No. 09-559

IN THE
Supreme Court of the United States

JOHN DOE, ET AL.,
Petitioners,
v.
SAM REED, ET AL.,
Respondents.

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

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the identities of citizens exercising direct legislative power must be shielded from disclosure under state public records laws.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] They have a compelling interest in the issue presented in this case: whether persons who sign petitions placing referenda on a state ballot may resist public disclosure of their names.

Many States have public records acts, like the Washington statute at issue in this case, that serve vital public interests by effectuating transparency in government. All but one of the 24 States that have initiative and referendum procedures disclose petition signatories as public records. Local governments also make provision for the release of information regarded by residents as bearing significantly on government activity. But the argument advanced by petitioners here, if accepted, could greatly undermine the effectiveness of such regimes, threatening to disrupt many settled areas of state administration. Petitioners' argument for anonymity also runs counter to the fundamental nature of the referendum, which is a form of direct legislation. *Amici* therefore submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

In their briefs, respondents explain the controlling legal doctrine that supports the holding below.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

Amici take a different focus in this brief: We address both the character of state referenda and the practical implications of petitioners' theory—both considerations that bear on the proper outcome here.

First, it is of central importance that referenda are acts of direct legislation. The movement that gave rise to the modern referendum, which grew out of the historic town meeting, conceptualized it as making each citizen a legislator. That is the character of the Washington referendum, which involves an exercise of the people's reserved right to legislate. And as a legislative act, full public disclosure of the referendum's supporters is essential to the proper functioning of the referendum; the notion of anonymous legislating is chimerical.

Second, public disclosure in this and related contexts serves vital purposes: It is essential to combat fraud and to support a fully informed electorate. For this reason, all States have public disclosure regimes that would be undermined by petitioners' theory. In addition, the expansive implications of petitioners' demand for anonymity would have greatly disruptive effects in many areas of the law, calling into question the legitimacy of such settled practices as open electoral caucuses, public availability of voter registration information, and campaign finance disclosure. Petitioners have not offered the justification necessary for the Court to take such a radical step.

I. A WASHINGTON REFERENDUM IS A LEGISLATIVE ACT.

In May 2009, the Washington State legislature passed legislation extending the rights of same-sex couples. In response, opponents of the measure sought to repeal it by popular referendum, a process

that authorizes citizens, by petition, to put a newly enacted law to an up-or-down vote of the statewide electorate. When transparency groups attempted to obtain the petition signatures via Washington's Public Records Act (PRA), Wash. Rev. Code § 42.56.001 *et seq*., petitioners opposed the effort on the ground that persons who signed the petitions would be subject to harassment if their identities were revealed. But petitioners' asserted desire to preserve their anonymity misunderstands the character of acts taken to place a referendum on the ballot: such conduct is a legislative act that, by its nature, is public.

1. To begin with, as respondent Washington Coalition for Open Government demonstrates, a referendum is a legislative act under the Washington State Constitution. Resp. WCOG Br. 11-13 (citing, *e.g.*, *State ex rel. Mullen* v. *Howell*, 181 P. 920, 926 (Wash. 1919) ("Under the Constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the lawmaking power of the state.")); see also Resp. Reed Br. 24-25 (citing decisions by other state courts finding that the referendum is a legislative act). The Washington Supreme Court thus recently explained that, as a matter of state law, "[a] referendum * * * is an exercise of the reserved power of the people *to legislate*." *Belas* v. *Kiga*, 959 P.2d 1037, 1040 (Wash. 1998) (emphasis added). This characteristic of referenda is of central importance here.

Although South Dakota was the first State to adopt the modern initiative and referendum in 1898, the referendum process had its origins in the New England town meeting and early state constitutional referenda, public acts of direct democracy and popular sovereignty. Dating back to the seventeenth cen-

tury, townspeople in the American Colonies gathered in meetings to propose ordinances, debate these proposals, and vote openly on them. David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* 3-4 (1989); Joseph F. Zimmerman, *The Initiative: Citizen Law-Making* 2-3 (1999). A process similar in spirit to the New England town meeting, voter ratification of state constitutions by statewide referendum was adopted by several States after the Revolution. Schmidt, *Citizen Lawmakers*, at 4. These referenda were held in open town and plantation meetings. Zimmerman, *The Initiative*, at 8.

In the late nineteenth and early twentieth centuries the Populists, and later the Progressives, championed a return to this sort of direct democracy and popular sovereignty. James Sullivan, one of the first American theorists to support the initiative and referendum movement, drew inspiration from the emergence of the initiative and referendum in Switzerland beginning in the 1860s. The Swiss had sought to revive aspects of a seventeenth-century tradition similar to the New England town meeting, the "*Landsgemeinde*," an "annual open-air meeting[] where all the men in a canton would vote on the policies of the local government." Schmidt, *Citizen Lawmakers*, at 5; see also Joseph F. Zimmerman, *The Referendum: The People Decide Public Policy* 3 (2001).

The goal of the Populists and Progressives was the transposition of the New England town meeting into a figurative assembly on a statewide scale, enabling each adult citizen to have his or her say in government. The notion was that this would create "citizen lawmakers" who could "revitalize legislative decision-making and invigorate citizen participation."

Zimmerman, *The Initiative*, at 4. As William Jennings Bryan urged at the Ohio Constitutional Convention in 1912: "The initiative and referendum do not overthrow representative government—they have not come to destroy but to fulfil. The purpose of representative government is to represent, and that purpose fails when representatives misrepresent their constituents." William Jennings Bryan, *The People's Law* 11 (1914).

In the first decades of the twentieth century, the movement found success, particularly in the West, where several States adopted the initiative and referendum in their constitutions to encourage "voters taking into their own hands the responsibility for determining public policies on important issues in the event a legislative body failed to establish a policy favored by a majority of the voters." Zimmerman, *The Initiative*, at x. By 1917, "only three states were without provision for [initiative and referendum] on at least one level of government." Schmidt, *Citizen Lawmakers*, at 10.

In the Progressive and New Deal eras, reformers used such ballot initiatives to pass measures in a number of States aimed against government corruption, inefficiency, and unresponsiveness. These initiatives included the adoption of primary elections, presidential primaries, direct senatorial elections, public official recall procedures, permanent voter registration, the amendment of budget procedures, reapportionment measures, and limits on campaign spending. Schmidt, *Citizen Lawmakers*, at 15-19; see also William B. Fisch, *Constitutional Referendum in the United States of America*, 54 Am. J. Comp. L. 485, 496-497 (2006). Today, twenty-four States have some form of statewide initiative or popular referen-

dum. Initiative and Referendum Institute, *What is the Initiative and Referendum Process?*, www.iandrinstitute.org.

This Court accordingly has recognized both the town meeting and the referendum as public acts of direct democracy: "The reservation of such [legislative] power [to the people] is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation * * *." *City of Eastlake* v. *Forest City Enters., Inc.*, 426 U.S. 668, 672-673 (1976) (footnote omitted). Thus

> [a] referendum * * * is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.

Id. at 678 (quoting *Southern Alameda Spanish Speaking Organization* v. *Union City,* 424 F.2d 291, 294 (1970)). See also *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199 (2003) (finding that the referendum provides the people the "power to govern").

2. Because referenda are legislative in character, the gathering of signatures in public, and the identification of the signatories, has always been integral to the referendum process. See generally Note, *Making Ballot Initiatives Work: Some Assembly Required*, 123 Harv. L. Rev. 959 (2010) (discussing the benefits of deliberation in ballot initiatives). Supporters tra-

ditionally "would bring petitions to meetings of civic groups and churches, and people would debate the merits of the proposal as they considered whether to sign." Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex. L. Rev. 1845, 1850 (1999). Signature drives thus were treated as "occasions for public deliberation." *Ibid.*; see also Thomas E. Cronin, *Direct Democracy: The Politics of Initiatives, Referendum, and Recall* 62, 207-219 (1989).

That process continues today. As the court below noted, governments that make signature sheets available under public record laws reinforce ongoing discussions "triggered between people that already have a personal connection like friends, relatives, and neighbors." Pet. App. 9a n.4. This interest helps to explain why the people of Washington, who enacted Washington's public records law themselves via the referendum process, declared that keeping the people "informed" will "assure that the public interest will be fully protected." Wash. Rev. Code § 42.56.030.[2]

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[2] Where growing populations preclude intimate community discussions, "deliberation over the internet or engagement through phone conversations may be better than no discussion at all." Note, *Making Ballot Initiatives Work*, at 970. The Internet has kept a previously public process accessible to citizens who increasingly communicate electronically with members of their communities. For example, social networking websites now serve as a primary outlet for political discussion. See, *e.g.*, Jane S. Schacter, *Digitally Democratizing Congress? Technology And Political Accountability*, 89 B.U. L. Rev. 641, 659 (2009) ("More commonly, users interact with one another on political matters in cyber-communities, such as those created on blogs, listservs and, increasingly, social network sites like Facebook and MySpace."). Third-party sites like the Center for Responsive Politics' opensecrets.org also make it easy to find out "which of

This element of disclosure and public scrutiny is an essential aspect of the legislative—and thus of the referendum—process. The Washington Constitution requires that the "doors of each house shall be kept open" when the legislature is in session, "except when the public welfare shall require secrecy." Wash. Const. Art. II, §11. Moreover, "[n]o bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same shall be entered on the journal of each house * * *." *Id.* § 22. The point is confirmed by Washington statute:

> No governing body of a public agency shall adopt any ordinance, resolution, rule, regulation, order, or directive, except in a meeting open to the public * * *. No governing body of a public agency at any meeting required to be open to the public shall vote by secret ballot. Any vote taken in violation of this subsection shall be null and void * * *.

Open Public Meetings Act, Wash. Rev. Code § 42.30.060(1)-(2).[3]

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your friends, relatives, and neighbors gave how much money to which candidates in recent Presidential elections." See Michael C. Dorf, *Is There a Constitutional Right to Sign a Petition Anonymously?*, FindLaw, Nov. 16, 2009, http://writ.news.findlaw.com/dorf/20091116.html.

[3] Courts in other States have broadly construed laws advancing open government. See, *e.g.*, *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 21* v. *Superior Court*, 165 P.3d 488, 496 (Cal. 2007) ("Public visibility breeds public awareness which in turn fosters public activism[,] politically and subtly encouraging the governmental entity to permit public participation in the discussion process."); *Bd. of County Comm'rs* v. *Costilla County Conservation Dist.*, 88 P.3d 1188, 1195 (Colo. 2004) ("We agree that the OML [Open Meeting Law] should be construed as

3. Shielding the names of the signatories whose actions placed a referendum before the statewide electorate therefore would depart from settled practice and run directly counter to the theory of direct legislation. But in nevertheless arguing for the right to preserve anonymity, petitioners point to what they describe as the danger of harassment by opponents. See Pet. Br. 45-56. Respondents explain why this contention is overstated. See Resp. Reed Br. 21-22; Resp. WAFST Br. 21-24, 34-38; Resp. WCOG Br. 11, 49-51, 53-54. Even if complaints or harassment by political rivals were a substantial risk in this context, however, that would not carry the day for petitioners: The notion of legislative anonymity is chimerical.

Historically, elected legislators have been subject to public protest, "uncomfortable" conversations with voters, and even occasional confrontations far more threatening than anything faced by petition signatories in Washington. See, *e.g.*, *Cross Burned on Lawn of Rayburn Residence*, N.Y. Times, July 27, 1956, at 5 (a "cross was burned on the front lawn of the home of Sam Rayburn, Speaker of the House" as debates were underway regarding civil rights legislation);

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broadly as possible to increase governmental transparency when the meeting at issue is one where the public may legitimately take part in or gain insight into the policy-making process."); *State ex rel. Newman* v. *Columbus Twp Bd.*, 735 N.W.2d 399, 404 (Neb. Ct. App. 2007) ("The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public."); *State ex rel. Citizens for Responsible Dev.* v. *City of Milton*, 300 Wis. 2d 649, 655-656 (Wis. Ct. App. 2007) ("We are guided, at the outset, by the Open Meetings Law's express public policy of ensuring public access to the workings of government and its mandate of liberal construction.").

Clayton Knowles, *Five Congressmen Shot in House by 3 Puerto Rican Nationalists*, N.Y. Times, Mar. 2, 1954, at 1 (Puerto Rican nationalists shot at representatives deliberating on an immigration bill).[4] And although petitioners maintain that the danger of harassment faced by petition signatories is a newly generated creature of the Internet age, that is not so; such a risk has always been present. See Thomas Goebel, *Direct Democracy in America, 1890-1940: A Government by the People* 169 (2002) (organizers of a counter-campaign against a 1937 single-tax initiative in California "offered to purchase petitions, intimidated circulators with threats of losing welfare benefits, visited them at home (after obtaining their addresses from compliant county clerks), and organized a skillful campaign of harassment that slowed the collection effort to a crawl"); *Threats Cited in Drive to Recall Reagan*, L.A. Times, July 19, 1968, at 26 (organizers of an effort to recall then-California Governor Reagan were the victims of threats, intimidation, and physical attack, and the recall office was vandalized and defaced).

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[4] Threats predicated upon government decisions continue to bedevil elected officials, though there has been no suggestion that criminal laws are inadequate to punish unlawful threats or that legislators' votes or identities should be kept secret. See, *e.g.*, *Pelosi, GOP, Decry Threats Against Congress*, N.Y. Times, March 25, 2010, http://www.nytimes.com/aponline/2010/03/25/us/AP-US-Health-Care-Threats.html (describing threats in connection with recent health care legislation such as a "fax bearing the image of a noose. A bullet through a window. Bricks thrown, a gas line cut"); Philip Rucker, *Former Militiaman Unapologetic for Calls To Vandalize Offices over Health Care*, Wash. Post, Mar. 25, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032501722.html.

In neither event, however, have such dangers ever been thought to justify legislative anonymity, whether for elected legislators or for petition signatories. Instead, this danger is generally addressed by penalizing persons who engage in threatening or destructive behavior. As respondent Washington Coalition for Open Government explains, Resp. WCOG Br. 53-54, Washington state law has effective methods to penalize and deter such misconduct without sacrificing the State's compelling interest in legislative disclosure. Thus, Washington provides criminal and civil penalties for harassment, specifically including the harassment of a petition signature gatherer. See Wash. Rev. Code § 9A.46.010, *et seq*. (2009); Wash. Rev. Code § 9A.46.110 (2009); Wash. Rev. Code § 9.61.230 (2009); Wash. Rev. Code § 9.61.260 (2009); Wash. Rev. Code § 29A.72.110 (2005).

Finally, it is worth noting that the form of legislative "anonymity" petitioners seek is highly selective. The petitions at issue here requested the e-mail addresses of signatories, a datum neither required by statute nor used by the Secretary of State in processing the petitions. See Resp. Reed Br. 34-35. The idea that the petition organizers could publicly solicit, retain, and exploit the contact information of the citizen-legislators for their own fund raising and other purposes, but then preclude other members of the public from uncovering the identities of the petition's signatories, finds support neither in this Court's precedents nor in common sense.

II. RECOGNITION OF A RIGHT TO ANONYMITY WOULD FOSTER FRAUD AND UNDERMINE VITAL DISCLOSURE LAWS.

The legislative nature of the referendum itself mandates public disclosure of petition signatories.

But beyond that, disclosure serves compelling public interests related to "the integrity and reliability of the initiative process." *Buckley* v. *Am. Constitutional Law Found.* (*Buckley II*), 525 U.S. 182, 191 (1999). Application of the PRA in this context furthers the State's interest in fostering "government accountability and transparency." *Ibid.* See also *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of the election process."). Indeed, the PRA is akin to voter identification requirements and bans on write-in and fusion candidates, all of which have been upheld as reasonable election regulations. See *Crawford* v. *Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (plurality opinion) (voter ID law); *Burdick* v. *Takushi*, 504 U.S. 428, 441-442 (1992) (write-in candidates); *Timmons* v. *Twin Cities Area New Party,* 520 U.S. 351, 369-370 (1997) (anti-fusion law).

A. Prohibiting Disclosure Will Undermine The State Interest In Combating Fraud In The Political Process.

1. This Court has recognized that "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). States undeniably have a "compelling interest" in acting to minimize voter fraud. *Ibid.* And the danger of both fraud and of hidden machinations of well-funded special interests is very real in the referendum context.

From the beginning, the referendum process became subject to some of the same corruptive forces that it had been designed to eradicate: "In a highly ironic development * * * the same economic interests

that direct democracy was originally supposed to rein in and even eliminate became important players in initiative and referendum politics." Goebel, *Direct Democracy*, at 7. Petition circulation became commercialized as early as the first decades of the twentieth century. Political professionals are often paid per name, receiving a fee for each petition signature they secure. See Dina E. Conlin, Note, *The Ballot Initiative in Massachusetts: The Fallacy of Direct Democracy*, 37 Suffolk U. L. Rev. 1087, 1098 n.84 (2004). Ample funding is "becoming a necessary component" of the effort to qualify a referendum for the ballot, and "wealthy groups have a disproportionate ability" to succeed in this effort. Garrett, *Money*, at 1849, 1847.[5] Payment per signature greatly increases the likelihood of irregularity in the procurement of signatures.

In addition, apart from the role of disclosure in combating outright corruption, more information—necessarily—leads to a more informed electorate. Although petitioners assume that voters gain little information from learning the identities of petition signatories, the simple fact is that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and mes-

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[5] "The record amount of spending on a single proposition is $154 million on California's Proposition 87 in 2006, which would have placed a windfall profits tax on oil companies. A handful of other measures have exceeded $100 million in spending—but in every case the measures had significant financial ramifications for an industry with deep pockets: gambling, oil, tobacco, or insurance." Initiative and Referendum Institute, *Same-Sex Marriage: Breaking the Firewall in California?*, 2 Ballotwatch 2 (2008), http://www.iandrinstitute.org/BW 2008-2 (Marriage).pdf.

sages." *Citizens United* v. *FEC*, 130 S. Ct. 876, 916 (2010). For example, analysis of petition signatures could reveal that a proposition was put on the ballot by a narrow special interest, such as a three-strikes referendum receiving its primary support from prison guard unions. See California Correctional Peace Officers Association, *Our History*, http://www.ccpoa.org/union/about/our_history (prison union "strongly backed" the three strikes initiative).

2. Against this background, public disclosure regimes, which can be used to help police the integrity of the referendum and election processes, serve essential purposes. "All states now have some form of freedom of information statute analogous to the federal Freedom of Information Act (FOIA), as well as a variety of open meeting and other 'sunshine' laws." Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 227 (2003). And States and many local governments have enacted public records acts to encourage transparency in government. See, *e.g.*, Alaska Public Records Act, Alaska Stat. § 40.25.110 (West 2010); Illinois State Records Act, 5 Ill. Comp. Stat. 160/1.5 (2010); Massachusetts Public Records Law, Mass. Gen. Laws Ann. ch. 66, § 10 (West 2010); see also Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1161 (2002) (noting that "all fifty states have open records statutes, a majority of which are modeled after FOIA"). These statutes provide each citizen with a right to access all public records.[6] Washington—like most States—broadly de-

[6] Public Records Acts establish open access to petition signatures, but do not mandate how proponents use the signatures. Those who request access to the signatures use them for a vari-

fines public records to include "any writing containing information relating to the conduct of government * * * retained by any state or local agency." Wash. Rev. Code § 42.17.020(42) (2010). Under these statutes, the public has an unqualified right to inspect public records—including petitions.

Every State but California with an initiative and referendum process—23 in all—discloses petition signatures as public records. See Resp. WAFST Br. 34.[7] Municipalities also often readily provide access to petition signatures. See, *e.g.*, Cuyahoga County of Ohio Board of Elections, *Candidate FAQs*, http://boe.cuyahogacounty.us/en-US/cfaqs.aspx ("[T]he act of signing a petition is a voluntary act by the signer, so the signer chooses to disclose his or her address in a document that becomes a public record."). A ruling in petitioners' favor would frustrate these disclosure practices. And that, in turn, would undermine the integrity of the electoral and legislative processes.

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ety of purposes. See Resp. Reed Br. 34-35. For example, national political parties have used lists of petition signatures to build extensive voter outreach databases. William Yardley, *Privacy Looms Over Gay Rights Vote*, N.Y. Times, Oct. 31, 2009, at A24. Others have used petition signatures to compile lists of campaign contributors. *Public Records Online: The National Guide to Private & Government Online Sources of Public Records* 22 (Michael L. Sankey & Peter J. Weber eds., 4th ed. 2003).

[7] See, *e.g.*, Colo. Rev. Stat. Ann. § 1-40-116(2) (West 2010); Idaho Code Ann. § 34-1806 (West 2010); Nev. Rev. Stat. Ann. § 295.0585 (West 2010); Utah Code Ann. § 20A-7-206 (West 2010); Arkansas Secretary of State, *2010 Initiatives and Referenda*, at 14, http://www.sos.arkansas.gov/elections/elections_pdfs/2010_I_R.pdf; *Florida Petition Form*, http://election.dos.state.fl.us/initiatives/fulltext/pdf/50667-1.pdf.

To be sure, States have sought to combat "flagrant examples" of voter fraud with varying methods of verifying voter eligibility at the polls. See *Crawford,* 128 S. Ct. at 1619 (plurality opinion); see also *id.* at 1619 n.12 (discussing voter fraud in Washington). States increasingly rely on statistical sampling to verify a random set of signatures. See Caroline J. Tolbert, Daniel H. Lowenstein & Todd Donovan, *Election Law and Rules for Using Initiatives*, *in Citizens as Legislators* 37-38 (Shaun Bowler et al., eds., 1998). But States also have relied on public scrutiny under public record acts to supplement state enforcement. And for good reason: Limited public resources mean that state efforts at curbing voter fraud will be more effective when assisted by the scrutiny of highly motivated individuals.

Recent history demonstrates the efficacy of anti-fraud efforts by private parties. A recent complaint filed in Pennsylvania, for example, alleges "forgery and fraud" in the signatures submitted by a candidate for the United States House of Representatives. Sean J. Miller, *Meehan's Signatures Face Court Challenge*, The Hill, Mar. 18, 2010, http://thehill.com/blogs/ballot-box/house-races/87673-meehans-signatures-face-court-challenge.[8] A ruling

[8] Similar signature challenges have occurred at all levels of government. See Kate Zernike, *Court Strikes Nader from Pennsylvania Ballot*, N.Y. Times, Oct. 14, 2004, http://www.nytimes.com/2004/10/14/politics/campaign/14nader.html; Borys Krawczeniuk, *McGuigan Knocked Off State Representative Ballot*, Times-Tribune (Scranton), Mar. 26, 2010, http://thetimes-tribune.com/news/mcguigan-knocked-off-state-representative-ballot-1.699547; Stephen Stirling, *Three Queens Candidates Knocked Off Ballot by Board of Elections*, Boro Politics, Aug. 5, 2009, http://www.boropolitics.com/stories/1/2/01_02_challenges_wrapup.html; Drew Griffin &

in petitioners' favor would unduly limit the ability of the public and candidates to verify the authenticity of signatures on petitions and ballot access forms.

B. Petitioners' Privacy And Intimidation Exceptions Would Endanger Other Election Regulations That Mandate Disclosure.

Petitioners' argument endangers the political process for other reasons. Their legal theory could require anonymity in any public act involving voting; petitioners argue for an "intimidation exemption" that would apply when a group is able to demonstrate that disclosure would "subject [supporters] to threats, harassment, or reprisals from either Government officials or private parties." Pet. Br. 25-26 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 74 (1976)). This would call into question the enforceability of a host of state election laws, most notably the candidate-selection caucus and the release of voter registration information. Additionally, the logic of petitioners' argument would insupportably expand the intimidation rationale governing campaign finance disclosure.

1. Caucuses.

Petitioners correctly recognize that "it is unnecessary here to decide whether the Constitution requires secret ballots * * *." Pet. Br. 19. While it is true that every State now utilizes secret ballots for general elections, *id.* at 19 n.23, many state political

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Kathleen Johnston, *Obama Played Hardball in First Chicago Campaign*, CNN, May 30, 2008, http://www.cnn.com/2008/POLITICS/05/29/obamas.first.campaign/index.html (describing how Barack Obama successfully challenged petition signatures of opponents in state senate race).

parties use caucuses to select candidates for office. Unlike primary elections, which mirror the privacy of the general election voting booth, caucuses occur in public. Typically, a caucus meets in a community space—such as a school gymnasium—and voters stand in different sections of the room to indicate support for their candidate. See, *e.g.*, Associated Press, *Some Basic Facts on the Iowa Caucuses*, Yahoo! News, Jan. 2, 2008, http://web.archive.org/web/20080105065613/http://news.yahoo.com/s/ap/20080102/ap_on_el_pr/iowa_caucuses_q_a. The process encourages interaction among party members. Thus, petitioners' desire for anonymity would inevitably clash with the laws of many States.[9]

Caucuses, by definition, are open and contested meetings. Citizens declare their support for a particular candidate, while others lobby for votes. Given their public nature, caucuses have the potential to engender intimidation and hard feelings. See, *e.g.*, Editorial, *Change Texas Caucus System*, Dallas Morning News, Mar. 12, 2008, http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/031208dnedicaucuses.481cb2c7.

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[9] For example, the Iowa caucuses inaugurate the quadrennial presidential nominating contests. During the 2008 election cycle, the Republican and Democratic parties held caucuses in 15 and 14 States, respectively. Indeed, Washington's Republican and Democratic parties conduct presidential caucuses. See Primary Calendar: Democratic Nominating Contests, N.Y. Times, http://politics.nytimes.com/election-guide/2008/primaries/democraticprimaries; Primary Calendar: Republican Nominating Contests, N.Y. Times, http://politics.nytimes.com/election-guide/2008/primaries/republicanprimaries. Because caucuses are more time-intensive and deliberative than primary elections, many state parties prefer them as indicators of commitment to a candidate.

html (describing a Texas Democratic presidential caucus that "nearly turned violent"). Indeed, the possibility of confrontation is likely greater in the caucus than in the referendum context. A crowded room full of people engaged in heated political debate is at least as likely to provoke threats as is the large-scale release of petition signatures on the Internet. A ruling in favor of petitioners' intimidation theory thus could instigate legal challenges to longstanding caucus procedures.[10]

2. Voter Information.

Many States make voter information public. See Solove, *Access and Aggregation*, at 1144. Illinois, for example, maintains a website that allows users to verify whether an individual is registered to vote. See *Am I Registered to Vote in Illinois?*, http://www.elections.state.il.us/VotingInformation/RegistrationLookup.aspx. Similarly, Maryland's Board of Elections permits Internet users who know an individual's full name, zip code, and date of birth to discover whether that person is registered to vote, as well as the person's mailing address and party affiliation. See *Maryland Elections Center*, http://www.mdelections.org/voter-registration/status. And Virginia authorizes the release of voter information to candidates, PACs, and political parties. See Fredick Kunkle, *Va. Investigates Legality of Access to Voter List*, Wash. Post, Oct. 30, 2009,

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[10] This Court has often entertained constitutional challenges to political party primaries. See, *e.g.*, *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) (invalidating closed primary law on First Amendment grounds); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (holding that the Democratic Party's "white primary" violated the Fifteenth Amendment).

http://www.washingtonpost.com/wp-dyn/content/article/2009/10/29/AR2009102904427.html.

Given the political saliency of voter information, it is unsurprising that voter rolls are often compiled and sold for get-out-the-vote (GOTV) drives, fundraising, and outreach purposes. Several firms specialize in assembling and disseminating this information. See E-Merges, https://www.e-merges.com/voter-lists.html ("This site enables you to create your own customized mailing list of registered voters."); GOTVoters Online, http://www.voter-lists.com/voter-lists.cfm (providing voter information that includes mailing address, party affiliation, phone number, race, and participation rate). While individuals such as prosecutors and judges may seek to keep their addresses and associated information private for fear of job-related retaliation, this is done at the request of the individual rather than through blanket recognition of anonymity. See, *e.g.*, Md. Code Regs. tit. 33, § 04.02.02 (2010). But this longstanding regime, too, is threatened by petitioners' theory.

3. Campaign Finance Disclosure Rules.

Finally, petitioners' core argument is that the alleged intimidation that occurred during California's Proposition 8 campaign would be repeated in Washington if the petition signatures were disclosed. See Pet. Br. 31-35. Petitioners' conflation of the California example with the situation in Washington is misguided on many levels, but it is important to recognize—as even petitioners do—that the now-famous Proposition 8 maps were compiled using "the names, employers, and contact information of Proposition 8 campaign *contributors* from public filings." *Id.* at 2 (emphasis added). Because California's Public Records Act explicitly exempts initiative signatures

from its ambit, Cal. Gov't Code § 6253.5, the *sine qua non* of the California controversy was not petition signatures at all, but campaign contributions.[11]

That this case instead arises in the petition signature context reduces the force of the California comparison. When an individual's campaign donation is disclosed, the inescapable assumption is that the donor supports the election of the candidate or cause that received monetary support. But when a citizen signs an initiative petition, the story becomes ambiguous. An individual may sign a petition because he or she believes in the cause advocated by the sponsor of the referendum; alternatively, the individual may sign because of faith in the people as sovereign and a desire to support direct democracy, or simply because he or she did not pay much attention to the petition when solicited by a professional signature collector to sign while boarding a bus or attending a state fair. See Pet. Br. 50 ("At the petition stage, the question is merely whether the people should have the final say."). Given the many possible reasons why a voter may sign a petition, the specter of harassment and intimidation is greatly reduced in such circumstances. In any event, campaign contributors to the Washington referenda will eventually have their identities revealed, as *every* State that has referenda requires contribution disclosure. See Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 1 (2007), http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf.

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[11] Tellingly, a district court has already rejected petitioners' intimidation argument in the Proposition 8 context. See *Protect-Marriage.com* v. *Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

Nevertheless, petitioners' argument stems from this Court's campaign finance case law, which has long recognized that disclosure requirements "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Citizens United*, 130 S. Ct. at 916 (citing *McConnell* v. *FEC*, 540 U.S. 93, 198 (2003)). But given the strong anti-corruption rationale for campaign finance regulation, the Court has drawn the intimidation exemption narrowly.

In *Brown* v. *Socialist Workers' '74 Campaign Comm.*, 459 U.S. 87 (1982), the Court exempted a minor political party from disclosure requirements because it was "historically * * * the object of harassment by government officials and private parties." *Id.* at 88. Petitioners, however, would expand *Brown*'s intimidation exception to swallow the rule. Rather than protect a small political party subjected to years of harassment by state and private actors, petitioners seek to shelter the names of more than 100,000 individuals who favored a referendum that received substantial public support.

Once the intimidation rationale is extended in this manner to cover any issue of public controversy no matter the depth of public support, there is no limiting principle. Indeed, as respondent Washington Families Standing Together points out, much of petitioners' evidence of harassment "includes emails to the campaign manager of Referendum 71, a public figure broadly identified with the campaign, not an individual signer." Resp. WAFST Br. 60 n.15. If threats to campaign leaders—rather than individual petition signatories—justifies anonymity, it will be impossible to maintain comprehensive and meaning-

ful systems of campaign finance disclosure. Petitioners have offered no justification for taking such a disruptive step.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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