No. 09-559

In The Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF COMMITTEE FOR TRUTH IN POLITICS, NATIONAL ORGANIZATION FOR MARRIAGE, FAMILY RESEARCH COUNCIL, AND AMERICAN VALUES IN SUPPORT OF PETITIONERS

HEIDI K. ABEGG
Counsel of Record
ALAN P. DYE
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500
habegg@wc-b.com

Counsel for Amici Curiae

March 4, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Compelled Disclosure Of The Names And Addresses Of The Petition Signers Implicates Important Privacy And Associational Privacy Interests 7

A. That which makes the Internet a stronger "disinfectant" also raises privacy interests 7

1. Disclosing the petitions ensures that the petition signers' association no longer resides in "practical obscurity" 8

2. Technology allows the petition signers to be forever associated with the petition, allows the association to be aggregated with other data, and thereby increases the potential for social stigma and sanctions 12

B. Disclosing the petition signers' names and addresses to allow "personal" and "uncomfortable" conversations implicates the signers' privacy rights 17

TABLE OF CONTENTS – Continued

Page

C. The Government has a special obligation to protect citizens' privacy of association when they are forced to disclose associations and other private information 21

II. The Privacy Interests At Stake Are Not Waived By Signing A Petition 25

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998).....18

Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).....25

Buckley v. Valeo, 424 U.S. 1 (1976).....4, 7

DeGregory v. Attorney Gen., 383 U.S. 825 (1966).....5

Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).....5

Margan v. Niles, 250 F. Supp. 2d 63 (N.D.N.Y. 2003).....23

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).....7

NAACP v. Alabama, 357 U.S. 449 (1958).....7

Olmstead v. United States, 277 U.S. 438 (1928).....21

Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986).....20

Sanders v. Am. Broad. Cos., 978 P.2d 67 (Cal. 1999).....25

Shelton v. Tucker, 364 U.S. 479 (1960).....7

Sweezy v. New Hampshire, 354 U.S. 234 (1957).....5, 7

Talley v. California, 362 U.S. 60 (1960).....7

U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487 (1994).....23

TABLE OF AUTHORITIES – Continued

Page

U.S. Dep't of Justice v. Reporters Comm for Freedom of the Press, 489 U.S. 749 (1989) ..... *passim*

Whalen v. Roe, 429 U.S. 589 (1977) 13, 22, 23

CONSTITUTION, STATUTES, REGULATIONS & RULES

26 U.S.C. § 501(c)(3) 2

26 U.S.C. § 501(c)(4) 2

28 U.S.C. § 455(a) 24

Wash. Const. Art. I, § 7 21

OTHER AUTHORITIES

Grayson Barber, *Article: Personal Information In Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63 (2006) 17

Fred Bernstein, Op-Ed, *An Online Peek at Your Politics*, N.Y. TIMES, Oct. 4, 2000 11

Louis Brandeis, Harper's Weekly, Dec. 20, 1913, http://www.law.louisville.edu/library/collections/brandeis/node/196 4

Center for Responsive Politics, http://www.opensecrets.org 11

Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980) 20

TABLE OF AUTHORITIES – Continued

Page

Christopher Hunter, *Political Privacy and Online Politics: How E-Campaigning Threatens Voter Privacy*, http://131.193.153.231/www/issues/issue7_2/hunter/index.html 5

Follow the Money, http://www.followthemoney.org 11

http://cyber.law.harvard.edu/research/digitalnatives/areallyouthdigitalnatives 14

Huffington Post, http://fundrace.huffingtonpost.com 11

Seth F. Kreimer, *Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991) .....*passim*

Andrew Lavoie, *Note: The Online Zoom Lens: Why Internet Street-level Mapping Technologies Demand Reconsideration of the Modern-day Tort Notion of "Public Privacy*," 43 GA. L. REV. 575 (2009) 25

1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5.10[A][2] (1998) 25

Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995) 14, 15, 22

William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003) 12, 19

TABLE OF AUTHORITIES – Continued

Page

Model Code of Judicial Conduct Canon 5(a) cmt. 4 24

Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 Law and Philosophy 559-596 (1998), *available at* http://www.nyu.edu/projects/nissenbaum/papers/privacy.pdf 9

Helen Nissenbaum, *Symposium: Technology, Values, and the Justice System: Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004).....6, 8, 20

Stefanie Olsen, *FundRace Shows Neighbors' Political Donations*, CNET News, http://news.cnet.com/2100-1028_3-5178135.html (last visited Feb. 26, 2010).....11

Peter Piazza, *How Public Should Public Records Be?*, Security Mgmt. (April 1, 2001) 9

Richard A. Posner, *Overcoming Law* (1995) 19

Public Records on the Internet: The Privacy Dilemma, http://www.privacyrights.org/print/ar/onlinepubrecs.htm (last visited February 16, 2010) 15

Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 KAN. L. REV. 195 (2004) 17

Ferdinand Schoeman, *Gossip and Privacy*, in GOOD GOSSIP 72 (Robert F. Goodman & Aaron Ben-Ze'ev eds., 1994) 26

TABLE OF AUTHORITIES – Continued

Page

Ferdinand Schoeman, *Privacy and Intimate Information,* in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 408 (Ferdinand David Schoeman ed. 1984) 20

Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213 (2002) 19

Daniel J. Solove, *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation: Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137 (2002) 12

Brad Stone, *Death Threats Follow Web Map of Donors*, Int'l Herald Trib., Feb. 9, 2009 13

Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996) 5, 15

Alexis de Tocqueville, 2 Democracy in America 512-13 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) 5

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) 8, 22

Alan F. Westin, *Privacy and Freedom* (1967) 19

Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 JOURNAL OF SOCIAL ISSUES 431 (2003) 6

www.eightmaps.com 13

TABLE OF AUTHORITIES – Continued

Page

www.law.berkeley.edu/institutes/bclt/about/about_news_02-10-09_2.htm (last visited March 2, 2010) 13

BRIEF *AMICI CURIAE* OF COMMITTEE FOR TRUTH IN POLITICS, NATIONAL ORGANIZATION FOR MARRIAGE, FAMILY RESEARCH COUNCIL, AND AMERICAN VALUES IN SUPPORT OF PETITIONERS

Committee for Truth in Politics, the National Organization for Marriage, the Family Research Council, and American Values submit this brief *Amici Curiae* and respectfully request that the Ninth Circuit's decision be reversed.

INTEREST OF *AMICI CURIAE*[1]

The Committee for Truth in Politics is an organization that is deeply concerned about associational privacy and the effect of compelled disclosure on the political process. Its interest is in defending against compelled disclosure of political associations.

The National Organization for Marriage is a nationwide, non-profit organization with a mission to protect marriage and the faith communities that sustain it. It was formed in response to the need for an organized opposition to same-sex marriage in state

[1] All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that this brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amici*, its donors, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

legislatures and it serves as a national resource for marriage-related initiatives at the state and local level. It is exempt from federal income tax under Internal Revenue Code § 501(c)(4).

Family Research Council, exempt from federal income tax under Internal Revenue Code § 501(c)(3), was founded as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Family Research Council also strives to ensure that the unique attributes of the family are recognized and respected through judicial decisions.

American Values is a non-profit organization whose vision is a nation that embraces life, marriage, family, faith and freedom, and it is deeply committed to defending traditional marriage and ensuring that the unalienable rights recognized by the Founding Fathers are upheld.

SUMMARY OF ARGUMENT

"Sunlight," that powerful disinfectant touted by Justice Brandeis, has become a panacea for any ill said to plague our democracy. Too much corruption in government? Enact stricter reporting requirements. Too many back-room deals? Enact earmark reform and lobbyist registration. Too many individuals and groups "hiding" behind misleading names on issue ads? Enact disclaimer requirements.

This case embodies what happens when sunlight reaches too far – when privacy rights are ignored – and disclosure of protected association and information is compelled for no other purpose than to silence those on the other side.

But openness, transparency and more information are not the only requirements to sustain a functioning vibrant democracy. The enjoyment of privacy of association, privacy of information, and the right to be let alone are also fundamental to our democracy. Technological advances continue to make our lives easier, but they also chip away at our privacy. We are subjected to scans and searches when we travel; we have to present identification to buy certain kinds of cough medicine; our vehicles are photographed going through intersections; our homes and businesses can be seen on the Internet at street view and even from above.

Yet despite this, citizens still value privacy and search for ways to maintain privacy and anonymity – for example, using cash; arranging transactions so that they remain under various reporting thresholds (e.g., campaign contributions; bank transactions); and using pre-paid cell phones. However, the only choice present in this case to maintain privacy lies in not exercising a fundamental right.

The state has conditioned the exercise of a fundamental right – a sovereign act to qualify referenda – on the relinquishment of privacy for information's sake. This information interest does not promote

openness, transparency or accountability of *government*. It does, however, focus the glare and heat of sunlight on ordinary citizens exercising their right to "vote" as citizen legislators. This compelled disclosure, coupled with technological advances, permits opponents to harass, intimidate and sanction these citizens. Consequently, the important associational privacy rights of these citizens should not be lightly dismissed.

ARGUMENT

This case illustrates the tension that exists between sunshine and associational privacy, both of which are required for a functioning democracy. *Cf. Buckley v. Valeo*, 424 U.S. 1, 237 (1976) (Burger, C.J., concurring in part and dissenting in part) ("The public right to know ought not to be absolute when its exercise reveals private political convictions.").

Justice Brandeis advocated "sunlight as a disinfectant" because it illuminates and is the "best of disinfectants." Louis Brandeis, Harper's Weekly, Dec. 20, 1913, http://www.law.louisville.edu/library/collections/brandeis/node/196 (last visited March 2, 2010). In the marketplace of ideas, more information is usually better. But when associational rights such as those implicated by petition signing are involved, privacy trumps a mere informational interest.

The "freedom to engage in association for the advancement of beliefs and ideas" encompasses the

"protection of privacy of association." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963); *see also DeGregory v. Attorney Gen.*, 383 U.S. 825, 829 (1966) ("'intrusion into the realm of political and associational privacy protected by the First Amendment.'" (*quoting Gibson*, 372 U.S. at 546)); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. . . . Exercise of these basic freedoms in America has traditionally been through the media of political associations.").

Alexis de Tocqueville noted the importance of associations in our country. *See* Alexis de Tocqueville, 2 Democracy in America 512-13 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966). "We constitute our selves in our associations with others, and our group affiliations are a crucial part of our identities." Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117, 178 (1996). When these associations "are exposed to the glare of unwanted publicity, great psychic, social, and economic harm may occur." Christopher Hunter, *Political Privacy and Online Politics: How E-Campaigning Threatens Voter Privacy*, http://131.193.153.231/www/issues/issue7_2/hunter/index.html (last visited February 15, 2010).

To protect our basic freedoms, the "law is also concerned with protecting sanctuaries of private liberty from state intervention." Seth F. Kreimer,

Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law, 140 U. PA. L. REV. 1, 7 (1991). The privacy afforded by these shadows are as necessary as the sunlight. *Id*. "The importance of that right to choose, both to the individual's self-development and to the exercise of responsible citizenship, makes the claim to privacy a fundamental part of civil liberty in democratic society." Alan F. Westin, *Social and Political Dimensions of Privacy*, 59 JOURNAL OF SOCIAL ISSUES 431, 434 (2003). Without privacy, citizens cannot exercise basic freedoms. "If we are 'switched on' without our knowledge or consent, we have lost our fundamental constitutional rights to decide when and with whom we speak, publish, worship and associate." *Id*. The vitality of our democracy depends not only on the autonomy of its citizens – bolstered through privacy – but "on the concrete protection against public scrutiny of certain spheres of decision-making, including but not limited to the voting booth." Helen Nissenbaum, *Symposium: Technology, Values, and the Justice System: Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 150 (2004). It is the decisionmaking of the petition signers, which is akin to decisions made in the voting booth that is deserving of protection against public scrutiny.

I. Compelled Disclosure Of The Names And Addresses Of The Petition Signers Implicates Important Privacy And Associational Privacy Interests.

The Court has previously recognized the importance of political and associational privacy. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California*, 362 U.S. 60 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). "[T]he inviolability of privacy belonging to a citizen's political loyalties has [an] overwhelming importance to the well-being of our kind of society." *Sweezy*, 354 U.S. at 265 (Frankfurter, J., concurring in the result); *cf. Buckley*, 424 U.S. at 237 (Burger, J., dissenting) ("[S]ecrecy and privacy as to political preferences and convictions are fundamental in a free society."). Technological advancements put these cornerstones of society at risk.

A. That which makes the Internet a stronger "disinfectant" also raises privacy interests.

Sunlight as a "disinfectant" was originally touted during a time when public records were accessible only by going to the depository, requesting specific documents, and then manually searching them for the desired information. Oftentimes, such searches involved great time and expense. The Internet has largely supplanted such searches, requiring only a wireless connection and a key search word or two.

Certainly, those who espoused the benefits of sunlight could not have foreseen the glare or heat of that same sunlight as amplified through technology.

One danger of the "disinfectant" is the accessibility it now provides. The prospect of only local limited access to public records has given way to "global broadcast." Nissenbaum, *Symposium, supra* at 122. The worries espoused by Samuel Warren and Louis Brandeis in the face of then-new developments in photographic and printing technologies are amplified hundredfold by Internet technology. *See id.*; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

1. Disclosing the petitions ensures that the petition signers' association no longer resides in "practical obscurity."

The federal government and the states have been collecting information related to associational privacy – voter registration, political party affiliation, contributions to candidates and other political organizations, frequency of voting – for decades, with most of it open to public inspection.

However, for the most part, these records of associations did not raise privacy concerns because they resided in "practical obscurity" due to the enormous effort necessary to locate and then search through them. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762

(1989); *see also* Peter Piazza, *How Public Should Public Records Be?*, SECURITY MGMT. (April 1, 2001) ("'[P]ractical obscurity' has long been a legal concept. It means that records made public . . . remain, for all practical purposes, obscure because they are difficult to access."). That is, they are so inaccessible in public archives that practically speaking, they remain private. *See* Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 Law and Philosophy 559-596 (1998), *available at* http://www.nyu.edu/projects/nissenbaum/papers/privacy.pdf at 16 (Noting that the time and effort needed to locate and search public records was costly and "created de facto protection, serving to limit access and, therefore, exposure.").

Consider, for example, an individual who wants to know whether his new employee has supported a referendum petition. Before the Internet and powerful search engines, records were localized, and someone looking for a public record had to determine its location (state, county, city), travel to the location of the depository (courthouse, state public records office), which could be located across the country, and make a request for the records. If the individual did not even know where in the United States the subject of the record resided, the search for information usually ended there. Even if the searcher knew that records regarding referendum petition signers were kept in a particular building in the state's capitol, if he lived a great distance from the capitol, that too might end the search.

Records were not located in searchable, indexed databases; depending on the size of the record, it might take large amounts of time to pore over each page. A searcher would have either needed to copy down the desired information, a very labor intensive task if a list of petition signers were involved, or hope that a copy machine was accessible and that he had enough change to make the necessary copies.

Contrast this labor-intensive, and often costly endeavor with the same search conducted today. There is "a vast difference between the public records that might be found after a diligent search of courthouse files, county archives . . . throughout the country and a computerized summary located in a single clearinghouse of information." *Reporter's Comm.*, 489 U.S. at 764. Records accessible on the Internet are no longer local; they can be found by anyone regardless of location.[2] The searcher does not need to know much about the particular record in question or where the desired public record is stored. Knowing only the name of the employee and general search terms (e.g., "John Doe," "Washington," "petition," "signatures"), the hypothetical employer in the above example can plug these terms into a search engine and is likely to turn up a sufficient amount of

[2] Assuming arguendo the citizens of Washington state have an interest in knowing the identities of the petition signers, it does not follow, for example, that citizens of Florida have such an interest.

"hits" or leads.[3] These hits may be links to searchable databases or files, which can be printed, saved, uploaded, shared and aggregated. In just a few clicks of the mouse, the searcher can have his answer, with little time or resources expended and without leaving the comfort of his home or office.

Once relegated to a filing cabinet in a government office, often never to be seen again, associational information is now widely disseminated and further aggregated and supplemented by private entities and members of the news media. *See, e.g.,* Center for Responsive Politics, http://www.opensecrets.org (using a coding system to classify contributors' occupations); http://fundrace.huffingtonpost.com (website that measures political contributions, with color-coded maps and allows searches by name or address);[4] http://www.followthemoney.org (using phone directories and other research tools to determine economic or political identities of political contributors).

Signing a petition now requires "broadcasting my beliefs to anyone who has a modem." *Cf.* Fred Bernstein, Op-Ed, *An Online Peek at Your Politics,*

---

[3] A searcher is not limited to locating the name of a specific individual who may have signed a petition; a general search may even turn up the entire list of petition signers.

[4] Upon discovering FundRace, "many people write in to have their information removed." Stefanie Olsen, *FundRace Shows Neighbors' Political Donations*, CNET News, http://news.cnet.com/2100-1028_3-5178135.html (last visited February 26, 2010). These requests are not honored. *Id*.

N.Y. TIMES, Oct. 4, 2000, at A35 (author commenting about mandatory disclosure of campaign contributions.). Ten years later, even that statement is outdated; private associations are now discoverable by anyone anywhere in the world with access to a wireless Internet device, for example, a cell phone.

2. Technology allows the petition signers to be forever associated with the petition, allows the association to be aggregated with other data, and thereby increases the potential for social stigma and sanctions.

"The law may remain the same, but its effect is entirely different." William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 12 (2003). Developments in technology have greatly impacted the privacy of association. Virtually unlimited amounts of information may be recorded, stored, aggregated, and shared permanently. The Internet can thus be used as the "spotlight of public opinion" to discourage unpopular associations. *Cf.* Seth Kreimer, *Article: Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 11 (1991).

Prior to the advent of the Internet, our associations remained private because searching for them was akin to a needle in a haystack search and rarely would anyone take the time to search. *See* Daniel J. Solove, *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation:*

Access and Aggregation: Public Records, Privacy and the Constitution, 86 MINN. L. REV. 1137, 1178 (2002). A time-consuming and costly search might have made one intent on harm think twice. *Cf.* Kreimer, *supra* at 42 ("[G]overnment disclosure frees resources otherwise spent searching out targets for harassment."). Technology removed the deterrent imposed by the time and resources necessary to locate practically obscure associations and increases the potential for social stigma and sanctions. *Cf. Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information. . . .").

Not only does technology enable an individual intent on harassment and intimidation to locate associations quickly, without much effort, the search, sharing of results and spotlighting can be done anonymously. For example, the website www.eightmaps.com (whose creators remain unknown), provides an interactive Google map showing locations, names, addresses, donation amounts and, where provided, names of employers, of supporters of California's Proposition 8, which related to same-sex marriage. http://www.eightmaps.com; *see also* http://www.law.berkeley.edu/institutes/bclt/about/about_news_02-10-09_2.htm (last visited March 2, 2010). This information is often enough to enable someone to locate a home or e-mail address. *Id*. As a result, some supporters of Proposition 8 received death threats and/or had their businesses boycotted. *Id*.; *see also* Brad Stone, *Death*

Threats Follow Web Map of Donors, Int'l Herald Trib., Feb. 9, 2009 at 12. While Proposition 8 supporters are known, the identities of the creators of the website remain a mystery.[5]

Technological advances are rapidly being used in new ways to aggregate information and make new uses of it. Technology is capable of accumulating and storing information that may otherwise have been forgotten. The permanence of our associations, and their effects, cannot yet be measured. As one author remarked in 1991, "[w]e do not understand the scope of a disclosure into an electronic environment." Kreimer, *supra* at 115. Nineteen years later, we still don't fully know the ramifications of disclosure. There has yet to be a generation for which there has been the ability to record and store online all aspects of their lives from birth until death. *Cf.* http://cyber.law.harvard.edu/research/digitalnatives/areallyouthdigitalnatives (Digital natives, or the generation that was "born digital" are those individuals that were born 1982 or after.). Consequently, signers of petitions today have not lived long enough with technology to be able to fully grasp the consequences of their

[5] Once these associations are disclosed by the state, they may be placed on the Internet for anyone in the world to see. *See* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1076 (1995) ("[T]here is no longer any viable tort remedy for injuries resulting from the dissemination of true information concerning an individual, no matter how private the information or how offensive the dissemination would be to a reasonable person.").

compelled association. *Cf.* Kreimer, *supra* at 115 ("Although today I may not care who knows about my ACLU membership, I may dearly wish in twenty years that it be confidential.").

Another danger of the "disinfectant" is its permanence, which removes any time limit on social stigma and harassment. *Cf.* Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1042 (1995). The disclosed associations made by a signer today will be part of his or her identity today as well as twenty years from now because the permanence permitted by technology "allows the scrutiny to be extended indefinitely." *Id*. Compelled disclosure of associations, coupled with the technology of the Internet, removes any ability by the signers to remove, or make secret, that association from their past. "Once one has been identified as a member of the NAACP, she may be able to become a non-member, but she will always be an ex-member." Tien, *supra* at 178; *see also* Public Records on the Internet: The Privacy Dilemma, http://www.privacyrights.org/print/ar/onlinepubrecs.htm (last visited February 16, 2010) (The loss of "social forgiveness" is a consequence of the permanency of an electronic record.).

The passage of time, coupled with practical obscurity, no longer serve as protections against loss of privacy. *See Reporters Comm.*, 489 U.S. at 771 ("[I]n today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age

80. . . .”). “Nondisclosure is insurance against the future.” Kreimer, *supra* at 115.

Not only will the hypothetical searcher, *see supra* at 6, have an answer to his question with a few clicks of the mouse, he will be able to add that information to other data available on the Internet. Information that was once scattered all over the country, with numerous institutions, may now be quickly gathered by “Googling” someone or purchasing information from an aggregator and then assembled into a permanent “digital biography” or dossier. The petition signer’s association

> can be combined with information that is easily obtained by even the most casual Internet sleuth. An enormous wealth of data on an individual can be collected in a matter of minutes. Information drawn from public records often consists of fairly innocuous details, including one’s height, weight, birth date, address, and telephone number. If one has access to special databases – and this access is fairly easy to get, in most instances – an interested party can ascertain a litigant’s credit history, occupation, debt burden, and income. By “Googling” an individual’s name, much more can often be learned, including educational background, civic involvement, and anything that has been deemed newsworthy by some editor at some point. This information creates . . . a “digital biography,”. . . .

Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 KAN. L. REV. 195, 200 (2004); *see also* Grayson Barber, *Article: Personal Information In Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 66 (2006) (describing the ease with which government records may be combined to create dossiers on citizens).

These digital biographies are used to make important decisions – whether to employ, whether to date, whether to entrust children in their care, whether to bombard with marketing. Digital biographies are also concerning from a privacy perspective because they may create an inaccurate picture of who someone is. (*See* Br. of Petitioners at 21) (some signers may merely intend to put the matter before the voters without expressing an opinion on the issue.). As such, the state should not add to the type of information available for compilation into digital biographies without demonstrating a compelling interest for the disclosure of protected association and private information.

B. Disclosing the petition signers' names and addresses to allow "personal" and "uncomfortable" conversations implicates the signers' privacy rights.

The state has asserted an interest in providing voters with information about who supports placing a

referendum on the ballot.[6] Two groups have publicly stated that they want to obtain copies of the petitions to encourage "personal" and "uncomfortable conversations." (Certiorari Petition Appendix 31a.) While attention has been given to the state's informational interest, and these groups' desire to confront, the court below gave little, if any, attention to the privacy rights of the petition signers.

Compelled public disclosure in this case involves revealing a political association, a fundamental liberty interest. *Cf. Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998) (recognizing that the Supreme Court has construed the right to informational privacy only when a fundamental liberty interest is implicated.). Compelling disclosure of the petition signers' names and addresses implicates the signers' interest in protecting against the disclosure of personal matters; interest in controlling his or her person and what information is shared; as well as a general right to be left alone.

The flip side of the state's "informational interest" is the petition signers' "informational privacy."

---

[6] Other than mere curiosity or for purposes of harassment and intimidation, there is no compelling reason for a voter to know who signed the petitions. Once the petition signers affix their signatures to the petition – that is, vote – there is no need for "personal" and "uncomfortable conversations." *Cf.* Kreimer, *supra* at 134 ("A self-regarding act cannot be said to require publicity to allow others to protect their interests.").

"Information privacy" has been defined as one's ability to control the dissemination of personal information. McGeveran, *supra* at 14; *see also* Alan F. Westin, *Privacy and Freedom*, at 7 (1967) (defining privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); *see also Reporters Comm.*, 489 U.S. at 763 (noting that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."); *see* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 264 (2002) (footnotes omitted) ("Privacy . . . enables us to present to others only those parts of our selves that we want them to see. That in turn enables us to put forth different versions of our selves in different contexts. . . ."). Judge Posner has called this interest, "the face we present to the world." Richard A. Posner, *Overcoming Law*, at 531 (1995). This right to control information about oneself is under siege by technological advances which capture information about us in ways in which we may not even be aware.

Compelled disclosure is an intrusion into a sphere of personal liberty. McGeveran, *supra* at 19. An essential aspect of autonomy requires that individuals control the selective revelation, and the timing, of personal information to others. *Id*. Political associations label us, and compelled disclosure displays that label to others without our consent. *Id*.

Compelled disclosure removes the ability, to some extent, to have different relationships with different people. *See* Ferdinand Schoeman, *Privacy and Intimate Information,* in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 403, 408 (Ferdinand David Schoeman ed. 1984). Freedom from scrutiny and zones of "relative insularity" are necessary conditions for formulating goals, values, conceptions of self, and principles of action because they provide venues in which people are free to experiment, act, and decide without giving account to others or being fearful of retribution. Nissenbaum, *Symposium*, *supra* at 148-149. Forcing citizens to publicly disclose associations they are constitutionally entitled to eschew is a violation of their constitutionally protected autonomy – their right to define themselves. *Cf.* Kreimer, *supra* at 69-70; *cf. also Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 32-33 (1986) (Rehnquist, J., dissenting) ("an individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in the freedom of conscience.").

"Our interest in privacy . . . is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention." Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980). When addresses are disclosed by the state, privacy interests are implicated because the individual's home is no longer a safe refuge. Those

intent on confrontation, intimidation or harassment know where to go.

The right to privacy has been called "the right to be left alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) The home has long been a protected sphere. The state of Washington recognizes that a man's home is his castle and that he should be free from confrontation there. *Cf.* Wash. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). Disclosing the petition signers' names and addresses violate not only the privacy of the home, but the right to be left alone – free of any unwanted "personal" and "uncomfortable conversations."

C. The Government has a special obligation to protect citizens' privacy of assoition when they are forced to disclose associations and other private inforation.

As suggested by Warren and Brandeis:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all person, whatsoever . . . their position or station, from having matters which they may properly prefer

> to keep private, made public against their will.

Warren & Brandeis, *supra* at 214-15.

The state has a duty to withhold the petitions from disclosure because they contain compelled associations, but also because of the private information contained in the petitions. In *Whalen*, 429 U.S. at 591, the Court recognized a "privacy interest in keeping personal facts away from the public eye." *Reporters Comm.*, 489 U.S. at 770; *see also* McClurg, *supra* at 1067 ("[I]ndividuals should have some control over whether and to what extent they wish to surrender their privacy."). The *Whalen* Court also acknowledged that "the right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . In some circumstances that duty . . . has roots in the Constitution. . . ." 429 U.S. at 605.

This Court has recognized that citizens have a reasonable expectation of privacy with respect to their home and addresses:

> It is true that home addresses often are publicly available through sources such as telephone directories and voter registration lists, but in an organized society, there are few facts that are not at one time or another divulged to another. . . . An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information

> may be available to the public in some form. . . . We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.

U.S. Dep't of Def. v. Fed. Labor Relations Auth., 510 U.S. 487, 502 (1994).

Government should protect individuals who disclose information about themselves to the state *only* because they are forced to do so. Barber, *supra* at 63. Compelled disclosure of the information in the petitions, and subsequent publication on the Internet, can comprise safety.

Petition signers are required to provide their name and address. For some, disclosure of an address can be a matter of life or death.[7] For example, victims of domestic violence or stalkers, witnesses in a protection program, and law enforcement officers may not wish to disclose their address knowing that it will be published on the Internet for anyone to find. The government has a duty to protect the privacy of individuals who have taken steps to protect themselves, especially when the provision of an address is required to exercise a right akin to voting. *Cf. Whalen*, 429 U.S. at 607 (Brennan, J., concurring).

---

[7] Consider, for example, the case of the murder of actress Rebecca Schaeffer, whose killer was able to locate her home address through Department of Motor Vehicles records. *See Margan v. Niles*, 250 F. Supp. 2d 63, 68 (N.D.N.Y. 2003).

For others, compelled disclosure of their association may create an appearance of bias, causing them to make the difficult choice between voting and avoiding an appearance of bias. For example, journalists often subscribe to a code of ethics that requires the avoidance of *public* political activity.

Judges are also deserving of protection from disclosure. The Model Code of Judicial Ethics allows *private* political activity, but signing a petition might be viewed as political activity. Model Code of Judicial Conduct Canon 5(A) cmt. 4 (the ban on public endorsements by judges "does not prohibit a judge . . . from privately expressing his or her views. . . ."). A judge might be required to recuse himself should a matter related to the petition come before him. *Cf.* 28 U.S.C. § 455(a) (calling for disqualification when a judge's "impartiality might reasonably be questioned."). Similarly, if a member of the armed forces signed a petition in favor of gay marriage, could his signature violate the "Don't Ask, Don't Tell" policy? These are but a few examples that highlight the important privacy interest that is implicated by the state's disclosure, and which is deserving of the state's protection.

The privacy of the petition signers' associational rights becomes even stronger when they are forced to choose between signing the petition and their privacy. An individual making a contribution to the referendum committee has a choice – assuming a high enough reporting threshold – the individual may maintain associational privacy as long as the contribution

amount is kept under the reporting threshold. A citizen that wants to associate with the referendum by signing the petition has no such choice.

II. The Privacy Interests At Stake Are Not Waived By Signing A Petition.

Individuals do not lose their associational privacy rights merely because not all aspects of the petition signing are private. *Reporters Comm.*, 489 U.S. at 770 ("[T]he fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'") (citation omitted); *cf. Sanders v. Am. Broad. Cos.*, 978 P.2d 67, 72 (Cal. 1999) (*quoting* 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5.10[A][2] (1998)) ("The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone."); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97 n.14 (1982) (although supporters of a political party are already public to some degree, "application of a disclosure requirement results in a dramatic increase in public exposure."). The privacy right lies in not revealing the association to those with whom he subjectively chooses not to share it. Andrew Lavoie, *Note: The Online Zoom Lens: Why Internet Street-level Mapping Technologies Demand Reconsideration of the Modern-day Tort Notion of "Public Privacy*," 43 GA. L. REV. 575, 577 (2009).

Disclosure in one arena does not entail and is not equivalent to disclosure in others. Kreimer, *supra* at

112. An individual may choose to reveal associations to a limited group, but withhold such private information from the rest of the world. Therefore, the fact that the addresses of the petition signers may already appear in telephone directories or the fact that the other signatories on the petition sheet saw their names does not operate to waive the signers' associational privacy rights. *Cf.* Ferdinand Schoeman, *Gossip and Privacy*, in GOOD GOSSIP 72, 73 (Robert F. Goodman & Aaron Ben-Ze'ev eds., 1994) (Positing that revealing private information in one setting does not mean that "rights to civil inattention" are waived in another setting.). The Court should therefore protect the signers' associational privacy rights from compelled disclosure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

HEIDI K. ABEGG
Counsel of Record
ALAN P. DYE
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20006
(202) 785-9500
habegg@wc-b.com

Counsel for Amici Curiae

March 4, 2010