NO. 09A356

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Washington's Public Records Act (the Act) was originally enacted by the people through an initiative, Initiative Measure No. 276, approved November 7, 1972. 1973 Wash.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.

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[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

political speech." Preliminary Injunction Order at 9; "[T]he Court finds that the Plaintiffs have established that it is likely that the Public Records Act is not narrowly tailored to achieve [a] compelling governmental interest." Preliminary Injunction Order at 15.) Rather than explaining how the Ninth Circuit's reversal of the District Court's "reli[ance] on [this] incorrect legal standard" would warrant review by certiorari, the Sponsors claim uncertainty as to the nature of the question that is and has been at the heart of this case. Ninth Circuit's Order at 3.

The Ninth Circuit's reversal of the District Court's preliminary injunction based on the District Court's application of "an incorrect legal standard" in subjecting the Public Records Act to strict scrutiny, does not conflict with the decision of another appellate court on the same question, or with relevant decisions of this Court. The Sponsors can point to no appellate decision suggesting, let alone holding, that First Amendment strict scrutiny applies to a law of general application that is content and viewpoint neutral and that simply requires government to provide public access to records in the government's possession relating to the conduct of government. The Sponsors do not assert otherwise.

Nor does the question of whether the Public Records Act is subject to First Amendment strict scrutiny independently present "an important question of federal law that has not been, but should be, settled by this Court." Rule 10.

The only statute that the Sponsors challenge in this case is Washington's Public Records Act. The Act is a law of general application. It is content and viewpoint neutral. It applies only to government, not to private persons, and it simply directs the government to provide public access to records in the government's possession relating to the conduct of government. It makes public records—i.e., "writing[s] 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) "available for public inspection and copying" (Wash. Rev. Code § 42.56.070(1)) upon request. Like its federal counterpart, the Freedom of Information Act (FOIA) 5 U.S.C. § 552, Washington's Public Records Act does not prohibit speech; it does not compel speech; it does not limit speech; and it does not otherwise regulate speech. To the extent that Washington's Public Records Act even affects speech, it affects it only incidentally. Accordingly, the Act would not be subject to strict scrutiny, and the Order of the Ninth Circuit that the district court "applied an incorrect legal standard" is wholly unremarkable.

In asserting a reasonable probability that the Court would grant certiorari, the Sponsors state only that "numerous cases on *similar* political speech issues indicate that there is a reasonable probability that the Court will grant certiorari." Application 16-17 (emphasis added). The Sponsors'

suggestion lacks merit. Despite the Sponsors' claim of similarity, none of the cases that the Sponsors identify is remotely similar to the instant case. All of the cases that the Sponsors posit as similar to this case challenged laws that compelled disclosure of anonymous political speech. Application at 17-18. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (First Amendment challenge to an Ohio law that compelled disclosure of the names of members of the Ohio Socialist Workers Party); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999), (First Amendment challenge to a Colorado law that compelled initiative petition circulators to identify themselves by wearing a name tag); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), (First Amendment challenge to an Ohio statute prohibiting distribution of anonymous campaign literature).

The Public Records Act is wholly dissimilar. The Act does not govern the conduct of private persons. It does not require them to disclose anything to the government. The Act is directed only at the government. It requires that, upon request, the government make records already in its possession that relate to the conduct of government available to the public. Wash. Rev. Code § 42.56.070(1). Nor does the Act compel anyone to place his or her name and address on a referendum petition. Even if it tenably could be asserted that a voter is engaged in anonymous political speech when the voter provides his or her name and address on a statutorily prescribed form that must be submitted

to the government in order to command a referendum election, that requirement is a product of Washington's constitution and laws regulating the election process, not the Act. *See* Wash. Const. art. II, § 1(b); Wash. Rev. Code § 29A.72.130; .230. The Sponsors do *not* challenge these laws.[3]

In sum, the Sponsors provide no meaningful support for the assertion that the Court is reasonably likely to grant the Sponsors' petition for certiorari.[4]

C. The Sponsors Have Not Demonstrated That The Court Would Set Aside The Ninth Circuit's Decision

1. The Public Records Act Is A Statute Of General Applicability That Is Subject To Intermediate Scrutiny

In this case the Sponsors challenge the Public Records Act. The District Court concluded that the Act compelled the disclosure of anonymous speech and failed strict scrutiny. The District Court's decision is clearly incorrect. The District Court relied on (1) *Buckley*, a First Amendment challenge to a Colorado law requiring initiative petition circulators to wear identification badges; (2) *McIntyre*, a First Amendment challenge to an Ohio statute prohibiting

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[3] Presumably, Sponsors do not challenge Washington's laws governing the referendum process because the Sponsors successfully have invoked these laws to direct the Secretary to place Referendum 71 on the ballot, and because the Sponsors recognize that these laws are amply supported by the State's interests. *See* note 5, *infra*.

[4] Perhaps realizing that the cases upon which they rely are inapposite, the Sponsors also suggest that the Ninth Circuit's opinion may say something about the standards for issuing a preliminary injunction or a stay that might be of interest to the Court. This is entirely speculative and highly unlikely, particularly in light of the Court's recent decisions making those standards clear. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008); *Nken v. Holder*, 129 S. Ct. 1749 (2009).

distribution of anonymous campaign literature; and (3) *Talley*, a First Amendment challenge to a municipal ordinance prohibiting the distribution of handbills not containing the name and address of the preparer.

These cases all involve laws that compel individuals to disclose information to the government or to the public. In contrast to these laws, the Public Records Act does not require anyone to disclose anything to the government or to the public. The Act is a law of general application that makes public records—i.e., "writing[s] 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) "available for public inspection and copying" (Wash. Rev. Code § 42.56.070(1)). The Act does not prohibit speech; it does not compel speech; it does not limit speech; and it does not otherwise regulate speech. It is viewpoint and content neutral. To the extent it affects speech at all, it affects it only incidentally. Indeed, the only entity under compulsion under the Act is the government, which is required to release public records upon request, in the absence of an exemption.

For this reason, the Act is not subject to strict scrutiny. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those

interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (upholding provisions of the Cable Television Consumer Protection and Competition Act of 1992 that require cable broadcasters to carry local broadcast television stations on cable television systems). "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 662 (1994). Narrow tailoring in this context requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 799 (1989)).

The Public Records Act satisfies intermediate scrutiny. The Act plainly furthers important, indeed compelling, state interests in government transparency and accountability. The means chosen—making public records open to the public upon request—is directly tailored to that purpose. It does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broadcasting*, 512 U.S. at 662. As applied to signed referendum petitions, the Act ensures (1) that Washington citizens have the means necessary to independently evaluate the Secretary's decision whether to certify a referendum to the ballot and to evaluate whether Washington's election laws properly are being enforced, (2) the opportunity to know who has triggered the peoples' direct legislative power, and (3) the opportunity to know who supports the measure, information that may bear

upon how Washington voters exercise their power of direct legislation. Disclosure of petitions under the Act also imposes a minimal burden on a signer's First Amendment rights.

The petitions are only subject to release under the Act after they have been submitted to the Secretary, when the signature gathering process has been completed. In *Buckley*, the Court approved of a state statute that required circulators to file an affidavit containing the circulator's name and address, and attesting to an understanding of and compliance with Colorado laws governing signature gathering. *Buckley*, 525 U.S. at 196. The Court approved of the affidavit requirement because "[w]hile the affidavit reveals the name of the petition circulator and is a public record [it] does not expose the circulator to the risk of heat of the moment harassment." *Buckley*, 525 U.S. at 198-99. Similarly, release of petitions under the Act occurs after signature gathering is completed. The Secretary routinely releases petitions, and the Sponsors have presented no evidence that the previous release of these petitions has had any impact on the signers' First Amendment rights.

2. Petitions Disclosed Under The Act Do Not Constitute Anonymous Speech

The District Court was also wrong in concluding that names and addresses on signed referendum petitions, in the hands of the government, are anonymous. In *Buckley,* the Court approved the state requirement that petition circulators file an affidavit with the state that contained the circulator's name

and address. The Court did not consider the name and address of the circulator to be anonymous after it had been submitted to the government. The Court recognized that "the affidavit reveals the name of the circulator," a participant in political speech, "and is a public record." *Buckley*, 525 U.S. at 198; *see also Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002) ("[t]he requirement that a *canvasser must be identified* in a permit application filed in the mayor's office and available for public inspection *necessarily results in a surrender of that anonymity.*"). (Emphasis added.)

Article II, section 1(b) of the Washington Constitution provides that the people's reserved referendum power "may be ordered on any act, bill, or law, or any part thereof passed by the legislature . . . either by petition signed by the required percentage of the legal voters, or by the legislature." When a voter exercises this constitutional right to command a referendum election he or she must sign the referendum petition, and print his or her name, address, town or city, and county of residence on the petition. Wash. Rev. Code § 29A.72.130, .150. Referendum petitioners "order and direct" the Secretary that the referendum "shall be referred to the people of the state for their approval or rejection." Wash Rev. Code § 29A.72.130. Referendum petitions also warn petitioners that knowingly providing false information on the petition may be punished by a fine, imprisonment, or both. Wash. Rev. Code § 29A.72.140.

For a referendum to reach the ballot, the Secretary of State must determine that the petition contains the signatures of the requisite number of legal voters. Wash. Rev. Code § 29A.72.230. ("Upon filing of [a referendum] petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition.") "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.

From these constitutional and statutory provisions, it is apparent that a voter cannot petition for a referendum election, and a referendum cannot qualify for the ballot, absent the petitioners disclosing their identities to the government in petitioning for the election. It further is apparent that persons who sign referendum petitions are made fully aware that the petitions, which include the petitioners' signatures, printed names, and addresses, and direction to the Secretary of State, are disclosed to the government. Petitioners disclose this information to the Secretary, who acts on behalf of Washington's citizens, to determine whether there is sufficient support among Washington registered voters to send the measure to a vote. This information also is available to law enforcement officials, who similarly act on behalf of the people of Washington, to evaluate whether a petitioner engaged in criminal misconduct. Persons who sign petitions thus know that they have disclosed their identity to the government as part of seeking a referendum election.

In addition, in the course of the referendum signature-gathering process, referendum petitioners disclose their names and addresses to an essentially unlimited segment of the public. Petition signers disclose their names and addresses to the sponsor of the measure who submits the petition to the Secretary of State. Wash. Rev. Code § 29A.72.150 ("[W]hen the person or organization demanding any referendum . . . has obtained [the requisite number] of signatures of legal voters . . . the petition containing the signatures may be submitted to the secretary of state."). Signers disclose their names and addresses to signature gatherers. They also disclose this information to other members of the public. A referendum petition usually contains twenty lines. The first signer on the petition indiscriminately discloses his or her identity and support for a referendum election to as many as 19 other signers or anyone who simply reads the petition after it has been signed.

Moreover, in Washington, there is nothing to prevent a sponsor or signature gatherer from making a list of the names and addresses on the petitions before submitting the petitions to the Secretary. This list might be used to create a data base for any purpose, including the referendum campaign and fundraising.

The Sponsors do not challenge any of the laws governing the referendum process.[5] These are the laws that actually require voters to disclose their names and addresses to the government—not the Public Records Act. Essentially the Sponsors want to take names and addresses disclosed to the government on the petitions, and make them anonymous after the fact.[6]

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[5] Even if the Sponsors challenged the laws governing referendum petitions, strict scrutiny would not apply. "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional Law Found., Inc.* 525 U.S. 182, 191-92 (1999). "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (citations and internal punctuation omitted). The burden of requiring a voters name and address on referendum petitions is modest. *See supra* p. 20. The state's interest in determining if the signer is a registered voter qualified to sign the petition is substantial.

[6] Based on old Attorney General's opinions, the Sponsors argue that referendum petitions are not public records. Application at 2, 21. This is both irrelevant and inaccurate. The Sponsors' complaint did not allege that referendum petitions are not public records under the Public Records Act. And even if it had, that is a state law question, not a federal question for this Court to resolve. Moreover, the 1938 and 1956 opinions the Sponsors refer to were issued prior to the adoption of the Public Records Act in 1973. The letter from the Secretary of State in 1973, barely six months after the Act was adopted, does not accurately reflect the law. Over thirty years of Washington Court decisions since the Public Records Act was adopted, establish that referendum petitions are public records subject to release. The record reflects that the current Secretary of State has routinely disclosed initiative petitions prior to the filing of this litigation.

3. The Public Records Act Satisfies Strict Scrutiny

Although the Public Records Act is not subject to strict scrutiny, it meets that test. The State has two compelling interests that are narrowly tailored for disclosing initiative and referendum petitions. First, the State has a compelling interest in *government transparency and accountability.* Ensuring such transparency was the very purpose of the Public Records Act. The Washington Supreme Court described the purpose of the Act as "nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions." *Progressive Animal Welfare Society v. Univ. of Washington*, 125 Wash. 2d 243, 251, 884 P.2d 592 (1994).

In the context of referendum signature petitions, this includes the ability of Washington citizens independently to evaluate whether the Secretary properly determined to certify or not certify a referendum to the ballot. Under Washington law, any citizen "dissatisfied with the determination of the secretary" will have the opportunity to challenge the determination of whether "an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters." Wash. Rev. Code § 29A.72.240. Any meaningful opportunity to challenge the Secretary's determination depends on access to signature petitions. Without such access, persons dissatisfied with the Secretary's determination would not be able to evaluate whether the gross