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

Reply Brief

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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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Argument

Corruption and intimidation in elections threaten self-government. Washington facilitates intimidation by mandating public disclosure of petition signers despite an absent or weak anti-corruption (or other) interest. This unconstitutionally burdens core political speech. (*See* Pet'rs' Br.)

Respondents Reed, Washington Families Standing Together ("WAFST"), and Washington Coalition for Open Government ("WCOG") spend 180 pages without refuting this controlling analysis.[1] They argue instead that this as-applied challenge is facial, petition signing isn't speech, associating and providing information to the government waive First Amendment privacy regarding general-public disclosure, serious burdens on core political speech merit reduced scrutiny, and interests incapable of limitation justify any disclosure Washington imposes.

I. Public Disclosure Here Implicates First Amendment Protections.

Respondents argue at length that "signing a petition is a legally operative legislative act, not speech." (Reed's Br. 22.) But the fact that speech and association might have some legislative effect[2] would not make them mere mechanical acts lacking speech and

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[1] Given considerable duplication on key analytical points, citations will be made primarily to Reed's brief, with citation to others when unique and important points are raised.

[2] The notion that petition signers are just legislators seconding motions (Reed's Br. 26-28) fails because single signatures yield no such effect and parliamentary procedure doesn't control referenda.

association content. (Pet'rs' Br. 17-23.) Moreover, the First Amendment also protects against the compelled speech comprising—and the privacy violation and intimidation resulting from—the general-public *disclosure* of petition signing. (Pet'rs' Br. 23-39.) In this challenge to the Public Records Act ("PRA") *as applied* to petition sheets, both the signing and the disclosure are at issue.

This Court rejected an argument like Respondents' in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Regarding speech and association*, the lower court had held that "contribution[s] and expenditure[s] . . . were conduct, not speech, . . . rel[ying] upon United States v. O'Brien, 391 U.S. 367 (1968)." 424 U.S. at 15-16. *Buckley* held that contributions and expenditures "simply cannot be equated with such conduct as destruction of a draft card." *Id.* at 16. Though "[s]ome forms of communication made possible by . . . the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two . . . [,] the dependence of a communication on the expenditure of money . . . [does not] introduce a nonspeech element . . . or . . . reduce . . . exacting scrutiny . . . ." *Id.* So here it matters not whether legislative conduct is involved because speech, compelled speech, and association are present, and the dependence of speech and association here on petition-signing formalities does not introduce a nonspeech element or reduce the scrutiny. And if contributions to candidates are speech and association, *id.* at 20-23, then signing referendum petitions promoting public *issues* is speech and association. *Regarding disclosure*, *Buckley* clearly applied a First Amendment privacy analysis to the general-public disclosure of contributions and expenditures because "compelled disclosure,

in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64.[3]

This Court has already held that the petition-signing "discussion" is "core political speech," which "discussion" includes signing. (Pet'rs' Br. 17.) The government remains unable to show why the discussant on one side of a petition sheet is engaged in First Amendment speech while the discussant across the sheet is not, and why the signature—integral to and goal of the discussion—is not part of that protected discussion. (*Id.*) Reed attempts a showing. First, he creates a straw man, i.e., Respondents' "primary argument is that . . . everything connected with circulating petitions is core political speech." (Reed's Br. 30.) Respondents made no such argument. Second, Reed

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[3] Respondents argue that there is no expectation of privacy (*See* WAFST's Br. 29.) Under *FOIA*, "expectation of confidentiality is relevant." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). But FOIA employs a "balancing" analysis, *id.* at 1189, not a constitutional analysis. *Glickman* avoided the First Amendment challenge by rejecting disclosure under FOIA. *Id.* at 1187 & n.8. *Glickman*'s petition-signers may have been aware of FOIA, but that did not waive privacy protection. Petition-signers here may have been aware of PRA, but that does not waive privacy. In both cases, the information had not been released to the general public when privacy was asserted. In *Glickman*, requesters faced FOIA's balancing test. Here, requesters face stringent constitutional standards. They must prove adequate interests and tailoring to overcome a strong right. While an expectation of privacy may be relevant to the Fourth Amendment, it plays no part in *Buckley*'s privacy analysis. And privacy involves selective information release (Pet'rs' Br. 36 n.35), so petitioners may choose disclosure to allies and government yet assert privacy against general-public disclosure.

argues that "the core political speech is the interactive communication," and signing is neither "expressive" nor "interactive." (*Id.* at 31.) His argument regarding "expressive" is premised on the error that speech with some possible legislative effect is not speech. *See supra*. His argument regarding "interactive" excises the key act of interaction—accepting the solicitation. That acceptance, stated in a signature bespeaking consent and support, is the circulator's goal, the discussion but his means. The signer does not break her interaction to sign elsewhere. She responds to the solicitor, takes his sheet (perhaps borrowing his pen), reviews language atop the form (perhaps asking questions about the referendum), signs the petition, provides required information, decides whether to provide her email (perhaps asking about its use), hands back the sheet, and likely continues the protected discussion a bit before departing (perhaps wishing her new associate success). Even if only "interactive" speech and association were all the First Amendment protects, which is not so, that vignette is *all* "interactive." And her signature has meaning. It speaks support for putting the issue to a vote and likely for the referendum's success.[4]

Reed argues that "signing a petition is simply part of the election process, not expressive conduct. (Reed's Br. 28.) Reed points to *Burdick v. Takushi*, 504 U.S. 428 (1992), for the proposition that, since the goal of candidate elections is winnowing out non-chosen

[4] Reed cites a manual suggesting voters will sign unattended sheets. (Reed's Br. 33.) There is no evidence for that here, but if it were done the written elements of interaction remain and are protected unless writing is to be excluded from the First Amendment.

candidates, the "function of signing a petition is to winnow out . . . measure[s] that will [not] make the ballot." While the process of referendum qualification in total is removing those lacking support, the signature of the *individual* signer is to endorse the issue being put to a vote, regardless of whether it makes the ballot. And Reed loses sight of the issue, which is whether First Amendment conduct is involved. Even if winnowing is the goal, that does not mean that there is no speech and association. *Burdick* acknowledged that even in the *candidate* context, the First Amendment association right was at issue and the burden had to be properly justified. *Id.* at 434 ("rigorousness of our inquiry . . . depends upon the extent . . . [of] burden[on] First and Fourteenth Amendment rights"). While *Burdick* only recognized an association right because the case involved write-in votes for *candidates*, where an *issue* is involved, as here, a petition signer not only associates with those seeking to qualify a referendum for vote but also identifies herself with the issue, which is speech. In any event, the *disclosure* of petition signers clearly implicates First Amendment privacy interests, *see supra*, so this case is distinguishable from *Burdick*.

Respondents have been unable to escape the horns of the dilemma posed by the implications of two kinds of language atop the petition forms and two possible signing motives. (Pet'rs' Br. 20-22.) "[I]f people signed just to put the issue on the ballot without expressing a view on the merits, then the State's cognizable interest vanishes, . . . but if they indicated their voting preference, the secret-ballot privacy interest protects against public disclosure." (Pet'rs' Br. 21.)[5] Reed argues that

[5] Reed says this argument is not properly before the Court

"[e]ven assuming such a right," the "[h]ighlights" portion of the petition form did not indicate how signers would vote and the neutral statutory language might have caused some to sign just to put the measure on the ballot. (Reed's Br. 25-26 n.4.) This leaves Respondents atop the horns. Merely *asserting* that the "[h]ighlights" language did not indicate how a signer would vote does not make it so, as Reed fails to address the actual language. (*See* Pet'rs' Br. 21 (language inviting response indicating position on referendum).) And Reeds' assertion that some just signed to put the referendum on the ballot merely restates one horn. (Reed's Br. 25-26 n.4.) As to these, any informational interest vanishes. As to those responding affirmatively to the "[h]ighlights" language, the secret-ballot interest engages. So Washington cannot compel disclosure of either and therefore of any.

Respondents lean heavily on the notion that petition signers have already disclosed their identity and belief. (Reed's Br. 33.) But if they *already* made their identity, association, and belief public, why seek the *same* under PRA? Petition signers have *not* made disclosure to the general public or those making PRA requests. Respondents' concept of the privacy interest is flawed. It conflicts with this Court's: "[P]rivacy 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

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because one horn of the dilemma is argued for the first time here. (Reed's Br. 25 n.4.) But the First Amendment claim is "properly presented," so "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Citizens United v. FEC*, 130 S. Ct. 876, 893 (2010) (quotation marks and citations omitted).

divulged to another." *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989) (emphasis added). "[W]e deal *not* with an interest in *total* nondisclosure but with an interest in *selective* disclosure." *Id.* at 763 n.14 (emphasis added). Washington's scheme imposes three levels of compelled speech that must each be justified, and only general-public disclosure poses the privacy loss and intimidation risk at issue here. (Pet'rs' Br. 35-39.) So disclosure to other petition signers, possible potential petition signers,[6] petition circulators, petition sponsors,[7] the Secretary and staff, and canvass monitors neither waives the selective assertion of privacy as to other disclosure nor poses the loss of privacy and risk of intimidation inherent in disclosure to the general public.[8]

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[6] There is no evidence of non-signers recording signers' information, disclosing same, or intimidating signers. Such a possibility is not before the Court but would waive no privacy. WAFST's assertion that such recording non-signers comprise a "much larger number" (WAFST's Br. 25) is without evidence and likely untrue because those opposing the topic of the petition-circulator's solicitation would seem less likely to engage the solicitor and review a petition.

[7] The fact that petition sponsors may make some other use of petition-signers' identity, (Reed's Br. 34-35), changes nothing about whether the First Amendment is involved and whether signers have waived privacy rights against general-public disclosure because the political-association right protects internal sharing of identity and information and pursuing common goals.

[8] The practice of other states is irrelevant because practice does not determine constitutionality. And the lawyerly practice of distinguishing cases on irrelevant points, in which Respondents engage at length in their briefs (on this point and

II. This Is an As-Applied Challenge Requiring Strict Scrutiny or Its Functional Equivalent.

Is this an as-applied challenge? Reed claims that "Count I . . . presents a facial challenge to the PRA" while "Count II presents an as applied challenge." (Reed's Br. 20-21.) But Count I expressly made an as-applied challenge and sought relief as to referendum petitions, not all PRA applications. (J.A. 16.) So this is an as-applied challenge. If Petitioners prevail, PRA will not be unconstitutional entirely.

Respondents apparently intend by the facial-challenge assertion to impose the "no set of circumstances" test of *United States v. Salerno*, 481 U.S. 739 (1987). (Reed's Br. 20.) But *Salerno* cannot apply to this as-applied challenge, and the "substantial overbreadth" test of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), applies in First Amendment facial challenges.

Respondents also intend to make "discussion of harassment . . . not relevant to this facial challenge," trying to limit its relevance to Count II. (Reed's Br. 21.) But this attempted manipulation of the claims does not make harassment evidence irrelevant to Count I because it clearly applies to irreparable harm and the balance of equities, as this Court recognized in staying broadcasting of the California Proposition 8 trial. (Pet'rs' Br. 55-56.) And the privacy right provides protection against intimidation (Pet'rs' Br. 29), making intimidation efforts relevant to both the privacy right (Count I) and the intimidation exemption (Count II). (Pet'rs' Br. 26-35.)

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elsewhere), does not alter the controlling analytic principles for which Petitioners have cited cases.

Does strict scrutiny or its functional equivalent apply? Petitioners argue that it does because petition-signing is core political speech in itself and an essential element in the protected petition-signing discussion, *see supra*, because PRA as applied is not viewpoint neutral[9] and is content based, because compelled general-public disclosure of identity, association, and belief seriously burdens the First Amendment privacy right, and because even on a sliding exacting-scrutiny scale the burdens are sufficiently high to make exacting scrutiny the functional equivalent of strict scrutiny. (Pet'rs' Br. 40-48.)

Respondents insist on intermediate scrutiny under *O'Brien*, 391 U.S. 367. (Reed's Br. 37.) Petition-signing is core political speech, *see supra* Part I, so *O'Brien* does not apply.

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[9] Petitioners argued viewpoint discrimination because, while both supporters and opponents of a referendum make *financial* disclosures, only those opposing the government's position are subject to the additional disclosure at issue here. (Pet'rs' Br. 41-42.) Reed does not address this (Reed's Br. 38 n.5). WAFST argues that this is not properly before the Court, but that is readily answered by the *Citizens United* quote in note 5, *supra*. WAFST then sidesteps the *as-applied* issue in this case to respond that any public records identifying proponents of the legislation would have to be disclosed. This resort to a higher level of generality does not address the problem, which is that only those *opposed* to the government must make the extra disclosure at issue here. Viewpoint neutrality requires the disclosure of those who oppose the petition circulation. WAFST's further argument that absent disclosure referendum sponsors "gain an advantage" of "unfettered access to the signed petitions" (WAFST's Br. 48) has no effect on the constitutional analysis because such access to internal information is simply a function of protected political association.

Moreover, both petition-signing and *disclosure* of petition-signers are at issue in this as-applied challenge. Reed makes no response to *Buckley*'s protection for *disclosure* of identity, association, and belief, 424 U.S. at 64, and to the heightened exacting scrutiny for *disclosure* under the sliding scale in *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008), under which Petitioners demonstrated that the burden is heavy so exacting scrutiny must be the functional equivalent of strict scrutiny.[10] (Pet'rs' Br. 42-48.) WAFST makes a partial and flawed response by arguing that "the right of association is irrelevant" because petition signers may not know each other. (WAFST's Br. 49-51.) The response is partial because First Amendment privacy protects identity and belief, not just association. The response is flawed because WAFST sees no association unless it is somehow like NAACP's. But *Buckley* recognized that even a *contribution* to a candidate is protected by the association right, 424 U.S. at 64. Few of Barack Obama's myriad contributors could claim a private, confidential association with him, yet *Buckley* says there was association. So a petition signature was

[10] Reed highlights the delay between interactive communication and disclosure. (Reed's Br. 57) (*citing Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 188-89 (1999) ("*Buckley-II*")). But the Court applied exacting scrutiny to, and noted the substantial burdens of, contribution disclosure in *Buckley* despite delay between speech and disclosure. 424 U.S. at 64-68. The delay played a role in *Buckley-II* but was not dispositive. *Id.* at 191 n.10, 198-99 (affidavit requirement not before Court). The state interests, perhaps compelling as to the affidavit requirement, did not justify the name-badge requirement. *Id.* at 198-99. Washington's interest in disclosure of petition-signers is likewise nonexistent or anemic.

enough to establish association. And there was clearly personal association between the signers and petition circulators, agents of the sponsors. And some petition signers voluntarily provided an email address to facilitate communication within their association. The Sponsors had a website on which signers could also associate with them. Those who associate online would be shocked to learn that they have not actually associated if WAFST is correct. But government may no more condition First Amendment protection on *how* we associate than on how we speak. *See, e.g.*, *FEC v. Wisconsin Right to Life,* 551 U.S. 449, 477 n.9 (*"WRTL-II"*) (controlling opinion) ("a speaker has the autonomy to choose the content of his own message").

WAFST argues for a reasonable time, place, and manner standard because a petition is a non-public forum. (WAFST's Br. 40-42.) This sort of argument was dispatched in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which said that, while states were not obliged to elect judges, having chosen to do so they must abide by the First Amendment in conducting elections. *Id.* at 788. States are not required to allow referenda, but if they do, they must do so under the First Amendment.

Respondents and the Ninth Circuit rely on *Burdick*, 504 U.S. 428, for a balancing standard where election-process statutes are challenged. (*See, e.g.*, Reed's Br. 28.) As shown above, the correct standard here is strict scrutiny or its functional equivalent under exacting scrutiny. But even *Burdick*'s scrutiny increases where First and Fourteenth Amendment burdens are high, 504 U.S. at 434, as they are here. *Burdick* was about candidate write-in voting and recognized First Amendment protection for association rights (but not speech

rights) for that. The present case about associating to put a public *issue* to a vote, involves speech in a way that candidate voting did not. And because Washington mandates disclosure with little or no cognizable interest—thereby violating rights of privacy and against intimidation—the constitutional burden is severe. So even under *Burdick*, scrutiny would have to be high.

Finally, in applying the correct scrutiny, it is important to frame the issue properly. Reed frames the issue in terms of a "right to anonymous speech." (Reed's Br. i.) Petitioners frame the issue in terms of "the First Amendment right to privacy in political speech, association, and belief." (Pet'rs' Br. i.) Respondents must not be permitted to reframe the question presented. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), this Court applied strict scrutiny to a statute requiring identifying disclaimers on communications and found this disclosure was "more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. [FECA] regulates only candidate elections, not referenda or other issue-based ballot measures." 424 U.S. at 356. *McIntyre* held that Mrs. McIntyre had a right to remain anonymous as to putting disclaimers on her handbills. There was debate between the majority and dissent as to whether there is a general right to anonymous political speech, but that issue need not be resolved here. Simply applying the requisite high scrutiny resolves this case in favor of Petitioners, whether or not there is a general right to anonymous political speech. Here, in light of Washington's absent or minimal interest in violating privacy and compelling speech by forcing general-public disclosure of petition-signers' identity, association, and belief, Washington

may simply not do so. That *outcome* might be described as saying that petition signers have a right to anonymous speech in the form of petition signing, but the outcome derives from standard, high-level First Amendment scrutiny, not from any "right to anonymous speech."

III. Asserted Interests Are Inadequate.

Buckley provided guidance on possible state interests in disclosure. 424 U.S. at 66-68. Two are unique to candidate elections and inapplicable to petition signers. (Pet'rs' Br. 48.) The remaining informational interest cannot justify disclosing petition-signers' identity because it is neither compelling nor important. (Pet'rs Br. 49-50.) Respondents' other interests are anemic or non-existent.

Respondents advance informational and anti-fraud interests.[11] (Reed's Br. 39-48.) However, Respondents provide no evidence that either is compelling or that PRA addresses either in a direct and material way. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("must do more than simply posit the existence of the disease sought to be cured").

Respondents assume PRA is an election regulation designed to prevent fraud and provide voters with information. (Reed's Br. 39-48.) That PRA may affect elections in some roundabout way does not make it so. History and attempted application of PRA to petition signers illustrate Respondents' error.

Referenda were authorized in 1912. (WCOG's Br. 9.) The election code contains numerous regulations

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[11] Transparency and accountability are not separate interests, but derive from Respondents' primary interests.

pertaining to referenda, but none requires public disclosure of petitions. *See* RCW § 29A.72.010 et seq.

The overwhelming authority is that the election code prohibits release of petitions. In 1938—again in 1956—the Attorney General issued a formal opinion that petitions are not subject to disclosure. Wash. Op. Att'y Gen. 378 (1938); Wash. Op. Att'y Gen. 55-57 No. 274 (1956).

After adoption of PRA, the Secretary declared petitions remained exempt from disclosure. A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (CP-App. 67a.). A court confirmed that opinion. *Neale v. Kramer*, No. 48733, Order Enjoining Examination of Initiative 282 Petitions (Wash. Sup. Ct. Thurston County, Sept. 14, 1973). And each opinion was drafted with full knowledge of the challenge provision. *Infra* at 15 n.14.

Respondents suggest that petitions are "routinely" released, but history tells a different story. (Reed's Br. 6.) Since 1912, the Secretary has received 1,601 referendum and initiative petitions and certified 107.[12] *Eight* were publicly released, all since 2006, and none were placed on the Internet by the State, or anyone else.[13] And as noted, two attorney-general opinions, an

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[12] Secretary, State Initiatives and Referendums 1914-2009, available at http://wei.secstate.wa.gov/osos/en/InitiativesandReferenda/Pages/StatisticalSummary.aspx.

[13] 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). Since PRA, 1,172 initiative and referendum were filed, 108 certified, and eight disclosed. (WCOG's Br. 11.)

official statement of the Secretary, and a court opinion opposed disclosure.

Washington's referenda power appears healthy—ranking fourth on the all-time list of statewide referendum use with no or little access to referendum petitions. (Br. of Amici Direct Democracy Scholars 10-11.) The regulatory regime, which has not historically released petitions, adequately serves any anti-fraud or informational interest.

The integrity of the election process is protected by the election code without PRA. The Secretary canvasses and certifies petitions. RCW § 29A.72.230. Referenda proponents and opponents may observe but are prohibited from recording names. RCW § 29A.72.230. The Secretary's determination may be challenged in court, but the provision does not require public access to petitions.[14] RCW § 29A.72.240. And the Secretary is efficient at detecting any fraud through traditional methods (signature comparison), public disclosure playing no part. *See Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000).

Washington's regulatory regime also addresses any informational interest without PRA. Referendum sponsors register with the campaign finance commission *before* filing notice of the referendum. *See generally* RCW § 42.17.010 (campaign finance act). *See also* Secretary, *Filing Initiatives and Referenda in Washington State: 2009 Through 2012*, at 6 (2009) (first step is registration with campaign finance commission).

[14] The challenge provision has operated for nearly 100 years without public access to petitions. *See* RCW § 29.79.210 (1965); Laws 1913, ch. 138 § 17 p. 427.

Reporting requirements continue during the circulation period and subsequent campaign. *Id.*

Furthermore, Respondents failed to prove that petition-signature fraud is a problem.[15] *See Turner*, 512 U.S. at 664 (must do more than posit existence of disease). The election-code, which does not rely on public disclosure of petitions, sufficiently protects the integrity of the election process. *Washington Initiatives Now*, 213 F.3d at 1139.

Attempting to avoid this lack of evidence, Respondents cite cases from other jurisdictions.[16] Many involve rejection of petitions for statutory deficiencies unrelated to petition-signature fraud.[17] *See Roberts v. Priest*, 975 S.W.2d 850 (Ark. 1998) (889 excess signa-

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[15] It is incorrect to rely on election fraud unrelated to petition signatures. For example, PRA cannot logically address "'illegal votes'—including votes cast by felons and votes cast on behalf of deceased electors." (Br. of Amicus State of Ohio et al. 21.) The solution must address the problem in a direct and material way.

[16] Respondents failed to introduce any evidence below of petition signature fraud, or evidence that public release of petition signatures is likely to detect fraudulent signatures. They cite, for the first time in their opposition briefs, cases from other jurisdictions.

[17] Ohio commits the same error in its amicus brief. (Br. of Amicus State of Ohio et al. 21-22.) Ohio also cites two cases involving Ralph Nader and suggests Nader was denied ballot access because of petition-signature fraud. (*Id.* at 23-24.) The cases involved prohibitions on out-of-state petition circulators, not petition-signature fraud. *See Nader v. Brewer*, 531 F.3d 1028, 1032 (9th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459, 463-67 (6th Cir. 2008). Each state failed to prove prohibiting out-of-state circulators constitutional. *Nader v. Brewer*, 531 F.3d at 1038; *Nader v. Blackwell*, 545 F.3d at 476.

tures, 1,506 rejected for statutory deficiencies, only 241 alleged fraudulent); *Citizens Comm. for D.C. Video Lottery Terminal Initiative v. D.C. Bd. of Elections & Ethics*, 860 A.2d 813 (D.C. 2004) (circulator affidavits); *State v. Pappas*, 424 N.W.2d 604 (Neb. 1988) (circulator affidavits); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006) (out-of-state circulators); *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006) (out-of-state circulators).

And Reed has conceded that petition-signature fraud may be related to per-signature compensation arrangements that create incentives. Ralph Thomas, *Bills Would Change the Way Signature Gatherers are Paid*, The Seattle Times, Jan. 27, 2007 (*available at* http://community.seattletimes.nwsource.com/archive/?date=20070127&slug=initiatives27m). Washington has not charged anyone with such fraud. *Id.* And the solution to any such problem is to attack the incentives—not public disclosure of petitions.

Respondents also failed to prove that public disclosure of eight initiative petitions released since 2006 led to the detection of any fraudulent signature.

PRA is not designed to serve the asserted interests. *Turner*, 512 U.S. at 664 (must demonstrate regulation will *in fact* alleviate harms in *direct* and *material* way). PRA is passive. Information is disclosed only if requested. The burden is on the requestor to disseminate the information. If PRA served an anti-fraud or informational interest it would require disclosure of all petitions, not just those requested. *See Republican Party of Minnesota*, 536 U.S. at 780 ("[Statute] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

Contrast PRA with an election regulation designed to serve compelling state interests. The campaign-finance statute requires financial reports at regular intervals, *see, e.g.*, RCW § 42.17.065, and Washington disseminates the information. *See* Wash. Admin. Code 390-14-026 (reports online within two days). If PRA were an election regulation designed to address the Respondents' asserted interests it would do the same. Yet less than *one-half of one percent* of petitions have been released, and R-71 would be the first publicized on the Internet.[18] The numbers demonstrate that PRA is not designed to serve fraud or informational interests.

Public disclosure is also unnecessary to serve any fraud interest. A voter concerned that his name erroneously appears on the petition need only check *his* name. Washington could implement a system similar to its system for checking voter registration. *See* Secretary, *MyVote: Personalized Voter Information*, http://wei.secstate.wa.gov/osos/VoterVault/Pages/MyVote.aspx. The system requires name and birthday for access, reducing the invasion of privacy to individual voters. *Id.* There is no need to place all 138,000 names on the Internet for the world to see. And placing the names on the Internet without such protections invites harrassment of petition-signers and fraud from opponents seeking to prevent the referendum from qualifying.[19] *See* Press Release, VoteonMarriage.org,

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[18] Considering only petitions filed after PRA, only *seven-tenths of one percent* have been released. *Supra* 14 n.13.

[19] Washington provides no mechanism for signers to remove signatures from petitions. States that do so generally require requests to be made *before* petitions are filed. *See, e.g.*, Alaska Stat. § 15.45.120; Ariz. Rev. Stat. Ann. § 19-113.

VoteonMarriage.org Cites MassEquality with Identity Theft and Fraud; Challenges False Allegations (Jan. 26, 2006) (available at http://voteonmarriage.org/news.shtml#060109pr) (reporting fraudulent removal requests).

This concern is currently unfolding in Utah. Utah amended its law to allow petition signers to remove their names up to one month after a petition is filed. Utah Code Ann. § 20A-7-205 (2009) (*amended by* 2010 Utah Laws Ch. 225 (S.B. 275)). Many fear public disclosure will invite harassment and intimidation to encourage petition signers to recant.[20] Josh Smith, *Utah Gov. Gary Herbert Signs Controversial Signature-Removal Bill*, Deseret News, Mar. 29, 2010. And the change, effective immediately, appears directed at an ethics petition currently being circulated.[21] *Cathy McKitrick*, *Suit Demands Secrecy for Ethics Petition Signers*, The Salt Lake Tribune, Apr. 15, 2010. A Republican Party official indicated any signer is unfit to run as a Republican. *Id.* Public disclosure of referendum petitions chills speech because it is impossible to predict what may be the next "controversial" issue. Here it is same-sex marriage, more recently, healthcare reform, and today, an ethics-reform petition.

And Respondents have been unable to escape the horns of the dilemma posed by the language atop the

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[20] Utah also removed the notary requirement from the signature removal statute, Utah Code Ann. § 20A-7-205 (2009), raising concerns about fraudulent removal requests.

[21] On April 15, a federal court temporarily restrained release of petitions. *Utahns for Ethical Government v. Barton et al.*, No. 2:10-cv-00333 (D. Utah 2010). A preliminary injunction hearing is scheduled for April 28, 2010. *Id.*

petition forms and possible signing motives.[22] *Supra* 5-6. Do petition signers (1) support the repeal of the law, (2) simply indicate they would like a public election to be held, or (3) simply sign to avoid any further discussion with a petition circulator? *See* Br. of Amici Direct Democracy Scholars 16 (third motive). The uncertainty surrounding what signatures represent cannot support the informational interest.

Moreover, the interest in providing voters with information is not absolute. *See McIntyre*, 514 U.S. at 348. This Court has not yet ruled whether compelled disclosure resulting in marginal informational gains (e.g., small contributions) is constitutional.[23] *Buckley* 424 U.S. at 84. The Ninth Circuit correctly decided that disclosure of de minimis contributions or expenditures is not permissible because the informational interest is not designed to advise the public who might generally favor or oppose referenda absent a cognizable *financial* commitment. *Canyon Ferry Road Baptist Church of East Helena v. Unsworth*, 556 F.3d 1021, 1032-33 (9th Cir. 2009). Here, the burden on petition-signers' privacy of speech, association, and belief greatly exceeds the marginal information gain disclosure provides.

Moreover, Respondents may not dictate the subject and scope of debate. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978). The power to decide

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[22] Respondents create a dilemma of their own, discounting PRA's burdens by arguing that criminal penalties are sufficient to deter harassment and intimidation, (Reed's Br. 53.), but arguing that criminal penalties are insufficient to deter petition-signature fraud. (*Id*. at 43.)

[23] (Pet'rs' Br. 51 (petition signers are like de minimis contributors).)

what information is relevant and to be compelled is the power to control speech, and the power knows no bounds. Respondents admit that "phone numbers, voting history, age, marital status, race, income, and other demographic information . . . provide useful information about participation in the political process." (Reed's Br. 48.) May Washington compel such information? Under Respondents' analysis it could. This proves the unconstitutionality of an open-ended informational interest because it not only violates privacy of identity, association, and belief, but such demographic information threatens to convert a public *issues* debate into class, race, and religious warfare.

Alarmingly, Respondents also assert an interest in promoting conversations between opponents and petition signers. (Reed's Br. 45, 47.) These are confrontations. (Pet'rs' Br. 2-7.) The informational interest does not lie in enabling such confrontations but in providing information about referenda. There is no constitutional authority to force the disclosure of some citizens' identity, association, and belief so others can confront them in intimidating ways. These confrontations chill speech and political participation.

The identity of petition signers provides no cognizable information and cannot justify disclosure.

IV. Public Disclosure Is Inadequately Tailored.

Petitioners addressed PRA's lack of tailoring above, and in Petitioners' opening brief. (Pet'rs' Br. 51-53.)

V. Petitioners Properly Received a Preliminary Injunction.

This Court should apply *Winter v. Natural Resources Defense Council*, 129 S. Ct. 265 (2008), in the First Amendment context to "ensure that the First Amendment rights this Court has zealously guarded from governmental interference retain their status as fundamental rights." (Br. of Amicus Liberty Counsel 4 (applying preliminary-injunction factors in First Amendment context).) Petitioners had likely success on the merits. *Supra*; (Pet'rs' Br. 16-53).

Respondents ignore the remaining preliminary injunction factors and declare "harassment . . . not relevant." (Reed's Br. 21-22.) But this Court considers harassment relevant to irreparable harm. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 712 (2010) (harassment demonstrates irreparable harm).

Respondents themselves make harassment relevant by arguing that *Burdick* applies. (Reed's Br. 28-29.) *Burdick*, 504 U.S. at 434 (rigor of review varies with burden on rights). It is also relevant under *Davis v. FEC*, 128 S. Ct. at 2775, which requires the functional equivalent of strict scrutiny with high burdens. That Respondents prefer to ignore PRA's harmful consequences does not make harassment irrelevant.

Harassment also demonstrates how technology altered disclosure. While modern technology makes disclosure "rapid and informative," *Citizens United*, 130 S. Ct. at 916, there are unforeseen consequences. Technology threatens deep First Amendment wounds absent restraint. (*See* Br. of Amici Comm. for Truth in Politics et al. (technology increases burdens).) Disclosure reports, once residing in practical obscurity, are now combined with maps offering satellite views of

donors' homes. *See* www.eightmaps.com. An amicus candidly admits it seeks petition-signers' identity for "employment decisions." (Br. of Amicus Am. Bus. Media et al. 14.) This is far from an interest in "plac[ing] . . . candidate[s] in the political spectrum more precisely than . . . on the basis of party labels and campaign speeches." Sunlight, championed as the best of disinfectants, threatens the cancer of intimidation to speakers absent appropriate protection. The harassment and intimidation illustrate the substantial and irreparable harm imposed by PRA.

Harassment and intimidation also balance equities for Petitioners. *See Hollingsworth*, 130 S. Ct. at 712. (*See also*, Pet'rs' Br. 56-57.)

Finally, public interest favors a preliminary injunction. Disclosure of petition-signers' identity cannot help citizens decide to sign a petition because it occurs *after* the petition is submitted. If signatures are merely a collective command to hold an election, as Respondents assert, disclosure cannot help voters decide how to vote in the election. If the signatures indicate how individuals would vote, disclosure infringes their right to privacy and a secret ballot.

The informational interest in *Buckley* is not about simplifying the message for voters. *See Bellotti*, 435 U.S. at 792 ("[A]ny danger that the people cannot evaluate the information and argument advanced . . . is . . . contemplated by the Framers . . . ."). Disclosure of petition-signers' identities threatens to prevent the debate from even occurring, and the First Amendment must promote, not discourage, public debate of issues.

Conclusion

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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