No. 09-559

In The Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY
OF STATE, and BRENDA GALARAZA,
PUBLIC RECORDS OFFICER FOR
THE SECRETARY OF STATE'S OFFICE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM H. MELLOR
STEVEN M. SIMPSON*
ROBERT P. FROMMER
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, Virginia 22203
(703) 682-9320
ssimpson@ij.org

Attorneys for Amicus Curiae
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public-interest legal center dedicated to defending the essential foundations of a free society, including the right of all to speak out on elections and other matters of public import. Mandatory disclosure laws that force those who speak out on ballot issues to reveal their identities to the entire populace serve no legitimate government interest and chill citizens' protected speech. For this reason, the Institute both litigates First Amendment cases that challenge mandatory disclosure in the ballot-issue context and files *amicus curiae* briefs in important campaign-finance cases, including *Citizens United v. FEC*, 175 L. Ed. 2d 753 (U.S. 2010); *FEC v. Wisconsin Right to Life, Inc. (WRTL II)*, 551 U.S. 449 (2007); and *McConnell v. FEC*, 540 U.S. 93 (2003). Further, the Institute has published two empirical research studies that identify the burdens and costs of campaign-finance disclosure requirements. The Institute believes that its legal perspective, experience, and empirical research will provide this Court with valuable insights regarding the costs and burdens

[1] The Institute for Justice has received the consent of all parties to file this brief with the Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

associated with mandatory disclosure of political activity.

SUMMARY OF ARGUMENT

1. Signing a petition in support of a ballot measure is core political speech that deserves full First Amendment protection. Indeed, this Court on five different occasions has recognized the important free-speech interests that surround ballot issues and has struck down regulations that chilled rights to freedom of speech and association in this context. To require that one publicly disclose his name and address in order to express the idea that a proposed measure should be placed on the ballot imposes a serious and unjustified burden on the exercise of First Amendment rights. This Court has upheld mandatory disclosure laws in the narrow context of candidate elections, *see, e.g., Citizens United v. FEC,* 175 L. Ed. 2d 753, 799 (U.S. 2010), but only where the laws have clearly advanced important state interests that could not be achieved through less burdensome means. *Cf. Davis v. FEC*, 128 S. Ct. 2759, 2775 (U.S. 2008) (striking down disclosure provision where related law was struck down). However, some lower courts have applied this Court's candidate disclosure holdings even where the context is ballot-issue elections, which do not involve the same state interests or burdens on speech as the candidate context. *See, e.g., Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003); *see also Richey v. Tyson*, 120

F. Supp. 2d 1298, 1310 (S.D. Ala. 2000) (committing same error). These lower-court holdings rest on the notion that disclosure provides vast benefits while imposing few, if any, costs on speech. On closer inspection, though, this view is based on nothing more than supposition and conjecture.

2. The Institute for Justice has surveyed public attitudes about disclosure laws in an attempt to determine the true costs of disclosure laws. The results were striking: while many respondents generally supported the idea of disclosure, that support quickly waned when they faced the prospect of having their own name and address made public. And three out of five said that mandatory disclosure would make them think twice before participating in the political process. This research focused on donating to an issue committee, rather than signing a petition, but its message is clear: forcing people to expose themselves to the public in order to exercise their First Amendment rights means that many will stay silent.

3. Signing a petition on a matter of public concern is core political speech and mandatory disclosure chills that speech. Respondents must therefore prove, with evidence, that publicly disclosing the name and address of every signer serves a compelling state interest. Neither of the justifications that Respondents offer is sufficient. The so-called "informational interest" is, at its heart, nothing more than the bare desire to know what positions others are taking on ballot issues. This Court rejected disclosure laws based on this interest in *McIntyre v. Ohio Elections*

Comm'n, 514 U.S. 334 (1995), and the alleged informational interest has no limiting principle. And although the State of Washington has a legitimate interest in maintaining the integrity of its referendum process, Respondents can achieve that interest through far more narrowly tailored means than public disclosure of every signer's name and address. Because Washington's scheme of mandatory disclosure imposes severe costs without serving any legitimate government interest, this Court should strike it down.

ARGUMENT

I. Signing a Ballot Petition Is Entitled to Full First Amendment Protection.

The citizen initiative is one of the hallmarks of our representative form of government. Using this process, and its close cousin, the referendum, citizens are able to directly impact the course of government decision-making. To this end, the process of qualifying and voting on a ballot measure is one that, perhaps more than any other, calls on the public to speak and debate about issues that are at the very core of the First Amendment. *See, e.g., Citizens United v. FEC,* 175 L. Ed. 2d 753, 775 (U.S. 2010) (concluding that political speech "is central to the meaning and purpose of the First Amendment"). As a result, the First Amendment's protection in this area is "at its zenith." *Buckley v. Am. Constitutional Law Found.* (*ACLF*), 525 U.S. 182, 187 (1999) (internal

quotation omitted); *Meyer v. Grant,* 486 U.S. 414, 421 (1988) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' ") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

This Court has addressed restrictions on speaking and associating in the ballot-issue context on five different occasions in the past three decades. In every case, it has applied strict scrutiny and struck the law down. *See ACLF*, 525 U.S. 182 (1999); *McIntyre*, 514 U.S. 334 (1995); *Meyer*, 486 U.S. 414 (1988); *Citizens Against Rent Control v. City of Berkeley* (*CARC*), 454 U.S. 290 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The restrictions in these cases varied widely. In *Meyer*, the question was whether Colorado could ban the payment of petition signature gatherers; in *McIntyre* and *ACLF*, whether individuals could speak about a measure without having to reveal their identities to the public; and in *CARC* and *Bellotti*, whether the government could restrict the campaign finances of those who wish to speak out for or against ballot measures. Still, the analysis this Court employed in each case was the same: It first looked at whether the provision burdened political speech. *ACLF*, 525 U.S. at 186; *McIntyre*, 514 U.S. at 347; *Meyer*, 486 U.S. at 425; *CARC*, 454 U.S. at 294; *Bellotti*, 435 U.S. at 785-86. If so, it then asked if the

provision satisfied strict (sometimes referred to as "exacting") scrutiny.[2]

The law at issue in this case falls squarely within these precedents and should be treated the same way. Requiring individuals to publicly disclose their names and addresses as a condition of signing a petition chills their speech, as many people do not wish their identities to be publicly disclosed or associated with their political views. Strict scrutiny should therefore apply. Respondents, however, contend that this Court should create a different level of scrutiny for laws that burden the First Amendment rights of petition signers on the grounds that the laws are merely disclosure laws. Brief of Appellants at 15-27, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (No. 09-35818). This argument incorrectly relies on precedent that applies to disclosure laws in the candidate context, where the burdens and government interests are different than in the ballot-issue context. Equally important, however, the Respondents' approach would create a maze of new standards and fine distinctions that would turn on the identity of the speaker and the precise nature of his speech. This Court just rejected a similar approach in *Citizens United*. *See*

[2] The Court has used the term "exacting" scrutiny interchangeably with "strict" scrutiny in these cases to mean that the government must show that its laws narrowly advance a compelling state interest. *See ACLF*, 525 U.S. at 192 n.12; *id.* at 206 (Thomas, J., concurring in the judgment); *McIntyre*, 514 U.S. at 345-46 & n.10; *Bellotti*, 435 U.S. at 786.

175 L. Ed. 2d at 782 (stating that "restrictions distinguishing among different speakers" are contrary to the First Amendment). It should do the same here.

A. Washington's Public Records Act Impinges on Signers' Right to Anonymous Speech.

As the Petitioners note, Washington's Public Records Act burdens the independent exercise of the right to speak which inheres in the act of signing a referendum petition, and should fall on that ground alone. Brief for Petitioners at 17-23. The Act also infringes on the right to anonymous speech and constitutes a separate and independent burden on First Amendment rights in that respect as well.

Unfettered participation in the political world often requires anonymity. In some cases, a would-be speaker may stay silent out of fear of the repercussions that may follow should his opinions become common knowledge. *See, e.g., Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). In others, speakers may desire anonymity not out of fear, but because they want their message to be judged on its own merits rather than based on the identity of the speaker. *McIntyre*, 514 U.S. at 342. As the Court has noted, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley v. California*, 362 U.S. 60, 64 (1960). Thomas Paine signed some of the pamphlets that he drafted with pseudonyms. James

Madison, Alexander Hamilton, and John Jay wrote the Federalist papers as "Publius," and the Anti-Federalists who wrote against ratification responded to Publius' arguments using the names "Cato," "Brutus," and "the Federal Farmer." *McIntyre*, 514 U.S. at 343 n.6.

Many people will only sign a petition on a controversial subject like Referendum 71 if they are assured that their identities will be protected. To ensure that as many people as possible feel free to make their opinions heard, this Court has long protected speakers' anonymity in the face of an inquiring government or public. Fifty years ago in *Talley*, this Court struck down an ordinance that forbade the distribution of any handbill if it did not contain the name and address of the person who prepared it. In doing so, the *Talley* Court recognized that "[i]t is plain that anonymity has sometimes been assumed for the most constructive purposes." 362 U.S. at 65. Likewise, the Court in both *McIntyre* and *ACLF* invalidated state laws that required would-be speakers to sacrifice their anonymity, which thereby "discourage[d] participation in the . . . process by forcing name identification without sufficient cause." *ACLF*, 525 U.S. at 200.

B. This Court's Cases Upholding Disclosure Laws Do Not Apply in the Ballot-Issue Context.

Although this Court has upheld mandatory disclosure laws, it has done so in the context of

candidate elections for contributors to a candidate or expenditures by independent speakers on their behalf. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 81-82 (1976). However, both the government interests and the burdens on First Amendment rights are different in the candidate context than in the ballot-issue context. In *Buckley*, this Court listed three interests that disclosure serves: (1) alerting "the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office;" (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;" and (3) "gathering the data necessary to detect violations of the contribution limitations." 424 U.S. at 66-68. The disclosure laws that the Court upheld in *Buckley* were part of a regulatory scheme that affected only the "narrow aspect" of political association in which the government's interests in combating corruption were the greatest. *See id.* at 28.

The Court's approach to disclosure in *Buckley* and its progeny does not apply to laws such as the Public Records Act for two reasons. First, as this Court has repeatedly held, ballot issues do not involve concerns about corruption that have become the focus of and justification for candidate campaign-finance laws, including the disclosure laws that support them. Second, the interests listed in *Buckley* do not apply to ballot issues. Even the so-called informational interest listed in *Buckley* serves the

purpose of alerting voters to the interests to which *candidates* are likely to be responsive in order to facilitate predictions about their future performance in office. *See id*. at 67. This has no application in the ballot-issue context.

Nonetheless, some lower courts, most notably those in the Ninth Circuit, have uncritically applied *Buckley*'s holding to disclosure laws in the ballot-issue context. *See Doe v. Reed*, 586 F.3d 671, 680 (9th Cir. 2009) ("Referendum petition signers have not merely taken a general stance on a political issue; they 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 issue."); *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1183 (9th Cir. 2007).

These courts often view disclosure laws as a relatively cost-free means of educating voters about ballot issues. But both sides of this equation are wrong. As the next section demonstrates, disclosure laws such as Washington's Public Records Act are not cost-free. As the following section shows, the alleged interest in voter education cannot justify the burdens these laws impose on First Amendment rights.

II. Mandatory Disclosure Laws Have Chilled the Exercise of First Amendment Rights.

This Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on . . . First

Amendment" freedoms. *Buckley v. Valeo*, 424 U.S. at 64 (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates*, 361 U.S. 516 (1960); *Patterson*, 357 U.S. 449 (1958)). *See also Talley*, 362 U.S. at 65 (1960) ("The reason for those holdings [in *Bates* and *Patterson*] was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance."). Compelled disclosure can be particularly chilling in the case of ballot issues, which often involve a wide range of viewpoints on important and controversial subjects such as race, religion, and sexual orientation.

Notwithstanding this recognition, mandatory disclosure laws often have been assumed to be a form of "benign regulation that shines light on valuable information without any real costs." DICK M. CARPENTER II, INSTITUTE FOR JUSTICE, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM 1 (2007), http://www.ij.org/publications/other/disclosurecosts.html. As a consequence, mandatory disclosure laws have proliferated in recent years:

> All 24 states with ballot initiatives require disclosure to the government of contributors' personal information after minimal contribution thresholds are met. In the name of transparency and access to information, these laws require initiative committees to collect and report personal information about contributors, including names, addresses,

> contribution amounts and, in 19 states, even employers and/or occupation.

Id. at 3-4.

Here, Washington State has taken its requirement of disclosure to the government one step further by treating petition sheets that propose initiatives and referenda[3] as "public records." In this case, that means all 138,500 names and corresponding signatures and addresses will be made available to anyone who requests them, including third parties who have indicated that they will post the information on the Internet where it can be easily accessed and searched. Press Release, Knowthyneighbor.org, Whosigned.org Refutes Intimidation Charges; Will Post Names of Petition Signers as Planned (June 8, 2009), *available at* http://knowthyneighbor.blogs.com/home/2009/06/whosignedorg-refutes-intimidation-charges-will-post-names-of-petition-signers-as-planned.html.

Historically, many assumed that public disclosure imposed few, if any, costs on political speech, but that assumption had never been tested empirically.

---

[3] Under the Washington State Constitution, any bill the legislature passes may be put up for a referendum. WASH. CONST. art. II, § 1(b). Qualifying a referendum for the ballot requires the signatures of Washington registered voters who constitute more than four percent of the total votes cast in the most recent gubernatorial election. *Id*. A petition signer must provide his name, signature, and the address at which they are registered to vote on the petition sheet, which state officials use to verify that referendum organizers have obtained the requisite support.

See Jeffrey Milyo, *The Political Economics of Campaign Finance*, 3 INDEP. REV. 537, 537 (1999), *available at* http://www.independent.org/pdf/tir/tir_03_4_milyo.pdf (stating that before the Institute's recent studies, "no one [had] analyzed systemically the effects of campaign-finance regulations on freedom of speech or association"). However, the dearth of any empirical analysis has made it "difficult to evaluate the desirability of either current laws or proposed reforms when the potential costs of various policies have been completely ignored by scholars and policy makers alike." *Id.*

Today, however, the empirical research conducted by the Institute for Justice and others, as well as recent threats, harassment, and reprisals facilitated by disclosure, demonstrate the manner in which mandatory disclosure laws chill First Amendment freedoms. *See Citizens United*, 175 L. Ed. 2d 753 at 872-74 (U.S. 2010) (Thomas, J., concurring in part and dissenting in part) (invoking "real world, recent examples" of intimidation and retaliation provided by *amici* to show the "fallacy . . . that disclaimer and disclosure requirements . . . do not prevent anyone from speaking").

A. Disclosure Creates a Disincentive To Engage in Political Activity.

In 2007, Dr. Dick Carpenter researched whether mandatory disclosure requirements impose burdens that chill political participation. *See* DISCLOSURE COSTS

at 5-6. Dr. Carpenter is an Associate Professor at the University of Colorado, Colorado Springs, where he teaches graduate courses in research methods and statistics, and he is the Director of Strategic Research at the Institute for Justice. *Id.* at 22.

Dr. Carpenter's research is the first of its kind to test questions that scholars have long raised about disclosure:

> [M]ore than 30 years ago political scientist Herbert Alexander warned against the "chilling effect" of [campaign-finance] laws on free speech and citizen participation. Alexander described a situation in which citizens might be reluctant to participate or speak for fear of unintentionally violating laws they knew little about or did not understand.
>
> * * *
>
> Brad Smith, former chair of the Federal Election Commission and current chair of the Center for Competitive Politics, also points to the not unheard of possibility of retaliation against citizens whose political activities are disclosed to the public by the state. Smith asks, "What is forced disclosure but a state-maintained database on citizen political activity?"

Id. at 5 (footnotes omitted).

Specifically, Dr. Carpenter's study contrasted individuals' general opinions about mandatory disclosure requirements in the abstract with their attitude

about those same requirements when disclosure affected them personally. Dr. Carpenter found that although individuals generally claim to support mandatory disclosure, that support drops off when those individuals consider the personal costs.

> [S]upport for disclosure wanes considerably when the issue is personalized. . . . [M]ore than 56 percent disagreed or strongly disagreed that their identity should be disclosed, and the number grew to more than 71 percent when disclosure of their personal information included their employer's name.
>
> * * *
>
> Indeed, when we compared respondents' support for disclosure generally to their support for disclosing their own personal information, we found a very weak statistical relationship, especially if disclosure of one's employer is required. In other words, enthusiastic support for disclosure laws does not translate into a belief that one's own personal information should be released publicly.

Id. at 7-8 (internal citations omitted). Furthermore, three out of five people said that they would think twice about donating to a ballot-issue campaign if it meant that the state would disclose their names and addresses to the public. *Id*. at 7. The bottom line is that "even those who strongly support forced disclosure laws will be less likely to contribute to an

issue campaign if their contribution and personal information will be made public." *Id.* at 8.

Significantly, when "asked, through open-ended probes, why they would think twice if their personal information was disclosed, the reason most often given (54 percent) was a desire to keep their contribution anonymous." *Id*. at 8. Typical responses included, "'Because I do not think it is anybody's business what I donate and who I give it to,'" and "'I would not want my name associated with any effort. I would like to remain anonymous.'" *Id*. Participants often recognized the impact of disclosure on their privacy, stating, for example, that "'I don't want other people to know how I'm voting,'" and disclosure "'removes privacy from voting. We are insured privacy [in] the freedom to vote.'" *Id*. Respondents also cited anonymity when asked why they would think twice before donating if their employer's identity were disclosed, saying things like "'It's not anybody's business who my employer is and it has nothing to do with my vote,'" or "'My employer's name is nobody's business.'" *Id*. at 9. Beyond the desire for anonymous political participation, individuals also had concerns over a variety of potential repercussions, including fear for personal safety, identity theft, invasion of privacy, and loss of employment. *Id.* at 8-9.

As discussed below, these concerns about personal or economic repercussions are far from hypothetical, especially in an age where campaign-finance reports are widely accessible through the Internet,

and are used more frequently to retaliate against political opponents.

B. The Fear of Intimidation, Threats, and Reprisal for Political Participation Is Real and Reasonable.

As the Petitioners make clear in their brief, the uncritical expansion of mandatory disclosure has given many people the tools to intimidate those with whom they disagree. In the most recent election cycle, for instance, supporters of several state ballot initiatives on same-sex marriage were subjected to various forms of reprisals that were made possible by the public release of information on initiative supporters. In California, for instance, supporters of Proposition 8 were subjected to death threats, physical violence, threats of physical violence,[4] vandalism,[5] and

[4] *See, e.g.*, Ben Winslow, *Powder Scares at 2 LDS Temples, Catholic Plant*, DESERET NEWS, Nov. 14, 2008, *available at* http://www.deseretnews.com/article/705262822/Powder-scares-at-2-LDS-temples-Catholic-plant.html; Amanda Perez, *Prop 8 Death Threats*, ABC FRESNO, Oct. 31, 2008, http://abclocal.go.com/kfsn/story?section=news/local&id=6479861&pt=print.

[5] *See, e.g.*, *Prop 8 protestors vandalize church*, ABC FRESNO, Jan. 4, 2009, http://abclocal.go.com/kgo/story?section=news/local/san_francisco&id=6584961; *Anti-Prop 8 Vandals Hit Alto Loma Home*, ABC LOS ANGELES, Oct. 28, 2008, http://abclocal.go.com/kabc/story?section=news/local/inland_empire&id=6470557&pt=print; Chelsea Phua, *Mormon property defaced; Church struck by vandals in wake of vote*, SACRAMENTO BEE, Nov. 9, 2008, at B1; *Vandals Egg Downtown Fresno Church*, ABC FRESNO, Oct. 28, 2008,

(Continued on following page)

economic reprisals.[6] Significantly, this Court has already taken note of the threats, harassment, and reprisals directed at Proposition 8 supporters, s*ee Hollingsworth v. Perry*, 130 S. Ct. 705, 712-13 (U.S. 2010), and characterized them as a "cause for concern." *Citizens United*, 175 L. Ed. 2d at 802.

Quite simply, the easy accessibility of one's personal information suggests that it is time for this Court to re-examine the conventional wisdom about the relative low cost of mandatory disclosure rules. In 2010, a person wishing to harass citizens with a different viewpoint no longer needs to visit a government office and pour through thousands of paper records to access this information. Now, data regarding one's political leanings, address, employer, and occupation are searchable from any computer, day or night. In such an environment, it is perfectly reasonable for individuals to fear the consequences of speaking out or participating in the political arena.

In sum, this Court should invalidate mandatory disclosure laws that "subject[ ] citizens of this Nation

---

http://abclocal.go.com/kfsn/story?section=news/local&id=6473251&pt=print.

[6] *See, e.g.*, Steve Lopez, *Prop. 8 Stance Upends Her Life*, L.A. TIMES, Dec. 14, 2008, *available at* http://articles.latimes.com/2008/dec/14/local/me-lopez14 (describing the experience of a restaurant manager who made a personal donation in support of Proposition 8, ultimately resulting in the boycott of her restaurant); Jesse McKinley, *Theater Director Resigns Amid Gay Rights Ire*, N.Y. TIMES, Nov. 12, 2008, *available at* http://www.nytimes.com/2008/11/13/theater/13thea.html.

to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech." *Citizens United*, 175 L. Ed. 2d at 874 (Thomas, J., concurring in part and dissenting in part) (internal quotation omitted).

III. Washington's Public Records Act, As-Applied to Referendum Petitions, Fails Strict Scrutiny.

A. The Public Records Act Burdens Core Political Speech and Triggers Strict Scrutiny.

This Court has long held that laws that burden First Amendment rights must satisfy strict scrutiny. *See Meyer*, 486 U.S. at 423 ("[S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed.") (internal quotation omitted); *see also WRTL II*, 551 U.S. at 464 ("Because [the statute] burdens political speech, it is subject to strict scrutiny."); *McIntyre*, 514 U.S. at 347 ("When a law burdens core political speech, we apply 'exacting scrutiny. . . .'"); *CARC*, 454 U.S. at 298 ("As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny.").

As the previous section shows, compelling citizens to choose between anonymity and political participation means that many will choose to remain silent. Washington's Public Records Act, by mandating release to

the public of every signer's identifying information, poses just this danger. But the Act also impinges on freedom of speech in two ways that mirror the harms that this Court identified in *Meyer v. Grant*. First, Washington's requirement that every signer disclose his name and address to the public means that a substantial percentage of the population will be unwilling to sign any referendum petition, no matter the topic. Because these people will reflexively refuse to sign, innumerable conversations about "the nature of the proposal and why its advocates support it" will go unspoken. *Meyer*, 486 U.S. at 421. Therefore, Washington's mandatory disclosure law "has the inevitable effect of reducing the total quantum of speech on a public issue" in the same way that Colorado's ban on paying circulators did in *Meyer*. *Id*. at 423. Second, mandatory disclosure will make it much harder to qualify any initiative or referendum for the ballot. Washington's law therefore frustrates the ability of initiative or referendum organizers "to make the matter the focus of statewide discussion." *Id*. All the conversations that would have taken place about the specific pros and cons of myriad proposals, as well as the discussions about what the scope of government should be generally, will be lost due to the chilling effect of the Public Records Act. For all of these reasons, strict scrutiny should apply here as it has in five other cases before this Court involving restrictions on speech and association in the ballot-issue context. *See* Section I, supra.

Under strict scrutiny, the Respondents bear the burden of demonstrating that the Public Records Act advances a compelling state interest and is narrowly tailored. *See Meyer*, 486 U.S. at 420. As this Court has stated, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986). To satisfy this standard, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted).

1. This Court's discussions of mandatory disclosure in the candidate context do not provide a rationale for requiring disclosure in the ballot-issue context.

The Ninth Circuit's decision, and the argument put forth by the Respondents below, is based on an incorrect premise: that this Court's rulings upholding disclosure in the candidate context necessarily apply to the ballot-issue context. As a result, it held that only intermediate scrutiny applies in this case and that the Public Records Act should be upheld as it

applies in this case as a matter or course. *Doe*, 586 F.3d at 678. As stated above, however, this Court's cases upholding disclosure laws in the candidate context serve interests that are uniquely suited to the candidate context. Thus, the so-called informational interest at issue in *Buckley* involved the interest in providing voters with information "as to where political campaign money comes from and how it is spent *by the candidate* in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67 (emphasis added) (internal quotation omitted); *see also id*. at 79-80 (narrowing the reach of disclosure provisions so as to cover only "spending that is unambiguously related to the campaign of *a particular federal candidate*") (emphasis added). A few years after *Buckley*, this Court confirmed in *Brown v. Socialist Workers '74 Campaign Committee* that the interests announced in *Buckley* were indeed limited to the candidate context, stating that in *Buckley* "[t]he Court found three government interests sufficient in general to justify requiring disclosure of information concerning campaign contributions and expenditures: enhancement of voters' knowledge about *a candidate's* possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations." 459 U.S. 87, 92 (1982) (emphasis added); *see also Davis*, 128 S. Ct. at 2775 (striking down disclosure provision that applied to candidates because law to which it was related was struck down).

These same concerns do not exist in the ballot-issue context because there is no candidate. A ballot issue is not beholden to any interests; it is what it is, and does what it is does, regardless of who favors or opposes it. *Cf. McIntyre*, 514 U.S. at 354 (stating that candidate disclosure is supported by "an interest in avoiding the appearance of corruption that has no application" to ballot issues).

This Court has never held that state governments have carte blanche to regulate any and all electoral advocacy as such. *See, e.g., Buckley*, 424 U.S. at 47-49; *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). Its decisions make clear that candidate campaign-finance cases provide support for disclosure laws in the candidate context only; they do not provide support for disclosure laws in the ballot-issue or petition-signature contexts. As a result, this Court should approach this case as it approaches any case involving a law that burdens First Amendment rights and apply strict scrutiny.

2. This Court's statements about ballot-issue disclosure laws are dicta and do not support the Washington Public Records Act.

Both the Respondents, and the court below, contend that the Public Records Act furthers a compelling government interest "in affording its citizens the opportunity to know who supports sending referendum measures to the ballot." Brief of Appellants

at 26, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (No. 09-35818); *see also Doe*, 586 F.3d at 680 ("Referendum petition signers have not merely taken a general stance on a political issue; they 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 issue."). And while this Court has alluded to the utility of disclosure laws in the ballot-issue context, it has done so only in dicta and only in cases where it struck down laws that burdened speech about ballot issues. *See ACLF*, 525 U.S. at 202-04; *CARC*, 454 U.S. at 298-300; *Bellotti*, 435 U.S. at 791-92 & n.32.

For example, in *ACLF*, the Supreme Court struck down three regulations of ballot-petition circulators. 525 U.S. at 186-87. It was only after concluding that the regulations failed strict scrutiny that the Supreme Court commented in dicta about how the remaining provisions served the state's "substantial interests" in "protect[ing] the integrity of the initiative process, specifically to deter fraud and diminish corruption." *Id*. at 204-05. These included a requirement that the initiative sponsors disclose their names and the amounts they paid to petition circulators, as well as a number of other "process measures" such as requiring sponsors to submit a certain number of valid signatures, the single subject rule and others. *Id*. at 205.

The disclosure that the Court discussed in *ACLF* was of a far different kind than what is at issue in

this case. The Colorado law simply required the "*sponsors* of ballot initiatives to disclose who pays petition circulators, and how much." *Id*. (emphasis added); *see also id*. at 202 (referring to disclosure of "proponents' names and the total amount they have spent to collect signatures for their petitions"). A ballot initiative's sponsor is the one who drafts the initiative, pays petition circulators, obtains the necessary signatures, and ushers the initiative through the process of placing it on the ballot. The state's interest in knowing who the sponsors are and what they paid petition circulators simply does not support requiring those who sign petitions to disclose their names and addresses. After all, petition signers only sign a sheet of paper to say that a proposed measure should be put before the public. Because the First Amendment demands that the government justify each instance where the application of its laws would chill speech, *see WRTL II*, 551 U.S. at 478, any comments that the Court may have made in *ACLF*, *CARC*, or *Bellotti* about disclosure regimes that are not at issue in this case are beside the point.

B. The State Has No Compelling Interest in Providing Voters with Information About Who Signed a Referendum Petition.

Respondents' burden under strict scrutiny is not simply to contend that its interests are desirable or

even important, but that they are *compelling*. *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (state must present more than assertion and conjecture to justify restriction on speech). To do so, Respondents must offer more than speculation; they must offer evidence that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted); *see also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989) (striking down ban on party primary endorsements because the state presented no evidence that the law served the state's alleged interest in preventing confusion). But Respondents have offered no evidence that voters in Washington are suffering from a dearth of information about the issues in ballot-measure elections or that identifying other citizens who have signed a petition to place such measures on the ballot would address such an information gap even if it existed.

Campaign-finance scholars have recognized that mandatory disclosure can only provide benefits if the electorate actually accesses and uses the information as part of the decision-making process. Thomas L. Gais & Michael J. Malbin, *Campaign Finance Reform*, 34 SOC'Y 56 (1997). However, the DISCLOSURE COSTS study discussed above found that few citizens actually make use of information made available through disclosure laws. Carpenter, DISCLOSURE COSTS at 11-12. Other studies have shown, moreover, that

the press rarely reports such information. *See* Raymond J. La Raja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 ELECTION L. J. 236 (2007) (comparing print news coverage of campaign finance in states with disclosure requirements to those without requirements); Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 INDEP. REV. 567, 579 (2009), *available at* http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf. The importance and operation of issues involved in a ballot-measure election simply do not turn on the views of other voters or those who support or oppose the measure or sign a petition in favor of its placement on the ballot. Voters appear to recognize this. In all events, Respondents have not shown that voters are suffering from a dearth of information or are otherwise unable to understand the issues involved in a ballot-measure election.

Respondents' argument thus reduces to the "simple interest in providing voters with additional relevant information" that this Court rejected as a justification for disclosure in *McIntyre*. *See* 514 U.S. at 348. Indeed, if anything, the government's "informational interest" is far weaker here than in *McIntyre*, because the information conveyed from any one signature on a petition is vague at best. It is not at all clear that those who sign a petition actually support its ultimate passage; many signers may simply wish to see the issue placed on the ballot. And even if particular signatures conveyed useful

information, the Respondents' argument is premised on the unfounded – indeed, counterintuitive – assumption that voters will root through hundreds of thousands of petition signatures to uncover a common view that they can then attribute to the referendum or issue committee itself. Far more likely is that those who are interested in intimidating voters and petition signers will scour petitions. *See* Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST, July 1, 2007, at B3 (detailing how her name and address appeared on the website of an animal-rights terrorist organization that had culled FEC records for donors whose employers perform animal testing); John R. Lott, Jr. & Bradley Smith, Op-Ed., *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, WALL ST. J., Dec. 26, 2008, at A13 (summarizing examples of individuals who faced economic retaliation for donations in support of Proposition 8).

While few citizens make use of the disclosure rolls, those who do often do not make the best use of the information they find. Seen from this perspective, the supposed virtue of disclosure may just as easily be described as a vice. There is just as much reason to conclude that voters would be confused or draw entirely incorrect conclusions about a referendum from the identities of those who signed a petition to get it on the ballot.[7] Worse, there is just as much

[7] Many commentators laud voters' use of heuristic cues and support mandatory disclosure as a tool to provide voters with

(Continued on following page)

reason to think that the presence of a few notorious individuals in the rolls of signers would excite voter prejudices for or against a measure regardless of its underlying merits. *Cf. McIntyre*, 514 U.S. at 341-42 & n.5 (noting that the desire for anonymity may be motivated by fear of retaliation or ostracism and that anonymity can be beneficial in promoting objectivity). Indeed, the President of the Center for Governmental Studies in California has said that one purpose for requiring disclosure of contributions to ballot-issue campaigns is to let the voters keep track of "politically unpopular groups." Deposition of Robert M. Stern, President, Center for Governmental Studies, taken September 26, 2007, in *Sampson v. Coffman*, No. 06-CV-01858, 2008 U.S. Dist. LEXIS 70583 (D. Colo. Sept. 18, 2008) at 217:21-218:10. By monitoring government-mandated disclosure rolls to determine whether a member of a particularly disfavored group signed a petition or contributed to promote or defeat a

---

this "necessary" information. But this information can impede, rather than improve, voters' decision-making. Some empirical research suggests, for instance, that listeners will often overlook a message's content because they instead focus on an unreliable peripheral cue such as the speaker's race or identity. James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion in* ELEMENTS OF REASON 153, 174-75 (Arthur Lupia et al. eds., 2000). And in experiments, many voters' use of cues – such as supporting or opposing a referendum based on the identifying characteristics of those who sponsor the measure – actually harmed the quality of the decisions they reached. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making,* 45 AM. J. POL. SCI. 951 (2001).

measure, voters can use that information to vote based, not on the underlying merits of the proposition, but on whether they "like or hate" such groups. *Id*. at 218:7.

Furthermore, the Respondents' alleged interest in informing voters has no limiting principle. The unacknowledged premise at the root of the Respondents' argument is that the *views, allegiances, and interests* of those who sign petitions will convey useful information to voters. A mere name and address is useless information unless a voter can determine what that name and address conveys. Thus, many states require those who contribute to ballot-issue committees to disclose their employers as well. *See* Carpenter, DISCLOSURE COSTS at 4. But there is no principled reason to stop there. Financial information, level of education, political and religious affiliations, and interest group memberships would convey far more relevant information if educating voters about ballot measures is truly the interest at issue. Knowing the name and street address of an individual who signed a petition conveys almost nothing. Knowing that the signer is a Republican or Democrat, a member of the NRA or the ACLU, or an atheist or devout Catholic conveys far more about the likely consequences of the ballot measures they support or oppose. But the right to associate is a fundamental aspect of the First Amendment, *Patterson*, 357 U.S. at 460, and the government cannot "compel[ ] disclosure of affiliation with groups" as a condition of being able to exercise one's right to speak. *See id*. at 462.

This Court should not accept the claim that states have a compelling interest in requiring those who sign a petition to disclose their identities and addresses simply to "inform" or educate voters. This alleged interest boils down to little more than the bare desire to know who is supporting what side of an issue. In this respect, requiring individuals to disclose their support for placing an issue on the ballot is not fundamentally different from requiring them to disclose which way they will vote in the election. *Cf. McIntyre*, 514 U.S. at 343.

C. Mandatory Disclosure of All Petition Signers to the Public Does Not Directly Further Washington's Interest in Preventing Fraud at the Petition Stage.

For the reasons stated above, providing information to voters about who signed a petition is not a compelling government interest. The Respondents, though, suggest that releasing the names and addresses of all 138,500 signers would help prevent fraud in the referendum petition process. *See* Brief of Appellants at 25-26, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (No. 09-35818) ("Public access to signed petitions allows Washington citizens independently to examine whether the Secretary properly certified or properly declined to certify a referendum measure for the ballot, and to discover and report possible criminal law violations by petition signers."). Of course, all states with plebiscites have a strong interest in

establishing clear rules to ensure the integrity of their elections, such as rules that require that an initiative or referendum's sponsor demonstrates that a proposed measure enjoys a certain level of public support before it is placed on the ballot. And they likewise surely have an interest in making sure that that support is legitimate and not the product of fraud.

But as this Court has noted, "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Meyer*, 486 U.S. at 427. And to safeguard its initiative process, Washington has put in place an elaborate statutory scheme that, for many years, has functioned adequately without requiring the release of each and every petitioner's identifying information. *See* Wash. Rev. Code §§ 29A.72.130, .140, .230-50; *see also Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) (noting only two prosecutions for petition fraud in the previous seven years). If the current statutory scheme is somehow lacking, Washington assuredly has less-restrictive means at its disposal than releasing the names of each and every signer to the public.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this Court reverse the opinion below.

Respectfully submitted,

WILLIAM H. MELLOR
STEVEN M. SIMPSON*
ROBERT P. FROMMER
INSTITUTE FOR JUSTICE
901 N. Glebe Road
Suite 900
Arlington, Virginia 22203
(703) 682-9320

Attorneys for Amicus Curiae
**Counsel of Record*

Dated: March 4, 2010