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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. Counsel of record for the ACLJ has presented oral argument before this Court in numerous cases, including *McConnell v. FEC*, 540 U.S. 93 (2003).

The proper resolution of this case is a matter of utmost concern to the ACLJ because of its dedication to First Amendment liberties, particularly in the context of grassroots political activity. The Ninth Circuit's disregard of this Court's controlling precedents on the First Amendment's protection of anonymous political speech must be corrected.

SUMMARY OF THE ARGUMENT

In enabling same-sex marriage advocacy groups to publish to the world the names and addresses of the signers of the Referendum 71 petition, Washington's Public Records Act (PRA) trenches upon Petitioners' First Amendment rights to: 1)

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* The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

anonymous political speech, 2) be free of state-created threats of reprisal for their political views, and 3) associate together to achieve political change.

Circulating and signing ballot initiative petitions is an exercise of popular sovereignty entitled to the highest degree of First Amendment protection. Although the states can regulate the ballot initiative process to ensure its integrity, they must avoid infringing the core political speech rights inherent in ballot initiatives. This Court's precedents establish that when core political speech rights are violated in the context of ballot initiatives, the government faces a "well-nigh insurmountable burden" to justify the violations. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Thus, the Ninth Circuit erred in applying intermediate scrutiny and sustaining the PRA's disclosure requirements.

There is no meaningful First Amendment distinction between circulating ballot initiative petitions, signing them, and voting for them once they qualify for the ballot. All three activities are indispensable to the power of the people to initiate legislation. Stripping the right to anonymity from any of the three activities threatens an essential function of popular sovereignty. The state's interest in protecting the integrity of ballot initiatives does not come close to justifying so severe a violation of First Amendment rights. The Ninth Circuit should be reversed.

ARGUMENT

This case involves a composite of First Amendment liberties, including the right to engage anonymously in grassroots political activity, the right to be free from state-created threats of reprisal for one's political beliefs, and the right to associate with others for the purpose of effecting political change. The disclosure requirements of the Washington Public Records Act (PRA)[1] trample on all three.

Washington's scheme permitting legislation to be subject to popular referendum is but one manifestation of the constitutional principle that the people are sovereign and "have the final say." *Citizens United v. FEC,* 175 L. Ed. 2d 753, 785

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[1] Under Washington's Public Records Act, any Washington citizen can inspect and copy any public record. WASH. REV. CODE § 42.56.070 (LexisNexis 2010). The term "public record" is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency." WASH. REV. CODE § 42.56.010(2) (LexisNexis 2010). As set forth fully in Petitioners' brief, several groups requested access to the Referendum 71 Petition, including the names and addresses of the signers. These groups stated that they would publish on the Internet the names and addresses of the signers. *Doe v. Reed*, 2009 U.S. Dist. LEXIS 91745, *11–12 (W.D. Wash. 2009).

(2010). Popular sovereignty is severely jeopardized when private citizens cannot weigh in on the issues of the day without fear of punishment from other citizens who disagree with them. *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 469 (2007) ("The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment") (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978). First Amendment protection of citizen participation in ballot initiatives and referenda is therefore "at its zenith." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186–87 (1999); *Meyer v. Grant*, 486 U.S. 414, 422 (1988). Thus, the burden that states face to justify restrictions on the power of the people to initiate legislation is "well-nigh insurmountable." *Meyer*, 486 U.S. at 425.

I. THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY STRICT SCRUTINY TO PETITIONERS' FIRST AMENDMENT CLAIMS.

Ignoring this Court's controlling decisions in *Meyer* and *Buckley*,[2] the Ninth Circuit held that the burden imposed by Washington's Public Records Act on Petitioners' First Amendment rights triggered intermediate scrutiny only. *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009). The Ninth Circuit erred. The PRA severely burdens the First Amendment right to speak anonymously in support of political change.

A. Circulating And Signing Referenda Petitions Is Core Political Speech.

This Court has established that circulation of ballot initiative and referenda petitions is core political speech. *See Buckley*, 525 U.S. at 186–87; *Meyer*, 486 U.S. at 421–22. Ballot initiatives represent citizen efforts to "achieve political change" and involve communication between the petition circulator and those who indicate agreement with the circulator by signing the petition. The process is

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[2] The Ninth Circuit only mentioned both decisions in passing and dismissively concluded that they did not apply. *Doe v. Reed*, 586 F.3d 671, 677–78 (9th Cir. 2009).

"interactive," *Meyer*, 486 U.S. at 422, and cannot be accomplished without political expression by both circulator and signer. Thus in *Meyer,* this Court applied strict scrutiny to a state law banning the use of paid petition circulators, holding that the law trenched upon the right "to discuss political policy generally or advocacy of the passage or defeat of legislation." *Id*. at 428.

B. Both Petition Circulators and Signers Have a First Amendment Right to Anonymous Political Advocacy.

After *Meyer*, but before *Buckley*, this Court struck down an Ohio law prohibiting the distribution of anonymous campaign literature. Identifying a "respected tradition of anonymity in the advocacy of political causes," this Court held that disclosing the author's identity is no different from other components of the campaign literature that the "author is free to include or exclude." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995).

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. *See generally* J. Mill, On Liberty and Considerations on Representative Govern-

> ment 1, 3–4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

McIntyre, 514 U.S. at 357; *See also Talley v. California,* 362 U.S. 60 (1960) (city ordinance banning anonymous leafleting violates the First Amendment).

This Court rejected Ohio's argument that the ban on anonymous campaign literature was merely a regulation of the electoral process, subject to an ordinary balancing test in which "the relative interests of the state are considered against the interests of the injured voters." *Id*. at 345–46. Rather, because Ohio's ban was a regulation of "pure speech," strict scrutiny was warranted. *Id*. at 346 (citing *Meyer*, 486 U.S. at 420).

Building upon *Meyer* and *McIntyre*, *Buckley* struck down a Colorado statute requiring 1) petition circulators to wear identification badges, and 2) petition sponsors to disclose the names and addresses of all paid circulators in a report to the state. 525 U.S. at 187. Although the *Buckley* Court did not state that the Colorado law triggered strict scrutiny, it held first, that under *Meyer,* petition circulation is core political speech which is entitled to maximum First Amendment protection, *Id.* at 186–87; and second that the Colorado law was an even "more severe" infringement of the First Amendment than the Ohio law in *McIntyre*. *Id*. at 199. This was because the interaction between petition circulator and signer is more extensive, involving dialog over, and cooperation in, "the desire for political change." *Id*.

The ambiguity raised in *Buckley* about the applicable level of scrutiny to be applied to laws burdening core political speech was resolved this term in *Citizens United,* where this Court stated, "[F]or these reasons, political speech must prevail against laws that would suppress it, whether by design or by inadvertence. Laws that burden political speech 'are subject to strict scrutiny.'" 175 L. Ed. 2d at 782.

Read together*, Citizens United, Meyer, Buckley, and McIntyre* compel the conclusion that the PRA's disclosure requirements must be subjected to strict

scrutiny and that the PRA severely burdens Petitioners' First Amendment right to anonymous political speech. There can be no principled basis upon which to provide First Amendment protection to anonymity for petition circulators but not to those on the other side of the dialog—petition signers. Both circulator and signer are indispensible to the political change that is sought.

C. The Right to Anonymity in Ballot Initiatives Is Just As Important to Meaningful Participation in the Political Process As the Right to a Secret Ballot.

There is no meaningful distinction between signing a referendum petition and voting. Whether the citizen touches a screen, presses a lever, or signs his name, he is participating in the political process—expressing his convictions on the political issue at hand. The right to secret ballot—"the hard-won right to vote one's conscience without fear of retaliation," *McIntyre*, 514 U.S. at 343,—is, of course, one of the most precious rights. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality) (citing *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964) (the "right to vote freely for the candidate of one's choice is of the essence of a democratic society")).

The right to secret ballot safeguards citizens from the historic evil of voter intimidation. *Burson*, 504 U.S. at 206. Similarly, the right to anonymity in signing referendum petitions is no less essential in safeguarding signers from reprisal or intimidation. The Ninth Circuit's contention that petition signers have no expectation of anonymity because they see the names of other signers, and because state officials view the signatures in the process of qualifying the referendum petition, is specious. *See Doe*, 586 F.3d 671, 677. The right to secret ballot is not diminished if the voter advertises his political beliefs on a bumper sticker or yard sign. The right to anonymous political speech is not conditional on the citizen's keeping his views entirely to himself. Sharing political opinions with a few others does not justify state-ordered disclosure to the rest of the world.

Nothing in *McIntyre, Buckley, or Burson* suggests that the right to anonymous political expression in the context of a ballot initiative depends upon a showing that there is a "reasonable probability" that participants in a referendum petition drive would face threats, harassment or reprisals. *Cf. Citizens United*, 175 L. Ed. 2d at 801 (disclosure requirements of Bipartisan Campaign Reform Act may be unconstitutional if there is "reasonable probability" of reprisal or harassment). In *Buckley*, this Court struck down the statutory requirement

that the names of the paid petition circulators be disclosed in a report to the state, yet there was no suggestion that petition circulators were subject to the risk of retaliation or harassment. 525 U.S. at 204–05. The Court determined that the exposure of their identities alone had a chilling effect on their First Amendment rights. *Id.* at 199–200.

Similarly, no state conditions the right to secret ballot on a showing that the voter is in danger of retaliation or harassment. In all 50 states, the right to secret ballot is absolute. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality).

Nevertheless, if this Court determines Petitioners' First Amendment right to anonymous political speech is subject to a showing that they are at risk of harassment and reprisal, the Petitioners satisfy that test.

D. Opponents Of Marriage-Like Rights For Same-Sex Couples Are Increasingly at Risk Of Harassment And Retaliation.

Whether states recognize as marriage the relationships of same-sex couples is one of the most divisive issues of the day. It engenders strong emotions from many on both sides of the debate. A small segment of advocacy groups supporting same-

sex marriage have grown increasingly aggressive in targeting for harassment traditional marriage proponents. As Justice Thomas recognized in *Citizens United*, the experience of many Californians who supported *Proposition 8*[3] is the most alarming example of the length to which extremists will go to chill the First Amendment rights of their opponents. *See* 175 L. Ed. 2d at 872–73 (Thomas, J., concurring) (describing the personal threats—including death and bodily injury threats—and property damage that Proposition 8 supporters suffered as a result of the public disclosure of their identities).

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[3] Proposition 8 was a state ballot initiative which amended California's Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Cal. Const. Art I, §7.5. California law required the public disclosure and Internet posting of the names and addresses of donors who gave more than $100 to any committee that supported or opposed Proposition 8. CAL. GOVT. CODE ANN. §§ 84211(f), §§ 84600–84601; §§ 84602–84602.1 (Deering 2010); §§ 84602.5–84604 (West 2005); § 84605 (Deering 2010); §§ 84606–84609 (West 2005).

California's experience is not unique.[4] A year and a half ago in Arizona, Proposition 102 ("Prop. 102") was passed, amending the state's Constitution to provide that "[o]nly a union of one man and one woman shall be valid or recognized as marriage in the state."[5] In response, same-sex marriage supporters advocated an "Equality Boycott" against those who supported Prop. 102.[6] Posting on the Internet lists of Arizona's Prop. 102 supporters, boycott proponents urged the boycott of any businesses that supported or had employees who supported Prop. 102.[7]

In this case, the District Court found the proponents of Referendum 71 have already been subjected to threats and harassment. *Doe v. Reed*, 2009 U.S. Dist. LEXIS 91745, *11–12 (W.D. Wash. 2009).[8] Specifically, leaders of the Protect Marriage

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[4] The problem is not limited to the same-sex marriage controversy. *See Citizens United*, 175 L. Ed. 2d at 872–73 (Thomas, J., concurring) (describing the "cottage industry that uses forcibly disclosed donor information to preempt citizens' exercise of their First Amendment rights.")

[5] Ariz. Const. art. 30, § 1.

[6] Equalityboycott.com, *Fight Back with Your Dollars*, Dec. 8, 2008, http://equalityboycott.com/ (last visited Feb. 3, 2010).

[7] *Id.*

[8] *If You Sign a Petition, it Should Be Public Record*, OLYMPIAN, Dec. 18, 2009, *available at* http://www.theolympian.com/

Washington have received death threats and other threatening emails and blog postings.[9]

WhoSigned.org and its national partner KnowThyNeighbor.org[10] want access to the identities of Referendum 71 petition signers for the purpose of encouraging "uncomfortable" conversations between friends, relatives, and neighbors. [11] An article published in the Olympian on December 18, 2009 stated that, according to a spokesman for the organization WhoSigned.org, opponents of Referendum 71 hoped that by posting the list of names, it "would lead to conversations between neighbors about the legislation" and that "the list would give gay rights advocates the opportunity to educate individuals about the need for equal

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opinion/story/1075142.html.

Id.

[9] Posting of Lurleen to Pam's House Blend, http://www.pamshouseblend.com/main/7 (Jan. 18, 2010, 11:00 EST).

[10] Elizabeth Hovde, Editorial, *Privacy and Petitions Group's Warning: If You Sign, Your Name Goes Online*, Sunday Oregonian, June 14, 2009, *available at* http://www.oregonlive.com/hovde/index.ssf/2009/06/privacy_and_petitions_if_you_s.html.

[11] Adam Liptak, *Court to Rule on Right to Privacy for Referendum Petition Signers*, N.Y. TIMES, Jan. 16, 2010, at A13.

protections under the law."[12] When asked about the possible chilling effects of publishing the names, the co-director of KnowThyNeighbor.org, Tom Lang, reportedly remarked "so be it." His position is that people need to be held accountable for the role they play in the lawmaking process.[13]

Under this reasoning, Mr. Lang would also be entitled to the names and addresses of all Washington voters who vote in favor of Referendum 71. The November vote is no less crucial to the legislative success of Referendum 71, than is the petition circulating and signing.

Mr. Lang's apathy notwithstanding, the PRA's forced disclosure of the names and addresses the Referendum 71 petition signers cannot withstand First Amendment scrutiny.

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[12] *If You Sign a Petition, it Should Be Public Record*, OLYMPIAN, Dec. 18, 2009, *available at* http://www.theolympian.com/opinion/story/1075142.html.

[13] Hovde, *supra* note 10.

II. PUBLIC DISCLOSURE OF THE IDENTITIES OF REFERENDUM PETITION SIGNERS VIOLATES THEIR FIRST AMENDMENT RIGHT TO POLITICAL ASSOCIATION.

This Court has long recognized that compelled disclosure of political associations and activities can infringe the First Amendment right to political association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (disclosure of membership lists); *Brown v. Socialist Workers 74 Campaign Comm. (Ohio)*, 459 U.S. 87, 99 (1982). The right to political association is especially important to the advocacy of controversial political viewpoints. *NAACP*, 357 U.S. at 462. The lack of First Amendment protection may deter participation to the point where the movement cannot survive. "The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena." *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) (footnotes omitted). Thus, disclosure requirements that infringe First Amendment associational rights are subject to strict scrutiny. *Id.* at 64.

The state interests that justify the campaign finance disclosure requirements at issue in *Buckley*

v. Valeo are irrelevant here.[14] Ballot initiatives do not raise the same risk of fraud and corruption that candidate elections do because there is typically no "quid pro quo" exchanges that can be present in candidate elections. *Buckley v. American Constitutional Law Foundation*, 525 U.S. at 203; *Meyer*, 486 U.S. at 427–28 (the risk of fraud or corruption or the appearance thereof is more remote at the petition stage of an initiative than at the time of balloting).

Washington's asserted interest in the integrity of the Referendum process is protected by other statutory provisions which impose criminal penalties on a petition signer who signs the "petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition . . . ." WASH. REV. CODE § 29A.72.140 (LexisNexis 2010). Additionally, the Washington statute requires the Secretary of State to "verify and canvass the names of the legal voters on the petition," WASH. REV. CODE § 29A.72.230 (LexisNexis 2010), in the presence of "persons representing the advocates and opponents

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[14] Preventing the misuse of campaign funds, enhancing the electorate's ability to evaluate candidates, and enforcing contribution limitations were state interests that prevailed in *Buckley v. Valeo*, 424 U.S. at 66–68.

of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process." *Id.* Significantly, the Washington Supreme Court has held that these provisions "evidence an intent on the part of the Legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, in the exercise of this constitutional right by the people . . . ." *State v. Superior Court of Thurston County,* 81 Wn. 623, 647, 143 P. 461 (1914).

In *Buckley v. American Constitutional Law Foundation,* similar statutory provisions were held sufficient to protect the state's interest in the integrity of the ballot initiative process. 525 U.S. at 205 (citing Colorado statutory provisions making it criminal to forge initiative petition signatures, and declaring petition void if circulator has violated any provision of the laws governing circulation). Publically disclosing the identities of Referendum petition signers contributes nothing to the state's interest in ensuring the integrity of the Referendum petition process. If anything, such disclosure will make future Referenda less likely, as Washington citizens decide that the cost of participation in an exercise of popular sovereignty is too high.

CONCLUSION

Amicus respectfully requests this Court to reverse the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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