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No. 09-559

IN THE

Supreme Court of the United States

JOHN DOE #1, *et al.*,
Petitioners,
v.
SAM REED, *et al.*,
Respondents.

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

BRIEF *AMICI CURIAE* OF DIRECT DEMOCRACY SCHOLARS IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF DIRECT DEMOCRACY SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI* [1]

This brief *amici curiae*, in support of Respondents, is filed on behalf of four scholars who have devoted

[1] Pursuant to Sup. Ct. Rule 37.3(a), written consent of all the parties to the filing of this brief has been lodged with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no counsel for a party or party has made any monetary contribution to the preparation or submission of this brief. Ballot Initiative Strategy Center, a District of Columbia nonprofit corporation, made a monetary contribution to the preparation of this brief; no other person other than *amici* or counsel for *amici* has done so.

much of their careers to the study of direct democracy in the United States, including the process of gathering signatures to qualify initiatives and referenda for the ballot. These scholars have a longstanding, demonstrated interest in developing an understanding of the operation of the direct democracy process in the States and, in particular, of the integrity of that process.

Daniel A. Smith is Associate Professor of Political Science at the University of Florida.[2]

Todd Donovan is Professor of Political Science at Western Washington University.

Janine A. Parry is Associate Professor of Political Science at the University of Arkansas.

Caroline J. Tolbert is Professor of Political Science at the University of Iowa.

SUMMARY OF ARGUMENT

Application of the "exacting scrutiny" standard is not appropriate in this case. Even assuming that the mere act of signing a referendum or initiative petition is "core political speech," Petitioners have not shown that public disclosure of the names of signers in any way *burdens* that speech. Such disclosure does not "compel" any speech beyond the mere fact that a voter has signed the petition. Disclosure does not infringe "privacy of identity, association and belief," as Petitioners suggest, because there is no reasonable expectation or assumption of privacy or

[2] Affiliations are provided for each amicus for identification purposes only, and the views contained herein should not be construed to reflect the views of the institutions with which they are affiliated.

secrecy: any voter who signs a petition knows that her signature, name and address, and the fact that she is signing, are being put on paper in the hands of a stranger, in a public place, in front of others, and then submitted to a government agency. Further, public disclosure of petitions is widespread and routine in states that allow ballot initiatives and referenda. Nor does disclosure create any risk of intimidation or harassment of signers. Of the approximately 600,000 voters who signed referendum petitions in Washington in the last decade, Petitioners have failed to identify a single individual who claims to have been harassed or intimidated as a result of mere disclosure of her signature. More than a million names of signers of petitions for referenda and initiatives opposing gay marriage have been posted on the internet. Yet there is no evidence that *any* of these signers has faced any threat of retaliation or harassment by reason of that disclosure.

Even if public disclosure of petition signatures is to be subjected to "exacting scrutiny," the State's disclosure of the signatures under the Public Records Act serves sufficiently important governmental interests to find such disclosure constitutional. *First*, fraud is a widespread, significant problem in signature gathering for ballot measures. Public disclosure has in fact proven essential and indispensable in exposing such fraud in a number of states.

Second, it has been commonplace for signature-gatherers to mislead and trick voters into signing referenda and initiative petitions those voters would not have signed had they been informed of the actual content of the ballot measures. Numerous voters have discovered such deception, and have been able to remove their names or disassociate themselves

from the measure, only because their signatures were disclosed publicly. In fact, there is no way that a voter duped into signing a petition can exercise that right in the absence of public disclosure.

Third, public disclosure serves an important interest in informing voters about ballot measures. Scholarship indicates that "information brokers" such as the media and interest groups can analyze and disseminate information about who is signing petitions and how they are being collected in a way that can provide "cues" to voters, enabling those voters to make more reasoned and informed decisions about whether to support a ballot measure.

ARGUMENT

I. DISCLOSURE OF BALLOT MEASURE PETITION SIGNATURES DOES NOT BURDEN CORE POLITICAL SPEECH

Central to Petitioners' argument is the proposition that the Court should apply the "exacting scrutiny" test—equivalent, in Petitioners' view, to "strict scrutiny"—on the theory that public disclosure of the names of those signing a referendum petition burdens "core political speech." Petitioners' Brief at 40-41, Doe v. Reed, 09-559 (Feb. 25, 2010) ("Petr.'s Br."). Petitioners rely heavily on *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (*Buckley II*), in which the Court applied "exacting scrutiny" to find unconstitutional provisions of a state law requiring petition circulators to wear an identification badge and requiring ballot committees to disclose the names and addresses of, and payments made to, paid circulators. *Id.* at 201-02. Affirming that petition circulation is "core political speech," *id.* at 186, the Court found that the badge requirement

burdened such speech by forcing circulators to reveal their identities while engaged in discussion with voters, risking immediate exposure to harassment, *id.* at 199; and that the disclosure requirement burdened such speech by forcing circulators to "surrender the anonymity enjoyed by their volunteer counterparts." *Id.* at 204.

This Court has never decided whether the act of signing, as distinct from circulating, a petition is a form of "core political speech." *Id.* at 186. Even assuming that it is, however, Petitioners do not show that mere public disclosure of the names and addresses of signers in any way *burdens* that speech. Certainly such disclosure does not directly impair the ability of any voter to sign a petition. Indeed, as the Court recently held, "Disclaimer and disclosure requirements . . . 'do not prevent anyone from speaking.'" *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003)).

Petitioners do not contend that public disclosure of petition signatures directly burdens the ability of any voter to sign a petition. Rather, Petitioners argue that such public disclosure burdens political speech by (1) compelling speech; (2) interfering with "privacy of identity, association and belief;" and (3) risking "intimidation" of signers by those opposed to their views. Petr.'s Br. at 23-35. The experience of the State of Washington and other states with the direct democracy process, however, demonstrates that public disclosure of signatures does not in fact create any of these supposed burdens.

A. Public Disclosure of Signatures Does Not "Compel" Speech

The act of placing one's name and address on a referendum or initiative petition is not a work of art or literature in which "an author generally is free to decide whether or not to disclose his or her true identity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995). All that the signer of a referendum or initiative petition is compelled to disclose is the mere fact that she supports putting the initiative or referendum *on* the ballot, not that she supports the substantive merits of the measure itself.

It is well-established that the State's interest in "making sure that an initiative has sufficient grass roots support to be placed on the ballot" may be "protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Meyer v. Grant*, 486 U.S. 414, 425-26 (1988). In order for States to be able to impose such a requirement, disclosure by a signer of her support for the proposal must be compulsory.

Petitioners suggest that the State of Washington "imposes three levels of compelled speech:" (1) signing the petition; (2) submission of the signatures to the Secretary of State for canvass and verification; and (3) release of the signatures to the public. Petr.'s Br. at 35-39. Washington law, however, does not "compel" a voter to do anything other than merely sign the petition. The question of whether public disclosure of signatures "forces" the voter somehow to disclose that she supports putting a measure on the ballot is simply another way of suggesting that the voter does not expect or want such disclosure—in other words, that public disclosure infringes the

voter's "privacy of identity, association and belief." Petr.'s Br. at 10. As indicated below, it does not.

B. Public Disclosure of Signatures Does Not Infringe "Privacy of Identity, Association and Belief"

Signing a referendum petition is not the same as voting for a candidate and is not protected by the "secret-ballot privacy interest" as Petitioners suggest. Petr.'s Br. at 21; *see also id.* at 22, 25, 41 & 50. The referendum is a *legislative* act and is central to the lawmaking process in Washington. Under the Constitution of the State of Washington, the people reserve to themselves the power to reject any bill or law through the referendum process. Wash. Const., art. II, §§ 1 & 1(b). In order to place a statewide referendum on the ballot in Washington, proponents must file with the Secretary of State petitions containing valid signatures in a number equal to four percent of the votes cast for the Office of Governor in the immediately preceding gubernatorial election. Wash. Rev. Code § 29A.72.150.

There is no expectation or assumption of privacy at any stage of the referendum process in Washington. Each referendum petition sheet has 20 lines for signers to sign and print their names and addresses. Wash. Rev. Code § 29A.72.130. No provision of Washington law prevents the proponents of the measure—who of course have possession of the signatures—from publicly disclosing those signatures or from using them for any purpose.

Upon filing the referendum petition, the Secretary of State is charged with verifying and canvassing the names of those who have signed each petition. Under state law, the canvassing and verification process

"may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process . . ." Wash. Rev. Code § 29A.72.230. For these reasons, no rational voter in Washington could possibly expect her signature to be protected from public disclosure at any stage of the process.

In fact, there is no reasonable expectation of privacy for signers of initiative and referendum petitions in direct democracy States generally. Petition gathering tends to take place in public venues, with not only signers, but also those opting to read a petition and choosing not to sign, able to see any other names and address of those who previously signed. *See, e.g.*, *California's Voter Initiatives: Sign Here*, The Economist, Feb. 6, 2010; *Antioch Bible Church Participates in Eyman's Referendum Sunday*, Northwest Progressive Institute Official Blog, May 21, 2006, http://www.nwprogressive.org/weblog/2006/05/breaking-antioch-bible-church.html (photographs of petition-gathering for Referendum 65 outside the Lake Washington High School gymnasium); *Another Petition Drive, This Time in Lake Elsinor*, David Allyn Dokich—Serial Child Rapist/High Risk Sex Offender, Feb. 4, 2006, http://dokich.blogspot.com/2006_01_29_ archive.html (photographs of petition-gathering for "Jessica's Law" ballot initiative in 2006 at the Lake Elsinore Outlet Center in the State of California). The news media are free to photograph voters in the act of signing. *See, e.g.*, *Signature Gathering to Repeal Prop 8 Begins*, Mike Tidmus/A Blog from San Diego, Nov. 19, 2009, http://www.miketidmus.com/blog/2009/11/19/signature-gathering-to-repeal-prop-8-begins (photograph of TV cameras

taping individuals signing an initiative petition in California). And the voter herself knows she is providing the subject information—her name, address, signature, and the fact of signing—to a person that is normally a perfect stranger.

Any expectation of privacy generally is further rendered unlikely and unreasonable by the fact that public disclosure of petition signatures is widespread and routine in direct democracy States. Submitted petitions are considered public documents in at least twenty of the twenty-seven states that permit statewide initiatives and referenda. These documents are subject to the public document access requirements found in each state's Open Records Acts and are available, at a minimum, through the formal processes described in those statutes.[3] Indeed, in at least thirteen of these states, no formal request under the State's open records or freedom of information law is even required in order for any member of the

[3] Alaska Stat. §§ 40.25.100 - 295; Ark. Code Ann. § 25-19-101 *et seq.*; Colo. Rev. Stat. § 24.72-101 *et seq.*; Fla. Stat. § 119.01 *et seq.*; Idaho Code Ann. §§ 9-337 - 347; 5 Ill. Comp. Stat. 140/1 *et seq.*; Me. Rev. Stat. Ann. tit. 21-A, § 22; Mass. Gen. Laws ch. 4, § 7 *et seq.*; Mich. Comp. Laws § 15.231 *et seq.*; Miss. Code Ann. § 25-61-1 *et seq.*; Mo. Rev. Stat. § 610.010 *et seq.*; Mont. Code Ann. § 2-6-101 *et seq.*; Neb. Rev. Stat. § 84-712 *et seq.*; N.D. Cent. Code §§ 44-04-17.1 to 21.2; Ohio Rev. Code Ann. § 149.43; Okla. Stat. tit. 24A, § 1 *et seq.*; Or. Rev. Stat. §§ 192.410 - 505; S.D. Codified Laws § 1-27-1 *et seq.*; Utah Code Ann. § 63G-2-101 *et seq.*; Wyo. Stat. Ann. § 16-4-201 *et seq.*; *see also* Nev. Rev. Stat. § 295.0858 (requiring county clerks to make copies of petitions publicly available for at least fourteen days).

public to be able to review the petition sheets and obtain the information appearing on them.[4]

Virtually any voter who signs a petition knows that his or her signature, name and address, and the fact that she signed the petition—the only facts of "identity, association and belief" at issue, Petr.'s Br. at 10—are being recorded, handed to a stranger, often in a public place, often in front of others, and submitted to a government agency. Neither in Washington nor in other direct democracy states can any voter realistically have any expectation of privacy for that limited bit of information.

C. Public Disclosure Does Not Create Any Risk of Intimidation

Petitioners make much of the alleged intimidation of financial donors to the Proposition 8 ballot committee in California, Petr.'s Br. at 2-6, and cite alleged harassment of the campaign manager for Protect Marriage Washington, the committee advocating for Referendum 71. *Id.* at 10-11. Petitioners do not, however, identify a *single* case in which a *voter signing a petition* has actually been subject to any form of harassment or intimidation as a result of public disclosure of that voter's signature, name and address on the petition.

Of the twenty-four states permitting citizens to challenge recently enacted legislation via the popular referendum, Washington ranks fourth on the all-time list of statewide referendum use. Between 1914 and

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[4] Per telephone interviews on March 18, 2010, with staff at the election authorities in Arkansas, Colorado, Idaho, Illinois, Michigan, Montana, Nebraska, North Dakota, Ohio (electronic copies available), Oklahoma, Oregon, South Dakota and Wyoming, access to petitions is available upon verbal request.

2009, proponents of referenda have filed seventy-five statewide referenda; thirty-six of those measures ultimately qualified for the ballot. Washington Secretary of State, Elections, State Initiatives and Referendums 1914-2009, http://wei.secstate.wa.gov/osos/en/InitiativesandReferenda/Pages/StatisticalSummary.aspx. Between 2000 and 2009, proponents of referenda in Washington have managed to qualify four referenda for the statewide ballot. A total of 599,284 signatures for those four referenda were submitted by the proponents (including 137,881 submitted to qualify R-71). Washington Secretary of State, Initiative & Referenda Signature Checks: A Historical Perspective, *available at* http://www.sos.wa.gov/_assets/elections/initiatives/Initiative%20%26%20Referenda%20Check%20Historical%20Stats%209-2-09.pdf. Yet, *amici* have been unable, after researching the public record and media accounts, to identify a single individual in the State of Washington who refused to sign a petition because of the possibility of having her name publicly disclosed or who claimed to have been harassed or intimidated as a result of such disclosure of his or her signature. Nor have Petitioners identified any such individual. Application of the Washington Public Records Act to public disclosure of referendum petitions does not appear to have any demonstrated chilling effect on the willingness of voters to sign such petitions.

The lack of any demonstrable threat of intimidation or harassment is not limited to Washington. In fact, it is difficult to identify any case of intimidation or harassment of a petition signer occurring during the entire previous century. Between 1906 and 2009, citizens in twenty-seven states have voted on a total of 302 ballot referenda and 2,299 ballot initiatives. National Conference of State Legislatures, *Ballot*

Measures Database, http://www.ncsl.org/default.aspx?abid=16580. Millions of citizens signed petitions for those ballot measures. With respect to the twenty-eight statewide referenda that have qualified for the ballot in thirteen States between 2000 and 2009, well over a million citizens have signed their names to petitions. Id. Yet Petitioners have identified no individual petition signer—not one—who has alleged any instance of harassment or intimidation.

Petitioners state that an organization called KnowThyNeighbor.org, an organization supporting equal marriage rights for lesbian and gay couples, "posted the names of traditional marriage supporters signing petitions in Arkansas, Florida, Massachusetts, and Oregon.[5]" Petr.'s Br. at 7 n. 14. Upwards of a million names and addresses of these individuals in three states (Arkansas, Florida, and Massachusetts) have been posted online by KnowThyNeighbor.org. Petitioners, however, have not identified a single individual who has actually faced any threat of intimidation, retaliation or harassment as a result of merely signing any of these petitions and having that signature publicly disclosed.

In April 2009, KnowThyNeighbor.org, after filing a public records request with the Arkansas Secretary of State, posted, on the internet, the names of 83,000 people who signed petitions to qualify a 2008 initiative that would make it unlawful for individuals cohabiting outside of a legally-recognized marriage to adopt or provide foster care to minors. Tom Lang,

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[5] In Oregon, KnowThyNeigbor did not post the names and addresses of those individuals who signed two referendums circulated in 2007, as neither qualified for the ballot. *See Both Referendums Fail to Qualify*, Know Thy Neighbor Oregon, http://knowthyneighbororegon. com/?p=21.

Names of Arkansas Antigay Petition Signers Posted Online, KnowThyNeighbor.org, Apr. 28, 2009, http://knowthyneighbor.blogs.com/home/2009/04/press-release-names-of-arkansas-antigay-petition-signers-posted-online.html. All the names are still accessible. *Who Signed the Anti-gay Adoption and Foster Care Petition in Arkansas*, KnowThyNeighbor.org, www.knowthyneighbor.org/arkansas. Yet an electronic search of statewide newspapers, news services, and political blogs conducted by *amicus* Professor Smith revealed only three newspaper articles, two editorials by regular columnists, two letters to the editor, and nine blog entries relating to this posting, which references cumulatively generated 208 comments. Of these, no article, posting or comment set out a single example of actual intimidation or harassment against any person who had signed the Arkansas referendum petition and whose name was posted on the Internet.

The act of signing a referendum petition may well be an instance of "core political speech." The question is whether the public disclosure of signers under the Washington Public Records Act actually burdens that speech, and if so, to what extent. Petitioners have demonstrated no actual burden. Disclosure does not limit, interfere with or impede the ability of any voter to sign a petition. No signer is compelled to disclose any information beyond what she voluntarily provides on the petition sheet. There is no reasonable expectation or assumption of privacy for that information; and the disclosure of signatures in direct democracy states is widespread and routine. Finally, there is no evidence whatsoever that disclosure of the signers of a referendum petition has ever resulted in any harassment, intimidation or retaliation.

"Election regulations that impose a severe burden on associational rights are subject to strict scrutiny. . . . 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." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451-52 (2008) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). In *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610 (2008), the Court applied an intermediate scrutiny test to uphold an Indiana law barring registered voters without photo identification from casting their vote at the polls, finding that although there was much hypothetical discussion of possible burdens on voters, "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* at 1622.

The burden imposed by public disclosure, on the act of signing a referendum petition, is slight to nonexistent. The Washington Public Records Act, in providing for public disclosure of the signers of a referendum petition, does not burden "core political speech." Neither "strict scrutiny" nor "exacting scrutiny" is appropriate.

II. PUBLIC DISCLOSURE OF PETITION SIGNATURES SERVES SUFFICIENTLY IMPORTANT GOVERNMENTAL INTERESTS

Even if public disclosure of petition signatures is to be subjected to "exacting scrutiny," as Petitioners suggest, such disclosure should still be held constitutional. "'[E]xacting scrutiny, . . . requires a 'substan-

tial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)). Public disclosure of the signers of a referendum or initiative petition has a "substantial relation" to three very important, arguably compelling, governmental interests: (1) ensuring the validity of the signatures submitted and uncovering fraud; (2) providing recourse to voters who were misled into signing a petition and who specifically do not wish to "speak" in favor of the referendum; and (3) informing the voters, particularly through intermediaries who distill, analyze and disseminate information based on petition sheets, of who is supporting the referendum.

A. Public Disclosure Is Essential In Order to Expose Fraudulent Practices in Signature-Gathering

"States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley II*, 525 U.S. at 191. The State has a legitimate interest "in making sure that an initiative has sufficient grass roots support to be placed on the ballot," and the State may protect that interest "by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Meyer v. Grant*, 486 U.S. 414, 425-26 (1988). Allowable measures include those which "aim[] to protect the integrity of the initiative process, specifically to deter fraud and diminish corruption." *Buckley II*, 525 U.S. at 204-05. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. . . .

While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610, 1619 (2008).

Fraud is in fact a significant problem in signature gathering for ballot measures. And contrary to Petitioners' suggestion that "no fraudulent signature has been detected by such [public] release," Petr.'s Br. at 13, public disclosure has in fact proven essential and indispensable in exposing fraud in signature gathering for initiatives and referenda.

1. Fraud Is a Significant Problem in Signature-Gathering for Ballot Measures

Today, as in years past, the signature gathering process for referenda in Washington and other states is dominated by well-funded organized interests. "[P]olitical interests with sufficient funding and professional assistance can qualify nearly anything they want for the ballot." Philip Dubois & Floyd Feenery, *Lawmaking by Initiative: Issues, Options and Comparisons* 102 (1998). As one study found, "citizens are often purposely approached at inconvenient times, when they will often sign the petition just to get on with their business," and "[c]irculators often also misrepresent the substance of the measure." Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 63 (1989). "Most of the time people do not ask to read [a] petition," and "[p]etition circulators seldom offer to read it." *Id.* According to another study, "[p]etitioners report that they can gather several thousand signatures and have not one signer read the petition language when she signs. Instead signers choose to sign or not to

sign based entirely on an abbreviated oral representation made by the solicitor." Richard B. Collins & Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L. Rev. 47, 101 (1995).

As a historian of the process argues, the politics of direct democracy has "has always centered on well-heeled interest groups using the process for their purposes." Thomas Goebel, *Direct Democracy in America* 196 (2002). Even populist-sounding ballot propositions frequently rely on financing from "vested interests." Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* 13 (1998). There are well-documented instances of fraud in the signature gathering process in many of the states permitting either or both the statewide initiative or referendum processes. Todd Donovan & Daniel A. Smith, *Identifying and Preventing Signature Fraud on Ballot Measure Petitions, in Election Fraud: Detecting and Deterring Electoral Manipulation* 132-34 (Michael Alvarez et al. eds., 2008). High-cost referendum campaigns have existed since the adoption of direct democracy early in the twentieth century, and petition circulators—paid and unpaid—have occasionally engaged in fraud to boost the likelihood that they will have sufficient signatures to qualify. Daniel A. Smith and Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer*? 14 J. Pol'y Hist. 349, 362 (2002); Richard Ellis, *Democratic Delusions: The Initiative Process in America* 67-74 (2002).

Throughout the history of direct democracy, there have been numerous cases in which signature fraud has proven to be decisive in causing referenda to be certified for the ballot. For example, in Oregon in

1912, an investigation found that 60 percent of roughly 13,000 submitted signatures on a referendum petition to overturn certain appropriations were either forged or fraudulent. The *Eugene Register* opined, "fraud and forgery [are] becoming an annual scandal. . . . that threatens to bring popular government into disfavor." Ellis, *supra* at 184. In 1917, saloon keepers and bartenders in Ohio—fearing that women would cast ballots in favor of prohibition—engaged in widespread signature-gathering fraud to qualify a referendum repealing women's suffrage. C. Ewing, *Sufficiency Certification of Initiatives in Oklahoma*, 31 Am. Pol Sci. Rev. 65, 70 (1937).

Scholars have documented many additional examples in the modern era. In numerous states, "questionable methods of obtaining signatures have been used in nearly every state that permits the initiative," including adding fictitious names to petitions, forging names from phonebooks, and transferring names of legal voters from one sheet to another. Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* 62 (1989). In the early nineteen-eighties in Colorado, for example, proponents of a measure to legalize casino gambling submitted petitions with 25,000 fraudulent signatures—including the forged name of a Denver judge. David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 63 (1984). Signature gatherers in Florida in the 1990s were found to have filed fraudulent signatures on constitutional amendments that included names copied directly out of phone books and names of deceased voters. Florida State Commission on Government Reform and Oversight, Citizen Initiative in Florida: A Review of the Citizen Initiative Method of Proposing Amendments to the Florida Constitution 33 (1995);

see also, P.K. Jameson & Marsha Hosack, *Citizen Initiative in Florida: An Analysis of Florida's Constitutional Initiative Process*, 23 Fla. St. U. L. Rev. 417, 448 (1996).

More recently, thousands of fraudulent signatures were found on petitions filed in Massachusetts to qualify a measure banning same-sex marriage. The Massachusetts legislature held hearings to document examples of petition fraud associated with work conducted in Massachusetts by California-based Arno Political Consultants in 2005 during the campaign, and the Massachusetts Attorney General subsequently conducted a criminal investigation. Casey Ross, *Group Labels 2000 Names on Gay List Fraudulent*, Boston Herald, Jan. 26, 2006, at A8; Steve LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Associated Press, Feb. 28, 2006.

Also in 2005, in Maine, a municipal clerk noticed irregularities with submitted signatures on a ballot measure. John Christie, *Forgeries Raise Question About Role Money Plays in Petition Process*, Bangor Daily News, Feb. 4, 2010, *available at* http://www.bangordailynews.com/detail/136144.html. She contacted those registered voters who supposedly signed the petitions. *Id.* One woman who was summoned by the clerk—a former city councilor—recalled that she was "appalled" and "shocked" when she saw the petition, as her signature did not come close to resembling the way she signed her name. *Id.* Becoming suspicious, the clerk checked every name on all five petitions submitted by the signature gatherer. *Id.* She discovered that every signature on the petitions was fabricated; the signature gatherer had lifted the supposed signature out of the local phonebook. *Id.* It turned out that one paid petition

gatherer had forged more than 300 signatures, names, and addresses on the petition. *Id.*

Professional paid signature gatherers have been known to use deceptive tactics to draw potential signers to their petitioners. For example, in Montana in 2006, in an action challenging the certification for the ballot of an initiative that would have imposed constitutional limits on the spending and taxing power of the State, the trial court found that "a number of paid out of state signature gatherers used bait-and-switch tactics to fraudulently induce countless Montanans to sign petitions other than the petitions they thought they were signing." *Montanans for Justice v. Montana*, No. CDV-06-1162(d), slip op. at 12 (8th Jud. Dist., Sept. 13, 2006) (*Montanans for Justice*), *aff'd*, 146 P.3d 759 (Mont. 2006).

Clearly fraud can pose a potentially significant problem in the signature-gathering process for ballot initiatives and referenda. The State of Washington has a very important interest in preventing, exposing and remedying such fraud. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610, 1619 (2008) ("[N]ot only is the risk of voter fraud real but [] it could affect the outcome of a close election. . . . There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

2. Much Fraud Can Be Exposed and Remedied Only Through Public Disclosure of Petition Signatures

Under Washington law, referendum signature petitions are filed with the Secretary of State, who is then obligated to verify and canvass the names of voters on the petition. Wash. Rev. Code § 29A.72.230. As noted, this canvass of signatures may be observed

by persons representing the advocates and opponents of the measure, but the Secretary may limit the number of observers to two per side and observers are prohibited from copying down information from the petitions. Wash. Rev. Code § 29A.72.230. Anyone "dissatisfied" with the Secretary's decision that a referendum has qualified for the ballot can bring an action in Superior Court. Wash. Rev. Code. § 29A.72.240.

As the Court of Appeals correctly observed, public disclosure of the petitions under the Public Records Act "is necessary to make meaningful use of the state superior court challenge . . . . The superior court procedure would be at best inefficient and at worst useless, if citizens have no rational basis on which to decide whether they are 'dissatisfied' with the Secretary of State's determination. . . . And they cannot gain that understanding without the right to inspect the petition sheets." *Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009). Indeed, only by scrutinizing petition sheets *in toto*, rather than simply observing randomly-drawn signatures from across petitions, can citizens identify suspect patterns of signatures, such as identical handwriting for supposedly different voters and multiple signatures on different petitions by the same individual. Similarly, only by scrutinizing full petition sheets can citizens detect other types of fraud, such as one person falsely signing as a circulator for petitions circulated by another person.

For example, an independent analysis was conducted on the petitions submitted for a Washington initiative submitted in 2006, I-917. The Secretary of State found the initiative to have an insufficient number of valid signatures; 218,786 (82.3 percent)

of the roughly 266,000 submitted signatures were found to be valid. Todd Donovan & Daniel A. Smith, *Identifying and Preventing Signature Fraud on Ballot Measure Petitions, in Election Fraud: Detecting and Deterring Electoral Manipulation* 138 (Michael Alvarez et al. eds., 2008). The independent analysis found, in addition, however that there were more than 300 individuals who signed an I-917 petition three or more times, and at least fifty percent of the twenty signatures submitted on fifteen separate I-917 petitions were found to be invalid. *Id.* at 139-40. This type of analysis would, of course, be impossible without the public disclosure of submitted petitions.

In fact, in a number of recent cases, significant fraud in signature-gathering was detected only by virtue of the fact that citizen opponents of ballot measures had full access to the petitions and were thereby able to conduct the type of in-depth, time-consuming analysis necessary to detect fraud. In Montana in 2006, several ballot issue committees hired out of state firms to gather signatures on three different ballot initiatives. *Montanans for Justice* at 2. The Secretary of State found that sufficient signatures had been collected and certified all three measures for the ballot. *Id.* at 22-23.

Groups of citizens opposed to the ballot measures requested access to the submitted petitions, analyzed them, and challenged the certification of all three measures. *Id.* The challengers were able to determine, for example, that circulators had falsely sworn to witnessing signatures, based on the fact that a single paid signature-gatherer swore to having witnessed persons signing the petition in areas of the state hundreds of miles from each other, on the same day. *Id.* at 9-11. The citizens groups were also able

to demonstrate that proponents' out of state paid signature gatherers had provided false or fictitious addresses in the sworn certifications required by state law. *Id.* at 9, 17. Finally, the challengers were able to produce specific signers of the petition who attested that they were personally misled by a signature-gatherer into signing multiple petitions when they intended to sign only one. *Id.* at 12-16.

The citizens groups presented this evidence in an action challenging the State's certification of the ballot measures. Based on this evidence, the trial court found that the signature-gathering practices constituted a "pattern and practice of fraud and procedural defect . . . prevalent throughout the statewide signature gathering process," *id.* at 42; invalidated numerous signatures; and invalidated the Secretary of State's certification. *Id.* at 44-46. The Montana Supreme Court affirmed, *Montanans for Justice v. Montana*, 146 P.3d 759 (Mont. 2006), agreeing with the trial court that there was a "'pervasive and general pattern and practice of fraud'" and ruling that "if the initiative process is to remain viable and retain its integrity, those invoking it must comply with the laws passed by our Legislature." *Id.* at 776-78.

In 2008, the Montgomery County, Maryland, County Council enacted an ordinance, adding gender identity as a protected characteristic under the county's anti-discrimination laws. A citizens group opposed to the law gathered signatures on a petition to have a referendum on the bill. *Doe v. Montgomery County Board of Elections*, 962 A.2d 342, 344-45 (Md. 2008). The county board of elections found that a sufficient number of signatures had been collected, and certified the referendum for the ballot. *Id.* at 345.

Citizens supporting the law and opposed to the referendum obtained access to the petition sheets and challenged the validity of the petition. *Id.* Those citizens determined, among other things, that 10,876 of the 26,813 signatures that had been submitted and accepted by the county elections board in fact did not match the names of voters as listed on the voter registration rolls, as required by state law. *Id.* at 359-60. The challengers were only able to determine this by examining all of the actual petition sheets: "Extensive review of all the signatures on the [proponent] petition pages validated by the BOE, and comparison with Montgomery County voter registration records provided by the BOE, reveal that thousands of the signatures submitted by [the proponents] and credited as valid by the BOE in fact do not comply with basic, specific legal requirements detailed in controlling Maryland and Montgomery County election law." Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 15, *Doe v. Montgomery County Board of Elections*, Civ. No. 293857 (Circuit Ct. Montgomery County, Md., June 2, 2008). The challengers also contended that the number of signatures required by the elections board was too low because the statutory percentage had been applied to a total number excluding "inactive" voters. *Doe v. Montgomery County Board of Elections*, 962 A.2d 342, 359 (Md. 2008). The circuit court rejected the challenges, but the Maryland Court of Appeals reversed and ordered the referendum off the ballot, finding that the wrong number of signatures had been required and that, in any event, even the lower number would not have been satisfied because "the 10,876 challenged signatures were invalid as a matter of law." *Id.* at 363. Those signatures would never have been held invalid but for the public

disclosure of the petition signatures, enabling citizen opponents of the referendum to review and analyze all of the signatures.

Thus, fraud at times is pervasive and persistent in the signature-gathering process for initiatives and referenda. Much more actual demonstrated fraud has taken place in this process, for example, than was demonstrated in *Crawford* with respect to voter impersonation. *See Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S.Ct. 1610, 1619 (2008) ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history"). Surely the State of Washington, and other States, have a very strong interest in exposing and remedying fraud in signature-gathering.

B. Public Disclosure Is Essential In Order to Provide Recourse to Voters Who Are Misled Into Signing a Petition

"[A] corollary of the right to associate is the right not to associate." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). While Petitioners emphasize the associational rights of those citizens who choose to sign a ballot measure petition, Petr.'s Br. at 24-26, they ignore the rights of those citizens who are tricked or misled into signing a petition, and want to be able to *disassociate* themselves from the particular ballot measure and its supporters.

As noted above, a Montana trial court found that "signature gatherers used bait-and-switch tactics to fraudulently induce countless Montanans to sign petitions other than the petitions they thought they were signing." *Montanans for Justice* at 12. In Massachusetts in 2005, signature-gatherers for an initiative to make same-sex marriage unconstitu-

tional were discovered to be using similar bait-and-switch tactics to trick voters into signing the petition. Kathleen Shaw, *Tricks on Petitions Described by Worker Student Employed to Gather Names*, Worcester Telegram, Oct. 13, 2005, at A1. One signature-gatherer stated that "co-workers informed her she could make more money if she induced people first to sign a petition regarding wine sales, then slip the petition to ban same sex marriage underneath and ask unsuspecting people to sign the second copy without telling them what it concerned." *Id.* Nearly a dozen voters testified before a committee of the state legislature that "petitioners for a campaign to outlaw gay marriage tricked residents into signing their petition by telling them it was a petition to allow the sale of wine in a grocery store." Amy Lambiaso, *Signature-gathering Fraud Charges Stir Call for New Laws*, *Oversight*, State House News Service, Oct. 18, 2005, *available at* http://masse quality.org/news/story.php?/type=news &id=163.

Without public disclosure of petition signatures, there is no way that a voter duped into signing a petition can disassociate herself from that petition—either by formally withdrawing her signature, if permitted by state law, or by some form of public notice that she did not intend to sign. In some states, including Alaska, Nevada and Utah public access to signatures on petitions facilitates the right to signature revocation by those who have signed petitions. Alaska Stat. § 15.45.120; Nev. Rev. Stat. 295.055(4); Utah Code Ann. § 20A-7-205(3). In Utah, citizens are permitted to remove their names from ballot petitions for any reason. Utah Code Ann. § 20A-7-205(3).

Public disclosure is the only way to alert citizens who suspect they might have been duped into signing

a petition that they have in fact signed it. One Washingtonian, who responded to a blog posting on the Washington Secretary of State's webpage, was looking forward to the public disclosure of R-71 petitions, as he wanted to verify that he was not duped into signing it. BobVB wrote:

> I was confronted by a signature gatherer for the King County proposition of having some district council members. I signed that. Later coming out I see he had carefully folded R-71 ballots that basically just showed the signature portion, absolutely none of the initiative they were for.
>
> I still don't know if I was slipped an R-71 ballot . . . I look forward to seeing if my signature is surprisingly on an R-71 petition—is there any recourse for a citizen that has been tricked into signing something they had no intention of signing?

Posting of BobVB to Washington Secretary of State Blog, http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/07/r-71-update-signature-requests-pending/ (July 29, 2009, 09:28 PST).

As this example makes clear, public disclosure of signatures on referendum petitions allows citizens to detect if they signed a petition under false pretenses, were misled into signing, or were even deceived or lied to when approached by a signature gatherer. In Massachusetts, the public disclosure on the web by KnowThyNeighbor.org of the individuals who signed petitions to ban gay marriage led not to harassment or intimidation of those signers, but rather to the realization by thousands of citizens that they had been duped into signing the petition, thinking they were signing a petition to *permit* gay marriage. Steve

LeBlanc, *State Investigating Gay Marriage Signature Forgery Allegations*, Associated Press, Feb. 28, 2006. Those citizens then asked to have their names removed from the website. *Id.* A group opposing the initiative, Mass Equality, "heard from more than 2,000 people who said they either didn't sign the petition or were tricked into signing it." *Id.*

The State surely has a strong interest in enabling those tricked or misled citizens to disassociate themselves from the petition, either by formal withdrawal if permitted by state law or by public notification to organizations (such as KnowThyNeighbor.org) that share their views. That interest is intertwined with the State's inherent interests in preserving the integrity of the ballot process and promoting transparency, but the significance of that interest is increased by the need to protect the associational rights of individual voters. Those rights simply cannot be protected without public disclosure of petition signatures.

C. Public Disclosure Serves an Important Interest in Informing Voters

The Court of Appeals recognized that the State of Washington has an important "informational interest" in informing voters of who is supporting a referendum. *Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009). Indeed, the Court reasoned that disclosure of signatories serves an informational interest even more compelling than disclosure of financial supporters of ballot measures, because "[r]eferendum petition signers . . . have taken action that has direct legislative effect. The interest in knowing who has taken such action is undoubtedly greater than knowing generally what groups are in favor of or opposed to a ballot measure." *Id.*

Petitioners contend that this informational interest is minimal because the signing of a petition merely indicates a voter's desire to put a measure on the ballot, not actual support of the measure. Petr.'s Br. at 13, 49. Petitioners further contend that disclosure of signatures plays no meaningful role in educating voters. *Id.* at 51-52.

As scholars of voting behavior know well, however, voters tend not to be deeply informed about issues. Robert Erikson & Kent Tedin, *American Public Opinion* 16 (2005). When it comes to ballot measures, voters tend to depend on cues from political parties, interest groups, the media, as well as information brokers. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Elec. L. J. 295, 326 (2005). With referenda and initiatives, which are often low-information affairs and lack partisan cues on the ballot, voters have little to draw on to make informed choices besides the ballot title, summary, or text of a measure, which are often convoluted. David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* 118-20 (1984). As election time nears, potential voters on ballot measures often look to information brokers or for shortcuts on how to vote, including informational cues provided by elites, interest groups, and party leaders. Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting and Direct Democracy* 58-61 (1998); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior, in California Insurance Reform Elections* 88 Am. Pol. Sci. Rev. 63, 76 (1994).

Additional information procured from the application of open records laws to the disclosure of referendum petitions can enhance the ability of ordinary

voters to understand the likely consequences of a vote for or against a particular ballot question, facilitating a "reasoned choice." Arthur Lupia & Matthew D. McCubbins, *The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know in Elements of Reason: Cognition Choice and the Bounds of Rationality* 48-49 (Arthur Lupia et al. eds., 2000); *see also*, Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums in Referendum Democracy: Citizens, Elites and Deliberation, in Referendum Campaigns* 191 (Matthew Mendelsohn & Andrew Parkin eds. 2001). Just as individuals rely on shortcuts to help them make daily choices, citizens can obtain cues gleaned from information about who is signing petitions and how they are being collected (especially if they are paid petitioners), which may help them decide whether to support or oppose a particular ballot question. Lupia & McCubbins, *supra* at 37. Public disclosure of referendum petitions can provide relevant information to information brokers who can distill it and bring it to the attention of prospective voters. As with publicly disclosed campaign finance data, such information gains may be difficult to measure precisely, but they are hardly marginal.

Contrary to Petitioners' claims that there is a "disconnect between public perception and actual evidence regarding disclosure," Petr.'s Br. at 43, the well-established theory of the "informed voter" has little to do with voters' ability to access lists of those who contribute to ballot issue campaigns in the state. Rather, the theoretical justification for the public disclosure of campaign finance data—and by extension, signatures collected to qualify a referendum—is

that publicly-disclosed records can be used not only by prospective voters, but also by *information entrepreneurs*, such as journalists, nonprofit organizations, think tanks, scholars, political parties, interest groups, and of course supporters and opponents of ballot issues. Information entrepreneurs are able to provide cues to prospective voters that may help improve voter competence. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 Elec. L.J. 295, 298 (2005).

Most citizens have limited time and attention to devote to political campaigns. It therefore defies reason to expect that many prospective voters will directly avail themselves of information resulting from disclosure of campaign finance data of ballot issues, much less specific signatures on referendum petitions. Dick M. Carpenter II, Institute for Justice, Disclosure Costs: Unintended Consequences of Campaign Finance Reform 2 (2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf [hereinafter Carpenter Report]. Indeed, there is little expectation that prospective voters will themselves become deeply immersed in campaign finance reports or in viewing names on submitted referendum petitions. This does not mean, however, that public disclosure such information is not valuable to voters. For example, the disclosure of campaign finance activities of ballot issues committees is frequently used by information entrepreneurs to convey relevant and credible information to voters. Garrett & Smith, *supra* at 297. Similarly, though many voters may not have direct knowledge about the laws, accessibility, and tools to access signatures submitted on petitions, information entrepreneurs—

such as http://KnowThyNeighbor.org and http://www.whosigned.org,—are able to use public disclosure laws to access, compile, and disseminate information to voters. Citizens can then use this information, either directly or in a distilled form, to help inform their voting decisions. By synthesizing publicly disclosed campaign finance data, informational entrepreneurs provide heuristics, or voting cues, to citizens that may improve their ability to vote consistently with their own preferences that is, casting "the same votes they would have cast had they possessed all available knowledge about the policy consequences of their decision." Elisabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Legislation Elections, in Citizen Competence and Democratic Institutions* 149 (S.L. Elkin & K.E. Soltan, eds. 1999). As with campaign finance disclosure laws that serve an informational function, public disclosure of names on referendum petitions may improve voter competence.

There is strong support in the State of Washington and other direct democracy states for public disclosure in citizen lawmaking. According to a 2009 statewide poll, Californians favor increasing public disclosure of funding sources for signature gathering and campaigns (81% favor, 14% oppose). Mark Baldassare, Dean Bonner, Jennifer Paluch & Sonia Petek, Public Policy Institute of California, Californians & Their Government (2009), *available at* http://www.ppic.org/content/pubs/survey/S_909MBS.pdf. Disclosure in ballot issue campaigns is widely accepted by the public. As cited in Petitioners' Brief, at 43-44, a 2006 Institute for Justice survey of 2,221 residents of six initiative states (California, Colorado, Florida, Massachusetts, Ohio, and Washington) found that 82.3 percent of respondents agreeing with

the statement, "The government should require that the identities of those who contribute to ballot issue campaigns should be available to the public." Carpenter Report, *supra*, at 7. There is no reason to think that these citizens would not be equally supportive of having public disclosure apply to the signature gathering process of ballot issue campaigns.[6]

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[6] Petitioners cite the Carpenter Report for the proposition that fear of public disclosure inhibits individuals from contributing to ballot measure campaigns. Petr.'s Br. at 44-45. Without offering any empirical evidence from the six-state survey data that directly tests this assertion, the Carpenter Report concludes that "the cost of disclosure seems to include a chilling effect on political speech and association as it relates to ballot issue campaigns." Carpenter Report at 19. In order to make this claim, however, the survey would have to show that an individual who has made a campaign contribution to a ballot issue committee in the past, or who is likely to make a campaign contribution to a ballot issue committee in the future, would be dissuaded from doing so once she became informed that certain personal information would be publicly disclosed. The Carpenter Report fails to show that this is the case. Indeed, in Washington alone, proponents and opponents of the three initiatives on the 2008 November ballot received more than $9 million from more than 20,000 contributors. National Institute on Money in State Politics: Washington 2008, Ballot Measures, http://www.followthemoney.org/database/StateGlance/state_ballot_measures.phtml?s=WA&y=2008&so=p#sorttable; Washington Public Disclosure Commission, http://www.pdc. wa.gov/. Despite the alleged "burden" of campaign finance disclosure in Washington, however, these 20,000-plus contributors evidently were unimpeded in their political speech by disclosure laws. Unlike the actual signing of *referendum* petitions—which as the Petitioners correctly assert does not necessarily express support for the ballot measure itself, Petr.'s Br. at 21—contributions to ballot *initiative* committees strongly signal one's support or opposition of a ballot measure. It is difficult to make the case that the supposed "burden" of disclosing contributions to ballot issues in Washington suppresses political giving.

For these reasons, the State's "informational interest" in public disclosure of petition signatures is a significant one. Equally important, if not compelling, are the State's interests in preventing, exposing and remedying fraud in signature collection and in enabling citizens who have been misled into signing a petition to withdraw their signatures or disassociate themselves from it. Only public disclosure of petition signatures can achieve these interests. Accordingly, even if "exacting scrutiny" is applied, the public disclosure of petition signatures bears a "substantial relation" to "sufficiently important governmental interests." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66) (1978)).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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