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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and were timely notified.

might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the right to freedom of expression and political participation by those who believe in traditional moral values and traditional marriage.

STATEMENT OF THE CASE

In accordance with state of law, citizens of Washington state circulated petitions calling for a referendum election on the state's domestic partnership law passed by the legislature, which extended state marriage law to cover same-sex partners. Petitions containing more than 138,500 signatures were duly filed with the Secretary of State, who canvassed and verified the petitions, and consequently placed the

referendum on the ballot for November, 2009. CP-App. 20a)

Gay rights advocate groups KnowThyNeighbor.org and WhoSigned.org stated publicly that they would request release of the referendum petitions under the state's Public Records Act ("PRA"), and post the names, addresses, phone numbers, and other personal information of the referendum petition signers on the Internet to encourage others to have "uncomfortable conversations" with them. (CP-App. 31a).

The Referendum statute, adopted by public vote of the people, reflects a policy of protecting this personal information. That statute does not make the petitions public or open to general public inspection. RCW Section 29A.72.010 *et seq*. It allows proponents and opponents of a referendum to have observers present while the Secretary of State verifies the signatures, but those observers may not record the names, addresses, or other information on the petitions. RCW Section 29A.72.230 *et seq*. If the Secretary determines that the petition signatures are insufficient for a referendum election, and that is confirmed on any appeal, the statute provides that the petitions are to be destroyed, not released.

Moreover, state Attorney General Opinions issued in 1938 and in 1956 ruled that referendum petitions are not public records subject to disclosure. Wash. Op. Att'y Gen. 378 (1938); Wash. Op. Att'y Gen. 55-57 No. 274 (1956). The PRA says nothing about referendum petitions, and after it was enacted then-Secretary of State Kramer held that such petitions were not subject to release under its requirements. A. Ludlow Kramer, Secretary of State of Washington Official Statement, July 13, 1973 (CP-App. 67a.); A. Ludlow Kramer, Letter to State Senator Hubert F.

Donohue, July 13, 1973 (CP-App. 66a). Kramer's position was later confirmed in state court. *Neale v. Cheney*, No. 48733 (Wash. Sup. Ct. Thurston County, Sept. 14, 1973).

Nevertheless, Secretary of State Reed stated in 2009 that he would publicly release the referendum petitions on the gay marriage legislation. This was in the context of abusive conduct by gay rights advocates in regard to Proposition 8 on the gay marriage issue in California, including some of the same groups making threats in Washington state over its gay marriage referendum petitions. These advocates posted the names, employers, and contact information of Proposition 8 campaign contributors on the Internet as part of a crusade of harassment and intimidation. (www.eightmaps.com; www.californiansagainsthate.com).

This resulted in death threats against supporters of Proposition 8, threats of violence against their families, and phone and email messages laced with profanity. Homes were vandalized, churches were defiled and disrupted, and cars were spray painted and scratched, with their windows broken and their tires deflated. Supporters were harassed at home and at work, with some losing their jobs because of the disruption.[2] This Court has identified this conduct as cause for concern. *Citizens United v. FEC*, No. 08-205, slip op. at 54 (Jan. 21, 2010) (558 U.S.

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[2] Dkt. 4, Ex. 12 at 10-15, 27-45, 45-51, 52-57; Dkt. 4, Ex. 13 at 2-6, 7-9, 10-12, 13-16, 17-20, 31-34, 35-38, 39-42, 43-45, 46-51, 58-60, 70-75, 76-80, 81-118, 119-36, 143-45, 173-82, 212-15, 223-34, 235-38, 239-45; Andres Araiza, *Prop 8 Threat: Fresno Police Close to Arrest*, ABC-30 (KFSN-TV), Oct. 31, 2008; Karen Grigsby Bates, *Backers of Calif. Gay Marriage Ban Face Backlash*, NPR, March 5, 2009.

___, 2010 WL 183856 (2010); *Hollingsworth v. Perry*, 130 S. Ct. 705, 712-13 (2010).[3]

To prevent this travesty of intimidation and harassment from repeating in Washington state, Petitioners brought this action for an injunction against public release of the referendum petitions, arguing that the PRA requiring that release under the Secretary of State's interpretation is unconstitutional. The District Court granted the requested preliminary injunction, but the Ninth Circuit reversed. This Court granted certiorari.

SUMMARY OF ARGUMENT

Signing referendum petitions is core political speech at the heart of the First Amendment, and consequently entitled to its highest possible protection. The law is well established and has been long settled that such core political speech is protected by strict scrutiny.

The evidence in this case clearly establishes that public release of the referendum petitions so that personal information of petition signers can be placed on the Internet would burden the core political speech involved in signing the petitions. The threatened campaign of harassment, intimidation and violence against petition signers that experience and the evidence shows will likely ensue is not a constitutionally permissible burden to place on those trying to exercise their legal rights to call for a referendum election, and to express their desire for change

[3] KnowThyNeighbor.org had similarly posted the names of referendum petition signers on the Internet in Arkansas, Florida, Massachusetts, and Oregon. www.knowthyneighbor.org.

by petitioning their government for redress of grievances.

There must be no place in our democracy for Brown Shirts seeking to force their way through thuggery and violent intimidation. If this activity is not stopped now, it will become a permanent feature of our politics not only in regard to referenda petitions and elections, but ultimately candidate petitions and elections as well.

No state interest in publicly releasing the referendum petitions and publicizing the personal information of the petition signers has been advanced that is remotely sufficient to justify the resulting burden on the core political speech involved in this case.

ARGUMENT

I. SIGNING REFERENDUM PETITIONS IS CORE POLITICAL SPEECH PROTECTED BY THE FIRST AMENDMENT.

This Court has already recognized that signing referendum petitions is core political speech. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)("*Buckley II*"); *Meyer v. Grant*, 486 U.S. 414 (1988). The Court in *Buckley II* recognized that signing such petitions "involves both the expression of a desire for political change and discussion of the merits of the proposed change." 525 U.S. at 199.

The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life, Inc*., 479 U.S. 238 (1986); *First Na-*

tional Bank of Boston v. Bellotti, 435 U.S. 765 (1978); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Citizens United*, *supra*.

Moreover, as the above cited cases make abundantly clear, it is far too late in the day to argue that such core political speech is not protected by strict scrutiny, which the Ninth Circuit below inexplicably failed to recognize. As the Court said in *McIntyre*,

> When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.

514 U.S. at 347. In a factually quite similar case discussed further below, *Brown v. Socialist Workers Comm.*, 459 U.S. 87 (1982), the Court explained,

> The right to privacy in one's political association's and beliefs will yield only to a 'subordinating interest of the State [that is] compelling,' *NAACP v. Alabama*, *supra*, at 357 U.S. 463 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 354 U.S. 265 (1957) (opinion concurring in result)), and then only if there is a 'substantial relation between the information sought and [an] overriding and compelling state interest." *Gibson v. Florida Legislative Comm.*, *supra*, at 372 U.S. 546.

The public release of the referendum petitions and the threat of violence, harassment and intimidation that entails is transparently not a time, place and manner restriction, or an "incidental effect on expres-

sive conduct," as the Ninth Circuit also inexplicably failed to recognize. Slip Op. at 14-15. Moreover, Petitioners are challenging the public release of the referendum petitions, not the referendum petition procedures established by the referendum statute. Slip Op. at 12.

In addition, the core political speech involved in signing referendum petitions does not somehow lose its constitutional protection because it supposedly also involves legislative action. First of all, referendum petitions do not involve legislative action, but only whether a question will be put on the ballot before the voters. It is the referendum election that may involve legislative action. Moreover, if the signing of referendum petitions did involve legislative action in addition to core political speech, that could only increase constitutional protection even further, not reduce it. Courts would not tolerate death threats, violence, harassment and intimidation of legislators in regard to their votes, or, analogously, a riot on the floor of the legislature.

This case also implicates the constitutional interest in the right to vote. If effective brown shirts can intimidate petition signers out of signing referendum petitions, then they are effectively intimidating voters out of their right to vote. Compelled disclosure of referendum petitions consequently also transgresses this constitutional interest.

II. PUBLICIZING PERSONAL INFORMATION OF REFERENDUM PETITION SIGNERS WOULD BURDEN CORE POLITICAL SPEECH.

The evidence in this case clearly establishes that public release of the referendum petitions so that personal information of petition signers can be placed on the Internet would burden the core political speech involved in signing the petitions. The threatened campaign of harassment, intimidation and violence against petition signers that experience and the evidence shows will likely ensue is not a constitutionally permissible burden to place on those trying to exercise their legal rights to call for a referendum election, and to express their desire for change by petitioning their government for redress of grievances.

Record evidence shows the chilling effect on core political speech the threatened retribution against petition signers will produce. One California victim of such retribution swore that he would not speak out publicly again in the future for "fear for the safety of children." Dkt. 4, Ex. 13 at 119-36. Another testified that he would have to "seriously consider . . . the safety of family in the future when deciding to support a [similar] cause." *Id*. at 194-97. Others expressed fears for the safety of their family, Id. at 39-42, 43-45, 58-60, 223-34, and testified that they would be less likely to speak out publicly and participate politically in the future because of fears of violence and intimidation. *Id*. at 13-16, 43-45, 70-75, 164-66, 194-97, 219-22. *See also*, Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009) (www.heritage.org/Research/Family/bg2328.cfm); Dick Carpenter II, *Disclosure Costs: Unintended Con-*

sequences of Campaign Finance Reform (2007) <www.ij.org/publications/other/disclosurecosts.html> (Nearly 60% would be discouraged from political contributions if names and addresses were to be released to the public).

This Court faced similar concerns in *NAACP v. Alabama*, 357 U.S. 449, 451 (1958), where "the question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all of its Alabama members and agents." The Court observed,

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this court recognize that the abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action . . . . The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon, rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment.
>
> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's association

> . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. at 461-462.

The Court granted the requested injunction against the compelled disclosure because it found threats of harassment, intimidation and violence quite similar to those found here:

> We think that the production order . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that, on past occasions, revelation of the identity of its rank and file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective efforts to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

357 U.S. 462-463.

Similarly, in *Brown v. Socialist Workers Comm.*, 459 U.S. 87, 88 (1982) the Court considered,

> the question whether certain disclosure requirements of the Ohio Campaign Expense Reporting Law . . . can be constitutionally applied to the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties. The Ohio statute requires every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the First Amendment prohibits the government from compelling disclosures by a minor political party that can show a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassments, or reprisals.'

In *Brown*, the lists of names and addresses of contributors and recipients were open to public inspection for at least six years. 459 U.S. at 90. Again as in the present case before the Court, in *Brown*,

> Appellees introduced proof of specific incidents of private and governmental hostility toward the SWP and its members in the four years preceding the trial. These incidents, many of which occurred in Ohio and neighboring states, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at a SWP office. There was also evidence that, in the 12 month period before trial, 22 SWP members,

> including 4 in Ohio, were fired because of their party membership.

459 U.S. at 99.

As a result, the Court held,

> The First Amendment prohibits a State from compelling disclosures by a minor party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals. Such disclosures would infringe the First Amendment rights of the party and its members and supporters. In light of the substantial evidence of past and present hostility from private persons and Government officials against the SWP, Ohio's campaign disclosure requirements cannot be constitutionally applied to the Ohio SWP.

459 U.S. at 101-102.[4]

As the Court said in *The Ku-Klux Cases*, 110 U.S. 651, 666 (1884),

> In a republican government . . . the temptation to control these elections by violence and corruption is a constant source of danger . . . .if the very sources of power may be poisoned by corruption or controlled by violence and outrage . . . then, indeed, is the country in danger . . . .

There must be no place in our democracy for Brown Shirts seeking to force their way through thuggery and violent intimidation. "Brownshirt." *A Dictionary*

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[4] This Court added in *Buckley II*, "[T]he First Amendment requires us to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." 525 U.S. at 192.

of World History. 2000. *Encyclopedia.com*. 1 Mar. 2010 <http://www.encyclopedia.com> ("The Brownshirts, recruited from various rough elements of society, were founded by Adolf Hitler in Munich in 1921 . . . . Their violent intimidation of political opponents and of Jews played a key role in Hitler's rise to power."); Nazi Germany-Dictatorship, History Learning Site, http://www.historylearning site.co.uk/Nazi_Germany_dictatorship.com> ("To 'keep the peace' and maintain law and order, the SA (the Brown Shirts) roamed the streets beating up those who openly opposed Hitler."). If this activity is not stopped now, it will become a permanent feature of our politics not only in regard to referenda petitions and elections, but ultimately candidate petitions and elections as well.

III. THERE IS NO COMPELLING STATE INTEREST JUSTIFYING THE BURDEN ON CORE POLITICAL SPEECH INVOLVED IN PUBLICIZING PERSONAL INFORMATION OF REFERENDUM PETITION SIGNERS.

No state interest in publicly releasing the referendum petitions and publicizing the personal information of the petition signers has been advanced that is remotely sufficient to justify the resulting burden on the core political speech involved in this case.

There is no anti-corruption interest served by the public release of referendum petition signatures. The information interest involved in public disclosure of campaign contributions, so the public may know who is financing campaigns, is also not present in this case. The interests involved in financing campaigns can be relevant to citizens in deciding how to vote.

But the identity of particular petition signers involves no similar interest.

The Ninth Circuit court below asserted an interest in "preserving the integrity of the election by promising government transparency and accountability." Slip Op. at 17. But this apparently rhetorical interest cannot remotely justify the burden imposed on core political speech in this case. *NAACP v. Alabama*, *supra*; *Brown v. Socialist Workers Comm.*, *supra*. There is no government accountability interest at stake in the release of the personal information of referendum petition signers. The release of such personal information also does not promote the integrity of any election.

The court below also asserted an information interest in "providing Washington voters with information about who supports placing a referendum on the ballot." Slip Op. at 17. But there is no government interest in inciting a riot, let alone a compelling one. Publicizing the personal information of referendum petition signers runs contrary to a real constitutional interest in secret ballots. *Burson v. Freeman*, 504 U.S. 191, 206 (1992)("[A]ll 50 states, together with numerous other Western democracies . . . [require] a secret ballot" to prevent "intimidation" and "fraud."); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 343 (1995) (Courts have "embraced a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation*."); Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000). The United Nations also recognizes the secret ballot as a human right. United Nations Declaration of Human Rights, Art. 2.

There is also no anti-fraud compelling interest in this case. Publicizing the personal information of referendum petition signers does not help to combat fraud. The Secretary of State canvasses and verifies signatures on all petitions, including candidate petitions, and is fully equipped to do so. Public observers are allowed to monitor that canvassing and verification process. Criminal penalties also apply for fraudulent signatures.

The record offers no evidence of a problem with signature fraud that these measures are not fully adequate to combat. There is no evidence either that disclosing the personal information of petition signers has ever led to the discovery of any fraudulent signatures.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed, and the relief requested by Petitioners should be granted.

Respectfully submitted,

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