No. 09-559

In The
Supreme Court of the United States

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

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

BRIEF *AMICUS CURIAE* OF AMERICAN BUSINESS MEDIA, CONSUMER DATA INDUSTRY ASSOCIATION, FIRST AMERICAN CORELOGIC, INC., THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS, REED ELSEVIER, INC., THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, TRANSUNION, AND THOMSON REUTERS IN SUPPORT OF RESPONDENTS

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Motion for Leave to File Out of Time

Amici respectfully move this Court for leave to file the attached brief out of time. The reason that this brief is being filed out of time is due to a computation error on the part of counsel. Upon learning of that mistake, counsel promptly contacted the clerk's office, which instructed us to file the brief immediately and include this motion. Counsel also promptly contacted the parties to determine whether any of them would object to this filing, and none of them will object. We respectfully request the Court's indulgence.

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IDENTITY OF AMICI CURIAE*

Amici are users and aggregators of a wide array of public record information, including voter registrations and other politically-related information available through public records. Many of *amici's* businesses depend on access to names and other identifying information found in public records.

Amici file this brief because they believe (1) that the Ninth Circuit correctly rejected the proposition that the First Amendment categorically prohibits the disclosure, through state public records acts, of the contents of all "issue" ballot petitions that contain the names of those who have signed the petitions; and (2) that any legitimate First Amendment privacy interests of these petitioners and others similarly situated do not require that overbroad approach, but can adequately be addressed through specific challenges in the small number of situations in which disclosure might create a danger of intimidation or similar harm. The identities of the *amici* are as follows:

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* *Amici* file this brief with the consent of all of the parties. No counsel for a party authored this brief, in whole or in part, and only those entities listed on the cover have contributed financially to its preparation.

First American CoreLogic, Inc. collects real estate-focused public records from various government sources throughout the nation. Its publications are used by customers to detect and prevent fraud, improve mortgage transaction efficiency, manage risk, measure the value of residential and commercial properties, identify real estate trends and neighborhood characteristics, and track market performance.

The Consumer Data Industry Association ("CDIA") is an international trade association that represents more than 200 companies that publish databases containing consumer credit and other information for purposes such as the prevention of fraud, the assessment of credit risk, the evaluation of prospective employees and tenants, the location of witnesses and non-custodial parents, and the apprehension of fugitives.

The National Association of Professional Background Screeners represents over 600 pre-employment background screening firms across the United States. Its members provide pre-employment background screening information to employers and the managers of apartment buildings in every state, who use that information to decide whether or not to extend a job offer or to rent an apartment. NAPBS clients are representative of the more than 88% of companies in the U.S. who perform background checks on their employees across the country. Our information products protect employers from liability and ensure that newly hired employees pose no financial risk.

American Business Media, founded in 1906, is a not-for-profit association serving business-to-business information providers and trade publications. Many of its 236 members republish political data, including political disclosures required by state and federal law.

Reed Elsevier Inc. is a publisher of information products and services for the business, professional and academic communities. Its LexisNexis business unit provides access to state and federal statutes, regulations, and public records, including criminal history information, property title records, liens, and tax assessor records.

TransUnion is a global information solutions company that offers a broad range of data and analytical services that enable business organizations and governmental entities to manage risk, locate individuals, protect against fraud, and confirm the identity of individuals with whom subscribers do business. Public data collected and used in services provided by TransUnion include court records (federal and state), tax liens, flood maps, phone listings, property ownership records, and mortgage data.

The Software & Information Industry Association is a trade association of software creators and information providers. Its approximately 500 member companies publish databases and related software tools used by researchers, journalists and business professionals.

Thomson Reuters is a leading source of information for businesses and professionals. The Thomson Reuters, Legal business provides access to editorially enhanced case law, statutes, regulations, analytical material and public records at the state and federal levels. Public data collected and used in services provided by Thomson Reuters, Legal include voter registration data, liens and judgments, real property deeds and political donor information. Thomson Reuters, Legal serves customers in the law enforcement, academic and legal professional communities.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly resolved any tension between the First Amendment's right to anonymity and Washington state's public records laws. Historically, this Court has found that once information, including information about identity, is released to the general public, the First Amendment generally requires that it remain public. These principles, when applied to the context of the information's availability in the signature process, effectively moot any claim to anonymity that petitioners may have under the First Amendment.

Even assuming that a First Amendment interest in this identifying information exists, the Ninth Circuit correctly applied intermediate scrutiny to Washington's public records act (PRA). That statute promotes speech, not suppresses it, and is plainly supported by substantial state interests in disclosure. The proper way to resolve this case is not—as petitioners suggest—through a broad constitutional rule through an as applied challenge involving these particular petitioners, not a broad ruling on issue petitions generally.

Access to identifying information contained in both politically and non-politically related public records is critical to amici's ability to produce its products and services that offer important benefits to the public. An overbroad rule, such as that petitioners propose, would result in either delays or unavailability of that information, with potential adverse effects on government, economic, and First Amendment activity.

ARGUMENT

I. Once Information Becomes Public, Its Status as Public Information Cannot be Rescinded.

This Court has repeatedly found that once information—names and similar identifying information—is made available to the public, the government may not withdraw that information from public discourse.[1] In *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491 (1975), for example, this Court found that a state attempting to protect juvenile privacy could nevertheless not impose sanctions on a television station for republishing the identity of a juvenile offender once that identity had appeared in court records. It makes no difference, moreover, that identity information is publicly available only in a limited area or forum. For example, in *Florida Star v. BJF*, 491 U.S. 524 (1989), the Court held that a state statute criminalizing the publication of a rape victim's name was unconstitutional as applied to a newspaper that acquired the name from a police pressroom, the only place in which the name had been publicly revealed. *See also Smith v. Daily Mail*, 443 U.S. 97 (1979) (newspaper cannot be punished for publishing lawfully obtained name of juvenile offender). *Cf. Bartnicki v. Vopper,* 532 U.S. 514 (2001) (radio

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[1] That "public" status has some limits, but those are not implicated by this case. *Cf. Feist Publ'ns., Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 353-54 (1991) (citing *Int'l News Service v. Associated Press*, 248 U.S. 215, 234 (1918)).

station may not be held liable for rebroadcast of information obtained in violation of wiretapping statute).

The identities of signers of petitions in a Washington voter referendum are public within the meaning of the *Cox Broadcasting/Florida Star* doctrine. Those identities are disclosed:

- when a petition is circulated and signed, during which any person asked to sign the petition can view the signature sheet;

- to members of the petitioning organization, which often places those names on its mailing list and which may distribute or sell that mailing list to other organizations;

- during the course of the petition verification process, when the identities of the petition signers are disclosed to those who challenge the validity of the petition; and

- during challenging the validity of the petition, when in litigation the identities are disclosed to challengers and to trial observers.

In each of these contexts, those to whom petition-signers' names are disclosed may publish or otherwise make that identifying information available to others. When identifying information is made available to the public to that extent, the Constitution does not permit the information to be removed from the public's reach.

II. The Ninth Circuit Correctly Rejected the District Court's Decision That Requires the Names of the Signers of All Issue Referendum Petitions Be Kept Secret.

Assuming *arguendo* that, despite the fact that their names have been open to public scrutiny, petitioners have a protectable First Amendment interest in whether their names can be released under Washington's PRA, the Court of Appeals correctly analyzed that interest using intermediate, not strict, First Amendment scrutiny. *See Doe v. Reed (Doe II),* 586 F.3d 671, 678-80 (9th Cir. 2009). Washington's PRA is a content-neutral regulation designed not to suppress speech, but to serve the public interest in having the contents of public records generally available for public scrutiny. If the application of the content-neutral PRA has an incidental effect on petitioners' First Amendment interests, that effect is subject to intermediate scrutiny review. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). That standard requires that the PRA be narrowly tailored to advance substantial state interests. *See, e.g., United States v. O'Brien,* 391 U.S. 367, 376 (1968); *Clark v. Community for Creative Non Violence,* 468 U.S. 288,

294 (1984). Washington's PRA clearly meets that intermediate-scrutiny standard.

The reason that states and the federal government have enacted public records laws is because "[s]unlight is said to be the best disinfectant; electric light the most efficient policeman." *Buckley v. Valeo,* 424 U.S. 1, 67 (1976) (citing L. Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)). The Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, is premised on that principle. It "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citing S. Rep. No. 813, at 3 (1965)). Like its federal counterpart, the primary purpose of Washington's Open Records Act is to inform political debate and hold the government accountable for its actions. *See Doe II,* 586 F.3d at 674. Washington's citizens "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Wash. Rev. Code § 42.56.030. The purpose of the Open Records Act is not only unrelated to the suppression of free expression, it is designed to encourage free expression in that it makes the actions of the government transparent so that voters can debate them and, if necessary, correct them through the political process.

Without public disclosure, the state's interest in promoting the integrity of its election process

would be substantially weakened. *Doe II,* 586 F.3d at 768. Unless there were a right to inspect petition sheets, for example, citizens would not be able to avail themselves of the right to challenge the legal sufficiency of the petition. *See id.* at 679; Wash. Rev. Code § 29A.72.240. Information regarding the identity of the petition signers has additional valuable uses that enrich and inform the political process, such as helping candidates, political parties and citizens supporting ballot propositions contact potential supporters and volunteers. Access to this information helps drive voter participation and education—the very heart of participatory democracy. The application of Washington's PRA to petitions generally is clearly supported by substantial state interests.

III. Any Legitimate Interest In Preserving Anonymity Should be Addressed on a Case-by-Case, Basis, Not By a Rule Excluding the Contents of All Referendum Petitions From Public Records Laws.

The petitioners in this case brought a two-count complaint. The first sought a broad rule that would exclude all referendum petitions from the ambit of public records laws, regardless of the subject addressed by the petition and regardless of whether there was any credible threat that public disclosure of the names on referendum petitions would create any significant danger of harassment. *See Doe v. Reed (Doe I),* 661 F. Supp. 2d 1194, 1196 (W.D. Wash. 2009). That rule would be enormously overbroad, since a threat of harassment or similar

harm will be present in, at most, a small minority of ballot petition campaigns. Petitioners' second count does not seek a broad rule applicable to all referendum petitions. It alleges that disclosure of the petitioners' identities, because of the particular nature of the ballot proposition involved in this case, subjected petitioners to a danger of harassment, should their names be made public. *See id.* That case-by-case approach, rather than an overbroad exclusion of all referendum petitions, is the appropriate procedure for protecting the interest in petition-signer anonymity that may possibly be present in connection with some ballot-proposition campaigns.

This Court has recognized that the First Amendment may, in certain circumstances, protect against the disclosure of identifying information where a determination is made that disclosure would create a "reasonable probability" of intimidation or similar harm. *See Buckley,* 424 U.S. at 74; *McConnell v. FCC*, 540 U.S. 93,198 (2003); *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010). "Although the proof requirements guiding this separate inquiry remain flexible, and direct proof of harm from disclosure is not required, ultimately the [speaker] must prove that the harm to it from disclosure . . . outweighs the governmental interest in disclosure." *Brown v. Socialist Workers Party,* 459 U.S. 87, 115 (1982) (Rehnquist, C. J., O'Connor, and Stevens, J. J., concurring). To the extent that these petitioners can show that they reasonably fear harassment or retaliation as the result of the public records request in this case and that that interest is greater than the government's interest in disclosure (questions on

which *amici* take no position), *Buckley* and its progeny provide a basis for protecting their identities from disclosure without making unwarranted inroads into the general utility and value of public records laws. If the Court concludes that referendum petitions may, in some circumstances, be constitutionally immune from public-records law disclosure, this case should be remanded to the district court to address the question whether disclosure of their names in the particular context of this case would subject them to unreasonable harassment and intimidation.

IV. It is Important to Avoid Overbroad Exclusions of Identifying Information from Public Records.

A. Identifying Information Is Critical to the Public Benefits that Amici's Publications Provide.

Many of *amici's* businesses in some way depend on access to names and other identifying information found in public records maintained by government bodies on the federal, state and local levels. As a general matter, identifying information, whether linked to a "political" public record or not, is routinely used in a variety of contexts that serve important purposes. For example, such identifying information in *amici's* products and services is an important tool in the hands of law enforcement:

> Subscription to [amici's public records databases] allows FBI investigative personnel

> to perform searches from computer workstations and eliminates the need to perform more time consuming manual searches of federal, state, and local records systems, libraries, and other information sources. Information obtained is used to support all categories of FBI investigations, from terrorism to violent crimes, and from health care fraud to organized crime.[2]

In addition, law enforcement efforts benefit from technology developed by *amici* that assists them in

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[2] *Hearing on the 2000 Budget* before the Senate Committee on Appropriations, Subcommittee for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies, at 280 (Mar. 24th, 1999) (Prepared Statement of Louis Freeh, Director, FBI). *See also* The Privacy Office, Department of Homeland Security, Privacy and Technology Workshop, Official Transcript at 19 (Sep. 8, 2005) ("[I]f you look back 23 years ago, if I wanted to gather information about a subject, ….We would have to physically go down to the courthouse to get real estate records, we would have to be sending these to another state to go get a driver's license record or a picture, we would have to go to a lot of different places, and manually gather this information.... So, I looked at commercial databases as a way to efficiently gather information....") (comments of Chris Swecker, Assist. Director of the Criminal Investigative Division for the FBI), *available at* http://www.dhs.gov/xlibrary/assets/privacy/privacy_wk2005_transcript_panel1.pdf (last viewed Apr. 1, 2010).

identifying and locating sex offenders in near real time.[3]

The ability of various *amici* and others to perform background checks that enable employers and volunteer organizations to make more intelligent employment decisions is dependent on their access to criminal history information that identifies specific individuals. Moreover, commercial entities routinely rely on products produced by *amici* to prevent fraud by helping authenticate the identity of those with whom they are contemplating doing business and alert them to any indicators of potential fraud. For example, when an e-commerce customer types in a delivery address that does not match his or her credit card billing address, *amici*'s anti-fraud products flag that transaction for additional scrutiny by the seller to ensure the transaction is legitimate. Similarly, when that product is delivered, if the carrier cannot find the right address, *amici*'s products can cross-reference the address with other available identifying information to assist the carrier in making the delivery.

The inclusion of political identifying information in public records provides important indirect public benefits. Certain *amici* rely on the

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[3] *See* LexisNexis, White Paper: Using Groundbreaking Technology to Enhance Law Enforcement Efforts to Locate Sex Offenders, *available online,* http://www.lexisnexis.com/government/insights/whitepapers/Sex_Offenders.pdf.

identifying information in so-called "political" records to help intelligence and law enforcement agencies to be more efficient and accurate. For example, some *amici* cross-reference voter registrations with other information to ensure that law enforcement and intelligence agencies are searching for the right "John Smith." There are numerous other examples of the value of the use of identifying information in databases compiled by commercial entities—such as tracking down parents who refuse to pay child support or heirs to an estate, or verifying that a borrower has the proper assets to collateralize a loan.

Moreover, the use of identifying information is heavily involved in research that results in additional First Amendment activity and stimulates public dialog. For example, readers of American Business Media's publications receive information about who in a given industry is petitioning the government, and on what subject. In addition, journalists, watch dog entities, political parties and candidates, campaign researchers and others frequently use politically-related information to determine who sponsored or benefited from, as well as how specific legislators voted on, particular political initiatives.[4] Users of *amici's* and similar

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[4] "Watch-dog" groups that seek to keep the federal and state governments accountable consider political information critical to their mission. For example, OpenSecrets.org allows the public to track political expenditures made by those that lobby the federal government, including by individuals, lobbying firms, or area of interest. *E.g.*, http://www.opensecrets.org/orgs/indivs.php. *See also, e.g.*,

publications often view political contribution, voter registration, and lobbying disclosures (e.g., who lobbied on behalf of whom for a particular piece of legislation) in the context of soliciting additional information to attempt to persuade voters of the validity of their position, but that is by no means the limits of the use of such information. The analysis, publication and discussion of such information serve to enhance political debate and benefit the general public.

B. The Adoption of a Broad Constitutional Rule Poses A Real Threat to the Important and Legitimate Uses of these Public Records.

The federal Freedom of Information Act, the Washington Open Records Act and other similar state public records laws operate in the same general way. They require disclosure of information held by the government if the information falls within the relevant law's definition of a public record and its disclosure is not barred by a specific exception. *See, e.g.*, 5 U.S.C. § 552, Wash. Rev. Code § 42.56.001 *et seq*. The structure set forth in FOIA and replicated throughout the several states has provided the public with a nationwide, generally uniform means of accessing and publishing government information. The presumption in favor of the release of

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http://www.FollowtheMoney.org (state analog of opensecrets.org permitting members of the public to search through campaign and lobbyist disclosure information for all fifty states by lobbyist, lobbying firm, or area of interest).

identifying information in public records consistent with this relatively uniform system—broadly construed access to public records and narrowly read exceptions to that access—serves the public interest in many ways.

Amici fear that, in practice, this Court's adoption of the broad proposition supported by the District Court will interfere with the legitimate and important use of public records by creating situations in which access to those records will effectively be denied. In ordinary cases, the government bears the burden to show that a particular record is governed by an exception. *See, e.g.,* 5 U.S.C. § 552(a)(4)(B); *Brouillet v. Cowles Pub. Co.*, 791 P.2d 526, 529 (Wash. 1990). If the record is public and no exemption applies, it must be disclosed no matter what the purpose of the requester. *See, e.g.,* Wash. Rev. Code § 42.56.080 (requiring public records to be disclosed no matter what the identity of the requestor); Government-in-the-Sunshine Manual, A Reference for Compliance with Florida's Public Records Laws 101-103 (2003) (citing, *inter alia,* Fla. Stat. § 119.07(1)(a)); *Santa Clara v. Superior Court,* 89 Cal. Rptr. 3d 374, 391-92 (6th App. Dist. 2009) (describing lack of custodian discretion and public policy of disclosure). That structure, a cornerstone of the movement in the latter part of the 20th century that lead to the adoption of PRAs nationwide, removed the unbridled discretion that public record custodians had

previously enjoyed with respect to the disclosure or non-disclosure of public records.[5]

In this case, petitioners seek to have the First Amendment create its own exemption to every state and federal law for issue petitions. Brief of Petitioner, at 28, 29, *Doe v. Reed*, No. 09-559 (2010). That overbroad position readily threatens not only the availability of issue petitions, but voter registration information that *amici* use to confirm identities. Certainly, the "privacy" of other information, such as political contributions and lobbying disclosures used both by *amici* and their customers for expressive purposes, will readily become the target of further litigation if petitioners' suggestion were adopted.

Outside of the "political" context, *amici* fear that record custodians, those identified in public records who desire to remain anonymous, and others will disrupt this straightforward, orderly process by seizing on the breadth of the rule that petitioners proffer. *Amici's* experience suggests that custodians of public records will be more reluctant to grant

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[5] *See A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H.R. REP. NO. 99-253, pt. II, at 2-4 (2005) (discussing the shift from an undefined process for requesting public records to the current presumption of disclosure that is free from "arbitrary or unreviewable actions"). Along with the federal government, all fifty states have laws requiring access to public records. The Reporters Committee for Freedom of the Press, Open Government Guide (2006), *available at* http://www.rcfp.org/ogg/item.php?pg=intro.

public record requests—a proclivity that *amici* have experienced in the past as some custodians invoked overly broad and unwarranted "privacy" objections to prevent the distribution of public records under both statutory and constitutional guises. *See, e.g., Matter of Data Tree, LLC v. Romaine*, 880 N.E.2d 10, 15 (N.Y. 2007) (reversing lower court that placed burden of proving applicability of exemption on the requestor in case involving production of real estate records); *Burnett v. County of Bergen*, 954 A.2d 483, 497 (N.J. Super. App. Div. 2008) (finding that disclosure of information lawfully placed on public records violated state constitutional privacy right), *aff'd on other grounds*, 968 A.2d 1151 (N.J. 2009) (affirming judgment of lower court on statutory, not constitutional grounds). This cloud of litigation would both raise the cost of accessing these records and delay *amici*'s acquisition of such records. The harm from these gaps will be felt not only in the political arena, but in the law enforcement and everyday commercial contexts. Indeed, unwarranted delays or omissions of identifying information will create gaps in potentially entire classes of information—weakening not only First Amendment activity such as investigative journalism, scholarly research and political campaigning, but law enforcement and other governmental activity. The Ninth Circuit's decision wisely avoided any such result.

V. Conclusion

The judgment of the Court of Appeals should be affirmed and the case should be remanded to the district court for consideration of count II of the complaint.

Respectfully submitted,

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