

IN THE SUPREME COURT OF THE UNITED STATES

JOHN DOE #1, an individual, JOHN DOE #2, an individual,
and PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, in his official capacity as Secretary of State of Washington, et al.,

Respondents.

RESPONSE TO APPLICATION TO VACATE THE COURT OF APPEALS
STAY OF PRELIMINARY INJUNCTION

Respondents, the Washington Secretary of State (Secretary) and the Washington Coalition for Open Government (WCOG) file this Response to the application to vacate the Court of Appeals stay of the preliminary injunction issued by the District Court pursuant to a request from Justice Kennedy.

John Does No. 1 and 2 and Protect Marriage Washington (Sponsors) brought this action to enjoin the Secretary from releasing referendum petitions containing the names and addresses of petition signers pursuant to a request under Washington's Public Records Act. The Sponsors claim that the Public Records Act violates the First Amendment of the United States Constitution.

The District Court entered a preliminary injunction to prevent release of the petitions. Because the referendum in question is on the November 3, 2009, general election ballot, the Secretary and the WCOG appealed the preliminary injunction and sought a stay of the injunction, and expedited review. The Court of Appeals granted expedited review and, after full briefing and oral argument, reversed the district court and entered a stay of the preliminary injunction. There is no basis upon which to vacate the stay entered by the Court of Appeals.

STATEMENT

A. Washington's Public Records Act

Washington's Public Records Act (the Act) was originally enacted by the people through an initiative, Initiative Measure No. 276, approved November 7, 1972. 1973 Wash. Sess. Laws page nos. 1-31. In passing the Act, the voters declared that the "people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Wash. Rev. Code § 42.56.030. Accordingly, the "people insist on remaining informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030.

The Act requires state agencies to "make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]" Wash. Rev. Code § 42.56.070. The term "public record" is defined

as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency.” Wash. Rev. Code § 42.56.010(2). The Act exempts a number of specific categories of records from public disclosure (*see, e.g.*, Wash. Rev. Code §§ 42.56.210-.480). However, “[s]tatutory exemptions are narrowly construed because the [Act] requires disclosure, and the agency claiming the exemption bears the burden of proving that the documents requested are within the scope of the claimed exemption.” *Newman v. King County*, 133 Wash. 2d 565, 571, 947 P.2d 712 (1997).

B. Washington’s Referendum Process

In Washington, laws may be enacted in either of two ways: through the acts of the state’s elected legislature, or directly by the people through the use of the initiative and referendum powers. Under the state constitution, a referendum “may be ordered on any act, bill, law, or any part thereof passed by the legislature” with exceptions not at issue in this case. Wash. Const. art. II, § 1(b). If constitutionally established prerequisites for a referendum election are met, then the electorate votes on whether to accept or reject the bill passed by the legislature. Wash. Const. art. II, § 1(b).

In order to trigger the referendum process, the state constitution requires the filing of petitions that contain the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the office of

governor at the last gubernatorial election preceding the filing of a referendum. Under the required form, the voters who sign a referendum petition “respectfully order and direct that Referendum Measure No. . . . , filed to revoke a (or part or parts of a) bill that (concise statement required by [Wash. Rev. Code §] 29A.36.071) and that was passed by the . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection” in an election. Wash. Rev. Code § 29A.72.130. The referendum “petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.” Wash. Rev. Code § 29A.72.130. In signing the petition, the law requires voters to declare that: “I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.” Wash. Rev. Code § 29A.72.130. Each petition must also contain a warning that: “[e]very person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.” Wash. Rev. Code § 29A.72.140. Each petition “must consist of not more than one sheet with

numbered lines for not more than twenty signatures[.]” Wash. Rev. Code § 29A.72.100.

Referendum petitions are filed with the Washington Secretary of State who is required “to verify and canvass the names of the legal voters on the petition.” Wash. Rev. Code § 29A.72.230. “The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure[.]” Wash. Rev. Code § 29A.72.230. The observers are prohibited from making a record of the information on the petitions during the verification process except upon court order. Wash. Rev. Code § 29A.72.230.

Anyone can challenge in court the Secretary of State’s decision that a referendum has or has not been signed by an adequate number of legal voters to qualify for the ballot. Wash. Rev. Code § 29A.72.240 provides: “*Any citizen dissatisfied with the determination of the secretary of state that [a referendum] contains or does not contain the requisite number of signatures of legal voters may appeal to the superior court and seek a writ of mandate to compel certification or an injunction to prevent certification of the measure to the ballot. (Emphasis added.)*”

Referendum petitions filed with the Secretary of State pursuant to Washington’s election statutes are public records under the Act because they are a “writing containing information relating to the conduct of government or

the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency.” Wash. Rev. Code § 42.56.010(2). Petitions must be submitted to the Secretary, and are used by the Secretary to determine whether a referendum petition is supported by the requisite number of valid signatures of Washington voters to qualify the measure to the ballot. None of the exemptions from public disclosure apply to referendum petitions and, prior to this litigation, the Secretary has routinely disclosed petitions in response to public records requests.

C. Referendum 71 Petitions

In 2007, the Washington Legislature created state registered domestic partnerships. 2007 Wash. Sess. Laws page nos. 616-37. A domestic partnership may be formed when “both persons are members of the same sex; or (b) at least one of the persons is sixty-two years of age or older.” Wash. Rev. Code § 26.60.030. The 2007 law gave registered partners certain rights and responsibilities. In 2009, the legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5688, which expanded the rights, responsibilities, and obligations accorded state registered same-sex and senior domestic partners.

In May 2009, Protect Marriage Washington began gathering petition signatures for a referendum election on E2SSB 5688. As required by Wash. Rev. Code § 29A.72.130, the signers of Referendum 71 “order and direct [the Secretary of State] that Referendum Measure No. 71 . . . shall be referred to the

people of the state for their approval or rejection at the regular election to be held on the 3rd day of November, 2009” and each of the signers certified that “I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.” The Referendum 71 petitions each contained the maximum 20 lines for signatures.

Signature gathering took place in public places such as at Wal-Mart and Target stores. Typically, the signature gatherer sets up a table and asks members of the public walking by to sign the petition. There is also interaction among members of the public about whether the petitions should be signed.

On July 25, 2009, the proponents of Referendum 71 submitted their signature petitions. The petition signatures were delivered in an open, public forum and referendum supporters and opponents were in attendance, as were several members of the news media. The petition sheets were counted at that time and the Secretary of State’s Office began the task of verifying the signatures. The Secretary subsequently concluded that Referendum 71 had about 122,000 valid signatures, and certified the measure to the November 3, 2009, general election ballot.

During the signature-gathering process, the website of WhoSigned.org announced that it would file a public records request to obtain the Referendum

71 petitions and post the information from the petitions on the internet. ER 100-01. The Secretary subsequently received four requests for the Referendum 71 petitions. One of the requesters was the president of the WCOG, a non-profit, non-partisan organization that advocates for open government, including access to public records, in the State of Washington.

D. Proceedings In The District Court

On July 28, 2009, the Sponsors filed this action in Federal District Court. The Sponsors alleged that the Public Records Act violated their First Amendment rights, sought a declaration that the Act was unconstitutional, and asked for a permanent injunction. The Sponsors advanced two claims. First, the Sponsors brought a facial challenge that releasing the petitions, which contained signers' names and addresses, would violate the signers' First Amendment right to anonymous speech. Second, the Sponsors brought an as-applied challenge that releasing Referendum 71 petitions under this Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. The Sponsors' complaint did not allege that the Referendum 71 petitions were not public records as defined by the Act or that the petitions were subject to one of the Act's exemptions.

A hearing on the motion for a preliminary injunction was held on September 3, 2009. On September 10, 2009, the District Court granted the

Sponsors' motion for a preliminary injunction. The District Court first considered the Sponsors' likelihood of prevailing on the merits of their facial challenge. According to the District Court, the Sponsors "assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. The *type of free speech in question is anonymous political speech.*" Order Granting Plaintiffs' Motion For Preliminary Injunction (Preliminary Injunction Order) at 8-9 (emphasis added, citation omitted).¹ With regard to anonymous political speech, the District Court stated: "The Supreme Court has consistently held that a component of the First Amendment is the right to anonymously participate in a political process." Preliminary Injunction Order at 9. The District Court cited *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *Talley v. California*, 326 U.S. 60 (1960). Based on these decisions, the District Court found that the Sponsors "have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." Preliminary Injunction Order at 12. Based on this conclusion, the District Court held that the Act was subject to strict scrutiny, and that it was not narrowly tailored. According to the District Court: "In light of the State's own verification process

¹ The Order Granting Plaintiffs' Motion For Preliminary Injunction is attached to the Sponsors' application.

and the State's own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as an important check on the integrity of the referendum election process." Preliminary Injunction Order at 15 (internal punctuation omitted). The District Court also rejected the State's interest in informing the voters of who supported the referendum because no one knows "whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public[.]" Preliminary Injunction Order at 15. Thus, for the District Court, "the identity of the person who supports the referral of a referendum is irrelevant to the voter as the voting public must consider the content of the referendum[.]" Preliminary Injunction Order at 15.

Having concluded that the Sponsors were likely to prevail on the merits, the District Court held that there would be irreparable harm because "[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction[.]" Preliminary Injunction Order at 16 (internal punctuation omitted). In balancing the equities, the District Court held that "[b]ecause this Court finds that [Sponsors] have established that this case likely raises serious First Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury, this court also finds that the equities tip in favor of the [Sponsors]." Preliminary Injunction Order

at 17 (citation omitted). Finally, with regard to the public interest, the District Court stated that “the public’s interest in protecting First Amendment rights may sometimes be overcome where there is a strong showing of other competing public interests [but the Secretary has] failed to make a strong showing of other competing public interests.” Preliminary Injunction Order at 17 (internal punctuation omitted).

The District Court’s Order does not directly set out the scope of the injunction. However, the court granted the injunction based on the Sponsors’ facial challenge. In their motion, the Sponsors requested an injunction to “[e]njoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act, Wash. Rev. Code § 42.56.001 *et seq.*, or otherwise[.]” Sponsors’ Motion for Preliminary Injunction (Appendix A). Thus, the preliminary injunction is not limited to Referendum 71 petitions. The District Court did not rule on Count II, the Sponsors’ as applied-claim. Preliminary Injunction Order at 16.

E. Proceedings In The Court Of Appeals

On September 11, 2009, the Secretary filed his Preliminary Injunction Appeal. On September 14, 2009, the Secretary filed an emergency motion seeking a stay of the preliminary injunction and expedited treatment so the appeal could be resolved before the November 3, 2009, election on Referendum 71. On September 22, 2009, the Ninth Circuit granted the motion for expedited

review, established a briefing schedule, and scheduled oral argument for October 14, 2009. The court did not at that time rule on the Secretary's motion to stay the preliminary injunction. The Court of Appeals heard oral argument, and on October 15, 2009, issued an order reversing the District Court because "the district court's Order Granting Plaintiffs' Motion for Preliminary Injunction (the "Preliminary Injunction Order"), filed September 10, 2009, relies on an incorrect legal standard[.]" Ninth Circuit's Order at 3.² In addition to reversing the District Court, the Ninth Circuit ordered that the Secretary's "motion for a stay pending appeal is granted and the Preliminary Injunction Order is hereby stayed, effective immediately, pending final resolution of these appeals." Ninth Circuit's Order at 3. The court went on to explain that an "opinion setting forth the reasons for the court's reversal of the Preliminary Injunction Order shall be issued expeditiously and in due course." Ninth Circuit's Order at 3. The issuance of the stay cleared the way for the Referendum 71 petitions to be disclosed in advance of the November 3rd election.

The Sponsors filed their application to vacate the Ninth Circuit's stay of the preliminary injunction with Justice Kennedy on October 16, 2009.

² The Ninth Circuit's Order is attached to the Sponsors' application.

**REASONS FOR DENYING THE APPLICATION
TO VACATE THE STAY**

A. The Burden Is On The Sponsors To Establish The Basis To Vacate The Stay

The burden is on the Sponsors to “rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of case—are correct.” *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). The panel below “carefully considered the issues presented and unanimously concluded that a stay was appropriate. Its decision . . . is entitled to great weight.” *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973) (Marshall, J., in chambers). “[T]he Court, and individual Circuit Justices, should be most reluctant to disturb interim actions of the Court of Appeals in cases pending before it.” *San Diegans For The Mt. Soledad Nat’l War Mem’l v. Paulson*, 548 U.S. 1301, 1304 (2006) (Kennedy, J., in chambers). This should be all the more true where, as here, the stay at issue was entered only following full briefing, oral argument, and a determination that the preliminary injunction was predicated on an erroneous legal standard. Ninth Circuit’s Order at 3. The Sponsors bear the burden to demonstrate that four justices would vote to grant certiorari, that the Court then would set aside the Ninth Circuit’s decision, and that the balance of the stay equities are in the

Sponsors' favor. *San Diegans*, 548 U.S. at 1302. The Sponsors can satisfy none of these standards.

B. The Sponsors Have Not Demonstrated That Four Justices Would Vote To Grant Certiorari

The decision below implicates no question that would warrant granting a petition for a writ of certiorari. Rule 10 explains that “[a] petition for a writ of certiorari will be granted only for compelling reasons” and identifies “the character of the reasons the Court considers.” Put generally, the reasons are (1) conflicting appellate decisions on the same important federal question; (2) an appellate court decision on “an important question of federal law that has not been, but should be, settled by this Court”; or (3) an appellate decision on an important federal question that conflicts with relevant decisions of this Court. *Id.* The Ninth Circuit’s Order implicates no question of this character.

Sponsors claim to be at a disadvantage in making this showing because of the absence of a full opinion by the court below. The “disadvantage” is seriously overstated. The Ninth Circuit’s Order concludes that the District Court’s preliminary injunction “relies on an incorrect legal standard.” Ninth Circuit’s Order at 3. It is apparent from even the most cursory review of the preliminary injunction order that the “legal standard” relied upon by the District Court was its application of strict scrutiny to Washington’s Public Records Act, based upon the District Court’s erroneous view that the Act compels disclosure of anonymous political speech. (“The type of speech in question is anonymous

