

No. 09-559

In The
Supreme Court of the United States

**John Doe #1, John Doe #2, and Protect
Marriage Washington, *Petitioners***

v.

Sam Reed et al., *Respondents*

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

Petitioners' Brief

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Questions Presented

The district court granted a preliminary injunction protecting against public disclosure, as opposed to private disclosure to the government only, of those signing a petition to put a referendum on the ballot (“petition signers”). The Ninth Circuit reversed, concluding that the district court based its decision on an incorrect conclusion of law when it determined that public disclosure of petition signers is subject to, and failed, strict scrutiny. The questions presented are:

1. Whether the First Amendment right to privacy in political speech, association, and belief requires strict scrutiny when a state compels public release of identifying information about petition signers.

2. Whether compelled public disclosure of identifying information about petition signers is narrowly tailored to a compelling interest, and whether Petitioners met all the elements required for a preliminary injunction.

Parties to the Proceeding

Petitioners in this Court, Plaintiffs-Appellees below, are John Doe #1, an individual, John Doe #2, an individual, and Protect Marriage Washington, a state political committee and proponent of Referendum 71.

Respondents in this Court, Defendants-Appellants below, are Sam Reed, in his official capacity as Secretary of State of Washington, and Brenda Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington.

Additional Respondents in this Court, Defendants-Intervenors-Appellants below, are Washington Coalition for Open Government and Washington Families Standing Together.

Corporate Disclosure Statement

No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

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Opinions Below

The appellate order (CP-App.¹ 1a) reversing the district court is reported at 586 F.3d 671 (9th Cir. 2009). The district court's order and opinion granting a preliminary injunction (CP-App. 23a) is unreported.

Jurisdiction

The appellate court's order (CP-App. 1a) was filed on October 15, 2009. The appellate court's opinion and judgment (CP-App. 3a) was filed on October 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The following are in the certiorari petition appendix: First Amendment (CP-App. 46a); Fourteenth Amendment (CP-App. 46a); Washington Constitution, article II, § 1(b) (CP-App. 46a); Revised Code of Washington ("RCW") § 29A.68.011 (CP-App. 47a); RCW § 29A.72.200 (CP-App. 48a); RCW § 29A.72.230 (CP-App. 49a); RCW § 29A.72.240 (CP-App. 50a); RCW § 29A.84.210 (CP-App. 51a); RCW § 29A.84.230 (CP-App. 51a); RCW § 29A.84.250 (CP-App. 52a); RCW § 42.17.010 (CP-App. 53a); RCW § 42.56.001 (CP-App. 55a); RCW § 42.56.010 (CP-App. 56a); and RCW § 42.56.070 (CP-App. 56a).

¹ **Abbreviations:** Certiorari Petition Appendix ("CP-App."); Democratic National Committee ("DNC"); Freedom of Information Act ("FOIA"); Public Records Act ("PRA"); Referendum 71 ("R-71"); Revised Code of Washington ("RCW"); Secretary of State ("Secretary"); State Respondents ("State").

Statement of the Case

A. Background²

This case arose in the wake of events in California.³ On November 4, 2008, California passed Proposition 8, defining marriage as between one man and one woman. During and after the campaign, Proposition 8 opponents publicized on the Internet the names, employers, and contact information of Proposition 8 campaign contributors from public filings to harass and intimidate them. *See, e.g.*, www.eightmaps.com; www.californiansagainsthate.com. These intimidation efforts were widely reported, and this Court called them a “cause for concern.” *See Citizens United v. FEC*, No. 08-205, slip op. at 54 (Jan. 21, 2010) (558 U.S. ___, 2010 WL 183856 (2010)).⁴ *See also Hollingsworth v. Perry*, 130 S. Ct. 705, 712-13 (2010) (per curiam) (staying broadcast of Proposition 8 trial; recognizing harassment directed at Proposition 8 supporters).⁵

² In not redacting obscene language herein, Petitioners followed *Cohen v. California*, 403 U.S. 15, 16 (1971).

³ Additional facts are in the district court Opinion. (CP-App. 23a.)

⁴ All citations are to the slip opinion.

⁵ Proposition 8 supporters seek an as-applied exemption from campaign finance reporting requirements under *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). *See ProtectMarriage.com v. Bowen*, No. 2:09-cv-00058-MCE-DAD (E.D. Cal.). Supporters were denied a preliminary injunction preventing disclosure of additional names, *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009), after which a previously undisclosed contributor received this email:

The judge released the names today of the donors who

The intimidation campaign was facilitated by the compelled disclosure of contributors to committees supporting Proposition 8. (*See generally* Dkt. 4, Ex. 12 at 10-15, 27-45, 45-51, 52-57; Dkt. 4, Ex. 13 at 2-6, 35-38, 43-45, 46-51, 70-75, 76-80, 81-118, 119-36, 143-45, 235-38, 239-45.) Campaign reports facilitated boycotts and blacklists of businesses owned by, or employing, traditional marriage supporters. (*See* Dkt. 4, Ex. 12 at 2-9 (organized protest at business and numerous reports of boycotts).)⁶

Websites combined campaign-report information with publicly available contact information enabling Proposition 8 opponents to harass donors at home and work. *See, e.g.*, www.californiansagainsthate.com; www.eightmaps.com.

supported Prop 8, and your name is on the list as having donated . . . to keep same-sex couples from marrying. Someday you will have to account for the fact that you refused to love they [sic] neighbor, but in the meantime I hope your hateful little life is full of oppression and injustice as this is the kind of life you wish for others. You're a queer-hating douchebag. Fuck you. Best, Julia

(Dkt. 4, Ex. 13 at 243.) Trial is scheduled for March 14, 2011.

⁶ *See also* Dkt. 4, Ex. 12 at 27-45 (received email stating, "I AM BOYCOTTING YOUR ORGANIZATION AS A RESULT OF YOUR SUPPORT OF PROP 8"); *id.* at 46-51 (received email suggesting that business would suffer for contributing \$100 to support Proposition 8); Dkt. 4, Ex. 13 at 70-75 (name posted on Internet "Boycott H8ers List"); *id.* at 81-118 (boycott of artist threatened); *id.* at 70-75 (received email stating, "Your company is now on a list I am producing of those that will be boycotted and shut down soon").

As a result, Proposition 8 supporters became death threat targets.⁷ Others feared physical harm to self or family. (*See, e.g.*, Dkt. 4, Ex. 13 at 13-16 (feared physical violence at sign-waving; refused to bring children to events; worried about future violence to family for supporting similar causes).)⁸

Others saw their car windows broken, homes vandalized, and cars spray-painted and scratched because they supported Proposition 8. (*See, e.g., id.* at 7-9 (rear window of car smashed while parked in front of declarant's house); *id.* at 10-12 (car scratched and tires deflated; staircase from home covered in urine with puddle of urine at bottom).)⁹

⁷ *See* Andres Araiza, *Prop 8 Threat: Fresno Police Close to Arrest*, ABC-30 (KFSN-TV), Oct. 31, 2008, <http://abclocal.go.com/kfsn/story?section=news/local&id=6479879> (death threat directed at Fresno mayor for support of Proposition 8); (Dkt. 4, Ex. 13 at 120 (email stating “I tolerate you because I don’t come to where you are and slaughter you”).

⁸ *See also* Dkt. 4, Ex. 13 at 39-42 (incidents “shook” declarant “to the core”); *id.* at 43-45 (donor in Louisiana worried someone “could go after” her family in California); *id.* at 46-51 (would not host wave party without man present over concerns for participants’ safety); *id.* at 58-60 (concerned about safety of children and instructed principal that only he or wife could pick them up from school); *id.* at 119-36 (will not speak out publicly in future for “fear for the safety of children”); *id.* at 164-66 (did not display a bumper sticker because of aggression directed toward family and friends who supported Proposition 8); *id.* at 194-97 (would have to “seriously consider . . . the safety of family in the future when deciding to support a [similar] cause”); *id.* at 223-34 (fears for safety and safety of daughters).

⁹ *See also* Dkt. 4, Ex. 13 at 13-16 (car heavily scratched); *id.* at 17-20 (home egged and floured multiple times; car egged,

Another supporter feared jeopardy to her job for supporting Proposition 8. (*Id.* at 31-34.) The fear is well-founded because news media report that individuals were fired or forced to resign for supporting traditional marriage.¹⁰ Reports include a waitress forced to resign to end relentless protests outside restaurant after her \$100 contribution became public, as well as forced resignations in the theater industry. See Karen Grigsby Bates, *Backers Of Calif. Gay Marriage Ban Face Backlash*, NPR, Mar. 5, 2009, www.npr.org/templates/story/story.php?storyId=101460517&ft=1&f=100.¹¹

Peaceable assembly during the Proposition 8 campaign brought harassment. (*See, e.g.*, Dkt. 4, Ex. 13 at 13-16 (participated in 6-7 sign-waving events; at each, people shouted obscenities, made obscene gestures, and argued with Proposition 8 supporters).)¹²

floured, and honeyed multiple times; motorbike tipped over); *id.* at 61-63 (bumper sticker ripped off in shopping area); *id.* at 67-69 (bumper sticker ripped off at school).

¹⁰ In this economy, reprisals targeting employment are particularly chilling and have become a common tactic of same-sex marriage supporters. See A.P., *Counselor Wants Gay Marriage Complaint Thrown Out*, Bangor Daily News, Nov. 23, 2009, www.bangordailynews.com/detail/130565.html (complaint by National Association of Social Workers against school counselor supporting traditional marriage).

¹¹ The continued availability of information about Proposition 8 contributors permits ongoing retaliation. A 95-year-old board member of a California theater recently lost his position for supporting Proposition 8. Phillip Matier & Andrew Ross, *Prop. 8 Aid Puts Paramount Board Member on Hold*, Deseret News, Jan. 23, 2010, www.deseretnews.com/article/705360460/Prop-8-aid-puts-Paramount-board-member-on-hold.html.

¹² See also Dkt. 4, Ex. 13 at 31-34 (called a “filthy bag of

Even churches were not safe havens for Proposition 8 supporters. One supporter's pastor told her to find another church, though she attended a church whose teachings support traditional marriage. (Dkt. 4, Ex. 13 at 212-15.)

Another Proposition 8 supporter reported that police provided no assistance after receiving theft and vandalism reports related to Proposition 8. (*See id.* at 173-82 (reported yard sign theft and vandalism to police on three separate occasions, but received no response).) Another supporter did not report yard-sign theft believing police would provide no assistance. (*See id.* at 198-201 (declarant did speak to police dispatcher).)

The result of these actions is that individuals are intimidated from engaging in political speech. Proposition 8 donors report that they will not contribute to similar organizations in the future because of the harassment that occurred when contributions became public.¹³ Though most prevalent in California, intimi-

shit" and "bitch" while holding pro-Proposition 8 sign on street corner; unknown object thrown at declarant waving sign); *id.* at 64-66 (people passing peaceful pro-Proposition 8 demonstration made obscene gestures and yelled obscenities); *id.* at 249-52 (people regularly made obscene gestures and yelled at people participating at wave parties).

¹³ *See, e.g.*, Dkt. 4, Ex. 13 at 13-16 (will hesitate before supporting a similar cause because of worry about harassment, violence, and potential discrimination against family and fear of damage to property); *id.* at 43-45 (will think twice before supporting similar cause); *id.* at 70-75 (will be less likely to get involved in similar cause if confidentiality cannot be assured); *id.* at 194-97 (hopes to support similar cause in the future, but will first consider safety of family); *id.* at 219-22 (will hesitate before future giving because no way to ensure confidentiality).

dation efforts have been directed at supporters of traditional marriage across the country.¹⁴

B. Referendum 71

On May 18, 2009, Washington Governor Christine Gregoire signed Engrossed Second Substitute Senate Bill 5688. (CP-App. 29a.) It expands the rights, responsibilities, and obligations accorded state-registered, same-sex and senior-domestic partners to equate to those of married spouses and is commonly called the “everything but marriage” domestic partnership bill. (CP-App. 7a., 29a.)

In May 2009, Protect Marriage Washington began circulating Referendum 71 (“R-71”), a referendum petition on Senate Bill 5688. (CP-App. 29a.) The Washington people have reserved the power to repeal acts of their legislature. Wash. Const. art. II, § 1(b). To do so they must submit a petition evidencing sufficient support to warrant a referendum. *Id.* Then an election asks the people to “approve” or “reject” the legislation. *See* RCW § 29A.72.290.

¹⁴ KnowThyNeighbor.org, who intended to place Referendum 71 petition signers on the Internet, posted the names of traditional marriage supporters signing petitions in Arkansas, Florida, Massachusetts, and Oregon. *See* www.knowthyneighbor.org. *See also*, Joshua Rhett Miller, *Massachusetts Man Says He Was Fired for Telling Colleague Her Gay Marriage Is Wrong*, FoxNews.com, Nov. 9, 2009, www.foxnews.com/story/0,2933,572862,00.html; Kevin Miller, *Yes on 1 Advocate Targeted After TV Ad*, Bangor Daily News, Oct. 30, 2009, www.bangordailynews.com/detail/127393.html (campaign to strip guidance counselor of license after appearing in ad supporting traditional marriage); News 13, *Swastikas Painted on ‘Yes on One’ Signs*, MyFOXMaine.com, Oct. 28, 2009, www.myfoxmaine.com/dpp/news/20091028_swastikas_painted_on_yes_on_one_signs.

On July 25, Protect Marriage Washington submitted a petition containing more than 138,500 signatures to the Secretary of State (“Secretary”). (CP-App. 20a.) Petitioners John Doe #1 and John Doe #2 signed the petition. (J.A. 6-7.) The Secretary conducted an extensive canvass and verification of the petitions and determined that R-71 qualified for the November ballot.¹⁵

While Protect Marriage Washington was collecting signatures, several groups stated that they intended to utilize the Washington Public Records Act (“PRA”), RCW § 42.56.001 et seq., to obtain copies of petitions submitted to the Secretary.¹⁶ KnowThyNeighbor.org and WhoSigned.org stated publicly that they intended to place the names and addresses of R-71 petition signers on the Internet to encourage “uncomfortable conversations.” (CP-App. 31a.)¹⁷ The Secretary stated

¹⁵ The State must destroy petitions failing to qualify. RCW § 29A.72.200. The Secretary intended to release copies of the petitions before R-71 was certified. David Ammons, *R-71 Update: Signature Requests Pending*, Wash. Sec’y of State Blogs, July 29, 2009, <http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/07/r-71-update-signature-requests-pending>. If referendum petitions are public records subject to disclosure under the PRA *before* they are certified for the ballot, the statute authorizing their destruction if they are not certified is rendered superfluous. *See United States v. Menasche*, 348 U.S. 528, 538 (1955) (“give effect, if possible, to every clause and word of a statute”).

¹⁶ The PRA, provides for release of certain public records and is similar to the federal Freedom of Information Act (“FOIA”). *Compare* RCW § 42.56.001 et seq. *with* 5 U.S.C. § 552.

¹⁷ Individuals have used access to referendum petitions on other issues to harass petition signers and stifle debate. For

his intent to comply with requests for copies of R-71 petitions.¹⁸ Ammons, *R-71 Update, supra*.

example, in West Virginia the Fraternal Order of Police, after being denied access by the city clerk, obtained a court order granting access to referendum petitions to repeal an ordinance requiring two police officers in every cruiser. Casey Junkins, *Recht: Give FOP the Signatures*, *The Intelligencer: Wheeling News-Register*, Nov. 5, 2009. Police access of petition signer identity is chilling. *See also The Shepherdstown Observer v. Maghan*, No. 09-c-169, Order of Dismissal at 6 (Jefferson County, W.Va. 2009) (“[M]aking the names of those individuals who signed the petitions [public] would have a chilling effect on the ability of citizens to petition the government.”; newspaper’s request for access to referendum petition denied) (*available at* <http://jeffersoncountyclerkwv.com>).

See also Brief *Amici Curiae* of Common Sense for Oregon, the Oregon Anti-Crime Alliance, and Oregonians in Action in Support of Petitioners, *Doe #1 v. Reed*, No. 09-559 at 15-19 (U.S. 2010) (discussing successful harassment campaign directed at elderly widow circulating recall petition; petitions destroyed to protect supporters from harassment).

¹⁸The State’s position that referendum petitions are “public records” departs from nearly 70 years of precedent. Attorney general opinions from 1938 and 1956 declare that petitions are not public records subject to disclosure. Wash. Op. Att’y Gen. 378 (1938); Wash. Op. Att’y Gen. 55-57 No. 274 (1956). Even after the PRA was enacted, then-Secretary of State Kramer declared that petitions were not subject to public release, *see* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973 (CP-App. 66a), because “the release of these signatures [has] no legal value, but could have deep political ramifications to those signing.” A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973. (CP-App. 67a.) This position was later confirmed by the state courts. *Neale v. Cheney*, No. 48733 (Wash. Sup. Ct. Thurston County, Sept. 14, 1973).

That petitions are not “public records” is also supported by the fact that petitions are not made public by statutes regulat-

C. Litigation

Fearing Proposition 8 intimidation would repeat in Washington, Petitioners sued on July 28, 2009, alleging that the PRA violates their First Amendment rights. (J.A. 4-19.) In Count I, Petitioners' complaint asserted that the PRA is unconstitutional as applied to referendum petitions because it violates the interest in privacy of identity, association, and belief. (J.A. 16.) Count II asserted that the PRA is unconstitutional as applied because "there is a reasonable probability that the signatories . . . will be subjected to threats, harassment, and reprisals." (J.A. 17.)

In addition to the Proposition 8 intimidation evidence, Petitioners submitted evidence that history was repeating itself in Washington because individuals publicly associated with R-71 had been subjected to intimidation efforts. For example, Larry Stickney, the campaign manager for Protect Marriage Washington, received many harassing and threatening emails. (J.A. 9.) One said: "You better stay off the olympic peninsula. . . it's [sic] a very dangerous place filled with people who hate racists, gay bashers and anyone who

ing referenda. *See* RCW § 29A.72.010 et seq. Proponents and opponents of a referendum are permitted to have observers at the Secretary's verification, but observers may not make any record of names, addresses, or other information on the petitions. RCW § 29A.72.230. Where the Secretary determines that the collected signatures are inadequate (and a court confirms, if appeal is taken), the petitions are destroyed. RCW § 29A.72.200. As drafted, these statutes only divulge the names of petition signers to the referendum proponents and government for a very limited purpose—to allow public officials to verify the petition signatures and ensure sufficient support to justify placing referenda on the ballot.

doesn't believe in equality. Fair is fair." (*Id.*) Another: "Dear God fearing hate mongerers[. . .] Maybe you just want to feel a cock in your ass and hate yourself for it. Whatever. Praise Jeebus you retarded fuckholes!" (*Id.*)

A local blogger stated: "If Larry Stickney can do 'legal' things that harm OUR family, why can't we go to Arlington, WA to harm his family?" (J.A. 10.) Stickney took the threat seriously, reported it to the sheriff, and had his family sleep in an interior room to protect them. (J.A. 9-10.)

Boycotts were threatened: "We shall boycott the businesses of EVERYONE who signs your odious, bigoted petition." (J.A. 9.)

On September 10, the district court preliminarily enjoined the Secretary from releasing copies of the R-71 petition sheets. (CP-App. 23a.) It applied strict scrutiny, holding that Petitioners established likely merits success and satisfied other preliminary injunction factors. (CP-App. 43a.) The court did not reach Count II, which sought an exemption based on a reasonable probability of threats, harassment, and reprisals. (CP-App. 23a-45a.)

On October 15, the Ninth Circuit stayed the injunction, effective immediately, stating simply that the district court applied "an incorrect legal standard." (CP-App. 2a.) On October 19, Justice Kennedy stayed release of the petition. (CP-App. 22a.) On October 20, this Court extended the stay. (CP-App. 21a.) The Ninth Circuit issued its opinion on October 22, saying the district court applied an "erroneous legal standard when it applied strict scrutiny." (CP-App. 20a.) Applying intermediate scrutiny, the Ninth Circuit found the PRA likely constitutional as applied to referendum

petitions. (CP-App. 20a.) It neither considered Petitioners' Count II nor remanded for application of the reasonable-probability test. (CP-App. 4a-20a.)

Summary of Argument

There are two great enemies of citizen participation in our Republic, corruption and intimidation in elections. Much attention has been paid to preventing corruption, but this case is about protecting the people from intimidation while engaging in core political speech. While the case involves the reversal of the grant of a preliminary injunction, at its core lies the First Amendment question of whether, when the sovereign people seek to put a referendum on the ballot, they may be constitutionally compelled to *publicly* disclose identifying information about themselves, their association, and their belief that a measure should be on the ballot or whether any State interests are satisfied by *private* disclosure to the government.

The compelled disclosure of speech here implicates the First Amendment's protections created to safeguard citizens engaged in self-government, and this Court has recognized that the petition-signing discussion is core political speech.

Washington imposes three levels of compelled speech that must each be justified. First, in order to put a referendum on the ballot, people must speak and associate to qualify the referendum. Second, they are compelled to speak when they submit signatures to the Secretary for canvass and verification. As to these two levels, there is no fear of intimidation and no waiver of privacy rights. But as to the third level of compelled speech, *public* disclosure, there is a serious concern over both loss of privacy and intimidation.

Strict scrutiny applies to the petition-signing discussion, as this Court has recognized. Petition signing is integral to, and the goal of, this protected discussion, so burdens on it are necessarily subject to strict scrutiny. Strict scrutiny also applies because the burden is on core political speech; privacy of identity, association, and belief are burdened, including revealing how petitioners will vote; Washington's scheme has viewpoint discrimination; and Washington's scheme is content-based. Moreover, the evidence of serious disclosure costs indicates that the burden is serious so scrutiny must be strict.

The State's asserted interests in public disclosure are neither compelling nor important. The informational interest is weak, even if there is an information interest simply in who signed a petition, which is doubtful. To the extent that signers only intended to indicate that a question should be decided by the people, there is no cognizable informational interest. To the extent that signers indicated how they would vote, the secret-ballot interest protects from disclosure. The anti-fraud interest is neither compelling nor important. Fraud is of less concern in signature gathering than in voting. Fraud prosecution is rare. And though petitions have been subject to release in recent years, no fraudulent signature has been detected by such release.

Public disclosure is neither narrowly tailored nor sufficiently related to any informational interest. There is already adequate disclosure about proponents and contributors, and the State's long history of not disclosing petition signers reveals that this more narrowly-tailored approach adequately serves any state interests. Disclosure of de minimis involvement, as with de

minimis contributions, simply does not serve any state interest. Public disclosure is neither narrowly tailored nor sufficiently related to any anti-fraud interest. There is private disclosure to the Secretary, which serves the State's interest in assuring that there is adequate public support for a referendum, and the Secretary and observers canvass and verify petition signatures. This, along with the option of creating non-public review mechanisms and the presence of criminal penalties, satisfies any anti-fraud interest.

Petitioners properly received a preliminary injunction. In First Amendment cases, preliminary injunction standards should be protective of First Amendment rights. From the foregoing, it is clear that Petitioners had a likelihood of success on the merits. The other preliminary injunction standards follow from that conclusion. Petitioners had irreparable harm because deprivation of First Amendment rights is always irreparable harm. And if petition-signers' identities had been publicly disclosed, there was no way to reverse the disclosure. Balancing the equities favored Petitioners, given their risk from disclosure and the anemic nature of the asserted State interests. It is always in the public interest to protect constitutional rights.

Argument

In 1884, this Court said that “the two great natural and historical enemies of all republics . . . [are] open violence and insidious corruption,” *The Ku-Klux Cases*, 110 U.S. 651, 658 (1884), and that “the temptations to control . . . elections by violence and corruption is a constant source of danger.” *Id.* at 667. That case involved men charged with “conspir[ing] to intimidate” a man “in the exercise of his right to vote for a member

of the Congress of the United States.” *Id.* This Court said that “it is indispensable to the proper discharge of the great function of legislating . . . that those who are to control this legislation shall not owe their election to bribery or violence.” *Id.* at 663. And this Court said that the choosing of legislators should be as much the “free choice of the people” as was the act of the people in creating the United States. *Id.* at 666.

This case involves the “free choice of the people” in petitioning to put a referendum on the ballot. Intimidation and corruption remain enemies. The State argues corruption and downplays intimidation. But overemphasis on fighting corruption, by requiring disclosure at low levels of contribution or involvement, can enable intimidation. And corruption is virtually nonexistent in the petition-signing context, while intimidation is clearly resurgent here. This Court has decided many cases involving protection against corruption. This case requires the Court’s protection to assure that “the very sources of power . . . [are not] controlled by violence and outrage.” *Id.* at 667.

While this case involves the reversal of the grant of a preliminary injunction, its core is the First Amendment issue of whether, when the sovereign people seek to put a referendum on the ballot, they may be constitutionally compelled to *publicly* disclose identifying information about *themselves*, their *association*, and their *belief* that a measure should be on the ballot or whether any State interests are satisfied by *private* disclosure to the government. And this issue should be decided with attention to a backdrop of intimidation.¹⁹

¹⁹ This First Amendment issue is addressed in Parts I-IV, which establish likely success on the merits and is the central focus of the preliminary-injunction analysis in First Amend-

I. Public Disclosure Here Implicates First Amendment Protections.

The Ninth Circuit “assume[d], as did the district court, that the act of signing a referendum petition is speech, such that the First Amendment is implicated.” (CP-App. 11a.) But it noted that “[t]he State contends, with some force, that signing a referendum is not speech, but is instead, a legislative act, *i.e.*, that it is an integral part of the exercise of the legislative power reserved to the people” (CP-App.11a n.9.) The courts below were correct that this case involves core “political speech” (CP-App. 13a), and for that reason alone First Amendment protections engage. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) (Roberts, C.J., joined by Alito, J.) (“Because BCRA § 203 burdens political speech, it is subject to strict scrutiny.”).²⁰ In addition, three lines of cases establish that protected speech is involved—cases involving compelled speech, privacy, and intimidation. Moreover, the First Amendment right to petition is implicated here, providing its own protections.²¹

ment cases (with the other elements essentially following this determination).

²⁰ This opinion (“*WRTL-IP*”) states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

²¹ Broad protections are afforded under the right to petition, but since this Court analyzed the petition-signing discussion at issue here under the speech right, *see infra*, Petitioners emphasize that analysis. *See Brief of Justice and Freedom Fund as Amicus Curiae Supporting Petitioner* (briefly discussing applicability of petition right here),

A. Petition Signing Is Political Speech.

The courts below were correct that First Amendment protections engage because this case involves core “political speech” (CP-App. 13a). First, this Court has already decided that the petition circulation discussion at issue here is protected by the First Amendment. The Ninth Circuit noted that the district court relied on *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197 (1999) (“*Buckley-II*”), to establish this. (CP-App. 13a.) *Buckley-II* decided that the First Amendment protects referendum petition circulators, *id.* 197-200, because collecting signatures is “core political speech,” *id.* at 186. The petition-signing discussion “involves both the *expression* of a desire for political change and *discussion* of the merits of the proposed change.” *Id.* at 199 (*citing Meyer*, 486 U.S. at 421) (emphasis added). This case involves that same “expression” and “discussion.” A signature on the proffered petition sheet is integral to, and the goal of, this “discussion.” The State cannot explain how the discussant on one side of the clipboard in a protected “discussion” is protected but the discussant on the other side is not, especially when “expressi[ng the same] . . . desire for political change.” *Id.*

Second, the State’s argument that speech is not involved implicitly rests on the erroneous premises of (a) primacy of government by legislators over government by the people and (b) waiver of First Amendment protections when the people act sovereignly. Regarding primacy, the people are sovereign, so self-government is the primary, presumed form of governance. U.S. Const. pmb. The people may elect representatives, U.S. Const. art. I, § 1, but “the people are sovereign,”

Buckley v. Valeo, 424 U.S. 1, 14 (1976). The people of Washington similarly granted and reserved powers. The State’s assertion that when the people govern directly they are stripped of rights reverses our constitutional presumption. Moreover, if citizens acting sovereignly are somehow like their representatives, then ethics standards governing representatives should apply to citizens (rules about gifts, recusal for conflicts, etc.), which does not happen. And if citizens are really like their representatives, they should have the protections afforded representatives, as in the “privilege[] from Arrest” and “Speech or Debate” clauses, U.S. Const. art. I, § 6. Lacking those protections, citizens need First Amendment protection.

Regarding waiver, the First Amendment does not exclude from its protection those acting sovereignly to qualify and enact referenda. *See Buckley-II*, 525 U.S. at 192 (“the First Amendment requires us to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas”). The First Amendment’s central purpose is to protect self-governance, *see Citizens United*, at 12 (“political speech . . . is central to the meaning and purpose of the First Amendment”), so its protection cannot disappear when that purpose is being fulfilled.²²

Third, if people acting in their sovereign capacity lose First Amendment protections, then *voters* would lose First Amendment protections. Those voting on referenda act in their sovereign capacity, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 n.31

²² The notion that petition-signers waive privacy interests by signing multi-signer forms reviewed by referendum proponents and government officials is addressed further below. *See infra* at 36 n.34, 36 n.35, 38 n.36.

(1978) (“people . . . take action in their sovereign capacity”), as do voters for candidates, *Buckley*, 424 U.S. at 14 (“people are sovereign . . . [in] mak[ing] . . . choices among candidates”). While it is unnecessary here to decide whether the Constitution requires secret ballots, there are strong arguments that the First and Fourteenth Amendments protect voting privacy, which would be undercut by a holding that petition signing and voting are beyond constitutional protection.²³ In *Burson*, the (four-member) plurality spoke of the “widespread and time-tested consensus” on the necessity of the secret ballot and private polling booth, 504 U.S. at 206, and noted that the (three-member) “dissent concedes that a secret ballot was necessary to cure electoral abuses,” *id.* at 207. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), this Court cited the “reasoning” in *Talley v. California*, 362 U.S. 60 (1960),²⁴ as “embrac[ing] a respected tradition of

²³ “[A]ll 50 states, together with numerous other Western democracies . . . [require] a secret ballot” to prevent “intimidation” and “fraud.” *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality decision). For example, Washington requires that “[t]he legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.” Wash. Const. art. VI, § 6. The United Nations declares the secret ballot a human right. United Nations Declaration of Human Rights, art. 21 (“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic . . . elections . . . by universal and equal suffrage and . . . by secret vote or by equivalent free voting procedures.”) (*available at* www.un.org).

²⁴ *Talley* protected the right to circulate handbills advocating a boycott without printing on them the names and addresses of those sponsoring, preparing, and distributing them because “identification and fear of reprisal might deter

anonymity in the advocacy of political causes,” *McIntyre*, 514 U.S. at 343, adding: “This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one’s conscience without fear of retaliation,” *id.*²⁵

Fourth, here the right to vote is inextricably tied to petitioning to put the matter to a vote, so petition signers have the First Amendment protections that voters receive. The Sixth Circuit in *Anderson* struck a candidate-petition provision requiring signers to declare their intent to vote for the candidate because it violated the right to a secret ballot. *See supra* n. 25. The Eighth Circuit overturned the U.S. Department of Agriculture’s decision to release petitions (under FOIA) because “those signing the petition . . . declared their

perfectly peaceful discussions of public matters of importance.” *Id.* at 65.

²⁵ *See also Anderson v. Mills*, 664 F.2d 600, 608 (6th Cir. 1981). *Anderson* said that “[a]lthough the US Constitution does not specifically guarantee that a person has a right to a secret ballot, such a right has been recognized as one of the fundamental liberties of our democracy.” *Id.* (citing *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), *rev’d on other grounds*, 424 U.S. 1); *United States v. Executive Comm. of Democratic Party of Greene County, Alabama*, 254 F. Supp. 543, 546 (N.D. Ala. 1966). *Anderson* noted that Kentucky required a secret ballot and struck the State’s requirement that signers of a petition to put a candidate on the ballot declare “their “desire . . . to vote for the candidate,” *id.* at 608, because it “abridge[d] the right to a secret ballot,” *id.* at 608-09. The court noted that this disclosure provision “operates to discourage citizens from participation” by “invok[ing] the fears sought to be quelled by the secrecy of voting laws in this country,” e.g., “pressure of . . . neighbors, employers, and social peers,” *id.* at 608-09 (elaborating pressures), and was unconstitutional.

position on the ultimate issue,” *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000), and “[r]eleasing this petition . . . would substantially invade th[e] privacy interest [in a secret ballot],” *id.* In the present case, there are similar indications of how petition signers would vote. The petition form says, in a prominent “[h]ighlights” box, that “[b]y signing R-71 we can reverse that decision and protect marriage as between one man and one woman”²⁶ and that one should “[s]ign R-71 to protect children.” (J.A. at 31.) The required “official” language on these forms (below the “[h]ighlights” box in smaller fonts) is neutral, so some signers reading that may have merely intended to put the matter before the voters without expressing an opinion on the issue, as the district court noted. (*Id.*); (CP-App. 42a-43a.) These possibilities create a tension dooming public disclosure in either of two ways: (a) if people signed just to put the issue on the ballot without expressing a view on the merits, then the State’s cognizable information interest vanishes, *see infra* Part III.A, (b) but if they indicated their voting preference, the secret-ballot privacy interest protects against public disclosure. The State insists that petition signing was a *legislative* act, which means signers expressed how they would *vote*, which means the signing is protected by the secret-ballot privacy interest. Moreover, the right to vote and petition-signing are inextricably intertwined because

²⁶ The petition is for a referendum to *overturn* a legislative act granting everything-but-marriage status outside traditional marriage. This posture differs from petitions for an initiative to let voters make the initial policy choice. Here, voters *approving* the legislature’s act would be less likely to sign the R-71 petition, while those disapproving would be more likely to sign.

referenda qualification controls voting opportunities—if groups can keep measures off the ballot, the result is the same as winning the vote.

Fifth, this intertwining is further evidenced by the fact that the twin dangers requiring secret-ballot privacy threaten referendum qualification: “[T]he two great natural and historical enemies of all republics . . . [are] open violence and insidious corruption,” *The Ku-Klux Cases*, 110 at 658. In 1884, this Court asked whether government “has the power to protect the election[,] on which its existence depends, from violence and corruption,” *id.*, by those who “conspired to intimidate” a man “in the exercise of his right to vote,” *id.* at 657. Noting that “[t]he government of the United States was created by the free voice and joint will of the people,” *id.* at 666 (citation omitted), this Court held that “[i]t is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, *as that the original form of it should be so*,” *id.* (emphasis added). The people acting as sovereigns must be protected from both intimidation and corruption if our system of government is to work. “In a republican government . . . the temptations to control these elections by violence and corruption is a constant source of danger.” *Id.* “[I]f the very sources of power may be poisoned by corruption or controlled by violence and outrage . . . then, indeed is the country in danger . . .” *Id.* The secret-ballot privacy interest has been recognized to prevent these twin harms of corruption and intimidation, i.e., the need “to cure electoral abuses” and to be able to vote one’s conscience without fear of retaliation, *Burson*, 504 U.S. at 207. This Court has addressed the corruption threat. This case presents the need to protect against the intimidation threat

that has again become a problem. Disclosure rules pose little harm when all are committed to “the free choice of the people.” *Ku-Klux Cases*, 110 U.S. at 666. But if one side of a public debate seeks to win by intimidation, the republic’s foundation is threatened. If intimidation is unchecked, it is encouraged. Then victory is based on intimidation, not free debate and decision. Then many intimidation targets will be silenced and withdraw from political participation and some will likely feel compelled to respond in kind since the rules have changed, but either approach endangers the republic. Recognizing that petition-signing is within the pale of First Amendment protection here is a step toward preventing this danger. In any event, those intent on winning by intimidation thought that the petition signers were expressing their voting preference and so were engaging in core political speech, and the analysis should proceed accordingly.

B. The First Amendment Protects Against Compelled Speech, Privacy Violation, and Intimidation.

Because petition-signing is core political speech, it is specially protected by the First Amendment. *See supra*. But the First Amendment also protects against compelled speech, privacy violation, and intimidation.

Regarding *compelled speech*, the right to speak necessarily includes the right not to speak.²⁷ All forms

²⁷ Absent a compelling interest, government may not compel speech. *See Wooley v. Maynard*, 430 U.S. 705 (1977) (display of state motto); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper publication of candidate reply); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (disclosure of membership lists for tax purposes absent showing group is subject to licensing or tax requirement); *West Virginia State*

of campaign disclosure compel speech, *cf. McIntyre*, 514 U.S. at 355 (“compelled self-identification”), in an area of core First Amendment protection. To put referenda on the ballot, Washington voters are forced to submit to three levels of compelled speech. *See infra* Part I.D.

Regarding *privacy*, the First Amendment protects privacy of identity, association, and belief. *See Buckley*, 424 U.S. at 64 (“compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment”); *id.* at 66 (“the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations”); *id.* 75 (“strict standard of scrutiny” required “for the right of associational privacy”). This privacy interest recognized in *Buckley* was in privacy *per se* and should not be confused with the exemption for groups subject to intimidation, *see infra*.²⁸

In *McIntyre*, this Court addressed compelled public disclosure in violation of First Amendment privacy. Mrs. McIntyre was not compelled to publicly disclose her *belief* that a referendum should be defeated (a belief she voluntarily disclosed by distributing handbills), but she objected to public disclosure of her *identity* on her handbills if she did so. *McIntyre*, 514 U.S. at 337-38. This Court said that the desire not to be compelled to speak by public disclosure while participating in the political process “may be motivated

Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (schoolchildren flag salute).

²⁸ In 1964, a famous book warned against assault on privacy by government, business, and education. *See* Vance Packard, *The Naked Society* (1964).

by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *McIntyre*, 514 U.S. at 341-42. So maintaining privacy or anonymity, in and of itself, was a cognizable interest in *McIntyre*.

In *Buckley-II*, paid petition circulators (who were compelled to solicit petition signers to qualify a ballot initiative) were compelled to publicly disclose their *identity*, their *association* with others to advance a cause, and their *belief* that a measure should be on the ballot. 525 U.S. at 186. The present case is more like *Buckley-II* because Petitioners here also claim their First Amendment privacy right against compelled speech by the forced public disclosure of their *identity*, their *association* with petition circulators and signers, and their *belief* that R-71 should be placed on the ballot. Moreover, they claim their secret-ballot privacy interest against revealing their belief in the form of publicly revealing how they would *vote*, based on the “[h]ighlights” language on the petition forms. *See supra* at 21-22.

Regarding *intimidation*, *McIntyre* recognized that one of the reasons one might wish privacy is “economic or official retaliation” or “concern about social ostracism.” 514 U.S. at 341-42.²⁹ In addition to this recognition of an interest against intimidation at the personal level, *Buckley* provided a for a “blanket exemption,” 424 U.S. at 72—herein the “intimidation exemp-

²⁹ *Burson* also recognized the twin threats to elections posed by “intimidation and election fraud,” 504 U.S. at 206, and applied strict scrutiny in upholding a content-based law prohibiting political speech near entrances to polling places because of the strong secret-ballot privacy interest, *id.* at 211.

tion”—for groups able to “show . . . a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties,” *id.* at 74. This intimidation exemption is in addition to, and distinct from, the privacy protection that *Buckley* separately recognized. *See id.* at 66.

C. Privacy and Intimidation Must Not Be Conflated, And the Intimidation Exemption Standing Alone Is Inadequate Protection.

Though privacy and intimidation are often discussed together in compelled speech cases, they must not be conflated, especially because the as-applied intimidation exemption provides inadequate protection standing alone.

First Amendment problems of compelled speech, privacy, and intimidation often occur together. In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court recognized the right to associate and promote beliefs without intimidation resulting from “compelled disclosure” because “[t]his Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.” *Id.* at 462-63. *NAACP* imposed “the closest scrutiny,” which necessarily means strict scrutiny, to the compelled disclosure in order to prevent intimidation by protecting privacy. *Id.* at 461.

Buckley relied on *NAACP* for two needed protections related to disclosure. First, it recognized a general *privacy* interest protecting *all* because “compelled disclosure, *in itself*, can seriously infringe on *privacy* of association and belief.” 424 U.S. at 64 (emphasis added). This privacy interest was expressly protected by the same strict scrutiny applied in

NAACP to the “significant encroachments on First Amendment rights of the sort that compelled disclosure imposes,” *id.*: “Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny,” *id.* (citation omitted). “The *strict test established by NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.” *Id.* at 66 (emphasis added).³⁰ In addition to (or as part of)—but not as a *substitute* for—this “exacting scrutiny,” this Court “*also*” required a strong nexus (described as a “‘relevant correlation’ or ‘substantial relation’”) “between the governmental interest and the information required to be disclosed.” *Id.* (emphasis added). The nexus requirement was not a description of “exacting scrutiny,” though strict scrutiny’s narrow tailoring mandate requires a strong nexus.³¹ Nor was *Buckley*’s statement that there were “sufficiently important” interests, *id.* at 66, to meet exacting scrutiny a substitute for the “closest scrutiny” that *NAACP* mandated and the “strict test” equivalent

³⁰ “This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct in requiring disclosure,” *id.* at 65, which principle applies to the present case.

³¹ The requisite nexus was absent in *NAACP* where this Court said that disclosure of members’ names had no “substantial bearing” on whether the NAACP was conducting intrastate business and so was subject to a foreign corporate registration statute. 357 U.S. at 464. Under this nexus requirement, *Buckley* held that only communications “unambiguously related to the campaign of a particular federal candidate,” were subject to disclosure. 424 U.S. at 80.

that *Buckley* adopted. *Sufficiently* is a term prescribing no level of required adequacy (as *compelling*, *strict*, and *exacting* do), but rather states whether a required level *has been met*. *Sufficiently* stated no standard, only its satisfaction. Thus, strict scrutiny should be applied in all compelled speech cases—especially those involving core political speech—to protect against the inherent risk of the loss of privacy (which *also* carries with it an inherent risk of intimidation, but protecting privacy alone is sufficient reason for the protection, there being no need to prove intimidation).

Second, *Buckley* recognized an interest against *intimidation*, in the form of an as-applied intimidation exemption for groups. The exemption was from disclosure laws that had already met the strict scrutiny requirement that protected privacy (and would consequently protect individuals from potential intimidation). The exemption applied to groups “show[ing] . . . a reasonable probability that the compelled disclosure of . . . contributors’ names will subject them to threats, harassment, or reprisals from . . . officials or private parties,” 424 U.S. 74. Qualifying required only “reasonable probability,” without a “heavy burden” of proof, and with “sufficient flexibility in the proof of injury . . .” *Id.*

The proof may include . . . specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations

holding similar views.

Id.

These two *Buckley* protections should not be conflated. Strict scrutiny is necessary to protect the First Amendment privacy right, and the intimidation exemption is necessary to protect the First Amendment anti-intimidation right. Though both strict scrutiny and the exemption provide some protection against both intimidation and privacy violation. If “exacting scrutiny” is watered down so that the government is rubber-stamped in compelling speech, and if the courts rely on the intimidation exemption as the sole protection for citizens, then *Buckley*’s protections have been abandoned and citizens are put at risk. This is doubly so if *Buckley*’s reasonable-probability test is ignored and the standard for obtaining the intimidation exemption is raised so that it becomes difficult to obtain. As shall be shown, these problems are occurring. Citizens’ speech, association, belief, and participation in self-government are chilled as a result.

1. If “Exacting Scrutiny” Is Weakened, So Is Privacy Protection.

Buckley provided strong protection for privacy rights by a strong strict-scrutiny test. *McIntyre* affirmed that “exacting scrutiny” meant the “strict scrutiny” applied in *Meyer*, 486 U.S. 414, and *Burson*, 504 U.S. 191. *See McIntyre*, 514 U.S. at 346 & n.10. This provides strong privacy protection. But some subsequent cases could erroneously be read to have weakened exacting scrutiny.

McConnell v. FEC, 540 U.S. 93 (2003), spoke of “a sufficient relationship to . . . [an] important governmental interest.” *Id.* at 231.

Davis v. FEC, 128 S. Ct. 2759 (2008), reaffirmed *Buckley*'s recognition of per se infringement of privacy rights by compelled disclosure, required that the infringement be "closely scrutinized," and recognized that *Buckley* required both exacting scrutiny "and" a close nexus between interest and information, *id.* at 2774-75. *Davis* said that exacting scrutiny requires that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights," *id.* (citing *Buckley*, 424 U.S. at 68, 71). Of course, there is a serious burden where the sort of compelled disclosure at issue there and here is involved.

Citizens United said that "exacting scrutiny" . . . requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, at 51 (citations omitted).

If the high exacting scrutiny of *Buckley* and *McIntyre* is viewed by lower courts as having been diluted, then the privacy interest loses protection. This Court should reaffirm the high protection required to protect privacy rights against compelled speech.

If there is reduced protection for the privacy interest resulting from the weakening of exacting scrutiny, increased reliance is placed on the intimidation exemption to provide protection for both the privacy and intimidation interests. But high exacting scrutiny was the primary protection established to protect privacy rights, not the intimidation exemption. As shown next, the intimidation exemption protection has been watered down by lower courts and is inadequate. So for the vast majority of citizens chilled from participating in self-government by concerns about privacy and intimidation, the intimidation exemption is not avail-

able and so they have no real protection for privacy or against intimidation.

2. If the “Reasonable Probability” Test Is Made More Difficult, Intimidation Protection Is Reduced.

The intimidation exemption is no longer as protective as *Buckley* created it to be and cannot bear the burden of protecting against intimidation, let alone guarding privacy (which was to be the role of high exacting scrutiny), unless its high protection is reestablished. While this Court believed that courts would be sensitive in protecting against intimidation, *id.*, it is difficult to obtain an intimidation exemption. For example, though this Court said the evidence of intimidation directed at California’s Proposition 8 supporters was “cause for concern,” *Citizens United*, at 54, a court denied a preliminary injunction recognizing an exemption despite substantial intimidation evidence, *see ProtectMarriage.com*, 599 F. Supp. 2d at 1226.

The district court in that case imposed new tests, based on facts present in *Buckley* but not incorporated into the reasonable-probability test. It held that “minor status is a necessary element of a successful as-applied claim” and declared Proposition 8 backers neither a minority, nor a “fringe organization,” nor likely to be impoverished by intimidated donors. *Id.* at 1215. But none of that is in the reasonable-probability test, which was expressly stated in response to similar arguments and objections that *Buckley* listed and rejected. *See Buckley*, 424 U.S. at 68-74. While *Buckley* dealt with an exemption sought for minor parties, this Court noted minor party status could ebb and flow and did not correlate with the “critical factor,” which was “the

possibility that disclosure will impinge upon protected associational activity.” Id. at 72-73 (emphasis added). So Buckley expressly rejected the notion of an exemption just for minor parties.

The district court also relied on a “lack of evidence that [Proposition 8 supporters] ha[d] suffered animosity rising to the level hypothesized in *Buckley* and existing in *Brown*.” *ProtectMarriage.com*, 599 F. Supp. 2d at 1216. Again, *Buckley*’s test was that there be a reasonable probability of intimidation, not that the intimidation be like that suffered by some historic group.

And the district court insisted that, if the intimidation took the form of a boycott, such activity could not be considered intimidation because it was legal, *id.* at 1218-19, ignoring the fact that this Court held that the problem in such cases is the government’s *facilitation* of intimidation by compelling disclosure. *See NAACP*, 357 U.S. at 463 (“It is not a sufficient answer . . . that . . . repressive effect . . . follows . . . from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the . . . production order that private actions takes hold.”). If boycotts are organized in response to information *voluntarily* disclosed, the government facilitation of the intimidation is absent. The privacy interest is precisely about who controls the release of information.

While further analysis of this denial of the intimidation exemption cannot be done here (and Petitioners’ Count II is not at issue), the preceding demonstrates that the intimidation exemption as interpreted in a similar case provides little protection.

Another problem in obtaining an intimidation exemption is establishing the level of generality at which one must prove intimidation efforts. For example, the government in a case such as this will push for requiring proof of harassment at the very specific level of retaliation resulting specifically from petition signing. This is inconsistent with *Buckley's* broader scope for proof, *see* 424 U.S. at 74, which allowed even evidence of intimidation of similar groups. Thus, in a case like this, the proper level of generality required would be proof of intimidation against supporters of traditional marriage. Moreover, evidence of intimidation efforts where petition signatures are sought is evidence that the potential for intimidation is inherent whenever petition signers are disclosed (either actual danger or the prospect that potential signers would reasonably expect intimidation efforts and be chilled). *See supra* at 8 n.17. The problems discussed above show that the intimidation exemption, as it has developed, is an ineffective remedy.

Moreover, having to obtain as-applied court recognition of protected status under the intimidation exemption imposes the sort of problems for free expression and association rejected in *WRTL-II*, 551 U.S. at 469 and *Citizens United*, at 19. The present case is an as-applied challenge, but it is a challenge to public disclosure as applied to release of all petition sheets in referenda and ballot initiatives, not a challenge based on the peculiarities or special circumstances of any group or individuals. It is not the sort of as-applied challenge that a group would bring, based on its particular experience, to obtain an intimidation exemption under *Buckley's* reasonable-probability test, *see Buckley*, 424 U.S. at 72-74.

So in this respect it partakes of the same problems that *Citizens United* identified as requiring a facial remedy instead of a series of as-applied cases. See *Citizens United*, at 19. Obtaining an exemption involves the expense, burden, and delay of litigation, including the need to comply with or resist (sometimes with little or no success) discovery into information an intimidated group seeks to keep private. See *WRTL-II*, 551 U.S. at 469; see also *ProtectMarriage.com*, 599 F. Supp. 2d 1197 (preliminary injunction denied Jan. 30, 2009; trial scheduled for Mar. 14, 2011). Having to obtain an exemption acts like a prior restraint, cf. *Citizens United*, at 18. The exemption is a post hoc remedy that is too little, too late, for most organizations. The requirement of proof that an issue has resulted in intimidation requires a group speaking on an issue that has not previously generated threats and intimidation to first endure “death threats, ruined careers, damaged or defaced property, [and] preemptive and threatening warning letters” before seeking an exemption. *Citizens United*, at 6 (Thomas, J., concurring in part and dissenting in part).³² The difficulty in getting an exemption leaves opposition groups free to engage in intimidation as a campaign strategy, which undoubtedly chills core political speech. See *id.* at 4.

These problems indicate the need for this Court to clarify and reaffirm the reasonable-probability test for the intimidation exemption as it was articulated in *Buckley*—stripping away limiting glosses by lower

³² The criminal code, also a post hoc remedy, has proven inadequate to deter intimidation as a campaign tool. See *ProtectMarriage.com*, 599 F. Supp. 2d at 1218 (discussing criminal activity surrounding Proposition 8 campaign).

courts. And they also indicate that the intimidation exemption is inadequate alone to protect privacy and guard against intimidation. It provides no protection for the vast majority of citizens who cannot qualify for such an as-applied group exemption.

D. Washington Imposes Three Levels of Compelled Speech That Must Each Be Justified.

While First Amendment privacy protection against compelled public disclosure of identity, association, belief, and vote does not depend on the *reason* why one asserts the protection, this Court has identified reasons for asserting the protection. This Court said that the desire not to be compelled to speak by public disclosure while participating in the political process “may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *McIntyre*, 514 U.S. at 341-42. These reasons inform the following analysis of the three levels of compelled speech here.

Viewing Washington’s referendum qualification process from the perspective of compelled speech, those engaging their right to associate and speak for the purpose of putting a referendum on the ballot are faced with three levels of compelled speech.

First, Washington compelled 120,577 people³³ to speak and associate by signing petitions to qualify a referendum. There are less burdensome means for

³³ This is the number of individuals equal to four percent of those who voted for governor in Washington’s last gubernatorial election, and is the number required by the Washington Constitution for a referendum to qualify for placement on the ballot. Wash. Const. art. II, § 1(b). Petitioners submitted excess signatures to ensure sufficient signatures to qualify.

qualifying referenda, but the State's system is not challenged here. This signing of petition sheets is a private disclosure of identity, association, and belief, not a public one. Just as the Framers who published the Federalist Papers without publicly disclosing themselves had to privately associate with a printer and colleagues for the purpose of printing, binding, and distributing their pamphlets, those seeking to qualify a referendum associate privately with others. Petition signers disclose their identity to a petition circulator, who is acting as the agent of the referendum proponents. Petition signers also disclose their identity to potentially nineteen other persons signing petition sheets containing twenty names, as they associate together to get the referendum on the ballot.³⁴ And petition signers disclose their identity to the referendum proponents, who collect and review the petition sheets before submitting them to the Secretary. Regarding *McIntyre's* "desire to preserve as much of one's privacy as possible," 514 U.S. at 342, this is a minimal, private disclosure necessary to advance the common cause of qualifying the referendum for the ballot. Regarding *McIntyre's* "fear of economic or official retaliation [or] . . . concern about social ostracism," *id.* at 341, this private disclosure poses little risk because the proponents, the circulator, and the other persons signing on the same petition sheet share the common cause of getting the referendum on the ballot.³⁵

³⁴ See Brief *Amici Curiae* of Common Sense for Oregon, et al. at 23-26 (petition signing increasingly occurs without disclosure to other signers).

³⁵ No disclosure at this level constitutes a waiver of the privacy interest. As this Court said in addressing a privacy interest in *United States Department of Justice v. Reporters*

Second, petition signers and other members of the private association seeking to place the referendum on the ballot are compelled to speak when they submit the signatures to the Secretary for canvass and verification. This is no longer totally private speech, association, and belief, but it is “public” only in the sense that it is revealed to a public official (the Secretary) and those directly involved in the canvass and verification. It is not disclosure of identity, association, and belief to the general public. Here also there is little concern about giving up privacy or of social ostracism or retaliation because of the statutory protections, such as the fact that a government official retains the compelled information, observers of the canvass and verification may not write down any of the disclosed information, review of verification (if requested) is done confidentially by a court, and if the referendum is not qualified the petition sheets are destroyed. *See supra* at 8 n.15, 9 n.18. Compelling this minimal disclosure to the government is justified by the inter-

Committee for Freedom of the Press, 489 U.S. 749 (1989), “privacy encompasses the individual’s control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another.” *Id.* at 763. Consequently, “we deal not with an interest in total nondisclosure but with an interest in selective disclosure.” *Id.* at 763, n.14.

The Eighth Circuit held in *Glickman*, that under FOIA’s privacy exemption petition signers “did not waive their privacy interests” when they signed forms “with space for ten signatures” because they “would have no reason to be concerned that a limited number of like-minded individuals may have seen their names and thus discovered their position on the referendum. After all, they knew the petition forms would be collected and submitted to the USDA by the Campaign.” 200 F.3d at 1188.

ests the State has in not bearing the expense of putting issues on the ballot that have little public interest and in not requiring others to participate in this election absent such support.³⁶

Third, petition signers are compelled to speak to the public, disclosing their identity, association, and belief, if the petitions are released to the public. Suddenly privacy vanishes and concerns about social ostracism and retaliation rush forward. The question addressed in this case is whether the government can justify this level of compelled speech.

Important to the analysis is the distinction between private disclosure to the government and public disclosure. As the Eighth Circuit put it, “This type of privacy interest—one in which individuals seeks to keep information from the general public while simultaneously divulging it for limited purposes to others—is not unusual.” *Glickman*, 200 F.3d at 1188. The distinction is illustrated in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), a case involving an FEC investigation of campaign-finance complaints against the AFL-CIO, the DNC, and others. The FEC compiled numerous internal documents detailing information about volunteers, members, employees, activities, and political strategy that it planned to make public pur-

³⁶ There is no waiver of the privacy interest at this level of disclosure because, as the Eighth Circuit noted in finding non-waiver in *Glickman*, signers “knew their signatures would be collected and submitted to” the government agency verifying them, 200 F.3d at 1188 (“individuals divulge personal information to the government for limited purpose . . .”), but “[t]he present concern is that the petition not become available to the general public, including those opposing [the signers’ position],” *id.*

suant to its rule requiring release of investigation materials in closed cases. The union and DNC “assert[ed] that releasing the names of hundreds of volunteers, members, and employees w[ould] make it more difficult for the organizations to recruit future personnel.” *Id.* at 176.³⁷ The court’s analysis emphasized the private-public distinction: “[E]ven when requiring disclosure of political speech activities to a *government agency* may be necessary to facilitate law enforcement functions, we have held that ‘[c]ompelled *public* disclosure presents a separate first amendment issue’ that requires a separate justification.” *Id.* at 176 (*quoting Block v. Meese*, 793 F.2d 1303, 1315 (D.C. Cir. 1986) (emphasis added by *AFL-CIO*)). The Court held that the public-disclosure rule violated the First Amendment. The transferrable concept is that private (to the government) disclosure sufficed for government enforcement purposes and public disclosure was unjustifiable and in violation of First Amendment speech and association rights. Petitioners assert that any interests that Washington has may be met by private disclosure to the government. *See infra*.

From the foregoing, it is clear that compelled public disclosure of the identity, association, and belief of petition signers burdens privacy interests that the First Amendment was meant to protect. *See Bellotti*, 435 U.S. at 776. It is highly-protected core political speech.

³⁷ In addition to this future chill, the court noted that disclosure of strategies to opponents would “frustrate the organizations’ ability to pursue their political goals effectively.” *AFL-CIO*, 333 F.3d at 177.

II. Strict Scrutiny Is Required.

The district court correctly recognized that this is an as-applied challenge involving core political speech and the privacy interest in anonymous speech and so applied strict scrutiny. (CP-App. 38a (*citing McIntyre*, 514 U.S. at 346-47).) It was correct that strict scrutiny is required because *Buckley-II* required strict scrutiny of the petition-signing discussion and because the PRA, as applied to disclosure of referenda petitions, burdens core political speech and privacy of identity, association, and belief; is not viewpoint neutral; is content-based; and imposes heavy disclosure costs. *See infra*.

Though the Ninth Circuit recognized that “protected political speech” was burdened (CP-App. 13a), that the PRA would “deter[] some would be signers from signing petitions (CP-App. 15a), and that the PRA was “not an election regulation” (CP-App. 15a n.11), it employed intermediate scrutiny, applicable “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct” (CP-App. 14a (*quoting United States v. O’Brien*, 391 U.S. 367, 376 (1968) (internal quotation marks omitted)) to laws having “an incidental effect on expressive conduct” (CP-App. 15a). This was erroneous. There is no nonspeech element in the petition-signing discussion, *see Buckley-II*, 525 U.S. at 186 (collecting signatures is “core political speech”), and the Secretary’s policy of applying the PRA to referendum petitions creates more than a mere incidental effect on core political speech. Only by ignoring the fact that this as-applied case is about the protected petition-signing discussion, which “involves both the expression of a desire for political change and discussion of the merits of the proposed change,” *id.* at 199, could the court reach such a conclusion.

Buckley-II has already settled the level of scrutiny applicable to this petition-signing “discussion,” *id.*, holding that burdens must be narrowly tailored to serve compelling government interests, *id.* at 192 n.12.

Strict scrutiny also applies because the case involves burdens on core political speech. “When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.” *McIntyre*, 514 U.S. at 347 (citing *Bellotti*, 435 U.S. at 786 (equating “exacting scrutiny” with “strict scrutiny”)). *See also Buckley-II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating “core political speech” or imposing substantial burdens on First Amendment rights are always subject to strict scrutiny).

Strict scrutiny applies because the case involves burdens on privacy of identity, association, and belief. *See Buckley*, 424 U.S. at 64 (“exacting scrutiny”). This “strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights,” *id.* at 66. And this same scrutiny protects against intimidation that does not rise to the level of providing groups a blanket exemption. Strict scrutiny is applicable because the secret-ballot privacy interest applies since most petition signers likely signed a petition in response to the invitations in the “[h]ighlights” section of the form, so that revealing their names would reveal their votes. *See supra* at 21-22.

Strict scrutiny applies because the PRA is not viewpoint neutral as applied to the release of referendum petitions because it places heavier burdens on

those *opposing* government action than those supporting it. While both comply with campaign *finance* laws, see RCW §42.17.020(39), only those questioning the legislature’s wisdom suffer the *additional PRA disclosure* burden. The government favors supporters. The First Amendment prohibits the government from giving “one side of a debatable public question an advantage in expressing its views to the people.” *Bellotti*, 435 U.S. at 785-86.

Moreover, the PRA’s apparent facial content neutrality is undermined by ninety-five exemptions from public-record disclosure, RCW §§ 42.56.230–42.56.480, and there are 222 more exemptions under other state laws and another sixteen required by federal statutes. *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meeting Laws*, Chapter 12, pp. 12-1 through 12-4 (2006). Exemptions require officials to examine record contents to determine applicability. RCW § 42.56.580. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), cautioned that a general law, coupled with exemptions, may permit the government to “select the ‘permissible subjects for public debate’ and thereby to ‘control . . . the search for political truth.’” *Id.* at 51 (internal citations omitted); see also *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-15 (1981) (plurality opinion). The numerous exemptions also undercut the “credibility of the government’s rationale” for requiring disclosure in the first instance. See *Gilleo*, 512 U.S. at 52.

Strict scrutiny, or its functional equivalent in the form of high “exacting scrutiny” applies even if the level of scrutiny varies with the burden imposed. See *Davis*, 128 S. Ct. at 2774-75 (“the strength of the governmental interest must reflect the seriousness of

the actual burden on First Amendment rights.”). Here, given the serious harm to free speech, association, and belief by public disclosure, scrutiny must be strict. That the disclosure burden is high has become clearer after *Buckley* said (without the benefit of research on the effect of disclosure on First Amendment rights) that “sunlight is said to be the best of disinfectants,” *Buckley*, 424 U.S. at 67. Disclosure advocates seize on this language and often fail to adequately justify substantial burdens, treating “transparency” as a meaningful end in itself.³⁸ Time, experience, and studies have revealed the true costs inflicted by disclosure and suggest that it is time to reemphasize the importance of applying strict scrutiny to each application of a disclosure statute.

In 2007, the Institute for Justice commissioned one of the *first* studies to analyze the effects of disclosure on freedoms of speech, association, and belief. See Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at www.ij.org/publications/other/disclosurecosts.html) (“*Disclosure Costs*”). While the study involved campaign *finance* disclosure provisions, its findings illustrate the disconnect between public perception and actual evidence regarding disclosure.

³⁸ See, e.g., Dkt. 2, Ex. 4 at 2 (discussing State’s commitment to “transparency”). Nick Handy, State Elections Director, stated, “an unhealthy chilling effect occurs when public debate reaches a point where the passion of some individuals drives folks to take actions that are viewed by others as threatening or intimidating.” *Id.* He added, “Nobody is comfortable with releasing personal information in situations like this, but it is part of transparency in government. We hope people keep their cool.” *Id.* at 2-3.

Carpenter's study is important because it probed respondents beyond their general sentiments about disclosure statutes. Carpenter reported that nearly 80% of respondents favored the disclosure of the identities of individuals contributing to a ballot measure campaign.³⁹ *Id.* at 7. Carpenter probed further about the specifics of disclosure statutes. When the issue was personalized, support waned significantly. *Id.* Only 40% felt that their own name and address should be included and just 24% felt that their employer's name should ever be required. *Id.* Nearly 60% would think twice before contributing if it meant their name and address would be released to the public. *Id.* Even those strongly supporting disclosure indicated that they would be less likely to contribute if their information were released. *Id.*

Among reasons for not wanting personal information released, respondents cited a desire to remain anonymous, fear of retaliation (personal and economic), and that public disclosure would take away their right to a secret ballot. *Id.* Carpenter also explained that the public does not access campaign finance information:

The vast majority of respondents possessed no idea where to access lists of contributors and never actively seek out such information before they vote. At best, some learn of contributors through passive information sources, such as traditional media, but even then only a minority of survey participants could identify *specific* funders of campaigns related to the ballot issue

³⁹ Respondents were asked to state how they felt about the following statement. "The government should require the identities of those who contribute to ballot issue campaigns to be available to the public."

foremost in their mind. . . . Such results hardly point to a more informed electorate as a result of mandatory disclosure.

Id. at 13. *See also* Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, *The Independent Review*, 578 (Spring 2009) (*available at* www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf) (exploring further how the public fails to use disclosure reports). Thus, disclosure provisions do little to address the problem of voter ignorance described in *Buckley*, 424 U.S. at 68, while imposing substantial burdens on the First Amendment rights to privacy in speech, association, and belief.

Supplementing Carpenter's studies are real-world examples of harms resulting from disclosure provisions during recent elections.⁴⁰ *See, e.g.*, Brief of *Amicus Curiae* Alliance Defense Fund in Support of Appellant at 16, *Citizens United v. FEC*, No. 08-205 (U.S. 2009) (discussing reprisals against donors supporting California's Proposition 8 in 2008); Thomas M. Messner, *The*

⁴⁰ Evidence of social costs associated with compelled public disclosure was part of the record in *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-229 (D.D.C. 2003) (*per curiam*). Evidence ranged from numerous contributions at just below the disclosure trigger amount, to vandalism after public disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes not popular everywhere and the results of such disclosure. *Id.* *See also* William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 *Denv. U. L. Rev.* 195, 218-20 (2008) (discussing disclosure burdens).

Price of Prop 8, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009) (*available at* www.heritage.org/Research/Family/bg2328.cfm) (same). Petitioners here fear that similar reprisals will be directed at petition signers, especially in light of the threats and harassment already directed at individuals connected to the R-71 campaign. *See supra* at 7-12.

Technology has dramatically altered the disclosure environment considered in *Buckley*. Records available under the PRA were “public” in 1976, but access meant going to a government office during business hours. (CP-App. 61a (Initiative 276 § 28 (1972))). Searching records required manually flipping through documents stuffed in filing cabinets.⁴¹ It was often cost-prohibitive for individuals to obtain records. *See* Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec’y of State Blogs, Sept. 17, 2009 (*available at* <http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/>).

Today, records are kept in computer databases. Copies cost a nominal fee, are in electronic format, and can be uploaded to the Internet in searchable databases almost instantly. *See, e.g.*, www.knowthyneighbor.org (stating Washington is “Up Next”). Once on the Internet, the information can be combined with publicly available phone numbers and maps. *See, e.g.*, www.eightmaps.com.

In today’s “information age,” courts cannot ignore the tremendous invasions of privacy that occur when the government compels disclosure and allows it to

⁴¹ For example, Protect Marriage Washington submitted over 9,000 petitions sheets containing the names and other personal information of 138,000 individuals. (CP-App. 7a.)

become part of the public record. *See Reporters Committee*, 489 U.S. at 770 (“The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information.”) (internal citation omitted). For example, the Federal Rules of Civil Procedure now require litigants to redact certain personal identifying information because of identity-theft concerns. Fed. R. Civ. P. 5.2. The rule allows parties to move, for good cause, to redact additional information and limit or prohibit non-parties’ electronic access to filed documents. *Id.*

However, the concerns here go far beyond identity theft. Employers no longer must visit government offices during business hours to learn which employees supported referenda—they can do it from their offices. So can customers, suppliers, and neighbors. Recent elections demonstrate how individuals use disclosure reports to intimidate individuals exercising First Amendment rights. As the California Voter Foundation president said, “This is not really the intention of voter disclosure laws. But that’s the thing about technology. You don’t really know where it is going to take you.” Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. Times (Feb. 8, 2009) (available at <http://www.nytimes.com/2009/02/08/business/08stream.html>.)

Because of these high burdens on the privacy interest in controlling information about one’s identity, association, and belief while engaging in core political speech, “exacting scrutiny” is strict. Washington must prove that the PRA, as applied to compelled public disclosure of petition signers’ identity, association, and belief, is narrowly tailored to a compelling interest. But as shall be shown, Washington’s application of the PRA

to referenda petitions is also unconstitutional if Washington must only prove that releasing petitions is sufficiently related to an important interest.

III. Asserted Interests Were Neither Compelling Nor Important.

Though *Buckley* involved candidates, contributions, and expenditures, none of which apply here, it provides guidance on possible interests:

First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [“Information Interest”]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity [“Corruption Interest”]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [“Enforcement Interest”].”

Buckley, 424 U.S. at 66-68. *Buckley*’s Information Interest is focused on “campaign money,” which is not involved in petition signing, and then only in “large” amounts, *id.* And the Corruption and Enforcement interests are unique to candidate elections and cannot justify public disclosure of petition signers. See *Bellotti*, 435 U.S. at 789-90; *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031-32 (9th Cir. 2009); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003).

A. No Information Interest Is Sufficient.

The State asserts an information interest in publicizing names and contact information of petition signers. This interest is insufficient because it is neither compelling nor important.

First, the Information Interest is not absolute. It is designed to disclose who has demonstrated an interest in a referendum through substantial contributions and expenditures. *See Canyon Ferry*, 556 F.3d at 1032-33. It is not designed to advise the public who might generally favor or oppose referenda (even if merely signing a petition reliably indicated that, *see infra*). Such a broad information interest could justify requiring petition signers to disclose religious affiliation or income because such data could play a role in voters' decision-making processes, which would be extremely burdensome and chilling.

Second, the interest is compelling or important only if the information conveyed to the voters is significant. Marginal information gains cannot justify the substantial burdens imposed by compelled disclosure of the identities of 138,000 individuals.⁴² This is especially important for signers indicating only that issues are too important to be left to legislatures. (CP-App. 42a.) Thus, disclosing petition signers may spread misinformation about who supports or opposes referenda. And if signers indicated how they would vote, based on the “[h]ighlights” language on the forms, then the State

⁴² *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (remedy must alleviate problem in “direct and material way”).

has no legitimate interest in disclosing this information that is protected by the secret-ballot privacy interest. *See supra* at 21-22.

B. No Anti-Fraud Interest Is Sufficient.

The State asserts an anti-fraud interest that must also fail. First, fraud is a lesser concern during signature gathering than while voting. *Meyer*, 486 U.S. at 427-28. This is due to the justification for petition requirements—ensuring that issues have sufficient support to warrant the cost and effort of placing referenda on the ballot. At the petition stage, the question is merely whether the people should have the final say. Proponents failing to collect enough signatures would likely see their referendum fail at the polls. This provides little incentive for fraud during petition circulation, especially given criminal penalties. *See* RCW §§ 29A.84.210; 29A.84.230; 29A.84.250. Second, petition fraud prosecution is rare, *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (two in seven years), and was detected with traditional methods (signature comparison), public disclosure playing no part, *id.* Third, though petitions have been subject to release in recent years, the State has produced no fraudulent signature detected as a result of such public release.⁴³ This interest is neither compelling nor important.

⁴³ Even if the State were able to produce such evidence, a single fraudulent signature detected through the public release of a referendum petition would not justify the burdens that such disclosure represents. *See Turner Broad. Sys.*, 512 U.S. at 664 (remedy must alleviate problem in “direct and *material* way”) (emphasis added).

IV. Public Disclosure Is Neither Narrowly Tailored Nor Sufficiently Related.

Even if the asserted interests were sufficient, public disclosure of petition signers is neither narrowly nor sufficiently tailored, and there are less-restrictive means of advancing any interest, making compelled public disclosure of petition-signers' identity, association, and belief unconstitutional.

A. Public Disclosure Is Not Adequately Tailored to Any Information Interest.

Any information interest is more directly served through better-tailored regulations. There is already adequate public information about *proponents* and *financial* supporters. *See generally* RCW § 42.17.010 (campaign finance act). *See also* Washington Secretary of State, *Filing Initiatives and Referenda in Washington State: 2009 Through 2012*, at 6 (2009) (first step to start referendum is registration with campaign finance commission). Washington's long history of not publicly disclosing petition signers, *see supra* at 9 n.18, reveals that this more narrowly tailored approach adequately served any information (and anti-fraud) interest.

Even as to *contributions*, states may not require disclosure of contributors of de minimis amounts to ballot measure campaigns. *Canyon Ferry*, 556 F.3d at 1034. As Judge Noonan asked in concurrence, *id.* at 1036: "How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave \$76 to this cause. I must be against it!'" The interest in compelling public disclosure of *petition-signers'* identity, association, and belief is less weighty, so states cannot compel their disclosure. Here one could ask, "How do the names of petition signers affect anyone else's vote? Does any voter exclaim, 'Hank

Jones signed the petition. I must be against it!”

Public disclosure is neither narrowly tailored nor sufficiently related to any information interest.

B. Public Disclosure Is Not Adequately Tailored to Any Anti-Fraud Interest.

Any anti-fraud interest here is met by better-tailored means. First, there is limited, private disclosure to the government for signature verification. Only the Secretary has authority to canvass and verify petition signatures. RCW § 29A.72.230. This serves the State’s interest in ensuring that sufficient voters support the referendum. It also protects the integrity of the election process, along with observers who ensure proper procedures and potential subsequent judicial review. *See supra* at 9 n.18. The fact that public disclosure occurs under the PRA, not the elections code, illustrates the weakness of the asserted interest. If the goal were to allow for public assistance in the signature verification process, one would expect the elections code to mandate public disclosure and provide procedures for contesting names. And while Washington now permits release of petitions, it cites no instance where release yielded detection of a fraudulent signature. *See Washington Initiatives Now*, 213 F.3d at 1139.

Second, if Washington believes that its Secretary cannot be trusted to verify signatures, that its scheme of monitors and court review is inadequate to provide a check on the Secretary, and that citizens are needed for an independent canvass and verification, it could create a special mechanism for doing so while protecting privacy so as not to chill speech and association. It could randomly select citizen panels, along the lines of a grand jury, with members bound to secrecy in doing

an independent canvass and verification.

Third, there are criminal penalties. *See* RCW §§ 29A.84.210; 29A.84.230; 29A.84.250. The State has failed to demonstrate that penalties are inadequate to deter fraud. *See WRTL-II*, 551 U.S. at 479 (rejecting “prophylaxis-upon-prophylaxis approach”); *Buckley*, 424 U.S. at 56 (“There is no indication that the substantial criminal penalties for violating [the Act] combined with the political repercussion of such violations will be insufficient to police [the Act].”). The fact that fraud prosecutions have been rare, *Washington Initiatives Now*, 213 F.3d at 1139, indicates that penalties are adequately serving any anti-fraud interest.

The State failed to prove that public disclosure of petition signers’ identity, association, and beliefs is either narrowly tailored or sufficiently related to an anti-fraud interest, and it has failed to show that less-restrictive means are inadequate.⁴⁴

In sum, the State failed to meet its burden of proving that public disclosure of petition signers passes constitutional scrutiny. Consequently, Petitioners had likely success on the merits of their claim.

⁴⁴ California relies heavily on ballot initiatives but does not release petition-signer information, and there is no record of cognizable problems of the sort the State urges would exist absent the disputed disclosure here. *See* Cal. Elec. Code § 18650 (list of signatures may only be used to qualify initiative, referendum, or recall for the ballot); *see also Bilofsky v. Deukmejian*, 124 Cal. App. 3d 825, 830-831 (Cal. App. 1981) (recognizing privacy interest of petition signers).

V. Petitioners Properly Received a Preliminary Injunction.

Where one will likely succeed in proving that privacy of petition-signers' identity, association, and belief is constitutionally protected, then (a) there is irreparable harm if speech is compelled, (b) the government has no interest in violating constitutional rights, and (c) the public interest favors enforcing constitutional liberty.

A. Speech-Protective Standards Control.

Because this is a First Amendment preliminary-injunction case, it provides this Court the opportunity to apply its standards in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), to that context. Where free speech, association, and belief are involved, preliminary injunction standards must protect them. In First Amendment cases, preliminary injunction decisions often effectively decide the whole case because irretrievable speech opportunities are lost or irretrievable information is disclosed. This Court should require that *Winter's* standards be applied protectively in such contexts. While further development of this argument is precluded by space limitations, the subject was addressed in pages 29-31 of the certiorari petition.

B. Petitioners Had Likely Success on the Merits.

As shown already, Petitioners had likely success on the merits. *See supra* Parts I-IV. The other elements should have followed.

C. Plaintiffs Had Irreparable Harm.

If the identity, association, and belief of petition signers had been publicly disclosed, their First Amendment privacy interest in controlling information about

these would have been immediately and irreparably harmed. The same is true if their voting intent was revealed. Information published cannot be corralled. The release would have been particularly egregious because such compelled disclosure was not constitutionally justified. And if Plaintiffs had not received judicial protection, they would have suffered the irreparable injury of a reasonable probability of threats, harassment, and reprisals, which would also have chilled future participation in core political activity.

“Deprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction: “The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.” *Sumnum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (quoting *Elrod*); *Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (irreparable injury presumed when Plaintiffs state colorable First Amendment claim); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (“Where a plaintiff alleges injury from . . . regulation that directly limits speech, the irreparable nature of the harm may be presumed.”).

All doubt as to irreparable harm has been removed by this Court’s decision to stay broadcasting of the California trial on Proposition 8, in which this Court held that “it would be difficult – if not impossible – to reverse the harm from those broadcasts.” *Hollingsworth*, 130 S. Ct. at 712. Citing incidents of past

harassment, witnesses stated they would not testify if the trial were broadcast. *Id.* at 713. This Court noted the particular harms created by a nationwide broadcast and stated that individuals harassed for their testimony may be less likely to participate in future proceedings. *Id.* The same concerns are present here.

D. Balancing Equities Favored Petitioners.

While this Court has not had opportunity to provide similar speech-protective preliminary-injunction standards in First Amendment cases, in the Ninth Circuit, “[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellants’] favor.” *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). This is true even where “the merits of the constitutional claim were not clearly established at this early stage in the litigation,” *id.* (internal quotations and citations omitted), though they were clearly established in the present case. This speech- and association-protective standard should govern First Amendment cases.

Here, once the names of the petition signers were released to groups indicating they would place petition-signers’ names on the Internet, would contact signers, and would encourage harassment of signers, the First Amendment rights of those who signed the R-71 petition would have been violated. Considering the anemic nature of the state interests asserted in this context, a balance of harms favored Petitioners.

E. An Injunction Served the Public Interest.

Another Ninth Circuit decision provides a rule that

should control all preliminary-injunction analyses: “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Sammartano*, 303 F.3d at 974 (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Com’n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by “a strong showing of other competing public interests,” *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest for a court to find it in the public interest to deny injunctive relief. *Id.*

Here there was no interest—strong or otherwise—to justify the challenged public disclosure of petition signers’ identity and beliefs. It is in the public interest that First Amendment freedoms be preserved.

Conclusion

For the foregoing reasons, Petitioners properly received a preliminary injunction, the Ninth Circuit should not have overturned it, and the decision below should be reversed.

Respectfully submitted,
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