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

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE PETITIONERS

MARC ROTENBERG
Counsel of Record
JARED KAPROVE
GINGER MCCALL
KIMBERLY NGUYEN
JOHN VERDI
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

March 4, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Cuidadania Activa, *La Lista: un pueblo bajo sospecha (summary),* 2006 16

David Chaum, *Achieving Electronic Privacy*, Scientific American 96 (Aug. 1992) 2

David Chaum, *Punchscan, Voting Method*, http://punchscan.org 2

David Chaum, *Secret-Ballot Receipts: True Voter-Verifiable Elections, Presented at ITL Seminar Series,* Nat'l Inst. of Standards & Tech. (May 19, 2004) 2

Direct Democracy League, States DD Chart, http://www.ddleague-usa.net/statesDD.htm 26

ELECTRONIC PRIVACY INFORMATION CENTER, PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS (2006) 16

ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS (1994) 12

Expose of the Communist Party of Western Pennsylvania: Hearing before the H. Comm. on Un-American Activities, 81st Cong. 1292 (1950) 12

Gary T. Marx, *What's in a Concept? Some Reflections on the Complications and Complexities of Personal Information and Anonymity*, 3 U. OTTAWA L. & TECH. J. 1 (2006) 2

Grayson Barber, *Electronic Health Record and the End of Anonymity*, 198 N.J.L.J. 227 (2009) 2

INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable and Telecommunications Association v. Federal*

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amici* lodged with the Court Petitioners' and Respondents' letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. Matthew Phillips, EPIC Appellate Advocacy Counsel, contributed to the preparation of this brief.

Communications Commission, 555 F.3d 996 (D.C. Cir. 2009); Bunnell v. Motion Picture Association of America, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in protecting anonymous political speech and the privacy of citizens who submit information to the government. EPIC's advisory board includes distinguished experts in privacy law and technology who have written about the right of anonymity and developed techniques to safeguard anonymity.[2]

---

[2] *See, e.g.*, Grayson Barber, *Electronic Health Record and the End of Anonymity*, 198 N.J.L.J. 227 (2009) ("[C]omputer scientists have shown that anonymous data can be re-identified easily. . . . In short, we must protect our digital records from re-disclosure. Computers cannot do this without the force of law."); David Chaum, *Achieving Electronic Privacy*, Scientific American 96-101 (Aug. 1992) ("Over the past eight years, my colleagues and I . . . have developed a new approach, based on fundamental theoretical and practical advances in cryptography, that . . . avoid the possibility of fraud while maintaining the privacy of those who use them [to complete transactions]."); David Chaum, *Punchscan, Voting Method*, http://punchscan.org ("There are ongoing efforts by technologists to develop better models for conducting more private, secure, and reliable balloting methods for public elections. One method that has many of the features necessary for a public election is Punchscan"); Ronald L. Rivest and Warren D. Smith,

Three Voting Protocols: Three Ballot, VAV, and Twin (2007), *available at* http://people.csail.mit.edu/rivest/RivestSmith-ThreeVotingProtocolsThreeBallotVAVAndTwin.pdf ("Voters traditionally have been anonymous 'going into' the voting process (submitting ballots). Floating receipts now provide a new layer of anonymization 'coming out' (taking home receipt copies)."); Gary T. Marx, *What's in a Concept? Some Reflections on the Complications and Complexities of Personal Information and Anonymity*, 3 U. OTTAWA L. & TECH. J. 1, 19 (2006) ("We seek privacy and often anonymity, but we also know that secrecy can hide dastardly deeds and that visibility can bring accountability. But too much visibility may inhibit experimentation, creativity and risk taking."); David Chaum, *Secret-Ballot Receipts: True Voter-Verifiable Elections, Presented at ITL Seminar Series,* Nat'l Inst. of Standards & Tech. (May 19, 2004); Stefan Brands, *Non-Intrusive Cross-Domain Digital Identity Management*, Presented at Proceedings of the 3rd Annual PKI R&D Workshop (Apr. 2004), *available at* http://www.idtrail.org/files/cross_domain_identity.pdf ("The distinction is critical; many authentication systems provide security while preserving anonymity by allowing for the separation of attributes and identification."); Alessandro Acquisti, Roger Dingledine, and Paul Syverson, *On the Economics of Anonymity*, Financial Cryptography, 84-102 (2003) ("Individuals and organizations need anonymity on the Internet. People want to surf the Web, purchase online, and send email without exposing to others their identities, interests, and activities."); Latanya Sweeney, *Anonymity: A Model for Protecting Privacy*, International Journal on Uncertainty, Fuzziness and Knowledge-based Systems, 10 (5), 557-70 (2002) ("In many cases the survival of the database itself

EPIC supports the right of individuals to remain anonymous while voting and while engaging in Constitutionally protected political speech. EPIC has filed several *amicus* briefs in this Court concerning the critical importance of protecting the anonymity of political speakers and voters.[3] EPIC argues in this

---

depends on the data holder's ability to produce anonymous data because not releasing such information at all may diminish the need for the data, while on the other hand, failing to provide proper protection within a release may create circumstances that harm the public or others."); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1425 (2000) ("The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association—decisions that otherwise might be chilled by unpopularity or simple difference—is part of our constitutional tradition."); Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 756 (1999) ("There is both empirical evidence and normative philosophical argument supporting the proposition that paradigmatic forms of privacy (e.g., seclusion, solitude, confidentiality, secrecy, anonymity) are vital to well-being. It is not simply that people need opportunities for privacy; the point is that their well-being, and the well-being of the liberal way of life, requires that they in fact experience privacy."); Jerry Kang, *Cyberspace Privacy*, 50 STAN. L. REV. 1193, 1209 (1998) ("[W]e must recognize that anonymity comes in shades. Although no specific individual is identified facially, the individual may be identifiable in context or with additional research. . . .").

[3] *See, e.g., Brief of Amici Curiae Electronic Privacy Information Center, American Civil Liberties Union, American Civil Liberties Union of Ohio and 14 Legal Scholars in Support of Watchtower Bible, etc. Petitioners*,

brief that the state should not compel the disclosure of the identity of those who express their political views by means of the petition process.

The Ninth Circuit's determination in the present case threatens to expose the identity of petition signatories, individuals engaging in political speech – political speech that is often controversial. The Ninth Circuit decision, if upheld, threatens to deprive political speakers of their right to anonymity, and places them at risk of retribution and intimidation.

Technical Experts and Legal Scholars

Anita Allen
Professor of Law and Professor of Philosophy,
University of Pennsylvania

James Bamford
Author and Journalist

David Banisar
Visiting Research Fellow, University of Leeds,
Non-Resident Fellow, Stanford University

Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002), *available at* http://www.epic.org/anonymity/watchtower.pdf (supporting First Amendment Right to anonymous door-to-door speech); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), *available at* http://www.epic.org/privacy/voting/crawford/epic_sc_111307.pdf (opposing voter photo-ID requirements as infringing on citizens' right to cast a secret ballot).

Grayson Barber, Esq.
Grayson Barber, LLC

Francesca Bignami
Professor, George Washington University Law School

Christine L. Borgman
Professor and Presidential Chair in Information Studies, UCLA

Julie E. Cohen
Professor of Law, Georgetown University Law Center

Bill Coleman
Founder, CEO & Chairman, Cassatt Corporation

David Farber
Professor of Computer Science and Public Policy, Carnegie Mellon University

Philip Friedman
Friedman Law Offices, PLLC

Ian Kerr
Canada Research Chair in Ethics, Law & Technology, University of Ottawa

Chris Larsen
CEO, Prosper.com

Rebecca MacKinnon
Visiting Fellow, Princeton Center for Information Technology Policy

Gary T. Marx
Professor Emeritus of Sociology, MIT

Mary Minow
Library Law Consultant

Pablo G. Molina
Associate VP of IT and Campus CIO, Georgetown University

Peter G. Neumann
Principal Scientist, SRI International Computer Science Lab

Helen Nissenbaum
Professor of Media, Culture & Communication, NYU

Ray Ozzie
Chief Software Architect, Microsoft

Deborah C. Peel, MD
Patients Privacy Rights

Chip Pitts
President, Bill of Rights Defense Committee

Ronald L. Rivest
Professor of Electrical Engineering and
Computer Science, MIT

Pamela Samuelson
Professor, Berkeley Law School &
School of Information

Robert Ellis Smith
Publisher, *Privacy Journal*

Edward G. Viltz
www.InternetCC.org

(Affiliations are for identification only)

SUMMARY OF THE ARGUMENT

The privacy of petition signatories safeguards fundamental First Amendment interests and helps to ensure meaningful participation in the political process without fear of retribution. History has made clear the real risks to those whose names on referendum petitions are not protected from improper disclosure. Much as states safeguard the secret ballot to protect the privacy of voters, states such as Washington have taken measures to protect the identity of those who sign petitions. Even though it may be possible to observe a person signing a petition in a public place or to notice a name on a list of other signatures, this hardly constitutes waiver as the Court made clear in the *McIntyre* decision. Further, courts have considered and previously rejected the view that petitions should be disclosed under open government statutes. Courts have also recognized that in some areas, a fundamental right to privacy is a necessary safeguard against the consequences of the disclosure of personal information. In few areas can this be more compelling than the expression of support for causes that may be controversial, unpopular, or simply abhorrent.

ARGUMENT

I. Referendum Signatories are at Risk of Retribution if Their Identities are Made Public

Parties have described in the detail the experiences of Proposition 8 and R-71 supporters who sought to express their political views through their participation in the referendum process and were then subject to ridicule, but this is hardly an isolated event. In the U.S. and other countries, petition signatories have frequently faced retribution. Signatories have been harassed, intimidated, threatened, arrested, and injured because of their decision to support a petition. This experience underscores the need to safeguard the privacy interests of Referendum 71 signatories, particularly in view of the broad consensus that rapid technological change necessitates vigilant maintenance of cherished privacy safeguards. As one of the current Justices once wrote:

> [W]e sense a great threat to privacy in modern America; we all believe that privacy is too often sacrificed to other values; we all believe that the threat to privacy is steadily and rapidly mounting; we all believe that action must be taken on many fronts now to preserve privacy.[4]

---

[4] SAMUEL ALITO, THE BOUNDARIES OF PRIVACY IN AMERICA 1 (1972) ("Report of the Chairman") (on file with *amici*).

A. Petition Signatories in the United States Have Endured Retribution

There have been many instances of retaliation against petition signatories in the United States, but none are more famous than those undertaken by the McCarthy-era House Un-American Activities Committee.[5] In the 1960s the Un-American Activities Committee pursued a number of "suspected communists." Hearing records indicate that many of these suspects were named based on their participation as signatories in a variety of petitions, including a Petition to free Earl Browder,[6] Communist Party Election Petitions,[7] Communist Party Nominating Petitions,[8] a petition to Governor

---

[5] Individuals have also been subject to retribution for political speech outside the petition context. Perhaps most notably, *NAACP v. Alabama* struck down an Alabama law requiring disclosure of the NAACP's membership list. *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). The Court noted that the NAACP was able to show that in the past, disclosure of the information had exposed members to economic reprisal, loss of employment, threats of physical coercion and other public hostility. *Id.* at 462.

[6] *Hearings Regarding the Communist Infiltration of Labor Unions: Hearing before the H. Comm. on Un-American Activities,* 81st Cong. 659, 674-77, 680 (1949), *available at* http://www.archive.org/stream/hearingsregardin01unit#page/n3/mode/2up.

[7] *Id.* at 665.

[8] *Id.* at 668.

Olsen of California to free Sam Darey,[9] a petition for the American Committee for Democracy and Intellectual Freedom,[10] a petition for the National Federation for Constitutional Liberties,[11] petitions against the Mundt-Nixon Bill,[12] and numerous other organizations. Witnesses before the Committee linked individuals with petitions they signed, then identified the individuals as communists (often as the basis of petition involvement).[13] Many individuals named as communists suffered personal, political, and professional repercussions from these hearings.[14]

---

[9] *Id.* at 672.

[10] *Id.* at 678.

[11] *Id.* at 679.

[12] *Expose of the Communist Party of Western Pennsylvania: Hearing before the H. Comm. on Un-American Activities,* 81st Cong. 1292, 1293 (1950), *available at* http://www.archive.org/stream/exposofcommuni01unit#page/n3/mode/2up.

[13] *Id.* at 1293, 1296-97, 1319.

[14] ELLEN SCHRECKER, THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS (1994), *available at* http://www.writing.upenn.edu/~afilreis/50s/schrecker-blacklist.html.

In a recent opinion column for *The New York Times*, historian and broadcaster Studs Terkel told of the retaliation against him, stating:

> In the 1950s, during the sad period known as the McCarthy era, one's political beliefs again served as a rationale for government monitoring. . . . I was among those blacklisted for my political beliefs. My crime? I had signed petitions. Lots of them. I had signed on in opposition to Jim Crow laws and poll taxes and in favor of rent control and pacifism. Because the petitions were thought to be Communist-inspired, I lost my ability to work in television and radio after refusing to say that I had been 'duped' into signing my name to these causes.[15]

Like many politically active Americans at the time, Mr. Terkel was investigated and monitored by the FBI.[16] FBI records have also frequently noted petition signatures in investigation files. Historian John Hope Franklin, who was a vocal supporter of "Communist" W.E.B. Dubois, had a full file at the FBI. The file included documents noting Franklin's

---

[15] Studs Terkel, *The Wiretap This Time,* N.Y. Times, Oct. 29, 2007, http://www.nytimes.com/2007/10/29/opinion/29terkel.html.

[16] Paul Robeson, *FBI Tracked "Working" Man, Studs Terkel,* NYCity News Service, Nov. 15, 2009, http://nycitynewsservice.com/tag/paul-robeson/.

signature on a petition against the McCarthy-era Committee on Un-American Activities.[17] When John Lennon and Yoko Ono's FBI files were revealed, the files noted the fact that Lennon and his wife, Yoko Ono, had signed a petition in support of the Cambodian monarchy when the South-East Asian nation was being bombed by the US during the Vietnam War.[18]

There are recent examples of retaliation against petition signatories, as well, some involving matters of local concern. In Northern Michigan, the signatories of a recall petition expressed concerns about retaliation after state troopers began knocking on the doors of citizens who signed the petition.[19] Petition signatories reported that officers were "harassing" and practicing "retaliation and intimidation."

The experience of the petitioners is only the most recent of those who have sought to express political views through the referendum process. In February

---

[17] Justin Elliott, *The John Hope Franklin File, FBI Looked at Esteemed Historian for Communist Ties*, Talking Points Memo, Dec. 15, 2009, http://tpmmuckraker.talkingpointsmemo.com/2009/12/the_john_hope_franklin_file_fbi_probed_communist_ties.php.

[18] News.com.au, *FBI Lennon Files Pretty Mundane,* Dec. 21, 2006, http://www.news.com.au/couriermail/story/0,23739,20961304-5003402,00.html.

[19] Marla McMackin, *Recall Petition Signature Probe Sparks Concern,* Traverse City Record Eagle, Jan. 10. 2004, http://archives.record-eagle.com/2004/jan/10elmpet.htm.

2009, *The New York Times* reported that "some donors to groups supporting [Proposition 8] have received death threats and envelopes containing a powdery white substance, and their businesses have been boycotted."[20] The New York Times reported that a new website, called "eightmaps.com" had contributed to the harassment and threats of violence.[21] The site collected names and ZIP codes of people who donated to the ballot measure—information that California collects and makes public under state campaign finance disclosure laws—and overlaid the data on a map.[22]

Visitors could see markers indicating a contributor's name, approximate location, amount donated and, if the donor listed it, employer. This information was often enough information for interested parties to find more information, such as email address or home address.[23]

B. Petition Signatories Around the World Have Endured Retribution

The experience of those outside of the United States who have sought to express their political views through the petition process further illustrates the critical importance of anonymity to petition

---

[20] Brad Stone, *Prop 8 Donor Website Shows Disclosure Law is a 2-Edged Sword,* N.Y. Times, Feb. 7, 2009, http://www.nytimes.com/2009/02/08/business/08stream.html.

[21] *Id.*

[22] *Id.*

[23] *Id.*

signatories. Beginning in 2003, advocates in Venezuela circulated a petition calling for a referendum to recall the President of Venezuela at the time, Hugo Chavez.[24] More than 2.4 million Venezuelans signed the petition.[25] President Chavez asked Venezuela's National Electoral Council ("CNE") to provide copies of all the petition signatures, ostensibly to expose "mega-fraud."[26] President Chavez also threatened to record "for history" the fingerprints of anyone who signed the referendum.[27] A representative of the ruling party in the legislature, Luis Tascón, led the collection of the signatures, then posted on his website the database of signatures and national identity card numbers.[28] Tascón stated that he posted the database in order to provide a way for people whose names appeared on

---

[24] *See* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), PRIVACY AND HUMAN RIGHTS: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS 1062-63 (2006).

[25] Tascón List, Wikipedia, http://en.wikipedia.org/wiki/Tasc%C3%B3n_List.

[26] *Id.*

[27] Cuidadania Activa, *La Lista: un pueblo bajo sospecha (summary),* 2006 (showing, at 11:02, President Chavez stating that anyone who signs the Presidential Recall Referendum against Chavez will have to give his fingerprints to be recorded for history), *available at* http://www.youtube.com/watch?v=jS_4TLvphW8.

[28] *See* Helen Murphy, *Chavez's Blacklist of Venezuelan Opposition Intimidates Voters*, Bloomberg, April 17, 2006, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=abASlsAyXgoE.

the list, but who had not actually signed the petition, to complain to the CNE.[29]

As a result, many individuals who worked for the government and whose names appeared on the list were fired, denied work, or denied issuance of official documents.[30] The president of the public-sector workers' union, Federación Unitaria Nacional de Empleados Públicos, reported that there were 780 cases of persons negatively affected by political discrimination as a result of the Tascón list.[31] Of this total, 200 were dismissed, 400 were subjected to pressure tactics, and 180 transferred. Tascón later removed the list from his website after widespread complaints that the list was being used to discriminate against the petition signatories.

Incidents like this have occurred worldwide. In China, signatories of a public appeal for human rights and democracy in China faced harsh retaliation by the government.[32] Several prominent signatories of the document, "Charter 08," were detained by the police, and at least 10 other people were questioned in connection with the document.[33]

---

[29] *Id.*

[30] *Id.*

[31] Inter-American Commission on Human Rights, *2005 Annual Report* (2005) at Chapter IV, *available at*

http://www.cidh.org/annualrep/2005eng/chap.4e.htm.

[32] Human Rights Watch, *China: Retaliation for Signatories of Human Rights Charter,* Dec. 10, 2008, http://www.hrw.org/es/news/2008/12/10/china-retaliation-signatories-rights-charter.

[33] *Id.*

One prominent activist was recently given an 11-year jail sentence.[34]

In Russia, policemen visited and intimidated signatories of documents supporting the candidates of ecological and preservationist groups in the Primorsky district in the northeast of St. Petersburg.[35] The police intimidation was done under the guise of investigating signature fraud, after a political opponent wrote a complaint to the election commission charging that the signatures were false.[36]

In the Gaza Strip, Palestinian leader Yasser Arafat lashed out against dissidents who signed a document blaming him for widespread government corruption.[37] Arafat ordered 11 of the signatories arrested hours after the document was released and urged the parliament to lift the immunity of nine other signatories who were lawmakers.[38] Palestinian lawmakers then decided to censure the dissidents

---

[34] Cara Anna, *Chinese Dissident Gets 11 Years for Subversion,* Taiwan News, Dec. 25, 2009, http://www.etaiwannews.com/etn/news_content.php?id=1141369.

[35] Sergey Chernov, *Police Said to Have Intimidated Opposition,* St. Petersburg Times, Feb. 20, 2009, http://www.sptimes.ru/index.php?action_id=100&story_id=28306.

[36] *Id.*

[37] Pittsburgh Post Gazette, *Arafat Foes Refuse to Back Down,* Nov. 30, 1999, http://news.google.com/newspapers?id=2uAdAAAAIBAJ&sjid=h28DAAAAIBAJ&pg=6707%2C10103685.

[38] *Id.*

involved in the petition. One of the dissidents was shot hours later an attack that he said was retaliation for signing the anti-corruption document.[39]

In East Germany, petitions were frequently grounds for political persecution and blacklisting. Stefan Heym, an internationally famous writer, signed the petition protesting the exile of Wolf Biermann, a German dissident and songwriter.[40] From this point on, Heym could only publish his works in the West.[41]

These examples demonstrate the very real risk of political, physical, and professional retaliation that petition signatories face if their names are publicized.

II. The Court Below Wrongly Concluded that Petitioners Did Not Engage in Anonymous Speech

The court below misunderstood the anonymity interest of petitioner and thereby reached an erroneous conclusion. By focusing on the conduct of the individuals exercising their political right to participate in the referendum process rather than on

---

[39] Lodi News Sentinel, *Arafat Slaps Aside Corruption Challenge,* Dec. 2, 1999, http://news.google.com/newspapers?id=YOk0AAAAIBAJ&sjid=MSEGAAAAIBAJ&pg=2210%2C4368980.

[40] The Cambridge Encyclopedia, *Stefan Heym - Life, Works, Literature and Links,* Vol. 71, http://encyclopedia.stateuniversity.com/pages/21240/Stefan-Heym.html#ixzz0gf29evNO.

[41] *Id.*

the state seeking to compel the disclosure of individual's identities, the court created an impossible standard for an anonymity claim, one that this Court had previously rejected.

A. As the Court Made Clear in McIntyre, Citizens Enjoy a Legal Right to Anonymous Speech Even When Technical Protections Are Imperfect

In *McIntyre v. Ohio*, the Court struck down an Ohio statute that prohibited the distribution of "unsigned documents designed to influence voters in an election."[42] The Court emphasized the value of anonymous speech and noted the close tie to the secret ballot, stating:

> The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . On occasion, 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. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of

---

[42] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995).

> political rhetoric, where the identity of the speaker is an important component of many attempts to persuade, the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning 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.*[43]

The Court found that "the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment," and "[that the] advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded [the speech]."[44] Thus, the Court held that "[w]hen 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."[45]

The facts in *McIntyre* are particularly significant in light of the lower court's ruling in this matter. The *McIntyre* court held that Margaret McIntyre's distribution of leaflets to individuals attending a public meeting constituted core, political speech and

---

[43] *Id.* at 341-43 (internal quotations omitted) (emphasis added).

[44] *Id.* at 346-47.

[45] *Id.* at 347.

that it was anonymous. But as the Court noted, some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS."[46] Thus, the anonymity of speech at issue in *McIntyre* was, as a practical matter, imperfect. She identified herself on some handbills as the author. On others, she did not. The author herself distributed the handbills in public in her local community.[47] It is plausible that these facts could have led an intrepid investigator, or simply a neighbor, to identify Ms. McIntyre despite her attempts to speak anonymously.

However, this Court did not inquire as to the effectiveness of Ms. McIntyre's defenses against identification. Nor did the *McIntyre* court explore the reasonableness of her expectation of privacy. Indeed, the Court acknowledged that Ms. McIntyre's practical anonymity was imperfect—after all, she was identified and prosecuted under the Ohio statute at issue.[48] Yet, the Court focused on the impropriety of *the State's attempt to compel the disclosure of her*

---

[46] *Id.* at 337.

[47] *Id.* (noting "McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School," and "Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.").

[48] *Id.* at 352 (noting "as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code.").

identity, and struck down Ohio's attempt to deny citizens their Constitutional right to speak anonymously on matters of public concern.[49]

The court below simply misunderstood the anonymity interest of petitioner in this case. In fact, the logical conclusion of the lower court's anonymity analysis is that no one would be entitled to such a right unless they had constructed a method to ensure perfect anonymity. But of course, there would be no need for a legal claim if the technical method provided the safeguard. Hence, the legal claim necessarily arises in those instances where there is gap between the right to anonymity and technical perfection, and the focus is appropriately on the action of the state that seeks to wrest control over the disclosure of identity.

B. Washington State Traditionally Limited Access to Petition Signatures

Washington State law includes well-established provisions to protect the privacy and anonymity of referendum signatories. The Washington referendum statute is designed to ensure referendum integrity without violating the petition signatories' privacy. The statute strictly limits disclosure, and comparison with similar laws in other states demonstrates that the Washington legislature clearly intended to

---

[49] *Id.* at 347, 353, 357 (holding "[w]hen a law burdens core political speech, we apply exacting scrutiny," "Ohio has shown scant cause for inhibiting the leafletting at issue here," and "[o]ne would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.").

protect the privacy of petition signatories and for many years did in fact do so.

The Washington referendum law, passed in 1912, requires submission of petitioners' personal information to the State, but contemplates disclosure for only one purpose: the verification of the petition's legal validity.[50] This disclosure is strictly limited. The verification and canvassing "may be observed by persons representing the advocates and opponents 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* . . . "[51] The Washington legislature was aware of the privacy risk inherent in the verification process, and they addressed that risk by establishing this law.

The limited disclosure method of ensuring referendum integrity while protecting the privacy of petition signatories was a long-standing part of Washington's history with this process, as described by Respondent's own office.[52] According to the official blog of the Washington Office of the Secretary of State,[53] *no petition signatory information was ever*

---

[50] Wash. Rev. Code § 29A-72-230 (2009).

[51] *Id.* (emphasis added).

[52] Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blog, Sept. 17, 2009, http://blogs.secstate.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/.

[53] The blog "provides from-the-source information about important state news and public services" and "acts as a bridge between the public and Secretary Sam Reed and his staff." *About this Blog*, Wash. Sec'y of State Blog,

distributed to the public until 2006, in spite of the passage of the Public Records Act in 1972.[54] The Secretary of State attributes this change to "advice by the Attorney General's Office in the 1990s" and to the decreased cost of distribution that has come with the advent of digital records.[55] From the adoption of Washington's ballot initiative law in 1912 to 2006, the practices of the Washington Secretary of State demonstrated that such limited disclosure is a meaningful way of protecting the privacy of petition signatories.

Washington's statutory scheme with respect to verification is unique in that it allows for representatives of petition proponents and opponents to observe the verification.[56] This model includes a bar on disclosure for purposes other than perfection of the referendum process. This framework supports Washington citizens' reasonable expectation that their participation in the referendum process will remain confidential.

---

http://blogs.secstate.wa.gov/FromOurCorner/ (last visited Feb. 26, 2010).

[54] A possible exception is the 31-month period between an Attorney General Opinion of March 1953 determining that "such petitions do become public records," Wash. Op. Att'y Gen. 53-55 No. 152 (1953), and a subsequent Opinion on the same question from the same Attorney General determining instead that "to regard such signatures as public records would be contrary to public policy," Wash. Op. Att'y Gen. 55-57 No. 274 (1956).

[55] Zylstra, *supra* note 52.

[56] Wash. Rev. Code § 29A-72-230 (2009).

Comparison with other states' petition verification practices shows the considerations taken by the Washington legislature to both recognize the importance of signature verification and ensure the privacy of petition signatories. Twenty-seven states and the District of Columbia now have implemented their own versions of popular referendum. Of those, twenty-five allow for popular initiative as a means of introducing either legislation or constitutional amendments.[57] Three additional states without popular initiative do still maintain the process referred to as "statute referendum" or "statute veto," which allows petitioners to set a given piece of legislation passed by the legislature to a popular referendum before it may go into force.[58] While the state of Washington allows for popular initiatives as well, Referendum 71 was such a statute referendum.

While each state differs slightly, the process for initiative and referendum is generally the same across the various states that support it. In every case, those supporting the placement of the referendum before the voters of the state must gather a certain number of valid signatures from people who support the referendum's existence.[59] Once the

---

[57] Initiative & Referendum Institute at the University of Southern California, State I&R, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Mar. 2, 2010).

[58] Direct Democracy League, States DD Chart, http://www.ddleague-usa.net/statesDD.htm (last visited Mar. 2, 2010).

[59] For a full list of each state's signature requirement, *see* Initiative & Referendum Institute at the University of

signatures have been collected and turned in to the proper body, they must be certified as valid. Three states certify signatures by presuming that they are all valid. Ten states, including Washington, take a random sample and verify the sample against the voter rolls, then calculate the percentage of valid signatures based on the percentage valid within the sample. The remaining twelve states verify each signature. [60]

Of the other states that have ballot initiatives and verification of petition signatures, the overwhelming majority of them make little to no allowance for public participation in the process. Instead, they mainly provide for the secretary of state or county election officials to perform the necessary verification and certification.[61] Some states, such as

---

Southern California, Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf.

[60] Initiative & Referendum Institute at the University of Southern California, Comparison of Statewide Initiative Processes 20–22, http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf.

[61] *See* Alaska Stat. §15.45.150 (2010); Ariz. Rev. Stat. § 19-121 (LexisNexis 2010); Ark. Code Ann. § 7-9-111(a) (2009); Cal. Elec. Code § 9030 (Deering 2009); Colo. Rev. Stat. §§ 1-40-116, -118 (2009); Fla. Stat. Ann. § 100.371 (LexisNexis 2009); Idaho Code Ann. §§ 34-1802, -1803B

Colorado and Ohio, provide mechanisms by which citizens may challenge the determinations of these officials.[62] In most of these states, the laws contemplate that petition proponents will be challenging an official's decision to exclude a signature, rather than situations in which opponents of a petition seek the full list of signatures to challenge their validity.[63] Indeed, Nevada, the only other state besides Washington to include non-governmental observers to participate in the verification process, the statute only provides that

---

(2009); Me. Rev. Stat. Ann. tit. 21A, §§354, 902 (2009); Mass. Gen. Laws ch. 53, § 22A (LexisNexis 2009); Mich. Comp. Laws Serv. § 168.476 (LexisNexis 2010); Miss. Code Ann. § 23-17-21 (2009); Mo. Rev. Stat. §§ 116.120–.121 (2009); Mont. Code Ann. § 13-27-103, -306 (2009); Neb. Rev. Stat. Ann. §§ 32-631 to -632 (2009); Nev. Rev. Stat. Ann. § 293.1277 (LexisNexis 2009); N.D. Cent. Code § 16.1-01-10 (2009); Ohio Rev. Code Ann. §§ 3519.15–.16 (LexisNexis 2010); Okla. Stat. tit. 34, §§ 6.1, 8 (2009); Or. Rev. Stat. § 250.105 (2007); S.D. Codified Laws § 9-20-9 (2009); Wyo. Stat. Ann. § 22-24-114 (2010).

[62] *See, e.g.*, Colo. Rev. Stat. § 1-40-118 (2009); Ohio Rev. Code Ann. § 3519.16 (2010).

[63] *E.g.* Neb. Rev. Stat. § 32-631 (2009) (requiring that Nebraska election officials who find a petition insufficient "shall prepare in writing a certification under seal setting forth the name and address of each signer or circulator found not to be a registered voter and the petition page number and line number where the signature is found.").

the person who submits the petition may observe the verification process, not opponents to the initiative.[64]

III. Signing a Referendum is Similar to Casting a Vote and Should be Protected Accordingly

A. Courts Have Also Recognized that Disregard for Privacy Interests may Unconstitutionally Burden the Right to Vote

In describing the fundamental right to vote, the Supreme Court has stated, "no right is more precious in a free country than that of having a voice in the election of those who make the laws, under which, as good citizens we must live."[65] Although states may impose certain qualifications and regulations on this right, any restriction must promote a compelling state interest, and must be narrowly tailored to serve that interest.[66] Courts have found that certain requirements impinging on privacy rights unconstitutionally burden the fundamental right to vote.

In *Greidinger v. Davis*,[67] the Fourth Circuit found that requiring disclosure of a social security

---

[64] Nev. Rev. Stat. § 293.1277 (2009). The statute does allow for the subject of a recall petition to observe the verification process as well, but in that special case the subject is a government actor.

[65] *Wesberry v. Sanders*, 376 U.S. 1, 17 (1976).

[66] *Hill v. Stone*, 421 U.S. 289, 297 (1975).

[67] 988 F.2d 1344 (4th Cir. 1993).

number ("SSN") obtained from voter registration applications in the public voting rolls impermissibly burdened the right to vote. Under the Constitution of Virginia, all citizens qualified to vote were required to provide their SSN on their voter registration application, which was subject to public inspection in the Office of the General Registrar and provided, upon request, as part of voter registration lists.[68] The number was used to help maintain the accuracy of voter registration records but was also made public by the state in the voting rolls, where it was displayed next to the voter's name and address.

On July 24, 1991, Marc Alan Greidinger completed an application, but omitted his social security number, and as a result was denied the ability to register to vote.[69] Greidinger filed suit against Robert H. Davis, his local registrar, and other members of the Virginia State Board of Elections, alleging "to the extent Virginia authorizes the collection and publication of SSNs for voter registration, it unconstitutionally burdens his right to vote."[70] The Fourth Circuit, in accordance with *Evans v. Cornman*[71] and *Hill v. Stone*,[72] applied strict

---

[68] VA. CONST. art. II, § 2.

[69] *Greidinger*, 988 F.2d at 1345.

[70] *Id.* at 1346.

[71] 398 U.S. 419, 422 (1970) ("Before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interest served by it must meet close constitutional scrutiny.").

[72] 421 U.S. 289, 297 (1975) ("[A]s long as the election in question is not one of special interest, any classification

scrutiny analysis to this question of voter qualification and ballot access. Citing the Privacy Act and the Freedom of Information Act, which both contain provisions exempting SSNs from disclosure in certain circumstances, and potential harms that can result from dissemination of one's SSN, the court concluded, "The statutes at issue compel a would-be voter in Virginia to consent to the possibility of a profound invasion of privacy when exercising the fundamental right to vote," and as such, constituted a substantial burden on Greidinger's right to vote.[73]

The court also found that the Virginia laws mandating disclosure of SSNs on the voter registration application were not narrowly tailored to the state's asserted interest of preventing voter fraud: "the fact that the SSN may be potentially disseminated to any registered voter or political party with the attendant possibility of a serious invasion of one's privacy is demonstrably more restrictive than predicating the right to vote on the simple receipt and internal use of the SSN."[74] Therefore, because the Virginia laws conditioned voter registration on public disclosure of SSN, the provisions were invalid as imposing a substantial burden on would-be voters that was not narrowly tailored to the state's purpose of preventing voter fraud.

---

restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.").

[73] *Greidinger*, 988 F.2d at 1354.

[74] *Id.* at 1352.

Greidinger demonstrates that there are Constitutionally impermissible privacy burdens when the state chooses to publish information individuals have provided to the state so that they may participate in the political process.

B. In Open Government Cases, Courts Have Recognized Fundamental Privacy Rights

The Freedom of Information Act[75] ("FOIA") and state open records laws exist for the purpose of "open[ing] agency action to the light of public scrutiny."[76] Mandatory disclosure of government records, however, is subject to several exemptions, including the personal privacy exemption.[77] In determining what types of information fall within the scope of this exemption, courts balance the privacy interests of the individual against the public's interest in disclosure of the information.[78] Courts have found that because of the strong privacy rights implicated when signing politically-charged petitions,

---

[75] 5 U.S.C. § 552, as amended by Pub. L. 104-231, 110 Stat. 3048 (1996).

[76] *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

[77] Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1994) (FOIA disclosure "does not apply to matters that are . . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); *see also* LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 167-207 (Harry A. Hammit et al. eds., 2008).

[78] *See Rose*, 425 U.S. at 372.

such petitions fall under the personal privacy exemption of the Freedom of Information Act.

In *Campaign for Family Farms v. Glickman*,[79] the Eighth Circuit found that mandatory disclosure of the names, addresses, and related information of petition signatories was prohibited because the "substantial privacy interest in a secret ballot . . . overrides whatever public interest there may be in the oversight of the verification process."[80] In *Glickman*, a family farm and community membership group, the Campaign, organized a petition to require the United States Department of Agriculture ("USDA") to call a referendum on a program requiring pork producers and importers to pay an assessment, or check-off, to the National Pork Board on every sale or import of pork products.[81] The Campaign submitted a petition to the USDA containing over 19,000 signatures, which became the subject of a FOIA request by The Council, the National Pork Board's general contractor.[82] The USDA determined the information did not fall under FOIA's personal privacy exemption, and the Campaign, along with individual pork producers, filed a reverse FOIA action, which was the subject of the Eighth Circuit appeal, to prohibit disclosure of the records.[83]

---

[79] 200 F.3d 1180 (8th Cir. 2000).

[80] *Id.* at 1189.

[81] *Id.* at 1182-83.

[82] *Id.*

[83] *Id.* at 1184-85.

In ruling that the petition did fall under the personal privacy exemption of the FOIA, the Eighth Circuit likened signing a petition to voting with a secret ballot: "to make public such an unequivocal statement of their position on the referendum effectively would vitiate petitioners' privacy interest in a secret ballot."[84] Citing *Burson v. Freeman*[85] and *McIntyre v. Ohio Elections Comm'n*[86] as examples, the court stated that the "secret ballot is of paramount importance to our system of voting."[87] The Eighth Circuit held:

> While we need not decide whether there is a constitutional right to a secret ballot, we do not hesitate to hold 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

---

[84] *Id.* at 1187.

[85] 504 U.S. 191 (1992).

[86] 514 U.S. 334 (1995).

[87] *Glickman*, 200 F.3d at 1187-88. *See Burson*, 504 U.S. at 206 ("[A]ll 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments . . . . demonstrat[ing] that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud."). *See also McIntyre*, 514 U.S. at 343 ("[T]he secret ballot [is] the hard-won right to vote one's conscience without fear of retaliation.").

privacy exemption than it is in other contexts.[88]

As such, the balancing test clearly favors protecting the privacy of the signatories of the petition, and mandatory disclosure of information relating to the signatories could not be compelled under FOIA.[89]

A subsequent district court decision followed the reasoning in *Glickman* in order to protect from mandatory FOIA disclosure the names and telephone numbers of attendees who were listed on a sign-in sheet for a meeting with Immigration and Naturalization Services ("INS").[90] According to the court, its decision to protect such information from public disclosure was supported by FOIA's exemption six, the Supreme Court's decisions in *United States Dep't of Defense v. FLRA*[91] and *United States Dep't of State v. Ray*,[92] and the 8th Circuit in *Glickman*.[93]

---

[88] *Id.* at 1188.

[89] *Id.* at 1189.

[90] *Judicial Watch v. Reno*, 2001 U.S. Dist. LEXIS 25318 (D.D.C. 2001).

[91] 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.").

[92] 502 U.S. 164, 179 (1991) ("Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy.").

[93] *Judicial Watch*, at 20-21.

The court in *Howard Johnson Co., Inc. v. NLRB*[94] likened authorization cards to a secret ballot, finding that such cards contained personal information about the interest of employees in union representation. As in *Glickman*, the court found submission of a name in the context of a controversial matter implicated strong privacy rights warranting an exemption to the mandatory disclosure provisions of FOIA. The court held, "The privacy which attaches to an employee's interest in union representation approaches that which surrounds the secret ballot in an election. . . . Such a finding of a right of privacy in the authorization cards does not stretch the application of exemption 6 or 7(C) [of the FOIA] beyond that intended by Congress."[95]

Courts have also considered the right to personal security in examining privacy in a FOIA context. The Substantive Due Process Clause of the Constitution recognizes two types of privacy rights: the right of an individual to make personal decisions relating to family relationships and child rearing,[96] and the right of an individual to avoid disclosure of personal matters.[97] The latter, referred to as an informational privacy right, has been recognized by courts in two instances: "(1) where the release of personal information could lead to bodily harm, and (2) where the information released was of a sexual, personal,

---

[94] 1977 U.S. Dist. LEXIS 15881 (W.D.N.Y. 1977).

[95] *Id.* at *7.

[96] *See Lawrence v. Texas*, 539 U.S. 558 (2003).

[97] *Whalen v. Roe*, 429 U.S. 589 (1977).

and humiliating nature."[98] In *Kallstrom v. City of Columbus*,[99] the Sixth Circuit considered whether undercover police officers had a privacy interest "of constitutional dimension" in information contained in their personnel files, such that the information would be shielded from disclosure in spite of Ohio's Public Records Act.

The plaintiffs in *Kallstrom* were undercover police officers involved in a drug trafficking investigation relating to a violent gang in Columbus, Ohio.[100] The plaintiffs testified in *United States v. Derrick Russell, et al.*, against eight of the gang members who were prosecuted on drug conspiracy charges.[101] The defense counsel in *Russell* requested and obtained from the City of Columbus, in accordance with Ohio's Public Records Act,[102] the personnel and pre-employment records of the police officers, which included names and addresses of the officers and their immediate family members. The officers brought suit against the City of Columbus, alleging that disclosure of information contained in their personnel files violated their right to privacy guaranteed by the Due Process Clause of the

---

[98] *Lambert v. Hartman*, 517 F.3d 433, 440-41 (6th Cir. 2008).

[99] 136 F.3d 1055 (6th Cir. 1998).

[100] *Id.* at 1059.

[101] *Id.*

[102] Ohio Rev. Code. Ann. § 149.43(A)(1)(h) (LexisNexis 2010).

Constitution, and placed them and their family members at risk for their safety.[103]

The Sixth Circuit acknowledged the important interest set out in the Public Records Act, but the court found the police officers had a fundamental liberty interest, recognized by the Supreme Court, to be free from "unjustified intrusions on personal security."[104] Because disclosure of the records implicated a fundamental right to privacy and personal security and was not narrowly tailored to serve the interest of informing the public as to the functions of Ohio's law enforcement agency, the court found the City was liable to the officers for damages under 42 U.S.C. § 1983, and afforded the officers injunctive relief prohibiting the City from disclosing such information in the future without providing the officers with meaningful notice.[105]

In 2001, the Sixth Circuit applied the reasoning in *Kallstrom* to Tennesee's Open Records Act.[106] In that case, Tennessee had passed an ordinance imposing licensing requirements on adult entertainment businesses, and requiring the disclosure of information for the purpose of

---

[103] *Kallstrom*, 136 F.3d at 1060.

[104] *Id.* (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

[105] *Id.* at 1069-70.

[106] *See Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377 (6th Cir. 2001).

conducting background checks.[107] Plaintiffs challenged these disclosure provisions on constitutional grounds, alleging that the provisions posed more than an "incidental burden on First Amendment freedoms." The burden was greater than was necessary to further the government's interest, because members of the public with illicit motives could compel disclosure of such information under Tennessee's Open Records Act.[108] The court found that the disclosure requirements were not unconstitutional, because under *Kallstrom*, such information was exempt from Tennessee's Open Records Act:

> Applying *Kallstrom*'s reasoning to this context, we find that all sexually oriented business license and permit applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal.[109]

---

[107] *Id.* at 375-86, 393.

[108] *Id.* at 394-95.

[109] *Id.* at 395.

More recently, a district court in Tennessee similarly found that while identifying information may be included on an entertainer's permit, a provision requiring the entertainer to present the permit to a "customer" upon request was invalid, because such private information was exempt from Tennessee's Open Records Act.[110]

---

[110] *Belew v. Giles County Adult-Oriented Establishment Bd.*, 2005 U.S. Dist. LEXIS 46996, *72-73 (M.D. Tenn. Sept. 29, 2005).

CONCLUSION

Amici respectfully request this Court to grant Petitioners' motion to reverse the decision of the lower court.

Respectfully submitted,

MARC ROTENBERG
JARED KAPROVE
GINGER MCCALL
KIMBERLY NGUYEN
JOHN VERDI
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

March 4, 2010