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, WASHINGTON SECRETARY OF STATE,
AND BRENDA GALARAZA, PUBLIC RECORDS OFFICER
FOR THE SECRETARY OF STATE'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SECRETARY OF STATE SAM REED'S BRIEF IN OPPOSITION

ROBERT M. MCKENNA
Attorney General

William Berggren Collins*
Anne Elizabeth Egeler
Deputy Solicitors General
**Counsel of Record*

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

Blank Page

QUESTION PRESENTED

The Public Records Act requires government to make public records available for citizens to inspect. Public records are writings about the conduct of government, and include referendum petitions voters sign to qualify a measure for the ballot. Does the Public Records Act violate petition signers' First Amendment right to anonymous speech by allowing inspection of referendum petitions upon which signers have publicly disclosed their names and addresses to referendum sponsors, signature gatherers, members of the public, and government?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Blank Page

BRIEF IN OPPOSITION

The Attorney General of Washington, on behalf of Sam Reed, the Washington Secretary of State, and Brenda Galarza, the Secretary of State's Public Records Officer, respectfully requests that the Court deny the petition for a writ of certiorari in this case.

STATEMENT

Washington's Public Records Act (the Act) requires state and local government to make public records available for inspection and copying at the request of members of the public. John Does No. 1 and 2 and Protect Marriage Washington (Sponsors) brought this action to declare that application of the Act to referendum petitions containing the names and addresses of petition signers violates the First Amendment of the United States Constitution, and to enjoin the Secretary of State (Secretary) from releasing referendum petitions pursuant to requests under the Act. The district court held that the Act is subject to strict scrutiny because it requires disclosure of anonymous political speech, and that it does not satisfy the strict scrutiny standard. The Ninth Circuit Court of Appeals reversed, holding that signing a referendum petition is public speech—not anonymous speech. The Ninth Circuit held that the Act is subject to intermediate scrutiny, and that it satisfies that standard.

A. Washington's Public Records Act

The Public Records Act was enacted by the people in 1972, through Initiative Measure No. 276. 1973 Wash. Sess. Laws page nos. 1-31. The Act

declares 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 (2009). Accordingly, the "people insist on remaining informed so that they may maintain control over the instruments that they have created." *Id.*

The Act defines a "public record" 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) (2009). Agencies are required 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 (2009). Statutory exemptions from disclosure are narrowly construed. Wash. Rev. Code § 42.56.030. Washington courts consistently refer to the Act as a "strongly-worded mandate for open government, requiring broad disclosure[.]" *E.g., Rental Housing Ass'n of Puget Sound v. City of Des Moines,* 199 P.3d 393, 394 (Wash. 2009).

B. Washington's Referendum Process

Under the Washington Constitution, the people of the state reserve the legislative powers of initiative and referendum. Wash. Const. art. II, § 1. State laws are enacted either by the state legislature, or directly by the people through the use of the initiative and referendum powers. A referendum "may be ordered on any act, bill, law, or

any part thereof passed by the legislature" when the legislature refers a bill to the people or when the people file a petition with the requisite number of signatures.[1] Wash. Const. art. II, § 1(b). If the constitutional prerequisites for a referendum are met, the electorate votes on whether to accept or reject the bill passed by the legislature. *Id.*

When the legislature passes a bill that may be subject to referendum, the bill cannot take effect until 90 days after the legislative session is adjourned, during which time the people may trigger a referendum by filing petitions containing 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. Wash. Const. art. II, § 1(b), (c). 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 (2009). The referendum petition sheets signed by the voters must state:

> "To the Honorable . . . . . ., Secretary of State of the State of Washington:
>
> We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. . . . . ., filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . . . .

---

[1] There are some exceptions to the referendum power, but none of the exceptions are at issue in this case.

> 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 at the regular (special) election to be held on the . . . . day of November, (year); and each of us for himself or herself says: 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." *Id.*

The petition sheets must warn 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 (2009). Each petition sheet on which signatures are gathered "must consist of not more than one sheet with numbered lines for not more than twenty signatures[.]" Wash. Rev. Code § 29A.72.100 (2009).

Referendum signature petitions are filed with the Secretary. The Secretary must "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 (2009). The Secretary "may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the

verification process." *Id.* During the verification process, observers are prohibited from making a record of the information on the petitions, except upon court order. *Id.*

Anyone "dissatisfied" with the Secretary's decision that a referendum has or has not been signed by an adequate number of legal voters to qualify for the ballot may bring an action in superior court challenging the Secretary's decision. Wash. Rev. Code § 29A.72.240 (2009). Within five days of the superior court's decision, parties may seek review in the Washington Supreme Court. *Id.*

Since referendum signature petitions filed with the Secretary are "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," they are public records under the Act. Wash. Rev. Code § 42.56.010(2). None of the statutory exemptions from public disclosure apply to referendum petitions. Prior to this litigation, the Secretary has routinely disclosed petitions in response to public records requests.

C. Referendum 71

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 "(a) 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(6) (2009). 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. Signature gathering took place in public places, such as outside Wal-Mart and Target stores. The signature gatherers set up tables and asked members of the public walking by to sign the petition sheets. There was interaction among members of the public about whether the petitions should be signed. The Referendum 71 petition sheets each contained 20 lines for signatures. Nothing shielded the names and signatures on the petition sheets, which were readily visible to other people who signed or read the petition.

On July 25, 2009, the proponents of Referendum 71 submitted their signature petitions to the Secretary in an open, public forum. Referendum supporters and opponents were in attendance, as were several members of the news media. The petition sheets were counted 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 organization 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. The Secretary subsequently received public disclosure requests from Toby Nixon of Washington Coalition for Open

Government, Arthur West, Brian Spencer on behalf of Desire Enterprises, and Anne Levinson on behalf of Washington Families Standing Together (WAFST). Although a requestor is not required to state the purpose of a public records request, WAFST stated that it sought to review the signed petitions to address legal errors made by the Secretary related to the form and authentication of petitions and the acceptance of certain signers as registered voters.

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, in Count I, the Sponsors asserted that releasing completed signature petitions for any referendum would violate the signers' First Amendment right to anonymous speech. Second, in Count II, the Sponsors asserted that, in any event, releasing Referendum 71 petitions under the Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. The Sponsors did not allege that referendum petitions are not public records, as defined by the Act, or that the petitions are statutorily exempt from disclosure. The Sponsors also did not allege that any part of Washington's laws governing the referendum process violated the Constitution.

On September 10, 2009, the district court granted the Sponsors' motion for a preliminary

injunction based on Count I of the complaint. The district court first considered the Sponsors' likelihood of prevailing on the merits of that Count. 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*." Pet. 33a (emphasis added). The district court stated that "[t]he Supreme Court has consistently held that a component of the First Amendment is the right to anonymously participate in a political process." Pet. 34a (citing *Buckley v. Am. Constitutional Law Found. (Buckley II)*, 525 U.S. 182, 200 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Talley v. California*, 326 U.S. 60, 65 (1960)). 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." Pet. 38a. 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 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." Pet. 42a (internal punctuation omitted). The district court also rejected the State's interest in informing the public of the names of the persons 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." *Id.* Thus, for the district court, "the identity of the person who supports the referral of a referendum is irrelevant to the voter[.]" Pet. 42a-43a.

The district court's conclusion that the Sponsors were likely to prevail on the merits, effectively determined its ruling on the Sponsors' motion for a preliminary injunction. The district court held that "[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction[.]" Pet. 43a-44a (internal punctuation omitted). The district court also concluded 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]." Pet. 44a-45a (citation omitted).

Although the district court's order did not directly set out the scope of the injunction, the court granted the injunction based on the Sponsors' Count I claim. In their motion, the Sponsors requested an injunction to enjoin Defendants from making referendum petitions available to the public pursuant to the Public Records Act. Thus, the preliminary injunction was not limited to Referendum 71 petitions. The district court did not rule on Count II, the Sponsors' claim that, as applied to Referendum 71, the Act violates the First Amendment. Pet. 43a.

E. Proceedings In The Court Of Appeals

The Secretary immediately appealed the preliminary injunction and 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.[2] The Ninth Circuit granted the motion for expedited review and, after oral argument on October 15, issued an order reversing the district court, and stating that an "opinion setting forth the reasons for the court's reversal of the Preliminary Injunction Order shall be issued expeditiously[.]" Pet. 2a-3a. The Ninth Circuit also 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." Pet. 2a.

On October 16, the Sponsors filed an application with Justice Kennedy to vacate the Ninth Circuit's stay of the preliminary injunction.[3] Following Justice Kennedy's referral of the application, the Court issued an order that the district court's preliminary injunction "shall remain

---

[2] Washington Coalition for Open Government and Washington Families Standing Together intervened at the district court and appealed the district court order. The Ninth Circuit consolidated the three appeals.

[3] The Secretary did not release the Referendum 71 petitions after the Ninth Circuit's Order on October 15 because a state court also had issued a preliminary injunction prohibiting release of the Referendum 71 petitions. *Eyman v. Reed,* No. 09-2-02447-0 (Thurston Cy. Wash. Oct. 14, 2009). The state court action is stayed pending the outcome of this case.

in effect pending the timely filing and disposition of a petition for a writ of certiorari." Pet. 21a. "Justice Stevens would deny the application." *Id.*

On October 22, the court of appeals issued its opinion. Pet. 3a. The court of appeals assumed that "the act of signing a referendum petition is speech, such that the First Amendment is implicated." Pet. 11a. "Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the [Public Records Act] to strict scrutiny." Pet. 12a.

The court of appeals held that "the district court's analysis was based on the faulty premise that the [Public Records Act] regulates anonymous political speech." Pet. 12a. The Ninth Circuit rejected the district court's conclusion that signing a referendum petition is anonymous political speech for several reasons. "First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." Pet. 12a. Moreover, "each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers." *Id.* In addition, as the court of appeals observed, "any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise." *Id.* "In fact, the [Public Records Act] provides to the contrary." *Id.* Finally, the Ninth Circuit observed that "Washington law specifically provides that both

proponents and opponents of a referendum petition have the right to observe the State's signature verification and canvassing process." *Id.* Accordingly, the court of appeals concluded that "[t]he district court's application of anonymous speech cases requiring strict scrutiny was error." Pet. 13a.

The Ninth Circuit next rejected the district court's reliance on *Meyer v. Grant*, 486 U.S. 414, 420–21 (1988) and *Buckley II*, 525 U.S. at 197, for the proposition that "any regulation of protected political speech is subject to strict scrutiny." Pet. 13a. According to the court of appeals: "This suggestion is unsupported by the applicable case law" because "it does not follow that a regulation that burdens [protected] speech is necessarily subject to strict scrutiny." Pet. 13a. In this respect, the court of appeals referred to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994), where this Court applied intermediate scrutiny to viewpoint- and content-neutral provisions of federal law that required cable television operators to carry local broadcast stations on cable systems. The court of appeals also pointed to *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), where this Court applied a balancing test, rather than strict scrutiny, to an election law that burdened First Amendment rights by banning write-in voting. Pet. 13a.

Having determined that the district court's application of strict scrutiny to the Act was error, the court of appeals then considered the appropriate constitutional standard. The court assumed that "signing a referendum petition has a 'speech' element such that petition signing qualifies as expressive

conduct" and further "assume[d] that the [Public Records Act's] public access provision has an incidental effect on referendum petition signers' speech by deterring some would be signers from signing petitions." Pet. 14a-15a. In light of these assumptions, the court of appeals concluded that the intermediate scrutiny standard of *United States v. O'Brien,* 391 U.S. 367 (1968), applies to the Act. Pet. 14a-16a. Applying the intermediate scrutiny test articulated in *O'Brien,* the court of appeals concluded that the Public Records Act furthers important government interests unrelated to suppression of speech, and the incidental effect on speech is no greater than necessary. Pet. 16a.

The court of appeals began its analysis of the government interests furthered by the Act by noting this Court's recognition of a state's "'compelling interest in preserving the integrity of the election process.'" Pet. 16a (quoting *Eu v. S.F. Cy. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989)). The court of appeals concluded that Washington's Public Records Act "plays a key role in preserving the integrity of the referendum process" by providing government transparency and accountability to the public generally. Pet. 17a. The court of appeals recognized that Washington's statute authorizing two opponents and two proponents of the referendum to view the Secretary's verification of signatures provides oversight by special interest groups, but does not provide oversight by the general public. Pet. 17a; Wash. Rev. Code § 29A.72.230.

The court of appeals then considered the Act's role in enabling the public to "make meaningful use" of state law authorizing Washington citizens to

challenge the Secretary's determination that the petition has sufficient signatures. Pet. 17a; Wash. Rev. Code § 29A.72.240. The court reasoned that without public disclosure, citizens could not inspect petition sheets and rationally determine whether they were dissatisfied with the Secretary's decision. This would render the superior court procedure "at best inefficient and at worst useless[.]" Pet. 17a-18a.

In addition, the court recognized that the State has an important "informational interest" in disclosure. Pet. 18a. The court explained that unlike campaign donors, "[r]eferendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect." *Id.* The public's interest in knowing who has taken legislative action "is undoubtedly greater" than knowing what groups favor or oppose a ballot issue. Pet. 19a.

Based on this analysis, the Ninth Circuit concluded that "each of the State's asserted interests is sufficiently important to justify the [Public Records Act's] incidental limitations on referendum petition signers' First Amendment freedoms," and held that the Act "as applied to referendum petitions does not violate the First Amendment." *Id.* Because the Sponsors failed to meet the first factor for a preliminary injunction—likelihood of success on the merits—the Ninth Circuit found it unnecessary to examine the remaining three factors. *Id.* n.14.

The court of appeals did not address the Sponsors' Count II claim specific to Referendum 71 because the district court based its preliminary

injunction on Count I, and did not did not consider Count II. Pet. 10a n.6.

The Sponsors filed their Petition For A Writ Of Certiorari on November 6, 2009.[4]

REASONS FOR DENYING THE WRIT

The Sponsors devote slightly more than one page of their petition to explaining why the Court should grant certiorari. Pet. 7-8. The bulk of the petition is devoted to arguing that the case satisfies the preliminary injunction standard. Pet. 9-33. Perhaps this is so because the Sponsors believe that their Petition For A Writ Of Certiorari is a mere formality, as the Court effectively made a decision to grant the writ when it issued the Order reinstating the district court's preliminary injunction. However, that Order expressly contemplates that certiorari may be denied because it provides: "Should the petition for a writ of certiorari be denied, this stay shall terminate automatically." Pet. 21a.

There is good reason for this provision. When the preliminary injunction was reinstated, the Ninth Circuit had not issued its opinion. Thus, it was possible that the court of appeal's decision might have required review by the Court. Now that the Ninth Circuit has issued its opinion, it is clear that there is no basis for certiorari. The Ninth Circuit's decision is not in conflict with another decision and there is no confusion in the circuits on the question presented in this case. Nor does this case present an

---

[4] On November 3, 2009, Washington voters approved Referendum 71.

important national question that requires review by this Court.

Although the Ninth Circuit has issued its opinion, the Sponsors do not discuss the opinion or explain why intermediate scrutiny is not appropriate. The Sponsors simply argue that the Public Records Act is subject to strict scrutiny because (1) it requires the release of referendum petitions that publicly disclose the signers' identity and belief that Referendum 71 should be on the ballot, and (2) laws relating to referendums are subject to strict scrutiny because referendums constitute core political speech. Both of these notions are incorrect.

The Ninth Circuit's application of intermediate scrutiny is a correct and routine application of the First Amendment. The Sponsors' petition should be denied.

A. The Sponsors' Petition Is Based On Two Incorrect Premises

The Sponsors' petition is based on two premises. The Sponsors' first incorrect premise is that the Public Records Act, the only Act that the Sponsors challenge, requires petition signers to publicly disclose their identity and their belief that Referendum 71 should be placed on the ballot. Pet. 10. In fact, Sponsors disclose this information to the public long before the Public Records Act comes into play. Petition signers publicly disclose this information during the referendum process, pursuant to state laws that the Sponsors do not challenge. Moreover, the Act does not require the Sponsors to disclose any information. Rather, the

Act applies only to government and requires only government to disclose public records.

The Sponsors' second incorrect premise is that the Act is subject to strict scrutiny because all matters relating to referendums, including signed referendum petitions, constitute core political speech, and the Act applies to such petitions. Pet. 17. In fact, content- and viewpoint-neutral statutes of general application that incidentally burden speech, such as the Act, are not subject to strict scrutiny. *Turner Broadcasting*, 512 U.S. at 661-62. The same is true of statutes regulating many aspects of the election process. *Buckley II*, 525 U.S. at 186.

1. The Public Records Act Does Not Require Petition Signers To Disclose Their Identity Or Belief To The Public—Signers Disclose That Information To The Public When They Sign Referendum Petitions

The premise that the Act requires petition signers to disclose their identity and belief to the public is wrong for two reasons.

The first flaw with this premise is the notion that a signer's name and address are only disclosed to the public when a petition is released in response to a public records request. In fact, voters disclose this information to the public when they sign the petition. As the court of appeals correctly explained, "the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition." Pet. 12a. The "petition sheet contains spaces for 20

signatures, exposing each signature to view by up to 19 other signers and any number of potential signers." *Id.* Moreover, this signer information is disclosed to the sponsor of the measure, and persons who gather signatures on behalf of the sponsor, and to anyone with whom they choose to share this information.

The Sponsors acknowledge this disclosure to the public, but argue it is not really public disclosure because the sponsor, signature gatherers, and other signers share a common cause. Pet. 11-12. This argument ignores the signature-gathering process. Individuals are asked to read the petition sheets, which openly display the signatures that have been gathered. Although some may choose to sign, other people may oppose the petition. Discussion and reading of the petitions ensures that the names of petition supporters are exposed to persons who do not agree with the cause.

In addition, nothing in Washington law prohibits sponsors, signature gatherers, or other signers from further disclosing or making use of the information for other purposes. For example, in California, petition circulators sought to use the names and addresses of voters who signed a prior petition to qualify a new measure for the ballot. They sought "to use the names and addresses of signers to mail to them blank petitions with a request that they circulate them and return the signed petitions to plaintiffs for filing[.]" *Bilofsky v. Deukmejian,* 177 Cal. Rptr. 621 (Cal. Ct. App. 1981). The circulators also sought to use this information "to mail notices to signers of campaign events and information concerning the progress of the campaign,

and to mail to them additional materials, including solicitations for funds, for purposes consistent with the objective of the campaign." *Id.* California law prohibited using voters' names and addresses on the petitions for any purpose other than qualifying the measure for the ballot. *Id.* There is no similar restriction in Washington. Indeed, a sponsor may sell the list of names and addresses to anyone.

In this case, it appears that the Sponsors did not gather the voters' signatures for the sole purpose of qualifying Referendum 71 for the ballot. The Referendum 71 petitions also had a space for the signers to provide their email addresses, even though state law does not require voters to provide their email addresses, and the Secretary does not use email addresses to verify voters' signatures. Protect Marriage Washington, the sponsor of Referendum 71, converted from a ballot committee to a Political Action Committee (PAC) after the election in November 2009. *See* http://www.pdc.wa.gov/QuerySystem/politicalcommittees.aspx. The PAC is not statutorily prohibited from using information it gathered on the initiative petition while it was a ballot committee. It would not be surprising if the names, addresses, and email addresses are now being used to solicit donations for the PAC. *See id.*

Given that voters publicly disclose their names and addresses when they sign the petition, any remaining associational privacy interest is very limited. In *Uphaus v. Wyman*, 360 U.S. 72 (1959), the Court affirmed a judgment of civil contempt for failure to comply with a court order to produce the names of individuals who stayed at a camp operated by World Fellowship, Inc. According to the Court,

the "individual rights in an associational privacy . . . were here *tenuous at best.*" *Id.* at 80 (emphasis added). This was because the records sought were already public. The Court explained that the "camp was operating as a public one, furnishing both board and lodging to persons applying therefor. As to them, New Hampshire law requires that World Fellowship, Inc., maintain a register, open to inspection of sheriffs and police officers." *Id.*; *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 550 (1963) ("the claim to associational privacy in *Uphaus* was held to be 'tenuous at best,' since the disputed list was already a matter of public record by virtue of a generally applicable New Hampshire law requiring that places of accommodation, including the camp in question, maintain a guest register open to public authorities.") (citation omitted).

This case presents an analogous circumstance. Washington laws that the Sponsors do not challenge require voters who seek a referendum to publicly disclose their names and addresses on the referendum petition. The subsequent availability of that information under the Public Records Act thus implicates no significant interest in associational privacy.

In sum, the Sponsors' premise that the Public Records Act requires public disclosure of their identities and beliefs is unsound. Voters disclose that information to the public when, as unchallenged state law requires, they decide to sign a referendum petition.

The Sponsors' premise that the Public Records Act requires them to disclose their identity and belief

to the public is incorrect for a second reason. The Act does not require voters to disclose any information. The Act imposes obligations only on government, requiring government to maintain public records and to disclose them upon request. The Act does not require petition signers to disclose any information to the public or to the government. Voters disclose their names and addresses on referendum petitions to the public and the government as a consequence of state election laws that the Sponsors do not challenge. Indeed, the Act does not impose any obligations on voters at all.

2. Laws Governing Initiatives And Referendum Are Not Always Subject To Strict Scrutiny

The Sponsors' second premise—that the Public Records Act is subject to strict scrutiny because it regulates referendum petitions, and all laws relating to the referendum process constitute core political speech—is also wrong for two reasons. First, the Act does not regulate referendum elections. It is a statute of general application that requires the disclosure of public records—including referendum petitions. Second, even if the Act is somehow viewed as an election regulation, laws governing initiative and referendum elections are not always subject to strict scrutiny.

The Court does not apply strict scrutiny to all laws that touch upon speech. Laws "that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."

Turner Broadcasting, 512 U.S. at 642 (citation omitted). The Ninth Circuit held that the Public Records Act was subject to intermediate scrutiny, and was valid under that standard. Pet. 14a-19a. The Ninth Circuit's decision is a correct application of the First Amendment. *See infra* pp. 32-36.

Nor are all laws that touch on any aspect of initiative or referendum elections always subject to strict scrutiny. The Court has referred to petition circulation, not to the entire referendum election process, as core political speech because petition circulation involves interactive communication—the exchange of ideas between the voter and the signature gatherer with respect to the proposed measure. *Meyer*, 486 U.S. at 421-22 ("the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *Buckley II*, 525 U.S. at 186 ("Petition circulation, . . . is 'core political speech,' because it involves 'interactive communication concerning political change.'"). Thus, "[p]etition circulation undoubtedly has a significant political speech component. When an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in 'interactive communication concerning political change.'" *Id.* at 215 (O'Connor, J., concurring in the judgment in part and dissenting in part).

Contrary to the Sponsors' premise, however, not every aspect of the referendum process is interactive communication, and not every law that governs initiative and referendum elections is subject to strict scrutiny. According to the Court in

Buckley II, "[s]tates 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." *Id.* at 191. "Not all circulation-related regulations target this [interactive communication] aspect of petition circulation . . . . Some regulations govern the electoral process by directing the manner in which an initiative proposal qualifies for placement on the ballot." *Id.* at 215 (O'Connor, J., concurring in the judgment in part and dissenting in part). "These latter regulations may indirectly burden speech but are a step removed from the communicative aspect of petitioning and are necessary to maintain an orderly electoral process. Accordingly, these regulations should be subject to a less exacting standard of review." *Id.*

The Court has adopted a flexible test to judge election regulations under the First Amendment. As the Court explained in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S. Ct. 1184, 1191-92 (2008): "Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are narrowly tailored to serve a compelling state interest. If a statute imposes only modest burdens, however, then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." (Citations and internal quotation marks omitted).

Signed petitions are released only after they have been publicly signed and submitted to the Secretary—that is when they become public records.

Disclosure under the Act is removed from the interactive communication that exists when a signature gatherer is trying to persuade a voter to sign the petition. In this respect, disclosure under the Act is like the circulator affidavit the Court approved of in *Buckley II*. There, state law required the petition circulators to "attach to each petition section an affidavit containing, *inter alia*, the circulator's name and address and a statement that he or she has read and understands the laws governing the circulation of petitions[.]" *Buckley II*, 525 U.S. at 188-89 (footnotes and internal quotation marks omitted). The affidavit was a "public record." *Id.* at 198. The Court approved of the affidavit requirement because it "does not expose the circulator to the risk of 'heat of the moment' harassment. *Cf.* 870 F. Supp. at 1004 (observing that affidavits are not instantly accessible, and are therefore less likely to be used 'for such purposes as retaliation or harassment'"). *Buckley II*, 525 U.S. at 199. The same is true with respect to the release of petitions under the Act. The State's interests in governmental transparency and accountability, and in providing voters with information, are important interests that justify this modest burden. *See infra* pp. 34-36.

Thus, if the Public Disclosure Act is viewed as an election regulation, it would not be subject to strict scrutiny because it does not implicate core political speech, and the burden it imposes on any remaining interest in associational privacy is modest indeed. It would be anomalous to subject a law of general application, such as the Act, to strict scrutiny in its application to referendum petitions,

when the Act would not be subject to strict scrutiny as an election regulation governing only such petitions.

B. This Case Does Not Meet The Criteria For Issuing A Writ Of Certiorari

The Sponsors spend slightly over one page in the petition explaining why the Court should grant the writ. But there is no basis for certiorari. There is no conflict or confusion in decisions of the court of appeals and, contrary to the Sponsors' claim, this case does not present an important national question that requires resolution by this Court.

1. The Ninth Circuit's Decision Does Not Conflict With Another Decision And There Is No Confusion Regarding The Application Of Strict Scrutiny In The Context Of Initiatives And Referendums

The Sponsors do not claim that the decision below conflicts with any other decision of the court of appeals, or the highest court of a state. Nor is there any confusion in the circuit decisions related to the Questions Presented. The Sponsors' first Question Presented asks whether the Public Disclosure Act is subject to strict scrutiny. Pet. i. The courts consistently draw the distinction between laws that restrict or regulate communicative conduct and laws that simply affect other aspects of the referendum or initiative process.

Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1085 (10th Cir. 2006), concerned a provision in the Utah Constitution requiring any

initiative relating to hunting to be passed by a two-thirds vote. The plaintiffs claimed that this requirement had a "chilling effect on their speech in support of wildlife initiatives in Utah" and argued that the requirement was subject to strict scrutiny, relying on *Meyer* and *Buckley II*. *Id.* at 1088, 1099. The Tenth Circuit refused to apply strict scrutiny, and upheld the requirement. The "distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Id.* at 1099-1100. Quoting the Tenth Circuit's analysis, the Second Circuit applied the same reasoning in *Molinari v. Bloomberg*, 564 F.3d 587, 599 (2d Cir. 2009) (quoting *Initiative and Referendum Inst.*, 450 F.3d at 1099-1100). So did the Sixth Circuit in *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993). In *Taxpayers United*, the court recognized that "the state may constitutionally place nondiscriminatory, content-neutral limitations on the plaintiffs' ability to initiate legislation. Unlike the challenged provisions in *Meyer*, Michigan's initiative system does not restrict the means that the plaintiffs can use to advocate their proposal. Further, the Michigan procedure does not limit speech on the basis of content." *Id.* at 297. The Eighth Circuit followed suit. In *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998), the court explained that "*Meyer* does not require us to subject a state's initiative process to strict scrutiny in order to ensure that the process be the most efficient or affordable.

Absent some showing that the initiative process substantially restricts political discussion . . . *Meyer* is inapplicable." Nor is there any confusion in the Ninth Circuit. *See Caruso v. Yamhill Cy. ex rel. Cy. Comm'r*, 422 F.3d 848, 855-56 (9th Cir. 2005) ("unlike the provisions challenged in *McIntyre* and *Meyer* (which respectively prohibited the distribution of anonymous campaign literature, and the payment of petition circulators), section 280.070(4)(a) governs the political process more than it does political speech.") (citations omitted). Finally, the Eleventh Circuit is also in accord. *Biddulph v. Mortham*, 89 F.3d 1491, 1498 (11th Cir. 1996), *cert. denied,* 519 U.S. 1151 (1997) ("The *Meyer* Court did not examine Colorado's initiative process as such. Rather, the Court indicated that a state, though generally free to regulate its own initiative process, is limited in the extent to which it can permissibly burden the communication of ideas about the political change at issue in an initiative proposal that occurs during petition circulation.") (citation and footnote omitted).

Thus, neither conflict between the courts nor confusion among the circuits—hallmark reasons for the grant of certiorari—is present in this case.

2. Contrary To The Sponsors' Claim, This Case Does Not Present An Important National Question

The Sponsors' only argument in support of certiorari is that this case presents an important question of whether citizens "may be constitutionally compelled to *publicly* disclose identifying information about *themselves* and their *support* for placing the measure on the ballot, or whether the

State interests are satisfied by *private* disclosure." Pet. 8.[5] Sponsors claim that this issue arises with great frequency because 27 states have some kind of initiative and or referendum procedure. *Id.* In fact, outside of this case, the Sponsors point to no other case that raises this question. Thus, the case hardly presents an important national issue warranting the attention of the Court.

Moreover, it is not unusual for initiative or referendum petitions to be released to the public. Every state in the union has some kind of public disclosure law. Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 722 (1980-1981).[6] Citizens have used these public disclosure laws to inspect initiative and referendum petitions. *State ex rel. Halloran v. McGrath*, 67 P.2d 838, 840 (Mont. 1937) (referendum "petitions or sections of petitions in the hands of the county clerk and recorder . . . are

---

[5] The Sponsors also suggest that this case provides an opportunity to address the application of the preliminary injunction standard in *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365 (2008), in a speech-protective manner, to the First Amendment context. Pet. 7 n.9. This is not a basis for certiorari. The Sponsors do not claim that the Ninth Circuit misapplied *Winter* or that there is any confusion about how to apply the *Winter* standard. It appears from the Sponsors' discussion (Pet. 29-31) that they simply invite the Court to take up clear, well-established, preliminary injunction standards, and jettison them in favor of standards that the Sponsors would prefer.

[6] When this article was written in 1980, Mississippi was the only state that did not have a law requiring disclosure of public records. Mississippi adopted a public disclosure law in 1983. Miss. Code Ann. § 25-61-1 (West 2009).

at that time and place subject to public inspection. It is undisputed that when the petitions come to the Secretary of State with the certificates of the county clerks they are public records and subject to inspection"); *State ex rel. Kernells v. Ezell*, 282 So. 2d 266, 269 (Ala. 1973) ("In the instant case, it seems clear that the appellant is entitled to inspect this 'public writing' in the hands of the probate judge, namely, the referendum petition, and that the trial court was in error in sustaining the motion to dismiss the petition for mandamus and in discharging the alternative writ under the allegations as disclosed by the petition.").

In some states, initiative and referendum petitions are public as a matter of law without a public records request. For example, Utah "[i]nitiative packets are public once they are delivered to the county clerks." Utah Code Ann. 1953 § 20A-7-206(7) (West 2009). In Utah, a "voter who has signed an initiative petition may have his signature removed from the petition by submitting a notarized statement to that effect to the county clerk." Utah Code Ann. 1953 § 20A-7-205(3)(a)(i) (West 2009). For this reason, opponents of a measure may "contact[] the petition signers to encourage them to remove their signatures from the petition." *Gallivan v. Walker*, 54 P.3d 1069, 1077 (Utah 2002).

Prior to the adoption of the Public Records Act, the Attorney General advised that names on initiative and referendum petitions were not public records because "[w]hile there is no specific statute on the precise question presented, the above statutes demonstrate, in our view, a tendency on the part of

the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege." 55-57 Op. Att'y Gen. 274 (Wash. 1956); Pet. 64a-65a. After the adoption of the Act in 1972, there has been a specific statute under which petitions are public records. The Secretary has released petitions concerning limiting motor vehicle charges, government regulation of private property, energy resource use, and long-term care services.

Despite the fact that initiative and referendum petitions have been released around the country for years, the question of whether the release violates the signers' First Amendment rights has never been raised until this case. This fact belies the Sponsors' claim that this case presents an important national question that must be resolved by this Court.

The Sponsors point to the fact that a website, http://knowthyneighbor.org/, has petition signer information on marriage issues in Arkansas, Florida, Massachusetts, and Oregon and allege that the purpose of the site is to encourage harassment and intimidation of the signers. Pet. 8. The Sponsors also argue that supporters of traditional marriage have been harassed and threatened because they oppose same-sex marriage or domestic partnerships between same-sex couples. Pet. 5-6. However, the claim that the petitions should not be released because of the possibility of harassment and threats is not before the Court.

In Count II of their complaint, the Sponsors claim releasing Referendum 71 petitions under the Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. Count II is based on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) and *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982). In these cases, the Court blocked the release of names of members of minority groups that hold views outside the mainstream, whose effectiveness may depend on protection from disclosure of private speech or identity. To prevail, the groups must show a "'reasonable probability' that the compelled disclosures [will subject those identified] to 'threats, harassment, or reprisals'" that will cause substantial harm to associational interests. *Brown*, 459 U.S. at 88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). Both the district court and the court of appeals expressly declined to reach Count II, and it is not before this Court. Obviously, if the Court denies the writ, the district court will have to rule on Count II.[7]

The Sponsors fail to demonstrate any reason to grant certiorari. The decision below is not in

---

[7] In *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217 (E.D. Cal. 2009), the district court refused to enjoin release of the names of individuals who contributed to Proposition 8, the California measure that banned same-sex marriage because plaintiffs "do not, indeed cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP."

conflict with another decision, there is no confusion in the circuits, and this case does not present an important national question.

C. The Ninth Circuit's Decision Is A Routine And Correct Application Of The First Amendment

The court of appeals held that the Public Records Act does not violate the First Amendment because it satisfies intermediate scrutiny. This decision is a correct application of the First Amendment, and does not require review by this Court.

The Court's precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting*, 512 U.S. at 642. Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny[.]" *Id.* On the other hand, "regulations that are unrelated to the content of speech are subject to an *intermediate level of scrutiny* because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.* (emphasis added, citations omitted).

The Public Records Act is subject to intermediate scrutiny because it is a statute of general application that is content and viewpoint neutral. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. "By contrast, laws that confer benefits or impose burdens on speech without

reference to the ideas or views expressed are in most instances content neutral." *Id.* Judged by this standard, the Act is content neutral. A 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). This definition does not distinguish between favored and unfavored speech. Nor does it single out particular speakers or content. State and local governments "make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]" Wash. Rev. Code § 42.56.070. No conditions are imposed on the release of public records based on favored or unfavored speech.

A statute satisfies intermediate scrutiny if: "[1] it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377). "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Turner Broadcasting*, 512 U.S. at 662 (internal quotation marks omitted).

The Public Records Act satisfies this standard. The State has two important governmental interests.[8] The first is an interest in government transparency and accountability. In the context of referendum signature petitions, this includes the ability of Washington citizens independently to evaluate whether the Secretary properly determined whether to certify or not to certify a referendum to the ballot. Washington election law expressly contemplates that any of its citizens "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 requires access to signature petitions. Without such access, persons dissatisfied with the Secretary's determination would not be able to evaluate whether the gross number of signature petitions submitted to the Secretary satisfied the constitutional minimum, whether the Secretary counted duplicate signatures, or whether the Secretary counted the signatures of persons who are not eligible to vote under Washington law. The interest in government transparency and accountability also includes the authority of citizens to determine whether persons who sign referendum petitions in violation of state law are subject to appropriate prosecution—in other words, to evaluate whether state law enforcement

---

[8] Although strict scrutiny is not the proper level of scrutiny, these governmental interests are compelling and narrowly tailored and therefore would satisfy that standard.

agencies are acting to enforce Washington election-related criminal laws. *See* Wash. Rev. Code § 29A.72.140 (requiring referendum petitions to warn of criminal penalties for knowingly (1) signing the same petition more than once, (2) signing when not a legal voter, and (3) making false statements on the petition).

The second important governmental interest is providing Washington voters the opportunity to know who has invoked the peoples' direct legislative power or, put somewhat differently, who supports the measure. When voters sign a referendum petition, they "order and direct" the Secretary to put the measure on the ballot. When voters sign a petition they are acting in their legislative capacity. *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) ("'A referendum or an initiative measure is an exercise of the reserved power of the people to legislate, and the people in their legislative capacity remain subject to the mandates of the [Washington] Constitution.'") (citations omitted).

The governmental interests in transparency and accountability, and providing information to the public, are unrelated to the suppression of free expression. In fact, these interests enhance free expression by allowing people to obtain information about their government so that they can make informed decisions.

Finally, if any incidental restrictions on First Amendment freedoms are caused by the Act (and in our view there are none), they are no greater than necessary to further the governmental interests. Public records are only released in response to a

request. Thus, any incidental impact on First Amendment freedoms exists only if a citizen requires the information and makes a request.

The Public Records Act satisfies intermediate scrutiny, and the Ninth Circuit decision upholding the Act on that basis is a correct application of the First Amendment. It does not require review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted.

ROBERT M. MCKENNA
Attorney General

William Berggren Collins*
Anne Elizabeth Egeler
Deputy Solicitors General
**Counsel of Record*

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

Dec. 7, 2009