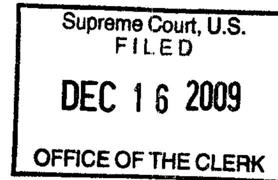

No. 09-559

In The
Supreme Court of the United States

John Doe #1, **John Doe #2**, and **Protect Marriage Washington**, *Petitioners,*

v.

Sam Reed et al., *Respondents.*

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

Reply to Opposition to Petition for Writ of Certiorari

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Sarah E. Troupis
Scott F. Bieniek
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)
Counsel for Petitioners

December 16, 2009

Table of Contents

I. Whether the First Amendment Protects Petition Signers from Compelled Public Disclosure Is an Important Question that Deserves the Attention of This Court. 1

II. This Case Should Be Taken by the Court Because the Ninth Circuit and Respondents Take a Position that Implicitly Overrules *NAACP v. Alabama* and Proclaims that Any Private Disclosure Justifies Unlimited Public Disclosure by the Government. 2

III. This Case Should be Taken by the Court Because the Ninth Circuit and Respondents Take a Position that Deviates from this Court's History of Analyzing Each Component of Disclosure Separately and Distinctly. 4

IV. The Procedural Posture Provides the Court with an Opportunity to Apply the Preliminary Injunction Standards in a Speech-Protective Manner. 7

V. Conclusion 10

Table of Authorities

Cases

Bates v. City of Little Rock,
361 U.S. 516 (1960) 3
Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999) 1, 6
Elrod v. Burns,
427 U.S. 347 (1976) 7
FEC v. Wisconsin Right to Life,
551 U.S. 449 (2007) 5, 6, 8
McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 6
Meyer v. Grant,
486 U.S. 414 (1988) 1
NAACP v. Alabama,
357 U.S. 449 (1958) 2, 3
Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 8
Perry v. City & County of San Francisco,
No. 09-17241 (9th Cir. Dec. 11, 2009) 7
The Shepherdstown Observer, Inc. v. Maghan,
No. 09-c-169 (Jefferson County, W.Va. 2009) . . . 9
Winter v. Natural Res. Def. Council,
129 S. Ct. 365 (2008) 7

Other Authorities

Thomas Harding, *Judge Sanders Keeps Petition Names Secret*, The Observer, Sept. 5, 2009 9

Casey Junkins, *Recht: Give FOP the Signatures*, The Intelligencer: Wheeling News-Register, Nov. 5, 2009 9

Casey Junkins, *Voters to Decide Cruiser Issue*, The Intelligencer: Wheeling News-Register, Aug. 19, 2009 8

Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 . . . . 9, 10

Blank Page

I. Whether the First Amendment Protects Petition Signers from Compelled Public Disclosure Is an Important Question that Deserves the Attention of This Court.

The Washington Secretary of State ("the Secretary") and Washington Families Standing Together ("WAFST") (collectively "Respondents") attempt to minimize the important First Amendment issues presented in this case by arguing that Washington's Public Records Act ("PRA") imposes only incidental burdens upon expressive association because it regulates the process of elections, not speech. (Sec'y Opp'n 21-36; WAFST Opp'n 17-19.) Accordingly, Respondents argue that the PRA is not subject to strict scrutiny. (*Id.*) Respondents are incorrect.

In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*Buckley-II*"), this Court decided that the First Amendment protects referendum petition circulators, *id.* at 197-200, because collecting signatures is "core political speech," *id.* at 186. The petition-signing conversation "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Id.* at 199 (*citing Meyer v. Grant*, 486 U.S. 414, 421 (1988)).

This case involves the same conversation, from the perspective of the person on the other side of the petition clipboard. The Court is asked to accept this case to decide whether petition signers are entitled to the same protection from compelled public disclosure by the First Amendment as petition circulators. This is an important question of federal law that has not been, but should be, settled by this Court.

II. This Case Should Be Taken by the Court Because the Ninth Circuit and Respondents Take a Position that Implicitly Overrules *NAACP v. Alabama* and Proclaims that Any Private Disclosure Justifies Unlimited Public Disclosure by the Government.

The Secretary states that "[s]igned 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." (Sec'y Opp'n 24; *see also* WAFST Opp'n 17-18.) Similarly, the Ninth Circuit makes the assumption that, because individuals signing a petition do so in public and know that their names will be submitted to the Secretary, they forfeit any First Amendment expectations or protections they may have against the subsequent unlimited public disclosure of the petitions. (Pet. 12a-13a.)

In effect, the Ninth Circuit and Respondents assert that individuals that engage in private political speech by signing a petition and associating with a group of like-minded individuals thereby waive any right they have to prevent the unlimited public release of their personal information. The ramification of this position is that the Ninth Circuit implicitly overrules the holding of this Court in *NAACP v. Alabama*, in which this Court drew an explicit distinction between private, associational disclosure and other types of disclosure. 357 U.S. 449 (1958). If *NAACP v. Alabama* is to be overruled, it should not be done implicitly by the Ninth Circuit, but explicitly by this Court. Thus, this case

presents an issue worthy of decision by this Court.

In *NAACP v. Alabama*, this Court prevented certain membership lists of the NAACP from being disclosed to the government. *Id.* at 467. The individual members of the NAACP who chose to exercise their First Amendment rights and associate with the NAACP were not subject to government disclosure merely because of association with the group. *Id.*; *see also Bates v. City of Little Rock*, 361 U.S. 516, 527 (1960) (preventing compelled disclosure of membership lists to government).

In contrast to *NAACP v. Alabama*, the Ninth Circuit's and Respondents' arguments presume that, because individuals associated with a group and disclosed themselves to that group, any further First Amendment rights regarding disclosure of their personal information—such as the disclosure to the government that was sought and denied by this Court in *NAACP v. Alabama*—is waived. Put simply, individuals that engage in a private disclosure should assume that disclosure is not private, but is public.

Taken to its conclusion, the Ninth Circuit's and Respondents' argument would allow an extraordinary level of intrusion into protected First Amendment rights. This argument would suggest that if a group such as the Federalist Society or the ACLU posted some of its prominent members on the internet to encourage support and establish it as a legitimate organization, the public should be allowed access to all members of the organization because there has been some public disclosure of the membership. Taken further, this argument would allow unlimited public disclosure of anything a person says or does, so long as the action was seen or heard by a member of the public—even if that private disclosure was not made in

public, and was only seen or heard by one other individual.

This position is even more troublesome when one considers that twenty-seven states have some sort of ballot measure provision. Even if the decision of the Ninth Circuit is limited to the Ninth Circuit, it impacts eight of the nine states located within the Circuit, each of which have ballot measure provisions.

III. This Case Should be Taken by the Court Because the Ninth Circuit and Respondents Take a Position that Deviates from this Court's History of Analyzing Each Component of Disclosure Separately and Distinctly.

Respondents and the Ninth Circuit take the position that, once one aspect of disclosure has satisfied the First Amendment, no further analysis of the First Amendment on subsequent disclosure need be made. (Sec'y Opp'n 17-21; WAFST Opp'n 16-18; Pet. 16a-19a.) In other words, Respondents "piggy back" the unlimited release of the petition signers on their First Amendment analysis of the limited government disclosure and private disclosure, which should be separately analyzed.

The ramification of this position is that the Ninth Circuit and Respondents deviate from the long history of this Court analyzing each component of disclosure separately and distinctly to determine whether individuals' First Amendment rights are being adequately protected. The Ninth Circuit decided this case without separately analyzing each aspect of disclosure; if this is the position that should now be taken in the Ninth Circuit and those states where there are ballot mea-

sures, this is something that this Court, rather than the Ninth Circuit, should determine. Thus, this case presents an issue worthy of decision by this Court.

To understand the ramifications of the position taken by the Ninth Circuit and Respondents, one must look at the three distinct levels of disclosure implicated in the present case. (Pet. 11-16.)

The first disclosure occurs when an individual opts to sign a petition. The disclosure includes a decision to associate with the individual or group sponsoring the petition. It also includes limited disclosure to a small number of individuals who either opt to sign the same petition sheet or who review the sheet and decide not to associate. (Pet. 11-12.)

The second type of disclosure occurs when the group sponsoring the referendum submits the petitions to the state.[1] This limited disclosure is necessary to determine whether the petition received a sufficient number of signatures to receive a place on the ballot. (Pet. 12-13.)

The third type of disclosure that the Ninth Circuit and Respondents allege must occur is unlimited public disclosure of the petition signers. (Pet. 13.)

The concept that each of these aspects of disclosure must be separately analyzed for its impact on protected First Amendment rights is not a new or unique concept; this Court often analyzes the distinct effects of the First Amendment upon separate aspects of a law. *See, e.g.*, *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) ("*WRTL-II*") (rejecting "prophylaxis-upon-

[1] Presumably, had the petitions not contained the requisite number of signatures to place R-71 on the November 2009 ballot, the only type of disclosure that would have occurred would have been the first—private disclosure.

prophylaxis approach"); *Buckley-II*, 535 U.S. at 182 (analyzing each aspect of a law dealing with petition signers and the application of the Constitution to those aspects of the law separately).

Here, neither Respondents nor the Ninth Circuit *perform this separate and distinct analysis of the First* Amendment on the third type of disclosure—unlimited public disclosure. Instead, their arguments presume that, because limited disclosure may have been appropriate with the first two types of disclosure—private disclosure and limited government disclosure—that an individual waives his or her First Amendment rights with regard to the third type of disclosure—unlimited public disclosure.

Under the Ninth Circuit's and Respondents' position, this Court would have only needed to analyze one aspect of the restrictions on the petition circulators in *Buckley-II* to find that all of the restrictions are constitutionally sound, or that all of the restrictions are constitutionally unsound. However, this analysis was expressly refuted in *Buckley-II*, which looked at the various regulation imposed by Colorado's restrictions *on circulators separately, to determine the constitu*tionality of each of those separately. *Buckley-II* at 192; *see also McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337 (1995) (protecting the right to anonymously distribute political handbills even though author had identified herself on some distributed handbills); *WRTL-II*, 551 U.S. at 479 (rejecting "prophylaxis-upon-prophylaxis approach"). The Ninth Circuit and Respondents espouse a position that deviates from this Court's history of analyzing each instance of disclosure separately, to determine whether proper First Amendment protections are being given to individuals at each instance where disclosure occurs.

IV. The Procedural Posture Provides the Court with an Opportunity to Apply the Preliminary Injunction Standards in a Speech-Protective Manner.

As set forth above and in the Petition, this case presents the Court with an opportunity to answer important questions of federal law that have not been, but should be, decided by this Court. WAFST argues that the procedural posture makes the case a poor vehicle to resolve the legal issues. (WAFST Opp'n 10-14.) WAFST is incorrect.

The procedural posture illustrates the wisdom of deciding the important questions presented at the earliest possible juncture because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The case also provides the Court with an opportunity to apply the standards for a preliminary injunction, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008), in a manner that is speech- and association-protective. (*See also* Pet. 29-34.)

At stake are the speech and associational rights of more than 138,000 citizens that signed the R-71 petition, as well as countless other signatories to referendum and initiative petitions in Washington and throughout the nation. The potential chilling effect on the freedoms of speech and association resulting from the Ninth Circuit's opinion and analysis are substantial and deserve the attention of this Court. *See Perry v. City & County of San Francisco*, No. 09-17241 (9th Cir. Dec. 11, 2009) (justifying exercise of mandamus jurisdiction in part because of potential chilling effect on First Amendment rights of otherwise un-appealable

discovery order). Once names are released, there is no way to un-ring the bell, even if this Court were to later rule for Petitioners.

Moreover, the issues here are primarily legal and do not require a developed factual record.[2] *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justifications raised."). In close cases, the tie must always be drawn in favor of the speaker, *WRTL-II*, 551 U.S. at 474, especially at the preliminary injunction stage where the issue is the preservation of the status quo, i.e., no-law or non-disclosure, as the parties litigate the important First Amendment issues. The procedural posture of the case should not dissuade this Court from answering the important questions of federal law presented given the potential chilling effect on political speech connected to one of the purest forms of democracy: self-governance through the initiative and referenda process.

Illustrating the importance of the questions presented are similar cases proceeding in West Virginia involving referenda. One concerns a city ordinance requiring two police officers in every cruiser. *See* Casey Junkins, *Voters to Decide Cruiser Issue*, The Intelligencer: Wheeling News-Register, Aug. 19, 2009.[3] The Fraternal Order of Police opposed the referendum and

---

[2] Petitioner's second count—relating to the threats, harassment, and reprisals suffered by supporters of traditional marriage—is more fact-intensive. It is not before the Court.

[3] *Available at* http://theintelligencer.net/page/content.detail/id/527357.html.

was granted access to petition signers' names. *See* Casey Junkins, *Recht: Give FOP the Signatures*, The Intelligencer: Wheeling News-Register, Nov. 5, 2009.[4] The chilling effect of an organization such as the Fraternal Order of Police having access to a petition adverse to its interest is self-evident.

The other case involved a referendum directed at a land-use planning ordinance. A newspaper sued after its Freedom of Information Act request for copies of the petitions was denied. *See* Thomas Harding, *Judge Sanders Keeps Petition Names Secret*, The Observer, Sept. 5, 2009.[5] The judge, recognizing the important First Amendment issues, dismissed the case, stating that "making the names of those individuals who signed the petitions [public] would have a chilling effect on the ability of citizens to petition the government." *The Shepherdstown Observer, Inc. v. Maghan*, No. 09-c-169, Order of Dismissal at 6 (Jefferson County, W.Va. 2009) (*available at* http://jeffersoncountyclerkwv.com/).[6]

Further, technology has exponentially increased the chilling effect that compelled public disclosure has upon protected First Amendment activity, and thus, the effect of the Ninth Circuit's opinion. (Pet. at 18-23.) This is illustrated by the Secretary's own comments explaining the history of petition disclosure in Washington. "[F]rom 1998 to 2006 nobody followed through on a public records request for such documents because

---

[4] *Available at* http://www.theintelligencer.net/page/content.detail/id/530542.html.

[5] *Available at* http://www.wvobserver.com/2009/08/judge-sanders-keeps-petition-names-secret/.

[6] Available at http://jeffersoncountyclerkwv.com/.

it was far too expensive."[7] Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/). Thus, despite a policy change in 1998, the chilling effect of public disclosure remained hypothetical because no one requested copies. Today, the chill is real. *See* http://www.knowthyneighbor.org (posting the names and addresses of petition signers in Arkansas, Florida, Massachusetts, and Oregon, and threatening to do the same in Washington). The Secretary is prepared to disclose copies of the R-71 petition if the Ninth Circuit's opinion is allowed to stand. Release will result in immediate and irreparable injury to the speech and associational rights of more than 138,000 Washington citizens as well as untold others in future referenda across the country. This makes the questions presented important questions of law deserving this Court's attention.

V. Conclusion

As set forth above and in the Petition, Respondents and the Ninth Circuit have taken a simple position: the

[7] The PRA was adopted in November 1972 and became effective January 1, 1973. Until 1998, the Secretary took the position that referendum petition sheets were not subject to public disclosure under the PRA, a policy consistent with that of the Secretary prior to the adoption of the PRA. Brian Zylstra, *The Disclosure History of Petition Sheets*, Wash. Sec'y of State Blogs, Sept. 17, 2009 (*available at* http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets/); *see also* Pet. 3-4.

individual circulating a referendum petition in Washington is granted more First Amendment protections than the individual who is signing the petition. Such a position is contrary to law and logic. For the reasons stated here and in the Petition, this Court should grant this petition.

Respectfully submitted,

James Bopp, Jr.,
Counsel of Record
Richard E. Coleson
Sarah E. Troupis
Scott F. Bieniek
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
812/232-2434
812/235-3685 (facsimile)

Blank Page