that occurs inside the Capitol, does not." 304 F.3d 82, 86-87 (D.C. Cir. 2002) (citation omitted).

Similarly, the Tenth Circuit implicitly recognized the non-public forum nature of initiatives when it held that a subject matter could be removed from the initiative process, stating that a plaintiff "is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. Her right to free speech in no way depends on the presence of SQ 642 on the ballot." *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996), *overruled on other grounds by Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006).

A petition is a method under which the state allows qualified individuals selective access to the legislative process. In this way, signing a petition is analogous to the non-public fora at issue in *Forbes* (a candidate debate on public television) and

*American Library Association* (Internet access in public libraries), or a city council or legislative hearing offering public comment time but limiting the time to three minutes per speaker, or placing other content-neutral time, place, and manner regulations on the comment opportunity. In each case, the content-neutral regulation of the speech fits easily within the state's power to regulate the non-public forum.

Petitioners, of course, retain their right to speak, and even to speak anonymously, on the subjects at issue. There is no dispute that petitioners can distribute anonymous handbills, write anonymous letters to their legislatures, or meet in private with like-minded individuals to plan how to advocate a change in the law. Had petitioners done any of these things, the government could not compel them to include their identities as part of their speech. Instead, petitioners signed a petition for a referendum, in a state with a well-defined public policy of open government, a strong Public Records Act, and a well-established practice of disclosing referendum and initiative petitions.

#### **4. Signing a Referendum Petition Is Not Pure Speech**

Petitioners' primary argument for the application of strict scrutiny relies on the assumption that signing a referendum petition is "core political speech." This premise is incorrect.

Signing a referendum petition is an act with significant legal effect, wholly apart from whatever speech component it might contain. It not only suspends the operation of a lawfully enacted statute but commands the state to place the matter on the ballot at the next general election. As a result, it involves conduct of legal significance and, as the court of appeals recognized, is therefore subject to intermediate scrutiny pursuant to *United States v. O'Brien*, 391 U.S. 367 (1968). See Pet. App. 14a.

First, the language appearing on the petition sheets simply directs the Secretary of State to place the matter on the next general election ballot. WASH. REV. CODE § 29A.72.130 (proscribing language to appear on petitions for referenda, including "We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that [this] Referendum . . . shall be referred to the people of the State for their approval or rejection") (WAFST App. 6a). It does not articulate a position with respect to the underlying legislation, and, as a result, citizens signing the petition are not necessarily voicing disagreement with that legislation. But even if construed as "speech" opposing the statute at issue, that speech is incidental to the intended legal significance of the act of signing, as courts of appeals have held.

In *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), the First Circuit upheld a subject-matter exclusion from the state initiative process. The

court distinguished between "the communicative aspect of the political process" (where strict scrutiny applied) and the reasonable regulation of the act of creating legislation through initiative or referendum (where intermediate scrutiny applied). *Id.* at 277. "The primary goal of state initiative procedures is to create an avenue of direct democracy whereby citizens can participate in the generation of legislation—that is, the *act* of creating law." *Id.*

Similarly, in *Marijuana Policy Project*, the D.C. Circuit held that Congress's act of stripping away the District of Columbia's power to legislate the legality of marijuana through initiative did not violate the First Amendment, stating that it was aware of no case "establishing that limits on legislative authority—as opposed to limits on legislative advocacy—violate the First Amendment. This is not surprising, for although the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject." 304 F.3d at 85.

Petitioners nevertheless maintain that petition-signing constitutes pure speech. Effectively ignoring the Court's decision in *O'Brien*, they simply argue that what is at issue is "the petition-signing *discussion*." Petitioners' Brief at 40 (emphasis added) (citing to *Buckley II*, 525 U.S. at 186). This assertion fails to confront the issue. Beyond a doubt the *discussion* between the signature-gatherer and a citizen who signs the

petition is protected speech, but Washington does not even purport to regulate *the discussion*. Both the signature-gatherer and the citizen signing the petition remain entirely free to engage in whatever discussion they would like and nothing about the Public Records Act affects, controls or reveals that discussion. The law applies only as a result of the *act* of signing a petition that is intended to be a government record with legal effect. The public release of the petition sheets thus at most implicates mixed conduct and speech.

Despite these distinctions, only one of the amicus briefs filed in support of petitioners even cites *O'Brien*. The amicus brief submitted by the Justice and Freedom Fund attempts to distinguish *O'Brien* by arguing that "the 'act' of signing a petition is more like writing a news article, book, or other communication that clearly constitutes protected speech than expressive conduct." Brief of Justice and Freedom Fund as *Amicus Curiae* Supporting Petitioners at 6. Although a book or newspaper article is undoubtedly protected speech, signing a petition is different: it has legal effect, and its significance is assuredly *not* dependant on its persuasiveness.

The Fund's brief also analogizes signing an initiative petition to the right to petition the government for redress of grievances. But there is a qualitative difference between a petition for redress that is essentially a *plea* to the government to change course (similar to the petitions for

redress referenced in the Declaration of Independence) and the use of a state-created legal mechanism by which the people can command change if there are sufficient signatures. The former (having no legal effect) is only speech; the latter (causing delay in legislation and the consequent legal rights that were to flow from it pending a vote of the people) is something *more*. In the former citizens can decide whether to make their identities part of their communication; in the latter their validated identities as legal voters is the necessary component of their participation. Because signing a petition involves conduct, the court should, at most, apply intermediate scrutiny.

**5. The Public Records Act Is a Reasonable and Content-Neutral Time, Place, and Manner Regulation**

Petitioners next attempt to avoid application of intermediate scrutiny with the surprising contention that the Public Records Act is not viewpoint neutral as applied to the disclosure of petitions. Petitioners' Brief at 41-42. This argument is easily dispatched. First, it was not made below or in the Petition and thus is not properly before this Court. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Cooper Indus., Inc. v. Aviall Servs. Inc.*, 543 U.S. 157, 168 (2004) ("We ordinarily do not decide in the first instance issues not decided below.") (internal quotation marks and citation omitted).

But even if considered on the merits, the argument fails. Petitioners assert that the Public Records Act is not viewpoint neutral "as applied to the release of referendum petitions" because only those seeking to overturn a legislative act would have submitted such petitions to the Secretary of State. Petitioners' Brief at 41-42. But the Public Records Act *also* requires disclosure of any public records that identify *proponents* of any piece of legislation. It is assuredly content neutral: all public records are required to be disclosed, regardless of their label, content, or purpose.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted).

It would be difficult to find a more neutral statute with universal applicability than Washington's Public Records Act. The Public Records Act is a law of broad application to *all* public records. *See, e.g., In re Dependency of KB*, 210 P.3d 330, 333 (Wash. Ct. App. 2009) ("The [Public Records Act] requires that each agency make all public records available for public inspection and copying.") (internal quotation marks and citation omitted); *Kitsap County v. Smith*, 180 P.3d 834, 844 n.21 (Wash. Ct. App. 2008) ("[T]he primary purpose of the Public Records Act is to

ensure an open and honest government and, to that end, allow the public access to all public records unless those records fall under an exception to the act.") (citing WASH. REV. CODE § 42.56.030). It does not favor any one viewpoint over another and broadly applies to all governmental records. If anything, it was designed to allow those who are skeptical of government to obtain public records about governmental action.

Moreover, absent public disclosure, referendum proponents in fact gain an *advantage* in the public debate. Sponsors of a referendum have unfettered access to the signed petitions both before and after they turn those petitions in to the Secretary of State. Petitioners do not represent that they did not copy the petition sheets or create a database listing those who signed so that they could subsequently direct campaign mail to them. *See* Petitioners' Brief at 36. At the same time, petitioners seek to prevent others from having access to this same information.

Petitioners also assert that the "Public Records Act's apparent facial content neutrality is undermined" by the fact that there are numerous statutory exemptions from the Act. *Id.* at 42. Petitioners do not argue, however, that those exemptions themselves are content-based. Rather, they appear to be arguing that the existence of statutory exemptions, without more, will render a records-related statute content-based. *Id.* Certainly petitioners presented no evidence that

the State has applied the Public Records Act to petitions on the basis of whether any particular document favors one side or the other of any particular political debate. If anything, the record confirms the opposite, given the declared and consistent policy of the State to disclose all initiative and referendum petitions, as well as the heavy consequences imposed by the Public Records Act upon the State for failing to produce public records. *See* WASH. REV. CODE § 42.56.550(4); *see also* *Yousoufian v. Office of Ron Sims*, 98 P.3d 463, 471 (Wash. 2004) (concluding that court has no discretion to reduce penalty period for failure to disclose public records).

#### **6. The Right of Association Is Irrelevant**

Petitioners next argue that strict scrutiny should apply because disclosure violates their "privacy" of "association." Petitioners' Brief at 24. This argument assumes that those who signed the Referendum 71 petition have necessarily associated themselves with other signers. Citizens who sign a referendum petition do not form a private association, however, and the disclosure of their names does not warrant application of strict scrutiny under *NAACP v. Alabama* and *Brown v. Socialist Workers '74 Campaign Committee*.

First, and perhaps most obviously, those who sign referendum petitions are not "associating" in the constitutional sense; they are simply signing a petition. They may know of other signers because they signed in a group or they read the names of

those who had signed before them. That is hardly a confidential association. Petitioners cannot sustain their suggestion that disclosure of these petitions would reveal an "association" that was never organized or mentioned to (much less subscribed to) its very members. Indeed, at this level of generality, virtually *any* public disclosure would reveal an "association" of citizens. But no court has ever recognized such a sweeping and ambiguous associational right limiting a state's power to require public disclosure of government records.

The record in this case is markedly different from that before the Court in *NAACP*. The NAACP was "a nonprofit membership corporation organized under the law of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name, and it operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner." *NAACP*, 357 U.S. at 451-52 (footnote omitted). Likewise, the Socialist Workers '74 Campaign Committee was "a small political party with approximately sixty members in the State of Ohio" with a constitution governing its activities and "members [who] regularly run for public office." *Brown*, 459 U.S. at 88. In both cases, membership was not publicly disclosed.

The right of association is, in short, irrelevant to this case, and the Court should reject petitioners'

attempt to liken all signers to a private association protected by the First Amendment.

**B. Disclosure of Petitions Under the Public Records Act Serves Important Interests**

For these reasons, the court of appeals correctly applied intermediate scrutiny to the question of whether petitions can be publicly disclosed. Under intermediate scrutiny, disclosure of petitions under the Public Records Act does not violate the First Amendment if it furthers an important governmental interest unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedoms is no greater than necessary to justify the interest. *See O'Brien*, 391 U.S. at 377. Here, public disclosure of petitions serves both important anti-fraud and informational interests, and any effect on speech is incidental.<sup>11</sup>

**1. Public Disclosure Serves to Detect and Deter Fraud**

The detection and deterrence of electoral fraud is a compelling governmental interest. This Court has consistently recognized the vital role public disclosure plays to safeguard the political process and has upheld laws restricting speech when faced with anti-fraud interests. In this case, petitioners advance the startling suggestion that fraud in the petition process is not a danger and that preventing such fraud is not a legitimate state interest.

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<sup>11</sup> These interests are so important and so well served by disclosure that any higher level of scrutiny is also satisfied.

History, and this Court's jurisprudence, teaches otherwise. In Washington and elsewhere throughout the nation, signature-gathering fraud is a distressingly and increasingly common threat to the initiative and referendum process, and the public, rather than governmental agencies alone, plays an important role in combating fraud.

In *Burson*, 504 U.S. 191, for example, the Court held that the government's interest in preventing fraud in the election process is so compelling that it justified restrictions on pure political speech where strict scrutiny applied. *Id.* at 211. The Court upheld a Tennessee law that prohibited the display of campaign materials and solicitation of votes within 100 feet of the entrance of polling places. *Id.* Recognizing that strict scrutiny applied because the law restricted political speech, the Court nevertheless held that the state's interest in preserving the integrity of the election process and preventing undue influence on voters was sufficiently compelling. *Id.* at 198-200.

Likewise, the Court has consistently acknowledged the compelling anti-fraud interest served by public disclosure of campaign contributions. In *Buckley I*, the Court upheld contribution disclosure provisions of the Federal Election Campaign Act of 1971 because such disclosure requirements were the least restrictive means of "curbing the evils of campaign ignorance and corruption." 424 U.S. at 68. The Court wrote,

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

*Id.* at 67 (internal quotations and citation omitted); see also *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (upholding disclosure and disclaimer requirements); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 196 (2003), *overruled in non-relevant part on other grounds by Citizens United*, 130 S. Ct. 876 (2010) (upholding disclosure requirements based on the state's interests in "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof and gathering the data necessary to enforce more substantive electioneering restrictions"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) ("Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance.") (alteration in original) (citation omitted).

This anti-fraud interest is no less compelling in the context of initiative and referendum signature-gathering. Signature-gathering fraud in connection with initiative and referendum petitions is an increasingly common issue and one that the states have struggled to control. As with political

contributions, public disclosure of initiative and referendum petitions plays a crucial role in protecting this very public legislative process.

Signature-gathering fraud has occurred throughout the nation, with reported cases just in the last ten years from not only Washington, but also Arizona, Colorado, the District of Columbia, Maine, Michigan, Nebraska, Ohio, Oklahoma, and Oregon (*see supra* at 8-11). The states, including Washington, have ample reason to be alarmed at this activity, and the use of public disclosure to combat it serves compelling state interests.

The government acting without public scrutiny cannot prevent or discover signature-gathering fraud entirely. For example, in Washington, the State generally checks only 3 to 5% of signatures and cannot catch fraud that might easily be noticed by the public—either citizens checking to make sure their own names do or do not appear on a petition or by an organization motivated to ensure that a referendum campaign is acting legally.<sup>12</sup>

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<sup>12</sup> In Washington, state law authorizes a party to challenge the certification of an initiative or referendum for the ballot. WASH. REV. CODE § 29A.72.240 (Pet. App. 50a). This important statutory safeguard is largely toothless without access to the petitions themselves to check for fraud. Petitioners themselves only barely surpassed the minimum number of signatures needed, and WAFST had concerns about PMW's campaign, yet was hindered by the restraining order from using the petitions to check for fraud or otherwise ineligible signers. *See* Order Amending and Extending the Court's TRO (Dkt. #59). Although WAFST was eventually

*Initiative and Referenda Signature Checks: A Historical Perspective*, Washington Secretary of State, <http://tinyurl.com/ydfxglp> (last visited Mar. 24, 2010).

There are other areas in the election process where public disclosure regularly detects fraud. Absentee ballot envelopes, poll books, registration lists, voting history records, polling place reconciliation records, and a wide variety of similar election records are routinely made public during an election, recount, or election contest litigation. These records can be and routinely are used to determine whether citizens voted more than once or unqualified citizens voted. If disclosing petitions violates the First Amendment, then what about these records?

Indeed, these very records were used in 2004 by both the presumptively-elected Washington Governor and the defeated candidate to demonstrate that illegal votes had been cast in the election by convicted felons, individuals who voted twice, and individuals who voted absentee ballots on behalf of deceased spouses. *Borders v. King County*, Case No. 05-2-00027-3, Final Judgment Dismissing Election Contest with Prejudice and Confirming Certification of Election of Christine

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provided with copies of the petitions, as an exception to the TRO entered by the trial court, WAFST could not publicly disclose the names of signatories to verify that they had actually signed because of a confidentiality order. Moreover, the petitions were in a form that could not be correlated to the work done by WAFST observers.

Gregoire, Chelan County Super. Ct. (June 24, 2005). The public was heavily involved on both sides, with those supporting the defeated gubernatorial candidate posting online a variety of election-related records in an effort to use public scrutiny to identify voter fraud (comparing voting history records with conviction or death records available elsewhere). See *Sound Politics Voter Database*, <http://tinyurl.com/yhhygof> (archived page of database of voters who voted in Washington's 2004 gubernatorial election, posted in February 2005) (last visited Mar. 23, 2010).

Disclosure also serves governmental interests by providing information that promotes the "[p]reservation of the individual citizen's confidence in government." *Bellotti*, 435 U.S. at 788-89. Public disclosure serves this interest by providing additional oversight for government action, *id.* at 792 n.32, exactly the goal of the Public Records Act. With petitions, public disclosure promotes confidence in government by ensuring that the government has fairly and accurately counted the signatures, that only registered voters have signed the petitions, and that signature-gathering fraud has not infected the signature-gathering process.

Owing to limited time and government resources, public disclosure is plainly an important method for detecting fraud in the initiative and referendum process. As the Court has previously acknowledged, "voter intimidation and election fraud are successful precisely because they are

difficult to detect." *Burson*, 504 U.S. at 208.<sup>13</sup> Public disclosure addresses this problem by allowing the public to verify the legitimacy of petition signatures. Washington's choice to allow sunlight into this process—a choice embraced by nearly every other state with initiative or referendum processes—is narrowly tailored to address the compelling anti-fraud interest.

## **2. Public Disclosure Serves Informational Interests**

In addition, public disclosure of referendum petitions serves important informational interests in an informed and confident electorate. Just this term, in *Citizens United*, the Court recognized that public disclosure laws help citizens "make informed choices in the political marketplace." 130 S. Ct. at 914, 915-16 (internal quotation marks and citation omitted) (holding that the "informational interest alone" was sufficient to uphold the application of disclosure and disclaimer provisions to corporate advertising). This interest was also recognized in *Bellotti*, where the Court held that the government has an interest in notifying the electorate about the

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<sup>13</sup> Deterring fraud in referenda is particularly important because referenda delay implementation of a law duly enacted by the legislature. This delay can cause real and material harm. In *Wynand v. Department of Labor & Industries*, 153 P.2d 302 (Wash. 1944), the Washington Supreme Court held that an injured worker was properly denied benefits that he would have otherwise obtained if a referendum measure had not delayed implementation of new legislation until after the date of the worker's injury.

source of political communications so the voters can make informed choices. 435 U.S. at 793 n.32.

The public release of petition signatures serves this informational purpose. Although signing is not necessarily the same as opposing the underlying legislation, information about who signed can provide insight into whether support for holding a vote comes predominantly from particular interest groups, political or religious organizations, or other group of citizens. *See Buckley II*, 525 U.S. at 202 (holding disclosure of initiative sponsors and amount spent gathering support for their initiatives serves important check on "domination of initiative process by affluent special interest groups"). Such information will also allow those considering whether to sign to discuss the issue with those who have already signed. *See, e.g., McConnell*, 540 U.S. at 197 (upholding disclosure provisions on the ground that they would help citizens "make informed choices in the political marketplace") (internal quotations and citation omitted).

### **3. The Potential Effect of Public Disclosure on Petition Signing Is Incidental**

Against these compelling government interests in disclosure, petitioners argue that disclosure "chills" citizens from signing initiative or referendum petitions. *E.g.*, Petitioners' Brief at 8 n.17, 29, 52. But the argument is unsupported by the record before the Court and certainly does not

rise to the level of long historical experience necessary to support a facial challenge that would require all petitions to be kept confidential as a matter of federal constitutional law. Isolated incidents of rude or boorish behavior over a particular subject, even if perceived as threatening, do not justify a sweeping constitutional bar to the routine application of public records disclosure statutes to initiative, referendum and other governmental petitions by states around the country.

The record before this Court is lacking significant evidence to support Petitioners' sweeping "Count I" of their lawsuit, that challenges the application of the Public Records Act to *any* referendum or initiative petitions. There are no allegations in the complaint that *any* citizens refused to sign the Referendum 71 petition—or any other petition for that matter—for fear of harassment. Nor do the three "John Doe" declarations filed in support of the motion for preliminary injunction assert that the declarants were aware of anyone refusing to sign the petition for fear of harassment. This remarkable silence is telling, particularly because, as petitioners point out, Referendum 71 petitions were circulating in Washington shortly after Proposition 8 in California, and petitioners contend supporters of Proposition 8 were harassed.<sup>14</sup>

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<sup>14</sup> Curiously, even the information petitioners submit regarding events in California during the Proposition 8

Indeed, the record here stands in stark contrast to the evidence before the Court in *Buckley II*, which struck down a state law requiring petition circulators to wear name tags. In *Buckley II*, the plaintiff submitted testimony by individuals stating that they would not circulate petitions if forced to identify themselves. 525 U.S. at 197-98.<sup>15</sup>

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campaign fails to demonstrate that anyone actually refused to sign Proposition 8 because of fear of harassment.

<sup>15</sup> The information petitioners present regarding events during the campaigns for California's Proposition 8 and Washington's Referendum 71 largely amounts to evidence of heated debate. One John Doe declaration recounts a "calm" phone call where the caller suggested that she might picket the declarant's church. John Doe Decl. #3 in Support of Motion for Preliminary Injunction ¶ 3 (Dkt. # 52 at 1). Such behavior would be rude and obnoxious, to be sure, but hardly constitutes illegal harassment or a threat. Another John Doe declaration describes certain non-violent and relatively civil confrontations in public while actively collecting signatures for Referendum 71. John Doe Decl. #4 in Support of Motion for Preliminary Injunction ¶¶ 10-17 (Dkt. #53 at 2-3). The third John Doe declaration describes phone calls with a specific person who indicated plans to picket the declarant's church, where she is a pastor. John Doe Decl. #5 in Support of Motion for Preliminary Injunction ¶¶ 2, 17, 20 (Dkt. #54 at 1-4). Again, while such behavior might be annoying or rude, it is not threatening. The bulk of petitioners' remaining evidence includes emails to the campaign manager of Referendum 71, a public figure broadly identified with the campaign, not an individual signer. Even then, with the exception of one or two emails highlighted by petitioners, most of the emails reflect a civil attempt to convince the campaign manager that his viewpoint is wrong. Compl. (Dkt. #2).

Impolitic, argumentative, and even threatening statements are not uncommon in political campaigns.<sup>16</sup> That may be cause for political parties, candidates, and initiative sponsors to take responsible action to control their supporters; it might be reason for individual citizens to encourage moderate political discourse and condemn those engaged in incendiary rhetoric; and, at the extreme, it might be cause for law enforcement activity. But it hardly justifies the rejection of state public disclosure policies as applied to initiative and referendum petitions.

Heated debate lies at the core of our democracy and the constitutional provision that petitioners invoke. The Court has refused efforts to ban speech because some viewers or listeners may find it

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<sup>16</sup> The problem, as one might expect, cuts both ways. Those opposing the effort to qualify Referendum 71 for the ballot, including members of WAFST, received angry telephone and email messages and were the subject of hostile, threatening, and harassing blog and internet postings. Levinson Decl. in Opposition to Motion for Temporary Restraining Order, Exs. E-G, filed in *Family Pac. v. Reed*, No. 09-5662 (W.D. Wash. Oct. 21, 2009) (Dkt. #26). This, of course, is almost *always* the case where citizens or their representatives vigorously debate important public policy issues about which they hold passionate views. Where zealous advocacy crosses the line to credible threat or actionable harassment, then law enforcement can and should police such behavior. Short of that, it is most assuredly not the role of the federal courts to intervene in such vigorous political debate and wield the Constitution to overturn state public records policies in a misguided effort to introduce civility into our public discourse.

offensive. *See, e.g., Virginia v. Black*, 538 U.S. 343 (2003) (reversing conviction for cross burning that was based on statutory presumption of intent to intimidate); *Miller v. California*, 413 U.S. 15 (1973) (defining standard between obscenity and non-obscene pornography). The Court has nearly always embraced the principle that more speech, not less, is favored, and thus, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007). It is not for this or any other court to decide what is "good" speech or "bad," because it is only in the crucible of public debate that the marketplace can reliably discern fact from fiction. *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.") (Holmes, J., dissenting).

Passionate, rude, or even hostile speech relating to a single referendum in one state is not cause for this Court or any court to overturn reasonable state regulation of the initiative and

referendum process designed to further important government interests.

**CONCLUSION**

For the reasons set forth above, Washington Families Standing Together respectfully requests that the Court affirm the court of appeals.

Respectfully submitted,  
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