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 OF *AMICUS CURIAE* VOTERS WANT MORE CHOICES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

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INTEREST OF *AMICUS CURIAE* [1]

Voters Want More Choices is a grassroots taxpayer-protection organization, committed to safeguarding individual rights and fostering government accountability through the exercise of the freedoms of speech and association protected by the First Amendment.

[1] Pursuant to this Court's Rules, all parties consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of the Court. Counsel for all parties received 10 days notice.

Voters Want More Choices attempts to protect the rights of individuals by limiting the power of the legislature by promoting the use of signature drives, signed petitions and ballot referenda. Sponsoring and signing petitions thus represents the purest form of political speech for the supporters of Voters Want More Choices and, in attempting to attract like-minded supporters, implicates freedom of association. These interests are magnified by the commitment of many supporters of Voters Want More Choices to the political and social positions at which their petitions are directed.

The interest of Voters Want More Choices is not a theoretical abstraction. The record in the instant case demonstrates that citizens of the kind that support it have been subject to intimidation and threats of physical violence often directed by anonymous callers or Internet website posters who have obtained the names and other information of these victims as a result of their having signed petitions. Especially because there is no law enforcement requirement or demonstrable public necessity for the release of these badges of identity, Voters Want More Choices seeks to assist this Court in assuring that the citizens of the State of Washington, and elsewhere, can continue to express themselves without the fear of harassment and retribution.

SUMMARY OF ARGUMENT

The First Amendment prohibits Congress from making laws that abridge the freedom of speech or the right of the people peaceably to assemble.[2] Under the Due Process Clause of the Fourteenth Amendment these protections apply to the States. *See*

[2] U.S. Const. amend. I.

DeJonge v. Oregon, 299 U.S. 353, 364 (1937); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Thus, every citizen enjoys protection to speak and act peaceably to express his or her views across the spectrum of issues that are the subject of public debate and governmental consideration. The methods of such expression are widely varied. Some people might stand on soapboxes in the public square or, today, use electronic equivalents. Others might write editorial pieces or take out newspaper advertisements. Still others, and this is where the interest of Voters Want More Choices comes in, believe that the best way to vent public issues is by signing petitions that lead to referenda and initiatives that force or block legislative action.

However different from one another they might be, all of these avenues represent political speech, and affecting such speech implicates freedom of association as like-minded people join in particular political endeavors. *See Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Going to the core of democracy, these rights might be abridged only if the government can satisfy the strict scrutiny standard by showing a compelling interest. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). In the instant case, the State government's publicizing the names of individuals who have signed political petitions, without any demonstrable law-enforcement need or private right of enforcement, needlessly chills speech and free association and so cannot pass First Amendment muster.

At least as long ago as its decision in *NAACP v. Alabama*, this Court has protected the anonymity of the membership lists of political groups because the security of their identities is "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *NAACP v. Alabama*, 357 U.S. 449, 466 (1958); *see also NAACP v. Button*, 371 U.S. 415 (1963). Such people associate for the purpose of speaking politically both with the force and the protective anonymity that a group provides. *See N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). The reason to protect the identities of the signers of political petitions is the same as it was in *NAACP v. Alabama*, *i.e.*, to avoid harassment and retaliation. And, similarly, there is no demonstrable public necessity for disclosure. Unless this Court holds for Petitioner, the supporters of Voters Want More Choices will, under threat of retaliation for the expression of their political views, find that their right to free speech and peaceable association will have been arbitrarily trammeled.

ARGUMENT

In a manner analogous to the disclosure forbidden by this Court in *NAACP v. Alabama*, *supra*, the instant matter presents a legal challenge to a state's acting to release and publicize the identities and related information of individual private citizens who are participating in legitimate public and political activities. *See NAACP v. Button*, *supra*. The court of appeals erroneously held that the First Amendment does not protect an individual's name from being released because other signors of the petition might see the individual's name and because government

officials also could verify the individual's identity. However, these conclusions are logically faulty. The fact that *supporters* of a given petition signatory might see a name is inconsequential. It is *opponents* that constitute the concern. And, while state authorities are free to verify the accuracy of a signatory's information, there is no need for outsiders to participate in the mandated process and hence no compelling interest, indeed no interest at all, in the State of Washington's threatened abridgement of the right of its citizens to speak and to associate freely.

I. WHEN INDIVIDUALS SIGN A PETITION, THEY ARE ENGAGING IN POLITICAL SPEECH AND ASSOCIATION THAT IS PROTECTED UNDER THE FIRST AMENDMENT.

There can be no question that the issue that undergirds Petitioner's complaint—whether the State of Washington should redefine marriage to include unions of persons of the same sex—is both publicly significant and appropriate for consideration and debate in the public forum. Nor, under the law of Washington is there any question that it is appropriate for citizens to attempt, by executing petitions, to affect political outcomes by mandating ballot initiatives and referenda.

There should not be any dispute that signing a petition constitutes political speech and that organizing groups of people to sign petitions constitutes political association. Indeed, the manifestation of speech is two-fold. First, organizers and signatories are expressing a desire to compel immediate political action, that is to get an issue placed on a public ballot that, if successful, will lead to or prevent legislative action. Subordinately, organizers and signatories are

taking an initial step in expressing themselves on the ultimate merits of the issue that is the subject of their procedurally-oriented initial expression. Whatever other characterization or purpose that anyone wishes to assign to the endeavor, it clearly constitutes speech intended to secure political change. *See NAACP v. Button*, *supra*.

In *NAACP v. Alabama*, this Court held that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association . . . inviolability of privacy in group association may in many circumstances be indispensable to preservation of the freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, *supra*, at 462. While much has changed in this country since then, especially concerning issues related to race, we still live in a charged political climate, and issues like reproductive rights, quota-based affirmative action and, as in this case, same-sex marriage are issues of vital concern and, to zealots on the fringes of both sides of such issues, retaliation and harassment still represent tactics of choice. In the Internet age, verbal harassment has taken on a new form when the identity of an individual can instantaneously be transmitted across the world and, through social media and other vehicles, further information can be acquired that ends up subjecting political actors to pressures in the community and on the job that might dissuade all but the most committed from entering the public fray.

It does not tax the imagination to conclude that the widespread dissemination of personal information, untethered to any legitimate public purpose could result in the construction of "enemies lists" and other

forms of directed harassment. The record in this case at least demonstrates that such fears are not hypothetical.

The rights to speak and associate, sometimes in secret, are not just guaranteed to members of formal civil rights organizations but to anyone who wishes to avail himself or herself of the "freedom to engage in association for the advancement of beliefs and ideas [that] is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, *supra*, at 460; *see Tashjian v. Republican Party*, *supra*, at 214; *NAACP v. Button*, *supra*, at 430; *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960). Additionally, "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters." *NAACP v. Alabama*, *supra*, at 466.

In the case at bar, the speech and association in question relates to political and, some argue, religious matters. The collection of signatures to advance views on such issues is, under this Court's precedents, core political speech. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186 (1999).

As in this Court's earlier precedents, the publication of a list of the individuals who signed petitions in Washington State would be subjected to "the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *NAACP v. Alabama*, *supra*, at 462. Similarly, Petitioner has established "an uncontroverted showing that on past occasions revelation of the identity of its . . . members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations

of public hostility." *Id*. Thus, the "compelled disclosure of . . . membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort 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." *NAACP v. Alabama*, *supra*, at 462-63. Just such a showing has been made here. Citizen activists who are members and supporters of Petitioner (and this *Amicus*) have declared that they will no longer associate with the group, or express themselves, due to fear of repercussions from the publication of their information, even to the point of fearing to attend church services or leave their homes because of threats made against them.[3]

The persons whose identities most often require protection as they engage in political activities are those who espouse unpopular causes, as is the case here in certain politically correct quarters. Thus, this Court has held that "[t]he Constitution protects against the compelled disclosure of political associations and beliefs. Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." "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."" *Brown, et al. v. Socialist Workers '74 Campaign Comm*., 459 U.S. 87, 91(1982) (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *NAACP v.*

[3] These facts are listed in the Verified Complaint for Declaratory and Injunctive Relief. (Joint Appendix 9.)

Alabama, *supra*, at 462.) That is just the case for organizations like *Amicus*, that would have no reason for existing if persons could not associate with it and join in its petition writing efforts.

As in this Court's early civil rights precedents, petition signers, especially those supporting controversial causes likely to engender problematic responses by opponents, require the utmost First Amendment protection. *See Citizens United v. FEC*, No. 08-205, slip op. at 54 (S. Ct. Jan. 21, 2010); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). If the State of Washington publishes the individual petition-signer information, those persons will end up on "enemies lists." They will be harassed in their workplaces and homes. Indeed, it is entirely possible using modern technology to create lists not just showing "enemies" but to link their names with easily found addresses, Internet Uniform Resource Locators, and even maps and driving directions to their homes. In other words, these individuals could be persecuted for their beliefs anywhere they could be found.

II. STATE ACTION THAT "CHILLS" FREE SPEECH AND THE FREEDOM TO ASSOCIATE IS SUBJECT TO STRICT SCRUTINY.

A. There Is No Compelling Interest That Would Support Disclosure.

The First and Fourteenth Amendments do not prohibit all State actions that limit free speech. However, "[i]n the domain of the indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action."

NAACP v. Alabama, *supra*, at 461. Specifically, "[t]he 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."" *Brown v. Socialist Workers '74 Campaign Comm.*, *supra*, at 91 (citing *NAACP v. Alabama*, *supra*, at 463; *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963)). In other words, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny," *NAACP v. Alabama*, *supra*, at 460, and any burden on these rights must be narrowly tailored to serve compelling government interests. *Buckley v. American Constitutional Law Found.*, *supra*, at 192.

"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." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). *See Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981); *NAACP v. Button*, *supra*. As we have discussed earlier, the activities of Petitioner and others like it represent core political speech in two manifestations: an expression that a particular issue belongs on the State ballot; and an expression as to the ultimate merits of the issue. Under the reasoning of cases like *McIntyre* and *Buckley*, the act of collecting signatures is core political speech, which cannot be burdened, if at all, unless that State has narrowly tailored its conduct to serve a compelling State interest.

The State admittedly has an interest in preventing fraud in election and petition matters. Accordingly,

State enforcement authorities have access to petitions and the identities of their signatories. However, the State has no need to publish this information. Indeed, the Washington State legislature has recognized this by having created an enforcement mechanism that is entirely internal to government (unless, of course, a violation is determined and public action on it is required). In other words, the public has no role at all in investigating or assessing violations and no public right of action that would require its knowledge of the identity of petition signatories.

As the Supreme Court explained in *Buckley v. American Constitutional Law Found.*, *supra*, "ballot initiatives do not involve the risk of 'quid pro quo' corruption" and "[t]he 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." *Buckley v. American Constitutional Law Foundation*, *supra*, at 203 (quoting *Meyer v. Grant*, 486 U.S. 414, 427 (1988)); *see also Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000).

As in *Washington Initiatives*, the State's interest in enforcement has nothing to do with the disclosure of the petition signatories' identities. In short, not only is there no compelling interest in disclosure, there is no interest at all.

B. The State's Obligation Not To Disclose Is Highlighted By The Analogous Fact That Its Citizens Are Entitled To Vote By Secret Ballot.

Article 6, Section 6 of the Washington State Constitution provides that, "[t]he legislature shall provide for such method of voting as will secure to every elec-

tor absolute secrecy in preparing and depositing his ballot."[4] According to the governing State law case, *State ex rel. Empire Voting Mach. Co. v. Carroll*, "[t]he object of all constitutional provisions and laws providing for a vote by ballot is primarily to procure secrecy, and this the legislature is admonished to do." *State ex rel. Empire Voting Mach. Co. v. Carroll*. 78 Wash. 83, 85 (1914). That holding parallels this Court's recognition that there is a "widespread and time-tested consensus" that secret ballots are necessary to protect voters from intimidation and harassment. *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

At least one federal court, the United States Court of Appeals for the Eighth Circuit, has equated the denial of a release of the identities of the signers of a petition calling for a referendum to terminate a federally-imposed assessment on certain agricultural sales with protection of their rights to a secret ballot. In holding that these disclosures could not be made under the Freedom of Information Act, the court opined that "[t]o make public such an unequivocal statement of their position on the referendum effectively would vitiate petitioners' privacy interest in a secret ballot." *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1187 (2000). Additionally, the Court also noted that "there is a strong and clearly established privacy interest in a secret ballot and that this privacy interest is no less compelling in the context of FOIA's personal privacy exemption than it is in other contexts. We also believe that in the circumstances of this case the privacy interest in a secret ballot is severely threatened. Releasing this petition, which contains a clear declaration of how

[4] Wash. Const. art. VI, § 6.

the petitioners intend to vote in the referendum, would substantially invade that privacy interest." *Id*. at 1188.

The court went on to note, "[t]hough many people signed the petition forms, each with space for ten signatures, and thus probably realized that a few individuals signing afterwards would be able to see their names, in so doing they did not waive their privacy interests under FOIA. Although an individual's expectation of confidentiality is relevant to analysis of the privacy exemption, here the petitioners would have no reason to be concerned that a limited number of like-minded individuals may have seen their names and thus discovered their position on the referendum." *Id*. at 1188 (citation omitted). The court should not forget that "[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." *United States DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 770 (1989) (citations omitted). Finally, the Eighth Circuit held that "the substantial privacy interest in a secret ballot . . . overrides whatever public interest there may be in oversight of the verification process." *Campaign for Family Farms*, *supra*, at 1189.

In the instant case, this Court need not decide an issue that has not been presented to it, *i.e*., whether the initiative petitions signed by Petitioner's members and others are the functional equivalent of a secret ballot. Instead, *Amicus* simply urges the Court to recognize that secrecy of the identities of persons participating in the political process, where there is, as is the case here, danger of undue influence or reprisal, is something that both furthers the impartial administration of government and the

protection of the governed. Moreover, it is incumbent upon the State to resist disclosure under such circumstances and that arguments concerning partial disclosures to allied persons or enforcement interests that do not admit of public participation are, as the Eighth Circuit held, irrelevancies.

Thus, to the extent that there is a compelling State interest in anything, it is in non-disclosure of the identities of petition signatories, not in disclosure.

CONCLUSION

For the foregoing reasons, *Amicus* Voters Want More Choices respectfully submits that the judgment of the Ninth Circuit should be reversed and that this Court hold for Petitioner that the First and Fourteenth Amendments preclude the State of Washington from publicly disclosing the identity of individuals who sign petitions relating to, *inter alia*, initiatives and referenda.

Respectfully submitted,

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