No. 09-559
In the Supreme Court of the United States

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

v.

SAM REED, WASHINGTON SECRETARY
OF STATE, AND BRENDA GALARZA,
PUBLIC RECORDS OFFICER FOR THE
SECRETARY OF STATE'S OFFICE,
Respondents.

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

BRIEF FOR THE STATES OF OHIO, ARIZONA, COLORADO, FLORIDA, IDAHO, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the designation of referendum petitions as public records under the Washington Public Records Act, Wash. Rev. Code § 42.56.001 et seq., is a reasonable election regulation subject to review under the balancing test articulated in *Burdick v. Takushi*, 504 U.S. 428 (1992).

2. Whether Washington's compelling interests in preventing fraud, preserving ballot integrity, and promoting open government outweigh any minimal burden on speech created by designating referendum petitions as public records.

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STATEMENT OF AMICI INTEREST

The amici States have a direct interest in the outcome of this appeal. In recent years, States have experienced numerous incidents of election fraud, including both voter fraud and petition fraud. In 2006 alone, the Montana Supreme Court invalidated every signature collected by non-resident petition circulators and three ballot initiatives because the circulators engaged in bait-and-switch tactics; the Oklahoma Supreme Court struck an initiative petition upon finding a pervasive pattern of wrongdoing and fraud in the signature collection process; and a federal district court concluded that circulators misrepresented the purpose of a Michigan initiative petition. And these are but a few examples of recent election fraud.

Each State unquestionably has a compelling interest in preventing election fraud, ensuring the integrity of its elections, and promoting open government. Consistent with these interests, all fifty States and the District of Columbia have enacted reasonable election regulations to prevent fraud and to preserve the integrity of their ballots. In addition, each of the twenty-three States that allow referenda reasonably regulates the referendum petition process. See, *infra*, note 2. Likewise, all fifty States and the District of Columbia have enacted public records and open meetings laws to make government transparent and more accessible to the public. See State Sunshine Laws, available at www.sunshinereview.org/index.php/State_sunshine_laws (last visited Mar. 31, 2010); State Open Meetings Laws, available at www.sunshinereview.org/index.php/State_Open_Meetings_Laws (last visited Mar. 31, 2010). Like other States,

Washington has tied these two regulatory strands by designating referendum petitions as public records. Together these laws function as a reasonable election regulation designed to allow for public oversight of the referendum process.

SUMMARY OF ARGUMENT

This Court has long recognized that the Constitution permits reasonable election regulations. The State of Washington, like every other State, has adopted a raft of rules to ensure smooth, fair, and open elections that are free of fraud. Among those rules is the State's Public Records Act ("PRA"), Wash. Rev. Code § 42.56.001 et seq., under which referendum petitions are deemed public records.

The application of the PRA to referendum petitions should be evaluated under the balancing test for election regulations set forth in *Burdick v. Takushi*, 504 U.S. 428 (1992). Under that test, strict scrutiny applies only if an election regulation severely burdens protected speech. The public disclosure of referendum petitions imposes no such burden, however, because petition signatures are not protected speech under the First Amendment. And even if signing a petition were protected speech, the intimidation alleged by Petitioners John Doe #1, John Doe #2, and Protect Marriage Washington ("Petitioners") does not suffice to show a severe burden. Since strict scrutiny does not apply, Washington only need demonstrate that it has an important regulatory interest sufficient to justify its reasonable, nondiscriminatory scheme of publicly disclosing referendum petitions upon request.

Washington's decision to make referendum petitions publicly available is amply justified by three compelling state interests: preventing election fraud, preserving public confidence in the integrity of elections, and promoting open government. Petitioners themselves acknowledge two major threats to democracy—intimidation and fraud—but they err in focusing on the former to the exclusion of the latter. Washington has an exceedingly strong interest in forestalling and ferreting out election-related fraud, and "[s]unlight is said to be the best of disinfectants" to fraud. Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (Frederick A. Stokes Co. 1914). The States have an undeniable interest in open government as an end unto itself, and here Washington bolsters that interest by employing open government to prevent election fraud and promote ballot integrity. Washington's public disclosure of referendum petitions does not burden protected speech; indeed, it advances the State's compelling interests in a manner consistent with the goals of the First Amendment.

ARGUMENT

A. Washington's designation of referendum petitions as public records is a reasonable election regulation subject to *Burdick* balancing review.

Washington's regime should be evaluated for what it is: a reasonable regulation of the election process. To the extent the PRA's disclosure requirement works together with the election code to regulate the State's election process, the PRA functions as an election regulation and therefore

triggers *Burdick* review. Cf. Pet. App. 15a & n. 11. Under *Burdick*, strict scrutiny does not apply to election regulations that—as here—impose anything less than a severe burden on protected speech. 504 U.S. at 434.

The Court has long recognized that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). In fact, "[s]ubstantial regulation of elections" is essential if they "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, strict scrutiny does not apply to First Amendment challenges of election regulations, for "to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Instead, the Court applies "a more flexible standard," *id.* at 434, designed to let States "weigh the costs and benefits of possible changes to their election codes." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 1626 (2008) (Scalia, J., concurring). The Court allows a State's "judgment [to] prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Id.* at 1626-27.

Burdick therefore established two tiers of scrutiny for challenges to state election laws. 504 U.S. at 434. A court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments

that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). If a regulation "impos[es] severe burdens on plaintiffs' rights," then it "must be narrowly tailored and advance a compelling state interest." *Timmons*, 520 U.S. at 358. But if a regulation imposes a burden that is anything less than severe, then "a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Burdick*, 504 U.S. at 434). Stated another way, "the rigorousness of [the Court's] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434.

B. Public disclosure of referendum petitions imposes minimal burdens, if any, on protected speech.

Washington's practice of designating referendum petitions as public records imposes little, if any, burden on petition signers. Petitioners object that the disclosure of signatures creates "a serious concern over both loss of privacy and intimidation." Pet. Br. 12. They work mightily to raise a specter of "clearly resurgent" intimidation "in the petition-signing context," and liken themselves to victims of the Ku Klux Klan. Pet. Br. 15. But Petitioners' rhetoric is beside the point. When the Court "grapple[s] with the magnitude of burdens," it does "so categorically and [does] not consider the peculiar

circumstances of individual voters or candidates." *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring).

In that light, Petitioners identify no meaningful burden that Washington's regulation imposes on speech. Not only is signing a referendum petition not speech, but designating petitions as public records does not impose any burden on petition signers who have no reasonable expectation of privacy in their signatures in the first place.

1. Signing a referendum petition is an act performed for its legal significance; it is not speech, and certainly not core political speech.

Signing a petition is not speech, but is instead "an integral part of the exercise of the legislative power reserved to the people by the Washington Constitution." Pet. App. 11a & n. 9. When a Washington voter signs a referendum petition, she does so to achieve a distinct legislative end. Any communicative or expressive element of the signature is merely ancillary to this legally operative function, and is not protected by the First Amendment. Moreover, even if signing a petition were expressive conduct, it is not core political speech.

The act of signing a referendum petition does not fit naturally in the realm of core political speech because it is an act of legislative significance: It directs the placement of an issue on the ballot. The Washington Constitution makes clear that signing a referendum petition is a legislative act. See *State ex rel. Heavey v. Murphy*, 982 P.2d 611, 615 (Wash. 1999) ("A referendum or an initiative measure is an

exercise of the reserved power of the people to legislate.") (internal quotation omitted). Like many other States, the Washington charter expressly reserves certain legislative powers to the people: "[T]he 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."[1] Wash. Const. art. II, § 1. This power includes the ability to "order" a referendum "on any act, bill, law, or any part thereof passed by the legislature," *id.* § 1(b), if petitions are filed containing the valid signatures of registered Washington voters equaling at least four percent of the votes cast in the most

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[1] Other State constitutions similarly describe the right of referendum as a reservation of legislative power. See, e.g., Ariz. Const. art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature . . . , but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature."); Colo. Const. art. V, § 1 (The legislative power of the state shall be vested in the general assembly . . ., but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly."); Ohio Const. art. II, § 1 (The legislative power of the state shall be vested in a general assembly . . . but the people reserve to themselves the power to . . . adopt or reject [laws and amendments to the constitution] at the polls on a referendum vote as hereinafter provided.").

recent gubernatorial election, Wash. Rev. Code § 29A.72.150. Moreover, the Governor cannot veto legislation enacted by initiative or referendum. Wash. Const. art. II, § 1(d).

Consistent with this constitutional reservation of power, the Washington legislature has enacted laws to clarify the referendum process. When the people sign a referendum petition, they "respectfully *order and direct*" that the measure in question "be referred to the people of the state for their approval or rejection" in an election. Wash. Rev. Code § 29A.72.130 (emphasis added). "The 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." *Id.* Every signer must declare: "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.*; see also *id.* § 29A.72.140 (requiring the petition to bear a warning that any person who violates this declaration may be fined, imprisoned, or both). Finally, a "petition . . . must consist of not more than one sheet with numbered lines for not more than twenty signatures." *Id.* § 29A.72.100.

After a referendum petition is filed with the Washington Secretary of State, the Secretary must "verify and canvass the names of the legal voters on the petition." *Id.* § 29A.72.230. Representatives of the measure's supporters and opponents may observe this process, but they cannot record the information on the petitions. *Id.* If the Secretary determines that "the requisite number of signatures of legal

voters" have been submitted, he must certify the referendum for the ballot. *Id.* If this threshold number is not met, the Secretary will not certify the measure. *Id.* (also requiring the Secretary to reject a petition that does not include all required information or is untimely). Any citizen who disagrees with the Secretary's determination may seek a writ of mandamus or injunction in the superior court of Thurston County. *Id.* § 29A.72.240 (also authorizing appeals of superior court determinations to the Washington Supreme Court).

Like voting, signing a referendum petition is a discrete and legally operative act. This Court has rejected the contention that voting is speech or expressive conduct on several occasions. "Ballots serve primarily to elect candidates, not as a fora for political expression." *Timmons*, 520 U.S. at 363 (upholding Minnesota's ban on a candidate appearing multiple times on the same ballot as a representative of different parties). Similarly, the Court has explained 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].'" *Burdick*, 504 U.S. at 438 (citations omitted). Indeed, "[a]ttributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* "[B]y its very nature, a properly cast ballot does not make any 'statement' apart from its role in the selection of candidates to represent the voters in government." Laurence H. Tribe, *Erog v. Hsub and its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 Harv. L. Rev. 170, 243 (2001). Similarly, a legislator's "act of publicly voting

on legislation . . . is quintessentially one of governance." *Spallone v. United States*, 493 U.S. 265, 302 n.12 (1990) (Brennan, J., dissenting). Likewise, signing a petition is quintessentially a legally operative act.

Petitioners' contention that signing a petition is unquestionably speech, Pet. Br. 17-23, also disregards the crucial distinction between circulating a petition and signing a petition. The Court's decisions holding that petition circulation is protected First Amendment speech are animated by a desire to promote uninhibited political discussion of candidates and issues. See *Buckley v. Am. Constitutional Law Found.* ("*Buckley II*"), 525 U.S. 182, 186-87 (1999); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). In "almost every case," circulation of a petition "involve[s] an explanation of the nature of the proposal and why its advocates support it." *Meyer*, 486 U.S. at 421. Petition circulation is, therefore, precisely "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Id.* at 421-22.

But there is a significant difference between laws applicable to "the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006). The right to free speech is implicated "only by the state's attempts to regulate speech *associated* with an initiative procedure," not by the initiative process itself. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1211

(10th Cir. 2002) (emphasis added); accord *Molinari v. Bloomberg*, 564 F.3d 587, 602 (2d Cir. 2009) ("First Amendment rights are not implicated by referendum schemes per se . . . , but by the regulation of advocacy within the referenda process, i.e., petition circulating, discourse and all other protected forms of advocacy.") Petition signatures are an essential element of the referendum process, but they are not advocacy *about* the referendum; they *are* the referendum.

"Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise." *Initiative & Referendum Inst.*, 450 F.3d at 1099; see also *Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) ("[A]lthough the First Amendment protects public debate about legislation, it confers no right to legislate on a particular subject."); but see *Wirzburger v. Galvin*, 412 F.3d 271, 276 (1st Cir. 2005) (holding that use of the initiative process is expressive conduct). Unlike a petition circulator, a petition signer need not engage in debate or attempt to persuade anyone of his views. Instead, the act of signing a petition is "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies." *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 673 (1976); see also *Biddulph v. Mortham*, 89 F.3d 1491, 1497 (11th Cir. 1996) ("[I]n the initiative process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether."). A referendum represents an instance of "the [state]

itself legislating through its voters." *City of Eastlake*, 426 U.S. at 678 (quoting *S. Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970)). Thus the act of signing is a legal command to place an issue on the ballot. See *James v. Valtierra*, 402 U.S. 137, 142 (1971) (comparing the referendum process to other legislative devices such as gubernatorial vetoes or filibuster rules). And the First Amendment has nothing to say about that legal command.

2. Disclosing petition signatures would impose minimal, if any, burdens on petition signers.

The people's exercise of their sovereign referendum power is, by its very nature, a public act. And since Washington's disclosure of petition signatures under the PRA simply makes available information that is part of an inherently public process, persons who sign the petitions have no reasonable expectation of privacy in their signatures.

Referenda are an exercise of the people's legislative power and, as such, have always been subject to extensive governmental regulation. Initiatives and referenda have existed in the United States since the seventeenth century. See M. Dane Waters, *Initiative and Referendum Almanac* 3 (Carolina Acad. P. 2003). Alexander Hamilton articulated the rationale for permitting referenda in 1788: "As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority . . . whenever it may

be necessary to enlarge, diminish, or new-model the powers of the government." James Madison, *Federalist 49*, in *The Federalist: A Commentary on the Constitution of the United States* 322 (Robert Scigliano ed., 2001).

Although legislative referenda have been common since the Constitution's enactment, popular referenda first arose across the United States in the late nineteenth century. Waters, *supra* p. 12, at 3. Populists and Progressives encouraged States to adopt statewide initiatives and popular referenda in order to allow citizens to place issues on the ballot. *Id.* Between 1898 and 1918, twenty-four states adopted initiative or popular referendum laws. *Id.* at 4. At present, twenty-three states allow popular referenda. See Initiative and Referendum States, www.ncsl.org/Default.aspx?TabId=16589 (last visited Mar. 31, 2010).

Like all States that allow referenda, Washington carefully regulates its referendum process to ensure that it is fair, orderly, and serves the purpose of giving legislative power to the people.[2]

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[2] Every State authorizing popular referenda extensively regulates the referendum process. See Md. Const. art. XVI; N.M. Const. art. IV, § 1; Alaska Stat. §§ 15.45.250–465; Ariz. Rev. Stat. Ann. §§ 19-101–143; Ark. Code Ann. §§ 7-9-101–125, 7-9-401–415; Cal. Elec. Code §§ 9000–9096; Colo. Rev. Stat. §§ 1-40-101–135; Idaho Code Ann. §§ 34-1801–1823; Me. Rev. Stat. Ann. tit. 21A, §§ 901-906; Mass. Gen. Laws ch. 53, § 22A; Mich. Comp. Laws §§ 168.471-168.488; Mo. Rev. Stat. §§ 116.010–.340; Mont. Code Ann. §§ 13-27-101–504; Neb. Rev. Stat. §§ 32-1402–1416; Nev. Rev. Stat. §§ 293.12756–12795, 293.252–253; N.D. Cent. Code §§ 16.1-01-01–09; Ohio Rev. Code Ann. §§ 3519.01–.22; Okla. Stat. Ann. §§ 34-1-27; Or. Rev. Stat. §§ 250.005–.135; S.D. Codified Laws §§ 2-1-3–18; Utah Code

Washington's election regulations ensure that the process remains subject to public scrutiny. To place an issue on the ballot, a fixed percentage of Washington voters must sign a referendum petition that "respectfully *order[s] and direct[s]*" that a measure "be referred to the people of the state." Wash. Rev. Code § 29A.72.130 (emphasis added). Each signer must provide her name and address, *id.*, and the Washington Secretary of State verifies and canvasses the signatures after the petition is filed, *id.* § 29A.72.230. If enough valid signatures are present, then the Secretary *must* certify the issue for the ballot. *Id.* In other words, whether an issue is certified turns entirely on the action of *the people*; the Secretary only has a ministerial duty to act upon a petition's request to refer a measure to the voting public. See *State ex rel. Heavey*, 982 P.2d at 615. Even as the Secretary verifies and canvasses signatures, the process remains in the hands of the people—representatives of a measure's supporters and opponents may observe the Secretary's work, Wash. Rev. Code § 29A.72.230, and can challenge the Secretary's determination in court, *id.* § 29A.72.240.

Most States with popular referenda administer the process similarly. They constitutionally reserve this power for their citizens, see *supra* note 1, and require a minimum amount of voters to sign each referendum petition.[3] A

Ann. §§ 20A-7-101–103, 20A-7-301–312; Wash. Rev. Code §§ 29.79.010–.500; Wyo. Stat. Ann. §§ 22-24-102–201. See also generally Waters, *supra* p. 12, at Ch. 4 ("State-by-State History and Overview").

[3] All States impose minimum signature requirements to qualify a referendum for the ballot, and some also impose geographic distribution requirements. See, e.g., Alaska Const. art. XI, § 3

designated official then verifies and canvasses the signatures, and determines whether to certify an issue for the ballot.[4] Finally, States generally allow citizens to challenge this certification decision in state court.[5] Further, many States limit the scope of the people's right of referendum with respect to certain categories of legislation.[6]

In light of this reasonable regulation of the referendum process in Washington (and in every other referendum State), no Washington voter could reasonably assume any privacy right in his signature on a petition. See *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1188 (8th Cir. 2000) (explaining that "an individual's expectation of confidentiality is relevant to analysis of [FOIA's]

("[T]en percent of those who voted in the preceding general election, who are resident in at least three-fourths of the house districts of the State, and who, in each of those house districts, are equal in number to at least seven percent of those who voted in the preceding general election in the house district."); Idaho Code Ann. § 34-1805 ("[T]he petition must contain a number of signatures of qualified electors from each of twenty-two (22) counties equal to not less than six percent (6%) of the qualified electors at the time of the last general election in each of those twenty-two (22) counties."); Me. Const. art. IV, pt. 3, § 7 ("10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition.").

[4] See, e.g., Ariz. Rev. Stat. Ann. §§ 19-121.01-.02; Cal. Elec. Code §§ 9030-9031; Colo. Rev. Stat. § 1-40-116; Idaho Code Ann. § 34-1807; Me. Rev. Stat. Ann. tit. 21A, § 905; Mont. Code Ann. §§ 13-27-303–307; Wyo. Stat. Ann. § 22-24-116.

[5] See, e.g., Alaska Stat. § 15.45.460; Ariz. Rev. Stat. Ann. § 19-121.03; Ark. Code Ann. § 7-9-112; Colo. Rev. Stat. § 1-40-118; Idaho Code Ann. § 34-1808; Me. Rev. Stat. Ann. tit. 21A, § 905; Okla. Stat. Ann. § 34-8.

[6] See e.g., Alaska Stat. § 15.45.250; Colo. Const. art. V, § 1; Mass. Const. art. XLVIII, pt. III, § 2; N.M. Const. art. IV, § 1.

privacy exemption"). A voter cannot petition for a referendum, and a referendum cannot qualify for the ballot unless a petitioner discloses her identity to the government when filing the petition. Further, the petition signer discloses her identity not only to government officials for verification purposes, see *id.*, but also to "an essentially unlimited segment of the public," Br. of Appellants at 18, *Doe #1 v. Reed*, No. 09-35818 (9th Cir. Sept. 18, 2009). Each signer reveals her name to a petition circulator, to the person or organization who submits the measure to the Secretary of State, and to other members of the public. For example, the Referendum 71 petitions included twenty signatures per page, meaning that the first nineteen signers on a petition revealed their identity to *any* subsequent person who was asked to read and sign the document, whether or not that person signed. The first signer on a completed petition disclosed her identity to at least nineteen subsequent signers. Washington law does not prohibit any of these people from making a list of the signers' names and addresses.

A speaker who discloses her identity has no right to anonymity and certainly no reasonable expectation of privacy. See *Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007); cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (invalidating requirement that private individuals disclose their identity when publishing political pamphlets). Just as under the Fourth Amendment, "[w]hat a person knowingly exposes to the public . . . is not a subject of protection." *California v. Greenwood*, 486 U.S. 35, 41 (1988) (internal quotation omitted) (finding no legitimate privacy expectation in trash left in an

area "accessible to the public"). In the search-and-seizure context, citizens have no reasonable expectation of privacy in areas observable by airplanes flying overhead, *California v. Ciraolo*, 476 U.S. 207, 213 (1986); in private fields surrounded by no trespassing signs if the fields are publicly accessible, *Oliver v. United States*, 466 U.S. 170, 179 (1984); or when driving on a public road, *United States v. Knotts*, 460 U.S. 276, 281-85 (1983). It is no less true that a person who signs a referendum petition in Washington cannot reasonably expect that his signature will remain private.

Even if petition signers had a reasonable expectation of privacy in their signatures, they would have no First Amendment right to anonymity in this context. As with voting, there is no First Amendment right to anonymity when signing a petition. See *Burson v. Freeman*, 504 U.S. 191, 206 (1992) (recognizing that the secret ballot is a creature of the states, not a federal constitutional guarantee); Steven F. Huefner, *Remedying Election Wrongs*, 44 Harv. J. on Legis. 265, 291 (2007) (noting that, until 2002, each ballot cast in Arkansas could be traced to a particular voter). Washington specifically chose to guarantee a right to secret ballots, Wash. Const. art. VI, § 6; Wash. Rev. Code § 29A.04.206, but it makes petition signatures a matter of public record. Even if Washington's petition signers were entitled to anonymity at the time they signed a petition, that would not entitle them to absolute anonymity because, once submitted to the Secretary of State, a petition is part of the legislative process and has a legally operative effect. See Jennifer B. Wieland, Note, *Death of Publius: Toward a World Without Anonymous Speech*, 17 J. L.

& Politics 589, 617 (2001) ("Perhaps anonymity at the time of expression is valued, but an interest in remaining anonymous is by no means absolute."). In *Buckley II*, for example, the Court recognized that petition circulators had a right to remain anonymous while circulating petitions, 525 U.S. at 200, but could be compelled to disclose their identities on an affidavit after the fact, *id.* at 188-89, 205 (leaving intact an unchallenged affidavit requirement).

The PRA imposes little, if any, burden on petition signers in Washington, because petition signatures are not speech and the petition signers have neither a reasonable expectation of privacy nor a right to anonymity. Because the burden is so minimal,[7] *Burdick* dictates that strict scrutiny does not apply. Instead, this reasonable and nondiscriminatory regulation will withstand First Amendment scrutiny if it furthers Washington's

[7] Notably, to the extent future plaintiffs can demonstrate that the designation of petition signatures as public records imposes a severe burden on their speech, the result of this analysis may differ. Moreover, many State public records laws balance the State's interest in public disclosure against competing privacy interests. For example, Montana enshrines this requirement in its constitution: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." Mont. Const. art. II § 9. And other State public records acts require similar balancing. See, e.g., Cal. Gov. Code § 6255 (an agency can withhold a record "by demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record"); Hawaii Rev. Stat. § 92F-13(1) (disclosure not required if it "would constitute a clearly unwarranted invasion of personal privacy").

"important regulatory interests." *Burdick*, 504 U.S. at 434. It does that in spades.

C. Public disclosure of referendum petitions furthers Washington's compelling interests in preventing election fraud, preserving ballot integrity, and promoting open government.

Washington has compelling interests in preventing fraud, preserving ballot integrity, and promoting open government in the context of its elections. "Preserving the integrity of the electoral process, preventing corruption, and '[sustaining] 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 v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citations omitted & alterations in original). When evaluating a State's interests, this Court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 520 U.S. at 364. Instead, the Court recognizes that States may "respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986). For the reasons explained below, Washington's asserted interests outweigh the minimal burdens imposed by the public disclosure of petition signatures and, in fact, are sufficiently compelling to ensure that the State's regulatory scheme would survive even strict scrutiny.

1. States have a compelling interest in preventing election fraud.

This Court has expressly recognized that States have a "compelling interest in preventing voter fraud," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), and this interest naturally extends to other forms of election fraud as well. "Allegations of . . . . fraud and misrepresentation in collecting signatures for ballot initiatives have haunted the process for nearly a century." Jocelyn Freidrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 Fordham Urb. L.J. 889, 910 (2007). Reports of petition fraud have continued apace since the Court last considered a state regulation of the petition circulation process in 1999. See *Buckey II*, 525 U.S. 182. Both real and perceived election fraud can cause considerable harm to state elections systems.

As the Federal Commission on Election Reform explained in 2005, "election fraud is difficult to measure," but "it occurs." *Building Confidence in U.S. Elections,* Report of the Commission on Federal Election Reform 45 (2005), *available at* www.american.edu/ia/cfer/report/full_report.pdf (last visited Mar. 31, 2010). These incidents generally "attract[] public attention and come[] under investigation only in close elections." *Id.* Even so, reported investigations are numerous. For example, during the three-year period between October 2002 and September 2005, the United States Department of Justice launched more than 180 election fraud investigations, and States investigated and prosecuted many more incidents. *Id.*

Washington experienced election fraud as recently as its 2004 gubernatorial election. See *In the Matter of Coday*, 130 P.3d 809, 810 (Wash. 2006) (summarizing the election dispute in the context of subsequent litigation). After two recounts, the Democratic candidate was certified the winner. The Republican Party filed suit, "claim[ing] that hundreds of 'illegal votes'—including votes cast by felons and votes cast on behalf of deceased electors—made the difference in the election" and alleging that "'errors, omissions, mistakes, neglect and other wrongful acts' by county election officials affected the outcome of the election and necessitated its nullification." *Id.* (citation omitted). The trial judge dismissed the suit, ruling that "while the contestants had proved that errors and omissions by county election officials had occurred and that illegal votes were cast, they had not proved that the outcome of the governor's election was changed as a result." *Id*.

Reports of similar voting irregularities have plagued many States in recent years. In 2006, a district court reviewing Indiana's voter identification requirements noted reports of "in-person fraud in recent elections in Florida, Georgia, Missouri, New York, Washington, and Wisconsin," as well as published reports of "individual voters using the names of dead persons . . . in Georgia, Illinois, Maryland, Missouri, Pennsylvania, and Wisconsin." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826 (S.D. Ind. 2006). During the 2004 election in Milwaukee, Wisconsin, for example, more than 100 voters either double-voted or voted under a fake name or someone else's name; more than 200 ineligible felons cast votes; and the number of votes counted exceeded the number of recorded voters by

more than 4,500. Preliminary Findings of Joint Task Force Investigating Possible Election Fraud 2-3 (May 10, 2005), available at www.wispolitics.com/1006/electionfraud.pdf (last visited Mar. 31, 2010).

Election-related fraud is not limited to voter fraud. In fact, petition fraud has become increasingly common in recent elections. This Court's observation, more than two decades ago, that the risk of election fraud is "more remote at the petition stage . . . than at the time of balloting," *Meyer*, 486 U.S. at 427, has not borne out. In the years since *Meyer*, "[g]athering signatures has increasingly become a business, and like any other business it is run for profit." Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 Mont. L. Rev. 35, 37 (2003). This is not just a general trend: In Washington specifically, there was a "rapid transformation . . . from volunteer to professional signature gatherers" in the 1990s. *Id.* at 56. In conjunction with this shift, scholars now conclude that there may be as much, if not more, corruption in initiative campaigns than representative elections. See K.K. DuVivier, *Perspectives: Ballot Initiatives and Referenda: Out of the Bottle: The Genie of Direct Democracy*, 70 Alb. L. Rev. 1045, 1048 (2007); see also *id.* at 1048 n.15 (citing other commentators).

For example, in 2006, opponents to three Montana initiatives challenged more than 64,000 petition signatures collected by nonresident petition circulators. The circulators used false addresses and "bait and switch" tactics to collect signatures. See *Montanans for Justice v. State*, 146 P.3d 759, 776 (Mont. 2006). Based on voter testimony about the

circulators' conduct, and the proponents' failure to present a single circulator who could rebut or limit the allegations, the Montana Supreme Court invalidated all of the challenged signatures. *Id.*

That same year, the Oklahoma Supreme Court struck an initiative petition supporting a constitutional amendment known as the Taxpayer Bill of Rights. See *In re Initiative Petition No. 379*, 155 P.3d 32, 34 (Ok. 2006). The Court found that circulators engaged in "a pervasive pattern of wrongdoing and fraud" in the signature collection process. *Id.* The circulators "committed much more than mere technical violations of Oklahoma law—they attempted to destroy the safeguards by which signatures are obtained and verified." *Id.* at 50.

Also in 2006, the Michigan Civil Rights Commission investigated numerous allegations of fraud involving the Michigan Civil Rights Initiative ("MCRI"). A federal district court concluded that "[t]he evidence overwhelmingly favor[ed] a finding that the MCRI defendants engaged in voter fraud." *Operation King's Dream v. Connerly*, No. 06-12773, 2006 U.S. Dist. Lexis 61323, at *33 (E.D. Mich. Aug. 29, 2006). Circulators had "objectively misrepresented the purpose of the petition." *Id.*; see Report of the Michigan Civil Rights Commission Regarding the Use of Fraud and Deception in the Collection of Signatures for the Michigan Civil Rights Initiative Ballot Petition (June 7, 2006), available at www.michigan.gov/documents/Petition Fraudreport_162009_7.pdf (last visited Mar. 31, 2010).

Petition fraud similarly marred independent candidate Ralph Nader's efforts to appear on the

2004 presidential election ballot. Ohio discovered that Nader's supporters submitted a large number of invalid and fraudulent signatures in an attempt to place Nader's name on the ballot in 2004. See *Nader v. Blackwell*, 545 F.3d 459, 462 (6th Cir. 2008). An independent candidate in Ohio must submit a nominating petition with 5,000 voter signatures to be placed on a general election ballot. Ohio Rev. Code Ann. § 3513.257(A). Local election boards invalidated nearly 8,000 of the 14,773 signatures on Nader's petition, and—exercising their right to publicly access the petitions—protesters challenged many of the remaining signatures. *Nader*, 545 F.3d at 462. The Secretary of State ordered an administrative hearing, which led to the invalidation of an additional 2,756 signatures based on detailed evidence of election fraud and forgery. *Id.* at 467. Nader was removed from the ballot.

Nader faced similar problems in Arizona, where voters filed suit alleging that Nader's nomination petitions "did not provide the required number of valid signatures, that the petitions included signatures forged by circulators, that some petitions had been circulated by felons, and that the petitions contained falsified addresses of circulators." *Nader v. Brewer*, 531 F.3d 1028, 1032 (9th Cir. 2008) (describing Nader's 2004 election efforts in the context of Nader's subsequent challenge to Arizona's nomination-petition system). "Nader conceded that the petitions did not meet the signature requirements and . . . withdrew his candidacy for the Arizona ballot." *Id.*

The States have a compelling interest in preventing both petition fraud specifically and

election fraud more generally. The above evidence demonstrates that the risk of fraud is real. And Washington need not prove that petition fraud has occurred within its borders to justify regulating the petition process. This Court recently upheld an Indiana law intended to prevent election fraud even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford*, 128 S. Ct. at 1619. In spite of that silence, the Court recognized Indiana's interest in combating a "real" "risk of voter fraud" in light of the "flagrant examples of such fraud in other parts of the country," "occasional examples . . . in recent years," and the State's experience with other kinds of voting fraud. *Id.* Like Indiana, Washington here has a "compelling interest in preventing . . . fraud" in its petition process. *Purcell*, 549 U.S. at 4.

"While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 128 S. Ct. at 1619. Washington's decision to make petition signatures public records combats fraud by allowing for public oversight of the petition process. And "[t]here is no question about the legitimacy or importance of the State's interest in counting only the [signatures] of eligible voters" *and* allowing the public an opportunity to ensure the State's accuracy. *Id.*; see *infra*, Part C.3 (discussing the State's compelling interest in open government).

2. States have a compelling interest in preserving the integrity of elections.

Washington also "indisputably has a compelling interest in preserving the integrity of its

election process." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); see also *Crawford*, 128 S. Ct. at 1617 (confirming the States' interest in "protecting the integrity and reliability of the electoral process"); *Timmons*, 520 U.S. at 364 (describing the States' interest in "protecting the integrity, fairness, and efficiency of their ballots and election processes."); *First Nat'l Bank*, 435 U.S. at 788-89 (observing that state regulatory interests, including "[p]reserving the integrity of the electoral process . . . are interests of the highest importance"). Though "closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford*, 128 S. Ct. at 1620 (internal quotation omitted).

Efforts to preserve ballot integrity encompass not only the prevention of actual fraud, but also perceptions of fraud. "An electorate that perceives fraud as an endemic presence in the electoral system—based on either their own experiences or the prevalence of allegations elsewhere—is likely to lose faith in the accuracy of an election's results, regardless of the fraud's actual effect on the outcome of the election." Benson, *supra* p. 20, at 912; see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 942 (2005) (mere allegations of fraud "adversely affect[] Americans' views of the electoral process"). As the Court has recognized, a State cannot ensure that its "electoral system . . . inspire[s] public confidence if no safeguards exist to deter or detect fraud or to confirm

the identity of voters." *Crawford*, 128 S. Ct. at 1620 (internal quotation omitted). In fact, this is the precise reason the Court allows greater flexibility when reviewing election regulations: "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick*, 504 U.S. at 433 (citing *Storer*, 415 U.S. at 730).

Washington's designation of referendum petitions as public records furthers the State's important interest in protecting the integrity of its ballot by helping to ensure that any ballot issues have the support mandated by state law. See *Anderson*, 460 U.S. at 788 n.9 ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot."). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley II*, 525 U.S. at 191. In the end, Washington's requirements for exercising the right of referendum are meaningless if the State cannot verify that a petition qualifies for the ballot—and public access to petitions is an essential tool for verifying that a petition is qualified.

Because ballot integrity hinges on public perception, Washington's interest in preserving the integrity of its elections necessarily encompasses an interest in making information about the electoral process publicly available. Thus, Washington's interest necessitates giving the very citizens who are exercising their sovereign legislative authority

through the referendum process an opportunity to verify the integrity of that process. Public access to referendum petitions is as important to protecting ballot integrity as it is to preventing actual fraud.

3. States have a compelling interest in promoting open government.

Finally, Washington has a compelling interest in furthering the democratic ideal of open government. This country has long cherished the principles of open government as essential to preserving democracy. Stated simply, "[d]emocracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2003). The Framers of the First Amendment sought to "protect[] the people against secret government" because "[w]hen government begins closing doors, it selectively controls information rightfully belonging to the people." *Id.* (internal quotations and citations omitted). "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Public access to information helps "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Id.*

Not only does democracy value an informed public for its own sake, but a State's interest in open government is bolstered by the fact that "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936); see *Buckley v. Valeo,* 424 U.S. 1, 83 (1976) ("[D]isclosure serves information functions, as well as the prevention of corruption and

the enforcement of . . . contribution limitations"). An informed public "'alone can . . . protect the values of democratic government.'" *Detroit Free Press*, 303 F.3d at 683 (quoting *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (per curiam) (Stewart, J., concurring)). When information is readily available, the people are able to "ensure[] that government does its job properly; that it does not make mistakes." *Id.* at 704; see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 491-95 (1985) (arguing that abuse of governmental power "can be warded off by a strict insistence, as a matter of constitutional doctrine, that traditional standards of openness in government be maintained").

Giving the public access to information provides a check on both intentional and inadvertent mistakes by governmental bodies. One clear example is Nader's 2004 nominating petition in Ohio. See, *supra* pp. 23-24. As explained above, after Ohio's Secretary of State determined that only 6,464 of the 14,473 signatures on Nader's petition were valid, protesters contested a large number of the remaining signatures. Only after protesters raised this subsequent challenge did a hearing officer for the Secretary of State invalidate an additional 2,756 signatures for election fraud and forgery. If Ohio had not made the petition signatures publicly available, nearly 3,000 fraudulent signatures would have been counted toward Nader's petition, and Nader would improperly have been included as a candidate on the ballot.

Similarly, Montana's laws allowing citizens to challenge petition signatures, Mont. Code Ann. § 13-

27-301, withdraw them, *id.* § 13-27-306, and contest ballot issues, *id.* § 13-27-317, are all premised on public access to petition signatures. As explained above, see *supra* p. 22-23, this public access aided both challengers and the district court in evaluating allegations of petition fraud in 2006. The district court's findings of fact explain how individual petition signers relied on such access to verify whether or not they had fallen prey to bait-and-switch tactics and to remove their signatures from petitions they did not intend to sign. *Montanans for Justice v. State*, No. CDV 06-1162, Findings of Fact and Conclusions of Law, 12-15 (Sept. 13, 2006). Further, the district court relied on the public availability of the petitions to determine a pattern of likely bait-and-switch tactics by looking for areas where significantly more voters signed all three initiative petitions. *Id.* at 15.

Every State has recognized its compelling interest in open government—both as a check on government power, and as a means of informing the public—by enacting public records acts and open meeting laws. See State Sunshine Laws, *supra* p.1; State Open Meetings Laws, *supra* p.1. These laws are "justified without reference to the content of the regulated speech," *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), and impose only "reasonable restrictions on the time, place, or manner" of speech, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). These laws do not compel speech; instead, they grant public access to certain speech relevant to government processes and decisions. And they only minimally burden the speech of public officials because they leave open

ample alternative channels for communication. See *id.* at 802.

Texas recently defended the constitutionality of the Texas Open Meetings Act ("TOMA") in *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009) (en banc), and—because the Fifth Circuit dismissed that case as moot rather than resolving the merits of the challenge—is now doing so again in *City of Alpine v. Abbott*, No. 4:09-cv-00059-RAJ (W.D. Texas) (pending). TOMA, like all open meetings laws, requires designated governmental bodies to conduct certain meetings in the open (with advance public notice), at least where a quorum is present, and the discussion involves a public issue within the jurisdiction. As Texas has persuasively argued, requiring public officials to conduct public business in public furthers fundamental First Amendment values. See Appellees Supp. Br., *Rangra v. Brown*, No. 06-51587 (5th Cir. Aug. 28, 2009), at 33-39. Further, open meetings laws satisfy traditional First Amendment analysis under *Ward* because they are justified without reference to the content of the regulated speech and they are narrowly tailored to serve the States' significant interest in open government. See *id.* at 39-53; see also *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010); *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) (upholding Colorado open meetings law as a reasonable time, place, and manner restriction); *Difanis v. Barr*, 414 N.E.2d 731, 739 (Ill. 1980) (upholding Illinois open meetings law).

Like open meetings laws, public records acts fulfill the First Amendment's goal of "affording the public access to discussion, debate, and the

dissemination of information and ideas." *First Nat'l Bank*, 435 U.S. at 783. Indeed, courts have repeatedly invoked the First Amendment itself to require public access to and openness in a variety of government proceedings. *See, e.g., Press-Enter. Co. v. Superior Court,* 464 U.S. 501 (1984); *Globe Newspaper Co.*, 457 U.S. 596; *Richmond Newspapers Inc. v. Virginia,* 448 U.S. 555 (1980). In fact, the Court recently rejected an as applied challenge to disclosure and disclaimer requirements for election advertising, explaining that "the informational interest alone is sufficient to justify" their application to corporate advertising. *Citizens United*, 130 S. Ct. at 915-16.

The PRA's preamble echoes these interests in open government: "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. The people insist on remaining informed so that they may maintain control over the instruments that they have created." Wash. Rev. Code § 42.56.030. In addition, the Washington legislature also contemplated public access to the specific information at issue—petition signatures—by giving the people a statutory right to challenge the Secretary of State's verification process. *Id.* § 29A.72.240. Without access to petitions, there would be no way for the people to exercise this right. Functioning together, the PRA and Washington's election regulations promote the State's interest in open government because they both ensure that Washington citizens are informed participants, and serve as a check on State officials.

D. Washington's disclosure of referendum petitions under the PRA withstands First Amendment review, regardless of the test applied.

Washington's designation of referendum petitions as public records is consistent with the First Amendment. Because the PRA's application to petition signatures imposes minimal, if any, burdens on petition signers, and is narrowly tailored to serve a compelling government interest, it can easily withstand either the flexible *Burdick* balancing test or more exacting strict scrutiny. Although "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms," *Timmons*, 520 U.S. at 359, a regulation that would survive strict scrutiny, as here, necessarily survives *Burdick* review as well.

Because Washington's designation of referendum petitions as public records imposes minimal, if any, burdens on protected speech, the State's important regulatory interests in preventing fraud, preserving ballot integrity, and promoting open government are sufficient to satisfy *Burdick* review. *Burdick*, 504 U.S. at 434. Standing alone, any of these three compelling interests is sufficient to outweigh any burden imposed on petition signers. "It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class." *Crawford*, 128 S. Ct. at 1626-27 (Scalia, J., concurring). Here, the Washington legislature decided that its compelling interests outweighed any

potential burdens caused by disclosing petition signatures. And the Court must defer to that judgment because the regulation does not "impose[] a severe and unjustified overall burden" and is not "intended to disadvantage a particular class." *Id.*

Moreover, because the regulation is narrowly tailored to advance a compelling state interest, it would survive even strict scrutiny. Washington's designation of referendum petitions as public records is narrowly tailored to serve each of its three compelling interests because this is the "only means for Washington citizens (1) to independently evaluate and challenge the Secretary's decision whether to certify a referendum to the ballot, and (2) to independently determine whether election laws are being properly enforced." Reply Br. of Appellants at 17-18, *Doe #1 v. Reed*, No. 09-35818 (9th Cir. Sept. 28, 2009). These interests would not be served by a regulatory scheme that relied solely on the government to police itself; therefore, a "less restrictive alternative" is not "readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988).

Regardless of how the Court characterizes the burden imposed, Petitioners' First Amendment challenge fails.

CONCLUSION

For the above reasons, the Court should affirm the Ninth Circuit's decision.

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