

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**

—◆—
**BRIEF OF AMICUS CURIAE
CONCERNED WOMEN FOR AMERICA
IN SUPPORT OF PETITIONERS**

—◆—
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INTEREST OF AMICUS CURIAE¹

Concerned Women for America (CWA) is a non-profit, tax-exempt corporation organized to protect and promote Biblical values among all citizens – first through prayer, then education, and finally by influencing our society – thereby reversing the decline in moral values in our nation. The vision of CWA is for women and like-minded men, from all walks of life, to come together and restore the family to its traditional purpose and thereby allow each member of the family to realize their God-given potential and be more responsible citizens.

CWA's Washington state group collected signatures for the Referendum-71 petition which is the subject of this appeal. CWA believes those signatories had a reasonable expectation that their personal information would not be disclosed for any other purpose than to verify the statutory requirements for signing a petition. Additionally, CWA seeks to protect those signatories from having their support of Referendum 71, their personal information, and the address of their family's home globally publicized and made available to individuals and groups with a history of harassment and intimidation against those opposed to the homosexual viewpoint. CWA believes that its public policy perspective will provide a useful

¹ No party counsel authored any of this brief and no party, party counsel, or person other than counsel for amicus curiae Concerned Women for America paid for brief preparation and submission. The parties consented to the filing of this brief.

additional viewpoint to this Honorable Court on relevant matters not already brought to its attention by the parties.



SUMMARY OF ARGUMENT

The state of Washington historically has protected the public trust by adhering to a policy of treating the signing of a referendum petition equivalent to voting and granting these two forms of political speech identical Constitutional protections – until the issue of the Referendum 71 (“R-71”) petition arose. The history of corruption and voter intimidation that led to the implementation of the secret ballot in our nation illustrates the need for anonymity for voters who sign referendum petitions today. The voters who signed the R-71 petition have the right to privacy in their signatures and personal identifying information placed on the petition. Signing the R-71 petition was substantially the same core political speech as casting a vote on the ultimate issue, and therefore the signatures, home addresses, and all other personal identifying information on the petition should be treated with the confidentiality of a secret ballot.



ARGUMENT

I. Signing The Referendum 71 Petition Equivalent To Casting A Vote

This Court is being called to consider whether voters who signed a referendum petition may be compelled against their will to have personal identifying information about themselves, their association, and their political opinions disclosed to the public at large. The importance of anonymity in signing a petition is best exemplified by its political counterpart – voting. Washington has had a long-standing public policy which regards voting and signing petitions as equivalent, and it is important that this Court consider the similarities and relationship between voting and signing a petition, and the history and reasons our nation implemented the secret ballot procedure in elections. The rationale that led to the use of secret ballots in our elections is the same argument that favors anonymity for voters who sign petitions today.

A. Voting And Signing Petitions Have The Same Prerequisites Of Law And Criminal Penalties For Violations

The action, or political speech, involved in signing the R-71 petition is substantially the same as casting a vote by secret ballot. The prerequisites of law for voting and signing a referendum petition are equivalent. To vote in the state of Washington one must be a legally qualified and registered voter. RCW

29A.08.010; RCW 29A.84.660. There are criminal penalties for registering to vote if not a qualified voter, for making a false statement regarding your residence on a voter registration form, for voting if not a registered voter and for voting more than once. RCW 29A.84.130; RCW 29A.84.660; RCW 29A.84.650. It is a crime to threaten or bribe a voter to vote for or against any person or ballot measure, or to use “menace, force, threat, or any unlawful means towards any voter to hinder or deter such a voter from voting . . . ” RCW 29A.84.620. Each of these voting offenses is a class C felony punishable under RCW 9A.20.021. *Id.*; RCW 29A.84.130; RCW 29A.84.660; RCW 29A.84.650.

Similarly, to sponsor or sign a referendum petition in the state of Washington one must be a legally qualified and registered voter. RCW 29A.72.010; RCW 29A.84.230. There are criminal penalties for signing a petition if not a legal voter, for signing a petition with another name, for making a false statement regarding your residence on an initiative or referendum petition, or for signing a petition for the same initiative or referendum more than once.² RCW 29A.84.230. It is a crime to:

² The R-71 petition had a warning printed in bold in a box at the top of the petition stating, “WARNING: Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or

(Continued on following page)

“Interfere with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum petition or with the right to *vote* for or against an initiative or referendum measure by threats, intimidation, or any other corrupt means or practice;”

RCW 29A.84.250 (emphasis added). Note that the Washington legislature treats interfering with a voter signing a petition and interfering with a voter’s right to vote for or against a referendum equally in the eyes of the law. *Id.* Each of these crimes is a gross misdemeanor punishable under RCW 9A.20.021. *Id.* If the law treats the actions, or political speech, of signing a petition and voting with the same protection from criminal interference, then it logically follows that they should be treated with equal confidentiality by the law as well.

B. Washington Public Policy Has Treated Voting And Signing Petitions Equally

Public officials in the state of Washington have long held the position that signing petitions and casting a secret ballot are equivalent and deserve the same strict protection from publication. G.W. Hamilton, Washington’s Attorney General in 1938, explained the public policy of the state this way:

imprisonment or both.” *See* Joint Appendix to Petitioners’ Brief pp. 31-32.

“[i]t is the public policy of this state that we uphold the secret ballot in every particular and *these petitions are, more or less, in effect a vote of those who sign the petitions* requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied.”

Wash. Op. Att’y Gen. 378 (1938) (emphasis added).³ Even after Washington’s current Public Records Act was enacted, the Secretary of State of Washington, A. Ludlow Kramer, issued an Official Statement that held:

“It has been my policy not to release the names of citizens signing initiative or referendum petitions. As far as I am concerned petitions are not public records and are being held in trust by this office. I consider *the signing of an initiative or referendum petition a form of voting by the people*. Furthermore, the release of these signatures have no legal

³ See also Washington Attorney General Opinion stating that after the secretary of state has counted the signatures on an initiative petition and found it to be sufficient, the bound volumes of such signatures are not public records and should not be available for public inspection. “In our opinion to regard such signatures as public records would be contrary to public policy.” Wash. Op. Att’y Gen. 55-57 No. 274 (1956).

value, but could have deep political ramifications to those signing. I will not violate the public trust.”

A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (emphasis added).

C. Interpretation Of Signing Petitions As Secret Ballots

Federal Courts as well as state courts, when considering the issue of whether a petition should be treated as a secret ballot, have concluded the privacy interests equivalent. The Eighth Circuit Court of Appeals recently determined that petitions have the same privacy interest as secret ballots:

... those signing the petition all declared their position on the ultimate issue: “We support a voluntary checkoff program.” In so doing, petitioners all unequivocally declared that they would vote to end the mandatory program and thus return to the voluntary program. *To make public such an unequivocal statement of their position on the referendum effectively would vitiate petitioners’ privacy interest in a secret ballot.*

Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187 (8th Cir. 2000); *See also Daily Gazette Company v. Bailey*, 152 W. Va. 521, 528, 164 S.E.2d 414, 418 (1968), and *The Shepherdstown Observer v. Maghan*, No. 09-c-169 (Jefferson County, W. Va. 2009) (noting “many signers of the certificates indicated that they would not have signed had they believed

their names would be published.”). The Washington Constitution provides that “[a]ll elections shall be by ballot. The 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 (emphasis added). The United Nations has proclaimed that the secret ballot is a fundamental human right. United Nations Universal Declaration of Human Rights, Art. 21.⁴ “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” *Id.* Such worldwide recognition that tyranny and oppression results from violating a voter’s right to privacy and confidentiality in political expression clearly holds true for both the secret ballot and voters who sign petitions. Having petitions published globally on the internet and votes cast in elections kept by secret ballot would violate the UN’s proclamation for “equivalent free voting procedures.” *Id.*

Even the language on referendum petitions indicate to the voter that signing a petition is declaring a position, i.e. voting, on the ultimate issue decided in a

⁴ The United Nations Universal Declaration of Human Rights, adopted on December 10, 1948 by the UN General Assembly, is available at www.un.org.

later election.⁵ The R-71 petition contained the words “Ballot Measure Summary” and “Ballot Title” at the top of the petition. *See* Joint Appendix to Petitioners’ Brief pp. 31-32. Based upon the language of petitions, and the long legal precedent and public policy of the state of Washington, the individuals who signed the petition reasonably had confidence that their signatures and private information, including the location of their homes where they and their children reside, would not be disclosed by the government to the public and world at large.

II. The Secret Ballot

A. History Of Voting In The United States

As the signing of the R-71 petition was equivalent to casting a vote, this case involves the most significant right held by citizens of this country, the right to freely and without hindrance vote one’s conscience. The right to vote is recognized by this Court as “a right at the heart of our democracy.” *Burson v. Freeman*, 504 U.S. 191, 198 (1992). The “right to vote

⁵ The R-71 petition contained language highlighted in a banner across the top stating, “[t]he legislature just passed a law that effectively makes same-sex marriages legal. By signing R-71 we can reverse that decision and protect marriage as between one man and one woman” and “[i]f same-sex marriage becomes law, public schools K-12 will be forced to teach that same-sex marriage and homosexuality are normal . . . even over the objections of parents. Sign R-71 to protect children.” *See* Joint Appendix to Petitioners’ Brief pp. 31-32.

freely . . . is of the essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). It has always been recognized as one of the most precious rights of the citizens of our country. “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesbury v. Sanders*, 376 U.S. 1, 17 (1963).

Throughout history the democratic process has evolved in response to undue external influences to protect the integrity of elections and citizens’ right to vote their conscience freely. During the colonial period voters cast their vote by *viva voce*, voice vote, or by a showing of hands. *Burson* at 200. Voting orally or by a showing of hands meant that your vote was known by all and that lack of secrecy naturally led to corruption, bribery, intimidation, fraud and violence.⁶ Footnote 6 in the *Burson* decision describes the open corruption of the voice vote and showing of hands methods of elections:

⁶ *Id.*; *George et al. v. Mun. Election Commission of Charleston*, 335 S.C. 182, 188 (1999); *See generally* E. Evans, *A History of the Australian Ballot System in the United States* 1-6 (1917); J. Harris, *Election Administration in the United States* 15-16 (1934); J. Rusk, *The Effect of the Australian Ballot Reform on Split Ticket Voting: 1876-1908*, pp. 8-11 (1968); G.H. Utter and R.A. Strickland, *Campaign and Election Reform: A Reference Handbook*, 8-9 (1997); Wright and Graham, *Federal Practice and Procedure: Evidence*, 5632 (1992) (discussing history of secret ballot in connection with rejected rule of evidence on voter’s privilege).

One writer described the conditions as follows: ‘This sounds like exaggeration, but it is the truth; and these are facts so notorious that no one acquainted with the conduct of recent elections now attempts a denial – that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the Government; that systematic organization for the purchase of votes, individually and in blocks, at the polls, has become a recognized factor in the machinery of the parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election.’

Burson at note 6. By the late 1700s most states had begun using a paper ballot, with voters preparing their own handwritten ballot at home and then delivering the ballot to the polling place. *Id.* Seeing opportunity, political parties and candidates soon began preparing brightly colored or specially designed ballots to give to the voters. *Id.* These ballots could be recognized at a distance and once placed in the hands of a bribed or intimidated voter, the vote buyer could watch until it was placed in the ballot box. *Id.*

Approaching a polling place in those days to vote was quite literally placing oneself in mortal danger as they were “scenes of battle, murder, and sudden

death.”⁷ Like the *viva voce* method, the paper ballot system was fraught with corruption, fraud and abuse, leaving voters helpless pawns in the manipulative hands of the political system.⁸ Voter intimidation, especially by employers, was extensively practiced:

Many labor men were afraid to vote and remained away from the polls. Others who voted against their employers’ wishes frequently lost their jobs. If the employee lived in a factory town, he probably lived in a tenement owned by the company, and possibly his wife and children worked in the mill. If he voted against the wishes of the mill-owners, he and his family were thrown out of the mill, out of the tenement, and out of the means of earning a livelihood. Frequently the owner and the manager of the mill stood at the entrance of the polling-place and closely observed the employees while they voted. In this condition, it cannot be

⁷ *Burson* at 204, quoting W. Ivins, *The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association* 316 (1906).

⁸ A committee report of the 46th Congress describes how average citizens were hindered from exercising their own right to vote freely, “men were frequently marched or carried to the polls in their employer’s carriages. They were then furnished with ballots and compelled to hold their hands up with their ballots in them so they could easily be watched until the ballots were dropped into the box.” *Burson* at note 7.

said that the workingmen exercised any real choice.

Id. at note 7, quoting Evans 12-13. Then, much like today, “. . . the failure of the law to secure secrecy opened the door to bribery and intimidation.” *Id.* at 201.⁹

B. The Australian Ballot

To combat the violence and corruption experienced not only in the United States but worldwide in emerging democracies, an Australian lawyer by the name of Henry Samuel Chapman invented the government-printed ballot slip in 1856 that became known as the “Australian ballot” or “secret ballot.”¹⁰ Chapman’s invention quickly spread from Australia to New Zealand, and then England, Canada, Belgium, and from 1888 to 1892 it made its way through half of the American states.¹¹ The secret ballot is widely recognized today as crucial to maintaining the integrity of the electoral process, and is

⁹ See generally Evans 7, 11; Harris 17, 151-152; V. Key, *Politics, Parties, and Pressure Groups* 649 (1952); J. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920*, p. 36 (1988); Rusk 14-23.

¹⁰ Brent, Peter, *The Australian ballot – born 1855 and still going strong*, *The Canberra Times*, Dec. 19, 2005.

¹¹ *Id.*

now used in emerging democracies like Iraq.¹² The evolution of elections over time demonstrate the need for the secret ballot and the confidentiality of citizens' political choices in a free society, which today extend to the signatures of voters on referendum petitions.

III. Privacy Concerns

A. Private Information On Petitions

The harassment, threats, intimidation and corruption that led to the vote by secret ballot in this country are just as present for modern day petition signers.¹³ The risk of reprisal for a minority opposition who signs a petition is the same as that of a voter, and in fact, in some regards is even greater. When a citizen casts a secret ballot, that ballot does not contain the voter's name, home address, or email address. A secret ballot only contains the voter's opinion on the ultimate issue in the election without any identifying information regarding the voter himself. However, when a voter signs a referendum petition, the petition contains the voter's opinion on the ultimate issue as well as his personal email

¹² *Id.*; *See also* The United Nations Universal Declaration of Human Rights, Art. 21, adopted on December 10, 1948 by the UN General Assembly (available at www.un.org).

¹³ *See also* Petitioners' Brief pp. 2-12, describing in detail the harassment, pecuniary harm, intimidation and violence directed at voters across the country once their names, political positions and home addresses were published worldwide on the internet.

address and the home address.¹⁴ Therefore, it is reasonably concluded that voters who sign referendum petitions have an even more urgent privacy interest in having the petitions held in confidence by the government than voters who cast secret ballots. The global publication on the internet of this personal information encompasses privacy and safety issues extending beyond the voter who signed the petition to his or her spouse, innocent children, any other individual residing with the signer, and even their neighbors.¹⁵ In California, Proposition 8 supporters had their homes egged, floured and even urinated on.¹⁶ Obviously, the release of the home address information of petition signatories leaves even their neighbors and their neighbors' property in peril.

B. Voter Intimidation In The Global Village

The resurgence of the problems seen before the implementation of the secret ballot, now being used to intimidate and harass voters who sign petitions, illustrate the need for maintaining the same confidentiality of the secret ballot with regard to petitions. The privacy concerns of citizens is even more

¹⁴ See Joint Appendix to Petitioners' Brief pp. 31-32.

¹⁵ See Petitioners' Brief pp. 2-12 describing in detail the vandalizing of homes and damage to personal property of voters whose names, political positions and home addresses were published worldwide on the internet.

¹⁶ See Petitioners' Brief pp. 2-12.

profound now in the “global village” of the internet realm. The “global village” as popularized in Marshall McLuhan’s books *Understanding Media* and *The Global Village*, describes how the globe has been contracted into a village by electric technology and the “all-at-onceness’ character of information moving at the speed of light” to all corners of the world.¹⁷ The ease with which voters names, email addresses, home addresses, and vote for or against a referendum petition can be disseminated around the globe, even with pictures and maps to the voters’ residences and places of business, is stunning. This kind of immediate ability for dissenters around the globe to have “uncomfortable conversations” with voters against a local proposition could never have been foreseen by the founders of our country.¹⁸ There is no way that the voters who signed the R-71 petition could have reasonably foreseen there was a possibility the personal information of where they, their children and their spouses reside would be broadcast to every corner of the world instantaneously. There is no precedent for any such event in Washington’s history. Given the additional risks of identity theft and harassment from persons worldwide who disagree with

¹⁷ McLuhan, Marshall & Powers, Bruce R., *The Global Village: Transformations in World Life and Media in the 21st Century*, 1 (Oxford University Press, 1989).

¹⁸ See www.knowthyneighbor.org and www.whosigned.org, advocating “uncomfortable conversations,” i.e. harassment and coercion into silence, between homosexual activists and the voters who signed R-71.

the R-71 petition, the publication of this and any other political petition on the internet would not only have a chilling effect on participation in the democratic process, it would freeze our democracy to a standstill.

Publication of this kind of personal information regarding the voters of the United States on the internet would even allow our enemies to participate in our government's political process through voter intimidation. With the assurance of anonymity, voices of dissent to the party in majority may exercise their right to speech without fear of reprisal. In contrast, with the threat of not only local but immediate worldwide publication of an unpopular position on a matter put to vote along with voters' private residential information, who would be bold enough to speak? Would a timid person vote their conscience in the face of global opposition? Indeed not. The danger to private citizens and their families from the instantaneous worldwide publication of this type of information increases exponentially due to the global village in which we live.

In the days before the secret ballot, workers and their families were particularly vulnerable to manipulation from employers, such as mill workers in company towns threatened with the loss of their job and home for the failure to deliver a vote for the mill owner's candidate or issue of choice.¹⁹ Modern day

¹⁹ Evans 12-13.

petition signatories face the same persecution and even worse if their personal information is released and published by advocates of a different viewpoint. The compelled disclosure of the names and personal information of supporters to Proposition 8 in California led to organized boycotts and blacklists of businesses, harassment and email threats against the physical safety of supporters and their families, death threats, vandalism of personal property, staircases of homes covered in urine, individuals fired or forced to retire from their jobs, and even forced out of church membership.²⁰ Just like the voter intimidation that took place in the 1800s, the results of this modern-day intimidation is a severe chilling effect on individuals from engaging in political speech.²¹

This type of voter intimidation and harassment, if allowed to continue, not only affects those directly harmed by the global publication of private voter information, it cuts to the core of our civil liberties and undermines our very way of life. As this Court has stated, “[n]o right is more precious in a free country . . . Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesbury*

²⁰ See Petitioners’ Brief pp. 2-12.

²¹ See *The Shepherdstown Observer v. Maghan*, No. 09-c-169 (Jefferson County, W. Va. 2009) (noting “many signers of the certificates indicated that they would not have signed had they believed their names would be published.”), and Petitioners’ Brief p. 6, note 13 reporting harassed citizens who will not support causes in the future after having their names, addresses and political positions published worldwide on the internet.

at 17. The harassment and intimidation campaign undertaken against Proposition 8 supporters in California and R-71 signatories in Washington is far more sinister than that suffered by voters in the 1800s due to the modern realities of the global village.²² If the names and personal information of the voters who signed the R-71 petition are released, the internet reality opens up their harassment and intimidation to anyone who logs on to the worldwide web. Wrongdoers and tormenters from every corner of the globe will be able to participate in the bullying and coercion into silence the voters against a proposition they support from anywhere in the world.



CONCLUSION

In the context of elections and referendum petitions, reprisal and intimidation against citizens for exercising their right to support or reject a candidate or initiative runs contrary to the basic tenets of our free society. Whether it's the mill owner of the 19th century firing an employee and evicting him and his family out of their company housing for voting against the mill owner's candidate of choice, or the political blogger of today posting the name and home address with Google map of a voter who signed a petition against a cause advocated by the blogger, voter intimidation is a disease that weakens our free

²² McLuhan & Powers 1.

republic, and the secret ballot and confidentiality of political petitions are the cure.

For the foregoing reasons, Amicus Curiae Concerned Women for America respectfully file this Brief in support of Petitioners request that the decision of the Ninth Circuit be reversed.

Respectfully submitted,

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