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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. :

- - - - - x

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 will 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 --

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 are
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 trying to separate
18 out the harassment aspects of this case from the working
19 proposition that there is 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 if -- well, one other aspect is the
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 interest 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 have you 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, 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 are 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 are not
9 going to get entirely excited about it, we still have to
10 say that that is 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 encouraged
17 people to harass them, which resulted in hundreds of --

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

24 MR. BOPP: Well, it may not manifest itself
25 in -- in any particular initiative. We agree with that,

1 but we think the potential is there. And there is
2 usually a group of supporters of any measure that, you
3 know, are passionate about that particular issue.

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

7 MR. BOPP: Yes.

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

12 MR. BOPP: Well --

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

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

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

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

6 MR. BOPP: We don't think that the exception
7 is a substitute for considering the initial validity of
8 the law.

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

19 MR. BOPP: Yes.

20 JUSTICE GINSBURG: Yes?

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

24 JUSTICE GINSBURG: They don't say: Now, I
25 agree you can use my name for fundraising purposes. But

1 that's -- it's implicit, you say, in their signing the
2 petition that the --

3 MR. BOPP: Well, what --

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

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

11 JUSTICE SCALIA: Mr. Bopp, do you have any
12 case in which we have held that the First Amendment
13 applies to activity that consists of the process of
14 legislation, of legislating or of adopting legislation?

15 MR. BOPP: Yes, Buckley II.

16 JUSTICE SCALIA: What is that?

17 MR. BOPP: Buckley II, you struck down the
18 requirement that the person who is soliciting signatures
19 self-identify.

20 JUSTICE SCALIA: That is -- soliciting
21 signatures is not taking part in the process of
22 legislating.

23 MR. BOPP: Well --

24 JUSTICE SCALIA: The person who requests a
25 referendum is taking -- when there's a certain number of

1 signatures required to achieve it is taking part in
2 that.

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

13 You are asking us to enter into a whole new
14 field where we have never gone before.

15 MR. BOPP: Well, with all due respect, you
16 have already opined in Buckley II that the person on the
17 other side of the clipboard is protected by the First
18 Amendment.

19 JUSTICE GINSBURG: I don't think that's --
20 that's true of Buckley II. What was -- what this Court
21 said could not be done is that the solicitor could not
22 be made to wear a badge that says "I am a paid
23 solicitor," but that the solicitor's name had to be
24 identified for the State. Certainly the solicitor --
25 there was an affidavit, and there was the filings with

1 whatever was the State agency.

2 So what was -- what this Court said could
3 not be judged was this kind of in-your-face big button
4 that says "I am a paid solicitor," but the solicitor's
5 name and address certainly had to be disclosed.

6 MR. BOPP: That is true. You've correctly
7 described Buckley II. But as we can see in the facts of
8 this case, the public disclosure of the petition names
9 in this case, there was a planned harassment and
10 intimidation of these voters.

11 JUSTICE KENNEDY: Well, let me -- let me ask
12 you, could the opponents of a particular ballot measure
13 organize a boycott for -- and picket businesses whose
14 managers had supported that boycott.

15 MR. BOPP: Yes.

16 JUSTICE KENNEDY: Had supported that
17 initiative?

18 MR. BOPP: Yes.

19 JUSTICE KENNEDY: Well, if that's -- if
20 that's so, then under Claiborne Hardware, which I -- I
21 notice you didn't cite in your brief, but if -- if
22 that's so, then it seems to me that the State's -- or
23 that -- that the signers' interest in keeping their
24 names private is somewhat diminished.

25 MR. BOPP: Yes.

1 JUSTICE KENNEDY: It's a First Amendment
2 activity.

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

7 JUSTICE GINSBURG: But -- but just --

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

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

15 MR. BOPP: That it --

16 JUSTICE GINSBURG: Or it could even be, you
17 say, that this solicitor is pesky, and in order to
18 placate the solicitor, to get rid of the solicitor, we
19 will just sign. So you -- you have said that -- that
20 the signing itself is ambiguous. You don't know what
21 the reason is. It doesn't necessarily mean that the
22 person is a supporter of the proposition.

23 MR. BOPP: With all due respect, we do not
24 say the third. We did say the first and the second.
25 And -- but either of those are political statements.

1 The highlighted box at the top, you know, states --
2 states that by signing R-71, we can reverse that
3 decision, meaning the passage of a law, and protect
4 marriage between a man and a woman.

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

11 MR. BOPP: I acknowledge that we said that,
12 Justice Ginsburg. And of course the second statement
13 is -- and which I think is the dominant statement, and
14 certainly sufficient, and that is that we want a measure
15 to be placed on the ballot in order for the people to
16 vote. That is what --

17 JUSTICE ALITO: Mr. Bopp, if the voter -- if
18 the legislature passes a statute and someone is -- is
19 satisfied with that statute, how likely is it that that
20 person is going to sign a petition to have a referendum
21 to see whether the statute should be blocked?

22 MR. BOPP: I think it's very unlikely. But
23 it -- we acknowledge it's possible, but I think it's
24 very unlikely.

25 JUSTICE ALITO: It's possible --

1 JUSTICE KENNEDY: But --

2 JUSTICE ALITO: -- but if you were in the
3 real world, if you were to poll the people who sign a
4 referendum petition with respect to a statute that was
5 passed by the State legislature, what percentage do you
6 think would be opposed to that legislation?

7 MR. BOPP: Very few.

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

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

19 Isn't that part of assessing the -- the
20 reasons why this initiative was proposed? And isn't
21 that vital to the voter's -- to the voter in making an
22 informed decision?

23 MR. BOPP: Well, actually, after your
24 Buckley II decision, the Ninth Circuit struck down the
25 requirement of disclosing the paid circulators. And of

1 course, in California, petitions are not public.

2 JUSTICE GINSBURG: They did that. It wasn't
3 due to Buckley II. Because as you just acknowledged,
4 under Buckley II, the solicitor is disclosed.

5 MR. BOPP: Well, the Ninth Circuit --

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

9 MR. BOPP: There is --

10 JUSTICE KENNEDY: We'll leave that out.
11 But -- but to know that -- that -- the persons that
12 supported the amendment.

13 MR. BOPP: There is no evidence in the
14 record that that is pertinent information and, at most,
15 we think it is marginal information.

16 JUSTICE SOTOMAYOR: Counsel, if we create
17 this right of -- this constitutional right of
18 association in the manner that you are describing it,
19 why is it limited to the voting area?

20 Would we be inviting review if a group of
21 citizens get together and send a letter to an agency
22 that says: Please pass X regulation, or rescind Y
23 regulation? Would the agency be prohibited from making
24 that letter public.

25 MR. BOPP: Well, potentially. And -- and

1 this Court -- I -- because it would be required to be
2 subject to a First Amendment analysis. It's this Court
3 that created, in the NAACP case --

4 JUSTICE SOTOMAYOR: So you're -- you're
5 suggesting --

6 MR. BOPP: -- the right of private
7 association.

8 JUSTICE SOTOMAYOR: -- that when the
9 petitioner or a person engages in political discourse
10 with the government, that they -- and they choose to do
11 it, because the government is not compelling them to
12 write to it, it is not compelling them to sign the
13 referendum. It's just --

14 MR. BOPP: And they are not compelling
15 Ms. McIntyre to distribute her brochure, either. But
16 this Court held that --

17 JUSTICE SOTOMAYOR: But it's -- but
18 Ms. McIntyre wasn't asking the government to engage its
19 process in her favor. She was asking for political
20 reform, but she wasn't asking to engage the government
21 process on her behalf.

22 MR. BOPP: Well, the government, you know,
23 has a lot of options. For instance, they don't have to
24 conduct elections for the election of judge. But if
25 they opt to do that and provide that procedure, well,

1 then, the First Amendment applies to the political
2 speech.

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

11 MR. BOPP: And your employer, as in this
12 case here.

13 JUSTICE ALITO: Could they do that?

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

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

19 MR. BOPP: They, of course, can -- can check
20 that.

21 JUSTICE SCALIA: Of course they can. So
22 they can get your name, right?

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

24 JUSTICE SCALIA: Okay.

25 MR. BOPP: -- and we are not objecting to

1 filing of the petition.

2 JUSTICE SCALIA: But you are objecting to
3 the public being able to check whether the agency is
4 indeed finding out whether this is a genuine petition or
5 not, correct?

6 MR. BOPP: No. No, I'm not objecting to
7 that.

8 JUSTICE SCALIA: Right?

9 MR. BOPP: They have procedures to check and
10 verify these signatures that do not involve full
11 disclosure.

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

15 MR. BOPP: California law does not require
16 disclosure of the petitions, and that has been upheld by
17 the courts of California. And you can verify these
18 signatures.

19 JUSTICE SCALIA: I don't understand. I
20 thought that is what you are challenging. The --

21 MR. BOPP: Well, but you asked about
22 California.

23 JUSTICE SCALIA: I'm sorry. I'm sorry.
24 Washington. I got the wrong State.

25 MR. BOPP: Okay.

1 JUSTICE SCALIA: Can you go -- the people of
2 Washington -- the people Washington evidently think that
3 this is not too much of an imposition upon people's
4 courage, to -- to stand up and sign something and be
5 willing to stand behind it.

6 MR. BOPP: In a sense --

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

11 MR. BOPP: Actually --

12 JUSTICE SCALIA: And you are saying that the
13 First Amendment absolutely forbids that.

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

16 JUSTICE SCALIA: That's fine. Proving my
17 point.

18 MR. BOPP: They did not publicly disclose
19 the petitions for a century.

20 JUSTICE SCALIA: It might have been a good
21 idea.

22 MR. BOPP: Well --

23 CHIEF JUSTICE ROBERTS: I suppose the -- a
24 majority of the voters in Washington decided that, and
25 one of the purposes of the First Amendment is to protect

1 minorities.

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

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

11 MR. BOPP: That is true. Some -- some in
12 their initiative and referendum statute, because they
13 actually provide some public input on verification where
14 Washington does not; others under their Public Records
15 Act. Some do not, such as California.

16 JUSTICE GINSBURG: So -- but what you are
17 saying with respect to Washington would go for most of
18 those other States that have -- that have public
19 disclosure of initiative and referendum petitions.

20 MR. BOPP: Well, one -- one thing we say is
21 different between Washington and these other States is
22 that Washington provides no way for the public, even if
23 they get access to the petitions, to participate in the
24 verification process.

25 The only thing the public can do is have --

1 observe -- a limited number of observers. These
2 observers are prohibited from --

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

8 MR. BOPP: That's not allowed in the State
9 of Washington. The instructions from the Secretary of
10 State is while you can have observers to observe the
11 process, the people --

12 JUSTICE GINSBURG: You mean if -- that was
13 over. It passed the screen of the Secretary of State.
14 It's disclosed to the public. If someone then said,
15 You've got a lot of dead souls on these lists, the State
16 would do nothing about it?

17 MR. BOPP: There is absolutely no procedure
18 under Washington statute to do anything with that
19 information. Nothing.

20 JUSTICE GINSBURG: Well, that's the -- well,
21 that's the --

22 MR. BOPP: Nothing.

23 JUSTICE GINSBURG: Well, that's the Attorney
24 General of Washington?

25 MR. BOPP: Yes.

1 JUSTICE SOTOMAYOR: Excuse me. Weren't two
2 of the Petitioners here seeking the list so that they
3 could go over the certification process the State had
4 done to ensure that they had certified all the right
5 people, et cetera?

6 MR. BOPP: Well, one of -- one of the
7 intervenors sought an exception from the -- from the
8 injunction, which we did not object to, that -- that
9 they would have access to the list. But under
10 confidentiality and protective order --

11 JUSTICE SOTOMAYOR: I'm not going to the
12 privacy questions. You responded to Justice Ginsburg by
13 saying that there was no way to challenge the State's
14 process of validation, and that -- I don't think that's
15 correct.

16 MR. BOPP: With all respect, I didn't say
17 that.

18 JUSTICE SOTOMAYOR: Oh.

19 MR. BOPP: What I -- what I said is there is
20 no role for the public in verifying signatures. You can
21 ask for judicial review --

22 JUSTICE SOTOMAYOR: That's assuming the
23 answer, meaning if they don't have the right to access,
24 they can't. But legally, they can challenge it if they
25 find on the petitions that things were erroneously

1 counted by the State. They can go into court and prove
2 that.

3 MR. BOPP: The only thing that they can do
4 is request that the court does its own count. In other
5 words, there's judicial review available. But the
6 public has no role in the verification, but they can
7 trigger judicial review. And then the court conducts
8 its own count.

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

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

17 MR. BOPP: Well, the observers can observe
18 the process, and if they feel --

19 JUSTICE GINSBURG: No, this is after the
20 observers. This is -- we are talking about a member of
21 the public noticing that there are people on the list
22 who shouldn't be there.

23 MR. BOPP: Well, the -- the observer --
24 under the Washington procedure, observers can observe
25 the process and if they feel, or if anyone feels,

1 that there has been an inadequate job in -- in
2 verification, then they can ask for judicial review.
3 And then the court can --

4 JUSTICE GINSBURG: Why would they ask for
5 judicial review instead of going first to the State's
6 Attorney General and saying, Look, you -- your people
7 missed it?

8 MR. BOPP: Well, there's no procedure for
9 that.

10 JUSTICE GINSBURG: Why involve the court?

11 MR. BOPP: That's not -- there is no
12 procedure for that. You know, if they wanted to involve
13 the public -- and that's the difference, I said, between
14 this procedure and other procedures. They are claiming
15 the need for public disclosure so the public can be
16 involved in verification. Well, there is no
17 procedure --

18 JUSTICE STEVENS: Isn't there another --

19 MR. BOPP: -- involved in verification.

20 JUSTICE STEVENS: Isn't there another
21 possible public interest? Would it be legitimate public
22 interest to say, I would like to know who signed the
23 petition, because I would like to try to persuade them
24 that their views should be modified?

25 Is there public interest in encouraging

1 debate on the underlying issue?

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

5 JUSTICE STEVENS: Well, it does identify
6 people who have a -- a particular point of view on a
7 public issue. And if you have the other point of view,
8 don't you have an interest in finding out who you would
9 like to convince to change their minds?

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

15 JUSTICE SCALIA: What about just -- just --
16 what about just wanting to know their names so you can
17 criticize them?

18 (Laughter.)

19 MR. BOPP: Well --

20 JUSTICE SCALIA: Is -- is that such a bad
21 thing in a democracy?

22 MR. BOPP: Well, what is bad is not the
23 criticism, it's the public -- it's the government
24 requiring you to disclose your identity and belief.

25 JUSTICE SCALIA: But part of the reason is

1 so you can be out there and be responsible for the
2 positions you have taken.

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

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

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

9 JUSTICE SCALIA: What do you mean, "both
10 sides"? The other side hasn't signed anything.

11 MR. BOPP: The other side --
12 (Laughter.)

13 JUSTICE SCALIA: When they sign something,
14 they will be out there for public criticism as well.

15 MR. BOPP: Okay. But this is a one-way
16 street.

17 JUSTICE SCALIA: Oh, this is such a
18 touchy-feely, oh, so sensitive about -- about any --
19 (Laughter.)

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

23 MR. BOPP: I'm sorry, Justice Scalia, but
24 the campaign manager of this initiative had his family
25 sleep in his living room because of the threats.

1 JUSTICE SCALIA: Well, that's bad. The
2 threats should be moved against vigorously, but just
3 because there can be criminal activity doesn't mean that
4 you -- you have to eliminate a procedure that is
5 otherwise perfectly reasonable.

6 MR. BOPP: But all we are asking for is a
7 First Amendment analysis of the compelled disclosure of
8 the identity of these people and whether or not these
9 interests are sufficient.

10 Can I reserve the balance of my time?

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

13 ORAL ARGUMENT OF GENERAL ROBERT M. MCKENNA
14 ON BEHALF OF THE RESPONDENTS

15 GENERAL MCKENNA: Mr. Chief Justice, and may
16 it please the Court:

17 I would like to begin with the question of
18 how the public can bring to the attention of the
19 government that errors and fraud have been discovered.

20 First of all, it's important to understand
21 that the petitions do not become public records after
22 the verification process, but in fact are made available
23 as public records before the verification process even
24 begins.

25 This is because the Secretary of State's

1 first step after receiving submitted petitions is to
2 take them to his archiving section and to have them
3 digitized. As soon as they are digitized, they are
4 available on disks for anyone who requests them. Then
5 the verification process begins.

6 During the verification process, it is
7 possible --

8 JUSTICE SOTOMAYOR: How much time are we
9 talking about in those processes?

10 GENERAL MCKENNA: The verification process,
11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Yes.

13 GENERAL MCKENNA: The verification process
14 will depend on how many signatures have been
15 submitted --

16 JUSTICE SOTOMAYOR: No, I'm trying to get
17 the relationship between the disks being made available
18 and the verification process.

19 So is there a time for the public to look
20 through the disks before the people who are sent into
21 the room are sent into the room?

22 JUSTICE GINSBURG: That's what you just
23 said, that they're -- that they are immediately
24 available on the disk, and so while the checking is
25 going on by the Secretary, the public has the list. Is

1 that what you just said?

2 GENERAL McKENNA: Yes, that's correct. For
3 example, in the case of Referendum 71, the proponents of
4 the referendum submitted the petition sheets on
5 Saturday, July 25, 2009, and on Tuesday, July 28, a
6 records request was already submitted. So they
7 can obtain records --

8 JUSTICE KENNEDY: Was that pursuant to the
9 Public Records Act that we are talking about --

10 GENERAL McKENNA: Yes.

11 JUSTICE KENNEDY: -- or was that part of the
12 initiative and referendum structure before the Public
13 Records Act was passed?

14 GENERAL McKENNA: Justice Kennedy, this is
15 part of the Public Records Act. This is as a result of
16 the Public Records Act that these petition sheets are
17 made available.

18 CHIEF JUSTICE ROBERTS: Counsel --

19 JUSTICE KENNEDY: So -- all right. So
20 this -- the public record -- pardon me; the -- in
21 California, we call it the initiative and referendum
22 process -- existed and was in place before the Public
23 Records Act added this additional feature of disclosure?

24 GENERAL McKENNA: Yes, that's correct.

25 JUSTICE KENNEDY: So there was a judgment at

1 one time by the State of Washington that it didn't --
2 that it didn't need the public records disclosure?

3 GENERAL McKENNA: Well, when the initiative
4 and referendum processes were created by public vote on
5 the Constitutional Amendment of 1912, there was no
6 Public Records Act at all. And the Public Records Act,
7 an act of general applicability, was adopted by the
8 voters in 1973 as part of an initiative which also
9 enacted comprehensive campaign finance reform.

10 CHIEF JUSTICE ROBERTS: Counsel, if the
11 State had a law that you could disclose voters and for
12 whom they voted, would that implicate First Amendment
13 interests?

14 GENERAL McKENNA: Yes, Mr. Chief Justice, we
15 would -- we do believe that First Amendment interests
16 would be implicated by revealing how people voted, and
17 we don't see a legitimate State interest in knowing how
18 people voted, only --

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

22 GENERAL McKENNA: No, Justice Scalia. I --

23 JUSTICE SCALIA: That it was
24 unconstitutional for a whole century not to have a
25 secret ballot?

1 GENERAL McKENNA: No, Justice Scalia, I
2 didn't say that I thought that the secret ballot was
3 constitutionally required. I was asked by the Chief
4 Justice whether some First Amendment interests would be
5 implicated. They probably would be.

6 CHIEF JUSTICE ROBERTS: What would the First
7 Amendment interests be?

8 GENERAL McKENNA: Well, the First Amendment
9 interest in how you vote?

10 CHIEF JUSTICE ROBERTS: Yes.

11 GENERAL McKENNA: You know, it might be
12 implicated by a potential chill from voting, if you know
13 your vote is going to be revealed.

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

17 GENERAL McKENNA: Mr. Chief Justice, some
18 chill may result, just as some chill may result from
19 having your campaign contributions disclosed, or the
20 fact that you have registered to vote and provided your
21 name, address, your voting history is being disclosed.
22 So some chill might be -- might result, but we do not
23 think that it is significant enough.

24 CHIEF JUSTICE ROBERTS: You don't think
25 revealing that you are a voter has the same chilling

1 effect as revealing how you voted, do you?

2 GENERAL McKENNA: No, I do not. I think how
3 you voted would have a much greater chilling effect than
4 the fact that you are registered to vote.

5 And -- and, of course, this Court has not
6 ruled on whether the secret ballot is, you know, a
7 constitutional right. If -- if it is, then is town hall
8 voting in New England unconstitutional? Is the caucus
9 system in Iowa for presidential candidates
10 unconstitutional? The Court in this case does not
11 have --

12 CHIEF JUSTICE ROBERTS: I thought you told
13 me that the First Amendment interests were implicated
14 with respect to the secret ballot, that you couldn't
15 require people to reveal how they voted.

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

25 JUSTICE ALITO: Well, I would like to know

1 how far you -- you are -- you want to go. You say in
2 your brief that the availability of the referendum
3 signature petitions allows Washington voters to engage
4 in a discussion of referred measures with persons whose
5 acts secured the election and suspension of State law.

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

11 GENERAL McKENNA: It -- it would depend on
12 the strength of the State interest in having the
13 telephone number. The State does not have an interest
14 in the telephone number on the petition form, because
15 the State has -- only needs to know from the petition
16 form the name and the address in order to verify --

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

23 GENERAL McKENNA: It -- yes, it probably
24 would make it easier for people to contact. And the
25 policy --

1 JUSTICE ALITO: So you would -- you would
2 endorse that?

3 GENERAL McKENNA: That would be a policy
4 determination for the legislature to make,
5 Justice Alito.

6 JUSTICE ALITO: No, I'm not asking the
7 policy question. I'm asking whether the First Amendment
8 would permit that.

9 GENERAL McKENNA: I believe it could permit
10 that, yes, Justice Alito.

11 JUSTICE ALITO: Now, one of your
12 Co-Respondents says that supplying this information
13 provides insight whether support comes predominantly
14 from members of particular political or religious
15 organizations.

16 Would it be consistent with the First
17 Amendment to require anybody who signs a petition to
18 list the person's religion?

19 GENERAL McKENNA: No, I do not believe it
20 would, Justice Alito.

21 JUSTICE BREYER: Suppose that in 1957 in
22 Little Rock, a group of Little Rock citizens had wanted
23 to put on the ballot a petition to require the school
24 board to reopen Central High School, which had been
25 closed because there was a sentiment in the community

1 that they didn't want integration. And it was pointed
2 out that if they signed this petition, there was a very
3 good chance that their businesses would be bombed, that
4 they would certainly be boycotted, that their children
5 might be harassed.

6 Now, is there no First Amendment right in
7 protecting those people? And if there is, how does it
8 differ from your case?

9 GENERAL McKENNA: Justice Breyer, that is
10 count two. That is count two of the Petitioners'
11 complaint. This Court ruled as recently as Citizens
12 United that such situations should be evaluated on a
13 case-by-case basis to evaluate the reasonable
14 probability of threats, harassments, and reprisals. But
15 that --

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

22 GENERAL McKENNA: Yes, Justice Scalia. That
23 would be the Socialist Workers Party case. This -- this
24 Court has ruled that on a case-by-case basis, it is
25 possible that some information otherwise disclosed --

1 JUSTICE KENNEDY: What about a business
2 boycott?

3 JUSTICE SCALIA: What about a general
4 challenge to ever, ever disclosing the names of petition
5 signers?

6 GENERAL McKENNA: Of any type of petition
7 including nominating petitions, initiative petitions,
8 and the rest.

9 JUSTICE SCALIA: All right.

10 JUSTICE KENNEDY: What about a business
11 boycott? Suppose that were a -- a likely outcome of
12 disclosing the name?

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

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

25 GENERAL McKENNA: Yes.

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

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

11 JUSTICE GINSBURG: And that would --

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

16 GENERAL MCKENNA: We -- there is no evidence
17 of that in the record. There's no evidence --

18 JUSTICE GINSBURG: Does -- is this --

19 CHIEF JUSTICE ROBERTS: There is no
20 evidence -- there is no evidence of episodes of violence
21 or intimidation?

22 GENERAL MCKENNA: Involving the
23 Referendum 71 signers? No. The evidence in the record
24 is about people who are out circulating petitions,
25 people who are out, you know, campaigning for the

1 petitions, the campaign manager for the measure. But
2 none of the evidence in the record speaks to petition
3 signers, and none of the evidence in the record speaks
4 to petition signers for other, similar measures which
5 were cited by the Petitioners.

6 JUSTICE GINSBURG: Is that because nobody
7 got to count two? And the district court -- this whole
8 case in the lower courts was on count one alone; wasn't
9 that so?

10 GENERAL MCKENNA: Yes, that is -- yes, that
11 is correct.

12 JUSTICE GINSBURG: And count two is the one
13 that deals with the harassment.

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

24 JUSTICE ALITO: Well, let's say somebody is
25 thinking of circulating a petition on a sensitive

1 subject and fears that people may be dissuaded from
2 signing because they fear retaliation. At what point
3 could they bring this as-applied challenge?

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

10 GENERAL MCKENNA: Justice Alito, it would be
11 possible procedurally for them to bring the motion for
12 an injunction even before collecting the signatures, if
13 they had sufficient evidence.

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

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

24 JUSTICE SCALIA: But -- but you -- you have
25 rejected that here. You said there is no evidence here

1 that any of the petition -- petition signers were
2 subjected to any harassment.

3 GENERAL McKENNA: Right.

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

9 GENERAL McKENNA: One could look to --

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

13 GENERAL McKENNA: I imagine, Justice Scalia,
14 that these individuals moving for that preliminary
15 injunction would do what the Petitioners have done to
16 this case. They would cite to an example from another
17 State involving a comparable --

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

20 GENERAL McKENNA: They can bring it into the
21 court. I'm not saying the court would accept it,
22 because I don't know --

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

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

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

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

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

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

1 been subject to harassment?

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

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

8 GENERAL McKENNA: There has been no measure
9 on domestic partner benefits or same-sex marriage in
10 Washington State, but there are other --

11 CHIEF JUSTICE ROBERTS: No, but what's
12 the -- what's the other one that's going to get
13 people -- that's the most controversial public issue?

14 GENERAL McKENNA: Justice --

15 JUSTICE SOTOMAYOR: Proposition 8?

16 GENERAL McKENNA: Well --

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

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

24 CHIEF JUSTICE ROBERTS: Was the referendum
25 in favor or opposed to assisted suicide?

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

6 So there have been controversial measures.

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

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

13 GENERAL McKENNA: Yes.

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

19 GENERAL McKENNA: Justice Kennedy, we have
20 considered the history of the Petition Clause. And we
21 see a basic difference between the kinds of petitions
22 under the Petition Clause and the petitions at issue
23 here, because essentially, petitioning the government
24 under the Petition Clause is asking the government to do
25 something. You are petitioning them: Please do

1 something.

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

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

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

15 GENERAL MCKENNA: And, Justice Kennedy, I
16 would like to speak to that question, because several
17 justices asked: Well, what can we tell from what, you
18 know, someone who signed? Do we know how they are going
19 to vote.

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

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

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

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

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

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

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

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

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

1 voting lists?

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

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

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

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

24 JUSTICE ALITO: Well, what's the answer to
25 my question? Couldn't you -- couldn't this be done

1 simply? If I want to see whether somebody has
2 fraudulently signed my name, very quickly go to a
3 website, wouldn't be expensive to set up, put in your
4 voter ID number, and see whether -- and your name, and
5 see whether you are on the -- on the -- whether you --
6 somebody signed your name to the petition?

7 GENERAL McKENNA: Yes, Justice Alito,
8 that -- that could be done. And in our State and the
9 other States that's done when somebody requests public
10 records and chooses them to put online. The State
11 doesn't -- does not put the petition forms online
12 itself, although, you know, other information is put
13 online by the State.

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

19 GENERAL McKENNA: No, we were not taking
20 that position, Justice Kennedy. Of course --

21 JUSTICE KENNEDY: I mean without public
22 disclosure?

23 GENERAL McKENNA: What we know,
24 Justice Kennedy, is that in dozens of States around
25 the -- around the country, as recently as 2009 in

1 Maryland, 2006 in Massachusetts, and so on, it was
2 the -- it was the public who requested ballot petitions
3 by public records request who found significant fraud
4 and error. This isn't just about fraud -- fraud is very
5 important -- it's also about finding plain old mistakes
6 which the State, Secretary of State, or auditor has
7 missed.

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

13 JUSTICE SCALIA: Sometimes the public may
14 not trust the Secretary of State.

15 GENERAL MCKENNA: Yes, sir. Justice Scalia,
16 we agree.

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

21 GENERAL MCKENNA: That goes to the heart to
22 the Public Records Act, Justice Scalia, trust but
23 verify. The people did not leave to the State the idea
24 that, well, we will let you know what you need to know.

25 JUSTICE SCALIA: Trust but verify, I like

1 that.

2 (Laughter.)

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

10 GENERAL MCKENNA: The speech element could
11 be construed in the fact that someone has chosen to sign
12 a petition which we know means they want something to be
13 put on the ballot. So, they favor having it on the
14 ballot. That -- that much we know.

15 But we also looked to Burdick, of course,
16 because in this -- in -- in the Burdick decision this
17 Court held right in voting could be prohibited by the
18 State of Hawaii. That was upheld by the court of
19 appeals and this Court. And this Court found that
20 writing in a candidate's name was not even expressly
21 conduct.

22 So we look to the Burdick level of
23 intermediate scrutiny, to the O'Brien level of
24 intermediate scrutiny for the test.

25 Justice Ginsburg, the other point I wanted

1 to bring up is something about Buckley II.

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

5 GENERAL MCKENNA: The non-speech component
6 is suspension of law in the case of a referendum or the
7 legislative effect. We believe this is a legislative
8 act fundamentally.

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

17 GENERAL MCKENNA: The interest, Justice
18 Alito, is knowing, first of all, that there were a
19 sufficient number of signatures submitted to qualify the
20 measures for the ballot.

21 JUSTICE ALITO: The fraud interest?

22 GENERAL MCKENNA: That's the fraud interest.

23 And secondly, there is an valid information
24 interest in knowing who is it exactly who is calling for
25 this election and suspending --

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

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

14 GENERAL MCKENNA: No, Justice Alito, we
15 don't need to know that. We need to know whether there
16 were a sufficient number of registered voters who
17 signed -- we need to know whether they signed more than
18 once, we need to know they are registered in Washington
19 State.

20 Informational interest I think that could
21 you -- the information you could collect to satisfy
22 informational interest might include other information
23 that is in the voter registration records. You might
24 want to know --

25 CHIEF JUSTICE ROBERTS: I thought one of the

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

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

18 JUSTICE ALITO: Then I don't understand what
19 information is being -- what information you think you
20 are providing to the public. Outside of the fraud area,
21 if I see that John Jones from Seattle signed this
22 petition, that tells me absolutely nothing.

23 GENERAL McKENNA: Well, Justice Alito, it
24 might -- if you know John Jones that might tell you
25 something. Number two, we know from the -- we know from

1 the, you know, Direct Democracy Scholars green brief
2 that intermediaries and especially the press and
3 sometimes social science researchers and others will --
4 will look at the names, and they will be able to tell,
5 for example, that a large number of employees at one
6 company a measure; maybe it's a measure that would cut a
7 tax break for a particular industry. Or perhaps members
8 of a union, large numbers have signed --

9 CHIEF JUSTICE ROBERTS: How can they -- how
10 can they find that out with just the name and address,
11 that a large number of people from a company it?

12 GENERAL MCKENNA: Well --

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

15 GENERAL MCKENNA: No, you do not. I'm
16 saying intermediaries might discover this, for example,
17 by taking a close look at who is paying for the
18 signature gathering. If it's paid signature gathering,
19 they might be aware of prominent sponsors. In fact,
20 the -- the importance of knowing who the sponsors is, is
21 demonstrated --

22 CHIEF JUSTICE ROBERTS: I'm sorry, I'm still
23 on the companies. How -- how does knowing who the
24 sponsors are tell you how many people from a particular
25 company signed the petition?

1 GENERAL McKENNA: Well, a voter who -- who
2 works at that same company or does business with that
3 same company might know that, gosh, I know these
4 employees and they've -- they have all signed this
5 petition. The press may be able to do research to find
6 this out. Intermediaries do play an important role.

7 The last point if I may, I wanted to make,
8 about -- about Buckley II is that the Petitioners have
9 stressed that Buckley II down the requirement to wear
10 the name badge. But in that same decision this Court
11 upheld the requirement by Colorado that affidavits
12 signed by the petition circulators including the
13 petition circulator's name and address can be disclosed
14 as public records.

15 And the Court ruled that -- found that and
16 compared it favorably to the badge requirement because
17 the disclosures occurred after the heat of the moment.
18 After the moment of interactive discussion; it happened
19 later on. And we believe of all the Court's rulings
20 that -- that approval of the disclosure requirement of
21 the -- of the affidavit, in contrast to the badges, the
22 most similar to requiring after the fact or allowing
23 after the fact for petitions to be disclosed under the
24 Public Records Act.

25 JUSTICE ALITO: You know, if somebody called

1 your office and said, "I'd would like the -- the home
2 address of all the attorneys who work in the attorneys
3 general office because we want to -- we want to go to
4 their homes and have uncomfortable conversations with
5 them" --

6 (Laughter.)

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

9 GENERAL McKENNA: We would not, Justice
10 Alito. We could not release it because they can come to
11 the office and have uncomfortable conversations with
12 them --

13 (Laughter.)

14 GENERAL McKENNA: -- which I can personally
15 attest happens with some regularity.

16 (Laughter.)

17 JUSTICE SCALIA: Isn't that information, at
18 least the names of those people, isn't it probably
19 public information anyway?

20 GENERAL McKENNA: Yes, it is,
21 Justice Scalia.

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

24 GENERAL McKENNA: Yes, it can. Their names,
25 their office locations, their office phone numbers,

1 their office e-mails, all a matter of public record in
2 our State.

3 Thank you very much.

4 CHIEF JUSTICE ROBERTS: Thank you, General
5 McKenna.

6 Mr. Bopp, you have 2 minutes remaining.

7 REBUTTAL ARGUMENT OF JAMES BOPP, JR.,

8 ON BEHALF OF THE PETITIONERS

9 MR. BOPP: Thank you. First a clarification
10 of what we sought in the preliminary injunction. We
11 were -- we sought to base our preliminary injunction on
12 both count one and count two. Of course, the district
13 court and the Ninth Circuit did not reach -- in either
14 case reach count two.

15 Secondly, with respect to whether or not
16 there is any conduct here, I don't think signing a
17 written statement is conduct. And of course by signing
18 the statement, the person is adopting the statement on
19 the petition, one of which involves their preference on
20 the referendum, and the second is the -- the request
21 that the matter goes on the ballot, and of course it has
22 no legal effect unless 122,000 make the same political
23 statement.

24 Third, evidence of harassment comes in --
25 as in Citizens United, because the weight of the

1 interest that is required depends upon the burden of the
2 First Amendment -- to the First Amendment speech
3 involved; and this Court specifically referred in
4 Citizens United to the lack of evidence of harassment of
5 the donors that might occur if they were disclosed
6 through the reports which Citizens United upheld.

7 Here we do have evidence of harassment, and
8 we believe that that requires a greater burden. In the
9 First Amendment --

10 JUSTINE GINSBURG: But that's out of the
11 case up till now. That's count two. You put it in your
12 pleading, but it wasn't reached by the court.

13 MR. BOPP: Actually not.

14 JUSTICE GINSBURG: So everybody agrees
15 that's still in the case.

16 MR. BOPP: Yes, but it is relevant to count
17 one. Bates, for instance, looked to the evidence of
18 harassment in protecting the membership list of the
19 NAACP from disclosure.

20 JUSTICE GINSBURG: The court did not rule on
21 whether there was a risk of harassment here. It dealt
22 only with count one.

23 MR. BOPP: That -- that is true, Your Honor.
24 There are -- there were several First Amendment claims
25 made -- made under count one, and this decision was --

1 was based on other claims.

2 I see my time is up. Thank you.

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

4 The case is submitted.

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

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