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No. 09-559

In The
Supreme Court of the United States

JOHN DOE #1, ET AL.,
Petitioners,
v.
SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,
Respondents.

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

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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March 1, 2010

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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The right to petition government for redress of grievances may seem like a constitutional stepchild, rarely considered in modern case law. But it is a cornerstone of the First Amendment. This case puts the spotlight on the right to petition, as well as the more familiar rights to speech and association. If the Washington Public Records Act ("Washington PRA") is applied to require widespread disclosure of the names and residential addresses of all those who sign a

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

controversial petition, all of these rights are jeopardized.

The website organizers seeking disclosure of the Referendum 71 petitions may claim to facilitate free expression when they post lists of petition signers online to encourage discussion. But the intimidating effect is exactly the opposite. These broad, intrusive disclosures of personal information extend far beyond the borders of Washington State, to persons around the world with no legitimate claim to this information. And while these disclosure requirements undoubtedly merit strict scrutiny, even under a more lenient intermediate standard they must fall. Disclosures about *private* speakers do not promote *government* transparency, and existing statutory procedures adequately preserve the integrity of the referendum process.

I. THE REFERENDUM IMPLICATES A CLUSTER OF INTEGRALLY RELATED FIRST AMENDMENT RIGHTS: SPEECH, ASSOCIATION, AND THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES.

The First Amendment rights to free speech and press "were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." *Thomas v. Collins,* 323 U.S. 516, 530 (1944). These rights are inseparable but not identical.

Speech, association, and petition rights are all at stake in this case. The Washington petition signers have associated in order to speak to their elected

representatives and express their concerns about certain legislation. This "interactive communication concerning political change…is appropriately described as core political speech." *Meyer v. Grant*, 486 U.S. 414, 422 (1988); *Buckley v. Am. Constitutional Law Found. (Buckley II)*, 525 U.S. 182, 186 (1999) ("*Buckley II*"). The Ninth Circuit recognized the referendum as speech, implicating the First Amendment. *John Doe #1 v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009). But more fundamentally, this particular speech is a petition for the redress of grievances, addressed to the Secretary of State of the State of Washington. Its opening line identifies the private speakers as "[w]e, the undersigned citizens and legal voters of the State of Washington." *Id.* at 675.

This Court has long recognized the right to petition government as "one of the attributes of citizenship under a free government." *United States v. Cruikshank*, 92 U.S. 542, 551 (1876). The states may not abridge the right to peacefully assemble, discuss matters of public concern, and communicate respecting them. U.S. Const. Amend. 14, § 1; *Hague v. CIO*, 307 U.S. 496, 512 (1939) (striking down permit requirement for parades or assemblies). All citizens share this right to petition regardless of the content of their ideas. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196 (2003). The referendum process is a "basic instrument of democratic government." *Id.*, at 196, citing *City of Eastlake v. Forest City Enterprises, Inc.,* 426 U.S. 668, 679 (1976).

Although it "look[s] to the modern eye almost like an afterthought," petitioning was "at the core of constitutional law and politics" in early America.

Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2153, 2157 (1998) ("*Vestigial Constitution*"). Far from being an afterthought, it was originally the "capstone" of the First Amendment. *Id*. at 2157.

The right to petition has a rich history that long predates the U.S. Constitution. Petitions were addressed to kings even before the Magna Carta, commonly as an appellate mechanism to correct error. *Id.* at 2163. Petitioning became part of the political fabric of England, whereby Englishmen communicated their grievances to the king and prayed for relief. *Id.* at 2169-2174. English colonists in America "understood petitioning as the foundation of politics and of individual and collective participation in politics, warranting the highest degree of protection." *Id.* at 2174. Early American colonies repeatedly affirmed the right to petition enjoyed by all persons. *Id.* at 2175. The Declaration of Independence bears witness to the primacy of petitioning as a vehicle for redress of grievances:

> In every stage of these Oppressions We have *Petitioned* for Redress in the most humble terms: Our repeated *Petitions* have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.
>
> The Declaration of Independence, para. 2 (U.S. 1776), cited in *Vestigial Constitution*, 66 Fordham L. Rev. at 2192 (emphasis added)

Petitions were a means of active participation in government for early American citizens, perhaps even more than voting. *Id.* at 2194. Many early state constitutions protected the right to petition. *Id.* at 2195. Instead of the deferential pleas to monarchs that characterized petitioning in past centuries, petitions in early America were the communications "of a free people [to] their servants." *Id.* at 2205.

More recently, the right to petition has received scarce consideration, having seemingly merged with other First Amendment rights such as speech, press, and association. *Id.* at 2155, 2158. Yet because it is still an essential component of the First Amendment, this case is an excellent opportunity to consider its nature and application in modern times.

A. Petitioning Is Neither An Act Of Government Nor Expressive Conduct Subject To Regulation.

The Ninth Circuit did not reach the State's argument that the referendum petition was a legislative act rather than protected speech. *John Doe #1 v. Reed*, *supra*, 586 F.3d at 677 n. 9. But the distinction between protected private expression and governmental action is critical to determining whether the mandated disclosures actually promote government transparency. This Court has held that:

> Statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, *do not, in and of themselves, constitute state action* for the purposes of the Fourteenth Amendment.

> *City of Cuyahoga Falls, supra*, 538 U.S. at 196 (no state action in referendum allegedly motivated by racial bias) (emphasis added)

The Washington referendum is an expression by the private citizens who signed the petition, not the speech or action of any governmental entity.

The Ninth Circuit acknowledged a speech "element" in the referendum but erroneously analogized it to the draft-burning expressive conduct in *United States v. O'Brien*, 391 U.S. 367 (1968). The opinion went further off track by assuming there was merely an "incidental deterrent effect" on potential petition signers that could be justified by the state interests asserted. But the "act" of signing a petition is more like writing a news article, book, or other communication that clearly constitutes protected speech rather than expressive conduct.

Petitioning is directly related to the legislative process in that the people are communicating their desire to place a political issue before the voters, who will vote to enact or repeal particular legislation. It also involves the "act" of lifting a pen and signing one's name. But regardless of these elements, the right of the people to petition government for redress of grievances is a core independent right protected by the First Amendment.

B. Referendum Procedures Must Comply With The First Amendment, And The Washington Public Records Act Must Not Be Applied In A Manner That Tramples The Right To Petition.

The referendum is a state-created right not mandated by the Constitution, yet it serves "[a]s a basic instrument of democratic government." *City of Eastlake v. Forest City Enters., Inc.*, *supra*, 426 U.S. at 678; *Molinari v. Bloomberg*, 564 F.3d 587, 597 (2d Cir. 2009). Where a state does grant the right of referendum such as the one conferred by the State of Washington, the initiative procedure must conform to the U.S. Constitution. *Meyer v. Grant, supra*, 486 U.S. at 420; *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993). This is comparable to the constitutional constraints on government entities that create limited public fora. Limits on access must be reasonable and viewpoint neutral in order to preserve and respect basic First Amendment rights. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-393 (1993). Similarly, the State of Washington must not impose substantial burdens on the speech and association rights of citizens who utilize the state's referendum right (Wash. Const., art. II, §§ 1 & 1(b)) as a means to petition the state government for redress of grievances.

Courts must guard against unconstitutional applications of a statute. This Court refused to apply the Sherman Anti-Trust Act against railroads that

conducted a public campaign to bring about changes in laws related to truck weight limits--allegedly to restrain trade and monopolize the long-distance freight business. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961). This Court explained that the Sherman Act could not prohibit persons from associating in an attempt to persuade the legislature to change the law, because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id*. at 137. If applied to such activities, the Sherman Act would improperly invade the First Amendment right to petition. *Id*. at 138-139. *See also United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition").

In a similar vein, when this Court upheld certain monetary disclosures for congressional lobbyists, the law was narrowly construed to avoid trampling the right to petition. The dissent would have gone even further, pointing out that:

> If this right [to petition] is to have an interpretation consistent with that given to other First Amendment rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government.
>
> *United States v. Harriss*, 347 U.S. 612, 635 (1953) (Jackson, J., dissenting)

The citizens of the State of Washington are entitled to that same "large immunity" as they petition their state

government. Widespread disclosure of their names and residential addresses, under the rubric of *government* transparency and other pretenses, strays far away from the First Amendment's protective umbrella.

II. THE DISCLOSURE REQUIREMENTS MERIT STRICT SCRUTINY--BUT CANNOT EVEN PASS INTERMEDIATE SCRUTINY.

The people's exercise of their right to petition government is core political speech, "an area in which the importance of First Amendment protections is at its zenith." *Meyer v. Grant, supra*, 486 U.S. at 425. This Court should "err on the side of protecting political speech rather than suppressing it." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2559 (2007). The "truth, popularity, or social utility" of the ideas expressed is irrelevant. *NAACP v. Button*, 371 U.S. 415, 445 (1963).

Burdens on core political speech merit exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347 (1995) ("*McIntyre*"). Limitations on "the power of the people to initiate legislation are closely scrutinized and narrowly construed." *Meyer v. Grant, supra*, 486 at 423. There must be a "relevant correlation" or "substantial relation" between the statute and the governmental interest asserted. *Buckley v. Valeo, supra*, 424 U.S. at 64; *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). Moreover, the statute must be narrowly tailored to serve a compelling state interest. *McIntyre, supra,* 514 U.S. at 347; *Buckley II, supra*, 525 U.S. at 206. Even the Ninth Circuit has acknowledged this heightened level of scrutiny where the burden on core

political speech is severe. *Caruso v. Yamhill Cy. ex rel. Cy. Comm'r*, 422 F.3d 848, 859 (9th Cir. 2005), citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), *Norman v. Reed,* 502 U.S. 279, 289 (1992).

Under some circumstances, it is appropriate to utilize a balancing framework, applying strict scrutiny only to more severe burdens. But when core political speech is at issue, this Court has "ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech." *Buckley II, supra*, 525 U.S. at 207-208 (Thomas, J., concurring). In *McIntyre*, this Court suggested that the severe/lesser burden framework was only appropriate for cases involving the mechanics of the process rather than speech itself. *McIntyre, supra,* 514 U.S. at 345. This case involves far more than mechanics. The people of Washington are "speaking" to their government to say that a particular issue should be placed on the ballot.

This Court has long recognized that compelled disclosures impose "significant encroachments" on political speech that require more than merely a legitimate state interest. *Buckley v. Valeo, supra*, 424 U.S. at 64; *Davis v. FEC, supra*, 128 S. Ct. at 2774-2775. The nature of the rights asserted--to petition government for redress of grievances, coupled with basic speech and association rights--along with the severity of the burden, warrants strict scrutiny by this Court.

The Ninth Circuit jettisoned strict scrutiny in favor of an intermediate standard, concluding that the mandatory disclosures were "incidental" restrictions that merely had to further "an important government

interest unrelated to the suppression of free expression." *John Doe #1 v. Reed, supra*, 586 F.3d at 679. But even under this relaxed standard, the statute must fall as applied to this case. These broadly tailored disclosures have an unreasonably chilling effect on the exercise of fundamental First Amendment rights and only a tenuous connection with the government interests asserted.

A. The Disclosure Requirements Do Not Further The Alleged Interests In Government Transparency And/Or Preserving The Integrity Of The Process.

As Justice Scalia observed in his dissent to the recently overturned *Austin* decision:

> [G]overnmental abridgment of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars).
>
> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting) (overruled in *Citizens United v. FEC*, 175 L.Ed.2d 753, 798 (2010))

The State of Washington asserts noble objectives: "(1) preserving the integrity of the election by promoting government transparency and accountability; and (2) providing Washington voters with information about who supports placing a referendum on the ballot." *John Doe #1 v. Reed, supra*,

586 F.3d at 679. But Washington must connect the dots. The State must demonstrate a relationship between the interest it asserts and the burden it imposes on core political speech.

In *Bates v. City of Little Rock*, 361 U.S. 516 (1960) a city ordinance violated the local NAACP's constitutional right of peaceable assembly by requiring all "organizations" to file financial statements listing contributors and dues payers. The ordinance allegedly required this information to ascertain the validity of a tax-exemption claim. But that assertion did not save ordinance, because the record did not reveal that any tax claim had even been asserted against the organization, or that any exemption had ever been sought, claimed, or granted. This Court could not connect the "dots":

> In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People.
>
> *Id.* at 525

Similarly, there is no relevant correlation between the interest in government transparency and the proposed application of the Washington PRA (Wash. Rev. Code § 42.56.001 et seq.) against the petition signers.

1. The Statute Does Not Promote *Government* Transparency Because It Requires Disclosure Of Personal Information About *Private* Speakers.

Private speakers engaged in issue advocacy should not be subjected to intrusive disclosure requirements under the pretext of promoting *government* transparency. The Washington petition signers have associated to express their concerns on a particular issue. Widespread disclosure of their names and addresses has only a tenuous link to government transparency--an interest adequately served by the existing verification procedures to confirm the accuracy of petitions.

In *United States v. Rumely,* 345 U.S. 41 (1953), this Court refused to apply certain disclosure requirements against the Committee for Constitutional Government, an organization that sold books of a political nature. When the organization's secretary (Rumely) refused to disclose the names of bulk purchasers, he was convicted of violating a law that required disclosures for all congressional lobbying activities. This Court overturned his conviction, limiting the term "lobbying activities" to direct contacts with Congress rather than extending it to attempts "to saturate the thinking of the community." *Id.* at 47.

More recently, even the Ninth Circuit acknowledged the chilling impact of imposing disclosure regulations on grassroots lobbying. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). A church member used her own paper to make less than fifty copies on the church's copier of a petition to collect

signatures to place a proposed constitutional amendment on the ballot in November. The church also broadcast a film, "Battle for Marriage," in connection with its regular Sunday evening service. The service was open to the public, and five radio stations aired public service announcements about the film without charge to the church. The church also photocopied and distributed fliers about the film, through bulletin inserts and its lobby. The petition was circulated among church attendees one Sunday, at all three services, to collect signatures. The Ninth Circuit easily found that required disclosures of these de minimus expenditures violated the church's First Amendment rights. *Id*. at 1031. The names and home addresses of individual petition signers are similarly de minimus, contributing nothing to *government* transparency while imposing onerous, irrational burdens on the privacy of association.

Like the Committee for Constitutional Government and the Canyon Ferry Baptist Church, the Washington petition signers are engaged in classic issue advocacy that does not pose any potential for corruption or undue financial influence. The Ninth Circuit once held that "mandating disclosure of the financiers of a ballot initiative may prevent the wolf from masquerading in sheep's clothing." *Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1106 n.24 (9th Cir. 2003). But here, there are no monetary contributions or expenditures to disclose "as a control or check on domination of the initiative process by affluent special interest groups." *Buckley II, supra*, 525 U.S. at 202.

Moreover, this case does not implicate the danger of corruption that might arise in the context of a political campaign:

> [T]he second interest--deterring corruption or the appearance thereof--falls out of the picture in the context of ballot initiatives, for such referenda present no risk of *quid pro quo. See, e.g., First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . is not present in a popular vote on a public issue."); *Mont. Chamber of Commerce v. Argenbright,* 226 F.3d 1049, 1056 (9th Cir. 2000) (same).
>
> *Canyon Ferry Rd. Baptist Church, supra,* 556 F.3d at 1031-1032; *see also Buckley II, supra*, 525 U.S. at 203, *Caruso, supra*, 422 F.3d at 856.

Finally, the government is not the party seeking the disclosures in this case. Private parties are requesting information about other private parties. In *Uphaus v. Wyman*, 360 U.S. 72 (1959), the government sought a list of persons registered at a camp organized for political discussion. State law already required that the guest list be available to local law enforcement officers. The government was investigating subversive activities and had a compelling interest in self-preservation that was sufficient to override the camp guests' interest in associational privacy. *Id.* at 81. Here, there is no such overriding interest to justify the mandatory release of information *about* private persons *to* private persons.

2. The Governmental Interest In Preserving The Integrity Of The Process Is Adequately Served By Existing Statutory Procedures.

This Court has classified the integrity of the election process as a compelling interest. *Eu v. S.F. County Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989). Similarly, states should protect the integrity and reliability of the initiative process and have considerable latitude to do so. *Buckley II, supra*, 525 U.S. at 191; *John Doe #1 v. Reed, supra*, 586 F.3d at 679.

Washington has enacted statutory procedures that are narrowly tailored to preserve the integrity of the state's referendum process. When a referendum petition is filed, the Secretary of State verifies and canvasses the names of voters who signed the petition. Wash. Rev. Code § 29A.72.230; *John Doe #1 v. Reed, supra*, 586 F.3d at 674. Observation is permitted but observers may not make any record of the names, addresses, or other information on the petition sheets. During this procedure, the Secretary of State may limit the observers to two opponents and two proponents of the referendum. Wash. Rev. Code § 29A.72.230. Judicial review in the Superior Court is available to any Washington citizen who is not satisfied with the Secretary of State's determination. Wash. Rev. Code § 29A.72.240. In other cases, this Court has observed the adequacy of similar statutory protections: *Meyer v. Grant, supra*, 486 U.S. at 426-427 (Colorado statute addressed potential danger that petition circulators might be tempted to "pad" petitions with false signatures); *McIntyre, supra,* 514 U.S. at 351 (since Ohio had already addressed the problem of

election fraud, a ban on anonymous speech to accomplish the same purpose would be merely supplemental). These state statutes tackle real dangers without "indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *McIntyre, supra,* 514 U.S. at 357.

Washington's carefully drawn procedures fulfill the state's legitimate interest in the integrity of the referendum process and would most likely pass strict scrutiny. But further disclosures on the world wide web--far beyond the state borders and long after the referendum has been approved (or not)--impose a far greater burden. No one has an absolute right to contact any and every person who signed a particular petition.

B. The Disclosures Are Far More Extensive And Burdensome Than Necessary To Serve Any Interest In Informing *Washington* State Voters.

The right to privacy is rooted in common law but is even more important in the hustle and bustle of modern society:

> The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to

> mental pain and distress, far greater than could be inflicted by mere bodily injury.
>
> Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196; cited in *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 570 n. 7 (1963) (Douglas, J., concurring) ("*Gibson*")

The Washington PRA provides that "[t]he people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." Wash. Rev. Code § 42.56.030; *John Doe #1 v. Reed, supra*, 586 F.3d at 674. Courts have recognized the importance of the state's "informational interest." *Cal. Pro-Life Council, Inc. v. Randolph,* 507 F.3d 1172, 1179 nn.8-9 (9th Cir. 2007); *Canyon Ferry Rd. Baptist Church, supra,* 556 F.3d at 1032; *John Doe #1 v. Reed, supra*, 586 F.3d at 680. Similarly, this Court has acknowledged the state's interest in "protecting voters from confusion and undue influence." *Eu v. S.F. Cy. Democratic Cent. Comm., supra*, 489 U.S. at 225-226.

But there must be a viable link between these informational interests and the means used to achieve them. In *Caruso, supra*, 422 F.3d 848, the state's interest in informed and educated voting was served by a requirement that ballots for initiatives proposing local option taxes include a statement--the "three-percent warning"--that the measure could cause property taxes to increase more than three percent. There was a real connection between the state interest

and the required disclosure. Moreover, that disclosure was narrowly tailored to provide the relevant information voters needed to evaluate the proposal, without extensive, unjustified disclosures of personal information about any private speaker.

Caruso contrasts sharply with this case, which involves disclosure of the names and residential addresses of thousands of private citizens, far beyond Washington's borders, to entities and persons with no legitimate claim to that information. The disclosure requirements are broadly tailored to serve private purposes--not narrowly tailored to serve a compelling, important, or even legitimate state interest. This extensive disclosure is an onerous, unjustified invasion of the privacy of whose who signed Referendum 71.

1. Widespread Internet Disclosure Invades Protected Privacy Interests And Is Far Beyond Incidental.

Two private entities, KnowThyNeighbor.org and WhoSigned.org, have announced their plans to publish the names of the Washington petition signers on their internet websites in order to encourage "personal" and "uncomfortable" conversations. *John Doe #1 v. Reed, supra*, 586 F.3d at 675 n. 4. This is far beyond an incidental burden on the signers' First Amendment rights. As Justice Thomas recently observed:

> The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *preempt* citizens' exercise of their *First Amendment* rights.

> *Citizens United v. FEC*, 175 L.Ed.2d 753, 873 (2010) (Thomas, J., concurring in part and dissenting in part).

KnowThyNeighbor.org has already posted internet lists of voters in four different states: Arkansas, Florida, Massachusetts, and Oregon. Washington is their next target.[2] WhoSigned.org is apparently limited to the State of Washington, but its website is accessible around the world, far beyond Washington's boundaries, to nonresidents who have no legitimate claim to personal information about Washington voters.[3]

The risk of compelled speech is substantial. Much like the identification badges for petition circulators in *Buckley II*, such broad disclosures compel "a message the [petition signer] might otherwise refrain from delivering" and deter signers who object to the invasion of their privacy. *Buckley II, supra*, 525 U.S. at 217 (O'Connor, J., concurring in part and dissenting in part). The law mutes the voices of those who want to sign the petition but object to further disclosure of their personal information, or who for other reasons do not want to engage in confrontational discussions. Some potential signers may be timid, elderly, battling health problems, or otherwise reluctant to risk being identified and targeted.

Of course, the organizers of KnowThyNeighbor.org and WhoSigned.org enjoy First Amendment rights to

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[2] Website last visited on February 19, 2010.

[3] Website last visited on February 19, 2010.

speak and attempt to persuade others to change their views. They have the right to reach willing listeners. *Hill v. Colorado*, 530 U.S. 703, 728 (2000). "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the *First Amendment*." *Buckley v. Valeo, supra,* 424 U.S. at 48-49; *Meyer v. Grant, supra*, 486 U.S. at 427 n. 7. Washington may not enhance the speech of these internet associations by stifling the expression of citizens who want to sign a referendum without engaging in further discussions.

The two internet groups, and those who share their views, have a wide array of options to promote their ideas without obstructing the speech of the petition signers or invading their privacy. In analyzing the right to be left alone, this Court has noted that "[t]he recognizable privacy interest in avoiding unwanted communication varies widely in different settings." *Hill v. Colorado, supra*, 530 U.S. at 716. A speaker's rights--even in a public forum--can be restricted when the unwanted speech intrudes on the privacy of a residence and cannot be avoided. *Id.* at 752 (Scalia, J., dissenting), citing *Frisby v. Schultz,* 487 U.S. 474 (1988) (upholding a ban on residential picketing). Widespread, prolonged internet disclosure of names and *residential* addresses is similarly intrusive. Internet groups can invite and encourage discussions, online or otherwise, but cannot encroach on the rights of others by compelling their participation.

This Court has identified an unwilling listener's interest in avoiding unwanted communication as part of the broader "right to be let alone," which Justice Brandeis described as "the most comprehensive of

rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Hill v. Colorado, supra*, 530 U.S. at 716-717. This is fundamentally a private citizen's right against government rather than other private speakers--here, the state government making disclosures as an application of the Washington PRA.

2. Petition Signers Consent To Restricted Disclosures That Serve Legitimate Purposes--Not Broad Internet Dissemination Of Their Names And Residential Addresses.

The Ninth Circuit focused on the limited disclosure that accompanies the petition signing process and attempted to bootstrap that into a more general consent. The petitions are signed in public places and a particular signer's name and address will be exposed briefly to the other 19 signers on that page. Later, the information is viewed by state representatives and observers during the verification process. *John Doe #1 v. Reed, supra*, 586 F.3d at 677. But while there is no guarantee of absolute confidentiality, these brief, limited disclosures are not the equivalent of long-term exposure on the worldwide web, far outside Washington's state boundaries and far beyond the time span of the referendum.

Some of this Court's previous decisions help clarify the limited nature of the petition signers' consent to further disclosure. In *Uphaus*, New Hampshire law required that a political camp's guest register be open to inspection by local law enforcement officers. *Uphaus v. Wyman, supra*, 360 U.S. at 80. Additional disclosure to the Attorney General was justified by the

compelling interest in investigation of subversive activities, particularly where there was some evidence of a nexus between the camp and Communist affiliations. *Id*. at 79. When the guests in *Uphaus* registered at the camp, they impliedly consented to the disclosure of their names to government officials. This Court distinguished *Uphaus* when rendering its decision in *Gibson, supra*, 372 U.S. 539. In *Gibson*, it violated associational privacy to mandate disclosure of NAACP membership lists to a committee created by the Florida Legislature to investigate infiltration of Communists, because there was insufficient evidence that NAACP members were involved in subversive activities. *Id*. at 550. More recently, this Court struck down a village ordinance that mandated a permit for door-to-door advocacy and required it to be displayed upon request. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) ("*Watchtower Bible*"). Even though door-to-door evangelists reveal their allegiance to a particular cause when they present themselves at the front door of a home to advocate, the ordinance implicated anonymity interests. *Id.*, at 166 (holding that ordinance violated the right to anonymous speech).

Referendum 71 signers consent to certain limited disclosures, including the petition circulator, others who sign the same page, and those who observe or participate in the Secretary of State's verification procedure. Like the *Uphaus* camp guests, they have no basis to object to this limited exposure. Unlike the NAACP membership lists in *Gibson*, the petition sheets are not absolutely protected. But as in *Watchtower Bible*, the petition signers' consent to restricted revelations of their identities cannot be construed as consent to widespread online

dissemination to anyone and everyone who wants to know.

3. The Statute Does Not Limit Disclosures To Reach Only Persons In *Washington* With A Legitimate Interest In The Information.

The reach of the Washington PRA, as applied to the petition signers, sweeps far beyond those persons who have an interest in access to their names and addressees.

In *State ex rel. Halloran v. McGrath*, 104 Mont. 490, 67 P.2d 838 (Mont. 1937), the Montana Supreme Court considered a citizen's request to review referendum petitions that had been submitted to the county clerk. The court issued a writ of mandate, reasoning that the citizen had both a statutory and common law right to inspect the petitions before they were forwarded to the Secretary of State. But the court qualified and explained the nature of the right. The common law right to inspect accrues to persons who have an interest in the subject matter of the records. *Id*. at 497. In *Halloran*, a citizen of *Montana* sought review of petitions for a *Montana* referendum.

The Ninth Circuit objected to the Washington statutory oversight procedure as being "insufficient to shift oversight from the special interest groups to the general public," because citizens have no reasonable basis to determine whether or not to challenge the Secretary of State's determination before initiating an action in the Superior Court. *John Doe #1 v. Reed, supra*, 586 F.3d at 679. Like the concerned Montana citizen in *Halloran*, perhaps a Washington citizen

would have a common law right to examine the petitions at the Secretary of State's office during normal business hours. But that is not equivalent to a right to retain copies of all the pages of the petition and disseminate the signers' personal information online, far beyond Washington's state boundaries.

4. The Disclosures Have A Stifling Impact On The Exercise of First Amendment Rights.

Compelled disclosures can seriously infringe protected First Amendment rights. *Buckley v. Valeo, supra*, 424 U.S. at 64; *Davis v. FEC, supra*, 128 S. Ct. at 2774-2775. More recently, this Court reaffirmed that principle in striking down name tag and income disclosures for petition circulators, because these restrictions "significantly inhibit communication with voters about proposed political change, and are not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Buckley II, supra*, 525 U.S. at 192.

Potential petition signers who value their privacy are likely to engage in self-censorship and decline to exercise their rights to speech, association, and petition. "[M]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks,* 539 U.S. 113, 119 (2003) (citation omitted). *FEC v. Wisconsin Right to Life, supra*, 127 S. Ct. at 2681. Just recently, Justice

Thomas observed that disclosure requirements can be used, either by government or private citizens, "to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of *First Amendment* rights." *Citizens United v. FEC, supra*, 175 L.Ed.2d at 873 (Thomas, J., concurring in part and dissenting in part) (emphasis in original). That is exactly what is occurring in this case. Voters who dare to sign a controversial petition must expose themselves to unreasonably broad intrusions on their privacy--or forego the exercise of their rights to speak, associate, and petition their government.

5. The Interest In Educating The Voters Does Not Trump The Right To Anonymous Speech Of Thousands Of Private Citizens. Washington Voters Do Not Need The Name And Address Of Every Individual Petition Signer To Make Informed Decisions About Referendun 71.

The right to anonymous speech is well established. Fifty years ago, this Court struck down a handbill identification requirement because it unduly inhibited the freedom to distribute information. *Talley v. California,* 362 U.S. 60, 64 (1960). Anonymous writings have played an important role throughout history, sometimes as the only means for a persecuted group to criticize oppressive laws. *Id.* at 64; *McIntyre, supra,* 514 U.S. at 341. There are many valid motivations, including fear of retaliation, social ostracism, or a simple desire to preserve privacy. *Id.* at 341-342; *Watchtower Bible, supra*, 536 U.S. at 166. Many Washington citizens may want to support

Referendum 71 without being targeted, ostracized, or disturbed by unwanted conversations on the subject.

The people of America are intelligent enough to evaluate anonymous speech. They can evaluate anonymity along with the content. *New York v. Duryea*, 76 Misc.2d 948, 966-967, 351 N.Y.S.2d 978, 996 (1974). "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919). The people of Washington State can evaluate the content of Referendum 71 without knowing the names and addresses of the many thousands who signed it.

Even the Ninth Circuit has followed *McIntyre* and upheld the right to anonymous speech, holding that the deprivation of anonymity is "'a broad intrusion, discouraging truthful, accurate speech by those unwilling to [disclose their identities] and applying regardless of the character or strength of an individual's interest in anonymity.'" *ACLU of Nev. v. Heller*, 378 F.3d 979, 988 (9th Cir. 2004), citing *Wash. Initiatives Now v. Ripple*, 213 F.3d 1132, 1138 (9th Cir. 2000) (quoting *Am. Const. Law. Found. v. Meyer*, 120 F.3d 1092, 1103 (10th Cir. 1997). In *Heller*, the Ninth Circuit struck down a state statute requiring the names and addresses of financial sponsors on printed materials related to an election, candidate, or any question on the ballot. *ACLU of Nev. v. Heller, supra*, 378 F.3d 979.

In *McIntyre*, this Court held that the name and address of a handbill's author "adds little, if anything, to the readers' ability to evaluate the document's message." *McIntyre, supra,* 514 U.S. at 348-349. The

interest in providing voters with information does not justify requiring a writer to include statements that would otherwise be omitted. *Id.* at 348. The same is true here. Washington voters do not need the names and addresses of *thousands* of individual petition signers in order to formulate an intelligent response to the referendum.

The right to privacy of association is a natural corollary of the general right to anonymous speech:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.
>
> *Gibson, supra*, 372 U.S. at 544

Limitations on the right to band together to advance a ballot measure restrain the First Amendment right to freedom of association. *Citizens Against Rent Control / Coalition for Fair Housing v. Berkeley,* 454 U.S. 290, 296 (1981); *Eu v. S.F. Cy. Democratic Cent. Comm. supra*, 489 U.S. at 224-225. These rights are implicated in the organization of PMW as a political committee under Washington law, in order to collect enough signatures to place Referendum 71 on the ballot and to encourage voters to reject SB 5688. *John Doe #1 v. Reed, supra*, 586 F.3d at 675 n. 2.

Compelled disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo, supra*, 424 U.S.

at 64, cited in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference"--such as the broad disclosures contemplated in this case. *Bates v. City of Little Rock, supra*, 361 U.S. at 523. Speech and association rights "need breathing space to survive." *NAACP v. Button, supra,* 371 U.S. at 433. Protection of these rights is imperative "where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial." *Gibson, supra*, 372 U.S. at 556-557. The subject matter of Referendum 71 is highly controversial. Supporters do not waive their First Amendment rights to privacy of association when they sign petitions.

Even if there were some compelling reason to disclose the *names* of petition signers, disclosure of their private residential *addresses* is neither justified nor narrowly tailored. A Washington appellate court recognized this distinction in a case where citizens requested the names of county police officers and their ranks. These citizens maintained controversial websites critical of the police. The court acknowledged the public interest in law enforcement and ordered disclosures, pointing out that the information to be revealed did not include other, more private information: *home addresses*, home phone numbers, or social security numbers. *King County v. Sheehan,* 114 Wn. App. 325, 346, 57 P.3d 307 (2002). The Washington PRA contains an exemption for the

residential addresses of public agency employees. *Id*. at 343; Wash. Rev. Code § 42.17.310(1)(u). Moreover, these disclosures involved government officials performing their official duties--not private citizens exercising their personal First Amendment rights by signing the petitions. If the home addresses of public employees are protected, that information should be guarded all the more carefully where private citizens are involved.

CONCLUSION

In the name of "government transparency," the Washington PRA threatens to impose onerous burdens on the most fundamental First Amendment freedoms of its own citizens. This is particularly true for the right to petition government for redress of grievances:

> The right to petition is "among the most precious of the liberties guaranteed by the *Bill of Rights*," *Mine Workers v. Illinois Bar Assn.,* 389 U.S. 217, 222 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937).
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> *McDonald v. Smith*, 472 U.S. 479, 486 (1985)

The effect of the proposed disclosures would be to punish the Washington citizens who chose to endorse Referendum 71. If that occurs, opponents of the measure will have free reign to intimidate and retaliate, potentially skewing the results of future

petitions by penalizing those who dare to exercise their First Amendment rights. This Court should reverse the decision of the Ninth Circuit in order to ensure that this never happens.

Respectfully Submitted,

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