

NO. 09-559

**IN THE SUPREME COURT OF
THE UNITED STATES**

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

Petitioners,

v.

SAM REED, SECRETARY OF STATE OF WASHINGTON,
AND BRENDA GALARAZA, IN HER OFFICIAL CAPACITY
AS PUBLIC RECORDS OFFICER FOR THE SECRETARY
OF STATE OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT SAM REED

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QUESTION PRESENTED

The Public Records Act requires government to make public records available for citizens to inspect. Public records are writings about the conduct of government, and include referendum petitions voters sign to qualify a measure for the ballot. Does the Public Records Act violate petition signers' First Amendment right to anonymous speech by allowing inspection of referendum petitions upon which signers have publicly disclosed their names and addresses to referendum sponsors, signature gatherers, members of the public, and government?

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STATEMENT

This is a facial challenge to Washington's Public Records Act (PRA). The PRA requires state and local government to make public records available for inspection and copying at the request of members of the public. Initiative and referendum petitions signed by voters to direct that an election be held on whether to adopt or revoke a law are public records subject to the PRA. Petitioners claim that the disclosure of any initiative or referendum petition, on any subject, violates the petition signer's First Amendment right to anonymous speech. The court of appeals correctly rejected this argument, holding that the PRA satisfies intermediate scrutiny because of the State's substantial interests in transparency and accountability in government, and providing information to the voters. The court of appeals should be affirmed.

A. Washington's Public Records Act

The PRA was enacted by the people in 1972, through Initiative Measure No. 276. 1973 Wash. Sess. Laws page nos. 1-31. The PRA declares that the "people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Wash. Rev. Code § 42.56.030 (2009). Accordingly, the "people insist on remaining informed so that they may maintain control over the instruments that they have created." *Id.*

The PRA defines a "public record" as "any writing containing information relating to the

conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency[.]” Wash. Rev. Code § 42.56.010(2) (2009). Agencies are required to “make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]” Wash. Rev. Code § 42.56.070 (2009). Statutory exemptions from disclosure are narrowly construed. Wash. Rev. Code § 42.56.030 (2009). Washington courts consistently refer to the PRA as a “strongly-worded mandate for open government, requiring broad disclosure[.]” *E.g.*, *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 199 P.3d 393, 394 (Wash. 2009).

B. Washington’s Referendum Process

State laws are enacted either by the state legislature, or directly by the people through the use of the initiative and referendum powers. Wash. Const. art. II, § 1. A referendum “may be ordered on any act, bill, law, or any part thereof passed by the legislature” when the legislature refers a bill to the people or when the people file a petition with the requisite number of signatures.¹ Wash. Const. art. II, § 1(b). If the constitutional prerequisites for a referendum are met, the electorate votes on whether to accept or reject the bill passed by the legislature. *Id.*

When the legislature passes a bill that may be subject to referendum, the bill cannot take effect

¹ There are some exceptions to the referendum power, but none of the exceptions are at issue in this case.

until ninety days after the legislative session is adjourned, during which time the people may trigger a referendum by filing petitions containing the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of a referendum. Wash. Const. art. II, § 1(b), (c). The referendum “petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.” Wash. Rev. Code § 29A.72.130 (2009). The referendum petition sheets signed by the voters must state:

“To the Honorable, Secretary of State of the State of Washington:

“We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No., filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.” *Id.* (ellipses in original).

The petition sheets must warn that: “Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.” Wash. Rev. Code § 29A.72.140 (2009). Each petition sheet on which signatures are gathered “must consist of not more than one sheet with numbered lines for not more than twenty signatures[.]” Wash. Rev. Code § 29A.72.100 (2009).

Referendum signature petitions are filed with the Secretary of State (Secretary). The Secretary may refuse to file an initiative or referendum petition if the petition (1) does not contain the information required, (2) the petition clearly bears insufficient signatures, or (3) the time within which the petition may be filed has expired. Wash. Rev. Code § 29A.72.170(1)-(3) (2009). If the Secretary refuses to file the petition, he “shall endorse on the petition the word ‘submitted’ and the date, and retain the petition pending appeal.” Wash. Rev. Code § 29A.72.170 (2009). “If no appeal is taken from the refusal of the secretary . . . to file a petition within the time prescribed, or if an appeal is taken and the secretary . . . is not required to file the petition by the mandate of either the superior or the supreme court, the secretary of state shall destroy it.” Wash. Rev. Code § 29A.72.200 (2009).

If the Secretary accepts the petitions for filing, he must “verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by

persons representing the advocates and opponents of the proposed measure[.]” Wash. Rev. Code § 29A.72.230 (2009). The Secretary “may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process.” *Id.* During the verification process, observers are prohibited from making a record of the information on the petitions, except upon court order. *Id.*

Anyone “dissatisfied” with the Secretary’s decision that a referendum has or has not been signed by an adequate number of legal voters to qualify for the ballot may bring an action in superior court challenging the Secretary’s decision. Wash. Rev. Code § 29A.72.240 (2009). Within five days of the superior court’s decision, parties may seek review in the Washington Supreme Court. *Id.*

A referendum petition with sufficient signatures has two operative legal effects. First, the Secretary is required to conduct an election with regard to the measure. Second, operation of the law subject to referendum is suspended until it is approved by the voters. Wash. Const. art. II, § 1(d). Absent a referendum, a law goes into effect ninety days after the adjournment of the legislative session in which it was adopted. Wash. Const. art. II, § 41.

Since referendum signature petitions filed with the Secretary are “writing[s] containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency,” they are public records under

the PRA. Wash. Rev. Code § 42.56.010(2). None of the statutory exemptions from public disclosure apply to referendum petitions. Prior to this litigation, the Secretary has routinely disclosed petitions in response to public records requests. J.A. 26.

Prior to the adoption of the PRA, the Attorney General advised that names on initiative and referendum petitions were not public records because “[w]hile there is no specific statute on the precise question presented, the above statutes demonstrate, in our view, a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege.” 55-57 Op. Att’y Gen. 274 (Wash. 1956); Pet. 64a-65a. Since the adoption of the PRA in 1972, there is a specific statute that requires disclosure.

C. Referendum 71

In 2007, the Washington Legislature created state registered domestic partnerships. 2007 Wash. Sess. Laws page nos. 616-37. A domestic partnership may be formed when “(a) both persons are members of the same sex; or (b) at least one of the persons is sixty-two years of age or older.” Wash. Rev. Code § 26.60.030(6) (2009). In 2009, the legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5688, which expanded the rights, responsibilities, and obligations accorded state registered same-sex and senior domestic partners. 2009 Wash. Sess. Laws page nos. 3065-3141. The legislature adjourned on April 26, 2009. *Id.* at i.

E2SSB 5688 would have gone into effect ninety days later on July 25, 2009.

In May 2009, Petitioner Protect Marriage Washington began gathering petition signatures for a referendum election on E2SSB 5688. Signature gathering took place in public places, such as outside Wal-Mart and Target stores. Dkt. 53, Decl. John Doe No. 4, p. 2; Dkt. 54, Decl. John Doe No. 5, p. 2. The signature gatherers set up tables and asked members of the public walking by to sign the petition sheets. There may also have been interaction among members of the public about whether the petitions should be signed. *Id.* The Referendum 71 petition sheets were eleven inches by seventeen inches and each contained twenty lines for signatures. J.A. 31. Nothing shielded the names and signatures on the petition sheets, which were readily visible to other people who signed or read the petition.

On July 25, 2009, the proponents of Referendum 71 filed their signature petitions to the Secretary in an open, public forum. Referendum supporters and opponents were in attendance, as were several members of the news media. The petition sheets were counted and the Secretary's Office accepted the petitions for filing, and began the task of verifying the signatures. J.A. 24-25. The Secretary subsequently concluded that Referendum 71 had about 122,000 valid signatures, which were enough to qualify the measure for the ballot.

Washington Families Standing Together (WAFST) opposed Referendum 71, and brought an action against the Secretary, separate from this case, under Wash. Rev. Code § 29A.72.240 (2009) to

prevent the Secretary from certifying the measure to the ballot. To facilitate its challenge, WAFST filed a public records request to obtain the Referendum 71 petitions so it could review them for legal errors made by the Secretary related to the form and authentication of petitions and the acceptance of certain signers as registered voters. J.A. 34-35. The Secretary also received public records requests for the petitions from other citizens, including Toby Nixon on behalf of the Washington Coalition for Open Government (WCOG). J.A. 25.

During the signature-gathering process, the organization WhoSigned.org announced that it would file a public records request to obtain the Referendum 71 petitions and post the information from the petitions on the internet.

D. Proceedings In The District Court

On July 28, 2009, John Doe Nos. 1 and 2 and Protect Marriage Washington (Sponsors) filed this action in Federal District Court. The Sponsors alleged that the PRA violated their First Amendment rights, sought a declaration that the PRA was unconstitutional, and asked for a permanent injunction. The Sponsors advanced two claims. First, in Count I, the Sponsors asserted that releasing completed signature petitions for any referendum would violate the signers' First Amendment rights. J.A. 16. Count I was not specific to Referendum 71. Second, in Count II, the Sponsors asserted that releasing Referendum 71 petitions under the PRA would violate the petition signers' First Amendment right of association because disclosure would subject them to harassment. J.A.

17. The Sponsors did not allege that referendum petitions are not public records, as defined by the PRA, or that the petitions are statutorily exempt from disclosure. The Sponsors also did not allege that any part of Washington's laws governing the referendum process violates the United States Constitution.

The district court entered a temporary restraining order and established a briefing schedule for the Sponsors' motion for a preliminary injunction. Subsequently, WAFST and WCOG moved to intervene in the case. WAFST argued that the temporary restraining order prevented it from examining the Referendum 71 petitions to pursue its action against the Secretary to prevent the certification of the measure. J.A. 34-35. The district court granted both motions to intervene (J.A. 37) and amended the temporary restraining order to grant WAFST access to the petitions for the purpose of pursuing its action under Wash. Rev. Code § 29A.72.240. J.A. 35.

On September 10, 2009, the district court granted the Sponsors' motion for a preliminary injunction based on Count I of the complaint. The district court first considered the Sponsors' likelihood of prevailing on the merits of that Count. According to the district court, the Sponsors "assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. The *type of free speech in question is anonymous political speech.*" Pet. 33a (emphasis added). The district court stated that "[t]he Supreme Court has consistently held that a component of the First

Amendment is the right to anonymously participate in a political process.” Pet. 34a-34b (citing *Buckley v. Am. Constitutional Law Found., Inc. (Buckley II)*, 525 U.S. 182, 200 (1999); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *Talley v. State of California*, 326 U.S. 60, 65 (1960)). The district court found that the Sponsors “have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously.” Pet. 38a. Based on this conclusion, the district court held that the PRA was subject to strict scrutiny, and that it was not narrowly tailored. According to the district court: “In light of the State’s own verification process and the State’s own case law, at this time the Court is not persuaded that full public disclosure of referendum petitions is necessary as an important check on the integrity of the referendum election process.” Pet. 42a (internal quotation marks omitted). The district court also rejected the State’s interest in informing the public of the names of the persons who supported the referendum because no one knows “whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public.” Pet. 42a. Thus, for the district court, “the identity of the person who supports the referral of a referendum is irrelevant to the voter[.]” Pet. 42a-43a.

The district court’s conclusion that the Sponsors were likely to prevail on the merits effectively determined its ruling on the Sponsors’

motion for a preliminary injunction. The district court held that “[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary injunction[.]” Pet. 43a-44a (internal quotation marks omitted). The district court also concluded that “[b]ecause this Court finds that [Sponsors] have established that this case likely raises serious First Amendment questions in regard to protected speech and this Court thereby presumes irreparable injury . . . this court also finds that the equities tip in favor of the [Sponsors].” Pet. 44a-45a.

Although the district court’s order did not directly set out the scope of the injunction, the court granted the injunction based on the Sponsors’ Count I claim. In their motion, the Sponsors requested an injunction to enjoin Defendants from making referendum petitions available to the public pursuant to the PRA. J.A. 21. Thus, the preliminary injunction was not limited to Referendum 71 petitions. The district court did not rule on Count II, the Sponsors’ claim that, as applied to Referendum 71, the PRA violates the First Amendment. Pet. 43a.

E. Proceedings In The Court Of Appeals

The Secretary immediately appealed the preliminary injunction and filed an emergency motion seeking a stay of the preliminary injunction and expedited review so the appeal could be resolved before the November 3, 2009, election on Referendum 71. The Ninth Circuit granted the motion for expedited review and, on October 15, 2009, the day after oral argument, issued an order reversing the district court, and stating that an “opinion setting forth the reasons for the court’s

reversal of the Preliminary Injunction Order shall be issued expeditiously[.]” Pet. 2a-3a. The Ninth Circuit also ordered that the Secretary’s “motion for a stay pending appeal is granted and the Preliminary Injunction Order is hereby stayed, effective immediately, pending final resolution of these appeals.”² Pet. 2a.

On October 16, 2009, the Sponsors filed an application with Justice Kennedy to vacate the Ninth Circuit’s stay of the preliminary injunction. Following Justice Kennedy’s referral of the application, the Court issued an order that the district court’s preliminary injunction “shall remain in effect pending the timely filing and disposition of a petition for a writ of certiorari.” Pet. 21a. “Justice Stevens would deny the application.” *Id.*

On October 22, 2009, the court of appeals issued its opinion. Pet. 3a. The court of appeals assumed that “the act of signing a referendum petition is speech, such that the First Amendment is implicated.” Pet. 11a. “Even assuming that speech is involved, however, we conclude that the district court applied an erroneous legal standard when it subjected the PRA to strict scrutiny.” Pet. 12a.

The court of appeals held that “the district court’s analysis was based on the faulty premise that

² The Secretary did not release the Referendum 71 petitions after the Ninth Circuit’s Order on October 15, 2009, because a state court had also issued a preliminary injunction prohibiting release of the Referendum 71 petitions. *Eyman v. Reed*, No. 09-2-02447-0 (Thurston Cy. Wash. Oct. 14, 2009). The state court action is stayed pending the outcome of this case.

the PRA regulates anonymous political speech.” Pet. 12a. The Ninth Circuit rejected the district court’s conclusion that signing a referendum petition is anonymous political speech. “First, the petitions are gathered in public, and there is no showing that the signature-gathering process is performed in a manner designed to protect the confidentiality of those who sign the petition.” *Id.* Moreover, “each petition sheet contains spaces for 20 signatures, exposing each signature to view by up to 19 other signers and any number of potential signers.” *Id.* In addition, as the court of appeals observed, “any reasonable signer knows, or should know, that the petition must be submitted to the State to determine whether the referendum qualifies for the ballot, and the State makes no promise of confidentiality, either statutorily or otherwise.” *Id.* “In fact, the PRA provides to the contrary.” *Id.* Finally, the Ninth Circuit observed that “Washington law specifically provides that both proponents and opponents of a referendum petition have the right to observe the State’s signature verification and canvassing process.” *Id.* Accordingly, the court of appeals concluded that “the district court’s application of anonymous speech cases requiring strict scrutiny was error.” Pet. 13a.

The Ninth Circuit next rejected the district court’s reliance on *Meyer v. Grant*, 486 U.S. 414, 420-21 (1988), and *Buckley II*, 525 U.S. at 197, for the proposition that “any regulation of protected political speech is subject to strict scrutiny.” Pet. 13a. According to the court of appeals: “This suggestion is unsupported by the applicable case law” because “it does not follow that a regulation that burdens

[protected] speech is necessarily subject to strict scrutiny.” Pet. 13a. In this respect, the court of appeals referred to *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994), where this Court applied intermediate scrutiny to viewpoint- and content-neutral provisions of federal law that required cable television operators to carry local broadcast stations on cable systems. The court of appeals also pointed to *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), where this Court applied a balancing test, rather than strict scrutiny, to an election law that burdened First Amendment rights by banning write-in voting. Pet. 13a.

Having determined that the district court’s application of strict scrutiny to the PRA was error, the court of appeals then considered the appropriate constitutional standard. The court assumed that “signing a referendum petition has a ‘speech’ element such that petition signing qualifies as expressive conduct” and further “assume[d] that the PRA’s public access provision has an incidental effect on referendum petition signers’ speech by deterring some would be signers from signing petitions.” Pet. 14a-15a. In light of these assumptions, the court of appeals concluded that the intermediate scrutiny standard of *United States v. O’Brien*, 391 U.S. 367 (1968), applies to the PRA. Pet. 14a-16a. Applying the intermediate scrutiny test articulated in *O’Brien*, the court of appeals concluded that the PRA furthers important government interests unrelated to suppression of speech, and the incidental effect on speech is no greater than necessary. Pet. 16a.

The court of appeals began its analysis of the government interests furthered by the PRA by noting

this Court’s recognition of a state’s “compelling interest in preserving the integrity of the election process.” Pet. 16a (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). The court of appeals concluded that the PRA “plays a key role in preserving the integrity of the referendum process” by providing government transparency and accountability to the public generally. Pet. 17a. The court of appeals recognized that Washington’s statute authorizing two opponents and two proponents of the referendum to view the Secretary’s verification of signatures provides oversight by special interest groups, but does not provide oversight by the general public. Pet. 17a; Wash. Rev. Code § 29A.72.230 (2009).

The court of appeals then considered the PRA’s role in enabling the public to “make meaningful use” of state law authorizing Washington citizens to challenge the Secretary’s determination that the petition has sufficient signatures. Pet. 17a; Wash. Rev. Code § 29A.72.240 (2009). The court reasoned that without public disclosure, citizens could not inspect petition sheets and rationally determine whether they were dissatisfied with the Secretary’s decision. This would render the superior court procedure “at best inefficient and at worst useless[.]” Pet. 17a-18a.

In addition, the court recognized that the State has an important “informational interest” in disclosure. Pet. 18a. The court explained that unlike campaign donors, “[r]eferendum petition signers have not merely taken a general stance on a political issue; they have taken action that has direct legislative effect.” *Id.* The public’s interest in

knowing who has taken legislative action “is undoubtedly greater” than knowing what groups favor or oppose a ballot issue. Pet. 19a.

Based on this analysis, the Ninth Circuit concluded that “each of the State’s asserted interests is sufficiently important to justify the PRA’s incidental limitations on referendum petition signers’ First Amendment freedoms,” and held that the PRA “as applied to referendum petitions does not violate the First Amendment.” Pet. 19a. Because the Sponsors failed to meet the first factor for a preliminary injunction—likelihood of success on the merits—the Ninth Circuit found it unnecessary to examine the remaining three factors. *Id.* n.14.

The court of appeals did not address the Sponsors’ Count II claim regarding Referendum 71 because the district court based its preliminary injunction on Count I, and did not consider Count II. Pet. 10a n.6.

The Sponsors filed their Petition For A Writ Of Certiorari on November 6, 2009.³ This Court granted the Sponsors’ petition on January 15, 2010.

SUMMARY OF ARGUMENT

1. The Sponsors claim that public access to any referendum petition under the PRA violates their First Amendment right to anonymous speech. Although the Sponsors characterize this case as an as applied claim because they are challenging the PRA as applied to referendum petitions, the

³ On November 3, 2009, Washington voters approved Referendum 71.

Sponsors' legal theory applies to all referendum petitions, and would apply equally to initiative, recall, and candidate nominating petitions. The challenge thus is facial. Under the Sponsors' theory, no set of circumstances exists under which the PRA would be valid in requiring disclosure of petitions signed by voters. The Sponsors also raised an as applied challenge below, alleging that disclosure of Referendum 71 petitions will subject the signers to harassment. Neither the district court nor the court of appeals addressed this as applied claim, and it is not before the Court. If this Court affirms the Ninth Circuit, the parties will have the opportunity to litigate the as applied claim in the district court.

2. When citizens sign a referendum petition, they are exercising the same legislative power as the elected Washington Legislature, having reserved this power in the state constitution. Signing a referendum petition is a legally operative act. A referendum petition with the requisite number of signatures requires the Secretary to conduct an election, and suspends the operation of the law that is the subject of the referendum. Thus, signing a petition is the first step in the election process, analogous to seconding a motion in a legislative body. In a legislative body, if there is no second, the motion fails. When Washington's citizens legislate directly, if there are not enough signatures, the measure will not qualify to the ballot.

3. The act of signing a referendum petition is very different from speech or expressive conduct. It is not core political speech and involves no substantial expressive element. A voter who signs a petition has no control over the content of the

petition. Rather, the content is dictated by statute and the sponsor. A signer is limited to providing his or her name and certain other identifying information, and to directing the Secretary to place the referendum on the ballot. This is very different from speech in preparing or circulating a handbill where the author controls the handbill's content. It also is very different from circulating an initiative or referendum petition. That is core political speech because it involves interactive communication between the signature gatherer and the voter. However, not every aspect of the initiative or referendum process is core political speech. This includes the act of signing the petition, which simply is a necessary step in the election process to place the measure on the ballot.

4. Signing a petition is a public act, not anonymous speech. Signatures are gathered in public. A voter who signs a petition discloses his or her identity to voters who subsequently sign the petition, to individuals who look at the petition but choose not to sign, to passersby, to the people who gather the signatures, and to the sponsors of the measure. Moreover, a voter has no control over how the information that he or she places on the petition will be used. Names and addresses on petitions can be sold or traded to other individuals and organizations and used for fund raising purposes.

5. Because signing a petition is an act without significant expressive content, instead of core political speech, it is subject to intermediate scrutiny. The PRA is valid because it furthers substantial government interests, and any incidental restriction on alleged First Amendment freedoms is

no greater than is essential to the furtherance of those interests. The PRA furthers two substantial government interests: an interest in government transparency and accountability and an interest in providing information to voters. The PRA ensures that Washington citizens have access to public records necessary to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot. The PRA also provides relevant information to Washington voters about who invoked the people's legislative power to direct that an election be held, and to suspend the operation of a law.

6. The PRA also satisfies other levels of First Amendment scrutiny. The Court has applied exacting scrutiny to disclosure requirements. Contrary to the Sponsors' claim, exacting scrutiny is different from strict scrutiny and requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. The PRA is substantially related to the government's interests in transparency and accountability, and in providing information to voters.

The PRA is also valid if viewed as an election regulation. If an election statute imposes a modest burden, a state's important regulatory interests are sufficient to justify reasonable, nondiscriminatory regulation. Disclosure under the PRA imposes a modest burden. It occurs after the petitions have been filed, after the circulation process has been completed, and precludes no speech.

Finally, the PRA satisfies strict scrutiny. The government interest in transparency and accountability and in providing information to voters is compelling, and the law is narrowly tailored, being neither underinclusive nor overinclusive in achieving its purposes.

ARGUMENT

A. This Case Presents A Broad Facial Challenge To The Disclosure Of Petitions Under The PRA

This case is limited to Count I of the Sponsors' complaint, which presents a facial challenge to the PRA. A "plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The Sponsors characterize their Count I challenge to the PRA as an "as applied" challenge because they are challenging the PRA "as applied to referendum petitions[.]" Pet'rs' Br. 10. However, their claim is actually facial. Under the Sponsors' theory, no set of circumstances exists under which the PRA could validly require disclosure of any voter petition filed with the government, including referendum, initiative, recall, and candidate nominating petitions. According to the Sponsors, the PRA is unconstitutional in all applications requiring disclosure of petitions. The Sponsors acknowledge that this is "not a challenge based on the

peculiarities or special circumstances of any group or individuals. It is not the sort of as applied challenge that a group would bring, based on its particular experience, to obtain an intimidation exemption under *Buckley's* reasonable-probability test, see *Buckley*, 424 U.S. at 72-74.” Pet’rs’ Br. 33.

The Sponsors have an extended discussion in their brief, regarding their claim that people who do not believe that domestic partnerships should have equal rights as married couples will be subject to harassment if their names are made public. Pet’rs’ Br. 2-7, 10-11. But this discussion is only relevant to Count II of the Sponsors’ Complaint where the Sponsors allege that releasing Referendum 71 petitions would violate the petition signers’ First Amendment right of association because disclosure would subject them to harassment. Count II presents an as applied challenge to the PRA.

The Sponsors’ discussion of harassment is not relevant to this facial challenge. As the Court explained in *Citizens United*, under *McConnell v. Federal Election Commission*, 540 U.S. 93, 198 (2003), the disclosure requirement “would be *unconstitutional as applied* to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed.” *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010). *Citizens United* did not address an as applied challenge because *Citizens United* “has offered no evidence that its members may face similar threats or reprisals. To the contrary, *Citizens United* has been disclosing its donors for years and has

identified no instance of harassment or retaliation.”
Id.

This case differs from *Citizens United* because the Sponsors claim to have suffered harassment. But this as applied challenge is before the district court in Count II. Neither the district court nor the court of appeals ruled on the Sponsors’ Count II challenge (Pet. 10a n.6, 43a) and it is not fairly within the question presented. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007). If this Court affirms the Ninth Circuit, the Sponsors will have the opportunity to present evidence to satisfy the reasonable probability test, and the Respondents will have an opportunity to rebut that evidence.

B. Signing A Petition Is A Legally Operative Legislative Act, Not Speech—Any Element Of Speech Is Incidental

The Sponsors’ First Amendment argument is based on their claim that signing a referendum or other petition is core political speech. Signing a petition is a legally operative legislative act similar to seconding a motion in parliamentary procedure. Any expressive aspect of signing a petition is incidental to its operative legislative purpose and is a quintessentially public act.

1. Signing A Petition Is A Legislative Act That Is The First Step In The Election Process

There are two ways to require a referendum in Washington. First, the Washington Legislature may order a referendum election on a law it has passed. Second, the people can direct the Secretary to

conduct a referendum election if there are enough signed petitions. Wash. Const. art. II, § 1(b) (“The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature . . . either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted[.]”).

Thus, when Washington citizens sign an initiative or referendum petition they are exercising the same power as the Washington Legislature. This is the legislative power that people reserved to themselves in the Washington Constitution. This Court recognized the principle of reserved legislative authority in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). *City of Eastlake* dealt with a challenge to a city charter provision requiring “that any changes in land use agreed to by the Council be approved by a 55% Vote in a referendum.” *Id.* at 670. In rejecting a claim that this constituted an unconstitutional delegation of power, this Court stated that “[a] referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.” *Id.* at 672 (citation omitted). The Court explained that this “reservation of such power is the basis for the town meeting, a tradition which continues to this day in some States as both a practical and symbolic part of our democratic

processes.” *Id.* at 672-73. Similarly, the referendum “is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies.” *Id.* at 673.

In the Washington Constitution, “the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.” Wash. Const. art. II, § 1. The Washington Supreme Court has stated that the “exercise of the initiative power is an exercise of the reserved power of the people to legislate” and that “[in] approving an initiative measure, the people exercise the same power of sovereignty as the legislature does when enacting a statute.” *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 779 (Wash. 2000).

The principle that the initiative and referendum power is legislative authority reserved by the people is not limited to Washington. Other states whose constitutions authorize the people to adopt initiatives and referendum also recognize this principle. *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (“By the express provisions of the Colorado Constitution the people have reserved for themselves the right to legislate. Colo. Const. Art. V, Sec. 1. This right is of the first order; it is not a grant to the people but a reservation by them for themselves.”); *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 314 (Or. 2006) (“In Oregon, the Legislative Assembly and the people, acting through

the initiative or referendum processes, share in exercising legislative power. *See* Or. Const., Art. IV, §§ 1(1), (2)(a), (3)(a) (vesting in both bodies the power to propose, enact, and reject laws.”); *Gallivan v. Walker*, 54 P.3d 1069, 1080 (Utah 2002) (“[T]he Utah Constitution vests the people’s sovereign legislative power in both (1) a representative legislature and (2) the people of the State, in whom all political power is inherent. Utah Const. art. VI, § 1(1) (Supp. 2001) Article VI, section 1 is not merely a grant of the right to directly legislate, but reserves and guarantees the initiative *power* to the people.”).

A referendum petition receiving the constitutionally required number of signatures has two legally operative effects. First, the Secretary is required to conduct an election with regard to the measure. Second, the operation of the law subject to referendum is suspended, instead of going into effect ninety days after the adjournment of the legislative session in which it was adopted. Wash. Const. art. II, § 1(d) provides “[s]uch measure shall be in operation on and after the thirtieth day after the election at which it is approved.”⁴

⁴ In a claim that is not properly before the Court, the Sponsors argue for the first time that if signing a petition is a legislative act, then disclosing the Referendum 71 petitions would violate the voters’ right to a secret ballot. Pet’rs’ Br. 20-21. This Court has never held that there is a constitutional right to a secret ballot, although the Court recognizes that “voting is of the most fundamental significance under our constitutional structure.” *Burdick*, 504 U.S. at 433. The Washington Constitution guarantees a secret ballot. Wash. Const. art. VI, § 6. Even assuming such a right, the two decisions upon which the Sponsors rely do not support their

2. Signing An Initiative Or Referendum Petition Is Analogous To Seconding A Motion In The Legislative Process

Signing an initiative or referendum petition is analogous to seconding a motion in a legislative body. When a motion is offered in a legislative body, there must be a second; if there is no second, the motion fails. Sarah Corbin Robert et al., *Robert's Rules of Order* § 4, at 34-35 (10th ed. 2000). If there is a second, the Chair restates the motion and presents it to the assembly for debate. *Id.* at 36. Like a second in the legislative arena, the purpose of gathering voters' signatures is to satisfy a legislative

claim: *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981), and *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8th Cir. 2000). In *Anderson*, the candidate nominating petition required the signer to declare "the subscribers desire . . . to vote for the candidate." *Anderson*, 664 F.2d at 608. In *Glickman*, the referendum petition signers were required to state: "We support a voluntary checkoff program." *Glickman*, 200 F.3d at 1187. Thus, in each of these cases, signing the petition required the signer to disclose how the signer would vote. Washington's referendum petitions contain no similar language. Wash. Rev. Code § 29A.72.100 (2009). The signers simply direct the Secretary to conduct an election. J.A. 31. There is nothing on the petition that indicates how a signer will vote. The Sponsors point to advertising language that they opted to include on the top of the Referendum 71 petition, that urges people to support the measure to "Preserve Marriage, Protect Children." J.A. 31. However, the Sponsors admit that the "required 'official' language on these forms (below the '[h]ighlights' box in smaller fonts) is neutral, so some signers reading that may have merely intended to put the matter before the voters without expressing an opinion on the issue[.]" Pet'rs' Br. at 21. The availability of signed referendum petitions under the PRA does not violate any requirement for a secret ballot.

requirement. Without the requisite signatures or “seconds,” the measure will not proceed in the legislative process. As the Court explained in the context of candidate nominating petitions, there “is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.” *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The same is true for ballot measures.

The concept that signing a petition is analogous to seconding a motion is an old one. A 1912 treatise explained that “the citizen who proposes it [a measure] must secure in advance the voluntary coöperation of a certain number or percentage of his fellow-citizens who are willing to join him in insisting upon bringing the matter formally before the entire body of voters.” Delos F. Wilcox, *Government By All The People* 15-16 (1912). “This requirement is analogous to the parliamentary rule that a motion must be seconded before it will be considered[.]” Wilcox at 16. “The first signer of a popular petition, therefore, may be considered as the mover of the resolution and all the other signers as seconders.” Wilcox at 16.

So, similar to a legislative body, the sponsor of a measure is like a legislator making a motion. The sponsor drafts the measure and takes all the steps necessary to prepare the petition, including obtaining a ballot title and having the actual petitions printed. Voters who sign the petition are analogous to other legislators who second the

sponsor's motion. A measure will only qualify for the ballot if it receives the constitutionally required number of signatures.

3. Signing An Initiative Or Referendum Petition Does Not Involve A Significant Element Of Expressive Conduct

The Sponsors contend that signing an initiative or referendum petition is core political speech. Apart from providing statutorily required information and direction to the Secretary to hold an election, the Sponsors acknowledge that one cannot discern what a signature expresses. Pet'rs' Br. 21. It may or may not mean the signer supports the referendum. For some signers, it may express nothing more than a decision to appease the signature gatherer and be on the signer's way. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376. In this and other significant respects, signing an initiative or referendum petition is decidedly different from speech or expressive conduct, let alone core political speech.

The conduct of signing a petition is simply part of the election process, not expressive conduct. In *Burdick*, 504 U.S. 428, this Court rejected a First Amendment challenge to write-in voting. The Court held that "the function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal

quarrel[s].” *Id.* at 438 (alteration in original) (citation and internal quotation marks omitted). Similarly, the function of signing a petition is to winnow out the measure that will make the ballot, and those that will not. According to the Court, “[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.” *Id.*

Signing a petition is unlike distributing handbills or circulating petitions because the signer has no control over the content of the petition. The sponsor determines the text of the initiative or identifies the parts of a law that are subject to referendum, and files the proposed initiative or referendum with the Secretary. Wash. Rev. Code § 29A.72.010 (2009). Once it is filed, the text cannot be changed. *Washington Citizens Action of Washington v. State*, 171 P.3d 486, 493 (Wash. 2007) (“[T]here is no mechanism for amendment of the text of an initiative after an initiative is filed. Wash. Const. art. II, § 1[.]”). State law requires that the petition include specific information and warnings. Wash. Rev. Code § 29A.72.130-.140 (2009); *supra* p. 3-4; J.A. 29. Once the printed petitions are circulated, the only thing a citizen can do is sign the petition and provide the required information. Wash. Rev. Code § 29A.72.130 (2009) (The referendum “petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.”).

In contrast, a person circulating a handbill has control over the content of the handbill, including whether to disclose his or her identity. As the Court

explained in *McIntyre*, 514 U.S. at 348, “the identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude.” The same is true of a person circulating a petition. The circulator is in control of the arguments he or she will use to persuade a voter to sign the petition. A person signing a petition makes no such argument and has no such control.

Speech involved in distributing a handbill or circulating a petition, and the action of signing a petition, also have different effects. The speech adds to the public debate on an issue, but it has no legally operative effect. In contrast, the act of signing a petition, if enough voters sign, has a legally operative effect. A valid petition requires that an election be held, and in the case of a referendum, it suspends the operation of a law passed by the legislature and signed by the governor. Wash. Const. art. II, § 1(d).

4. *Meyer* And *Buckley II* Do Not Hold That The Act Of Signing An Initiative Or Referendum Petition Is Core Political Speech Subject To Strict Scrutiny

The Sponsors’ primary argument is that *Meyer*, 486 U.S. 414, and *Buckley II*, 525 U.S. 182, hold that everything connected with circulating petitions is core political speech subject to strict scrutiny. Pet’rs’ Br. 17, 25, 40-41. The Sponsors’ reading of *Meyer* and *Buckley II* is incorrect. Neither decision stands for the proposition that everything connected with the initiative process is core political

speech, and neither decision holds that the act of signing a petition is speech at all.

The Court has referred to petition circulation as core political speech because petition circulation involves interactive communication—the exchange of ideas between the voter and the signature gatherer with respect to the proposed measure. Thus, *Meyer* explained that the “circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” *Meyer*, 486 U.S. at 421. Thus, a signature gatherer “will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.” *Id.* This is why “the circulation of a petition involves *the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’*” *Id.* at 421-22 (emphasis added). The core political speech is the interactive communication. As previously explained, signing a petition does not involve any significant expressive element (*supra* p. 28-30) nor does it involve any interactive communication.

Similarly, relying on *Meyer*, *Buckley II* stated that “[p]etition circulation . . . is ‘core political speech,’ because it involves ‘interactive communication concerning political change.’” *Buckley II*, 525 U.S. at 186. Thus, “[p]etition circulation undoubtedly has a significant political speech component. When an initiative petition circulator approaches a person and asks that person to sign the petition, the circulator is engaging in ‘interactive communication concerning political

change.” *Id.* at 215 (O’Connor, J., concurring in the judgment in part and dissenting in part).

However, the fact that the interactive communication involved in petition circulation is core political speech subject to strict scrutiny does not mean that everything connected to the initiative process is core political speech. *Buckley II* expressly rejects that notion. According to the Court in *Buckley II*, “States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.” *Id.* at 191. “*Not all circulation-related regulations target this [interactive communication] aspect of petition circulation. . . . Some regulations govern the electoral process by directing the manner in which an initiative proposal qualifies for placement on the ballot.*” *Id.* at 215 (O’Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added). “These latter regulations may indirectly burden speech but are a step removed from the *communicative aspect of petitioning* and are necessary to maintain an orderly electoral process. Accordingly, these regulations should be subject to a less exacting standard of review.” *Id.* (emphasis added). Signing a petition is removed from the communicative aspect of petitioning, and is necessary for an orderly election process. The public availability of signature petitions under the PRA is even farther removed, and as is discussed below (*infra* p. 56-57), substantially furthers vital government interests.

5. **Signing An Initiative Or Referendum Is A Public Act, Not Anonymous Speech**

Signing an initiative or referendum petition is a public act, not anonymous speech. As a manual for initiative sponsors explains, signature gathering takes place at “college registrations and polling places, meetings, fairs, art shows (gold mines), concerts (less good), and theater ticket lines (what have they got to do but read your petition?) [which] are standard collection points.” Mike A. Males, *Be It Enacted By the People: A Citizens’ Guide to Initiatives*, The NRAG Papers, Vol. 4, No. 2, at 4 (Fall 1981). “[D]owntown streets are good places for tables and ‘hawking’ (two behind the table witnessing signatures, two in front soliciting passersby), and public buildings like the post office also produce a steady stream.” *Id.* “Voters will also sign unattended petitions next to cash registers in shops.” *Id.* Signatures were gathered for Referendum 71 in such public places. *Supra* p. 7.

The Sponsors acknowledge that signatures were gathered in public, but argue that the disclosure was limited to like-minded individuals. According to the Sponsors, the relationship between signers and signature gatherers is like the relationship between the authors of the Federalist Papers and the printers they employed. Pet’rs’ Br. 35-36. There is no comparison between the printers of the Federalist Papers and those who sponsor and gather petition signatures. The printers of the Federalist Papers were agents of the authors. Sponsors and signature gatherers are not agents of the individuals who sign the petitions. Sponsors and

signature gatherers can and do use the signatures for purposes unrelated to the signed petitions; signers do not control such use.

The names and addresses on petitions can be sold or traded to other organizations or individuals. *See, e.g.,* Jim Camden, SpokesmanReview.com, *John Hancocks In Tug of War* (June 16, 2006), *available at* http://www.spokesmanreview.com/tools/story_pf.asp?ID=135916 (last visited Mar. 24, 2010) (The “president of Faith & Freedom, said Thursday the religious network had hoped to develop a mailing list for future efforts to overturn the law. If a new referendum or initiative campaign is launched, they’d probably mail a copy of that petition to the people who signed Referendum 65, asking them to sign the new proposal and have their friends sign it, too.”). The names and addresses on petitions may also be used for fund raising. Indeed, in discussing fund raising, the manual for initiatives explains that: “Your petitioners are another gold mine.” Males at 8.

In this case, it appears that the sponsor of Referendum 71, Protect Marriage Washington, did not gather the voters’ signatures for the sole purpose of qualifying Referendum 71 for the ballot. The Referendum 71 petitions also had a space for the signers to provide their email addresses (J.A. 31), even though state law does not require voters to provide their email addresses, and the Secretary does not use email addresses to verify voters’ signatures. Protect Marriage Washington converted from a single measure political committee to an ongoing political committee after the election in November 2009. *See* <http://www.pdc.wa.gov/>

QuerySystem/politicalcommittees.aspx (last visited Mar. 24, 2010). State law provides no statutory prohibition on use of any information Protect Marriage Washington gathered on the initiative petitions while it was a single issue committee. It would not be surprising if the names, addresses, and email addresses on the petitions are now being used to solicit donations for the political committee. *See id.*

The Sponsors argue that disclosure to other individuals who signed Referendum 71 petitions is not disclosure to the public and, consequently, the state must provide a separate justification to disclose the petitions to the Secretary for verification, and to the public under the PRA. Pet'rs' Br. 35-39. As previously explained, the Sponsors' basic premise is flawed—Referendum 71 petitions were disclosed to the public. The Sponsors' reliance on *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, and *AFL-CIO v. Federal Election Commission*, 333 F.3d 168 (D.C. Cir. 2003), to support their argument is misplaced. Neither case involved disclosure to public analogous to the signature-gathering process for a ballot measure.

Glickman applied the personal privacy exemption in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(6) (1994), and involved “a petition that call[ed] for a referendum to terminate a federally-imposed assessment on pork sales.” *Glickman*, 200 F.3d at 1182. The only individuals who could sign “were actually pork producers or importers during the representative period.” *Id.* at 1183. The court held that petition signers did not waive their right to privacy under the act and that

“the petitioners would have no reason to be concerned that a limited number of like-minded individuals may have seen their names and thus discovered their position on the referendum.” *Id.* at 1188.

The situation with signature gathering for referendum and initiative petitions generally, and for Referendum 71 specifically, is quite different. Although *Glickman* does not explain how the signatures were gathered for the referendum there at issue, it is unlikely that it was the same kind of public process involved in gathering signatures for initiative and referendum petitions. It seems unlikely that the Campaign For Family Farms set up tables outside of Wal-Mart and Target and asked passersby if they were pork producers or importers, and, if so, would they sign the petition. In the case of Referendum 71, the act of signing was public. Individuals were asked to read the petition sheets, which openly displayed the signatures that had been gathered. Although some chose to sign, other people may have opposed the petition. Discussion and reading of the petitions ensures that the names of petition signers are exposed to persons who do not agree with the cause.

AFL-CIO dealt with disclosure of records the Federal Election Commission obtained during the investigation of a complaint against the AFL-CIO and others. In the course of the investigation, the Commission “subpoenaed approximately 50,000 pages of documents[.]” *AFL-CIO*, 333 F.3d at 171. Unlike the petitions at issue in Referendum 71, the subpoenaed documents were never disclosed to the

public in the first instance. There was disclosure only to the government.

C. If The PRA Implicates First Amendment Rights At All, It Is Subject To Intermediate Scrutiny And Satisfies Its Standards

1. The Standard For Intermediate Scrutiny

For reasons explained above, the act of signing a referendum petition does not include any significant element of speech. Even if one were to assume that the act of signing a referendum petition implicates the First Amendment, the assumption would not mean that a law incidentally affecting the act of signing, such as the PRA, is impermissible. On the contrary, “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.” *O’Brien*, 391 U.S. at 376. In such circumstances, “a government regulation is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* at 377. “To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government’s interests.” *Turner Broad.*, 512 U.S. at 662. “Rather, the requirement of narrow tailoring is satisfied ‘so long

as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* (quoting *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))). The PRA meets all of these requirements.⁵

⁵ The Sponsors contend that intermediate scrutiny does not apply because the PRA is not viewpoint neutral and is content-based and thus should be subject to strict scrutiny. Pet’rs’ Br. 40. These arguments also lack merit. Viewpoint discrimination is a form of content discrimination that occurs “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995). Under the PRA, referendum signature petitions are available to the public without regard to the “motivating ideology or the opinion or perspective of the speaker.” *Id.* Indeed, signed referendum petitions would be equally available under the PRA whether the referendum petition sought to set aside a law that granted rights to domestic partners, or a law that denied such rights to domestic partners. The “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Turner Broad.*, 512 U.S. at 642 (quoting *Ward*, 491 U.S. at 791). “[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.” *Id.* at 643. The Sponsors acknowledge that the PRA is facially content neutral. Pet’rs’ Br. 42. Although the Sponsors observe that the PRA includes numerous exemptions, they point to nothing to show that any exemption, or lack of exemption from the PRA, is a function of government agreement or disagreement with the “message” that a particular type of public record may convey.

2. The PRA Furthers Two Substantial Government Interests

The PRA furthers two substantial government interests. The first is the interest in government transparency and accountability. The second is providing relevant information to Washington voters.

a. The PRA Furthers The Substantial Interest Of Government Transparency And Accountability

The “purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 884 P.2d 592, 597 (Wash. 1994) (citing Wash. Rev. Code § 42.17.251 (1994), *recodified* Wash. Rev. Code § 42.56.030 (2006)). Washington is not alone in recognizing that access to government records is essential to the proper functioning of a democracy. For example, in discussing its state public records law, the Ohio Supreme Court recognized that “[a] fundamental premise of American democratic theory is that government exists to serve the people. In order to ensure that government performs effectively and properly, it is essential that the public be informed and therefore able to scrutinize the government’s work and decisions.” *Kish v. Akron*, 846 N.E.2d 811, 816 (Ohio 2006). To the same effect is *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 74-75 (Tenn. 2002) (“[Tennessee Public

Records Act] serves a crucial role in promoting accountability in government through public oversight of governmental activities.”). *See also Forsberg v. Hous. Auth. of Miami Beach*, 455 So. 2d 373, 378 (Fla. 1984) (“[T]he purpose of Florida’s public records act . . . ‘is to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.’”).

This Court has articulated essentially the same point in the First Amendment context. “The freedom of the press to publish [information in public records] appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Indeed, the citizenry may make informed judgments about the proper conduct of government business only if it has access to the public records necessary to make those judgments. The PRA provides such access.

In the particular context of the instant case, the government’s interest in transparency and accountability applies with even greater force because the State “indisputably has a compelling interest in preserving the integrity of its election process.” *Eu v. San Francisco County Democratic Cent. Comm’n*, 489 U.S. 214, 231 (1989). “Preserving the integrity of the electoral process, preventing corruption, and ‘sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government’ are interests of the highest importance.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89

(1978) (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (footnote omitted)).

The PRA serves this heightened interest by ensuring that Washington citizens have access to public records necessary to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot. Under Wash. Rev. Code § 29A.72.240 (2009), “[a]ny citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters” may challenge that determination in court. Without access to the signed petitions, Washington citizens would have no meaningful opportunity to determine whether to mount such a challenge, let alone to succeed in one. Without access to the signed petitions, Washington citizens dissatisfied with the Secretary’s determination would not even be able to determine whether the gross number of signatures submitted satisfied the constitutional minimum. *See* Wash. Const. art. II, § 1(b) (requiring signatures equaling at least four percent of the number of votes cast for governor in the last gubernatorial election preceding the filing of the measure). Nor would Washington citizens be able to evaluate whether duplicate signatures were submitted, whether signers were registered to vote, or whether other statutory requirements relating to such petitions were satisfied. In short, without the access to signed petitions that the PRA provides, Washington’s citizens could not fulfill their role as “the final judge of the proper conduct of public business.” *Cox Broad.*, 420 U.S. at 495.

The Sponsors try to reduce this government interest in transparency and accountability to an interest in preventing fraud, and then discount their artificially narrowed interest on the basis that criminal penalties are adequate to deter fraud. Pet'rs' Br. 50. Preventing fraud is a very important government interest. However, the government's interest in transparency and accountability is substantially broader. It encompasses identifying innocent errors with respect to signatures and signature petitions, as well as oversight of the simple accuracy of the Secretary's certification of petitions. Petition signers may make errors in the signing process that do not involve fraud. Similarly, the Secretary may make errors in accepting or rejecting signatures without any occurrence of fraud. For example, over a ninety-day signature gathering period, a voter may innocently sign a referendum petition more than once, or a voter may sign a petition mistakenly believing that he or she is registered to vote. The Secretary may or may not correctly identify all such errors, or the Secretary may incorrectly conclude that a signature is a duplicate when it is not, or that a signature belongs to a person who is not eligible to vote in Washington, when in fact the person is properly registered.⁶

After artificially restricting the government's interest in transparency and accountability to

⁶ For example, in canvassing the signatures for Referendum 71, the Secretary concluded that there were 2,104 duplicate signatures. Another 12,316 signatures were rejected because no voter registration could be found. See <http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71SignatureStats.aspx> (last visited Mar. 24, 2010).

preventing fraud, the Sponsor also argues that occurrences of fraud are rare. Pet'rs' Br. 50. For this proposition, the Sponsor largely relies on a statement from *Meyer v. Grant*, 446 U.S. at 427, that the risk of fraud or corruption by petition circulators is more remote at the petition stage than at the time of balloting. No empirical support for this statement appears in the Court's opinion, and the statement itself is limited and relative. It suggests only that the risk of fraud or corruption is less pronounced during signature gathering than at the time of voting. The statement does not suggest that fraud and corruption in the petition process are somehow speculative, conjectural, or less than real, and actual experience reflected in reported cases demonstrates otherwise. *See, e.g., Roberts v. Priest*, 975 S.W.2d 850 (Ark. 1998) (holding initiative petition lacked sufficient support based in part on invalidated forged signatures); *Citizens Comm. for D.C. Video Lottery Terminal Initiative v. District of Columbia Bd. of Elections & Ethics*, 860 A.2d 813, 813-14 (D.C. 2004) (affirming Board's decision to reject initiative petitions based on false and forged signatures); *State v. Pappas*, 424 N.W.2d 604 (Neb. 1988) (affirming conviction of aiding and abetting another to willfully and falsely swear to signature upon initiative petition); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 770 (Mont. 2006) (affirming trial court determination that initiative signature gathering process was permeated by a pervasive and general pattern and practice of fraud); *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32 (Okla. 2006) (invalidating signature petitions based on fraudulent circulator affidavits).

Moreover, the Sponsors do not assert that errors in the signature gathering process and in the signature verification process that are not the product of fraud somehow are rare. Again, reported cases show otherwise. *See, e.g., Oklahomans For Modern Alcoholic Beverage Controls, Inc. v. Shelton*, 501 P.2d 1089 (Okla. 1972) (reversing secretary of state's determination of petition invalidity, and determining validity of signatures); *Las Vegas Convention & Visitors Auth. v. Miller*, 191 P.3d 1138 (Nev. 2008) (affirming secretary of state's decision striking initiative petition signatures for failure to substantially comply with circulator affidavit requirement); *Energy Fuels Nuclear, Inc. v. Coconino County*, 766 P.2d 83 (Ariz. 1988) (petition signatures held invalid based on lack of proper voter registration); *Porter v. McCuen*, 839 S.W.2d 521 (Ark. 1992) (proposed initiative removed from ballot for lack of requisite valid signatures based on failure to comply with variety of statutory signature gathering requirements). The government's interest in the transparency and accountability fostered by the PRA is compelling and substantial.

b. There Is A Substantial Interest In Providing Information To Voters

The second important government interest furthered by the PRA in the context of this case is providing relevant information to Washington voters. The PRA affords Washington voters the opportunity to learn who is operating the levers of state government by invoking the people's direct legislative power. More specifically, access to signed petitions allows Washington's voters to know who

demanding that an election be held on an enacted law, and who demanded that the law be suspended pending the results of the election.

Far from being in tension with the First Amendment, as the Sponsors suggest, the availability of this information furthers the purpose of the First Amendment. “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. This of course includes . . . all such matters relating to political processes.” *Mills v. State of Alabama*, 384 U.S. 214, 218-19 (1966). The First Amendment helps to ensure that our “constitutionally protected ‘discussion of governmental affairs’ is an informed one.” *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605 (1982).

The availability of referendum signature petitions allows Washington voters to engage in discussion of referred measures with persons whose acts secured the election and suspension of state law.

The Sponsors’ response to the government informational interest is not persuasive. The Sponsors argue that the government’s informational interest is not absolute. Pet’rs’ Br. 50. No one is suggesting that it is. Nor is anyone (other than the Sponsors) arguing that, regardless of the justifications for a law or its consequences for legitimate First Amendment interests, government could require disclosure of a wide swath of information from petition signers. *Id.*

The Sponsors endeavor to diminish the government's informational interest by asserting that "[m]arginal information [conveyed to the voters] cannot justify the substantial burdens imposed by compelled disclosure of the identities of 138,000 individuals." Pet'rs' Br. 49. Contrary to the implicit assumption in this argument, the PRA does not compel the disclosure of any information. Washington election statutes, that the Sponsors quite understandably do not challenge, require disclosure of petition signers' identities on referendum petitions as a necessary part of protecting the integrity of Washington's electoral process. Petition signatures are public long before the PRA comes into play. *See* Wash. Const. art. II, § 1(b); Wash. Rev. Code §§ 29A.72.100, .130, .140, .150 (2009). Moreover, as demonstrated above, the PRA imposes no substantial burden on the First Amendment rights of petition signers. The PRA does not affect in any way a petition signer's right to speak with petition circulators or others about the subject of a referendum or initiative, or to otherwise communicate his or her views about the subject of the referendum. The PRA provides only public access to the government's official record of the legally operative legislative act of signing the petition.

Finally, the Sponsors provide no meaningful support for the assertion that the information at issue is merely "marginal." "Research shows that voters find cues about how their interests might be affected by a proposed initiative or referendum. One of the most useful of these cues is knowing who favors or opposes a measure." M. Dane Waters,

Initiative and Referendum Almanac 456 (2003). Despite their argument, the Sponsors recognize this fact. It explains why the Sponsors themselves included the names, photographs, and statements of several Washingtonians who supported Referendum 71 on the Referendum 71 signature petitions. J.A. 32.

This informational interest is not undercut by the fact that some voters may sign a petition just to put the measure on the ballot. Knowing who wants to have an election on a ballot measure is useful information. In *Citizens United*, the plaintiff argued that the government's informational interest did not apply to "to its ads, which only attempt to persuade viewers to see the film [because] the information would not help viewers make informed choices in the political marketplace." *Citizens United*, 130 S. Ct. at 915. The Court rejected this argument because, "[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* Similarly, in this case people have an interest in knowing who directed that an election be conducted on the measure. A voter who asks a neighbor why he or she signed a petition obtains useful information, even if it is only that the neighbor has not decided how to vote on the measure.

This is not unique to issue elections. Use of information available through state disclosure of voter information, cross referenced with other information available on the internet, is widely used by the Republican and Democratic parties to communicate directly with individual voters. "These

databases put together phone numbers, voting history, age, marital status, race, income and other demographic information”. Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 Geo. Wash. L. Rev. 1070, 1071 (2005). This information does not reveal how a person voted, but it provides useful information about participation in the political process. The same is true of petitions.

The government’s interests in transparency and accountability, and in providing information to voters, furthered by the PRA, are thus substantial and compelling. They satisfy intermediate scrutiny.

3. The PRA Is Unrelated To The Suppression Of Free Expression

The PRA also satisfies the second prong of intermediate scrutiny. The government interests in transparency and accountability, and in providing information to voters, are “unrelated to the suppression of free expression”. *O’Brien*, 391 U.S. at 377. Rather than being designed to suppress speech, the government’s interests promote the purposes of the First Amendment. “[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills*, 384 U.S. at 218-19. The First Amendment ensures that our “constitutionally protected ‘discussion of governmental affairs’ is an informed one.” *Globe Newspaper*, 457 U.S. at 605. The PRA allows Washington citizens to obtain information about the government’s legislative process so that they may have a meaningful role in protecting the integrity of

the State’s electoral process, and so that they may make informed decisions with respect to important public issues.

4. The PRA Satisfies The Narrow Tailoring Requirement For Intermediate Scrutiny

Finally, the PRA satisfies the narrow tailoring requirement for intermediate scrutiny. The Sponsors do not argue, and could not plausibly argue, that the government interests in transparency and accountability and in providing information to voters would be achieved as effectively in the absence of the PRA. Without the PRA, Washington citizens would be deprived of public information necessary for them to exercise oversight over the process of direct democracy. *See* Wash. Rev. Code § 29A.72.240 (2009). And, without the PRA, Washington citizens would not have public information about who has triggered a referendum election and the suspension of state law—information that may be useful to a voter in deciding how to vote on the measure. Instead, the Sponsors argue that these interests could be served by “better-tailored” regulations. Pet’rs’ Br. 52-53. The Sponsors’ arguments thus ignore the intermediate scrutiny test for appropriate tailoring—whether the government’s interests would be achieved as effectively in the absence of the regulation. *Turner Broad.*, 512 U.S. at 662.

Even if that were not the case, the Sponsors’ arguments that the PRA could be “better-tailored” miss the mark for additional reasons. The Sponsors argue that campaign contribution reporting serves any information interest. Pet’rs’ Br. 49. This

argument assumes that contributors and petition signers are one and the same. Sponsors offer no basis for this assumption. Moreover, the Sponsors do not suggest that campaign contribution reporting serves the government interest in transparency and accountability with respect to the referendum process. For example, campaign donor information says nothing as to whether a petition signer was qualified to sign a petition, or whether the Secretary accurately verified and canvassed the petitions. Otherwise, the Sponsors simply express incredulity at the notion that a voter might be influenced in determining how to vote on a referendum by knowing who signed a petition. Pet'rs' Br. 51. The Sponsors' own action advising potential petition signers of the identity of Referendum 71 supporters, by placing such information on the signature petitions, surely undermines this claim. J.A. 32.

The Sponsors also incorrectly argue that the government's "anti-fraud interest" could be served by more narrow means. Pet'rs' Br. 52. The Sponsors contend review of petitions could be done by the Secretary, or by other public officials if, as the Sponsors suggest, the Secretary cannot be trusted. *Id.* This argument reflects the Sponsors' artificial narrowing of the government interest to one of preventing fraud. It misses the very point that private citizens have a role in our democracy to independently examine how the public's business is conducted, *Cox Broadcasting*, 420 U.S. at 495, and that they have a right under Wash. Rev. Code § 29A.72.240 (2009) to oversee the integrity of the petition verification process, whether for active misconduct or innocent error.

The Sponsors additionally argue that criminal penalties suffice to deter fraud, and thus adequately address the government's "anti-fraud interest." Pet'rs' Br. 53. Again, this argument suffers from the Sponsors' erroneous narrowing of the government interest in transparency and accountability to an interest only in preventing criminal misconduct. The argument additionally is flawed in that it simply assumes, without basis, that the same capacity to detect fraud (or other errors) would exist with or without the participation of interested citizens who are informed by public disclosure of the petitions. Contrary to the Sponsors' argument, the government is not powerless to safeguard the integrity of its election processes by all appropriate prophylactic means, and relegated only to criminal prohibitions.

Finally, the Sponsors suggest that if the government transparency and accountability interests were strong, the PRA would be part of Washington's election code. Pet'rs' Br. 52. In every meaningful sense, the PRA *is* part of Washington's election code. There hardly could be more plain proof of that fact than the instant case. Far from indicating a weak government interest, the fact that the people of Washington, acting through the initiative process, made the PRA broadly applicable across government demonstrates the strong interest of Washington's citizens in government transparency and accountability, and in the availability of public information.

D. If The PRA Implicates First Amendment Rights At All, It Also Satisfies Other Levels Of First Amendment Scrutiny

To the extent the PRA implicates protected speech, the Ninth Circuit correctly applied intermediate scrutiny. However, even if the Court applies a different level of scrutiny, the PRA does not violate the First Amendment.

1. The PRA Satisfies Exacting Scrutiny

In *Citizens United*, the Court explained: “Disclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities,’ *Buckley* [*v. Valeo*, 424 U.S. at 64] and ‘do not prevent anyone from speaking,’ *McConnell* [*v. Federal Election Commission*, 540 U.S. at 201.]” The Court stated that disclosure requirements are subject “to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest. *Buckley*, at 64, 66, 96 S.Ct. 612 (internal quotation marks omitted); see *McConnell*, *supra*, at 231-232, 124 S.Ct. 619.” *Citizens United*, 130 S. Ct. at 914. Because the PRA is a public disclosure law, the Court might apply exacting scrutiny.

The PRA satisfies the exacting scrutiny test set out in *Citizens United*. The State has a substantial governmental interest in government transparency and accountability, and in providing information to the voters. *Supra* p. 44-48. And there is a substantial relation between the PRA and these interests. *Supra* p. 39-44.

The Sponsors argue that “exacting scrutiny” is a form of “strict scrutiny.” Pet’rs’ Br. 41-42. *Citizens United* lays this claim to rest. The Court stated that strict scrutiny “requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’ [Fed. Election Comm’n v. Wisconsin Right To Life, Inc., 551 U.S. at 464.]” *Citizens United*, 130 S. Ct. at 882. In contrast, exacting scrutiny requires “‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Id.* at 914 (quoting *Buckley*, 424 U.S. at 64, 66) (citing *McConnell*, 540 U.S. at 231-32). The two tests are obviously different.

The two tests apply to different burdens on speech. The Court applied strict scrutiny to “an outright ban [on corporate speech], backed by criminal sanctions.” *Id.* at 897. The Court distinguished between this burden and “[d]isclaimer and disclosure requirements [that] may burden the ability to speak, but . . . impose no ceiling on campaign-related activities[.]” *Id.* at 914 (internal quotation marks omitted). Disclaimer and disclosure laws were not subject to strict scrutiny.

Contrary to the Sponsors’ argument, the Court’s application of exacting scrutiny in *Citizens United* is consistent with its use of exacting scrutiny in each of the election disclosure cases cited by the Sponsor. *Buckley II*, which the Sponsors contend applied strict scrutiny (Pet’rs’ Br. 40), states that “‘exacting scrutiny’ is necessary when compelled disclosure . . . is at issue.” *Buckley II*, 525 U.S. at 202. As in *Citizens United*, the *Buckley II* decision cites *Buckley v. Valeo* as supporting authority for

application of exacting scrutiny to election disclosure issues. *Buckley II*, 525 U.S. at 202. In a decision concurring in the judgment, Justice Thomas objected to the majority’s analysis, stating that strict scrutiny should have been used. *Id.* at 207 (Thomas, J., concurring in the judgment). The Sponsors claim that *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), applied the “functional equivalent” of strict scrutiny to disclosure is also mistaken. Pet’rs’ Br. 42-43. In *Davis*, the Court stated that “there must be ‘a “relevant correlation” or “substantial relation” between the governmental interest and the information required to be disclosed,’ and the governmental interest ‘must survive exacting scrutiny.’” *Davis*, 128 S. Ct. at 2775 (quoting *Buckley*, 424 U.S. at 64 (footnotes omitted)). Examination of the substantial relation between the government interest and the information to be disclosed is an exacting scrutiny analysis. It is not a strict scrutiny determination of whether there is a narrowly tailored, compelling government interest. Finally, the Court also applied exacting scrutiny in *McConnell* (Pet’rs’ Br. 29) and held that requiring disclosure of electioneering communications “bears a sufficient relationship to the important governmental interest of ‘shed[ding] the light of publicity’ on campaign financing.” *McConnell*, 540 U.S. at 231 (alteration in original) (quoting *Buckley*, 424 U.S. at 81).

Nor does *McIntyre* support the application of strict scrutiny to election petition disclosure. In *McIntyre*, the Court addressed election-related writings, distributed as anonymous handbills. The Court expressly distinguished its examination of

these writings from the exacting scrutiny analysis applied in *Buckley* to disclosure of campaign contributions made by individuals and groups. *McIntyre*, 514 U.S. at 355 (“[I]n another portion of the *Buckley* opinion we expressed approval of a requirement that even ‘independent expenditures’ in excess of a threshold level be reported to the Federal Election Commission. [*Buckley v. Valeo*, 424 U.S. 1] at 75-76. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. See *id.*, at 157-159[.]”). *McIntyre* explained that disclosure of an individual’s campaign contribution “may be information that a person prefers to keep secret” and probably “gives away something about the spender’s political views.” *McIntyre*, 514 U.S. at 355. However, disclosing campaign contributions “reveals far less information” than the “particularly intrusive” disclosure of an author’s “personally crafted statement of a political viewpoint.” *Id.*

While exacting scrutiny is distinct from strict scrutiny, the exacting scrutiny test set out in *Citizens United* corresponds with the intermediate scrutiny test set out in *O’Brien*. *O’Brien* refers to the government’s interest as “important or substantial.” *O’Brien*, 391 U.S. at 377. *Citizens United* refers to “‘sufficiently important’ governmental interest.” *Citizens United*, 130 S. Ct. at 914. *O’Brien* requires the restriction to be “no greater than is essential to the furtherance of that interest.” *O’Brien*, 391 U.S. at 377. *Citizens United* refers to a “‘substantial relation’ between the disclosure requirement” and

the government's interest. *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

2. The PRA Is Valid As A Reasonable Election Regulation

Although the PRA is not codified as part of Washington's election law, or applicable only in the election context, it applies to initiative and referendum petitions. For this reason, the PRA might be evaluated under the flexible test that the Court applies to judge election regulations under the First Amendment. As the Court explained in *Washington State Grange v. Washington State Republican Party*, 552 U.S. at 451-52: "Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are narrowly tailored to serve a compelling state interest. If a statute imposes only modest burdens, however, then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures." (Citations and internal quotation marks omitted.)

Releasing signed petitions, at most, imposes only a minimal burden on signers' First Amendment interests. Signed petitions are released only after they have been publicly signed and submitted to the Secretary—that is, after they become public records. Disclosure under the PRA does not implicate the interactive communication that exists when a signature gatherer is trying to persuade a voter to sign the petition.

In this respect, disclosure under the PRA is like the circulator affidavit the Court approved of in

Buckley II. There, state law required the petition circulators to “attach to each petition section an affidavit containing, *inter alia*, the circulator’s name and address and a statement that he or she has read and understands the laws governing the circulation of petitions[.]” *Buckley II*, 525 U.S. at 188-89 (footnotes and internal quotation marks omitted). The affidavit was a “public record.” *Id.* at 198. The Court approved of the affidavit requirement because it “does not expose the circulator to the risk of ‘heat of the moment’ harassment. *Cf.* [*Am. Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995, 1004] (observing that affidavits are not instantly accessible, and are therefore less likely to be used ‘for such purposes as retaliation or harassment’).” *Buckley II*, 525 U.S. at 199. The same is true with respect to the release of petitions under the PRA. The State’s interests in government transparency and accountability, and in providing voters with information, are important interests that justify this modest burden. *See supra* pp. 39-48.

3. The PRA Satisfies Strict Scrutiny

Strict scrutiny “requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’ [*Fed. Election Comm’n v. Wisconsin Right To Life, Inc.*, 551 U.S. at 464.]” *Citizens United*, 130 S. Ct. at 882. The State’s interest in government transparency and accountability and in providing information to the voters is compelling. *Supra* p. 39-48. And we have already discussed why the Sponsors’ narrow tailoring arguments fail, and those reasons apply equally to strict scrutiny narrow tailoring. *Supra* p. 49-51.

In addition, strict scrutiny narrow tailoring also requires that the law be neither underinclusive nor overinclusive. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. at 793 (law failed narrow tailoring because “the provisions of the statute . . . are both underinclusive and overinclusive”). The Sponsors have not argued that the PRA fails this standard, and it does not.

In *Bellotti*, the Court considered a statute that prohibited “corporate expenditures related to individual tax referenda[.]” *Bellotti*, 435 U.S. at 775. One of the governmental interests asserted in defense of the statute was “protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation.” *Id.* at 787. With regard to this interest, the Court held that the “underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted . . . even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters.” *Id.* at 793. In addition, the statute did not “prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.” *Id.* Indeed, the Court explained that the “fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been

concerned with silencing corporations on a particular subject.” *Id.* The Court also pointed to the fact that “the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations [from the statute] undermines the plausibility of the State’s purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8.” *Id.*

In contrast, the PRA is not underinclusive. All petitions for initiatives, referendum, recall, and candidate nomination are public records subject to disclosure. There is no subject matter that is excluded. And the PRA is not limited to state government; it also applies to local government, so petitions filed with city, county, or local election officials are subject to disclosure.

In *Bellotti*, the “overinclusiveness of the statute [was] demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure.” *Id.* at 794. There is no similar overinclusiveness in the PRA. Petitions are only disclosed in response to a public records request. Thus, there is only disclosure if citizens desire to make a decision about government accountability or obtain public information.

Because there are compelling government interests for the PRA, and the PRA is narrowly tailored, being neither underinclusive nor overinclusive, the PRA satisfies strict scrutiny.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted.

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