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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN DOE #1, ET AL., :

Petitioners :

v. : No. 09-559

SAM REED, WASHINGTON SECRETARY :

OF STATE, ET AL. :

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Washington, D.C.

Wednesday, April 28, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:11 a.m.

APPEARANCES:

JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf of Petitioners.

ROBERT M. McKENNA, ESQ., Attorney General, Olympia, Washington; on behalf of Respondents.

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P R O C E E D I N G S

(10:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 09-559, John Doe v. Reed, Washington Secretary of State.

Mr. Bopp.

ORAL ARGUMENT OF JAMES BOPP, JR.,

ON BEHALF OF THE PETITIONERS

MR. BOPP: Thank you, Mr. Chief Justice, and may it please the Court:

No person should suffer harassment for participating in our political system, and the First Amendment protects citizens from intimidation resulting from compelled disclosure of their identity and beliefs and their private associations.

JUSTICE SCALIA: What -- what about requiring disclosure of campaign contributions?

MR. BOPP: Well, the --

JUSTICE SCALIA: Do you think that is unconstitutional?

MR. BOPP: This Court has upheld the disclosure in Buckley v. Valeo in 1976.

JUSTICE SCALIA: Right. Now, why doesn't that fall within your principle that no person should be exposed to criticism for --

1 MR. BOPP: Well, it could --

2 JUSTICE SCALIA: -- his political beliefs?

3 MR. BOPP: It could potentially, and -- but  
4 this Court subjected those requirements to the  
5 appropriate constitutional First Amendment analysis,  
6 found that there was sufficiently important governmental  
7 interest, some of which are not present when we're  
8 talking about a referendum or initiative, and then also  
9 created an exception from even a generally valid statute  
10 where there is a reasonable probability of harassment of  
11 that particular individual or -- or group.

12 So the First Amendment analysis regarding  
13 the privacy of association, the privacy of identity and  
14 beliefs, the potential of -- of intimidation are all  
15 elements of the analysis that was employed by the Court  
16 in Buckley.

17 JUSTICE SOTOMAYOR: I'm -- I'm trying to separate  
18 out the harassment aspects of this case from the working  
19 proposition that there's some sort of freedom of  
20 association, of privacy.

21 Your theory, putting harassment aside, would  
22 invalidate all of the State laws that require disclosure  
23 of voter registration lists, correct? All of those  
24 States like New York that permit public review of voter  
25 registration lists and party affiliations, et cetera --

1 that's illegal?

2 MR. BOPP: No.

3 JUSTICE SOTOMAYOR: That's unconstitutional?

4 MR. BOPP: No. We believe they would not.

5 They would certainly be subject to First Amendment  
6 analysis. But in -- in those -- in the instance of  
7 voter registration, there are other governmental  
8 interests that are not present in petition signings for  
9 referendums.

10 JUSTICE SOTOMAYOR: Explain to me the  
11 difference. And -- well, one other aspect of State  
12 legislative -- I can only work from New York because I  
13 know it intimately, but it is a State that also permits  
14 or requires that petitions for candidate listing on the  
15 ballot be public as well. New York relies in part, as  
16 this State does, on the public reviewing those  
17 petitions. Would that be invalid as well, for a  
18 candidate's running?

19 MR. BOPP: Well, we believe it would be  
20 subject to First Amendment analysis. But, again, there  
21 are different governmental interests when you have  
22 candidates involved.

23 JUSTICE SOTOMAYOR: So explain to me what  
24 the difference is in those three situations.

25 MR. BOPP: Well, one is you have candidates

1 involved --

2 JUSTICE SOTOMAYOR: With -- with the State's  
3 interest.

4 MR. BOPP: One is you have candidates  
5 involved. And this Court recognized in Buckley that  
6 there were disclosure interests that related  
7 specifically, and actually only, to candidates. For  
8 instance, people who contribute to a candidate, that  
9 information, to the voter, can signal the interests that  
10 the candidate, once he or she takes office, will be  
11 responsive to.

12 When we have an initiative, we know what the  
13 law is that is being voted upon. It's not a matter  
14 of -- of electing a representative.

15 JUSTICE SOTOMAYOR: You don't think that --  
16 putting aside this kind of referendum, just a  
17 hypothetical referendum having to do with a certain tax  
18 scheme -- you don't think the voters would be interested  
19 in knowing what kinds of people in what occupations are  
20 interested in that particular tax benefit or not?

21 MR. BOPP: Well, a few -- few might be, but  
22 we think this is marginal information. First, they are  
23 adopting a law. And so we know what the law is. And --  
24 and while it might be marginal information for a few  
25 people, once the measure qualifies for the ballot, this

1 is only -- the petition signature and distribution is  
2 only for a very limited governmental interest.

3 CHIEF JUSTICE ROBERTS: Counsel --

4 MR. BOPP: And that -- and that --

5 CHIEF JUSTICE ROBERTS: I'm sorry, go ahead  
6 and finish your answer.

7 MR. BOPP: And that limited governmental  
8 interest is to preserve State money, to not conduct an  
9 election on the matter unless there is sufficient public  
10 support. So --

11 CHIEF JUSTICE ROBERTS: Now, counsel, the  
12 responses you have given to a couple of the questions  
13 has been that the First Amendment analysis would apply.  
14 But given you have a facial challenge, is that enough?  
15 Don't you have to indicate that the First Amendment  
16 analysis would prevail in either all of the other cases,  
17 most of the other cases, a significant portion?

18 This is a facial challenge. And if the  
19 challenge is going to fail in some of those other cases,  
20 I think your facial challenge fails as well.

21 MR. BOPP: Well, we're only challenging the  
22 application of the Public Records Act to petitions and  
23 referendum petitions. We're not challenging it as it  
24 would be applied to petitions to put people on the  
25 ballot.

1 CHIEF JUSTICE ROBERTS: So we have to decide,  
2 in assessing your claim that, no matter what the  
3 referendum issue was, that there's a significant  
4 intrusion on First Amendment rights?

5 MR. BOPP: Yes.

6 CHIEF JUSTICE ROBERTS: So that if, for  
7 example, the referendum involves a bond issue as to  
8 which people may have particular views, but they're not  
9 going to get terribly excited about it, we'd still have to  
10 say that that's protected under the First Amendment?

11 MR. BOPP: Well, actually, under -- with  
12 modern technology, it only takes a few dedicated  
13 supporters, and a computer, who are willing to map -- to  
14 put this information on the Internet, MapQuest it, as  
15 they did with respect to the contributors of  
16 Proposition 8, which resulted in -- and then encourage  
17 people to harass and intimidate them, which resulted in  
18 hundreds of examples of harassment --

19 CHIEF JUSTICE ROBERTS: Well, my point is,  
20 though, you're not likely to get that with respect to,  
21 you know, a debt issue, raising the debt ceiling from  
22 0.8 percent to 0.9 percent. You're not going to get a  
23 crowd outside your house because you signed that  
24 petition.

25 MR. BOPP: Well, it may not manifest itself



1 in -- in any particular initiative. We agree with that,  
2 but we think the potential is there, and there is  
3 usually a group of supporters of any measure that, you  
4 know, are passionate about that particular issue.

5 JUSTICE GINSBURG: But -- but don't you  
6 have -- I thought we were dealing with count 1 of the  
7 complaint.

8 MR. BOPP: Yes.

9 JUSTICE GINSBURG: Count 2 would be the  
10 counterpart to the exception that's made from the  
11 disclosure requirement with regard to contributions with  
12 certain organizations whose members might be harassed.

13 MR. BOPP: Well, with this --

14 JUSTICE GINSBURG: That's -- that's not --  
15 that would still be open if you lose the first part of  
16 this case.

17 So going back to the question you were  
18 asked, how does this differ -- that Justice Scalia  
19 asked -- how does this differ from the contributor who  
20 says, well, I might be harassed? The contributor  
21 would have an opportunity to show that.

22 MR. BOPP: Buckley dealt with that exact  
23 question. And first -- the first step of the analysis  
24 is whether or not the law is -- is valid under the First  
25 Amendment. And then there is an exception to even a

1 valid constitutional -- a constitutionally valid law.

2 JUSTICE GINSBURG: So, that's why I'm asking  
3 you why, on the first part, should it be any different,  
4 as long as you have the door open to show that if you  
5 were going to suffer reprisals, harassment, that an  
6 exception would have to be made?

7 MR. BOPP: Well, we don't think that the exception  
8 is a substitute for considering the initial validity of  
9 the law, which --

10 JUSTICE GINSBURG: May I -- may I ask you  
11 one -- something that was not in your brief, but was in  
12 the Secretary's brief. Is this list available to  
13 Project Marriage? And specifically on page 34 of  
14 Secretary Reed's brief, the statement is made that the  
15 sponsoring organizations sometimes sell or trade these  
16 lists. They use them for fundraising purposes. So that  
17 would be the end of a person's privacy, at least on one  
18 side. Is that true, that the initiative sponsor uses  
19 these lists?

20 MR. BOPP: Yes.

21 JUSTICE GINSBURG: Yes?

22 MR. BOPP: Yes, this is an act of private  
23 association. The petition signers are associating with  
24 the referendum committee for purposes of placing this  
25 measure on the ballot --

1 JUSTICE GINSBURG: They don't say: Now, I  
2 agree you can use my name for fundraising purposes. But  
3 that's -- it's implicit, you say, in their signing the  
4 petition that the --

5 MR. BOPP: Well, what --

6 JUSTICE GINSBURG: -- signature collector  
7 can sell the names, use them for its own fundraising  
8 purposes?

9 MR. BOPP: What is implicit is they are  
10 associating with this group for a purpose, and that is  
11 support for, in this case, Referendum 71. And so they  
12 use those names for valid purposes. But --

13 JUSTICE SCALIA: Mr. Bopp, do you have any  
14 case in which we have held that the First Amendment  
15 applies to activity that consists of the process of  
16 legislation, of legislating --

17 MR. BOPP: Yes, Buckley II.

18 JUSTICE SCALIA: -- or of adopting legislation?  
19 What is that?

20 MR. BOPP: Buckley II. You struck down the  
21 requirement that the person who is soliciting signatures  
22 self-identify.

23 JUSTICE SCALIA: That is --

24 MR. BOPP: That is a process --

25 JUSTICE SCALIA: Soliciting signatures is not

1 taking part in the process of legislating.

2 MR. BOPP: Well --

3 JUSTICE SCALIA: The person who requests a  
4 referendum is taking -- when there's a certain number of  
5 signatures required to achieve it, is taking part in  
6 that.

7 And in light of the fact that for the first  
8 century of our existence, even voting was public -- you  
9 either did it raising your hand or by voice, or later,  
10 you had a ballot that was very visibly red or blue so  
11 that people knew which party you were voting for -- the  
12 fact is that running a democracy takes a certain amount  
13 of civic courage. And the First Amendment does not  
14 protect you from criticism or even nasty phone calls  
15 when you exercise your political rights to legislate or  
16 to take part in the legislative process.

17 MR. BOPP: Well, the --

18 JUSTICE SCALIA: You are asking us to enter  
19 into a whole new field where we've never gone before.

20 MR. BOPP: Well, with all due respect, you  
21 have already opined in Buckley II that the person on the  
22 other side of the clipboard is protected by the First  
23 Amendment.

24 JUSTICE GINSBURG: I don't think that's --  
25 that's true of Buckley II. What was -- what this Court

1 said could not be done is that the solicitor could not  
2 be made to wear a badge that says "I am a paid  
3 solicitor," but that the solicitor's name had to be  
4 identified for the State. Certainly, the solicitor --  
5 there was an affidavit, and there was the filings with  
6 whatever was the State agency.

7 So what was -- what this Court said could  
8 not be done was this kind of in-your-face big button  
9 that says "I am a paid solicitor," but the solicitor's  
10 name and address certainly had to be disclosed.

11 MR. BOPP: That is true. You've correctly  
12 described Buckley II. But as we can see in the facts of  
13 this case, the public disclosure of the petition names  
14 in this case -- there was a planned harassment and  
15 intimidation of these voters by --

16 JUSTICE KENNEDY: Well, let me -- let me ask  
17 you, could the opponents of a particular ballot measure  
18 organize a boycott for -- and picket businesses whose  
19 managers had supported that boycott?

20 MR. BOPP: Yes.

21 JUSTICE KENNEDY: Had supported that  
22 initiative?

23 MR. BOPP: Yes. Under the --

24 JUSTICE KENNEDY: Well, if that's so,  
25 then under Claiborne Hardware, which I -- I notice you

1 didn't cite in your brief, but if -- if that's so,  
2 then it seems to me that the State's -- or  
3 that -- that the signers' interest in keeping their  
4 names private is somewhat diminished.

5 MR. BOPP: Yes.

6 JUSTICE KENNEDY: It's a First Amendment  
7 activity.

8 MR. BOPP: But what we're -- but what is  
9 involved here that is not involved there is the  
10 requirement by the government that you publicly disclose  
11 your identity and beliefs on a matter that then --

12 JUSTICE GINSBURG: But -- just --

13 MR. BOPP -- subjects you to the boycott.

14 JUSTICE GINSBURG: Let me stop you there,  
15 because I think your -- your own brief, I think you said  
16 twice that you cannot tell anything about the signer's  
17 belief from the mere signature. You said it could be  
18 support for -- for the proposition or it could be just  
19 support for letting the people decide.

20 MR. BOPP: That is --

21 JUSTICE GINSBURG: Or it could even be, you  
22 say, that this solicitor is pesky, and in order to  
23 placate the solicitor, to get rid of the solicitor, we'll  
24 just sign. So you -- you have said that -- that  
25 the signing itself is ambiguous. You don't know what

1 the reason is. It doesn't necessarily mean that the  
2 person is a supporter of the proposition.

3 MR. BOPP: But, with all due respect, we  
4 did not say the third. We did say the first and the  
5 second. And -- but either of those are political  
6 statements. The highlighted box at the top, you know,  
7 states -- states that by signing R-71, we can reverse that  
8 decision, meaning the passage of a law, and protect  
9 marriage between a man and a woman.

10 JUSTICE GINSBURG: May I call your attention  
11 to page 20 of your reply brief? Because I don't think  
12 that your response was correct. You say: Do petition  
13 signers support the repeal, simply indicate they would  
14 like public election to be held, or simply sign to avoid  
15 any further discussion with the petition circulator?

16 MR. BOPP: I acknowledge that we said that,  
17 Justice Ginsburg. And, of course, the second statement  
18 is -- and which I think is the dominant statement and  
19 certainly sufficient -- and that is that we want a measure  
20 to be placed on the ballot in order for the people to  
21 vote. That is one of the central --

22 JUSTICE ALITO: Well, Mr. Bopp, if a voter --  
23 if the legislature passes a statute and someone is -- is  
24 satisfied with that statute, how likely is it that that  
25 person is going to sign a petition to have a referendum

1 to see whether the statute should be blocked?

2 MR. BOPP: I think it's very unlikely. But  
3 it -- we acknowledge it's possible, but we think it's  
4 very unlikely.

5 JUSTICE ALITO: It's possible --

6 JUSTICE KENNEDY: But --

7 JUSTICE ALITO: -- but if you were in the  
8 real world, if you were to poll the people who sign a  
9 referendum petition with respect to a statute that was  
10 passed by the State legislature, what percentage do you  
11 think would be opposed to that legislation?

12 MR. BOPP: Very few.

13 JUSTICE KENNEDY: And so Justice Alito's  
14 question points out that this would be a very slim basis  
15 upon which to rest a holding in your favor.

16 And just to go back to the line of questions  
17 of the first, the State of California has very  
18 complicated referendum and initiative matters. Don't  
19 you think it's relevant for the public to know that,  
20 say, a public employees union had paid solicitors to put  
21 those signatures on the ballot, or that the Chamber of  
22 Commerce or the National Association of Manufacturers had  
23 paid solicitors to put this on the ballot?

24 Isn't that part of assessing the -- the  
25 reasons why this initiative was proposed? And isn't



1 that vital to the voters -- to the voter in making an  
2 informed decision?

3 MR. BOPP: Well, actually, after your  
4 Buckley II decision, the Ninth Circuit struck down the  
5 requirement of disclosing the paid circulators. And, of  
6 course, in California, petitions are not public.

7 JUSTICE GINSBURG: They did that. It wasn't  
8 due to Buckley II, because as you just acknowledged,  
9 under Buckley II, the solicitor is disclosed.

10 MR. BOPP: Well, the Ninth Circuit thought  
11 it was Buckley.

12 JUSTICE KENNEDY: Correct me, but the point is,  
13 isn't -- isn't there an interest in knowing this  
14 information? Not -- not that it's paid.

15 MR. BOPP: There is no evidence --

16 JUSTICE KENNEDY: We'll leave that out.  
17 But -- but to know that -- that -- the persons that  
18 supported the amendment.

19 MR. BOPP: There's no evidence in the  
20 record that that is pertinent information, and, at most,  
21 we think it is marginal information.

22 JUSTICE SOTOMAYOR: Counsel, if we create  
23 this right of -- this constitutional right of  
24 association in the manner that you are describing it,  
25 why is it limited to the voting area?

1           Would we be inviting review if a group of  
2 citizens get together and send a letter to an agency  
3 that says please pass X regulation, or rescind Y  
4 regulation? Would the agency be prohibited from making  
5 that letter public?

6           MR. BOPP: Well, potentially. And -- and  
7 this Court -- I -- because it would be required to be  
8 subject to a First Amendment analysis. It's this Court  
9 that created, in the NAACP case --

10           JUSTICE SOTOMAYOR: So you're -- you're  
11 suggesting --

12           MR. BOPP: -- the right of private  
13 association.

14           JUSTICE SOTOMAYOR: -- that when a  
15 petitioner or a person engages in political discourse  
16 with the government, that they -- when they choose to do  
17 it, because the government is not compelling them to  
18 write to it; it's not compelling them to sign the  
19 referendum. It's just --

20           MR. BOPP: And they're not compelling  
21 Ms. McIntyre to distribute her brochure, either. But  
22 this Court held that --

23           JUSTICE SOTOMAYOR: But it's -- but  
24 Ms. McIntyre wasn't asking the government to engage its  
25 process in her favor. She was asking for political

1 reform, but she wasn't asking to engage the government  
2 process on her behalf.

3 MR. BOPP: Well, the government, you know,  
4 has a lot of options. For instance, they don't have to  
5 conduct elections for the election of judge. But if  
6 they opt to do that and provide that procedure, well,  
7 then, the First Amendment applies to the political  
8 speech.

9 JUSTICE ALITO: Well, to follow up on  
10 Justice Sotomayor's question, do you think an agency  
11 could say, if you want to comment on proposed -- on a  
12 proposed rule, you have to disclose to us your name and  
13 your address and your telephone number and your  
14 political affiliation, and all sorts of -- your marital  
15 status and your income level and all sorts of other  
16 demographic information?

17 MR. BOPP: And your employer, as in this  
18 case here.

19 JUSTICE ALITO: Could they do that?

20 MR. BOPP: No -- no, because there is no  
21 sufficient governmental interest that would justify it.

22 JUSTICE SCALIA: Not even just your name, so  
23 they can check that this thing isn't phony and that all  
24 the names on it aren't -- aren't made up by one person?

25 MR. BOPP: They, of course, can -- can check

1 that.

2 JUSTICE SCALIA: Of course, they can. So  
3 they can get your name, right?

4 MR. BOPP: Yes, they can get your name --

5 JUSTICE SCALIA: Okay.

6 MR. BOPP: -- and we're not objecting to  
7 filing of a petition.

8 JUSTICE SCALIA: But you're objecting to  
9 the public being able to check whether the agency is  
10 indeed finding out whether this is a genuine petition or  
11 not, correct?

12 MR. BOPP: No. No, I'm not objecting to  
13 that.

14 JUSTICE SCALIA: Really?

15 MR. BOPP: They have procedures to check and  
16 verify these signatures that do not involve public  
17 disclosure.

18 JUSTICE SCALIA: Didn't you have some  
19 options, too? Have you started a referendum to repeal  
20 the -- the California law that requires disclosure?

21 MR. BOPP: California law does not require  
22 disclosure of the petitions, and that has been upheld by  
23 the courts of California. And you can verify these  
24 signatures.

25 JUSTICE SCALIA: I don't understand. I

1 thought that's what you're challenging. The --

2 MR. BOPP: Well, but you asked about  
3 California --

4 JUSTICE SCALIA: I'm sorry. I'm sorry.

5 MR. BOPP: -- if I heard your question.

6 JUSTICE SCALIA: Washington. I got the wrong State.

7 MR. BOPP: Okay. It --

8 JUSTICE BREYER: Can you go back --

9 JUSTICE SCALIA: The people of  
10 Washington -- the people Washington evidently think that  
11 this is not too much of an imposition upon people's  
12 courage, to -- to stand up and sign something and be  
13 willing to stand behind it.

14 MR. BOPP: In a sense --

15 JUSTICE SCALIA: Now, if you don't like  
16 that, I can see doing it another way. But -- but the  
17 people of Washington have chosen to do it this -- this  
18 way.

19 MR. BOPP: Actually, for --

20 JUSTICE SCALIA: And you're saying that the  
21 First Amendment absolutely forbids that.

22 MR. BOPP: Actually, for a century, they  
23 chose not to do this. It wasn't until 2006 --

24 JUSTICE SCALIA: That's fine. Proving my  
25 point.

1 MR. BOPP: They did not publicly disclose  
2 the petitions for a century.

3 JUSTICE SCALIA: It might have been a good  
4 idea.

5 MR. BOPP: Well --

6 CHIEF JUSTICE ROBERTS: I suppose the -- a  
7 majority of the voters in Washington decided that, and  
8 one of the purposes of the First Amendment is to protect  
9 minorities.

10 MR. BOPP: Well, only in the most general  
11 sense. They adopted a Public Records Act. They didn't  
12 adopt a law that specifically required the disclosure of  
13 these petitions. But in a general sense, they did.

14 JUSTICE GINSBURG: Mr. Bopp, this is not a  
15 peculiar thing to the State of Washington; that's  
16 correct, isn't it? Aren't there about 20-odd States  
17 that require disclosure of the names of signers to  
18 initiatives, referenda?

19 MR. BOPP: That is true. Some -- some in  
20 their initiative and referendum statute, because they  
21 actually provide some public input on verification where  
22 Washington does not; others under their Public Records  
23 Act. Some do not, such as California.

24 JUSTICE GINSBURG: So -- but what you're  
25 saying with respect to Washington would go for most of

1 those other States that have -- that have public  
2 disclosure of initiative and referendum petitions.

3 MR. BOPP: Well, one -- one thing we say is  
4 different between Washington and these other States is  
5 that Washington provides no way for the public, even if  
6 they get access to the petitions, to participate in the  
7 verification process.

8 The only thing the public can do is have --  
9 observe -- a limited number of observers. These  
10 observers are prohibited from --

11 JUSTICE GINSBURG: I thought that there were  
12 instances where the State official missed something and  
13 a member of the public who had access to the list of  
14 signers said: Wait a minute; I know so-and-so was my  
15 neighbor who died 5 years ago.

16 MR. BOPP: That's not allowed in the State  
17 of Washington. The instructions from the Secretary of  
18 State is while you can have observers to observe the  
19 process, the people --

20 JUSTICE GINSBURG: But you mean if -- that was  
21 over. It passed the screen of the Secretary of State.  
22 It's disclosed to the public. If someone then said  
23 you've got a lot of dead souls on these lists, the State  
24 would do nothing about it?

25 MR. BOPP: There is absolutely no procedure

1 under Washington statute to do anything with that  
2 information.

3 JUSTICE GINSBURG: Well, we'll ask --  
4 we'll ask the --

5 MR. BOPP: Nothing.

6 JUSTICE GINSBURG: We'll ask the Attorney  
7 General of Washington.

8 MR. BOPP: Yes.

9 JUSTICE SOTOMAYOR: Weren't two of the  
10 Petitioners here -- weren't two of the Petitioners here  
11 seeking the list so that they could go over the  
12 certification process the State had done to ensure that  
13 they had certified all the right people, et cetera?

14 MR. BOPP: Well, one of -- one of the  
15 intervenors sought an exception from the -- from the  
16 injunction, which we did not object to, that -- that  
17 they would have access to the list. But under  
18 confidentiality and protective order --

19 JUSTICE SOTOMAYOR: I'm not going to the  
20 privacy questions. You responded to Justice Ginsburg by  
21 saying that there was no way to challenge the State's  
22 process of validation, and that -- I don't think that's  
23 correct.

24 MR. BOPP: With all respect, I didn't say  
25 that.



1 JUSTICE SOTOMAYOR: Oh.

2 MR. BOPP: What I -- what I said is there's  
3 no role for the public in verifying signatures. You can  
4 ask for judicial review --

5 JUSTICE SOTOMAYOR: That's assuming the  
6 answer, meaning if they don't have the right to access,  
7 they can't. But, legally, they can challenge it if they  
8 find on the petitions that things were erroneously  
9 counted by the State. They can go into court and prove  
10 that.

11 MR. BOPP: The only thing that they could do  
12 is request that the court does its own count. In other  
13 words, there's judicial review available. But the  
14 public has no role in the verification, but they can  
15 trigger judicial review. And then the court conducts  
16 its own count.

17 In other words, this is not an adversary  
18 process in which people come in and present evidence  
19 of -- of people's -- of invalid signatures.

20 JUSTICE GINSBURG: Why would you involve the  
21 court? If the State's -- the executive representative  
22 of the State says: Oh, we missed that. Now we're going  
23 to have to deal with it. We don't need any court to  
24 order us to do it.

25 MR. BOPP: Well, the observers can observe

1 the process, and if they feel --

2 JUSTICE GINSBURG: No, this is after the  
3 observers. This is --

4 MR. BOPP: Well, but --

5 JUSTICE GINSBURG: We're talking about a member of  
6 the public noticing that there are people on the list  
7 who shouldn't be there.

8 MR. BOPP: Well, the -- the observer --  
9 under the Washington procedure, observers can observe  
10 the process, and if they feel, or if anyone feels,  
11 that there has been an inadequate job in -- in  
12 verification, then they can ask for judicial review.  
13 And then the court conducts the --

14 JUSTICE GINSBURG: Why would they ask for  
15 judicial review instead of going first to the State's  
16 Attorney General and saying, look, you -- your people  
17 missed it?

18 MR. BOPP: Well, there's no procedure for  
19 that.

20 JUSTICE GINSBURG: Why involve the court?

21 MR. BOPP: That's not -- there's no  
22 procedure for that. You know, if they wanted to involve  
23 the public -- and that's the difference, I said, between  
24 this procedure and other procedures. They're claiming  
25 the need for public disclosure so the public can be

1 involved in verification. Well, there's no  
2 procedure --

3 JUSTICE STEVENS: Isn't there another --

4 MR. BOPP: -- to be involved in verification.

5 JUSTICE STEVENS: Isn't there another  
6 possible public interest? Would it be a legitimate public  
7 interest to say I'd like to know who signed the  
8 petition because I would like to try to persuade them  
9 that their views should be modified?

10 Is there a public interest in encouraging  
11 debate on the underlying issue?

12 MR. BOPP: Well, it's possible, but we think  
13 this information is marginal. In other words, the --  
14 it's much more important --

15 JUSTICE STEVENS: Well, it does identify  
16 people who have a -- a particular point of view on a  
17 public issue. And if you had the other point of view,  
18 don't you have an interest in finding out who you'd  
19 like to convince to change their minds?

20 MR. BOPP: Well, we -- we think it's a -- a  
21 very marginal interest. The Ninth Circuit recently  
22 ruled that if you give a small contribution to an  
23 initiative, there's not -- I mean, nobody cares. So why  
24 should it be publicly disclosed when it's so marginal?

25 JUSTICE SCALIA: What about just -- just --

1 what about just wanting to know their names so you can  
2 criticize them?

3 (Laughter.)

4 MR. BOPP: Well --

5 JUSTICE SCALIA: Is -- is that such a bad  
6 thing in a democracy?

7 MR. BOPP: Well, what is bad is not the  
8 criticism; it's the public -- it's the government  
9 requiring you to disclose your identity and beliefs.

10 JUSTICE SCALIA: But part of the reason is  
11 so you can be out there and be responsible for the  
12 positions you've taken.

13 MR. BOPP: Well, then why don't they require  
14 both sides?

15 JUSTICE SCALIA: So that people -- people  
16 can criticize you for the position you have taken.

17 MR. BOPP: Then why don't they require both  
18 sides if that was the purpose?

19 JUSTICE SCALIA: What do you mean, "both  
20 sides"? The other side hasn't signed anything. When they  
21 sign something --

22 (Laughter.)

23 MR. BOPP: Well, but the other side --

24 JUSTICE SCALIA: When they sign something,  
25 they'll be out there for public criticism as well.

1 MR. BOPP: Okay. But this is a one-way  
2 street.

3 JUSTICE SCALIA: Oh, this is such a  
4 touchy-feely, oh, so sensitive about -- about any --  
5 (Laughter.)

6 JUSTICE SCALIA: You know, you can't run a  
7 democracy this way, with everybody being afraid of  
8 having his political positions known.

9 MR. BOPP: I'm sorry, Justice Scalia, but  
10 the campaign manager of this initiative had his family  
11 sleep in his living room because of the threats --

12 JUSTICE GINSBURG: Well, then that's --

13 JUSTICE SCALIA: Well, that's bad. The  
14 threats should be moved against vigorously --

15 MR. BOPP: And -- and --

16 JUSTICE SCALIA: -- but just because there  
17 can be criminal activity doesn't mean that you --  
18 you have to eliminate a procedure that is  
19 otherwise perfectly reasonable.

20 MR. BOPP: But all we're asking for is a  
21 First Amendment analysis of the compelled disclosure of  
22 the identity of these people and whether or not these  
23 interests are sufficient.

24 Could I reserve the balance of my time?

25 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

1 General McKenna.

2 ORAL ARGUMENT OF GENERAL ROBERT M. MCKENNA

3 ON BEHALF OF THE RESPONDENTS

4 MR. MCKENNA: Mr. Chief Justice, and may  
5 it please the Court:

6 I'd like to begin with the question of  
7 how the public can bring to the attention of the  
8 government that errors and fraud have been discovered.

9 First of all, it's important to understand  
10 that the petitions do not become public records after  
11 the verification process but, in fact, are made available  
12 as public records before the verification process even  
13 begins.

14 This is because the Secretary of State's  
15 first step after receiving submitted petitions is to  
16 take them to his archiving section and to have them  
17 digitized. As soon as they're digitized, they're  
18 available on disks for anyone who requests them. Then  
19 the verification process begins.

20 During the verification process, it is  
21 possible --

22 JUSTICE SOTOMAYOR: How much time are we  
23 talking about in those processes?

24 MR. MCKENNA: The verification process,  
25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: Yes.

2 MR. MCKENNA: The verification process  
3 will depend on how many signatures have been  
4 submitted --

5 JUSTICE SOTOMAYOR: No, no, no. I'm trying  
6 to get the relationship between the disks being made  
7 available and the verification process.

8 So is there a time for the public to look  
9 through the disks before the people who are sent into  
10 the room are sent into the room?

11 JUSTICE GINSBURG: That's what you've just  
12 said --

13 MR. MCKENNA: Yes, they're --

14 JUSTICE GINSBURG: -- that they're --  
15 that they are immediately available on the disk, and  
16 so while the checking is going on by the Secretary,  
17 the public has the list. Is that what you've just said?

18 MR. MCKENNA: Yes, that's correct. For  
19 example, in the case of Referendum 71, the proponents of  
20 the referendum submitted the petition sheets on  
21 Saturday, July 25, 2009, and on Tuesday, July 28, a  
22 records request was already submitted. And so they  
23 can obtain records --

24 CHIEF JUSTICE ROBERTS: Would these  
25 records --

1 JUSTICE KENNEDY: Was that pursuant to the  
2 Public Records Act that we're talking about --

3 MR. MCKENNA: Yes.

4 JUSTICE KENNEDY: -- or was that part of the  
5 initiative and referendum structure before the Public  
6 Records Act was passed?

7 MR. MCKENNA: Justice Kennedy, this is  
8 part of the Public Records Act. This is as a result of  
9 the Public Records Act that these petition sheets are  
10 made available.

11 CHIEF JUSTICE ROBERTS: Counsel --

12 JUSTICE KENNEDY: So -- all right. So  
13 this -- the public record -- pardon me. The -- in  
14 California, we call it an initiative and referendum  
15 process -- existed and was in place before the Public  
16 Records Act added this additional feature of disclosure?

17 MR. MCKENNA: Yes, that's correct.

18 JUSTICE KENNEDY: So there was a judgment at  
19 one time by the State of Washington that it didn't --  
20 that it didn't need the public records disclosure?

21 MR. MCKENNA: Well, when the initiative  
22 and referendum processes were created by public vote on  
23 a constitutional amendment of 1912, there was no  
24 Public Records Act at all. And the Public Records Act,  
25 an Act of general applicability, was adopted by the



1 voters in 1973 as part of an initiative which also  
2 enacted comprehensive campaign finance reform.

3 CHIEF JUSTICE ROBERTS: Counsel, if the  
4 State had a law that you could disclose voters and for  
5 whom they voted, would that implicate First Amendment  
6 interests?

7 MR. MCKENNA: Yes, Mr. Chief Justice, we  
8 would -- we do believe that First Amendment interests  
9 would be implicated by revealing how people voted, and  
10 we don't see a legitimate State interest in knowing how  
11 people voted, only in who voted.

12 JUSTICE SCALIA: So the country was acting  
13 unconstitutionally for a whole century before we adopted  
14 the Australian secret ballot? Do you really think that?

15 MR. MCKENNA: No. No, Justice Scalia. I --

16 JUSTICE SCALIA: That it was  
17 unconstitutional --

18 MR. MCKENNA: No, Justice Scalia.

19 JUSTICE SCALIA: -- for a whole century  
20 not to have a secret ballot?

21 MR. MCKENNA: No, Justice Scalia, I  
22 didn't say that I thought that the secret ballot was  
23 constitutionally required. I was asked by the Chief  
24 Justice whether some First Amendment interests would be  
25 implicated. They probably would be.

1 CHIEF JUSTICE ROBERTS: What would the First  
2 Amendment interests be?

3 MR. MCKENNA: Well, the First Amendment  
4 interest in how you vote?

5 CHIEF JUSTICE ROBERTS: Yes.

6 MR. MCKENNA: You know, it might be  
7 implicated by a potential chill from voting, if you know  
8 your vote is going to be revealed.

9 CHIEF JUSTICE ROBERTS: Do you think having  
10 your name revealed on a petition of this sort might have  
11 a chilling effect on whether you sign it?

12 MR. MCKENNA: Mr. Chief Justice, some  
13 chill may result, just as some chill may result from  
14 having your campaign contributions disclosed or the  
15 fact that you have registered to vote and provided your  
16 name, address, your voting history is being disclosed.  
17 So some chill might be -- might result, but we do not  
18 think that it is significant enough.

19 CHIEF JUSTICE ROBERTS: You don't think  
20 revealing that you're a voter has the same chilling  
21 effect as revealing how you voted, do you?

22 MR. MCKENNA: No, I do not. I think how  
23 you voted would have a much greater chilling effect than  
24 the fact that you are registered to vote.

25 And -- and, of course, this Court has not

1 ruled on whether the secret ballot is, you know, a  
2 constitutional right. If -- if it is, then is town hall  
3 voting in New England unconstitutional? Is the caucus  
4 system in Iowa for presidential candidates  
5 unconstitutional? The Court in this case does not  
6 have --

7 JUSTICE ALITO: -- in the last questions --

8 CHIEF JUSTICE ROBERTS: Well, I thought you  
9 told me that the First Amendment interests were implicated  
10 with respect to the secret ballot, that you couldn't  
11 require people to reveal how they voted.

12 MR. MCKENNA: We don't -- we don't know  
13 if this Court would rule that the vote could never be  
14 revealed. We know that in some places, votes are done  
15 in public. We know that before the late 1800s, there  
16 was no secret ballot. We just -- we don't know what the  
17 constitutional ruling would be. But we -- we do know  
18 that in this case, it's not necessary for the Court to  
19 reach that -- that determination, because in this  
20 case --

21 JUSTICE ALITO: Well, I'd like to know  
22 how far you -- you are -- you want to go. You say in  
23 your brief that the availability of the referendum  
24 signature petitions allows Washington voters to engage  
25 in discussion of referred measures with persons whose

1 acts secured the election and suspension of State law.

2 So would -- would it be consistent with the  
3 First Amendment to require anybody who signs a petition  
4 to put down not just the person's name and address, but  
5 also telephone number, so that they could be engaged in  
6 a conversation about what they had done?

7 MR. MCKENNA: It -- it would depend on  
8 the strength of the State interest in having the  
9 telephone number. The State does not have an interest  
10 in the telephone number on the petition form, because  
11 the State has -- only needs to know from the petition  
12 form the name and the address in order to verify --

13 JUSTICE ALITO: I thought that you were  
14 saying that one of the interests that's served by this  
15 is to allow people who -- to allow Washington citizens  
16 to discuss this matter with those who signed the  
17 petition. So putting down the telephone number would  
18 assist them in doing that.

19 MR. MCKENNA: It -- yes, it probably  
20 would make it easier for people to contact.

21 JUSTICE ALITO: So you would --

22 MR. MCKENNA: But the policy --

23 JUSTICE ALITO: You would endorse that?

24 MR. MCKENNA: That would be a policy  
25 determination for the legislature to make,

1 Justice Alito.

2 JUSTICE ALITO: No, I'm not asking the  
3 policy question. I'm asking whether the First Amendment  
4 would permit that.

5 MR. MCKENNA: I believe it could permit  
6 that, yes, Justice Alito.

7 JUSTICE ALITO: Now, one of your  
8 Co-Respondents says that supplying this information  
9 provides insight whether support comes predominantly  
10 from members of particular political or religious  
11 organizations.

12 Would it be consistent with the First  
13 Amendment to require anybody who signs a petition to  
14 list the person's religion?

15 MR. MCKENNA: No, I do not believe it  
16 would, Justice Alito.

17 JUSTICE BREYER: Suppose that in 1957 in  
18 Little Rock, a group of Little Rock citizens had wanted  
19 to put on the ballot a petition to require the school  
20 board to reopen Central High School, which had been  
21 closed because there was a sentiment in the community  
22 that they didn't want integration. And it was pointed  
23 out that if they signed this petition, there was a very  
24 good chance that their businesses would be bombed, that  
25 they would certainly be boycotted, that their children

1 might be harassed.

2 Now, is there no First Amendment right in  
3 protecting those people? And if there is, how does it  
4 differ from your case?

5 MR. MCKENNA: Justice Breyer, that is  
6 count 2. That is count 2 of the Petitioners'  
7 complaint. This Court ruled as recently as Citizens  
8 United that such situations should be evaluated on a  
9 case-by-case basis to evaluate the reasonable  
10 probability of threats, harassments, and reprisals. But  
11 that --

12 JUSTICE SCALIA: So you -- you would have no  
13 objection to as an-applied challenge to disclosing the  
14 names of individuals to a particular cause, where it is  
15 demonstrated that the opponents of that cause are  
16 violent and will do violence to the people who signed  
17 the petition?

18 MR. MCKENNA: Yes, Justice Scalia. That  
19 would be the Socialist Workers Party case. This -- this  
20 Court has ruled that, on a case-by-case basis, it is  
21 possible that some information otherwise disclosed --

22 JUSTICE KENNEDY: What about a business  
23 boycott?

24 JUSTICE SCALIA: So this is just a general  
25 challenge to ever, ever disclosing the names of petition

1 signers?

2 MR. MCKENNA: Of any type of petition  
3 including nominating petitions --

4 JUSTICE SCALIA: Right.

5 MR. MCKENNA: -- initiative petitions,  
6 and the rest.

7 JUSTICE KENNEDY: What about a business  
8 boycott? Suppose that were a -- a likely outcome of  
9 disclosing the name?

10 MR. MCKENNA: Well, of course, boycotts  
11 have been upheld under the First Amendment in Claiborne  
12 Hardware, and so if someone wanted to boycott a business  
13 because it turned out that the manager of the business  
14 had been a supporter of a particular ballot measure,  
15 that would be allowable, of course, to that person  
16 choosing to boycott.

17 CHIEF JUSTICE ROBERTS: Counsel, your answer  
18 to Justice Breyer was that they can bring an as-applied  
19 challenge. Now, that as-applied challenge would be  
20 small comfort unless the names were protected pending  
21 the resolution of that challenge, correct?

22 MR. MCKENNA: Yes.

23 CHIEF JUSTICE ROBERTS: So you think a stay  
24 should be granted in this case to allow the Petitioners  
25 to pursue an as-applied challenge.

1 MR. MCKENNA: Yes, of course -- yes,  
2 they could apply for another preliminary injunction if  
3 this Court upholds the court of appeals. They were able  
4 to obtain that preliminary injunction in this case,  
5 which is why these petition forms have not been released  
6 to date, except under a protective order by the court to  
7 the opponents.

8 JUSTICE GINSBURG: And that would --

9 CHIEF JUSTICE ROBERTS: Do you think that  
10 the disclosure of the names, pending the resolution of  
11 their as-applied challenge, would subject them to  
12 incidents of violence and intimidation?

13 MR. MCKENNA: We -- there is no evidence  
14 of that in the record. There's no evidence --

15 JUSTICE GINSBURG: Does -- is it --

16 CHIEF JUSTICE ROBERTS: There's no  
17 evidence -- there's no evidence of episodes of violence  
18 or intimidation?

19 MR. MCKENNA: Involving the  
20 Referendum 71 signers? No. The evidence in the record  
21 is about people who were out circulating petitions,  
22 people who were out, you know, campaigning for the  
23 petitions, the campaign manager for the measure. But  
24 none of the evidence in the record speaks to petition  
25 signers, and none of the evidence in the record speaks



1 to petition signers for other, similar measures which  
2 were cited by the Petitioners.

3 JUSTICE GINSBURG: Is that because nobody  
4 got to count 2? And the district court -- this whole  
5 case in the lower courts was on count 1 alone; wasn't  
6 that so?

7 MR. MCKENNA: Yes, that is -- yes, that  
8 is correct.

9 JUSTICE GINSBURG: And count 2 is the one  
10 that deals with the harassment.

11 MR. MCKENNA: That is true,  
12 Justice Ginsburg. Of course, in several other States,  
13 Arkansas, Florida, and Massachusetts, which had similar  
14 measures regarding gay civil rights or same-sex marriage  
15 on the ballot -- in those three States, the petition  
16 forms were obtained under public records, were put on  
17 the Internet, and no evidence has been provided that's  
18 in the record that anyone who signed any of those  
19 petitions in those three States was subjected to  
20 harassment --

21 JUSTICE ALITO: Well, let's say somebody is  
22 thinking of circulating a petition on a sensitive  
23 subject and fears that people may be dissuaded from  
24 signing because they fear retaliation. At what point  
25 could they bring this as-applied challenge?

1           Do they have to -- could they do it before  
2 they even begin to circulate the petition, arguing that  
3 if -- if these names -- if people are not assured ahead  
4 of time that their name and address is not going to be  
5 revealed to the public on the Internet, they're not  
6 going to sign this?

7           MR. MCKENNA: Justice Alito, it would be  
8 possible procedurally for them to bring the motion for  
9 an injunction even before collecting the signatures --

10           JUSTICE ALITO: And how would they --

11           MR. MCKENNA: -- if they had sufficient  
12 evidence.

13           JUSTICE ALITO: How would they prove that  
14 there's -- that there's a -- a threat, a sufficient  
15 threat of harassment in that particular case, before the  
16 petition is even signed?

17           MR. MCKENNA: I believe that the  
18 sponsors of the measure would bring to the court  
19 evidence, if they have any, of -- because of the  
20 controversial nature of that particular measure, that is  
21 based on what's happened to some of the people who were  
22 planning to put the measure on the ballot.

23           JUSTICE SCALIA: But -- but you -- you've  
24 rejected that here. You've said there's no evidence here  
25 that any of the petition -- petition signers were

1 subjected to any harassment.

2 MR. MCKENNA: Right.

3 JUSTICE SCALIA: Of course there isn't,  
4 because the names haven't gotten out yet. How could you  
5 possibly demonstrate before the names get out that  
6 petition signers are going to be subjected to  
7 harassment?

8 MR. MCKENNA: One could look to --

9 JUSTICE SCALIA: Or otherwise, don't insist  
10 upon evidence that these very petition signers will be  
11 harassed.

12 MR. MCKENNA: I imagine, Justice Scalia,  
13 that the individuals moving for that preliminary  
14 injunction would do what the Petitioners have done in  
15 this case. They would cite to an example from another  
16 State involving a comparable measure.

17 JUSTICE SCALIA: And you think that would be  
18 an acceptable type of evidence?

19 MR. MCKENNA: They could bring it into the  
20 court. I'm not saying the court would accept it,  
21 because I don't know --

22 JUSTICE SCALIA: Well, if you don't think  
23 it's acceptable, then -- then -- then you're not making  
24 an argument.

25 MR. MCKENNA: Justice Scalia, I didn't

1 say it couldn't be acceptable. I'm saying this is a  
2 hypothetical, so I don't know what the evidence would  
3 look like in the hypothetical example.

4 JUSTICE ALITO: Well, the -- the  
5 hypothetical is that before this petition is circulated,  
6 the supporters came into court, and they said: Look what  
7 has happened in California with -- with Proposition 8.  
8 Don't disclose -- enter an order prohibiting the public  
9 disclosure of the names and addresses here.

10 Would that be sufficient?

11 MR. MCKENNA: Justice Alito, I think  
12 that the evidence would have to be very strong. It  
13 would have to rise above criticism. I think it would  
14 have to rise to the level of threatened violence. It  
15 would have to rise to the level of the Socialist Workers  
16 Party case, for example, or the NAACP case.

17 I think the standard would be very high.  
18 But it would be up to the trial judge to decide whether  
19 or not the evidence was sufficient to issue the  
20 preliminary injunction.

21 JUSTICE GINSBURG: Is it -- the State has  
22 had this procedure now for some time, and there have  
23 been controversial ballot initiatives. Is there any  
24 history in the State of Washington that signers have  
25 been subject to harassment?

1 MR. MCKENNA: There has not,  
2 Justice Ginsburg, and that's even though a half a dozen  
3 initiatives on a variety of topics have been released.  
4 Another half dozen are pending.

5 CHIEF JUSTICE ROBERTS: What -- what's the  
6 most sensitive similar petition for a referendum?

7 MR. MCKENNA: There has been no measure  
8 on domestic partner benefits or same-sex marriage in  
9 Washington State --

10 CHIEF JUSTICE ROBERTS: No, but what's the --

11 MR. MCKENNA: -- but there are other --

12 CHIEF JUSTICE ROBERTS: What's -- what's  
13 the other one that's going to get people -- that's the  
14 most controversial public issue?

15 MR. MCKENNA: Justice --

16 JUSTICE SOTOMAYOR: Proposition 8?

17 MR. MCKENNA: Well --

18 CHIEF JUSTICE ROBERTS: No, I'm talking  
19 about in Washington, counsel.

20 MR. MCKENNA: In Washington State.  
21 Mr. Chief Justice, we have had measures on assisted  
22 suicide, for example, which was very controversial,  
23 and -- and there's no evidence involving that set of  
24 petitions.

25 CHIEF JUSTICE ROBERTS: Was the referendum

1 in favor or opposed to assisted suicide?

2 MR. MCKENNA: It was -- well, the  
3 referendum challenges the assisted suicide law. So if  
4 you vote for the referendum, you vote to uphold the  
5 legislature's adoption of that law, which -- which  
6 allowed assisted suicide.

7 So there have been controversial measures.

8 JUSTICE KENNEDY: This case will likely be  
9 controlled by our First Amendment precedents, because  
10 that's the most fully developed.

11 Did you look at the Petition Clause at all?  
12 In the early days of the republic, the petitions were  
13 the way in which you communicated with your legislator.

14 MR. MCKENNA: Yes.

15 JUSTICE KENNEDY: And I tried to look it up.  
16 I have a recollection, but I'm not sure, that those  
17 petitions were sometimes put in the Congressional  
18 Record. But did you look at the history of the Petition  
19 Clause?

20 MR. MCKENNA: Justice Kennedy, we have  
21 considered the history of the Petition Clause, and we  
22 see a basic difference between the kinds of petitions  
23 under the Petition Clause and the petitions at issue  
24 here because, essentially, petitioning the government  
25 under the Petition Clause is asking the government to do

1 something. You're petitioning them: Please do  
2 something.

3 The petitions for a referendum or an  
4 initiative are telling the government to do something.  
5 The petition form says that I, the signer, am directing  
6 the Secretary of State to conduct an election. And by  
7 submitting these petitions in a referendum, I am  
8 suspending the law which the legislature has already  
9 approved until the election has taken place.

10 Tell versus ask. I think that's a pretty  
11 big -- a significant difference.

12 JUSTICE KENNEDY: But, of course, that can  
13 cut the other way, too, because then it's more like a  
14 vote. And there -- there is strong interest in keeping  
15 the -- the vote private.

16 MR. MCKENNA: And, Justice Kennedy, I'd  
17 like to speak to that question, because several  
18 Justices asked: Well, what can we tell from what, you  
19 know, someone who signed? Do we know how they're going  
20 to vote.

21 I -- I agree that many people signing a  
22 petition are going to vote in favor of -- in the case of  
23 an initiative, in favor of the law the initiative would  
24 put on the ballot. But also we know from the social  
25 science research, which is cited, for example, in the

1 Direct Democracy Scholars green brief, that many people  
2 sign simply because they believe it's important for  
3 the -- for the public to have an opportunity to vote.  
4 And, of course, as the Petitioners have acknowledged and  
5 we also point out, some people vote just to get around the  
6 circulator and get into the store.

7 CHIEF JUSTICE ROBERTS: What percentage --  
8 what percentage of the people who signed this petition  
9 to put this law on the referendum do you think signed it  
10 because they think these sort of things should be  
11 generally put to a public vote as opposed to because  
12 they opposed the law?

13 MR. MCKENNA: The percentage of people  
14 who believe simply that there should be a vote held has  
15 not been quantified by the research, except that several  
16 scholars indicate that it is significant. So, whether  
17 it's 20 percent or 40 percent, I -- I really can't say  
18 within a certain --

19 CHIEF JUSTICE ROBERTS: You think as much as  
20 20 percent of the people who signed this petition are  
21 actually in favor of the law that it's aimed to repeal?

22 MR. MCKENNA: It is possible. But it's  
23 also possible some of those 20 percent don't have an  
24 opinion on the law, Mr. Chief Justice. They simply  
25 think that there should be a vote held, and they'll



1 make their mind up later on.

2           There are plenty of people who aren't aware  
3 when certain laws are -- are adopted that are subjected  
4 to a referendum, and they may not have decided at all.  
5 In fact, one of the reasons they may sign the petition  
6 is to say: Well, I'm not sure how I'm going to vote,  
7 but, you know, I think a public vote would be a good  
8 idea. So, I'm going to let it go forward to be on the  
9 ballot, and I'll decide.

10           JUSTICE ALITO: Can I ask you this question?  
11 It seems to me your -- the strongest State interest here  
12 is detecting fraud. And you mentioned that the records  
13 are digitized. And maybe you can correct my impression  
14 of this, but it seems to me that if the records are  
15 digitized, there are very simple ways of detecting fraud  
16 that would not require the disclosure of the list to the  
17 public.

18           If somebody wants to see whether his or her  
19 name has been fraudulently put on the list, wouldn't it  
20 be very simple to set up a Web site where the person  
21 could put in a little bit of identifying information and  
22 see whether that person's name is on the list? And if  
23 the -- the purpose is to see whether a particular person  
24 lives at a particular address, couldn't you just  
25 cross-reference by means of a computer program the

1 information on the referendum with the -- with the  
2 voting lists?

3 So if you've got John Jones who lives at 10  
4 Main Street, you see whether there really is a  
5 registered voter John Jones who lives at 10 Main Street?  
6 Why does this all have to be put out on the Internet?

7 MR. MCKENNA: Justice Alito, the -- just  
8 to be clear, you are right. They do use computer --  
9 computers because when -- in the verification process,  
10 the Secretary of State's staff, with the observers looking  
11 over their shoulder, will look at the petition and look  
12 up that voter in an -- in an electronic voter  
13 registration database.

14 This is exactly why the information is so  
15 useful to the public as well. They have access to  
16 electronic online voter registration history as well,  
17 and they can also check.

18 In -- in Massachusetts, under their public  
19 records law in 2006, petition forms obtained by public  
20 records requests were put online, and over 2,000 people,  
21 as has been documented in the Lambda amicus brief,  
22 discovered that they -- their names are on petitions  
23 that they claimed did not sign, and discovered that they  
24 had been, in some cases, misled.

25 JUSTICE ALITO: Well, what's the answer to

1 my question? Couldn't you -- couldn't this be done very  
2 simply? If I want to see whether somebody has  
3 fraudulently signed my name, very quickly go to a  
4 Web site, wouldn't be expensive to set up, put in your  
5 voter ID number, and see whether -- and your name, and  
6 see whether you're on the -- on the --

7 MR. MCKENNA: Yes.

8 JUSTICE ALITO: -- whether you --  
9 somebody signed your name to the petition?

10 MR. MCKENNA: Yes, Justice Alito,  
11 that -- that could be done. In our State and the  
12 other States that's done when somebody requests the public  
13 records and chooses them to put online. The State  
14 doesn't -- does not put the petition forms online  
15 itself, although, you know, other information is put  
16 online by the State.

17 JUSTICE KENNEDY: Do -- do we take this case  
18 on the assumption -- do you make the contention before  
19 us that the Secretary of State and those who assist it  
20 are not capable of determining whether the petition  
21 signatures are valid?

22 MR. MCKENNA: No, we are not taking  
23 that position, Justice Kennedy. Of course --

24 JUSTICE KENNEDY: I mean without public  
25 disclosure?

1                   MR. MCKENNA: What we know,  
2 Justice Kennedy, is that in dozens of States around  
3 the -- around the country, as recently as 2009 in  
4 Maryland, 2006 in Massachusetts, and so on, it was  
5 the -- it was the public who requested ballot petitions  
6 by public records request who found significant fraud  
7 and error. This isn't just about fraud -- fraud is very  
8 important -- it's also about finding plain old mistakes  
9 which the State, Secretary of State, or auditor has  
10 missed.

11                   That -- that does happen with regularity in  
12 this country, and we cite cases in our brief where error  
13 is not fraud, but errors in Washington State have been  
14 discovered by people who look at these public records.  
15 And --

16                   JUSTICE SCALIA: Sometimes the public may  
17 not trust the Secretary of State.

18                   MR. MCKENNA: Yes, sir. Justice Scalia,  
19 we agree.

20                   JUSTICE SCALIA: It -- it may be an issue in  
21 which his administration has taken a particularly firm  
22 stand, and the public may not trust the job that the  
23 Secretary of State does.

24                   MR. MCKENNA: That goes to the heart to  
25 the Public Records Act, Justice Scalia: Trust but

1 verify. The people did not leave to the State the idea  
2 that, well, we'll let you know what you need to know.  
3 The people want a --

4 JUSTICE SCALIA: Trust but verify -- I like  
5 that.

6 (Laughter.)

7 JUSTICE GINSBURG: You did say something  
8 about this category of speech. You said, well, this is  
9 in the category that -- it's like O'Brien. It has speech  
10 elements and non-speech elements. And I was trying to  
11 figure out which -- what is it in the signature that  
12 speaks and what is it in the signature that doesn't  
13 speak?

14 MR. MCKENNA: The speech element could  
15 be construed in the fact that someone has chosen to sign  
16 a petition which we know means they want something to be  
17 put on the ballot. So, they favor having it on the  
18 ballot. That -- that much we know.

19 But we also looked to Burdick, of course,  
20 because in this -- in -- in the Burdick decision this  
21 Court held that write-in voting could be prohibited by  
22 the State of Hawaii. That was upheld by the court of  
23 appeals and this Court. And this Court found that  
24 writing in a candidate's name was not even expressive  
25 conduct.

1                   So we look to the Burdick level of  
2 intermediate scrutiny, to the O'Brien level of  
3 intermediate scrutiny for the test.

4                   Justice Ginsburg, the other point I wanted  
5 to bring up is something about Buckley II, which --

6                   JUSTICE ALITO: Well, what is the -- to finish  
7 your answer to Justice Ginsburg's question, what is the  
8 non-speech component of signing a petition?

9                   MR. MCKENNA: The non-speech component  
10 is suspension of law in the case of a referendum or the  
11 legislative effect. We believe this is a legislative  
12 act fundamentally. In --

13                   JUSTICE ALITO: And what's the State's interest  
14 in regulating the non-speech component? When you --  
15 when you talk about the vote cast by an elected  
16 representative, of course, there's a strong interest in  
17 knowing how an elected representative voted, because the  
18 representative is answerable to the voters. But  
19 somebody who signs a petition isn't answerable to  
20 anybody -- any other citizen. So what's your interest?

21                   MR. MCKENNA: The interest, Justice  
22 Alito, is knowing, first of all, that there were a  
23 sufficient number of signatures submitted to qualify the  
24 measure for the ballot.

25                   JUSTICE ALITO: It's the fraud interest?

1 MR. MCKENNA: That's the fraud interest.

2 And, secondly, there is a valid informational  
3 interest in knowing who is it exactly who's calling for  
4 this election and suspending the --

5 JUSTICE ALITO: Well, but how far does that  
6 go? When I asked whether you could -- you want to know  
7 the religion of the people who signed, no, you can't do  
8 that. How much more demographic information could be  
9 -- could be -- does the -- does the State of  
10 Washington have an interest in making publicly available  
11 about the people who support this election?

12 Let's say it's -- it's a referendum about  
13 immigration. Does the State of Washington have an  
14 interest in providing information to somebody who says  
15 I want to know how many people with Hispanic names  
16 signed this, or how many people with Asian names signed  
17 this? Is that -- that what you want to facilitate?

18 MR. MCKENNA: No, Justice Alito, we  
19 don't need to know that. We need to know whether there  
20 were a sufficient number of registered voters who  
21 signed -- we need to know whether they signed more than  
22 once. We need to know they are registered in Washington  
23 State.

24 Informational interest I think that you could  
25 -- the information you could collect to satisfy

1 informational interest might include other information  
2 that's in the voter registration records. You might  
3 want to know --

4 CHIEF JUSTICE ROBERTS: I thought one of the  
5 reasons you wanted to do this was so people would have  
6 information that would allow them to participate in the  
7 civic process, and there are people who -- might think  
8 it makes a difference whether a referendum was requested  
9 by -- primarily by members of a particular ethnic group  
10 or not. So isn't -- doesn't -- I thought your brief  
11 would say the State has an interest in that type of  
12 disclosure.

13 MR. MCKENNA: I don't see what the valid  
14 State interest would be of knowing the ethnicity of the  
15 person. I mean, of course, anyone could look at the  
16 petition ballot forms and, I suppose, divine something about  
17 the ethnicity based on the last name, but the State's  
18 interest doesn't go -- go to that. That we -- we  
19 don't believe we need to know that. We believe we need  
20 to know what is requested -- required on the -- on the  
21 petition form.

22 JUSTICE ALITO: Then I don't understand what  
23 information is being -- what information you think you're  
24 providing to the public. Outside of the fraud area,  
25 if I see that John Jones from Seattle signed this



1 petition, that tells me absolutely nothing.

2 MR. MCKENNA: Well, Justice Alito, it  
3 might -- if you know John Jones, that would tell you  
4 something. Number two, we know from the -- we know from  
5 the, you know, Direct Democracy Scholars green brief  
6 that intermediaries and especially the press and  
7 sometimes social science researchers and others will --  
8 will look at the names, and they'll be able to tell,  
9 for example, that a large number of employees at one  
10 company signed a measure; maybe it's a measure that would cut  
11 a tax break for a particular industry. Or perhaps members  
12 of a union, in large numbers, have signed. They have been --

13 CHIEF JUSTICE ROBERTS: How can they --

14 MR. MCKENNA: -- able to provide  
15 that information.

16 CHIEF JUSTICE ROBERTS: How can they find that out  
17 with just the name and address, that a large number of people  
18 from a company signed it?

19 MR. MCKENNA: Well --

20 CHIEF JUSTICE ROBERTS: You don't have to  
21 put on who you work for, do you?

22 MR. MCKENNA: No, you do not. I'm  
23 saying intermediaries might discover this, for example,  
24 by taking a close look at who's paying for the  
25 signature gathering. If it's paid signature gathering,

1 they might be aware of prominent sponsors. In fact,  
2 the -- the importance of knowing who the sponsors is, is  
3 demonstrated --

4 CHIEF JUSTICE ROBERTS: I'm sorry. I'm still  
5 on the companies. How -- how does knowing who the  
6 sponsors are tell you how many people from a particular  
7 company signed the petition?

8 MR. MCKENNA: Well, a voter who -- who  
9 works at that same company or does business with that  
10 same company might know that, gosh, I know these  
11 employees, and they've -- they have all signed this  
12 petition. The press might be able to do the research to  
13 find that out. Intermediaries do play an important role.

14 The last point, if I may, I wanted to make  
15 about -- about Buckley II is that the Petitioners have  
16 stressed that Buckley II struck down the requirement to wear  
17 the name badge. But in that same decision this Court  
18 upheld the requirement by Colorado that affidavits  
19 signed by the petition circulators, including the  
20 petition circulator's name and address, can be disclosed  
21 as public records.

22 And the Court ruled that -- found that and  
23 compared it favorably to the badge requirement because  
24 the disclosures of public record occurred after the heat  
25 of the moment, after the moment of interactive discussion.

1 It happened later on. And we believe, of all the Court's  
2 rulings, that -- that approval of the disclosure requirement  
3 of the -- of the affidavit, in contrast to the badges, is the  
4 most similar to requiring after the fact or allowing  
5 after the fact for petitions to be disclosed under the  
6 Public Records Act.

7 JUSTICE ALITO: You know, if somebody called  
8 your office and said I'd like the -- the home  
9 address of all the attorneys who work in the Attorney  
10 General's Office because we want to -- we want to go to  
11 their homes and have uncomfortable conversations with  
12 them --

13 (Laughter.)

14 JUSTICE ALITO: -- which is what has been  
15 alleged here, would you release that information?

16 MR. MCKENNA: We would not, Justice  
17 Alito. We would not release it because they can come to  
18 the office and have uncomfortable conversations with  
19 them --

20 (Laughter.)

21 MR. MCKENNA: -- which I can personally  
22 attest happens with some regularity.

23 (Laughter.)

24 JUSTICE SCALIA: Isn't that information, at  
25 least the names of those people -- isn't it probably

1 public information anyway?

2 MR. MCKENNA: Yes, it is,  
3 Justice Scalia.

4 JUSTICE SCALIA: Can it be obtained under  
5 the Freedom of Information Act in this case?

6 MR. MCKENNA: Yes, it can. Their names,  
7 their office locations, their office phone numbers,  
8 their office e-mails is all a matter of public record in  
9 our State.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you, General  
12 McKenna.

13 Mr. Bopp, you have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF JAMES BOPP, JR.,  
15 ON BEHALF OF THE PETITIONERS

16 MR. BOPP: Thank you. First a clarification  
17 of what we sought in the preliminary injunction. We  
18 were -- we sought to base our preliminary injunction on  
19 both count 1 and count 2. Of course, the district  
20 court and the Ninth Circuit did not reach -- in either  
21 case -- reach count 2.

22 Secondly, with respect to whether or not  
23 there's any conduct here, I don't think signing a  
24 written statement is conduct. And, of course, by signing  
25 the statement, the person is adopting the statement on

1 the petition, one of which involves their preference on  
2 the referendum, and the second is the -- the request  
3 that the matter goes on the ballot. And, of course, it has  
4 no legal effect unless 122,000 make the same political  
5 statement.

6 Third, evidence of harassment comes in,  
7 as in Citizens United, because the weight of the  
8 interest that is required depends upon the burden of the  
9 First Amendment -- to the First Amendment speech  
10 involved; and this Court specifically referred in  
11 Citizens United to the lack of evidence of harassment of  
12 the donors that might occur if they were disclosed  
13 through the reports which Citizens United upheld.

14 Here we do have evidence of harassment, and  
15 we believe that that requires a greater burden in the  
16 First Amendment analysis --

17 JUSTINE GINSBURG: But that's out of the  
18 case up till now. That's count 2. You put it in your  
19 pleading, but it wasn't reached by the court.

20 MR. BOPP: Actually not. Many is the case --

21 JUSTICE GINSBURG: So everybody agrees  
22 that that's still in the case.

23 MR. BOPP: Yes, but it is relevant to count  
24 1. Bates, for instance, looked to the evidence of  
25 harassment in protecting the membership list of the

1 NAACP from disclosure.

2 JUSTICE GINSBURG: The court did not rule on  
3 whether there was a risk of harassment here.

4 MR. BOPP: Well, that --

5 JUSTICE GINSBURG: It dealt only with count 1.

6 MR. BOPP: That is -- that is true, Your Honor.  
7 There are -- there were several First Amendment claims  
8 made -- made under count 1, and this decision was --  
9 was based on other claims.

10 I see my time is up. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Bopp.

12 The case is submitted.

13 (Whereupon, at 11:08 a.m., the case in the  
14 above-entitled matter was submitted.)

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