No. 09-504

IN THE
Supreme Court of the United States

JOHN DOE #1, ET AL.,
Petitioners,

v.

SAM REED, SECRETARY OF STATE
OF WASHINGTON, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GANNETT CO., INC., NATIONAL NEWSPAPER ASSOCIATION, NEWSPAPER ASSOCIATION OF AMERICA, THE RADIO-TELEVISION DIGITAL NEWS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici curiae, described in Appendix A, are six national news media organizations — The Reporters Committee for Freedom of the Press, Gannett Co., Inc., National Newspaper Association, Newspaper Association of America, The Radio-Television Digital News Association, and the Society of Professional Journalists.

This case concerns an issue critical to the media and the public in general: whether referendum petitions are protected speech under the First Amendment and the effect on government accountability and openness laws should referendum petitions become protected under the First Amendment. *Amici* and their members regularly use government openness and accountability laws to effectively report on governmental affairs to the general public. Allowing each and every state open meetings law to be subject to constitutional challenge would severely affect their ability to perform this public function.

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[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

SUMMARY OF ARGUMENT

To understand this case, one must first recognize the line between private action and state action. When citizens undertake to "petition the government for a redress of grievances," they act in a private capacity and are subject to full First Amendment protection. U.S. CONST. amend I. But when citizens assume the role of a state actor, particularly by following the procedures for governmental action outlined in a state constitution, the First Amendment is not implicated. That amendment divides the free speech interest between two sides —government actors and the governed — and prohibits government action that interferes with the intellectual freedoms of the people. The petitioners here were playing a constitutionally described role and became state actors. Accountability for those actions simply does not implicate the First Amendment.

The line between state action and private action was not given proper attention by either the United States District Court for the Western District of Washington or the United States Court of Appeals for the Ninth Circuit. Both courts assumed that referendum petitions qualify as speech, but this conclusion is erroneous. This Court's first inquiry should not be what level of scrutiny applies here, but whether the First Amendment is implicated at all, given the fact that petitioners in this case are actually state actors.

Citizens who are exercising their referendum power are acting in a governmental capacity; they are no longer speaking as private citizens. *See State v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) (noting

that the referendum is an "exercise of the reserved power of the people to legislate"). This Court and others have previously recognized scenarios where private citizens are actually acting as the state, or where government officials are not entitled to First Amendment protection in carrying out their public responsibilities. Submitting a referendum petition — as opposed to the purely private action to "petition the government for a redress of grievances" in the First Amendment — is analogous to those state actions, and not to private citizens expressing political views. In fact, referendum petitions do not even deserve an intermediate level of scrutiny that is afforded to some types of expressive conduct because there is no need to conduct a balancing test to identify an overriding government interest when the behavior affected is government action itself, not private speech.

Further, referendum petitions should not be treated in the same manner as the secret ballot, because the secret ballot system sprang from a unique historical context that is not present in this case.

It is also inappropriate to claim that there is a constitutional right to privacy in this situation — this Court has only recognized a privacy interest when there is a threat of government interference in an individual's personal, private sphere. Initiating a law through a referendum — a law that will govern all residents of a state — is clearly an action taken in the public sphere, for which there is no constitutional individual privacy right. Finally, while this Court has found that strict scrutiny applies in cases involving petition circulation, this Court reached that conclusion because the laws at issue in those cases were

attempting to regulate interactive communication. Washington's Public Records Act does not restrict petitioners from communicating with others.

Allowing petitioners to prevail on the claim that referendum petition signatures are private would have far-reaching and devastating effects on this country's system of open government and governmental accountability. This country does not permit government to operate in secret, which is exactly what petitioners are asking this court to allow. Citizens have the right to evaluate their government and its actors, and they can only do so if governmental actors are required to *disclose* their actions. If governmental acts are allowed to occur anonymously under the guise of protecting speech, this Court will pave the way for any government acts involving personal expression to trump accountability and openness laws, risking the elimination of open meetings, governmental disclosure requirements, and almost any government accountability law.

ARGUMENT

I. This Court's initial inquiry should be whether petition signing in the referendum context truly qualifies as speech, or whether it is more like state action with no constitutional right to enforce its secrecy.

In claims involving expressive speech or conduct, the first question before the court is always whether the action at issue is speech, or whether the action is actually another type of conduct that does not necessarily implicate the First Amendment. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This initial inquiry is critical, as mistakenly classifying certain types of conduct as pure speech has far-reaching, adverse effects. Automatically classifying petition signing as "speech," without examining the context in which it occurs, may lead to the erroneous conclusion that petition signing qualifies as core political speech deserving of strict scrutiny, when in fact, citizens signing a petition should be viewed as state actors engaging in the legislative process. Failing to make this distinction between government action and speech will seriously damage this country's firmly established system of open government and accountability.

A. During a referendum, citizens are engaged first and foremost in the legislative process and are acting in a governmental capacity.

The state constitution of Washington allows citizens to act as legislators, by providing them the power to enact or revoke legislation through initia-

tives and referendums. *Wash. Const. art.* II § 1. Washington is not unique in this aspect; in 27 other states, voters can not only elect their representatives, but may also create and repeal laws through either the initiative and referendum process, or both. Initiative and Referendum Institute, *A Brief History of the Initiative and Referendum Process in the United States,* 2-3 (2008); *see also* http://www.iandrinstitute.org/. The power of self-governance is an important part of Washington history and forms a critical component of the state's government today.

Washington's referendum power has its roots in the Populist and Progressive movements that occurred during the late 1800s to early 1900s, both of which promoted direct democracy and the ability for the people to have more control within the legislature. Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum,* 32 Gonz. L. Rev. 247, 253 (1996-97). In 1911, Washington elected to amend the state constitution to grant its citizens the right to initiatives and referendums. *Id.* at 251-52. These rights are now viewed as analogous to those of the legislature. Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington's Law of Law-Making,* 39 Gonz. L. Rev. 447, 454-55 (2003-04).

The Washington Supreme Court has repeatedly confirmed that state citizens may become legislators through exercising initiative and referendum powers. "A referendum or an initiative measure is an exercise of the reserved power of the people to legislate." *State v. Murphy*, 982 P.2d at 615. In *In re Estate of Thompson*, the court found that the people "wield di-

rect legislative power" when voting to approve an initiative. 103 692 P.2d 807 (Wash. 1984); *see also Amalgamated Transit Union Local 587 v. State,* 11 P.3d 762, 779 (Wash. 2000) (court noted that the people act with "the same power of sovereignty as the Legislature" when acting in their reserved power to enact a statute); *Washington Federation of State Employees*, 901 P.2d 1028, 1034 (Wash. 1995) (finding [i]n approving initiative measures, the people exercise the same power of sovereignty as the Legislature when it enacts a statute").

Based on the language of the state constitution, the history of the referendum process in Washington, and state jurisprudence on initiatives and referendums, it is clear that citizens involved in the referendum process are no longer acting as private citizens, but rather as legislators and state actors. Petitioners in this case have moved beyond simply expressing their political views about a controversial issue; they are actively attempting to utilize the referendum power to revoke legislation. Petitioners are clearly engaging in a legislative act, which has not been afforded the traditional protections under the First Amendment.

B. Courts have previously distinguished between individuals when they act as private citizens and when they act in a public capacity.

A court does not automatically assume that a citizen is always a private citizen, no matter the circumstances. Courts have carefully drawn the line between private citizens and citizens acting as state agents, and have found that private parties can be

acting in unison with the government to the point where they become agents of the government, or that state agents are not automatically entitled to the same First Amendment rights and protections as a private citizen would be in the same situation.

For example, in *Berger v. Hanlon*, the United States Court of Appeals for the Ninth Circuit found that members of the media who accompanied police officers on searches of private property were state actors for purposes of a civil liability suit.[2] 129 F.3d 505, 514-16 (9th Cir. 1997) (vacated and remanded on other grounds, 526 U.S. 808 (1999)) (court allowed plaintiffs to sue under 42 U.S.C. § 1983 and *Bivens*; liability for private actors under those authorities is only available if the private party's conduct can be fairly attributed to the state). The Ninth Circuit found that courts use several "state actor tests" that were developed to determine whether the "conduct of private parties amounts to government action," including: (1) the governmental nexus test, where courts examine whether there is a sufficiently close nexus between the government and the party so that the action of the party may be fairly treated as that of the state itself; and (2) the public function test which states that state action is present when a private entity exercises functions traditionally and ex-

[2] *Amici* do not support the holding that members of the media should be considered government actors when they accompany law enforcement officials in these situations. However, *Amici* believe that if courts apply this standard to members of the media merely for coordinating coverage of a law enforcement event with officials, then the standard must be applied to citizens whose actions have a much greater nexus to government power so that they are considered government actors, such as petitioners in this case.

clusively reserved to the state.[3] *Id* at 514*; see also Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 350-51 (1974) (discussing the need for a close nexus between the state and the challenged action of the private party or regulated entity). Although the journalists in *Berger* were clearly not employed by the government, nor would they normally be assumed to be state actors, the Ninth Circuit made it clear that there was a sufficiently close nexus between the media and the government so that the media's private actions became public conduct.

Petitioners in this case meet the requirements for both of the above *Berger* tests to be considered government actors. There is a sufficiently close nexus between the government and petitioners so that petitioners' actions can be treated as those of the state; as discussed earlier, petitioners are taking over the role of state legislators to revoke legislation. Petitioners are also exercising functions traditionally and exclusively reserved to the state. Washington state officials and legislators are the only traditional parties that enact, revise, and revoke laws and regulations for the state, the only exception being when citizens invoke the referendum power. Under the "state actor" tests and *Berger*, petitioners are clearly behaving as government actors.

Courts have also found that governmental employees are not entitled to First Amendment protec-

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[3] There are two other tests named in *Berger*, but they are not relevant to this situation. A private actor does not need to meet all four tests to be considered a government actor; a court can select any of the tests that is most applicable to the situation. *See Berger,* 129 F.3d at 514.

tion when acting in their official capacity. In *Garcetti v. Ceballos*, the United States Supreme Court found that when a public employee made statements pursuant to his official duties, that employee was not speaking as a private citizen and therefore, that employee's speech was not protected by the First Amendment. 547 U.S. 410, 420, 426 (2006). Several other United States Courts of Appeals have followed suit, consistently finding that government employees speaking in the context of their employment may not be entitled to First Amendment protection. *See, e.g., Weintraub v. Board of Education*, 593 F.3d 196, 203-05 (2nd Cir. 2010) (holding that a public elementary school teacher's filing of a grievance was speech pursuant to the teacher's official duties and not speech as a citizen); *Nixon v. Houston*, 511 F.3d 494, 498 (5th Cir. 2007) (noting that the possibility of a First Amendment claim arises only after the court determines that an employee is not speaking in his/her role as an employee but rather as a citizen); *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007) (noting that "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe upon any liberties" the employee has as a private citizen). Much like government employees whose speech is not protected under the First Amendment when carrying out their professional duties, citizens acting as legislators should not be entitled to the same First Amendment protections as private citizens.

C. Protecting official acts as speech serves only to enhance government secrecy and diminish accountability.

It is critical that this Court distinguish between speech that qualifies as core political speech and government actions that are masquerading as speech. Improper categorization of government actions as core political speech sets a dangerous precedent because it allows the government to act in secret. If the Court allows referendums to be placed on the ballot without disclosing the identities of the government actors/citizens who petitioned for the referendum, the general public has no way of holding the government accountable for the legislation. The United States government is founded upon a strong tradition of open government and accountability, yet petitioners are asking this Court to ignore this foundation and to promote government secrecy in enacting legislation.

Allowing government conduct to masquerade as private speech has far-reaching implications and is devastating to the public's right to evaluate its government. Insisting that government actions must all undergo First Amendment analysis jeopardizes regulations designed to promote government openness and accountability. For example, the U.S. Court of Appeals for the Fifth Circuit recently endangered these openness and accountability regulations by holding that state open meeting laws that prevented elected members of a city council from participating in closed meetings must be subject to strict scrutiny. *Rangra v. Brown*, 566 F.3d 515, 517-18 (5th Cir. 2009) (holding that the speech of elected officials was identical to private citizen speech; overturned on *en banc* review on mootness grounds). Following the Fifth Circuit's lead and holding that any official action involving speech or expression was subject to constitutional scrutiny would make it extremely easy

for state actors to hold closed-door meetings and refuse to disclose information and records, claiming that these actions were protected under the First Amendment. For example, a state actor could claim that financial disclosures are now protected speech under the First Amendment, and thereby prevent the public from learning information that is highly relevant to evaluating that state actor. Obviously, allowing the political process to operate in secret in this manner would have significant adverse effects on government accountability.

D. A threshold test is necessary before determining what level of scrutiny to apply.

As a threshold matter, the Court must first determine whether scrutiny of state action is even appropriate, before attempting to determine what level of scrutiny may apply. Many entities involved in this matter have skipped the threshold question and instantaneously assumed that referendum petitions are subject to a certain level of scrutiny. Although many parties are attempting to fit this particular government action into one of previously established categories described below, referendum petitions do not, in fact, meet the elements required for any of the established levels of scrutiny.

This Court has previously held that there are different levels of scrutiny that can be applied to different expressive actions. While core political speech and anonymous speech is generally subject to strict scrutiny, intermediate scrutiny is used for laws that either regulate speech in a content-neutral manner or laws that regulate non-speech conduct, but have

an incidental effect on expression. *See Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182, 186, 199 (1999) (discussing the application of the strict scrutiny test to core political speech)**;** *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 661-62 (1994) (applying intermediate scrutiny analysis for content-neutral restrictions that imposed an incidental burden on speech); *United States v. O'Brien,* 391 U.S. 367, 376-82 (1968) (applying intermediate scrutiny to a regulation that had an incidental effect on expressive conduct); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (And What Do They Mean to the United States Supreme Court)?*, 30 Seton Hall L. Rev. 551, 552-53 (2000). When expressive conduct is at issue, courts will determine whether there is a sufficiently important governmental interest in regulating the non-speech element that justifies any incidental impact on First Amendment protections of speech. *O'Brien,* 391 U.S. at 376.

Referendum petitions do not fit into any of these established categories of speech and conduct, and in fact, do not even deserve intermediate scrutiny. As the Ninth Circuit found, this is not anonymous speech because the signatures on the petition were not gathered in confidence, and Washington law "makes no promise of confidentiality, either statutorily or otherwise." *John Doe #1 v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009). However, signing a referendum petition is not truly expressive conduct either, because expressive conduct always requires a balancing test to determine where there is a sufficiently important government interest that justifies the effect on First Amendment liberties. When referendum petitions are at issue, there will always be an exceed-

ingly strong government interest in keeping the legislative process open and the actors participating in that process accountable for their actions. That particular government interest will automatically be present whenever a referendum is used and there is no need to conduct an extensive balancing test to determine its existence.

Because referendum petitions do not meet any of the established categories, it is critical that this Court return to the initial inquiry of whether any scrutiny is even appropriate. In doing so, the courts should distinguish between restrictions on traditional speech and those restrictions that are actually meant to hold the government accountable to the people. True restrictions on an official's speech — regulating what topics they can comment on or what views they can express — would appropriately be subject to review under the *Garcetti* standard, and would be upheld or struck down, depending upon whether or not they met the elements under *Garcetti*. *Garcetti,* 547 U.S. at 420, 426. *Garcetti*, though, is inapplicable in this case because the proposed restriction on government disclosures implicates the ability of the people to govern, not just an individual official's employment status. In such a case, the court's next step is not to determine what level of constitutional scrutiny applies; it is instead to recognize that the "speech" that a government actor claims is restricted is not speech at all, but state action. Thus, there is no need for any further constitutional analysis to determine whether a level of scrutiny applies.

II. There is no justification for completing the referendum process in secret, particularly

when it denies citizens the opportunity to evaluate government.

A. It is inappropriate to treat the referendum process as being identical to the secret ballot or the right to vote.

Petitioners claim that the referendum process is identical to the right to vote. However, courts have already recognized that this is not the case. "[R]eferendums, unlike general elections for a representative form of government, are not constitutionally compelled." *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). In *Taxpayers United*, the United States Court of Appeals for the Sixth Circuit carefully distinguished between the right to initiate legislation, which was a "wholly state-created right," and the right to vote, which is granted to United States citizens through the federal constitution. *Id.* at 296-97. Because the petitioners in *Taxpayers United* had "not been prohibited from exercising a fundamental constitutional right," the court found that signing a petition was not entitled to the same First Amendment protection as exercising the right to vote. *Id.* at 296-97. Therefore, the referendum process is not automatically entitled to the same protections as the voting process.

Additionally, the referendum process does not share the same unique history as the secret ballot. Although the right to vote is as old as the federal Constitution, the secret ballot was not universally adopted until the late Nineteenth and early Twentieth Century, after Massachusetts became the first state to adopt it. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot:*

Challenges for Election Reform, 36 U. Mich. J.L. Reform 483, 490 (2003). Reformation of the ballot system was brought about not because of a belief in a privacy right in voting, but a clear need to correct an election process rife with corruption and fraud. *See Burson v. Freeman*, 504 U.S. 191, 200-202 (1992). Prior to reform, voting ballots were distributed by the political parties, which created ballots with distinctive colors and designs to ensure that it would be easy to tell for which party an individual voted. *Id.*. at 200. As a result, parties could either confuse voters by imitating popular party ballots or corrupt voters by threatening them or bribing them to vote for a particular party. *Id.* at 201. Massachusetts' use of the secret ballot spurred a nationwide adoption of reform between 1888 and 1891. Jill Lepore, *Rock, Paper, Scissors*, THE NEW YORKER (Oct. 13, 2008).

The need to maximize administrative efficiency may have also helped drive ballot reform. *See* David L. Permut & Joseph P. Verdon, *Protecting the American Tradition of Write-In Voting After* Burdick v. Takushi, 9 J.L. & Pol. 185, 191-92 (1992)**.** When the parties created their own ballots, the state was unable to ensure the integrity of the vote. *See* John C. Fortier, *The Absentee Ballot and the Secret Ballot,* at 490. There was no way to keep track of how many ballots there should be because the state did not created or distribute them, and ballots that varied vastly in color, size and organization and were made by either the party or the individual voter were burdensome for voters to create and administrators to count. *See Id.* at 489; Permut, *Protecting the American Tradition of Write-In Voting After* Burdick v. Takushi, at 191; *Burson,* 504 U.S. at 200, 203.

Petitioners emphasize the right to privacy in voting, but this focus is misplaced, given the secret ballot's history. The privacy concern was actually a secondary concern during the reform period, which focused primarily on the integrity of the voting process and the safety of the voters, instead of the individual right of privacy that is incidentally involved. *See Burson*, 504 U.S. at 200**.** In fact, before its adoption, many in the United States were vehemently opposed to a secret ballot, calling it cowardly and underhanded. Lepore*, Rock, Paper, Scissors*, at 3.

The history behind the secret ballot is instructive for the Court's ruling in this case. Contrary to petitioners' suggestions, the right to a secret ballot was not established because of a privacy right or an interest in anonymous voting. Rather, the secret ballot was created because of a primary need to eliminate corruption in the voting process.

Furthermore, petitioners claim that the right to vote is "inextricably tied" to a referendum petition, so a referendum petition must be given the same level of scrutiny. *Petitioners' Brief,* filed February 25, 2010, p. 20 ("Petitioners' Brief"); *see Campbell v. Buckley,* 203 F.3d 738, 742 (10th Cir. 2000) (noting that the right to vote cases are either subject to strict scrutiny or a balancing test). A citizen exercising the right to vote, however, is acting in a fundamentally different manner than a citizen who is exercising the right to legislate. A citizen casting a vote is only seeking to select officials that will later become responsible for creating and enacting legislation on a wide range of legislation. A citizen participating in a referendum is actively trying to govern on a specific

legislative initiative. These are two separate activities and should be treated as such.

B. Refusing to disclose signatories on a petition is an act of government secrecy and denies citizens the opportunity to evaluate the legislative process.

The primary purpose of Washington's Public Records Act is to promote open government and ensure that state actors are held accountable for their actions. The Public Records Act states that the "people insist on remaining informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code. § 42.56.030 (2009). For the citizens of Washington, a key component of remaining informed and maintaining the right to legislate is knowledge of what organizations or individuals are exercising their rights as state actors and attempting to overturn or revise legislation. If these citizens are not allowed to discover the identity of state actors, the state government will operate in secret.

The United States District Court for the Eastern District of California has already recognized the importance of knowing the identity of parties involved in government. In *ProtectMarriage.com v. Bowen*, the court refused to uphold a First Amendment challenge to a California state statutory requirement that ballot committees disclose names and personal information, noting that "being able to evaluate who is doing the talking is of great importance" because of the "complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures." 599 F.Supp.2d 1197, 1208 (E.D. Cal. 2009). Although

ProtectMarriage.com focused on disclosure of individuals who provided monetary donations to a political cause, the same logic applies to referendum petitions. Washington citizens also must be able to evaluate the parties putting forth a petition for referendum so that they can understand where support for the referendum is coming from, much in the way that these same citizens can evaluate state actors who are elected to office.

III. Washington's Public Records Act does not violate the First Amendment or any constitutional right of privacy.

In cases involving political speech, the First Amendment is interpreted to prohibit government action that denies the right of the people to communicate their opinions and beliefs on political issues. Petitioners insist that the right of the petition signatories is a First Amendment violation; however, the simple fact that a political petition is involved does not automatically qualify Washington's Public Records Act's public disclosure provisions as a First Amendment violation. In analyzing political speech cases, this Court and others have focused on whether there are actual restrictions on an individual's or party's right to communicate, and whether there is any prohibition on interactive communication between parties and individuals. Nothing in Washington's Public Records Act prohibits petitioners' right to communicate.

A. Even if submitting a referendum petition could be constituted as core political speech, it does not violate the First Amendment because nothing in

Washington's Public Records Act is restricting or prohibiting interactive communication.

This Court, as well as multiple other federal courts, has examined whether a First Amendment claim can arise out of the circulation of petitions for referendums. Petitioners are quick to point to these cases as establishing precedent for this current matter, but this reliance is misplaced. Petition circulation cases are fundamentally different from referendums designed to overturn legislation. When an individual circulates a simple petition, he or she is attempting to communicate his or her opinion to others and gather information on others that may support that cause. When an individual signs a referendum petition, however, that individual is attempting to exercise the right of self-governance. There is a critical, explicit distinction "between a state's power to regulate the initiative process in general and the power to regulate the exchange of ideas about political changes sought through the process." *Biddulph v. Mortham,* 89 F.3d 1491, 1498 n.7 (11th Cir. 1996). Courts have continually focused on the interactive communication aspects of petition circulation, which is not present when citizens act as the government.

For example, the plaintiffs in *Molinari v. Bloomberg* also attempted to argue that their First Amendment rights were implicated in a referendum context when the city amended a local law previously enacted by a referendum. 564 F.3d 587, 590 (2009). The U. S. Court of Appeals for the Second Circuit quickly noted that the plaintiffs' claim was "not based upon any actual restrictions on their right to communicate with voters" because there was no "at-

tempt to regulate the circulation of initiative or referendum petitions." *Id.* at 601. The court ultimately found that the plaintiffs had failed to identify a burden on their First Amendment rights. *Id.* at 606. The Second Circuit's key focus in *Molinari* was on identifying any restriction on plaintiff's right to communicate with voters and whether the circulation of a referendum petition was at issue.

Likewise, this Court also addressed First Amendment restrictions on interactive communication in *Meyer v. Grant* and *Buckley v. American Constitutional Law Foundation, Inc.* In *Meyer*, the Court found that Colorado's prohibition against compensating circulators of petitions violated the First Amendment. *Meyer v. Grant,* 486 U.S. 414, 414-15 (1988). In reaching that holding, this Court noted that "the circulation of a petition involves the type of *interactive communication* concerning political change that is appropriately described as core political speech." *Id.* At 421-22 (emphasis added). In *Buckley*, the Court held that Colorado's requirements that petition circulators be registered voters, wear an identification badge, and report the names and addresses of all circulators also violated the First Amendment. 525 U.S. at 183. The Court further noted that petition circulation was core political speech specifically "*because* it involves 'interactive communication concerning political change.'" *Id.* at 186-87 (emphasis added). Again, the critical component in *Meyer* and *Buckley* was the interactive communication aspect of actual petition circulation — that is what the First Amendment and the courts are protecting.

Interactive communication was also the type of speech at issue in *McIntyre v. Ohio Elections Commission*, where this Court held that a statutory prohibition against distribution of anonymous campaign literature violated the First Amendment. 514 U.S. 334, 334-35 (1995). Even though the campaign literature was anonymous, the focus of the Court was still on the interactive communicative aspect of the literature, framing the issue as one of determining whether the First Amendment's protection "encompasses documents intended to influence the electoral process." *Id.* at 344. Additionally, the petitioner in *McIntyre* sought only to inform voters about a controversial viewpoint and political opinion; the petitioner was not actually involved in enacting or revoking regulations, legislation, or laws.

Finally, the court in *Taxpayers United,* where plaintiffs' claimed that their First Amendment rights had been violated through Michigan's referendum procedures, also noted the difference between interactive communication and legislative action:

> The Michigan procedure does nothing more than impose nondiscriminatory, content-neutral restrictions on the plaintiffs' ability to use the initiative procedure that serves Michigan's interest in maintaining the integrity of its initiative process. Our result would be different if, as in *Meyer*, the plaintiffs were challenging a restriction on their ability to communicate with other voters about proposed legislation, or if they alleged they were being treated differently than other groups seeking to initiate legislation.

Taxpayers United, 994 F.2d at 297.

There is no interactive communication at issue in this matter; therefore, petitioners' First Amendment claim is without merit.[4] Petitioners claim that a referendum automatically falls into the same category as petition circulation, but citizens act in a fundamentally different capacity when distributing political literature than when they submit a referendum. A citizen who distributes political pamphlets is only passively participating in government — he or she is informing others about his or her opinion on a political issue. A citizen participating in a referendum has moved beyond interactive communication to taking an active role in government by attempting to overturn legislation that was enacted by elected officials.

Washington's Public Records Act does not attempt to regulate the interactive exchange of ideas about political issues. Petitioners are free to circulate petitions, gather signatures, and speak to whomever they would like without restrictions. The only process that Washington seeks to regulate is the general referendum process.

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[4] At least one court has refused to permit the disclosure of names in a referendum context. In *Campaign for Family Farms v. Glickman*, the United States Court of Appeals for the Eighth Circuit held that the United States Department of Agriculture could not release the names and addresses of persons signing a petition seeking a referendum abolishing mandatory checkoff program. 200 F.3d 1180, 1189 (8th Cir. 2000). That case differs from the current one in several aspects however. First, the court was focusing on the personal privacy exemption under the Freedom of Information Act, which is not applicable here. Secondly, the issue was only relevant to pork producers who had signed the petition in "their business or entrepreneurial capacities," which is also not applicable here. *Id*. at 1188-89.

Petitioners also argue that individuals will be less likely to participate in the referendum process. But courts have found that legislative or constitutional provisions that may make people less likely to participate in the political process are not necessarily unconstitutional. In *Initiative and Referendum Inst. v. Walker*, where plaintiffs challenged a constitutional provision requiring a supermajority for passing wildlife initiatives, the U.S. Court of Appeals for the Tenth Circuit upheld the provision because, although it discouraged some speakers from engaging in protected speech, it did not actually prevent such speech. 450 F.3d 1082, 1100, 1105 (10th Cir. 2006). Although individuals may be discouraged from signing petitions if their names are released to the public, nothing in Washington's PRA actually prevents speech.

B. Washington's Public Records Act does not implicate constitutional privacy interests.

Petitioners repeatedly emphasize the constitutional right to privacy; however this emphasis is completely misplaced. *Petitioners Brief*, pp. 26-29**.** This Court has recognized a constitutional right to privacy in specific, limited areas involving an individual's private activity. The focus has always been on preventing government interference in an individual's personal sphere. Initiation of laws that govern all Washington residents is clearly not a private activity that affects only an individual's personal sphere; in fact, it is one of the most public activities that exists. Petitioners fail to draw that distinction.

Protection against government intervention in an individual's personal sphere was illuminated in *Griswold v. Connecticut*, where this Court held that the Connecticut law forbidding the use of contraceptives unconstitutionally intruded upon the right of marital privacy. 381 U.S. 479, 486 (1965). Specifically, this Court discussed the Fourth and Fifth Amendments, which give "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" *Id.* at 484. This Court also specifically noted the "zone of privacy created by several fundamental constitutional guarantees," but these constitutional guarantees relate to the right to privacy in an individual's personal sphere, not an individual's public activities. *Id.* at 485.

Petitioners also rely heavily upon *NAACP v. Alabama* as providing a "privacy" right in associations, but this analysis is again incorrect. *Petitioners' Brief*, pp.26-27**.** *NAACP* focuses on individual's activities within their private sphere, not individual activities in the public sphere. *NAACP v. Alabama,* 357 U.S. 449, 463-4 (1958). Other courts also focus on the right to privacy in a person's personal, private activities. *See Dible v. Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (court noted that "the First Amendment does encompass a right of privacy, whose contours include within it a right to make personal decisions and a right to keep personal matters private"); *Crawford v. United States Trustee,* 194 F.3d 954, 958 (9th Cir. 1999) (court noted that U.S. Supreme Court cases delineated constitutionally protected privacy interests into two categories: the individual interest in avoiding disclosure of personal matters and the interest in independence in making certain kinds of important decisions). Additionally, any right to pri-

vacy that petitioners claim regarding their personal activities and beliefs disappears when they voluntarily disclose information on those activities to the public. *See Dible,* 515 F.3d at 918 (court noted that plaintiff's right to privacy claims were "virtually oxymorons" when plaintiffs made their personal activities public). Extending this right of privacy in the personal sphere to encompass a right of privacy in the public sphere, particularly in the legislative context, both misapplies precedent and denies citizens the right to know who is enacting and revoking laws that they must live under.

Furthermore, petitioners in *NAACP* were concerned with protecting the privacy rights of members who were "rank-and-file members," not official leaders of the organization. 357 U.S. 449, 463-64 (1958) (court noted that petitioner had not "objected to divulging the identity of its members who are employed by or hold official positions" with the organization); *see also Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 185 (court noted that ruling in *NAACP* applied to rank-and-file members). Petitioners in this case have much more in common with the official leaders of NAACP, who did not attempt to have their names withheld from public disclosure, because petitioners are not simply trying to exercise their right to associate — they are exercising their right to legislate. Therefore, they should not be accorded the same associational privacy rights that were granted to the rank-and-file members in *NAACP*.

CONCLUSION

In sum, petitioners claim that referendum petitions are protected under the First Amendment is without merit. Citizens submitting referendum petitions are acting as legislators, not as private citizens, and should be subjected to a threshold inquiry of whether legislative action truly constitutes speech. Petitioners have not been denied any rights to interactive communication under the First Amendment, nor do they have any constitutional privacy interests. This Court should find in favor of respondents.

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Gannett Co., Inc. ("Gannett") is an international news and information company that publishes 84 daily newspapers in the United States, including USA TODAY and The Indianapolis Star, and nearly 850 non-daily publications, including USA Weekend, a weekly newspaper magazine. Gannett also owns 23 television stations, and over 100 U.S. websites that are integrated with its publishing and broadcast operations.

Established in 1885, the National Newspaper Association (NNA) is the national voice of community newspapers. NNA represents owners, publishers, and editors of America's community newspapers and has over 2000 members. Most of its members are weekly or small daily newspapers, owned by families or small ownership groups. The mission of NNA is to protect, promote and enhance America's community newspapers. NNA is a 501(c)(6) non-profit trade association with no subsidiaries. NNA is headquartered in Columbia, Missouri.

Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States

and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Radio Television Digital News Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

APPENDIX B

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