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Constitutional Law - First Amendment - Shield or Spotlight - Doe v. Reed and the First Amendment's Application to Petitioners and Disclosure Requirements in the Citizen Lawmaking Process

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CONSTITUTIONAL LAW—FIRST AMENDMENT—SHIELD OR SPOTLIGHT? *DOE V. REED* AND THE FIRST AMENDMENT'S APPLICATION TO PETITIONERS AND DISCLOSURE REQUIREMENTS IN THE CITIZEN LAWMAKING PROCESS.

I. INTRODUCTION

> A popular Government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.[1]

Our Founding Fathers spoke warily of government conducted in the shadows, with a ruling elite legislating behind closed doors over an unenlightened citizenry. But what about when the citizens themselves become the lawmakers? Lawmaking by the initiative and referendum process—sometimes referred to as "citizen lawmaking" or "direct legislation"—has grown to hold a unique position in the legislative arena of many states.[2] It has been criticized as a "weapon of choice for interest groups and politicians."[3] And with initiatives and referendums increasingly being wielded as tools in the battles over hot-button political issues such as gay marriage and abortion rights, the constitutional privacy protections of citizens involved in direct legislation have now been called into question, with the issue rising all the way to the Supreme Court in *Doe v. Reed*, 130 S. Ct. 2811 (2010).

The hotly contested question considered in *Doe v. Reed* involves the process of gathering the signatures required in order to qualify an initiative or referendum for a state's electoral ballot.[4] Described by one commentator as "the latest First Amendment craze,"[5] the controversy turns on notions of privacy and anonymity for individuals who sign petitions in support of an initiative and whether third party groups may publish the names of people who have signed such petitions. Specifically, Internet-driven organizations, such as KnowThyNeighbor.org and WhoSigned.org, have led efforts in

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1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON 337 (Saul K. Padover ed., Harper & Row 1953).

2. *See generally* HAREL ARNON, A THEORY OF DIRECT LEGISLATION (2008); THE BATTLE OVER CITIZEN LAWMAKING (M. Dane Waters ed., 2001).

3. RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 36 (2002).

4. Although the initiative and the referendum are distinct legislative actions with unique functions, see *infra* Part II, the term "initiative" will be used to represent both actions throughout this note, unless otherwise noted.

5. *On Petitions and Secrecy: The Latest First Amendment Craze*, WALL ST. J. LAW BLOG (July 31, 2009, 13:46 PM), http://blogs.wsj.com/law/2009/07/31/on-petitions-and-secrecy-the-latest-first-amendment-craze.

several states to publish the names of people who have signed petitions in support of measures that would restrict or deny the expansion of rights and benefits for homosexuals.[6] While strongly criticized, the groups have earned national recognition for their campaign to expose citizens who support anti-gay measures, particularly when the published lists turn up public figures.[7]

The Supreme Court's consideration of the matter in *Doe v. Reed* comes only after the debate recently boiled over into the federal courts of two western states. In California's 2008 general election, voters approved "Proposition 8," an initiative that sought to amend the state's constitution to eliminate the possibility of homosexual marriage.[8] An organization that supported Proposition 8 promptly sought to enjoin the state from releasing the names of those who donated money in support of the initiative campaign, but a federal district court judge held that the names of those donors were permissibly made public.[9] Six months later, a federal judge hearing a similar case in Washington landed on the other side of the issue. In *Doe v. Reed*,[10] the district court issued a preliminary injunction to prevent the Secretary of State's office from releasing the names and contact information of petitioners who favored repealing a recently passed state law that granted gay couples new marriage-like benefits.[11] After the Ninth Circuit stayed the injunction upon appeal,[12] the Supreme Court intervened.[13]

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6. *See* KNOWTHYNEGHBOR.ORG, *About KnowThyNeighbor.org*, http://www.knowthyneighbor.org/national (last visited January 19, 2010) and WHOSIGNED.ORG, http://www.whosigned.org (last visited January 19, 2010).

7. A well-documented example came when the CEO of Wal-Mart, the world's largest retail company, was found to have signed a petition in support of "Act 1" in Arkansas in 2008, which denied same-sex couples the possibility of becoming foster parents. *See* Marc Gunther, *Wal-Mart CEO Has a Problem With Gays*, THE HUFFINGTON POST (May 6, 2009, 16:24 PM), http://www.huffingtonpost.com/marc-gunther/wal-mart-ceo-has-a-problem-with-gays/196366.html.

8. The amendment added a clause to the state's constitution that reads, "Only marriage between a man and woman is valid or recognized in California." *See* WHAT IS PROP 8?, http://www.whatisprop8.com (last visited Sept. 17, 2010).

9. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

10. 661 F. Supp. 2d 1194 (W.D. Wash. 2009), *rev'd*, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 120 S. Ct. 2811 (2010).

11. *Id.*

12. Doe v. Reed, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 120 S. Ct. 2811 (2010).

13. Writing in his role as Circuit Justice for the Ninth Circuit, Justice Kennedy's original order in October of 2009 simply put the district court's injunction back in place, effectively preventing the release of petitioner's names in the interim but leaving open the questions presented in the case. *See* Doe v. Reed, 130 S. Ct. 486 (2009) (Kennedy, Circuit J.); *see also Breaking News: Supreme Court Reverses Ninth Circuit, Reimposes Stay in Washington Referendum Signer Case*, ELECTION L. BLOG (Oct. 20, 2009), http://electionlawblog.org/archives/014602.html; Lyle Denniston, Posting to SCOTUSblog, http://www.scotusblog.com/2010/01/court-to-rule-on-petition-signers-rights (Jan. 15, 2010) (last visited Aug. 22, 2010); Chris Grygiel, *U.S. Supreme Court Could Be Next Stop for R-71*, SEATTLE POST-INTELLIGENCER (Nov. 8, 2009) *available at*

The Court voiced its sentiments in this debate over disclosure and petitioners' rights, which "raises fascinating questions on the merits,"[14] in an eight-to-one opinion issued on June 24, 2010. Notably, however, the decision contained no less than seven separate opinions,[15] thus reinforcing the opinion of judges and commentators alike that the question presented in the matter was a novel one.[16] Indeed, it involves a complicated mix of interrelated First Amendment issues and the corresponding interests of the state, the individual petitioners, and the democratic process. As Justice Breyer stated in his individual concurring opinion, the law at stake "significantly implicates competing constitutionally protected interests in complex ways."[17] Unfortunately, however, as this note will argue, the majority opinion authored by Justice Roberts failed to boldly meet the issue's complexity head-on—settling, rather, for a ruling on limited constitutional grounds that leaves the lower federal courts to grapple with the unanswered questions in this case and those surely to come.[18]

As will be discussed in greater detail, the Court's opinion upheld a broad right of disclosure with respect to signatories of initiatives and referendums—on its face, a victory for disclosure advocates and proponents of open government reform. However, the majority did so by narrowly invok-

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http://www.seattlepi.com/local/411967_gayrights09.html. The Court later granted certiorari the following January. *See* Doe v. Reed, 130 S. Ct. 1133 (U.S. Jan. 15, 2010).

14. Grygiel, *supra* note 13.

15. *See* Doe v. Reed, 138 S. Ct. 2811 (2010). Neither Justices Stevens nor Scalia signed Chief Justice Roberts's opinion. Only Justice Thomas dissented. *See also* Rick Hasen, *Initial Thoughts on* Doe v. Reed, ELECTION L. BLOG (June 24, 2010, 11:22 AM), http://electionlawblog.org/archives/016266.html (presenting a concise summary of the seven concurrences).

16. *See Doe*, 586 F.3d at 676, *aff'd*, 130 S. Ct. 2811 (2010) (declaring that the case "presented novel questions of whether referendum petition signatures are protected speech under the First Amendment"); *see also* David G. Savage & Carol J. Williams, *Gay Marriage Fights Fuel Debate Over Petitioners' Rights*, L.A. TIMES, Oct. 25, 2009, *available at* http://articles.latimes.com/2009/oct/25/nation/na-secrecy25 ("The fierce fight over same-sex marriage in California and elsewhere is creating pressure to recognize a new free-speech right . . . ."); William Yardley, *Privacy Looms Over Gay Rights Vote*, N.Y. TIMES, Nov. 1, 2009, *available at* http://www.nytimes.com/2009/11/01/us/01petition.html (stating that the Washington dispute raised "new questions about privacy, free speech and elections in the Internet age").

17. Doe v. Reed, 130 S. Ct. 2811, 2822 (2010) (Breyer, J., concurring) (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer J., concurring)).

18. *See* Dale A. Oesterle, Doe v. Reed *a Disappointment on Several Fronts*, ELECTION LAW @ MORITZ (July 2, 2010),
http://moritzlaw.osue.edu/electionlaw/comments/articles.php?ID=7425 (noting that " the case was a major disappointment in many ways," and "the majority decision, written by Chief Justice Roberts, did not decide the critical question in the case"); Daniel Schuman, *The Ticking Time Bomb in the Supreme Court's* Doe v. Reed *Opinion*, SUNLIGHT FOUND. BLOG (June 25, 2010,10:22 PM), http://blog.sunlightfoundation.com/2010/06/25/the-ticking-time-bomb-in-the-supreme-court's-doe-v-reed-opinion.

ing the state's interest in the "integrity of the electoral process" and related issues of ballot fraud.[19] Thus, while the opinion paid lip service to the First Amendment, it essentially cast aside the greater aspirations of the fundamental right to freedom of speech that could have provided the foundation for a strong precedent favoring transparency in the context of direct legislation. After all, what greater First Amendment interest exists than that of so-called "political speech," which has long been considered to be at the very core of the Amendment?[20] As the Supreme Court announced in *Mills v. Alabama*,[21] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[22] Lastly, as commentators, judges, and Supreme Court Justices alike have noted, there is even a compelling argument that the signing of a petition in the context of citizen lawmaking is a direct or quasi-legislative action, thus not requiring such actions to be subject to the scrutiny afforded under the First Amendment.[23]

This note examines the nexus between the freedoms of association and speech in relation to political advocacy and the privacy interests of those who sign political petitions. First, the note begins with a brief background of the rise and popular usage of citizen lawmaking in America. Next, the circumstances surrounding the recent controversial measures in California and Washington are presented, including the procedural posture that delivered the Washington case to the Supreme Court. The Court's decision in *Doe v. Reed* is reviewed, with focus on the narrow grounds upon which the holding was reached. The note then explores the relevant historical and legal backgrounds of the First Amendment guarantees of freedom of association and freedom of speech, strictly in the context of political advocacy. Following this background, the discussion turns to a critical analysis of precedent and arguments advanced by opponents of disclosure, before exploring several reasons why states' interests in disclosure may be found to be compelling—and why the Court could have staked a more definitive position in support of transparency. The note concludes by asserting that the Supreme Court missed an opportunity to strike a clear balance favoring transparency in government and openness in the citizen lawmaking process in America.

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19. *Doe*, 130 S. Ct. at 2819.

20. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1032 (2d ed. 2002).

21. 384 U.S. 214 (1966).

22. *Id.* at 218.

23. *See infra* Part III.B.1.

II. BACKGROUND

A. The Development and Role of Direct Legislation in Modern American Politics

In 1911, President Woodrow Wilson declared that the initiative "is the safeguard of politics. It takes power from the boss and places it in the hands of the people."[24] This populist sentiment reflects the American origins of the initiative and referendum process in our western states during the Populist and Progressive eras that spanned from the end of the nineteenth to the beginning of the twentieth century.[25] Direct legislation may have been an outgrowth of political dissatisfaction that emerged during the Industrial Revolution, as the population became skeptical of the emergence of special interest groups, party bosses, and corruption in the political system.[26] Indeed, the very essence of direct legislation lies in its ability to put legislative power explicitly in the hands of the electorate, thus bypassing the traditional role of elected officials. As author and political scientist Thomas Cronin put it, "When popular demands for reasonable change are repeatedly ignored by elected officials, and when legislators or other officials ignore valid interest and criticism, the initiative and referendum . . . can be a means by which the public may protect themselves in the very American tradition of self-government."[27] At its best, direct legislation embodies values such as increased participation in our democratic government, open access to the political agenda, and equality amongst all citizens in our political processes.[28]

An initiative and a referendum, both of which are integral functions in citizen lawmaking, are actually unique and distinct actions. The initiative process allows statutes or constitutional amendments, like Proposition 8 in California, to be proposed directly by engaged citizens or organizations. If enough signatures are collected via the petitioning process, it is then placed on the ballot for approval or rejection by popular vote.[29] In contrast, the popular referendum allows citizens to take an up-or-down vote on a measure *already enacted* by a governmental body, once the appropriate signatures are collected to authorize the vote via the state's electoral ballot.[30]

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24. Thomas E. Cronin, *The Paradoxes and Politics of Citizen Initiatives*, 34 WILLAMETTE L. REV. 733, 734 (1998).

25. *Id.* at 733–34; ARNON, *supra* note 2, at 5–9. In 1904, Oregon passed the first two initiatives in American history. *Id.* at 11. *See also* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 14–15 (1995).

26. ARNON, *supra* note 2, at 9–10.

27. Cronin, *supra* note 24, at 739.

28. Magleby, *supra* note 25, at 43.

29. *Id.* at 13.

30. *Id.* at 14.

Regardless of which procedure is used, both instruments allow citizens to "set the political agenda" by putting statutes or constitutional amendments up for the popular vote or by vetoing actions taken by state or local legislative bodies.[31]

Following early enthusiasm for the initiative and referendum process in the United States from 1898 to 1918,[32] the use of these tools slowed.[33] World War I marked a calming trend in the use of these legislative vehicles that endured from the 1940s until the late 1970s, when a revival of direct legislation swept across the nation.[34] A second wave of popularity during the 1990s[35] has not yet slowed and has been described as "the modern initiative revolution."[36]

But despite the emergence of initiatives and referenda as powerful tools in the modern political arsenal, criticism endures—often in the form of calls for greater disclosure and transparency. The romantic notion of citizens wresting power from unresponsive or corrupt factions of government belies the plain truth that special interest groups play, and have long played, a powerful role behind the scenes of citizen lawmaking.[37] Decrying that the importance of funding has become too influential in the direct legislation context, one scholar has commented that initiatives have now become "a luxury of the wealthy."[38]

Proposition 8, the initiative passed in California in 2008 and discussed in the next section, set a new record for spending on a social policy initiative and eclipsed the amount spent in every other political race in the country that year, save for the presidential contest.[39] Describing it as a "paradox" that has characterized the use of initiatives since their introduction in the United States, Thomas Cronin has propounded that direct legislation, as a

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31. *Id.* at 13.

32. ARNON, *supra* note 2, at 5–6. Over twenty states embraced some form of direct legislation during this early period.

33. *Id.*

34. *Id.* at 6, 12.

35. ELLIS, *supra* note 3, at 35 (noting that 458 initiatives appeared on the ballot nationwide between 1990 and 2000, which is over three times the rate of initiative qualification from 1940 to 1970).

36. *Id.* at 36; *see also* ARNON, *supra* note 2, at 12–13 ("It is reasonable to conclude that we are witnessing the rise of an era for popular democracy.").

37. *See* Magleby, *supra* note 25, at 30.

38. ARNON, *supra* note 2, at 30–31.

39. Justin Ewers, *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS & WORLD REPORT (Oct. 29, 2008), http://www.usnews.com/articles/news/national/2008/10/29/california-same-sex-marriage-initiative-campaigns-shatter-spending-records.html; *see also* Lisa Leff, *Donors Pumped $83M to Prop. 8 Race*, ASSOCIATED PRESS, (Feb. 2, 2009), http://www.ksl.com/?nid=148&sid=5490691 (noting that final campaign filings showed total expenditures from both sides of the Proposition 8 initiative surpassed $83 million).

tool to eliminate the influence of special interests and elevate the voice of regular citizens, is "in many ways a vain undertaking."[40]

Additionally, the citizen lawmaking approach thrusts the populace into what is traditionally the province of elected officials and legislative bodies, thereby sidestepping the conventional channels of government. The fact that "many ballot measures are intended to bypass or override the legislative process"[41] suggests that at least the same level of transparency as we require of our legislators should be demanded. As Gene Policinski phrased it, "If any process in our democracy demands openness, it's the process by which a group of citizens can circumvent elected officials and government bodies to take a legislative proposal directly to the rest of us."[42]

Finally, popular initiatives are frequently vehicles by which especially controversial, neglected, or politically divisive issues are put before the electorate. Under the guise of "let[ting] the voters decide," initiatives have become a method through which legislators may avoid having to confront especially difficult political or social issues, or by which they can enact measures that would otherwise not pass in the legislature.[43] As a result, the issues presented by direct legislation rarely reflect the most pressing political problems on the mind of voters, and instead often represent the will of ideological or social-reform groups that have been unsuccessful in the established legislative channels.[44] The issue agenda of initiative politics has been described as "diversionary,"[45] steering the discussion away from legitimately pressing governmental problems and tilting toward hot-button social issues.

B. The Current Battle over Disclosure and Transparency in Petition Circulation

Critics implore that this circumvention of the established halls of government, and the concomitant diversion from the politically imperative dis-

40. Cronin, *supra* note 24, at 734–35. Cronin elaborates that the initiative process has neither removed nor minimized the role of special interests in the legislative arena, and affirms that special interest groups continue to remain heavily involved in initiative politics. *Id.* at 735.

41. Yardley, *supra* note 16.

42. Gene Policinski, *Openness Should Govern Public Petitions, Too* (Feb. 8, 2009), http://www.firstamendmentcenter.org/commentary.aspx?id=21204. Policinski is the vice president and executive director of the First Amendment Center.

43. Magleby, *supra* note 25, at 29. It has also been remarked that initiatives are a "legislative tool for regulating political issues that are a source for significant political dissatisfaction," and are "designed to address specific hot political topics that are either unhandled or mishandled by elected legislators." ARNON, *supra* note 2, at 3.

44. Magleby, *supra* note 25, at 35.

45. *Id.* at 37.

cussions of the day, demand greater openness and accountability in the initiative process. In a fitting geographical tribute to the western-state origins of direct legislation, both California and Washington recently found themselves at the center of the ongoing controversy over disclosure requirements in initiative politics.

1. *Proposition 8 in California*

Proposition 8 launched an $83 million battle to abolish gay marriage in California, making it the most expensive ballot measure on a social issue in United States history.[46] The initiative was proposed following a state supreme court decision that legalized gay marriage in June 2008.[47] After Proposition 8 passed on November 4, 2008, with the support of over fifty-two percent of California voters,[48] gay-rights activists began to organize boycotts of businesses run by individuals who contributed to the Proposition 8 campaign.[49] These boycotts led to reports of harassment against the contributors, which, in turn, spurred a lawsuit to prevent the names of all Proposition 8 contributors from being publicly disclosed pursuant to California's Political Reform Act of 1994.[50]

The ballot committees that led the campaign in support of Proposition 8, along with some of their representative major donors, filed the action in federal court in California's Eastern District.[51] Their claims were twofold: first, that the disclosure requirements for contributors to ballot measure campaigns did not meet strict scrutiny, as should be required due to the infringement upon the contributors' freedom of speech, and second, that proponents of Proposition 8 should receive an exemption from the requirements because of the reasonable probability that such disclosure would result in harassment, threats, and reprisals.[52] In support of this contention, the plaintiffs provided anecdotal evidence and nine "John Doe" affidavits recounting specific examples of harassment, theft, boycotts, vandalism, and other "threats" against supporters of Proposition 8.[53]

Writing for the court, Judge Morrison England, Jr., first noted the ambiguity inherent in Supreme Court decisions addressing what standard of

46. Leff, *supra* note 39.

47. *Id.*

48. Jessica Garrison, Cara Mia DiMassa & Richard C. Paddock, *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, (Nov. 5, 2008), *available at* http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story.

49. Tami Abdollah & Cara Mia DiMassa, *Prop. 8 Foes Shift Attention*, L.A. TIMES, (Nov. 14, 2008), *available at* http://articles.latimes.com/2008/nov/14/local/me-boycott14.

50. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

51. *See id.*

52. *Id.* at 1204.

53. *Id.* at 1200–04.

review should apply to disclosure requirements in political contexts. Declaring that matter "an open question," the court "assumed without deciding" that strict scrutiny should apply in the case.[54] The opinion then quickly turned to a review of precedent supporting the argument that disclosure requirements were of utmost importance to the political process, particularly in the context of direct legislation efforts. Leaving no doubt as to how the court viewed the matter, Judge England unequivocally affirmed that "[i]f ever disclosure was important, indeed vital, to fuel the public discourse, it is in the case of ballot measures."[55]

Further, the court went on to eviscerate the plaintiff's plea for an exemption from disclosure based on their fear of resulting harassment. This exemption is based on the so called "*Buckley/Brown* test"[56] that exempts certain "minor parties" from disclosure, based upon a historical record of government and private hostility, amongst other factors. The court noted, however, that the record of harassment submitted by the plaintiffs showed only small, random acts of hostility against a very small group of the overall supporters of Proposition 8.[57] Therefore, their circumstances were nowhere near analogous to the circumstances of earlier groups, including the Socialist Workers Party in 1974 and the members of the National Association for the Advancement of Colored People (NAACP) in the Deep South in the 1950s, which had originally warranted the exception.[58]

Because California's interest in disclosure was compelling, and because the plaintiffs' circumstances did not merit an exemption for their supporters and contributors, the court upheld the disclosure provisions of the state's Political Reform Act. Transparency and open government won the day, and the gay-rights community seized upon the decision as a victory in the aftermath of their losing battle fought over Proposition 8. The war, however, was not over; less than a year later, the issue found its way into another federal courtroom in a nearby, western state—with a significantly different result.

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54. *Id.* at 1207. The finding that the appropriate standard of review in such cases remains "an open question" is particularly salient, as it points toward a potentially effective argument in similar ballot measure disclosure challenges—that is, the assertion that a lower level of scrutiny should apply to states' disclosure laws. See the discussion *infra*, Part II.B.2, of the Ninth Circuit's opinion in Washington's Referendum 71 case.

55. *ProtectMarriage.com*, 599 F. Supp. 2d at 1211.

56. *See infra* Part III.A.3. Associational anonymity is an implicit right in the First Amendment and is given heightened protection to groups that meet the *Buckley/Brown* test.

57. *ProtectMarriage.com*, 599 F. Supp. 2d at 1217.

58. *Id.* at 1214–18.

2. *Referendum 71 in Washington*

a. A different result in district court

The controversy over gay rights continued in 2009, with the passage of the so-called "everything but marriage" law in the Washington state legislature that granted new benefits to couples who have registered as domestic partners with the state. Opponents of the new law sought to have the matter put before a popular vote and, thus, qualified Referendum 71 for the November state election ballot.[59] Once KnowThyNeighbor.org announced its intention to post the names of all petitioners in support of the referendum online, a coalition led by a group called Protect Marriage Washington took the matter into federal court.[60]

Their two claims essentially mirrored those of the California plaintiffs. Their assertions were, first, that Washington's Public Records Act (PRA) violated the First Amendment as applied to referendum petitions because they were not narrowly tailored to meet a compelling governmental interest, and second, that the PRA was unconstitutional as applied to them because of the reasonable probability of threats, harassment, and reprisals resulting from disclosure of their names.[61] This time, however, the plaintiffs found a sympathetic ear in District Court Judge Benjamin Settle.

Writing for the federal court in Washington's Western District, Judge Settle declared that the type of free speech at issue was *anonymous* political speech; therefore, because the right to participate anonymously in the political process is implicit in the First Amendment, strict scrutiny must apply.[62] Although the state contended that petitioners waived any expectation of anonymity by supporting the referendum in an open and public forum, the court dismissed the argument stating that it knew of no authority requiring that signatures in support of a referendum *must* be obtained in a public forum.[63]

Notably, the state also asserted that the petitioners' actions should not even be considered protected political speech because, by signing a petition

59. It should be clarified that the Proposition 8 lawsuit involved disclosure of *contributors* to the measure, while the Washington case involves disclosure of mere *petitioners* who had signed their names in support of qualifying Referendum 71 for the electoral ballot. The courts, however, treated the issue in practically identical fashion and the decisions turned upon interpretations of the same legal precedent and cases.

60. *See generally* Savage & Williams, *supra* note 16.

61. *See* Doe v. Reed, 661 F. Supp. 2d 1194, 1196 (W.D. Wash. 2009), *rev'd*, 586 F. 3d 671 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010). The court decided the case upon the first issue and therefore did not reach argument for, nor decide upon the merits of, the *Buckley/Brown* exception.

62. *Id.* at 1202.

63. *Id.* at 1201.

in a direct legislation context, petitioners act as "quasi-legislators."[64] Again, however, the court was unmoved, holding that the quasi-legislative action does not require waiver of the petitioners' fundamental First Amendment protections.[65] Thus, the signing of a referendum petition was held to be protected political speech, thereby implicating the application of strict scrutiny. Although the court conceded that the state established a compelling interest,[66] it nevertheless held that the PRA's disclosure requirements were not narrowly tailored to accomplish this interest of preserving the integrity of the referendum process.[67] Because the PRA did not meet the burden of strict scrutiny, as applied to the disclosure of referendum petitioners, the court granted a preliminary injunction that prevented the Secretary of State's office from releasing their names.[68]

b. The Ninth Circuit reverses

The injunction protecting the Referendum 71 signatures did not remain in place for long, however. The district court decision was immediately taken up on appeal, and after oral arguments were heard, merely a month after the preliminary injunction was instated, the Ninth Circuit delivered its order on October 15, 2009.[69] Noting that the case presented "novel questions" of whether referendum petition signatures should be considered protected political speech, the court took issue with the lower court's interpretation of the issue and reversed its decision, in effect, staying the injunction.[70]

The Ninth Circuit's reversal stemmed from their determination that the "district court's finding that the speech at issue is anonymous is clearly erroneous."[71] The court listed the following four factors supporting the analysis that signatures collected during the petition process are clearly not anonymous: 1) that the petitions are signed in public and with no showing that they are designed to protect signers' confidentiality; 2) that each petition sheet allows up to twenty names, thereby allowing later petitioners to see the signatures of previous ones; 3) that any reasonable signer knows that the petitions will be handed over to the state, which gives no promise of confi-

64. *Id.*

65. *Id.* at 1201–02.

66. *Id.* at 1203 (citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214 (1989) ("[A] state indisputably has a compelling interest in preserving the integrity of its election process.")).

67. *Doe*, 661 F. Supp. 2d at 1204–05.

68. *Id.* at 1206.

69. The Ninth Circuit's brief order was granted and effective on October 15, 2009, with the note that "an opinion setting forth the reasons for the [order] shall be issued expeditiously and in due course." The actual opinion was delivered a week later on October 22.

70. Doe v. Reed, 586 F.3d 671, 676 (9th Cir. 2009).

71. *Id.* at 677.

dentiality; and finally, 4) that Washington law provides that both proponents and opponents of a referendum may observe the State's signature verification process.[72] Going one step further, the court then explained that even assuming (as it did) that petition signing is political speech, the application of strict scrutiny should not follow automatically.

c. The Supreme Court's—uncertain—decision

Recognizing that the proverbial floodgates may have been opened by the Ninth Circuit's decision, thus allowing the Secretary of State's office to release the lists of petition signatories to outside groups, Protect Marriage Washington and its allies immediately petitioned the Supreme Court to intervene. The Court did just that, stepping in immediately to issue a brief order that stayed the Ninth Circuit's decision and effectively put the district court's injunction back in place for the time being.[73] Certiorari was granted on January 15, 2010,[74] and the Court issued its ruling on June 24, 2010.[75]

Chief Justice Roberts penned the majority opinion for the 8-1 decision, although perhaps more telling was the fact that the decision spawned seven separate concurrences and two of the Justices abstained from signing the Chief Justice's opinion. In the holding, the Court found that the public interest in disclosure of the referendum petitions "in general" was substantially related to the important interest of preserving the integrity of the electoral process.[76] The Court noted, however, that upholding Washington's Public Records Act against such a broad-based challenge "does not foreclose a litigant's success in a narrower one"[77]—thus opening the door for groups of all stripes to preemptively seek an exemption under the *Buckley/Brown* test in order to maintain their supporters' anonymity.

The Court reached this opinion first by holding that signing a petition for initiatives and referendums is a form of expression that falls squarely within the First Amendment.[78] But it was the Court's quick departure from review under this amendment that is most notable. The State of Washington had asserted two interests to justify compelled disclosure of the signatures: "(1) preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and

72. *Id.*

73. Doe v. Reed, 130 S. Ct. 486 (2009) (Kennedy, Circuit Justice).

74. Doe v. Reed, 130 S. Ct. 1133 (U.S. Jan. 15, 2010) (No. 09-559); *see also* Denniston, *supra* note 13.

75. Doe v. Reed, 130 S. Ct. 2811 (2010).

76. *Id.* at 2820.

77. *Id.* at 2821.

78. *Id.* at 2817 ("The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment.").

accountability; and (2) providing information to the electorate about who supports the petition."[79] However, upon finding that the first interest—combating fraud and preserving electoral "integrity"—was sufficient to uphold the PRA, the Court skirted away from First Amendment considerations and simply stated, "we need not, and do not, address the State's 'informational' interest."[80] Interestingly, the opinion quickly noted that the State's interest in electoral integrity is not simply limited to combating fraud, but "also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is 'essential to the proper functioning of democracy'"[81]—reasoning that sounds quite similar to that advanced under the State's unexamined "informational interest."[82]

More importantly, while the broad challenge to the PRA's disclosure requirements failed, the Court nevertheless kept the window open for a narrower challenge for exemption based upon the *Buckley/Brown* test, discussed *infra*. It did so however, without delineating any guidelines as to how that doctrine should be applied and reviewed in the context of direct legislation. The Chief Justice noted that "the plaintiffs may press the narrower challenge . . . in proceedings pending before the District Court,"[83] thus leaving it to the Washington district court—and others that will surely see litigation to define the contours of the issue—to interpret the majority's ruling and what it means for petitioners who support or oppose controversial ballot initiatives.

C. Which Fundamental Rights Are Truly at Stake?

Despite the rhetoric, the media attention, and the heated political issues that underlie the aforementioned cases, courts considering the overall matter have found the real question implicated to be one of fundamental rights.[84] As Judge England said, regarding the controversy following passage of Proposition 8 in *ProtectMarriage.com v. Bowen*,[85] "this case is not about gay marriage . . . [t]his case is about the First Amendment."[86] Of course, the Constitution explicitly grants to the people the right to "petition the Gov-

79. *Id.* at 2819.

80. *Id.*

81. *Doe*, 130 S. Ct. at 2819.

82. See *infra* Part III.B.2 for a discussion of how this "informational interest" relates to First Amendment protections that may support compelled disclosure.

83. *Doe*, 130 S. Ct. at 2821.

84. However, compare *infra* Part III.B.1 for a discussion of how petition signing could be considered a legally operative act (as opposed to merely a form of expression), thus not even implicating the First Amendment.

85. 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

86. *Id.* at 1205.

ernment for a redress of grievances."[87] However, it should be noted that this basic privilege is not even implicated by this controversy—in fact, the fundamental First Amendment right to petition the government for a redress of grievances is unique and distinguishable from the petitioning process necessary to qualify an initiative for the ballot.[88] Rather, the constitutional inquiry at the heart of the matter involves our fundamental rights of freedom of speech and freedom of association. Therefore, we must examine the relation of these constitutional imperatives to the petitioning process involved in initiatives and referenda.

1. *Freedom of Speech Implications*

Since our nation's founding, political speech and advocacy has been an indispensable, defended right in our democratic process. "Political speech," as such, is considered to be one of the most protected forms of expression recognized by our courts and one that lies at the very heart of the First Amendment.[89] This protection symbolizes our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[90] By virtue of its place as a fundamental right secured by our Constitution, limitations on such political speech are viewed suspiciously and with high scrutiny by our courts.[91]

In the context of ballot proposals, the Court has explicitly declared that the petition process "involves both the expression of a desire for political change and a discussion of the merits of the proposed change."[92] Involving, as it does, this expression and discussion of political change, petition circulation has been held to lie at the very "core" of political speech.[93] Therefore, some courts have viewed laws that relate to the petitioning process under

87. U.S. CONST. amend. I.

88. *See generally* Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. COLO. L. REV. 129, 129–37 (1995).

89. CHEMERINSKY, *supra* note 20, at 1032–33; *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346–47 (1995); Buckley v. Valeo, 424 U.S. 1, 14–15 (1976); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

90. *N.Y. Times Co.*, 376 U.S. at 270. Indeed, this right of expression in our political and governmental arenas was part of the very foundation and rationale for the drafting of the First Amendment. As the Court declared in *Roth v. United States*, "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 354 U.S. 476, 484 (1957); *see also* Mills v. Ala., 384 U.S. 214, 218 (declaring the practical "universal agreement" that discussion of our nation's political affairs was a "major purpose" of the First Amendment).

91. CHEMERINSKY, *supra* note 20, at 1033 ("Thus, restrictions on political speech are subjected to strict scrutiny.").

92. Meyer v. Grant, 486 U.S. 414, 421 (1988).

93. *Id.* at 422; Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 186 (1999).

the critical eye of strict scrutiny.[94] In *Buckley v. American Constitutional Law Foundation*,[95] Justice Thomas drew a clear line with election laws, stating that when they "directly regulate" such core political speech, "we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest."[96]

However, the calculus involved in determining the standard of review is not always so straightforward, and the government may be able to present a substantive interest that can surmount the constitutional protections erected around political speech. As the majority held in *Buckley*, "We have also recognized, however, that 'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"[97] Therefore, a state's prerogative in disclosing the names of petition signers may survive strict scrutiny if a court is convinced that the state's interest is compelling and the disclosure provisions are narrowly tailored. Further, as will be shown in *infra* Part III.A.1, there is a convincing argument that the signing of a petition should be considered expressive *conduct*, rather than pure political *speech*; as such, it may be subjected to a lower level of judicial scrutiny. But before that constitutional hurdle is surmounted, another fundamental right related to political advocacy and the initiative process must be cleared.

2. *Freedom of Association Implications*

Although it is not expressly enumerated, a right of freedom of association has been held to be implicit in the First Amendment.[98] This fundamental right was first recognized in *NAACP v. Alabama ex rel. Patterson*,[99] in which the Supreme Court equated the right to associate with others for the advancement of a group's beliefs and ideas to the concept of liberty assured by the Due Process Clause of the Fourteenth Amendment.[100] But this freedom is void of constitutional worth without a corresponding right of anonymity in an individual's associations. As the *Patterson* court recognized, compelled disclosure of the names of individuals affiliated with certain

94. *Meyer*, 486 U.S. at 425 (finding that protection for such petition circulation under the First Amendment is "at its zenith").

95. 525 U.S. 182 (1999).

96. *Id.* at 207 (Thomas, J., concurring) (citing First Nat'l Bank of Bos.v. Bellotti, 435 U.S. 765, 786 (1978)).

97. 525 U.S. at 187 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

98. *See* CHEMERINSKY, *supra* note 20, at 1112–13.

99. 357 U.S. 449 (1958) [hereinafter *Patterson*].

100. *Id.* at 460.

groups may act as a restraint on the otherwise protected freedom of association.[101] Two years after that seminal decision, the Court affirmed this notion in *Bates v. City of Little Rock*,[102] striking down an Arkansas Supreme Court decision that allowed the city of Little Rock to compel disclosure of the members of a local chapter of the NAACP. As with previous similar cases involving the NAACP, the Court held in *Bates* that compulsory disclosure of membership lists would substantially interfere with the members' individual right of association, based upon reasonable fears of harassment, threats of bodily harm, economic reprisals, and overall community hostility as a result of such disclosure.[103]

Further, this associative right is deeply intertwined with other First Amendment freedoms—especially freedom of speech.[104] Most importantly, the freedom of association is an integral corollary to persuasive—and protected—political advocacy. As the Court acknowledged in *Patterson*, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[105] Citizens who support or oppose ballot proposals or other issues within our nation's political discourse clearly gain strength and influence through their associations in groups with other like-minded individuals.[106] As such, the protections afforded to political speech also extend to political associations, and part of this protection may include the right of associational anonymity.[107]

Nevertheless, First Amendment protections are not absolute. Thus, the critical issue facing states that seek to disclose the names of petitioners in an initiative campaign is how far such protections extend. Groups, such as those that supported Proposition 8 in California and Referendum 71 in

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101. *Id.* at 462.

102. 361 U.S. 516 (1960).

103. *Id.* at 523–24.

104. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) ("The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'") (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

105. *Patterson*, 357 U.S. at 460. Victor Brudney, Weld Professor of Law, Emeritus, Harvard Law School, has affirmed the belief that it "is a fixture in American political theory that participation in public discourse and advocacy activities by elective associations of all sorts significantly serves the governance of a democracy . . . ." Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 87 (1995).

106. Brudney, *supra* note 105, at 79 (asserting that "expressive or advocacy associations" amplify and integrate the expressive interests of their individual members, and the protections afforded to the speech of these associations is derived, at least in part, from the protections granted to the individual members).

107. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91 (1982) (noting that "the Constitution protects against the compelled disclosure of political associations and beliefs").

Washington, have sought to wield the First Amendment freedoms of speech and association as a shield against compelled disclosure of their petition signatories.[108] They raise the specter of harassment and the oft-cited safeguards for political speech as their compelling interests for remaining anonymous as petition-signers. But the First Amendment "does not shield us from the results of our actions, be they the adulation of approving admirers or the growls and scowls of angry dissenters."[109] Therefore, the ultimate question is whether those who sign political petitions in the citizen lawmaking context may use the First Amendment as a shield against disclosure, and in so doing, have legislative effect from behind a veil of anonymity.

III. DISCUSSION

The following section will assert that the Supreme Court missed a clear opportunity in *Doe v. Reed* to affirm the principles of transparency and open government in the context of citizen lawmaking and explain why, in the words of KnowThyNeighbor.org's executive director, Tom Lang, "All this information belongs to the public."[110] First, the arguments employed by the parties who sought anonymity in California and Washington will be presented and given a critical examination. Their reasoning revolves around the appropriate standard of review, protection for anonymous political speech, and exceptions to disclosure requirements for certain minority groups. However, all of these arguments can be challenged or outright distinguished in the context of petition circulation, as the California district court and the Ninth Circuit did in its opinions. Finally, after debunking these theories against disclosure, several compelling reasons will be presented for why the Supreme Court could have—and should have—struck a clear position that petition signatures should be open, accessible, and available to the public.

A. Distinguishing the Arguments Against Compelled Disclosure

1. *What Standard of Review Should Apply?*

Those seeking to prevent petitioners' names from being released to the public have asked the courts to apply their highest scrutiny to the states' disclosure requirements, under the auspices that they infringe upon "core

108. *See generally* Kris W. Kobach, *Taking Shelter Behind the First Amendment: The Defense of the Popular Initiative*, *in* THE BATTLE OVER CITIZEN LAWMAKING 167 (M. Dane Waters ed., 2001). "In conclusion, it is clear that the First Amendment has been, and will remain, the primary constitutional shield available to users of the initiative process." *Id.* at 186.

109. Policinski, *supra* note 42.

110. WALL ST. J. LAW BLOG, *supra* note 5.

political speech."[111] Of course, application of strict scrutiny by the courts would apply a near insurmountable hurdle to states' disclosure laws, requiring the states to prove they were narrowly tailored to a compelling governmental interest.[112] However, the Supreme Court's jurisprudence with regards to this question, in the explicit context of election law and direct legislation precedent, is riddled with uncertainty and ambiguity.[113]

In his opinion regarding Proposition 8, California judge, Morrison England, Jr., reviewed the Supreme Court precedent of the appropriate standard of review and deemed it "not a model of clarity."[114] The Ninth Circuit has also recognized the vagueness employed by the Supreme Court, stating that the Court "has been less than clear as to the proper level of judicial scrutiny we must apply in deciding the constitutionality of disclosure regulations."[115] In *Meyer v. Grant*,[116] the Court applied strict scrutiny (but described it as "exacting scrutiny," following the language of the Court in *Buckley v. Valeo*[117]) when considering state restrictions on "core political speech" involved in gathering petition signatures.[118] Yet, in *Buckley v. ACLF*, the Court took a decidedly less stringent approach to the standard of review, applying something more akin to intermediate scrutiny.[119]

In *Doe v. Reed*, the Chief Justice seemingly paid no heed to the cautionary flags raised by the lower courts; rather, the Court unequivocally held that "a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context" have uniformly applied the standard of review coined "exacting scrutiny."[120] As precedent for this statement, the Court looked to *Buckley v. Valeo*,[121] *Citizens United v. Federal Election Commission*,[122] *Davis v. Federal Election Commission*,[123] and *Buckley v. American Constitutional Law Foundation, Inc.*[124] With such a

111. *See* Doe v. Reed, 661 F. Supp. 2d 1194 (W.D. Wash. 2009), *rev'd*, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010); ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1206 (E.D. Cal. 2009).

112. Meyer v. Grant, 486 U.S. 414, 425 (1988).

113. *See generally* Kobach, *supra* note 108 (discussion in the section entitled "The Ambiguities of Meyer and Buckley").

114. *ProtectMarriage.com*, 599 F. Supp. 2d at 1206 (leaving the appropriate standard of review as "an open question" and deciding the case on other grounds). *Id.* at 1207.

115. Cal. Pro-Life Council v. Getman, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003).

116. 486 U.S. 414 (1988).

117. 424 U.S. 1 (1976).

118. Kobach, *supra* note 108, at 177.

119. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999); *see also* Kobach, *supra* note 108, at 177.

120. Doe v. Reed, 130 S. Ct. 2811, 2818 (2010).

121. 424 U.S. 1 (1976) (per curiam).

122. 130 S. Ct. 876 (2010).

123. 554 U.S. 724 (2008).

124. 525 U.S. 182 (1999). However, compare Kobach's commentary, *supra* note 108, on

bright line drawn, states must now show a "substantial relationship" between any disclosure requirement and its corresponding "sufficiently important" governmental interest.[125] Accordingly, disclosure requirements will not survive unless the power of the government's interest reflects "the seriousness of the actual burden on First Amendment rights."[126] Although the State of Washington's Public Records Act survived this hurdle in a broad sense, this distinction between potential levels of scrutiny may become a thorn in the side of advocates for government transparency, as the disclosure requirement—as applied to the particular petitioners in this case—will now have to be validated against this stricter standard upon rehearing in the district court. And, more importantly, the subsequent cases that are sure to follow will face the same burden.

Regardless of whether ambiguity exists surrounding the standard of review applied in previous cases within the arena of First Amendment rights and electoral politics, there are alternative theories that the Court could have adopted that would have justified a lower, "intermediate" level of scrutiny. First, in its seminal opinion in *United States v. O'Brien*,[127] the Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a *sufficiently important governmental interest* in regulating the nonspeech element can justify *incidental limitations* on First Amendment freedoms."[128] Although petition circulation has been held as squarely within the parameters of political speech, proponents of disclosure may persuasively argue that the signing of a petition has a weightier "conduct" element than it does a "speech" element. In considering the challenge to Referendum 71, the Ninth Circuit followed this approach and cited *O'Brien* as authority to do so.[129]

The Supreme Court has also established precedent for applying intermediate scrutiny in an election law context. In *Burdick v. Takushi*,[130] the Court considered Hawaii's prohibition on write-in voting and determined that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the . . . rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[131] Therefore, the Court could have justified the application of only

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how the *ACLF* Court actual applied an intermediate level of scrutiny, despite nominally calling it "strict" scrutiny.

125. *Doe*, 130 S. Ct. at 2814 (quoting Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 914 (2010)).

126. *Id.* (quoting Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2765 (2010)).

127. 391 U.S. 367 (1968).

128. *Id.* at 376 (emphasis supplied).

129. Doe v. Reed, 586 F.3d 671, 678 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

130. 504 U.S. 428 (1992).

131. *Id.* at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) ("Governmental regulation

intermediate scrutiny to this and other relevant direct legislation cases, if it had ruled that the state's disclosure requirements are only "reasonable" and "incidental" limitations to the petitioners' constitutional freedoms.

Moving one step further, there is also authority to support the notion that the release of petitioners' signatures may be held as a content and viewpoint-neutral regulation, thus subjecting it to a lower level of scrutiny. The Court has traditionally applied intermediate scrutiny to content-neutral regulations of otherwise protected First Amendment speech.[132] The *Burdick* court went on to declare, "we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls."[133] Again, the Ninth Circuit looked to *Burdick* and *O'Brien* in holding that the Washington district court erred in applying strict scrutiny.[134] Ironically, it was the Ninth Circuit that put forth perhaps the clearest guidepost to proponents of disclosure in these cases, stating that "[if a regulation] places only a minimal burden on fully protected speech and associational freedoms, or if the speech and associational freedoms are not fully protected under the First Amendment, we apply a lower level of constitutional scrutiny."[135] The burden should remain on the states to prove that their disclosure requirements are merely incidental, minimally-burdensome limitations on First Amendment rights; but, once proven, a lower level of scrutiny should be demanded. *Doe v. Reed*, however, seems to have settled that argument with the unequivocal declaration that exacting scrutiny is the proper standard.

2. *The Right to Anonymity in Political Speech and Participation*

The right to speak or participate in the political process anonymously has long been held to be a component of the First Amendment.[136] Stating that "[a]nonymity is a shield from the tyranny of the majority,"[137] the Supreme Court has called this right of discourse without identification an honored tradition of political advocacy that exemplifies the purpose of the First Amendment.[138] Thus, the Court has struck down laws and regulations that

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that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances.") (citing United States v. O'Brien, 391 U.S. 367 (1968)).

132. *See* Turner Broad. Sys. Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 661–62 (1994).

133. *Burdick*, 504 U.S. at 438.

134. *Doe*, 586 F.3d at 678.

135. Lincoln Club of Orange Cnty. v. City of Irvine, Cal., 292 F.3d 934, 938 (9th Cir. 2002).

136. *See* CHEMERINSKY, *supra* note 20, at 939–41.

137. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

138. *Id.* at 357.

required petition circulators to wear identifying name badges[139] and those that restricted the distribution of anonymous handbills and campaign leaflets.[140] Accordingly, critics of disclosure in the ballot measure context have also advanced this reasoning to support their interests in remaining anonymous as petition signers.

The thrust of their argument is that disclosing the names of petition signers may have a "chilling effect" on the petition-gathering process. Our jurisprudence disfavors regulations that limit or restrict the free flow of political discussion.[141] James Bopp, the lead attorney for Protect Marriage Washington, has asserted that his clients' free speech rights may be chilled by the fear of harassment, intimidation, and threats if their identities as supporters of Referendum 71 are exposed.[142] Eugene Volokh, a First Amendment expert and professor at UCLA Law School, concurs, worrying that disclosure (and the possibility of retaliatory actions by those who oppose the measures) may make some would-be supporters reluctant to sign the petitions.[143] Others view the efforts by groups like KnowThyNeighbor.org as themselves fomenting hostility and reprisals against petition signers—that is, their modus operandi is nothing more than an attempt to intimidate potential supporters of these ballot initiatives.[144]

But the very nature of the petition-circulating process is devoid of any expectation of anonymity. Accordingly, the Ninth Circuit based their reversal in *Doe v. Reed* on the district court's "faulty premise" that Washington's public disclosure acts regulated anonymous political speech.[145] In reaching this conclusion, the court listed four factors that mark the petitioning process as one administered in an open, transparent manner.[146] Based upon these factors, the court held that disclosure of petitioners' names does not

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139. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

140. *McIntyre*, 514 U.S. at 341–43; Talley v. Cal., 362 U.S. 60 (1960) (holding that identification of the authors behind political handbills and fear of reprisal might deter "perfectly peaceful discussions of public matters of importance"). *Id.* at 65.

141. Meyer v. Grant, 486 U.S. 414, 422–23 (1988).

142. Savage & Williams, *supra* note 16.

143. *See* Yardley, *supra* note 16; Eugene Volokh, *Ninth Circuit Overturns Preliminary Injunction Restraining Release of Names of Anti-Domestic-Partnership Petition Signers in Washington State*, THE VOLOKH CONSPIRACY (Oct. 19, 2009), http://volokh.com/2009/10/19/ninth-circuit-overturns-preliminary-injunction-restraining-release-of-names-of-anti-domestic-partnership-petition-signers-in-washington-state.

144. Bruce Ramsey, Editorial, *Petition Signatures Should Be Protected*, SEATTLE TIMES, (Oct. 22, 2009), *available at* http://seattletimes.nwsource.com/html/edcetera/2010120154_petition_signatures_should_be.html (describing the vows of KnowThyNeighbor.org and WhoSigned.org to publish, online, the names of Referendum 71 petition signers as "clearly a device to intimidate people from signing, and keep the measure off the ballot").

145. Doe v. Reed, 586 F.3d 671, 677 (9th Cir. 2009), *aff'd*, 120 S. Ct. 2811 (2010).

146. *See supra* Part II.B.2.b for a list of the four factors.

implicate anonymous political speech; further, petitioners should not have the expectation of true anonymity to begin with.[147] Justice Sotomayor endorsed this reasoning in her concurrence to the Supreme Court's opinion in *Doe v. Reed*, noting the "traditionally public nature" of direct legislation and finding that "the process of legislating by referendum is inherently public."[148] However, this line of analysis was absent from the majority opinion of the Court.

Lastly, it must be noted that there is a difference between the right to "speak" or "participate" anonymously in the political process and a presumption of a right to *legislate* anonymously, as it will be argued that petition signers are doing.[149] Questioning whether petition signers may have a First Amendment expectation of anonymity, Eugene Volokh stressed the distinction when he stated that "you have the right to speak anonymously but you don't have a constitutional right to essentially engage in a legally significant action anonymously."[150]

3. *The Buckley/Brown Exception for Persecuted Minority Groups*

A major source of contention in both the Proposition 8 and Referendum 71 lawsuits revolved around a doctrine, first articulated in *Buckley v. Valeo*,[151] which may exempt certain minority parties from disclosure requirements.[152] The *Buckley* Court found that the interest in disclosure is significantly diminished when applied to minor parties that have no real chance of winning at the polls.[153] Because such parties usually represent well-defined and publicized viewpoints, the Court opined, it is less imperative to inform voters of the specific interests that minor party candidates represent.[154] While rejecting a blanket disclosure exemption for all such groups, the *Buckley* decision nevertheless left open the possibility that similar parties could seek immunity from disclosure based upon their reasonable

147. *Doe*, 586 F.3d at 677.

148. Doe v. Reed, 130 S. Ct. 2811, 2821 (2010) (Sotomayor, J., concurring).

149. *See infra* Part III.B.1.

150. Savage & Williams, *supra* note 16.

151. 424 U.S. 1 (1976).

152. *See* Doe v. Reed, 661 F. Supp. 2d 1194 (W.D. Wash. 2009), *rev'd*, 586 F. 3d 671 (9th Cir. 2009), *aff'd*, 120 S. Ct. 2811 (2010). The Washington decisions, both of the district court and of the Ninth Circuit on appeal, were determined only upon the issue of appropriate standard of review and therefore did not reach discussion of, nor make a determination upon the merits of, the *Buckley/Brown* exception as applied to supporters of Referendum 71; ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

153. Buckley v. Valeo, 424 U.S. 1, 70 (1976).

154. *Id.*

fear that their members or contributors would suffer harassment, threats, or reprisals as a result of identification.[155]

This test was clarified in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*,[156] in which the Socialist Workers Party (SWP) was exempt from Ohio's campaign reporting requirements based upon their historical record of harassment by both government officials and private individuals.[157] The Court based this exemption on a determination that the record of open hostility established a "reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals."[158] Similarly, the *Buckley* Court alluded that the facts in *NAACP v. Alabama ex rel. Patterson*[159] and *Bates v. Little Rock*[160] could have upheld similar constitutional challenges, based upon the uncontested showing that past revelations of the NAACP's membership lists in Alabama and Arkansas led to economic reprisals, loss of employment, physical threats and other manifestations of public hostility against their members in the 1950s.[161] The *Buckley/Brown* exemption is premised, therefore, only upon a showing that the group desiring an exception from disclosure is a *minor party* with an established history of persecution and hostility against it, and further, that disclosure would lead to a *reasonable probability* of harassment, threats, and reprisals against its members. If such hostility has occurred or is expected with sufficient certainty, then the petitioning group may be excused from disclosure requirements.

The question that must be confronted in the ballot initiative context is, as put by District Judge England when referring to petitioners for California's Proposition 8, "whether *Brown* can properly be applied to groups that were successful at the polls, that have evidenced a very minimal effect on their ability to sustain their movement, and that are unable to produce evidence of pervasive animosity even remotely reaching the level of that present in *Brown*."[162] The experience in both California and Washington, at least, appears to demonstrate that *Brown* should not be applied. The record simply does not support the notion that supporters of initiatives that have successfully qualified for the ballot experienced circumstances similar to that faced by the Socialist Workers Party in 1974, much less the members of

155. *ProtectMarriage.com*, 599 F. Supp. 2d at 1212.

156. 459 U.S. 87 (1982).

157. *Id.* The appellants introduced evidence of FBI surveillance, threatening phone calls, destruction of property, police harassment, employment discrimination, and similar reprisals against its members. *Id.* at 99.

158. *Id.* at 100.

159. 357 U.S. 449 (1958).

160. 361 U.S. 516 (1960).

161. Buckley v. Valeo, 424 U.S. 1, 71 (1976).

162. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1214 (E.D. Cal. 2009).

the NAACP in the 1950s Deep South. Pointing out that the Proposition 8 campaign attracted millions of voters *and* dollars, and was successful in its efforts, Judge England called their supporters a "far cry" from the sixty-member, under-funded and unsuccessful SWP party.[163] Similarly, a three-judge panel of the Ninth Circuit, hearing oral arguments in Washington's Referendum 71 case, noted unequivocally that "[t]his isn't a persecuted minority."[164]

But this question appears to be a substantial factor in what so divided the numerous Justices that opted to write separately in the *Doe v. Reed* opinion—and it is also the most striking deficiency of the decision. Almost all of the Justices agreed that there should be an opportunity for organizations to seek an exemption based upon the *Buckley/Brown* test; however, the majority opinion was entirely devoid of guidance for the lower courts as to the appropriate standard of review, the interests of each party to be weighed, the sufficiency of evidence required to sustain a challenge, and so on.[165] As one commentator noted, "Plotting out the various concurrences and dissents one comes to the conclusion that there is no majority view on the Court concerning the circumstances under which a constitutional exception to the statue would be required."[166]

This narrower issue did, however, spark fierce debate among some of the Justices. In his concurrence (which was described by one scholar as "almost a dissent"[167]), Justice Alito forcefully argued for immunity from the PRA's disclosure requirements, believing that the "widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case."[168] He went even further—seemingly directing his commentary to the district court that would eventually hear the petitioners' renewed plea for exemption under the Court's ruling—in stating, "courts should be generous in granting

163. *Id.*

164. *9th Circuit Seems Unlikely to Rule in Favor of Petition Secrecy*, BALLOT ACCESS NEWS, http://www.ballot-access.org/2009/10/14/9th-circuit-panel-seems-unlikely-to-rule-in-favor-of-petition-secrecy (last visited Aug. 22, 2010) (also noting that Judge A. Wallace Tashima asked if the panel could "take judicial notice of the fact that the plaintiffs represent people who are in the majority").

165. Perhaps in explanation for this lack of direction, the Chief Justice noted that while the petitioners sought the exemption in *Doe*, the "question before us, however, is not whether PRA disclosure violates the First Amendment with respect to those who signed the [Referendum 71] petition," but rather the broader inquiry of whether disclosure "in general" violates the rights of petition-signers. *Doe v. Reed*, 130 S. Ct. 2811, 2820–21 (2010).

166. Arthur S. Leonard, *The Supreme Court's Decision in* Doe v. Reed – *Tilting Towards Disclosure?*, LEONARD LINK (June 24, 2010), http://newyorklawschool.typepad.com/leonardlink/2010/06/the-supreme-courts-decision-in-doe-v-reed-tilting-towards-disclosure.html.

167. Hasen, *supra* note 15.

168. *Doe*, 130 S. Ct. at 2823 (Alito, J., concurring).

as-applied relief in this context," and "in this case . . . plaintiffs have a strong case that they are entitled to as-applied relief, and they will be able to pursue such relief before the District Court."[169] Such reasoning prompted one disclosure advocate to groan that Justice Alito had "spen[t] his eleven pages laying out a roadmap to undercut the opinion in future decisions."[170]

On the other hand, Justice Sotomayor, joined by Justices Ginsburg and Stevens, believed the State's important interests in disclosure to be undiminished "[e]ven when a referendum involves a particularly controversial subject and some petition signers fear harassment,"[171] and therefore, it would be a "rare circumstance" in which such disclosure posed a "reasonable probability of serious and widespread harassment that the State is unwilling or unable to control."[172] Courts presented with such an as-applied challenge, she wrote, should be "deeply skeptical" of applying the doctrine.[173] Justice Stevens, joined by Justice Breyer, was also unimpressed, opining that it was unlikely that such a level of harassment would occur in cases involving the PRA.[174] Therefore, Stevens continued, he would require a "significant threat of harassment" and demand "strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech."[175]

Unfortunately, the Chief Justice adopted none of the posited standards upon which such as-applied challenges should be reviewed. At least one commentator believes Chief Justice Roberts remained non-committal because "any attempt to be more specific would have lost several of his opinion signers, depending on how he would advocate weighting the interests at stake."[176] Whatever the reason, this inherent ambiguity in the *Doe v. Reed* decision will almost certainly lead to continued litigation in the future, thereby forcing the lower courts to erect the guideposts and parameters of the doctrine.

Proponents of ballot measures concerning social issues such as gay marriage, divisive as the issue may be, likely face an extremely uphill battle in convincing a court that they are a "minor party" worthy of the *Buckley/Brown* exemption from disclosure. The very nature of modern campaigns for ballot initiatives—requiring them to raise large sums of money,

169. *Id.* at 2827; *see also* Hasen, *supra* note 15 (stating that Justice Alito "saw fit to write about how the lower court should resolve that challenge, which caused the other Justices to chime in on the question as well").

170. Schuman, *supra* note 18.

171. *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring).

172. *Id.*

173. *Id.*

174. *Id.* at 2831.

175. *Id.* (Stevens, J., concurring) (going on to state that a "statute 'is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are'").

176. Leonard, *supra* note 166.

attract media attention, recruit volunteers, and gather signatures from thousands of supporters—undercuts their assertion that they deserve special protection as such a group. The general counsel for the California Fair Political Practices Commission, which enforces the state's campaign disclosure laws, analogized the reasoning well in regards to Proposition 8 by declaring the "exception does not apply to a large, well-financed organization representing the views of several mainstream organizations such as the plaintiffs, who had over 36,000 contributors, garnered nearly $30 million in campaign contributions and whose ballot measure was passed by a vote of over 52 percent of the voters."[177] Modern campaigns supporting direct legislation, such as those in California and Washington, are plainly not analogous to the Socialist Workers Party, the NAACP members in the 1950s, or any other "persecuted minority" to which a court would apply the disclosure exemption.

Moreover, the plaintiffs in the California case also failed the second prong of the *Buckley/Brown* test, which requires a reasonable probability of threats, harassment, and reprisals if their names are disclosed. To bolster their position in this respect, the California plaintiffs provided nine "John Doe" affidavits and other anecdotal examples of harassment, thefts, vandalism, boycotts and other "threats" against supporters of Proposition 8.[178] However, the court was not persuaded that such animosity had risen to the level necessary to justify their exemption under *Brown* and its progeny.[179] "Plaintiffs do not, indeed cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or for that matter, the NAACP."[180] Further, as the state argued, much of the so-called "harassment" suffered by proponents of Proposition 8 was actually forms of protected free speech, such as threats of boycotts.[181]

Lastly, for those who did (or hypothetically may), in fact, incur true harassment or more injurious forms of hostility, there already exists a legal recourse—intervention of law enforcement and the application of criminal punishment—that does not require a First Amendment mandate.[182] Notably,

177. *Federal judge: Public has right to know names of Prop. 8 donors*, ASSOCIATED PRESS (Jan. 30, 2009), *available at* http://www.firstamendmentcenter.org/news.aspx?id=21180.

178. ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1200–04 (E.D. Cal. 2009).

179. *Id.* at 1217 (finding that "[o]nly random acts of violence directed at a very small segment of the supporters of the initiative are alleged").

180. *Id.*

181. *See* ASSOCIATED PRESS, *supra* note 177.

182. *See, e.g.*, Editorial, *Referendum and initiative petitions must remain open records in Washington state*, SEATTLE TIMES (Aug. 9, 2009), *available at* http://seattletimes.nwsource.com/html/editorials/2009620248_edit09sign.html ("Just as clearly, harassment of those who sign petitions is unlawful, and will be punished.").

two concurrences to the *Doe v. Reed* opinion recognized this extrinsic protection. Justice Stevens wrote that in order for a challenge to the Washington's Public Records Act to succeed, "there would have to be a significant threat of harassment directed at those who sign the petition *that cannot be mitigated by law enforcement measures*."[183] Justice Scalia was characteristically even more eloquent in his invocation of this defense, declaring that "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance."[184]

B. The Compelling Arguments in Favor of Disclosure

Beyond just distinguishing the arguments presented by critics of disclosure, however, as the Ninth Circuit and the Eastern District of California did in their respective holdings,[185] there also exist several compelling reasons why disclosure is in the interests of the states, their voters, and the public at large. Those seeking the release of petitioners' names counter the free speech arguments of their opponents by asserting that disclosure actually *furthers*, rather than *hinders*, the interests and goals of the First Amendment, as laid out in the Supreme Court's landmark decisions on political speech. But even more importantly, there is the forceful contention that signing a petition should not even fall in the realm of "speech" to begin with, because it is an act that effectuates legislative and governmental outcomes.

For example, Walter Dellinger, the former head of the Office of Legal Counsel during the Clinton administration and former acting Solicitor General, expressed his belief that "signing an official petition is a legislative act with official legislative consequences," thus raising "a fundamental question the [*Doe v. Reed*] court fails to explore in any depth: Does this case even raise a true First Amendment issue?"[186] Interestingly, Justice Scalia seemed to tacitly agree with this suggestion in his concurrence, ruminating that "I doubt whether signing a petition that has the effect of suspending a law fits within 'the freedom of speech' at all."[187]

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183. Doe v. Reed, 130 S. Ct. 2811, 2831 (2010) (Stevens, J., concurring) (emphasis supplied).

184. *Id.* at 2837 (Scalia, J., concurring).

185. *See* Doe v. Reed, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010); ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009).

186. Walter Dellinger, *Is There Even a First Amendment Issue in* Doe v. Reed*?*, SLATE (June 25, 2010), http://www.slate.com/id/2257937/entry/2258264/.

187. *Doe*, 130 S. Ct. at 2832 (Scalia, J., concurring); *see also* Schuman, *supra* note 18 (noting that Scalia offered "a distinction of rather large granularity and salinity to the opinion of the Court," and that "[n]o other justice doubted this case had constitutional dimensions").

1. *Signing a Ballot Petition Is a Legally Operative Act, Not Just Political Expression*

Could the other Justices have simply gotten it all wrong by reviewing the matter as a First Amendment issue? Scalia is not alone in his reservations. Eugene Volokh, the First Amendment professor and former law clerk to Justice Sandra Day O'Connor, has expounded the reasoning that beyond constituting mere "speech," the signing of a petition in the direct legislation context is a "legally operative act" that is granted legal effect by state law.[188] As such, the First Amendment speech rights of petitioners must be subordinated to the state's greater interest in the transparency, accountability, and integrity of its legislative process. Washington's Secretary of State, in defending the state's Public Records Act, put forth this assertion in the action over Referendum 71. The state relied upon *State ex rel. Heavey v. Murphy*,[189] a Washington Supreme Court decision declaring that "[a] referendum or an initiative measure is an exercise of the reserved power of the people to legislate."[190] Despite the fact that the Ninth Circuit did not reach this argument in its decision—prompting one election law expert to proclaim that they had "sidestepped perhaps the key question in the case"[191]—the court nevertheless noted, later in their opinion, that "petition signers have not merely taken a general stance on a political issue; they have taken action that has *direct legislative effect*."[192] This finding echoed their earlier statement in *California Pro-Life Council, Inc. v. Getman*,[193] that "voters act as legislators in the ballot-measure context."[194]

Nor is the Ninth Circuit alone in noting this critical distinction. Political science professor David B. Magleby has explained that voters may write statutes, and even constitutional amendments in some states, via use of the direct legislation process.[195] Advocates of disclosure in the Referendum 71 case, ranging from the editorial board of the *Seattle Times*[196] to the Washington Secretary of State's office,[197] also pursued this line of reasoning to

188. Volokh, *supra* note 143.

189. 982 P.2d 611 (Wash. 1999).

190. *Id.* at 615 (internal citations omitted).

191. Rick Hasen, *Ninth Circuit Issues Its Opinion Explaining Its Ruling in Washington R-71 Referendum Case*, ELECTION LAW BLOG (Oct. 22, 2009, 4:25 PM), http://electionlawblog.org/archives/014620.html.

192. Doe v. Reed, 586 F.3d 671, 680 (9th Cir. 2009) (emphasis supplied).

193. 328 F.3d 1088 (9th Cir. 2003).

194. *Id.* at 1106.

195. Magleby, *supra* note 25.

196. SEATTLE TIMES, *supra* note 182 ("People who sign such petitions are engaging in the legislative process.").

197. *See* David Ammons, *Election official: Citizen legislating is public business*, FROM OUR CORNER (Sept. 28, 2009), http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/

advance the state's interest in open government. The Secretary of State's office went as far as to release an official report in which the assistant state elections director declared that petitions "contain information relating to the conduct of government or the *performance of a governmental function*,"[198] and therefore, they qualify as public records that must be disclosed.[199]

As Walter Dellinger declared in his online post critique of the *Doe v. Reed* decision, discussed *supra*:

> I agree that signing a petition is also clearly an act of expression. But the expressive part does not trigger a disclosure requirement. *It is only when the citizen also wants his or her signature to be counted by the state as an official act for legislative purposes, such as suspending or canceling a law, that the public-records law requires identifying information to be revealed.* To me, this is the key. The state does not prevent any citizen from expressing anonymously any idea he or she wishes to express. Nor does the state prevent citizens from withholding whatever identifying information (such as addresses and occupation) they wish to keep private when joining with other citizens in collective association or expression. Only the official act of submitting a petition as part of the referendum lawmaking process triggers disclosure requirements.[200]

Dellinger continued by noting that although Justices Alito and Thomas cited the rights of privacy of belief and association in supporting the petitioners' arguments against disclosure, "those rights are fully protected by the state except when the speakers wish not only to convey their views but also to have the act of signing become an operative part of the legislative process."[201]

The Court could have strongly embraced a platform of transparency and openness in government and completed its analysis on the spot under such a line of reasoning. Justice Roberts, however, was not persuaded. While conceding that the signing of a referendum petition may ultimately have legal effect, the Chief Justice nevertheless held that an individual "expresses a view on a political matter" when he signs that petition, and thus, "[p]etition signing remains expressive even when it has legal effect in the

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09/election-official-citizen-legislating-is-public-business ("The elected Legislature does not act in secret. Citizens engaging in legislative action should not be permitted to act in secrecy either.") (quoting a letter from Shane Hamlin, assistant director of elections and head of the initiative and referendum program in Washington).

198. Katie Blinn, Assistant State Elections Director, Office of the Secretary of State, Washington, *Release of Initiative and Referendum Petitions*, (Oct. 15, 2009), *available at* http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/10/releasing-petitions-whats-the-deal (follow "in a new narrative" hyperlink) (emphasis supplied).

199. *Id.*

200. Dellinger, *supra* note 186 (emphasis supplied).

201. *Id.*

electoral process."[202] In support, the opinion cited the 2002 decision of *Republican Party of Minnesota v. White*,[203] declaring that "[t]he State, having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles.'"[204] In the end, Justice Scalia was the lone jurist on the Court to view this determination with skepticism.

2. *Legislative Actions Should Be Conducted with Transparency*

The argument that signing an initiative petition constitutes a "legally operative act" gains considerable traction when considered alongside our nation's traditional emphasis on transparency and openness in our legislative processes. If we do not allow our elected officials to legislate in secret, the reasoning goes, why should we allow the electorate to legislate directly without disclosing who supports such measures? As Washington's Secretary of State Sam Reed stated, "These petitions are not like a secret ballot, but amount to taking part in our legislative process, which is required to be open and accountable."[205]

The open exchange of information is nearly unassailable in the context of political discourse and the legislative arena. The states have an unequivocal interest in fostering an informed electorate,[206] preserving the integrity of the election process,[207] and protecting the reliability of the initiative process.[208] The Ninth Circuit upheld this last interest, finding that Washington's disclosure requirements served a "government accountability and transparency function" that was key to preserving the integrity of the referendum process as a whole.[209] Furthermore, the state's and public's interests in knowing who is advancing legislative proposals, even through ballot initiatives and referenda, is undeniably important. The Supreme Court discussed three "substantial government interests" in disclosure requirements

202. Doe v. Reed, 130 S. Ct. 2811, 2817–18 (2010).

203. 536 U.S. 765 (2002).

204. *Doe*, 130 S. Ct. at 2817.

205. Lornet Turnbull, *Release R-71 signatures, court says, but appeal planned*, SEATTLE TIMES, (Oct. 16, 2009), *available at* http://seattletimes.nwsource.com/html/localnews/2010072420_webref7115m.html.

206. Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989).

207. *Id.* at 231.

208. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 191 (1999). *But see* Meyer v. Grant, 486 U.S. 414, 426 (1988) (holding that Colorado's interest in protecting the integrity of the initiative process did not justify a ban on paid petition circulators, because the state did not demonstrate the regulation was narrowly tailored to meet its legitimate interests).

209. Doe v. Reed, 586 F.3d 671, 680 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

in *Buckley v. Valeo*.[210] Although *Buckley* concerned a candidate election, the Ninth Circuit has found that the same considerations of disclosure are as strong, if not stronger, in their application to ballot measures.[211] "[I]n the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well-established,"[212] the Ninth Circuit has stated, also declaring that disclosure "prevents the wolf from masquerading in sheep's clothing"[213] by informing voters about which interested parties back or oppose ballot initiatives.

Disclosure requirements augment this "informational interest" by aiding voters in sorting through the blitz of advertising, media, and messages that accompany a ballot measure campaign. The Supreme Court has reaffirmed this avowed interest in an informed electorate as recently as June of 2010, stating "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[214] This informational assistance takes on a larger role with ballot proposals, whereas opposed to candidate elections, voters must decide their preferences without traditional cues like party affiliation, candidate comparisons, voting records, candidate media appeal, and records of success or failure for incumbents.[215] Further, direct legislation campaigns are often spearheaded by well-funded special interest groups that wield distortions and half-truths in their advertising portfolios, leaving voters to decide whom they believe is more in line with their own beliefs.[216] And finally, research has illustrated that voters are often simply confused about the meaning and implications of the ballot measure they are voting on, leading many to inadvertently vote in a manner that is contradictory to their general preferences and feelings on the issue.[217] For all of these reasons, the "informational interest" supporting disclosure requirements is not only important, but vital, in the context of citizen lawmaking.

Justice Sotomayor emphasized this spirit of openness in governmental processes, stating in her concurrence to *Doe v. Reed* that "courts . . . should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who

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210. *See* Buckley v. Valeo, 424 U.S. 1, 66–68 (1976).

211. Cal. Pro-Life Council v. Getman, 328 F.3d 1088, 1105 (9th Cir. 2003). The *Getman* court noted that the so-called "corruption" and "enforcement" interests of *Buckley* were not present in the ballot measure context; however, the "informational interest" certainly applies. *Id.* at 1105 n.23.

212. Cal. Pro-Life Council v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007).

213. *Getman*, 328 F.3d at 1106 n.24.

214. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 916 (2010); *see also* Doe v. Reed, 130 S. Ct. 2811, 2828 (2010) (Sotomayor, J., concurring).

215. *See* Magleby, *supra* note 25, at 38.

216. *See Getman*, 328 F.3d at 1105–06.

217. Magleby, *supra* note 25, at 38–39.

seek to participate in lawmaking through a state-created referendum process."[218] Unfortunately, because the majority predicated its holding upon the narrow grounds of electoral integrity and anti-fraud interests, Justice Roberts's opinion shrunk from consideration of this critical nuance to the overarching issue. "Because we determine that the State's interest in preserving the integrity of the electoral process suffices to [merit disclosure of the Referendum 71 petitioners' names]," the Chief Justice wrote, "we need not, and do not, address the State's 'informational' interest."[219]

3. *Disclosure Furthers the Principles of the "Marketplace of Ideas"*

Finally, the Court's decision in *Doe v. Reed* eschews the potential that the release of petitioners' names in relation to ballot proposals may actually strengthen and further the core ideals of the First Amendment. As the Supreme Court espoused in *Federal Election Commission v. Furgatch*,[220] having first declared that informing the electorate of the sources of campaign-related speech was a goal derived from the "primary concern" of the First Amendment:

> The vision of a free and open marketplace of ideas is based on the assumption that the people should be exposed to speech on all sides, so that they may freely evaluate and choose from among competing points of view. One goal of the First Amendment, then, is to ensure that the individual citizen has available all the information necessary to allow him to properly evaluate speech . . . . The allowance of free expression loses considerable value if expression is only partial. Therefore, disclosure requirements, which may at times inhibit the free speech that is so dearly protected by the First Amendment, are indispensable to the proper and effective exercise of First Amendment rights.[221]

Accordingly, the disclosure of petitioners' names serves the valued principle of giving voters more information concerning the competing points of view on each side of a ballot measure. It underscores our "profound national commitment" to furthering a political conversation on public issues that is "uninhibited, robust, and wide-open."[222]

While critics of disclosure proclaim that their signatures on petitions should be protected due to the potential repercussions that may occur because of their exposure, they should be reminded that open-government

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218. *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring).
219. *Id.* at 2819.
220. 807 F.2d 857 (9th Cir. 1987).
221. *Id.* at 862.
222. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

advocates on the other side deserve the same protection because speech "does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[223] The First Amendment welcomes and gives safeguard to *all* parties and sides involved in our nation's political discussion, regardless of the truth, popularity, or social utility of the ideas or beliefs that are advanced therein.[224] The burden of sorting through this glorious mess of opinion, persuasion, and "spin" to get to the underlying truth is, therefore, the province of the voters, not the Constitution.

IV. CONCLUSION

Popular governance guided by ignorance—thus devoid of the information necessary to allow the people to make informed decisions on their future—was not James Madison's sole concern. Rather, he also trumpeted the dangers of intemperate passion in the hearts and minds of the electorate, especially when these passions are stoked by strong factions that seek to oppress other elements of society. "There are particular moments . . . when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men," Madison wrote, "may call for measures which they themselves will afterwards be the most ready to lament and condemn."[225] Unfortunately, the direct legislation process has been repeatedly utilized in our modern era to wage public battles over divisive social issues, such as gay marriage, that incite such irregular passions, fears, and anger of the American public of which Madison warned.

Disclosure of petitioners' names for ballot measures would, therefore, prevent laws from being enacted behind a shield of anonymity and temper the heated political dialogue involved by revealing the true speakers behind the initiative campaigns. If petition signers were forced to "stand behind their signatures" and take responsibility for the injustices these proposals often thrust upon members of their community,[226] the discussion surrounding these issues might be more open, forthright, and amenable to mutually-beneficial compromise. As Justice Scalia roared in his concurrence to *Doe v. Reed*'s majority opinion:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, cam-

223. *Id.* at 910.

224. NAACP v. Button, 371 U.S. 415, 444–45 (1963).

225. Mads Qvortrup, *The Courts v. the People: An Essay on Judicial Review of Initiatives*, *in* THE BATTLE OVER CITIZEN LAWMAKING 199 (M. Dane Waters ed., 2001).

226. Gunther, *supra* note 7.

> paigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[227]

Brave, however, this holding was not. Although the Court had ample precedent upon which to draw in establishing an authoritative position favoring disclosure, it shirked from such a bright-line stance and instead settled the case on narrow grounds and left many questions unanswered.[228] History suggests that supporters of high-profile direct legislation campaigns will have a difficult time establishing that strict scrutiny should apply to a state's disclosure requirements, or that they should be exempt from them based upon their assertion of "minor party" status. But the Court's decision in *Doe v. Reed* gives little guidance as to when the exemption should apply and virtually ensures continued litigation in order to flesh out the contours of the doctrine in the context of direct legislation. Moreover, the Court's ruling now forces judges to make value judgments on a case-by-case standard—before the petitions are even signed and the public reaction can be gauged—as to whether the organization seeking anonymity is truly unpopular or divisive enough so as to expect a level of harassment or violent reaction strong enough to warrant their protection. As one former Solicitor General posits, the decision "places the judiciary smack in the middle of a culture war in which various factions . . . are given new incentives to present themselves as oppressed."[229]

A definitive position could have been struck. These records do, indeed, belong to the public; therefore, disclosure of petition signatures should have been clearly upheld as attendant to our democratic ideals. The citizen lawmaking process circumvents our normal legislative channels, thus heightening the interest in transparency. Petition signatures for ballot measures are not merely modes of "expression" on a political issue; rather, they form part of the legislative record in the states in which these measures are passed.

From our country's earliest mornings, our society has valued sunshine upon our halls of government and transparency in our lawmaking process. But when the citizens become the lawmakers, they too must conduct themselves in the full glare of sunlight. Power gained via anonymity is anathema to the principle of free and unfettered political discussion that is enshrined in our First Amendment. Rather, in the words of Madison, it is only the

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227. Doe v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

228. *See, eg.,* Adam Liptak, *Justices are Long on Words but Short on Guidance*, N.Y. Times (Nov. 17, 2010) *available at* http://www.nytimes.com/2010/11/18/us/18rulings.html?ref=adamliptak, for one commentator's shared criticism of the Robert's Court's uncertain decision-making,.

229. Dellinger, *supra* note 186.

power which *knowledge* brings that truly enables a democratic people to govern themselves.

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