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, Secretary of State of Washington; and Brenda Galarza, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Respondents

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

Respondent Washington Families Standing Together's Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether Washington's Public Records Act, which requires disclosure of public records to protect the public interest, violates the First Amendment when applied to require public disclosure of copies of referendum petitions, which are typically signed in public without promise or suggestion of confidentiality and thereafter intentionally submitted to state election officials for the purpose of placing the referendum on the ballot.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, both Washington Families Standing Together ("WAFST") and Washington Coalition for Open Government are Defendants-Intervenors below.

WAFST has no parent corporation and no publicly held company owns any stock in it.

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Brief in Opposition to Petition for Writ of Certiorari for Washington Families Standing Together

I. OPINIONS BELOW

The decision of the court of appeals is reported at ___ F.3d __, 2009 WL 3401297 (9th Cir. Oct. 22, 2009). The district court's order and opinion, which granted a preliminary injunction in favor of Plaintiffs below and was reversed by the court of appeals, is unreported. Pet. App. 23a.[1]

II. JURISDICTION

Respondent WAFST agrees that jurisdiction under 28 U.S.C. § 1254(1) is proper.

III. PERTINENT STATUTES AND RULES

The relevant statutes and rules are included in the appendix to the Petition for Writ of Certiorari ("Petition" or "Pet."). Petitioners claim that Washington's Public Records Act, Chapter 42.56 Wash. Rev. Code, which requires public records to be available to the public, violates the First Amendment (Pet. App. 46a) when applied to required public disclosure of copies of referendum petitions, which are submitted to state election officials for the purpose of placing a referendum on the ballot pursuant to the Washington Constitution, article II, § 1(b) (Pet. App. 46a) and Chapter 29A.72 Wash. Rev. Code.

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[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed by Petitioners John Doe #1, John Doe #2, and Protect Marriage Washington.

The following are appended because they are not included in the appendix to the Petition: Washington Constitution article II, section 1 (App. 1a); Wash. Rev. Code § 29A.72.010 (App. 5a); Wash. Rev. Code § 29A.72.100 (App. 6a); Wash. Rev. Code § 29A.72.130 (App. 6a); Wash. Rev. Code § 29A.72.150 (App. 8a); Wash. Rev. Code § 29A.72.160 (App. 8a); Wash. Rev. Code § 42.56.030 (App. 9a).

IV. STATEMENT OF THE CASE

A. The Referendum Process in Washington State

Petitioner Protect Marriage Washington ("PMW") was the sponsor and principal proponent of a referendum petition ("Referendum 71") (Pet. App. 29a) that qualified for Washington's statewide election ballot in November 2009. Pet. 2. The John Doe petitioners signed the petition to place Referendum 71 on the ballot and thereafter objected to the public disclosure of copies of the petitions bearing their signatures. Pet. 2.[2]

The Washington Constitution reserves to the people of Washington State the power to require voter approval of any bill adopted by the legislature through the referendum process. Wash. Const. art. II, § 1(b) (Pet. App. 46a). This process begins when referendum proponents file their proposed

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[2] Petitioners do not challenge the constitutionality of Washington's referendum process. Pet. 11. The First Amendment issue raised in this case, however, must be considered in context with the referendum laws in Washington and how they were applied to Referendum 71.

referendum with the Secretary of State, Wash. Rev. Code § 29A.72.010 (App. 5a), and then circulate petitions for signatures of registered voters, Wash. Rev. Code § 29A.72.150 (App. 8a).

The unchallenged referendum petition statute requires the petitions to be in a certain form. In particular, signers must print and sign their names, and state their address, including the city and the county in which they are registered to vote. Wash. Rev. Code § 29A.72.130 (App. 6a). Each referendum petition sheet is to have "lines for not more than twenty signatures," Wash. Rev. Code § 29A.72.100 (App. 6a), and the petition for Referendum 71 had exactly twenty. Pet. App. 29a-30a. Thus, each person who is asked to sign the petition can observe, record, and even copy the names and addresses of the voters who have already signed the same sheet (or attached sheets). Petition gatherers and proponents of the referendum petition are under no obligation to keep the petitions confidential and may use them for fundraising, canvassing, and other political purposes without restriction.

Signatures for the Referendum 71 petitions were gathered in public locations across the State of Washington, including several churches and outside retail stores such as Wal-Mart, Target, and Fred Meyer. ER 068-069.[3]

After gathering a sufficient number of signatures, referendum petition proponents are to file the signed petitions with the Secretary of State

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[3] "ER" refers to the Excerpt of Record filed with the court of appeals.

by no later than 90 days after the final adjournment of the session of the legislature which passed the act. Wash. Rev. Code §§ 29A.72.150, 160 (App. 8a). PMW filed most of its petitions with the Secretary of State by the deadline for filing such petitions. PMW, however, failed to timely file all of the signed petitions it had gathered, and the Secretary of State refused to accept the late-filed petition sheets. PMW's Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order, served in *Washington Families Standing Together v. Secretary of State Sam Reed*, Superior Court of the State of Washington for King County, Case No. 09-2-31908-1 SEA. PMW maintained those rejected, signed petitions in its possession, with no obligation to keep them confidential.[4] Indeed, even with respect to petitions submitted and accepted by the Secretary of State, the proponents were free to make and retain copies of the petitions and to utilize them for fundraising, canvassing, and analysis to help focus their political activity regarding the referendum (or for any other political purpose).

The Secretary of State is tasked with verifying and canvassing the names and signatures on the petitions to ensure that they are of registered voters, to eliminate any duplication and to determine that the minimum number of valid signatures exists to place the measure on the ballot. Wash. Rev. Code § 29A.72.230 (Pet. App.

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[4] In fact, there is no way of knowing whether the John Doe petitioners signed petitions that were actually filed with the Secretary of State—and thus subject to public disclosure—or whether the sheets they signed were part of the group that PMW submitted late and were rejected.

49a). This verification and canvassing process is open to public observation by both proponents and opponents of the referendum petition. *Id.* With Referendum 71, which had generated public interest and media attention, the verification and canvassing stage was also open to members of the media. ER 078-079. Copies of the petitions were thus publicly available during the review process, allowing media and campaign representatives to view individual names, signatures and addresses without obstruction.[5]

Any citizen who disagrees with the Secretary of State's determination on the validity or the number of the petition signatures may apply to Washington superior court for a review of that

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[5] Although the Secretary of State has adopted rules to preclude the observers from recording or disclosing individual names on the petitions during the evaluation process, *see* Declaration of Mona Smith in Support of Plaintiff's Motion for Temporary Restraining Order Ex. A, filed in *Washington Families Standing Together v. Secretary of State Sam Reed*, Superior Court of the State of Washington for King County, Case No. 09-2-31908-1 SEA, Dkt. # 3B, at least for Referendum 71, the rule was neither effectively nor uniformly enforced. Indeed, the *proponents* of the referendum petition (Petitioners here) violated that very rule by not only taking note of the name of an individual who signed the petition, but by *contacting a relative of that individual*, all in express violation of the Secretary of State's rules. Declaration of Amanda J. Beane in Support of Plaintiff's Motion for Injunctive Relief, Exhibit B: Declaration of Kevin J. Hamilton in Support of Plaintiff's Motion for Temporary Restraining Order ¶ 8, filed in *Washington Families Standing Together v. Secretary of State Sam Reed*, Superior Court of the State of Washington for Thurston County, Case No. 09-2-02145-4, Dkt. # 7.

determination. Wash. Rev. Code § 29A.72.240 (Pet. App. 50a). The court and parties to such litigation must be able to examine the signatures to determine their validity. If the court determines that the petition contains the required valid signatures, then the referendum is placed on the ballot at the next general election. Wash. Const. art. II, § 1(d) (App. 4a).

B. Washington's Public Records Act

Washington's Public Records Act, Chapter 42.56 Wash. Rev. Code (the "PRA"), mandates that public records be made available for public inspection and copying. Wash. Rev. Code § 42.56.070 (Pet. App. 56a.) The PRA—itself adopted pursuant to Washington's initiative process—is designed to promote transparency in government and access to governmental records. In the words of the statute, "[t]he 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. 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 (App. 9a). This Court has routinely recognized public disclosure is an important interest. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (holding that public disclosure constitutes a substantial government interest on public informational, anti-corruption and record-keeping grounds); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment"). Petitioners

acknowledge that the Secretary of State considers referendum petitions filed with the Secretary of State to be part of the legislative process and public records.

C. Petitioners' Action

Soon after PMW filed the signed petitions for Referendum 71 with the Secretary of State, several entities made public records requests for the petitions, pursuant to the PRA. Pet. App. 30a-31a. Later, after it had initiated legal proceedings in superior court challenging the Secretary of State's determination of the validity of signatures for the referendum, WAFST also filed a public records request. WAFST's purpose was to obtain access to sufficient information to determine if there were irregularities relating to the signatures that the Secretary of State had counted.

On July 28, 2009, Petitioners filed a Complaint against Defendants ("Complaint") and a Motion for a Temporary Restraining Order and Preliminary Injunction ("Motion"). The Complaint set forth two causes of action: (1) that the PRA "violates the First Amendment as applied to referendum petitions because the [PRA] is not narrowly tailored to serve a compelling government interest"; and (2) that the PRA "is unconstitutional as applied to the Referendum 71 petition because there is a reasonable probability that the signatories of the Referendum 71 petition will be subjected to threats, harassment, and reprisals." ER 475 at ¶ 62 & 65. The Complaint alleged that the proponents of the Referendum 71 petition, a referendum which sought to repeal a domestic partnership law enacted in Washington State, had

been, or imagined that they would be, subject to various threats and harassment. ER 470 at ¶ 25. The Motion, which sought to enjoin the release of the petitions, was supported by a single declaration—that of Petitioners' own attorney. ER 088-091. This declaration attached exhibits of various websites and newspaper articles, declarations from litigation in California, and opinions from other cases, none of which involve Petitioners.

The district court granted the Temporary Restraining Order ("TRO") on July 29 and, despite the temporal restrictions imposed by Federal Rule of Civil Procedure 65(b), extended its effect for more than a month and ordered that the preliminary injunction hearing take place on September 3. Petitioners then moved to consolidate the preliminary injunction hearing with a trial on the merits; Defendants opposed this motion. On September 1, Petitioners filed three additional declarations in support of their Motion purporting to show that petition signers faced harm if their identities were disclosed, and the identities of the declarants themselves were redacted. ER 024-043.

Before the preliminary injunction hearing, WAFST moved to intervene in the action, having by that time filed its legal challenge to the signature verification and made its PRA request for the petitions. WAFST has an interest in an open and public referendum process and sought the ability to scrutinize the petition signatures for forgery or fraud under the applicable statutes. The district court granted WAFST's intervention motion.

At the preliminary injunction hearing on September 3, the district court entertained oral argument but did not take any testimony. At the conclusion of the hearing, the district court extended the TRO and took the motion for preliminary injunction under advisement, while denying Petitioners' motion to consolidate the preliminary injunction hearing with a trial on the merits (implying that there were further factual issues to be resolved before a permanent injunction should issue). ER 018.

On September 10, the district court granted the preliminary injunction. Pet. App. 23a. The district court held that Petitioners were likely to succeed on the merits of Count I and therefore did not reach Count II. Pet. App. 43a. Defendants and Intervenors appealed from this Order, and after expediting the appeal, the court of appeals reversed. Pet. App. 1a. On October 20, in response to Petitioners' emergency application, this Court stayed the court of appeals' reversal, thus preserving the district court's preliminary injunction to allow consideration of this petition for a writ of certiorari. Pet. App. 21a.

V. REASONS FOR DENYING THE PETITION

The Petition should be denied. This case is a particularly poor vehicle for consideration of the issues raised: the record is notably incomplete, procedurally complicated, and the issue at hand involves neither a Circuit split nor an issue of fundamental importance that would warrant review at this stage.

The vast majority of the Petition is spent arguing that the court of appeals was wrong on the merits. Petitioners, however, fail to explain why the Court should grant the Petition. Petitioners apparently contend that the Court should act as a court of error correction, regardless of whether the case is otherwise proper for a writ of certiorari. With all due respect and for the reasons set forth below, the Petition should be denied.

A. This Case Is a Poor Vehicle for Resolving Whether the Disclosure of Referendum Petitions Complies With the First Amendment

1. The Factual Record Is Limited and Undeveloped and Cannot Support an Inquiry into the Petitioners' Challenges

Petitioners claim that the public disclosure requirement of the PRA as applied to signatures on petitions submitted as part of the State of Washington's referendum process violates the First Amendment. To support this argument, Petitioners assert that disclosure of their signatures compels them to speak, that such compelled speech is subject to strict scrutiny, and that the government's regulation of this speech is not narrowly tailored to a compelling government interest. The resolution of these questions requires a developed factual record that does not exist in this case. The district court granted the preliminary injunction a little over 30 days after Petitioners filed their Complaint, and the record consists of only a handful of declarations untested by cross-examination and most of which involve

unrelated individuals in other states under markedly dissimilar circumstances. None of the Petitioners have been deposed; no discovery has occurred with respect to the Petitioners' own use of the copies of the petitions they retained; and no discovery has occurred with respect to the expectations of those signing the petition. Indeed, it is not even clear that the Petitioners here were included on petitions timely filed with the Secretary of State.

In contrast, Supreme Court cases considering as-applied challenges to election and petition processes on First Amendment grounds rely on well-developed records. For example, in *Buckley v. American Constitutional Law Foundation Inc.*—cited heavily by Petitioners—the Court granted certiorari and issued an opinion only *after* discovery, cross-motions for summary judgment and a full bench trial. Throughout its opinion, the Court cited to the well-developed trial record to evaluate First Amendment challenges to three Colorado state petition process regulations. *See* 525 U.S. 182, 193-94, 198 (1999); *see also id.* at 219-220 (O'Connor, J. concurring); *id.* at 229 (Rehnquist, J. dissenting). The majority, a concurring opinion, and the dissenting opinion each found trial testimony crucial in helping to confirm statistical representations, the full extent of the burden imposed on free speech, and the actual chilling effects of each regulation.

Similarly, in *Meyer v. Grant*, a unanimous Court relied extensively on the trial testimony of an appellee to determine whether the act of gathering petition signatures (an activity that is similar to the signing of a referendum petition) was core

political speech. 486 U.S. 414, 421 n.4 (1988). In a case where, as here, it was unclear whether an expressive activity qualified as core political speech, the Court used detailed trial testimony about the nature of the activity to make an informed determination.

Here, crucial factual questions remain unanswered because of the procedural posture of the case.

First, there is almost no evidence as to whether petition signers had any expectation of anonymity when signing. In fact, the limited evidence indicates that the collection of signatures occurred in public locations and on petition forms that on their face publicly disclosed up to 19 *other* names, signatures, and addresses, thus making implausible the suggestion that those who signed had any expectation of anonymity.

Second, there is no evidence on whether anyone, much less a significant number, would have been—or were—discouraged from signing the petitions because of an apprehension of disclosure of the petitions to the public. Indeed, the record demonstrates quite the opposite. PMW was able to collect a sufficient number of signatures to place the referendum on the ballot, demonstrating the absence of any significant or measurable burden on First Amendment rights. At a minimum, the record is significantly undeveloped on this point and, as postured at present, is ill-suited for this Court's consideration of the issue.

Third, the record is woefully incomplete with respect to the centerpiece of PMW's case: the

alleged threats posed to those whose names appear on the petitions and who fear threats or abusive responses from their fellow citizens. The record consists of a small handful of cursory declarations, many of which concern incidents occurring in California or elsewhere. None of the declarants themselves have been deposed, nor have any of the other signatories (much less those who are accused of making harassing or threatening statements).[6] Indeed, it would not be difficult to identify similar statements in the press, on the Web, or elsewhere about virtually *any* issue of public concern, and before this Court considers this issue, it should have a complete record before it.

Given the procedural posture and inadequate record of this case, it is not an appropriate vehicle to decide the First Amendment questions implicated by the Petition.

2. The Issues Presented Have Not Been Addressed by Other Courts

The Petition identifies no opinion from any other court of appeals or state court on point and essentially concedes there is no split of authority regarding the questions presented. Accordingly, not only has this case not been fully developed at the district court level, but the overarching

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[6] Indeed, even the limited record before the lower courts demonstrated the perils of an incomplete record. PMW affidavits suggested threats had been made to force "uncomfortable conversations," but as the court of appeals noted, the full quotation reveals the misleading nature of the partial quotation and the entirely appropriate (and non-threatening) statements. Pet. App. 9a n.4.

question of whether disclosure of referendum petitions violates the First Amendment has not percolated through the federal or state courts. This case is therefore not an appropriate vehicle to decide the constitutionality of disclosing referendum petitions. *See Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (justifying the denial of certiorari because of "the absence of a direct conflict among the Circuits"); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (reaffirming that conflict among lower courts is "[a] principal purpose" of granting certiorari); *United States v. Seckinger*, 397 U.S. 203, 204 (1970) (explaining that grant of certiorari was to rectify "divergent results that the lower courts have reached in construing the same or similar provisions"). Given the far-reaching implications of a ruling, the Court should allow the lower courts to consider these issues in the first instance.[7]

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[7] There is, of course, no urgency at this point for resolving the dispute at hand. At the 2009 general election, Washington voters overwhelmingly passed Referendum 71, thus approving the expanded domestic partnership law enacted by the Washington Legislature. Moreover, allowing other courts to consider the issue in a variety of factual contexts may ultimately make consideration by this Court unnecessary.

B. The Questions Presented Are Not Important Issues of Law That Conflict with the Decisions of This Court

1. The Issues Presented Are Not Important Questions of Federal Law

Although the Petition asserts that the questions presented are important questions of federal law that should be decided by this Court, it does nothing, other than identify the fact that other states have initiative and referendum laws, to support this argument. The fact that other such laws exist in other states cannot possibly be sufficient to establish the type of important question that should be decided by this Court before a proper record has been developed below and before the questions presented have been allowed to percolate through the lower courts.

2. The Court of Appeals' Decision Is Correct and Does Not Conflict with Decisions of This Court

Even if this Court were to reach the merits, certiorari is not warranted because the court of appeals correctly concluded that the district court erred in finding that the speech at issue is anonymous and in applying strict scrutiny. The court of appeals appropriately applied intermediate scrutiny and held that the state had important interests at stake when disclosing referendum petitions under the PRA and that disclosure did not directly burden speech. Thus, even if this Court were to reach the merits (and WAFST submits that it need not do so), the Petition should nonetheless be denied.

a. The Referendum Process Is an Inherently Public Process

The limited record below establishes that the entire referendum process is open to public inspection from beginning to end. Signatures are gathered in public places, and in front of petition circulators, other petition signers and anyone else who may be standing near the petition signer. After a voter signs a petition, other voters may sign on the same page below, and those later signers can see all the information of the previous signers. The referendum petition proponents have no obligation to keep those signatures confidential, and in fact, they cannot keep them private because they are required to submit them to the Secretary of State's office for verification and canvassing. Staff at the Secretary of State's office reviews the signatures, and both proponents and opponents of the referendum petition can observe the process. Additionally, a citizen who is dissatisfied with the Secretary of State's determination can challenge it in court, where the parties can examine the signatures and review the Secretary of State's canvass. Thus, at every step in the process, the signatures are not private and signers can have no reasonable expectation of confidentiality.[8]

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[8] Additionally, whether the petition signers actually had an expectation of anonymity is not developed in the factual record below and, as discussed in Section V(A)(1), that fact is a compelling reason why the Petition should be denied.

b. The PRA Is Constitutional as Applied to Referendum Petitions

Intermediate scrutiny is applied where a regulation has only an incidental effect on expressive conduct. Here the public act of signing a referendum petition is expressive conduct with a speech element, much like burning a draft card in *O'Brien*. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008) (finding school uniforms to be a form of expressive conduct and applying intermediate scrutiny to uphold the school policy); *Bar-Nevon v. Brevard County Sch. Bd.*, 290 Fed. Appx. 273 (11th Cir. 2008) (assuming wearing of jewelry by students to be expressive conduct and applying intermediate scrutiny); *Vlasak v. Super. Ct. of Cal.*, 329 F.3d 683, 690-91 (9th Cir. 2003) (concluding that actions at protest were expressive conduct and applying intermediate scrutiny). Furthermore, the court of appeals correctly concluded that the PRA imposes only an incidental burden on potential petition signers. Pet. App. 14a at *15. Specifically, there is no evidence in the record to conclude any potential petition signers actually refused to sign petitions that they otherwise supported because they were concerned that their signatures might become part of the public record.[9] The court of appeals

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[9] The lack of a record on this issue further illustrates why this case is not appropriate for the Court's review. Moreover, as noted above, the limited record before the Court in fact suggests that few, if any, voters were dissuaded from signing the Referendum 71 petitions for fear of public disclosure since the petition proponents collected a sufficient number of signatures to qualify the measure for the ballot.

accordingly did not err in concluding that the appropriate standard is intermediate scrutiny. Pet. App. 14a at *14.

Under intermediate scrutiny, the PRA as it applies to petitions submitted as part of the referendum process is constitutional if it (1) falls within the constitutional power of the state, (2) furthers an important state interest that is unrelated to the suppression of free expression, and (3) has an incidental restriction on First Amendment rights that is no greater than necessary to justify the interest. *O'Brien*, 391 U.S. at 377; Pet. App. 16a at *16. Under this standard, the PRA as applied to referendum petitions is constitutional.

The State asserted two interests, both of which are unrelated to any alleged suppression of free expression: (1) preserving the integrity of elections by promoting accountability and transparency, and (2) providing information to voters regarding support for placing a referendum measure on the ballot. The court of appeals correctly concluded that these are both important interests, and in fact, that preserving the integrity of elections is a compelling state interest. *See Eu v. San Francisco County Democratic Centr. Comm.*, 489 U.S. 214, 231 (1989). The court of appeals also correctly concluded that the incidental effect of the PRA on speech was no greater than necessary. Pet. App. 19a at *20.

For these reasons, the court of appeals opinion is consistent with this Court's First Amendment jurisprudence. This case is, in any event, simply not an appropriate vehicle for

deciding the First Amendment questions presented given the limited and undeveloped factual record and the lack of decisions from other federal or state courts.

VI. CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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