No. 09-559

In The
Supreme Court of the United States

JOHN DOE # 1, et al.,

Petitioners,

v.

SAM REED, et al.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF PROTECTMARRIAGE.COM – YES ON 8, A PROJECT OF CALIFORNIA RENEWAL IN SUPPORT OF PETITIONERS

CHARLES J. COOPER*
**Counsel of Record*
JESSE M. PANUCCIO
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Attorneys for Amicus Curiae

March 4, 2010

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, ProtectMarriage.com – Yes on 8, A Project of California Renewal (hereinafter "ProtectMarriage.com"), is a "primarily formed" ballot committee under California law. *See* CAL. GOV. CODE § 82047.5. A group of California citizens formed ProtectMarriage.com in order (i) to collect petition signatures in an effort to place what became known as "Proposition 8" on the November 2008 state ballot, and (ii) to campaign in support of Proposition 8 once it was on the ballot. Like Petitioners, Amicus engaged in a hotly contested political campaign to preserve the traditional definition of marriage in state law. As this Court has already noted, many of Amicus' supporters faced harassment, economic reprisal, vandalism, threats, and even physical violence. *See Hollingsworth v. Perry*, 130 S. Ct. 705, 707 (2010); *Citizens United v. FEC*, No. 08-205, slip op. at 54-55 (Jan. 21, 2010). In many instances, these citizens' support for, or affiliation with, Amicus was publicly disclosed only by operation of state law. Thus, like Petitioners, Amicus and its supporters have a paramount interest in seeing the cherished First Amendment rights to anonymous and/or private political speech, activity, and associations vindicated by this Court in the face

[1] Pursuant to Rule 37.6, Amicus affirms that no person other than Amicus or its counsel made a monetary contribution to the preparation or submission of this brief, and that no counsel for a party authored this brief in whole or in part. The parties' letters consenting to the filing of this brief are being concurrently filed with the Clerk.

of a powerful and spiraling trend towards eradication of those rights.

SUMMARY OF ARGUMENT

"The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982). This protection has roots in our most cherished traditions, as anonymous political speech and private political association were fundamental features of the Framers' political life and the campaign to ratify the Constitution. Accordingly, this Court has repeatedly invalidated government attempts to compel disclosure of the identity of anonymous political speakers, the identity of a political association's members, and the otherwise undisclosed political activities and beliefs of a citizen or association of citizens. These rights have their most urgent application during elections, particularly referendum elections, when a citizen's fundamental right to petition the government for political change is most directly in play.

This Court has always treated compelled political disclosure as constitutionally suspect, subjecting it to heightened scrutiny and approving it only where a compelling state interest justifies the inevitable chill associated with forced speech. In recent years, rapidly changing Internet technology has rendered such compelled disclosure much more

public, comprehensive, pervasive, and chilling. The facts of this case, and the history of Proposition 8 in California, attest to this reality.

In Washington, if a group of citizens disapproves of an enacted law, it may associate, in private and anonymously, to plan a campaign in support of a referendum to block the measure. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449 (1958). Those who circulate and solicit signatures for the petition for the referendum have a right to do so anonymously. *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 199 (1999) (hereinafter "*Buckley II*"). And those who ultimately vote for the measure, once it is on the ballot, may do so under the long-established protection of the secret ballot. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995); RCW § 29A.04.206(2) (guaranteeing "[t]he right of absolute secrecy of the vote"). But under Washington's Public Records Act ("PRA"), RCW § 42.56.001 et seq., those who sign the petition to place the measure on the ballot must disclose their name, address, and political beliefs to the world. This forced public disclosure of identity and political belief, justified by no compelling state interest, violates the First Amendment.

Amicus' experiences during and after the Proposition 8 election in California bring into sharp focus the importance of the First Amendment's protection of citizens from compelled disclosure of political association and beliefs. Like Petitioners, Amicus and its supporters backed a politically controversial ballot measure relating to the definition of marriage.

By operation of state law, the names, contact information, and employer information of many of Amicus' donors were publicly disclosed. This led to vast Internet dissemination of these citizens' personal information, which in turn led to widespread harassment, retaliation, threats, and outright violence. Passage of Proposition 8 only served to increase the reprisals and harassment directed against those citizens whose support of the measure was thrust into the public spotlight by operation of state law. Amicus' experience thus shows that it is essential for this Court to once again declare that the First Amendment rights to free political speech and association protect the privacy and anonymity that for some citizens are a precondition to their full and free participation in the political process.

ARGUMENT

I. Compelled Public Disclosure of an Individual Citizen's Support for Placing a Referendum Measure on the Ballot Violates the First Amendment.

The value of anonymous speech and private association was well understood and deeply cherished by the Framers, who, for instance, maintained the confidentiality of the proceedings of the Constitutional Convention for a generation, *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974), and who, by joining issue through nom de plumes such as Publius and the Federal Farmer, conducted in anonymity the

most significant referendum debate this country has ever known, *see, e.g.*, *McIntyre*, 514 U.S. at 343 n.6.[2] In light of this history, this Court has repeatedly recognized, in many different contexts, that the First Amendment prohibits compelled disclosure of a speaker's identity or a citizen's political beliefs, activities, and associations. *See NAACP*, 357 U.S. at 462-63 (recognizing that "the vital relationship between freedom to associate and privacy in one's associations" bars compelled disclosure of group's membership list); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *Talley v. California*, 362 U.S. 60 (1960) (invalidating city ordinance requiring disclosure of handbill author's identity); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 544 (1963) (state cannot compel membership list disclosure because "the guarantee [of free association] encompasses protection of privacy of association in organizations"); *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 828

[2] *See also id.* at 360-69 (Thomas, J., concurring in judgment); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 n.17 (D.C. Cir. 1981) ("It bears remembering that Elbridge Gerry, Oliver Ellsworth, Roger Sherman, Spencer Roane, Noah Webster, James Iredell, and others all sought anonymity while they conducted the most important political campaign of their lives, the campaign to ratify the federal constitution."); *Talley v. California*, 362 U.S. 60, 64-65 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. . . . It is plain that anonymity has sometimes been assumed for the most constructive purposes."); *Citizens United*, slip op. at 37. ("At the founding, speech was open . . . [and] there were no limits on the sources of speech and knowledge.").

(1966) (First Amendment bars compelled disclosure of "information relating to [a person's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings"); *Socialist Workers*, 459 U.S. at 100-01 (contribution and expenditure disclosure requirements were unconstitutional as applied to minor political party); *Dawson v. Delaware*, 503 U.S. 159 (1992) (introduction of criminal defendant's political association at penalty phase of trial violated First Amendment associational rights); *McIntyre*, 514 U.S. at 343 (embracing a "respected tradition of anonymity in the advocacy of political causes" in striking down law requiring identification of author of political handbills); *Buckley II*, 525 U.S. at 199 (striking down state law requiring petition circulator to disclose identity by wearing name badge); *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (striking down "requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection" because it results in a "surrender of that anonymity").[3]

---

[3] Likewise, the long line of cases affirming the First Amendment right not to speak are animated by the principle that it is not for the government to tell its citizens what to say, when to say it, or when and how to publicly embrace political speech, activities, or association. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of

(Continued on following page)

The First Amendment protects anonymous speech and privacy in political activity and association for several reasons. Most importantly, compelled disclosure of controversial, unpopular speech and political activity will often lead to harassment and reprisal, which in turn chills and diminishes such speech and activity. *See NAACP*, 357 U.S. at 462-63; *DeGregory*, 383 U.S. at 828-29; *Buckley v. Valeo*, 424 U.S. 1, 71 (1976) ("*Buckley I*"). This case falls in that bucket, based both on the expressed intentions of some of those who seek public disclosure of names in Washington, *see Doe v. Reed*, 661 F. Supp. 2d 1194, 1199 (W.D. Wash. 2009), and the recent history of the fallout from similar disclosures in California, *Hollingsworth*, 130 S. Ct. at 707 (noting that supporters of Proposition 8 have been subject to "death threats," "physical violence," "vandalism," verbal harassment, economic retaliation, and blacklisting through Internet dissemination of identity); *NAACP*,

---

the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (citation omitted); *PG&E Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 9 (1986) (conditioning speech on publication of unwanted additional speech unconstitutionally "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("[A]ny such a compulsion to publish that which reason tells them should not be published is unconstitutional.") (quotation marks omitted); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment . . . includes . . . the right to refrain from speaking at all."); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

357 U.S. at 462-63 (First Amendment bars disclosure upon "showing that on past occasions revelation of the identity of [association's] rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility").

But curtailment of harassment and reprisal is not the only reason for the First Amendment's solicitude for anonymity and privacy. Instead, the First Amendment recognizes and protects the myriad reasons a person may have for including or excluding particular information – including identity, associational bonds, or beliefs – from public political expression. *See* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 J. OF CONST. L. 1, 16-20 (2003). For example, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity." *McIntyre*, 514 U.S. at 342. *See also McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Kennedy, J., concurring in judgment and dissenting in part) ("The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views . . . ."). Or a citizen might seek to avoid "decontextualized judgments" derived from disclosure of only "fragmentary information" regarding that person's political views. McGeveran, *supra*, at 19. Or citizens may seek to insulate themselves from the potential post-election consequences of backing the wrong horse. *See Buckley I*, 424 U.S. at

237 (Burger, C.J., concurring in part and dissenting in part) ("[P]otential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent."); McGeveran, *supra*, at 16. Or citizens involved in an election campaign may prefer not to share their campaign strategy with their opponents, before, during, or after the election. *See McConnell*, 540 U.S. at 363 (Rehnquist, C.J., dissenting) (recognizing interest in keeping "political strategy" private); *id.* at 321 (Kennedy, J., concurring in judgment and dissenting in part) (same). Or citizens may object to the notion that their speech or association should be examined or cleared by the government. *See Watchtower*, 536 U.S. at 167 ("There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate . . ., that they would prefer silence to speech licensed by a petty official."); *Buckley II*, 525 U.S. at 198 n.19 (crediting evidence of petition circulator who simply did not "think it's right" to have to wear an identification badge). Or a citizen may simply – and quite understandably in an age of ever-increasing incursions on the privacy of personal information – "be motivated by . . . a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. In sum, citizens may choose to keep their political voices anonymous, and their political associations and activities private, for any number of reasons or no reason – and that is a choice that the First Amendment protects.

Despite these deep historical and constitutional roots, statutory and regulatory law in the last few decades has required ever-increasing public disclosures of political speech, belief, and associational activities that would otherwise remain largely anonymous and confidential. *See Buckley I*, 424 U.S. at 61-63 (describing history of federal campaign disclosure laws); McGeveran, *supra*, at 9 n.38. This Court has upheld such compelled disclosure requirements only in certain delimited circumstances, where the government has employed a measure narrowly tailored to advance a compelling interest. *See Buckley I*, 424 U.S. at 64-68 (finding that federal laws requiring disclosure of campaign contributions to candidates meet "exacting scrutiny" because government interests served were "sufficiently important"); *McConnell v. FEC*, 540 U.S. at 96 ("important interests" identified in *Buckley I* justify BCRA's disclosure requirements); *Citizens United*, slip op. at 51-55 (upholding, under "exacting scrutiny," disclosure requirement for "corporate independent expenditures" on candidate ads because of public and shareholder need to hold corporations and supported candidates accountable).

This case thus comes at the crossroads of two trends in American law. Behind one trend lies a venerable tradition of the right to anonymous and private participation in the political process that was a cherished practice of the Founders themselves. Behind the other trend lies modern regulatory attempts to compel disclosure of political beliefs and activity – attempts that have often, but not uniformly,

been found unconstitutional. Here, the immediate question is whether the State of Washington has advanced an interest so compelling that the State is justified in forcing its citizens to disclose publicly their political opinion and affiliation with respect to placing issues on the ballot. If the core First Amendment freedoms to speak, to associate, and to petition are to remain robust, the answer must be no.

A. Under the First Amendment, Citizens Cannot Be Compelled to Publicly Disclose Their Support for Inclusion of a Referendum Question on a Ballot.

As this Court has repeatedly recognized, political speech and association[4] during the course of a referendum campaign lie at the very core of the First Amendment's protection. *See McIntyre*, 514 U.S. at 347; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978) (speech during referendum campaign "is at the

[4] Political activism is often most effective when coordinated with, and buttressed by, like-minded associates. This is why the First Amendment protects assembly as well as speech. *See, e.g.*, *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process"); *NAACP*, 357 U.S. at 460 ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."); *Citizens United*, slip op. at 1 (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.").

heart of the First Amendment's protection" and "indispensable to decisionmaking in a democracy"); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("the circulation of a petition involves the type of interactive communication concerning political change that is . . . 'core political speech' "). And because privacy in association and anonymity in speech are often indispensible to effective exercise of the right, *NAACP*, 357 U.S. at 460-62, this Court has explicitly held that anonymity and privacy, if desired, are protected during nearly every aspect of a referendum campaign and election.

In *Buckley II*, this Court held that a petition circulator cannot be compelled to wear an identification badge while circulating a petition; because the "endeavor to persuade electors . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change," the circulator has a right of anonymity. 525 U.S. at 199. *See also Watchtower*, 536 U.S. at 166 (state cannot compel door-to-door solicitors to reveal identity). Under *NAACP*, 357 U.S. at 462-63, and *DeGregory*, 383 U.S. at 828-29, citizens have the right to associate in private to discuss a proposed referendum and plan a campaign for or against it.[5] In *McIntyre*,

[5] Legislators, too, are shielded from disclosure of internal and confidential political activity, speech, and deliberation. *See, e.g.*, CAL. GOV. CODE § 6254 (exempting from California Public Records Act disclosure some "[p]reliminary drafts, notes, or interagency or intra-agency memoranda"); RCW § 42.56.280 (exempting from Washington PRA disclosure "[p]reliminary

(Continued on following page)

this Court held that a person opposing a referendum measure already on the ballot cannot be compelled to include her identity – or any other content – on her homemade campaign handbill. 514 U.S. at 342-49 ("the identity of the speaker is no different from other components of [a] document's content that [an] author is free to include or exclude") (citing *Tornillo*, 418 U.S. 241). And, as this Court has recognized, when voters go to the polls to make their final decision on a ballot measure, they enjoy "the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." *McIntyre*, 514 U.S. at 343. *See also Rogers v. Lodge*, 458 U.S. 613, 647 n.30 (1982) (Stevens, J., dissenting) ("[T]he very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast."); *Buckley v. Valeo*, 519 F.2d 821, 867 n.117 (D.C. Cir. 1975) ("In this country a person's right to vote secretly is inviolate."), *aff'd in part and rev'd in part on other grounds*, 424 U.S. 1 (1976); *SASSO v. Union City*, 424 F.2d 291, 295 (9th Cir. 1970) (barring judicial inquiry that "would entail an intolerable invasion of the privacy that must

---

drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated"); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297-99 (9th Cir. 1984) (barring as a "hazardous task" deposition of state legislators to determine their motive in enacting a law). *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 48-54 (1998) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)) (absolute immunity for state legislators from "judicial interference" in federal civil suits).

protect an exercise of the franchise"); *Arthur v. City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) ("the policies underlying the 'secret ballot' prevent courts from inquiring into the votes of the electorate").[6]

There is, then, only one link missing from this chain: the protection of the anonymity and privacy of those persons who sign the petitions to place a referendum on the ballot. It follows ineluctably from the above authorities that this core expressive and associative activity – this petitioning of the government – likewise falls within the First Amendment's embrace of anonymous political speech and private assembly. Indeed, in *Buckley II*, the Court explained that a petition circulator's "endeavor . . . of necessity involves both the expression of a desire for political

[6] This Court has not squarely addressed the constitutionality of compelled disclosure of individual monetary contributions and expenditures by political associations made during ballot-measure campaigns. The Ninth Circuit has upheld such disclosure laws in California, but recognized that such disclosure "unquestionably infringes upon the exercise of First Amendment rights," and thus must be "justified by a compelling state interest." *California Pro-Life Council, Inc. v. Getmen*, 328 F.3d 1088, 1101 (9th Cir. 2003) (quotation marks omitted). That court held that the informational interest in helping voters evaluate millions of dollars worth of campaign advertising and spending justified the encroachment on this core political speech. As explained below, there is no similar informational interest here, where the political speaker is an individual citizen who is simply expressing a preference to put a specific measure on the ballot, the text of which speaks for itself and is indifferent to the identity of the individual citizens who support its inclusion on the ballot.

change and a discussion of the merits of the proposed change." 525 U.S. at 199 (quotation marks omitted). This discussion about political change involves, necessarily, two people – circulator and signer, solicitor and solicited. There is no principled reason why the First Amendment would protect the former's identity from compelled disclosure but not the latter's.[7]

---

[7] In *Buckley II*, the Tenth Circuit upheld a state law that required petition circulators to submit completed petitions with an affidavit that included the circulator's name and address and a statement that the circulator "has read and understands the laws governing the circulation of petitions." 525 U.S. at 188-89, 191. This Court did not have the affidavit requirement before it, *id.* at 186, but did note that such a regulation was "the type of regulation for which *McIntyre* left room," *id.* at 200. But the Tenth Circuit upheld that requirement because "[a] state has a strong, often compelling, interest in preserving the integrity of its electoral system" and petition circulators are "entrusted with personal responsibility to prevent irregularities in the petition process." *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1099-1100 (10th Cir. 1997). The affidavit requirement served that interest because it "ensure[d] that circulators . . . exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures." *Id.* (quotation marks omitted). Also, in explaining why the affidavit requirement was permissible but the badge requirement was not, the Tenth Circuit noted that "an identification badge is much more accessible than information attached to a filed petition." *Id.* at 1102. Neither rationale can be said to support public identification of *individual* petition signers in this case. First, unlike a petition circulator, a single voter does not have broad responsibility to ensure that all signatures are gathered without mistake, fraud, or abuse – so the compelling state interest is absent. Second, the record of accessibility of the affidavit was undeveloped in the 1997 Tenth Circuit case, *see id.* at 1099. In this case – in 2010, when information accessibility and

(Continued on following page)

The State has advanced the theory that petition signers in Washington waived their First Amendment rights (i) by signing in public, (ii) by signing forms that allowed subsequent signers to view their information, and (iii) because others who know of their signing are not prohibited from publicizing the information. Secretary of State Sam Reed's Br. in Opp. to Pet. for Cert. (hereinafter "Secretary's Cert. Opp.") at 17-21. In *Watchtower*, the Court rejected this very argument, holding that physical revelation of identity to individuals when canvassing does not mean "anonymity interests" are voided, for the canvasser still maintains anonymity with respect to those he or she does not know or recognize personally. 536 U.S. at 166-67. Indeed, in *McIntyre*, Ms. McIntyre personally distributed her unsigned leaflet at a local community gathering where she was personally known to some of the participants, yet that fact did not destroy her First Amendment right to omit her name from her leaflet. *See* 514 U.S. at 337-38.

Likewise, the fact that the petition form has space for multiple signatures does not mean that a signer thereby cedes all interests in anonymity. As

---

dissemination are nearly boundless – the record is clear that filing of petition signatures will result in immediate mass publication, available to anyone with an Internet connection, for the express purpose of prompting "uncomfortable" confrontations, or worse. *See Doe v. Reed*, 661 F. Supp. 2d at 1199. The closely analogous situation in California attests to the same fact. *See Citizens United*, slip op. at 2-3 (Thomas, J., concurring in part and dissenting in part).

the Eighth Circuit has explained under similar circumstances, petition signers "d[o] not waive their privacy interests" merely because subsequent signers might see their names. *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000). "The present concern is that the petition not become available to the general public. . . . This type of privacy interest[,] one in which individuals seek to keep information from the general public while simultaneously divulging it for limited purposes to others[,] is not unusual." *Id.*

Signing a petition in support of placing a measure on the ballot is an act of political expression. As with other political acts – like leafleting, soliciting petition signatures, or voting – a citizen is entitled to choose the means by which he or she publicizes that political expression, including means tailored to protect as much of that citizen's privacy and anonymity as possible. Thus, the State may intrude on that right, and force broad public disclosure of speech and association a citizen would otherwise keep private, only upon a showing of a compelling need.

B. The State Has No Interest Sufficient to Justify Its Abrogation of First Amendment Rights.

"The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State [that is] compelling, and then only if there is a substantial relation between the

information sought and [an] overriding and compelling state interest." *Socialist Workers*, 459 U.S. at 91-92 (quotation marks and citation omitted; alterations in original). The State has advanced (and the Ninth Circuit credited) two interests that supposedly justify broad public disclosure of a petition signer's name and address.

First, the State claims that petition signers act in a legislative capacity and the public has a right to know which individual citizens adopt such a role. Secretary's Cert. Opp. at 35; *see also Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009). This factually inaccurate argument proves far too much. Placing a question on the ballot effects *no* legislative change; rather, legislative change occurs when citizens vote to pass the ballot measure.[8] Thus, if the State has an interest "in knowing who has taken such action," *Doe*, 586 F.3d at 680, it has a much greater interest in abrogating "the secret ballot, the hard-won right to vote one's conscience without fear of retaliation," *McIntyre*, 514 U.S. at 343. Yet the State explicitly protects the secrecy of the ballot. *See* RCW § 29A.04.206(2). Moreover, the public purpose of the expressive act embodied in an individual citizen's appeal to the entire electorate for political change "'does not depend upon the identity of its source.'" *Citizens United*, slip op. at 33 (quoting *Bellotti*, 735

[8] *Cf. Buckley II*, 525 U.S. at 192 n.11 (petition "circulators act on behalf of themselves or the proponents of ballot measures," not as state actors).

U.S. at 777). Indeed, as Justice Stevens has recently noted, "[a] referendum cannot owe a political debt . . . , seek to curry favor, . . . or fear . . . retaliation," *id.* at 53 (Stevens, J., dissenting), and thus it is inconsequential which individual citizens supported its inclusion on the ballot. In any event, even if the identity of petition signers were somehow relevant to voters, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348.

Second, the State claims that public disclosure is necessary to ensure "government transparency and accountability" – that is, to ensure that the Secretary of State has properly evaluated a petition for certification purposes and that State officials are prosecuting those who illegally sign petitions. Secretary's Cert. Opp. at 34. The fact that Washington's referendum system functioned properly for many years without such public disclosure, Petitioners' Br. at 9 n.18, undermines the credibility of this argument. Indeed, in California, where voters resort to direct democracy more frequently than voters in all but one other state,[9] petition signers' privacy is explicitly protected in state law. *See* CAL. ELEC. CODE § 18650. Despite these protections, the Californian

[9] *See* Initiative and Referendum Institute, Initiative Use (Feb. 2009), at 2, *available at* http://www.iandrinstitute.org/IRI%20Initiative%20Use%20%281904-2008%29.pdf.

experiment in direct democracy continues to have ample transparency and accountability in the petition process.[10] In any event, the State fails to explain how the PRA – a blunderbuss disclosure law not specifically related to elections – is narrowly tailored to meet these asserted interests.

Thus, "[t]he strong associational interest in maintaining the privacy of [supporter] lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the [State]." *Gibson*, 372 U.S. at 555-56.[11]

---

[10] Thus, in holding that a petition signer has no interest or right to privacy under the First Amendment, the Ninth Circuit parted ways with the better reasoned decision of the Sixth Circuit in *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981). *Anderson* addressed a Kentucky statute that required a signer of a petition to put a presidential candidate on the ballot to attest that he or she desires to vote for the candidate. *Id.* at 607-08. The Sixth Circuit held that forcing a citizen to "hav[e] his political preference clearly and unmistakably disclosed" had an "obvious" "chilling effect . . . on associational rights." *Id.* at 609. Because the state could not demonstrate a compelling reason for such disclosure – avoiding "confusion, deception and even frustration of the democratic process" was not sufficient, *id.* at 609-10 – the Sixth Circuit found that the statute ran afoul of the First Amendment.

[11] In *Citizens United*, this Court upheld a requirement that corporations must disclose their identity when making large contributions to fund electioneering communications in federal candidate elections. Whatever the merits of such disclosure in that context, disclosure of *individual* voters' political speech and association during a *referendum* campaign presents a very

(Continued on following page)

II. In California, Public Disclosure of Donor Information Led to Chilling of Speech and Association.

This case began when two groups – Whosigned.org and KnowThyNeighbor.org – requested copies of the Referendum 71 petition so they could "publish the names on the internet of every" signatory and thereby "'encourage individuals to contact' and to have a 'personal and uncomfortable conversation' with any person who signed the petition." *Doe*, 661 F. Supp. 2d at 1199. This and similar efforts have not been

---

different calculus: the state's interest in disclosure is far less weighty and the potential chill is far greater. *See, e.g.*, *Citizens United*, slip op. at 53 (Stevens, J., dissenting) (listing cases recognizing "candidate/issue" distinction in justifying speech regulations); *Citizens Against Rent Control*, 454 U.S. at 299; *Buckley II*, 525 U.S. at 203 (citing *Meyer*, 486 U.S. at 427-28 (citing *Bellotti*, 435 U.S. at 790), *McIntyre*, 514 U.S. at 352 n.15). Signing a petition is more akin to voting than it is to making a large contribution; and even if it were akin to making a contribution, the amount contributed – zero – would not pass the rationality test for contribution disclosure thresholds. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033-34 (9th Cir. 2009). *Cf. Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (affirming "the existence of some lower bound" at which contribution limits are unconstitutional).

Moreover, in the context of corporate speech, individual citizens can still speak anonymously because their role as a shareholder or stakeholder within the speaking corporation may not be publicly known even if the corporation's identity is publicly disclosed. It would be anomalous and perverse to hold that those citizens who eschew the corporate form are not entitled to the same anonymity and privacy.

confined to Washington. On its website, for example, KnowThyNeighbor.org has published the names of petition signers in four other states.

In California, during the Proposition 8 election campaign, other groups published the names of every contributor to ProtectMarriage.com, along with a map that displayed each donor's name, profession, and address. *See* http://www.californiansagainsthate.com; http://www.eightmaps.com. In the wake of these broad public disclosures, supporters of Proposition 8 were subjected to economic reprisal, loss of employment, blacklisting, verbal abuse, racial and religious scapegoating, vandalism, threats of physical violence, actual physical violence, death threats, and other manifestations of public and private hostility. *See, e.g.,* Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009), *available at* http://www.heritage.org/Research/Family/upload/bg_2328-3.pdf. In light of these realities, this Court has already twice this Term taken note of the chilling effect public disclosure has had on participation in the debate over the definition of marriage in California. *See Hollingsworth*, 130 S. Ct. at 707, 713; *Citizens United*, slip op. at 54 (citing these examples as "cause for concern"). *See also id.* (Thomas, J., concurring in part and dissenting in part). *Compare Buckley II*, 525 U.S. at 198 (crediting evidence that identity disclosure lessened number of persons willing to work publicly for a petition drive because of fear of "recrimination and retaliation that

bearers of petitions on 'volatile' issues sometimes encounter").[12]

As these examples demonstrate, the chilling effect of compelled disclosure of political association and beliefs identified in *NAACP, Buckley II*, and a host of other cases has grown ever more frigid as technology has allowed such information to spread more quickly, widely, and permanently. *See* McGeveran, *supra*, at 11-13 (explaining how "change in technology qualitatively transformed the nature of disclosure laws"). *Cf. Citizens United*, slip op. at 48-49 (recognizing that "[o]ur Nation's speech dynamic is changing" and that "[r]apid changes in technology . . . counsel against upholding a law that restricts political speech . . . by certain speakers").

* * * *

The Founders, who kept the notes of their Constitutional Convention secret and who "sought anonymity while they conducted the most important political campaign of their lives," *Machinists Non-Partisan Political League*, 655 F.2d at 388 n.17, would recoil from the disclosures compelled by modern election laws. Because "political speech must prevail against laws that would suppress it," *Citizens United*,

---

[12] Once Proposition 8 passed, instances of retaliation and harassment only intensified, *see, e.g.*, Messner, *supra*, at 7-8, 12-13, further ensuring that Californians may hesitate to participate in future controversial ballot initiative campaigns, *see* Petitioners' Br. at 6 & n.13.

slip op. at 23, the First Amendment's deeply rooted protection of anonymous speech and private political association shields citizens from the type of harassment suffered by Proposition 8 supporters in California.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the PRA's compelled disclosure of ballot petition signatures should be held unconstitutional.

Respectfully submitted,

CHARLES J. COOPER
JESSE M. PANUCCIO
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600