

PROTECTING ANONYMOUS EXPRESSION: THE INTERNET'S ROLE IN WASHINGTON STATE'S DISCLOSURE LAWS AND THE DIRECT DEMOCRACY PROCESS

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"The rate at which the internet has grown and evolved into a universal source of news and information has left the legal community in its dust. The time has come for the law to begin establishing its place in this vast abyss."

INTRODUCTION

The Internet created a new and convenient means of accessing practically unlimited information. With regards to publicly revealing the privately held political views of others, however, it is time to establish a limit to the Internet's ability to disseminate information. Without such a limitation, the individual right to anonymous political expression will be forfeited. Despite Justice Stevens' assurance in *Reno v. American Civil Liberties Union*,² decided in 1997, that the Internet does not invade an individual's life "unbidden,"³ the issues at the heart of *Doe v. Reed*,⁴ recently decided by the United States Supreme Court, suggest that Justice Stevens underestimated the Internet's capacity to disclose traditionally private information.

The events leading to litigation in *Doe v. Reed* began when the Washington State Legislature passed the "Everything But Marriage Act" (EBM Act) in May 2009, which expanded the rights to which Washington State citizens in domestic partnerships were entitled to encompass all of the rights already enjoyed by married citizens. Private citizens who signed a referendum petition (R-71) to put the Act to a public vote claimed that their constitutional right to anonymous political speech was threatened after several gay rights organizations promised they would obtain the petition under the Washington Public Records Act (PRA) and post the

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1. Too Much Media, L.L.C. v. Hale, No. MON-L-2736-08, 2009 WL 2578521, at *7 (N.J. Super. Ct. Law Div. Sept. 10, 2010).

2. 521 U.S. 844 (1997).

3. *Id.* at 869.

4. 130 S. Ct. 2811 (2010).

names and addresses of the signers on publicly accessible, searchable websites.⁵ This case pitted two fundamental American freedoms against one another: the right to access information that enables evaluation of the legislative process versus the right to support political and ideological causes anonymously.⁶ By granting one right absolutely and at the expense of the other, however, the Washington Secretary of State and the reviewing courts ignored the pivotal role the Internet played in the conflict and subsequently precluded the possibility of its accommodating the demands of both rights in the context of this case.

In addition, Washington's existing precedent and statutes did not provide a clear framework with which the *Reed* courts could analyze and balance competing interests, while accounting for the pervasive nature of the Internet, particularly with regard to involuntary disclosure. After all, when the Washington legislature passed laws establishing disclosure and privacy rights of its citizens, thus setting up the framework for *Reed*, it could not have predicted the emergence of the Internet, let alone the Internet's limitless capability for disseminating information. A UCLA Law professor specializing in cyberspace communications warned twelve years ago: "[t]he new communications technologies are transforming our society, propelling us further into the Information Age. And as we accelerate into this new era, we slam into new problems or old ones that have morphed into unrecognizable shapes. One such problem is information privacy, which the coming cyberspace threatens."⁷ The contentious relationship between anonymous political speech and transparency central to *Reed* is one such "old" problem morphed into an unrecognizable shape. Accordingly, legal scholars and practitioners must recognize that the Internet's role in disclosing and spreading, without limit, information about individuals is modifying our country's conception of fundamental freedoms.⁸ *Reed* signals that it is time to acknowledge that by mak-

5. As of May 9, 2011, no websites have posted the information on R-71.

6. *Doe v. Reed*, 130 S. Ct. 2811, 2817–18 (2010) (noting the legitimate and fundamental interests of both sides).

7. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1284 (1998) (internal footnote omitted).

8. See Linda Greenhouse, *Into the Closet*, N.Y. TIMES OPINIONATOR (Jan. 14, 2010, 9:34 PM), <http://opinionator.blogs.nytimes.com/2010/01/14/into-the-closet/> (noting that the Supreme Court's decision that the U.S. Court of Appeals for the Ninth Circuit could not broadcast on YouTube.com the oral arguments in *Hollingsworth v. Perry*, the Proposition 8 case, "suggests that a merger of two separate lines of First Amendment precedent, one on freedom from compelled disclosure and the other on access to government proceedings, may not be far off. In fact, in this media-saturated age, it may be overdue. Whether this deeply divided court can navigate the contested terrain of same-sex marriage to arrive at a useful synthesis is another question.").

ing ideological and previously understood to be private aspects of one's life transparent to all, the Internet is rapidly eroding the individual—and thus, *everyone's*—right to choose what to publicly express. Following this controversial case, Washington State's Legislature now has the opportunity to modify disclosure laws and referendum processes created when disclosure possibilities were not nearly as expansive and intrusive as they are now, and to do so in a way that reflects a compromise between two valuable interests.

This Note proposes that the Washington State Legislature amend its Public Records Act to exempt from public disclosure personal information legally required to be disclosed by signers of referendum petitions. This Note also proposes that the Washington State Legislature designate an electronic system, to be detailed in its election law, by which referendum petitions can be checked for fraud without violating the right to anonymous expression protected by the First Amendment. Part I describes Washington State's referendum process and the path of *Doe v. Reed*, the case animating the reform presented in this Note. Part II illustrates how the rise of the Internet complicated the interpretation of the PRA; this section further demonstrates that the PRA could not have been intended to apply to referendum petitions. Part III proposes a statutory reform to Washington's PRA. Finally, this Note concludes that such a reform simultaneously advances the ideals of transparent government and an election process imbued with integrity, while providing a shield of anonymity for petition signers wishing to maintain a degree of privacy when participating in an expressive, direct, democratic process.

I. EVENTS LEADING UP TO *Doe v. Reed* AND *Reed's* PATH THROUGH THE COURTS

The "Everything But Marriage" Act was passed in Washington State in November 2009. The Act extended all rights, not previously granted, and except where prohibited by federal law, attendant to marriage to persons in domestic partnerships: specifically, rights concerning adoption and employee benefits such as pensions or insurance coverage.⁹ A referendum measure to overturn the EBM Act was submitted to Washington State voters on the November

9. Rachel La Corte, *Next Debate in Washington: Gay Marriage?*, SEATTLE TIMES, May 17, 2009, at B2, available at http://seattletimes.nwsourc.com/html/politics/2009228905_domesticpartnerships17m.html; Rachel La Corte, *Wash. Senate Passes "Everything But Marriage" Bill*, SEATTLE TIMES (Mar. 10, 2009) http://seattletimes.nwsourc.com/html/localnews/2008838858_apwaxgrdomesticpartnerships1stdwritethru.html.

2009 elections ballot as R-71, but a majority voted in favor of not repealing the EBM Act, marking the first time in U.S. history that voters approved a state ballot measure extending the rights of same-sex couples.¹⁰ This approval by Washington citizens qualified Washington State as one of the ten U.S. States whose citizens were willing to offer the most rights to same-sex couples.¹¹

Voter approval of the EBM Act also placed in doubt whether a majority of Washington State citizens continued to support the State's 1998 implementation of the 1996 Federal Defense of Marriage Act (DOMA), which gives states the option of legally defining marriage exclusively as the union between a man and a woman.¹² The Washington State statute applying DOMA explicitly invoked the will of the in passing a law pertaining to marriage; section 26.04.010 of the Revised Code of Washington was modified to read that the Washington legislature and the people of Washington State found that "[marriage] matters should be determined by the people within each individual state and not by the people or courts of a different state."¹³ The slim majority rejecting R-71, however—only 53%¹⁴—by no means indicates a decisive majority likely to hide any real hints of dispute. On the contrary, it highlights the division within the state on a traditionally polarizing social issue, illustrating the roughly equal strength of support for both sides. The competing rights at issue in the context of *Reed* similarly embody an equivalent opposition in that there is not necessarily a clear victor.

A. Washington State's Referendum Process

More than half of U.S. states permit at least one of two forms of what is referred to as direct democracy. One form, the initiative, allows members of a state's electorate to petition to place new laws

10. La Corte, *Next Debate in Washington: Gay Marriage?*, *supra* note 9.

11. See Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion & Policy Responsiveness*, 103 AM. POL. SCI. REV. 367, 373 (2009).

12. See *Washington: Statewide Relationship Recognition*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions/washington.html> (last visited Jan. 29, 2010); see generally WASH. REV. CODE § 26.04.010 (2005) (stating the legislature's intent "to fully exercise the authority granted the individual states by Congress in [DOMA] to establish public policy against same-sex marriage in statutory law that clearly and definitively declares same-sex marriages will not be recognized in Washington, even if they are made legal in other states."). Then-governor Gary Locke vetoed the implementation of DOMA, but was overridden by the legislature in a matter of hours.

13. WASH. REV. CODE § 26.04.010 (2010).

14. Mark Walsh, *On the Campaign Trail: Court Weighs Arguments for Anonymity on Public Petitions*, A.B.A. J., at 20 (June 2010), available at http://www.abajournal.com/magazine/article/on_the_campaign_trail/.

on a state ballot. The other form, the referendum, allows members of a state's electorate to petition to get an act recently passed by the legislature on a ballot, so that state citizens can then vote to uphold or overturn the act.¹⁵ The Constitution of Washington State permits both forms, and thus allows its citizens to reject a law or part of a law as long as petitioners comply with the statutory requirements for putting initiatives or referendums on election ballots.¹⁶ A referendum petition must be submitted not more than ninety days after the final adjournment of the session of the legislature that passed the act.¹⁷ If the number of valid signatures on the timely-submitted petition is equivalent to or in excess of 4% of the number of votes cast in the most recent gubernatorial election, the act will be placed on the ballot for the next November election to be approved or rejected by all registered voters in the state.¹⁸ In addition to signing a referendum petition and printing their names, petition signers must also disclose their home addresses and the county in which they are registered to vote.¹⁹

After a referendum petition is filed, the Washington Secretary of State verifies the petition by canvassing the names on the petition. Washington State law provides that this process

may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process . . . The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides.²⁰

15. LEAGUE OF WOMEN VOTERS, *DIRECT DEMOCRACY: THE INITIATIVE AND REFERENDUM PROCESS IN WASHINGTON STATE* 3 (2002), available at <http://lwvwa.org/pdfs/studies/init-ref-study.pdf>.

16. The two related forms are often addressed together due to the shared characteristic of citizens voting to pass or repeal a law, but it is crucial to not confuse the forms' respective processes: whereas a referendum allows the public to express support or opposition to an existing bill drafted and passed by the legislature, an initiative is undertaken when a group or individual proposes a new state law to be submitted to the legislature or voters. OFFICE OF THE SEC'Y OF STATE, ELECTIONS DIV., *FILING INITIATIVES & REFERENDA IN WASHINGTON STATE* 5 (2011), available at http://www.secstate.wa.govt/elections/pdf/filing_initiative_and_referenda_manual_2005-2008.pdf.

17. WASH. REV. CODE § 29A.72.160 (2010).

18. WASH. CONST. art. II, § I(b) (amended 2007).

19. WASH. REV. CODE § 29A.72.130 (2010).

20. *Id.* § 29A.72.230.

After completing the verification process, the Secretary of State issues a determination as to whether the petition contains the requisite number of valid signatures. Any citizen unsatisfied with this determination can appeal it by filing an action in the state superior court requesting a citation requiring the Secretary of State to submit the petition for court evaluation.²¹

B. Doe v. Reed: The Case Animating Reform

Alarmed by the state legislature's passage of the EBM Act, which Governor Christine Gregoire signed into law on May 18, 2009, citizens opposing the law formed a political action committee called Protect Marriage Washington (PMW) to sponsor a referendum petition to overturn the EBM Act and put the issue of whether the rights within the Act should be granted to domestic partners to a public vote.²² PMW initiated the signature collection process necessary for the referendum.²³ It collected roughly 138,000 signatures of Washingtonians and submitted the petition to the Secretary of State by the end of July 2009 in compliance with the statutorily prescribed 90-day time period.²⁴ Two organizations promptly requested the list of those who signed the petition and publicly declared that they would post online the names and addresses of the signers to make the gay marriage debate public. In their requests for the petition, the groups cited Washington State's Public Records Act (PRA), passed in 1973, which granted public access to government documents so that Washington State citizens could be informed of and maintain control over the government institutions created by and for the people.²⁵

21. *Id.* § 29A.72.240.

22. According to a mission statement on its website, the purpose of PMW was to "organize the effort to gather the 120,577 required signatures for Referendum 71 by July 25, 2009 to bring the controversial Senate Bill 5688 before the voters of Washington State in November." The belief animating the group's efforts was rooted in the concern that marriage would soon be available to same-sex couples: "In truth, [the EBM Act] will demolish the state's historical understanding and definition of marriage as that of uniting a man and a woman for life as Washington State will immediately become subject to litigation by same-sex partners demanding that the courts overturn the Defense of Marriage Act and impose 'same-sex marriage' . . ." PROTECT MARRIAGE WASH., <http://protectmarriagewa.com/> (last visited Jan. 5, 2011) (emphasis omitted).

23. Complaint at 4, *Doe v. Reed*, No. 09-5456BHS, (W.D. Wash. July 29, 2009), *rev'd*, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 130 S. Ct. 2811 (2010).

24. WASH. REV. CODE § 29A.72.160(1) (2010) (providing a 90-day period during which signatures can be collected in order to qualify a referendum for the ballot); *see also* FILING INITIATIVES & REFERENDA IN WASHINGTON STATE, *supra* note 16, at 6.

25. WASH. REV. CODE § 42.56.030 (2010). *See infra* note 77 and accompanying text.

WhoSigned.org (WhoSigned), one of the organizations that requested the petition, was expressly formed for the purpose of exposing R-71 signers via a searchable database on the organization's website.²⁶ The home page of WhoSigned's website features an image of a bright spotlight and states, "We believe the process for initiative and referendum petitions that maintain discrimination . . . must meet a high standard of transparency to ensure a fair and open discussion in the public forum."²⁷ KnowThyNeighbor.org (KTN), the other organization that requested the petition, was formed in 2005 to enable anyone wanting to "stand up for equal rights" to find the names and addresses of "friends, neighbors, family, co-workers, etc." in a searchable database of persons who signed petitions circulated primarily to repeal state legislation expanding gay rights.²⁸ KTN encourages "neighbor-to-neighbor advocacy" and claims it exists to "ensure" that "face to face conversation[s]" happen with those who signed ballot initiative petitions.²⁹

Within days, two unnamed individuals who had signed the petition—John Doe #1 and John Doe #2—along with PMW moved for an injunction and a temporary restraining order against Sam Reed, in his official capacity as Washington's Secretary of State, and Brenda Galarza, in her official capacity as Washington State's Public Records Officer. The remedies sought would prevent disclosure of personal information contained in the referendum petition to third parties requesting the petition under the PRA. The Complaint included two counts. Count I, a facial challenge, alleged that the PRA violated an individual's right, protected by the First Amendment, to speak anonymously, since the PRA was not narrowly tailored to serve a compelling government interest. Count II, an as-applied challenge, alleged that in the context of R-71, the PRA is unconstitutional since it creates a reasonable probability that signatories would be subjected to threats, harassment, and reprisals.³⁰ The Complaint noted WhoSigned's and KTN's intentions to publicly disclose petitioner information on the Internet in a searchable format and also their hopes that petition signers would be confronted by R-71 opponents.³¹ The Complaint also mentioned

26. See WHO SIGNED.ORG, <http://www.whosigned.org> (last visited Jan. 5, 2010).

27. *Id.*

28. *About KnowThyNeighbor.org* KNOWTHYNEIGHBOR.ORG, <http://www.knowthyneighbor.org/national/> (last visited Jan. 5, 2011).

29. *Id.*

30. Complaint at 10–11, *Doe v. Reed*, No. 09-5456BHS (W.D. Wash. July 29, 2009), *rev'd*, 586 F.3d 671 (9th Cir. 2009), *aff'd*, 130 S.Ct. 2811 (2010).

31. *Id.* at 6.

concerns that potential reprisals for the particular political views disclosed would consequently inhibit citizens from participating in direct democracy processes in the future.³²

Citing reasonable likelihood of irreparable harm to an individual's First Amendment freedoms, Judge Settle of the Western District of Washington granted the temporary restraining order.³³ Although neither of the State Respondents had responded to the initial motion, they appealed the order. In the meantime, on September 2, 2009 Secretary of State Sam Reed certified R-71 even after throwing out nearly 16,000 signatures because they were either duplicates or invalid because the signer either was not a registered voter or had not filled out the required referendum information properly.³⁴ The following day, the District Court granted motions to intervene submitted by Washington Families Standing Together and Washington Coalition for Open Government, allowing those two organizations to join the State Respondents in their appeal.³⁵ On September 10 the Western District held that the First Amendment protected an individual's right to participate anonymously in the political process and further, that it is always in the public interest to protect individual fundamental constitutional rights, including the right to anonymous political expression.³⁶ Reed and Galarza promptly appealed this decision.

On appeal, although the Ninth Circuit explicitly acknowledged that the PRA burdened the expression undertaken when signing referendum petitions and also said it had no views on whether such signing was a legislative act, on October 22, 2009 it reversed the District Court based on the premise that the District Court had falsely designated the political speech implicated as expression entitled to anonymity.³⁷ The Court of Appeals provided four reasons

32. *Id.* at 8.

33. *Reed*, No. 09-5456BHS, slip op. at 1 (W.D. Wash. July 29, 2009).

34. SEC'Y OF STATE SAM REED, CERTIFICATION OF REFERENDUM 71 (2009), available at <http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Documents/R-71%20Certification.pdf>.

35. Washington Families Standing Together was founded to preserve domestic partnership laws in Washington State and, more specifically, to ensure that the signatures on R-71 were valid. See Anne Levinson, *Statement from Washington Families Standing Together Concerning Litigation Filed on August 27th to Protect Families In Washington State*, APPROVE71.ORG, <http://approverreferendum71.org/08/statement-from-wafst-about-litigation-filed-today/> (last visited May 9, 2011). The Washington Coalition for Open Government was formed to "act as an independent, non-partisan, non-profit organization dedicated to promoting and defending the People's right to know in matters of public interest and in the conduct of the public's business . . . to help foster open government processes, supervised by an informed and engaged citizenry, which is the cornerstone of democracy." *Mission Statement*, WASHINGTONCOG.ORG, <http://www.washingtoncog.org/mission.php> (last visited Jan. 5, 2011).

36. *Doe v. Reed*, 661 F. Supp. 2d 1194, 1200, 1205 (W.D. Wash. 2009).

37. *Doe v. Reed*, 586 F.3d 671, 677 (9th Cir. 2009).

why the signatures were not anonymous speech: 1) the signatures were gathered in public, indicating that the gathering process made no promises as to confidentiality of identity; 2) since each petition page had 20 spaces for signatories, a signer's identifying information could be seen by up to 19 other signers; 3) the petition could not be understood as confidential because it is submitted to the State for verification; and 4) Washington law unambiguously gives both proponents and opponents of a petition the right to observe the verification process.³⁸ The opinion further explained that, in determining whether the PRA was unconstitutional, the District Court improperly applied a strict scrutiny standard rather than an intermediate scrutiny standard. The intermediate scrutiny standard was more appropriate in *Reed* since speech was accompanied by conduct—here the act of signing the referendum petition—thus relaxing the level of scrutiny applied.³⁹ Under the intermediate scrutiny standard, the PRA is constitutional so long as the suppression of speech resulting from a burden on expression is only incidental and the burden is no greater than necessary to justify an important government interest.⁴⁰ The court found that this standard was met, reasoning that the PRA “does not prevent the petition signers from signing the petitions or from otherwise lawfully qualifying their referendum for a vote. At most, it *might* deter *some* voters from signing the petition.”⁴¹ The court also stated that disclosure of signature details furthered transparency in government functions, an important state interest unrelated to the suppression of free expression.⁴²

A few days after the decision was submitted on appeal to Justice Anthony Kennedy, who handles Ninth Circuit emergency matters, the U.S. Supreme Court stayed the lower court's injunction until the Supreme Court decided the case.⁴³ The Supreme Court granted certiorari on January 15, 2010⁴⁴ and on April 28, 2010 heard oral argument. The transcript of the arguments reveals that almost all of the Justices seemed to support the State's contention that disclosing all referendum and initiative petitions furthered the State's interest in transparency and accountability in an electoral process.⁴⁵ Refusing to address the question as to whether the PRA

38. *Id.* at 678 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1976)).

39. *Id.*

40. *Id.* at 679.

41. *Id.* at 678 n.11 (emphasis in original).

42. *Id.* at 679.

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

44. *Doe v. Reed*, 130 S. Ct. 1133 (Jan. 15, 2010) (mem.).

45. Transcript of Oral Argument at *passim*, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

was unconstitutional as-applied since that question was then pending in the District Court, the Supreme Court held 8-1 that the PRA was not unconstitutional on its face and that states have ample leeway in structuring their voting systems. The Court allowed for the disclosure of identities in a referendum petition when requested by any citizen—even by those looking to widely disseminate the information for the sole purpose of exposing another’s previously privately-held beliefs.⁴⁶ The Court, however, did note that when a referendum addresses a particularly controversial subject, if raised in an as-applied challenge and signers could show their political expression of support would likely induce harassment, the petition might reasonably be deemed exempt from public disclosure.⁴⁷

II. UNFORESEEN AND OVERLOOKED EFFECTS OF INTERNET DISCLOSURE ON FIRST AMENDMENT & INDIVIDUAL PRIVACY RIGHTS

Neither the parties nor the courts involved in *Doe v. Reed* denied that the case addressed issues regarding freedom of speech and that the nature of the relevant speech was political. Neither did any parties involved deny that the First Amendment protects anonymous political speech. The Ninth Circuit, however, circumvented this First Amendment protection in *Reed*, by specifically holding that the R-71 signers were not actually speaking anonymously in signing the petition. The Ninth Circuit thereby avoided characterizing the issue in *Reed* as whether the PRA violated the signers’ rights by directing disclosure of political speech that should normally be accompanied by the right to anonymous expression.⁴⁸ Further, the Supreme Court also failed to address the necessity of clarifying the ambiguous PRA to account for the Internet as a new disclosure mechanism that significantly alters the relationship between public disclosure and expression of support for a referendum petition.

Since the founding of the U.S., the ability to express oneself anonymously, especially with regard to political or ideological issues, has been held invaluable by persons wishing to join together for political and social change yet avoid social stigma or other

46. *Reed*, 130 S. Ct. at 2827 (Sotomayor, J., concurring).

47. *Id.* at 2823–24 (Alito, J., concurring).

48. Although the Supreme Court held that referendum petitions could be disclosed under the PRA since the Act was not unconstitutional on its face, the Court at least acknowledged the strong competing interest of the signers in anonymous political expression. *See id.* at 2818.

backlash that may result from engaging in unpopular speech.⁴⁹ This fundamental right played an essential role in the debates that built the structure of the U.S. political and legal system. If it were not for the right to anonymous expression, we might not have had the Federalist Papers, which were published by Alexander Hamilton, James Madison, and John Jay under the alias “Publius” to gain public support for ratification of the U.S. Constitution.⁵⁰ Recently the Supreme Court affirmed its understanding of a fundamental right as a liberty “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”⁵¹ Such rights are generally protected to the highest degree.⁵² Under this definition, it is close to inconceivable that one could find a more fundamental right than that to anonymous political expression.

The Supreme Court has pointed to the Federalist Papers as the origin of the right to anonymous speech protected by the First Amendment numerous times, most notably in *McIntyre v. Ohio Elections Commission*, which held that Ohio’s statutory prohibition against distribution of anonymous campaign literature violated the First Amendment.⁵³ In *McIntyre*, the Court dismissed the contention of the State of Ohio that a reader can better evaluate a message in a political pamphlet if informed of the pamphlet’s author.⁵⁴ In that opinion, Justice Stevens wrote:

Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that the writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if

49. See *id.* at 2839 (Thomas, J., dissenting).

50. *Talley v. California*, 362 U.S. 60, 64–65 (1960).

51. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted).

52. *Id.*

53. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (pointing to the Federalist Papers as an example of potentially unpopular political speech which required protection of anonymity due to the potential for political persecution); see also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981); *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 625 (1976) (Brennan, J., concurring).

54. *McIntyre*, 514 U.S. at 348–49.

anything, to the reader's ability to evaluate the document's message.⁵⁵

Considering the high level of protection the Supreme Court has traditionally afforded anonymous political expression, one could apply Justice Stevens' reasoning to the circumstances involved in *Reed*: disclosing the identity of a petitioner does not add or detract any value from the petitioner's vote. *McIntyre* is distinguishable from *Reed* in that it involved distribution of anonymously distributed political literature rather than anonymous disapproval of a law through a referendum. Yet the disapproval in *Reed* is more analogous to voting on political issues normally protected by the secret ballot and thus merits a higher degree of protection regarding the anonymity of political views.

In *Reed*, Respondents claimed that public disclosure is valuable because voters are generally entitled to know all relevant information about a political issue to be able to properly evaluate it.⁵⁶ Respondents do not sufficiently explain, however, what the specific identities of citizens supporting a measure on a ballot reveal about the petition's "message"—likley because individual identities reveal nothing about the underlying issue. As Justice Alito said during oral argument in *Reed*, "if I see that John Jones from Seattle signed this petition, that tells me absolutely nothing."⁵⁷ Thus there is no informational benefit to disclosing the identities of individuals supporting a political opinion that might trump free speech.

Contrary to this idea, the founder of KTN stated, "for social change to happen, there has to be a shaming part Discussion, not intimidation, is the goal I'm trying to get you to understand that if you're going to try to take away my rights I want you to know what you're doing."⁵⁸ This statement, however, only underscores the harmful role disclosure can play when political opinions expressed through referendum petitions are exposed. No matter how repugnant a view may seem, shaming the person who holds it discourages citizens from participating in a political process open to everyone—not just those holding a viewpoint held by a majority or even just those with the courage to act on their views.

55. *Id.*

56. Reply Brief of Appellants at (D), *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (Nos. 09-35818, 09-35826).

57. Transcript of Oral Argument at 56–57, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

58. See William Yardley, *Privacy Looms Over Gay Rights Vote*, N.Y. TIMES, Oct. 31, 2009, at A24.

The Respondents contended that disclosing the identities of and personal information about persons who signed R-71 promoted government transparency and protected referendums from fraud. There was no evidence, however, that disclosure was needed in Washington State to prevent fraud or that the State's existing verification process did not suffice to prevent fraud.⁵⁹ It is notable that although one amicus brief harped on the potential fraud within petitions, providing examples over the course of the past century from several states that use the referendum process, none of these examples were from Washington State, a state infamous for utilizing direct democracy, but were instead from faraway states including Florida, Massachusetts, Maine, and Oklahoma.⁶⁰ As one commentator concluded,

such disclosure [of the identities of petition signers] could assist the state authorities in detecting fraudulent or otherwise invalid petition signatures as a form of "crowd sourcing." But there is no indication that [public] disclosure [of petition information] would have served this purpose in [*Reed*], whereas it is plausible to think that disclosure of the supporters of the petition would have facilitated harassment of at least some such supporters.⁶¹

Disclosure obviously assists state authorities in avoiding fraud as the counting and canvassing process aims to do, and in *Reed*, this process was accomplished, as the Secretary of State attested.⁶² The public need for the petition information, however, was simply not an issue in this case since Washington State had a clear process that already served the interest of fraud prevention.

Moreover, the Court's reasoning in *McIntyre* indicates that concerns about fraud are not serious in cases like *Reed* because, as Justice Stevens contended, the threat of fraud in collecting public votes on referendums or candidate elections "simply is not present

59. This conclusion was reached decades ago by Washington State Attorney General Don Eastvold who wrote that state referendum signature verification laws were drafted particularly to facilitate government oversight since they allowed observers, representing members of the public, to be present during the canvassing process. See Letter from Don Eastvold, Washington State Attorney General, to Herb Hanson, Washington State Representative (May 28, 1956) in Petitioner Exhibits to Complaint, available at <http://wei.secstate.wa.gov/osos/en/initiatives/Referenda/Pages/R-71Information.aspx>. See also *infra* Part II.C.

60. Brief for Direct Democracy Scholars as Amicus Curiae Supporting Respondents at 18-19, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-599).

61. Michael C. Dorf, *Is There a Constitutional Right to Sign a Petition Anonymously?*, FINDLAW (Nov. 16, 2009), <http://writ.news.findlaw.com/dorf/20091116.html>.

62. SEC'Y OF STATE SAM REED, *supra* note 34.

in a popular vote on a public issue.”⁶³ Admittedly, in some circumstances disclosure is necessary to reveal more serious instances of fraud. For example, there is widespread support for disclosure of identities of donors and expenditures involved in campaign finance.⁶⁴ The need for the public to monitor victorious politicians who might favor those who bankrolled their election at the expense of the American public is much greater than the need to publicly monitor individuals who agreed that an issue should be put to a public vote. Additionally, the Supreme Court treats monetary expenditures as less personal statements of political support, making it easier to justify disclosure requirements concerning financial support as opposed to purely ideological support.⁶⁵ As all of the Justices during oral argument, the Respondents, and Petitioners acknowledged, some citizens might not sign a referendum petition they support if they know that their support will not remain confidential.⁶⁶ The resulting chilling of speech would defeat one of the most important aims and benefits of direct democracy through referendums: expanding the base of individual participants.⁶⁷ Ironically, limiting the number of signatures on a petition precludes the public from engaging in a statewide discussion about gay marriage and distorts the public’s understanding of how prevalent support—or lack of support—is for a particular issue. A *Wall Street Journal* poll revealed that “three out of five people said they would think twice about their association with a ballot-issue committee if it meant public disclosure of their names and addresses. The reason most often given was a desire to keep their involvement anonymous.”⁶⁸ This chilling effect prevents citizens from contributing to the marketplace of ideas, thereby preventing fellow citizens from better understanding the true extent of a view’s acceptance in wider society. Worse, it could prevent the requisite number of signers from signing a referendum, causing an effort to fall just shy of the minimum number of signatures needed to put an issue on the ballot for a public vote.

63. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 353, 356 n.15 (1995).

64. See Elizabeth Garrett, *A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 U. RICH. L. REV. 1011, 1011 (2003).

65. See *id.* at 355.

66. Transcript of Oral Argument at 27, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

67. LEAGUE OF WOMEN VOTERS, *supra* note 15.

68. Dick Carpenter, *Neighbor Against Neighbor*, WALL ST. J., Apr. 28, 2010, at A.17.

A. Interpretation of Washington State's Disclosure Laws

Almost every article written about *Doe v. Reed* seems to proceed from an unspoken assumption that the Washington State PRA unambiguously requires disclosure of identifying information about referendum petition signers.⁶⁹ Analysis of the text of the PRA and other historical evidence, however, reveals that this is a false assumption with consequences too serious to ignore. The Respondents' main argument is that petitions are public records providing information pertinent to an electoral process, and that the personal information contained in the petitions is crucial for an accurate evaluation of political issues and therefore is not exempt from release.⁷⁰ Many news organizations and newspapers filed amicus briefs, together and individually, in support of this argument.⁷¹ This is unsurprising, considering that news organizations

69. See Les Blumenthal, *Conservative Group Doesn't Sway Scalia in Ballot Signature Case*, McCLATCHY NEWSPAPERS (Apr. 28, 2010), <http://www.mcclatchydc.com/2010/04/28/93054/supreme-court-skeptical-on-hiding.html> ("Under Washington [S]tate's Public Records Act, the names of those who signed the petition are public information, but Protect Marriage Washington filed a lawsuit in federal court that sought to keep the names secret."); Harriet Robbins, *U.S. Supreme Court: LGBTs and Conservatives Ironically Switch Positions in Petition-Signing Disclosure Case*, UNITED PRESS INT'L (Apr. 25, 2010), http://www.upi.com/Top_News/US/2010/04/25/US-Supreme-Court-LGBTs-and-conservatives-ironically-switch-positions-in-petition-signing-disclosure-case/UPI-42991272179700 ("The 9th [C]ircuit's decision should prevail because Washington's law was clear that referendum signatories' names may be released to the public."); see also Greenhouse, *supra* note 8 (assuming that "[u]nder Washington's Public Records Act, the signatures on referendum petitions are public records, available for inspection and copying"); Dahlia Lithwick, *What's Your Sign?*, SLATE (Apr. 28, 2010), <http://www.slate.com/id/2252251> ("Washington's Public Records Act makes those names a matter of public record in the interest of transparency and public inspection.").

70. OFFICE OF THE SEC'Y OF STATE, ELECTIONS DIV., RELEASE OF INITIATIVE AND REFERENDUM PETITIONS (Oct. 15, 2009), available at <http://blogs.secstate.wa.gov/FromOurCorner/wp-content/uploads/2009/10/Acr65.pdf> ("There is no dispute that initiative and referendum petitions are public records. Once filed by the sponsors, the petitions are in the custody of a public state agency and contain information relating to the conduct of government or the performance of a governmental function."). See also *Referendum 71 Litigation in Federal Court*, WASH. SEC'Y OF STATE, <http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71Information.aspx> (last visited May 5, 2010); *Doe v. Reed*, BALLOTPEDIA.ORG, http://ballotpedia.org/wiki/index.php?title=Doe_v_Reed (last visited May 5, 2010).

71. Brief for National and Washington State News Publishers, News Broadcasters, and News Media Professional Associations as Amicus Curiae Supporting Respondents, *Doe v. Reed*, 130 S. Ct. 2811 (Apr. 1, 2010) (No. 09-599). Brief for the Reporters Committee for Freedom of the Press, Gannett Co., International, National Newspaper Ass'n, Newspaper Ass'n of America, Radio Television Digital News Ass'n, and Society of Professional Journalists as Amicus Curiae Supporting Respondents, *Doe v. Reed*, 130 S. Ct. 2811 (Apr. 1, 2010) (No. 09-599). Some of the more well-known and potentially influential names among them are National & Washington State News Publishers, News Broadcasters & News Media Professional Associations, The Reporters Committee for Freedom of the Press, National Newspaper Association, Newspaper Association of America, Society of Professional Journalists, Thomson

and reporters historically have opposed laws limiting access to information or potentially impeding their ability to research and report.⁷² News organizations likely do not want *Reed* to set a precedent that might restrict reporter access to any public documents, whether referendum petitions or otherwise. It is far from clear, however, that referendum petitions are classified as public records under Washington State law, despite claims of third parties who would not suffer any consequences from publically disclosing sensitive information. The Elections Division in the Office of the Secretary of State of Washington claims that the petitions at issue in *Reed* fall under the following definition of a legislative document, referred to in the PRA's "Definitions" Section:

"[L]egislative records" shall be defined as correspondence, amendments, reports, and minutes of meetings made by or submitted to legislative committees or subcommittees and transcripts or other records of hearings or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions⁷³

If classified as legislative documents the referendum petitions are arguably public records. It is noteworthy then that neither the Ninth Circuit nor the Supreme Court explicitly referred in their respective opinions to the petitions as legislative documents.⁷⁴

Reuters, The Seattle Times Company, The New York Times, The Washington Post, The Wall Street Journal, Cox Media Group, Gannett Co., and various local Washington State newspapers. *Id.*

72. See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 967 (1964); *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2003); *Moldea v. N.Y. Times Co.*, 22 F.3d 310 (D.C. Cir. 1993); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

73. WASH. REV. CODE § 40.14.100 (2010). See INITIATIVE AND REFERENDUM PETITIONS Q & A, OFFICE OF THE SEC'Y OF STATE, ELECTIONS DIV., RELEASE OF INITIATIVE AND REFERENDUM PETITIONS (Oct. 15, 2009), available at <http://blogs.secstate.wa.gov/FromOurCorner/wp-content/uploads/2009/10/Acr65.pdf>.

74. In refusing to determine whether signing a referendum petition is a legislative act the Ninth Circuit said, "[b]ecause we assume, for purposes of this case, that signing a referendum petition is speech, we do not reach this argument [that signing a referendum petition is not speech, but is instead a legislative act] and intimate no view on it." *Doe v. Reed*, 586 F.3d 671, 677 n.9 (9th Cir. 2009). In response to Respondents' argument that signing a petition is a "legally operative legislative act," the Supreme Court, avoiding such a characterization, said,

Despite the Washington State Election Division's claim that referendum petitions are public documents, referendum petitions do not clearly fall under a plain reading of the statute's definition of "legislative records." On the contrary, there is significant evidence that not only disproves the State's conclusion, but that justifies a legislative reform of Washington State's PRA with regard to referendum petitions to dispel any confusion between the new Elections Division disclosure policy and Washington State policy prior to *Reed*. The PRA's statutory language; public understanding of disclosure rules; the historical background of the PRA's passage; the policies of Washington's former Attorneys General and Secretaries of State; and the likely consequences of previously unforeseen widespread Internet disclosure of signer information, all contribute to the inference that the Washington State Legislature did not intend for referendum petitions to be disclosed in their entirety to anyone requesting them and should be protected accordingly through state legislation.

*B. The Language Within the Public Records Act
and Related Election Law*

In addition to the PRA's plain language definition of a legislative document, there are clues within other sections of the Act that should have led to the finding that referendum petitions are not public records subject to disclosure in Washington State. For instance, Section 42.56.230 of the PRA, titled "Personal information," exempts from public inspection information that would violate Washington residents' individual right to privacy—specifically, documents and related materials used to prove identity and residential address and other personal information required to apply for a driver's license.⁷⁵ Logically, the principle of protecting personal information under this section should extend to protect identity and residential addresses disclosed in referendum petitions. Section 42.56.210 of the PRA, titled "Certain personal and other records exempt," which also exempts certain information

[i]t is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment.

Doe v. Reed, 130 S. Ct. 211, 2818 (2010).

75. WASH. REV. CODE § 42.56.230 (2010).

from public disclosure, indicates that information that would violate an individual's privacy should be redacted from an otherwise publicly disclosable document. This section explicitly states that "[n]o exemption may be construed to permit the nondisclosure of statistical information *not descriptive of any readily identifiable person or persons.*"⁷⁶ This language indicates that "statistical information" descriptive of otherwise unidentifiable persons should *not be disclosed under the PRA*. This language presents the possibility that, at the very least, residential addresses can be redacted from public records because disclosure of such information is indeed descriptive and allows for the violation of a signer's privacy. This language in the PRA thus lends even stronger support for the inference that personal information such as the name and address of an individual who supports the referendum should be redacted since the language of the PRA itself indicates that information descriptive of an identifiable person is not subject to disclosure. What is more descriptive than information indicating the location of a private citizen's residence or their ideological views or views of government processes, all of which can be gleaned from a disclosed referendum petition?

As to whether names and addresses of petition signers have been exempt from disclosure, an Eighth Circuit case, *Campaign for Family Farms v. Glickman*,⁷⁷ is particularly instructional. In order to determine what identifying information was protected from disclosure under the personal privacy exemption in the Freedom of Information Act⁷⁸ (FOIA), the Court balanced the privacy interests of individuals against the public interest in disclosure for the purposes of government oversight.⁷⁹ In *Glickman*, a group called the Campaign prepared a petition calling for a referendum on new regulations requiring pork farmers to pay the National Pork Board an assessment on every pork transaction they completed.⁸⁰ After the Campaign submitted the petition, which included the names and addresses of 19,000 referendum petition signers, the National Pork Board requested the identifying information of petition signers under FOIA.⁸¹ The federal government initially determined that the identifying petition information did not fall under a per-

76. *Id.* § 42.56.210 (emphasis added).

77. 200 F.3d 1180 (8th Cir. 2000).

78. 5 U.S.C. § 552(b)(6) (1994); see also *infra* Part II.C.

79. See *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

80. *Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1182–83 (8th Cir. 2000).

81. *Id.*

sonal privacy exemption akin to Section 42.56.210 of the PRA.⁸² However, the Eighth Circuit reversed, noting that the disclosure of personal information on a politically charged document similar to a secret ballot associates individuals with substantive political beliefs—far from simply revealing statistical information.⁸³ Consequently, an individual's interest in the privacy of potentially ideological, identifying information was deemed to be more substantial than the public's interest in its oversight of a petition verification process.⁸⁴ There is no reason why a personal privacy exemption under FOIA should not accordingly apply under the PRA's personal privacy exemption, especially since the referendum petition context, not often found in U.S. case law, is present in both *Glickman* and *Reed*.

The conclusion that residential information on referendum petitions was not meant to be publicly disclosed is further supported by the Ninth Circuit's characterization of a home being a man's castle and his "den" or refuge in *Dietemann v. Time, Inc.* In *Dietemann*, the court held that a newspaper violated an individual's right to privacy by publishing a newspaper article about this individual, as well as details relating to his home and profession.⁸⁵ The court specifically noted an increasing trend in the court recognizing privacy interests, emphasizing the notion that a man could reasonably expect privacy with regard to his residence and not have its location broadcast "to the public at large."⁸⁶ The court specifically noted that the plaintiff's home in that case did not exhibit identifying information: not only did the residence not have any signage on the outside identifying the plaintiff or occupation, but the plaintiff was also unlisted in telephone directories. These facts buttressed the court's determination that reporters were not entitled to violate the plaintiff's privacy by publishing his home address. Thus case law, as well as Washington statutory law, indicates that a person should be able to have a reasonable expectation of privacy regarding their home.⁸⁷ In the context of a referendum petition, providing an address that is then disseminated on the Internet for anyone to see seems even worse than the violation of the right to privacy protected in *Dietemann* from more limited newspaper

82. *Id.* at 1184–85; see also 5 U.S.C. § 552(b)(6); *infra* Part II.C (noting that the PRA was modeled on FOIA).

83. *Glickman*, 200 F.3d at 1187–88.

84. *Id.* at 1189.

85. *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971).

86. *Id.* at 249.

87. Leonard Niehoff, Class Lecture, Civil Liability: Intrusion & Other Newsgathering Torts, Mass Media Law, University of Michigan Law School (Mar. 9, 2010) (on file with the University of Michigan Journal of Law Reform).

exposure in 1971—especially considering that after the home addresses of the California donors to the controversial Proposition 8 campaign were listed on the Internet, dozens of instances of harassment were directed at them or their property.⁸⁸

Similarly, Section 42.56.540 of the PRA, titled “Court protection of public records,” provides courts with discretion to prevent disclosure where “examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.”⁸⁹ The Ninth Circuit should have exercised this discretion to affirm the judgment of the District Court in *Reed*. Upholding the constitutional right to express one’s political views anonymously is in the public interest since every citizen possesses that right and has a similarly strong interest in expecting it to be protected consistently. Further, the abridgment of the First Amendment right to anonymity here would cause irreparable damage as a result of the invasive disclosure, especially unacceptable due to the fundamental and thereby highly protected nature of the right to expression under the First Amendment. The Supreme Court has held in cases involving severe restrictions on the right to individual belief and association under the First Amendment that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁹⁰

It is important to clarify that the right to anonymous expression does not always subordinate conflicting fundamental rights, even when the right to anonymous expression is irreparably damaged. If a government interest is strong enough, it may be justified by allowing for the pursuit of a right considered more fundamental than the right to anonymity, as exemplified by campaign finance laws implemented to combat corruption in government, a significant state interest mentioned in *McIntyre*.⁹¹ But the purpose of the referendum process—to broaden the base of participants in the democratic process—could be diluted to the point of irrelevance if anonymous support is not an option.⁹²

88. Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law is 2-Edged Sword*, N.Y. TIMES, Feb. 8, 2009, at BU3, available at www.nytimes.com/2009/02/08/business/08stream.html (noting how disclosure of residential information of those who provided financial support for the Proposition 8 campaign, which limited marriage to union between a man and a woman, led to various incidents of harassment of supporters in their homes). See also *infra* Part II.D.

89. WASH. REV. CODE § 42.56.540 (2010).

90. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). See also *supra* text accompanying note 51 (defining “fundamental right”).

91. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 353, 356 n.15 (1995).

92. *Id.*; LEAGUE OF WOMEN VOTERS, *supra* note 15, at 2.

In contrast, in *Meyer v. Grant*, after applying strict scrutiny—making the application of only intermediate scrutiny in *Reed* all the stranger—the Supreme Court struck down as unconstitutional a law that forbade payment to petition signature collectors. The Supreme Court found that the interest of protecting the petition process from corruption did not outweigh the interest in overcoming barriers to the referendum process, including difficulty in communicating a political message while quickly and efficiently obtaining a certain number of signatures in a certain number of days.⁹³ The Court reasoned, “The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change,” characteristics of the highly protected core political speech.⁹⁴ Surely the fundamental nature of the core political speech at issue in *Reed*, especially given the lack of a financial context unlike that in *Meyer*, is enough to trump the fraud interest summarily disposed of in *Meyer*.

Section 42.56.250 of the PRA, “Employment and licensing,” states that employers, specifically public agencies, may not disclose residential or other contact information of employees.⁹⁵ Along the same lines, during the Supreme Court oral argument, Justice Alito asked Washington Attorney General McKenna if he would release the personal contact information of government employees whose names and government positions are available to any citizen who requests the information under the Freedom of Information Act, so the requester could have an “uncomfortable conversation[] with them” at the public servant’s home (one of the aims of the websites, KTN and WhoSigned).⁹⁶ Attorney General McKenna responded, “We could not release [the personal contact information] because they can come to the office and have uncomfortable conversations with them”⁹⁷ Surely Attorney General McKenna cannot mean that keeping the addresses of government employees private is more of a priority than keeping private the addresses of citizens.⁹⁸

93. *Meyer v. Grant*, 486 U.S. 414, 425–26 (1988).

94. *Id.* at 421.

95. WASH. REV. CODE § 42.56.250 (2010).

96. Transcript of Oral Argument at 58, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559); see also *About KnowThyNeighbor.org*, KNOWTHYNEIGHBOR.ORG, <http://www.knowthyneighbor.org/national/> (last visited Jan. 5, 2011); WHO SIGNED.ORG, <http://www.whosigned.org> (last visited Jan. 5, 2011).

97. Transcript of Oral Argument at 58, *Reed*, 130 S. Ct. 2811 (No. 09-559).

98. Because it undercuts the proposition that those acting under the aegis of the government can be subjected to disclosure of their personal information, Attorney General McKenna’s response also significantly weakens the Respondents’ important argument that

More importantly, although Washington election laws require that referendum petition signers disclose their identities by providing their residential addresses and counties on petitions, the only apparent reason for this requirement is that the Secretary of State and his employees can use this information to verify signatures on petitions.⁹⁹ Representatives for opponents and proponents of the referendum petition can observe this verification process, but, contrary to the Ninth Circuit's finding in *Reed*, such observance does not "waive" any right to privacy on behalf of the petition signers.¹⁰⁰ That the PRA explicitly prohibits the observers of state workers completing the verification process from writing down any identifying information, including the names and addresses of signers, undeniably indicates a strong privacy interest in protecting the signers' identifying information. One of the Respondent briefs speculates, "it seems apparent that this time-limited restriction on recording petition information is designed to avoid disruption of the signature verification process, and does not make petition information confidential."¹⁰¹ The brief, however, provides no support for this suggested explanation, and there is no apparent reason why avoiding disruption during the verification process is a vital aim that would be effectively advanced by prohibiting the transcription of identifying information. Finally, disclosure of the same information under the PRA that is statutorily protected during the verification process would render the prohibition meaningless. This consideration provides unambiguous proof that the legislature never intended for identifying information to be shared with anyone beyond those who verify the legitimacy of signatures.

C. Historical Context of the PRA

Washington voters passed the Washington State PRA through the initiative process in 1973, reflecting a nationwide movement promoting government openness and transparency. Seven years earlier, in 1966, President Lyndon B. Johnson signed the Freedom of Information Act, which afforded anyone who submitted a request access to federal government agency documents not falling

when private citizens sign a referendum petition they are acting like senators engaging in a legislative act. See *infra* II.C and note 105 and accompanying text.

99. WASH. REV. CODE §§ 29A.72.130, .150, .230 (2010).

100. *Id.*; see also *supra* Part I.

101. Reply Brief of Appellants at II(A)(1), *Reed*, 130 S. Ct. 2811 (Nos. 09-35818, 09-35826), 2009 WL 4922610, at *4.

under one of nine discretionary exemptions.¹⁰² According to leading media scholars, “[T]he Act’s basic philosophy remains that government records are presumed to be available for public scrutiny because open government is better government.”¹⁰³ Just a few years later, the Watergate scandal permanently damaged public trust in government, providing additional support for the public need to monitor governmental actions undertaken in the name of and for the supposed good of the public.

Washington State’s PRA similarly reflected the trend of states in the 1960s and ‘70s in passing disclosure legislation to promote government transparency and ensure that government servants were properly serving the people that elected them. The PRA’s “Construction” section, which expresses the aims animating the PRA, states:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.¹⁰⁴

Washington State citizens undoubtedly have a right to oversee government actions since they elect government representatives into office who are then rightfully accountable to the public. The PRA’s stated objective, however, does not mean that the public has a right to know what other *citizens* are up to, even if they are participating in a form of direct democracy like signing a referendum petition. The question then becomes whether referendum petitions should be considered documents illustrating details of government action, potentially legislative in nature if rejection or affirmation of a legislative act is successful, or considered documents containing personal information pertaining to private citizens and their political or ideological beliefs. The answer is undoubtedly the latter.

In their brief, Respondents likened a private citizen signing a referendum petition to a U.S. senator proposing a bill on the Senate floor. In this misplaced comparison, Respondents intended to show why the speech element of a petition is not of a private, anonymous nature, leading to the conclusion that referendum

102. DAVID KOHLER & LEE LEVINE, *MEDIA AND THE LAW* 665–67 (2009).

103. *Id.* at 665.

104. WASH. REV. CODE § 42.56.030 (2010).

petitions are not exempt from the PRA.¹⁰⁵ Importantly, Respondents failed to note that in their capacity as public servants U.S. senators do not act as individual citizens entitled to all First Amendment protections *against the State*.¹⁰⁶ The State cannot possibly have a First Amendment claim against itself; senators serve as accountable government actors and are not necessarily entitled to political anonymous expression when they voluntarily take the Senate floor in their public capacity to express the needs and views of their constituents rather than their own.¹⁰⁷ This is due to the structure of American constitutional government, premised on the understanding that the First Amendment is a protection for individuals from the encroachment of their rights by state actors—such as U.S. senators—and thus actually limits government expression.¹⁰⁸ It follows that senators, representing a collective entity rather than acting as a private individual, do not have a First Amendment right identical to that of individual citizens. In fact, one scholar has noted that despite an influx of communicative media and increased technological capabilities it is possible to infer that government speech rights are actually shrinking when compared to individual speech rights.¹⁰⁹ Further, even though American case law has increasingly defined individual free speech rights for roughly nine decades, the Court has never addressed what the parameters of government speech rights even are.¹¹⁰ This huge gap between the definitions of what individual citizens are entitled to and what senators are entitled to in terms of the First Amendment strikingly shows Respondents' comparison of senators and citizens to be downright reckless.

105. Reply Brief of Appellants at II(A)(1), *Doe v. Reed*, 130 S. Ct. 2811 (2010) (Nos. 09-35818, 09-35826), 2009 WL 4922610, at *4.

106. *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment free speech clause against the states through the Fourteenth Amendment).

107. See Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983). See also *Nevada Commission on Ethics v. Carrigan*, No. 10-568, slip op. (June 13, 2011), just recently decided, in which the Supreme Court noted that legislators are not protected by the First Amendment as regular citizens are because a government actor's legislative power is not personal to him or her and instead belongs to the people. Quoting *Raines v. Byrd*, 521 U.S. 811, 821 (1997), in which the Court denied Article III standing to legislators claiming their voting power was diluted by a statute providing for a line-item veto, the Court said, "the legislator casts his vote 'as trustee for his constituents, not as a prerogative of personal power.'" No. 10-568, slip op. at 8 (June 13, 2011).

108. MARK YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 160 (1983) ("This is consistent with older notions that the Constitution embodies norms against government secrecy, that the First Amendment is a check on official abuse of power, and that it restrains and does not enhance government powers.").

109. *Id.* at 380–81.

110. *Id.* at 375.

Additionally, senators propose and pass laws in a much more direct way than citizens do when they sign a referendum petition; thus it is even more questionable to place citizen approval or rejection of a law already passed by the state legislature in the same category. When comparing the former, a legislative process, with the latter, at best a quasi-legislative process, “direct democracy” then becomes a somewhat misleading term and eclipses the action it actually entails: *voting to vote*, the purpose of which is to “give voters an opportunity to approve or reject laws either *proposed or enacted by the Legislature.*”¹¹¹ So even in the case of “direct” democracy’s referendum petition process, the public acts as a quasi-legislative check to the legislative branch, expressing support of or opposition to a law *already created by or enacted by the legislature*, leading to the conclusion that Respondents’ comparison is inappropriate. Signing a referendum petition cannot be equivalent to actions undertaken by elected representatives if the respective actions do not have the same effect or force. This is especially true considering that if a petition is not certified the public will not even vote on the issue, an important fact noted by Justice Thomas in *Reed*.¹¹² Also, in order to provide a check on the legislature, the signer cannot *be* a legislator; a more appropriate check, as laid out in the various Articles of the U.S. Constitution, would be the judicial or the executive branches. As further support for the conclusion that the Respondents were misplaced in equating the direct democracy process with the traditional legislative process, the Washington State Constitution emphasizes that the people, even when participating in referendum or initiative measures, act “independent of the legislature,” the latter of which is vested with legislative authority.¹¹³

Further, a referendum petition merely places an issue on the state ballot during an election so that all Washington citizens can vote to approve or reject contested legislation. If any part of the referendum process should be classified as an act of government it should be the component that actually leads to a bill’s acceptance or rejection. Under that logic, the identifying information of *all* Washington voters should be disclosed, because the ultimate voters are more similar to direct legislators than are the citizens who merely get a referendum or initiative on the ballot. Our nation’s election system, however, is set up in a way that allows voters to maintain confidentiality in voting, keeping the votes resulting from a

111. LEAGUE OF WOMEN VOTERS, *supra* note 15 (emphasis added).

112. *Doe v. Reed*, 130 S. Ct. 2811, 2839 (2010) (Thomas, J., dissenting).

113. WASH. CONST. art. II, § 1.

referendum secret.¹¹⁴ The only natural inference then is that the vote initiated to bring about a vote must also be kept secret. Any signing citizens could then reasonably, and would likely, be under the impression that their support and identifying information would also remain confidential.¹¹⁵ At oral argument before the Supreme Court, when Attorney General McKenna said that signing a referendum was telling the government to do something, Justice Kennedy told him, “then it’s more like a vote. And there—there is strong interest in keeping the—the vote private,”¹¹⁶ a basic inference the Ninth Circuit should have made. Even more telling, California, Washington’s fellow Ninth circuit member, *keeps referendum petitions confidential*.¹¹⁷

Because the PRA passed by initiative, Washington State voters endorsed and approved it, and therefore arguably also approved disclosing personal information provided by referendum petition signers. Justice Scalia made this point during oral argument in *Reed*, saying that, “the people of Washington evidently think that [disclosure] is not too much of an imposition upon people’s courage, to—to stand up and sign something and be willing to stand behind it . . . Now, if you don’t like that, I can see doing it another way. But—but the people of Washington have chosen to do it this—this way.”¹¹⁸ Even accepting Scalia’s unproven assumption that the Washington voters in 1973 fully understood that under the PRA those participating in direct democracy were not voting but were instead acting as elected members of the government did and should thus be held publicly accountable, such approval does not

114. Interestingly, Justice Scalia vehemently defended the importance of the secret ballot in maintaining the integrity of the election process in *Burson v. Freeman*, 504 U.S. 191 (1992), a First Amendment case upholding a state law banning pollsters and campaigners from any location within 100 feet of a polling place on Election Day, despite the curious nature of the claim that the political speech of pollsters might be able to impede the voting process taking place within the walls of the building nearby. Justice Scalia protected the right to participate in a democratic process against the immemorial First Amendment protection of political campaign speech in a traditional public forum such as the sidewalk surrounding a polling place. *Id.* at 203 (Scalia, J., concurring). Yet in his *Doe v. Reed* concurrence, in order to *weaken* the protective claim voting may provide referendums, Scalia took great pains in pointing out the fact that the secret ballot was not an established right until 1888, and, incredibly, he cited *Burson* for support. *Id.* at 2834 (Scalia, J., concurring); see DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 140–41 (Rowman & Littlefield 1996).

115. It is worth noting that citizens did not request the information in referendum petitions until 2006 at the earliest. Transcript of Oral Argument at 21, *Reed*, 130 S. Ct. 2811 (No. 09-559). This fact indicates that citizens could have believed petition support was indeed more like a vote than an act of legislation.

116. *Id.* at 46.

117. CAL. GOV’T CODE § 6253.5 (West 1995).

118. Transcript of Oral Argument at 21, *Reed*, 130 S. Ct. 2811 (No. 09-559).

mean that voters necessarily approved of disseminating identifying information in the manner intended to be undertaken by WhoSigned and KTN. Disclosure in 1973 was very different from disclosure in 2011 due to the vast differences in technology's communicative capabilities.

It is curious then that during oral argument before the Supreme Court, neither the Justices nor counsel for the Petitioners noted that the PRA was enacted nearly four decades ago, whereas it was not until the mid-1990s that private use of the Internet beyond that of scientists and academics began to take hold.¹¹⁹ Due to the existence of the Internet, in the present day it does not require much time, effort, or thought to compile and spread personal information about someone and potentially use it in a manipulative or harmful way. In 1973, there was neither Internet nor any comparable method of quickly and easily sharing referendum petitions with the public. Even if someone managed to share petitions on a somewhat widespread basis by photocopying and distributing them, there was no way to quickly or easily search petition copies for specific signers like there is today with electronic "search functions"—the exact method sites like KTN and WhoSigned are designed to facilitate. One could not log onto the Internet and discover whether or not one's neighbor had signed a referendum petition in a matter of seconds.

Eightmaps.com (eightmaps), the website that identified monetary donors to Proposition 8 in California, exemplifies how the unforeseen development of the Internet perverts the original purpose of disclosure laws. As Bard Stone from the *New York Times* explained, eightmaps is:

. . . the latest, most striking example of how information collected through disclosure laws intended to increase the transparency of the political process, magnified by the powerful lens of the Web, may be undermining the same democratic values that the regulations were to promote. With tools like eight maps—and there are bound to be more of them—strident political partisans can challenge their opponents directly, one voter at a time. The results, some activists fear, could discourage people from participating in the political process altogether.¹²⁰

119. Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1099–1100 (1996).

120. Stone, *supra* note 88.

Note the disturbing tension between the transparency of the political process and transparency in determining the identities and locations of political opponents. Eightmaps, a website not unlike KTN or WhoSigned in that it was created for the sole purpose of personally targeting individuals, similarly distorts the government accountability objective of disclosure laws by furthering, and sometimes even promoting, harassment of private citizens for their views. The president of the California Voter Foundation, which advocates open democracy, highlighted the central problem in this case by saying of eightmaps, “This is not really the intention of voter disclosure laws. But that’s the thing about technology. You don’t really know where it is going to take you.”¹²¹ The voters in 1973 did not foresee that the PRA would cause names of referendum petition signers to be “taken” to an infinitely wide audience via websites primarily for the purpose of forced discussion where signers would be pressed to explain why they signed the petition, which does not further the cause of open government. If anything, disclosure furthers a bullying, majoritarian government which deprives those holding minority views legislative protection since they not only will lose to the majority of citizens who will triumph in gaining legislative representatives, but will also lose out on the opportunity to exercise the right to participate in direct democracy, free from harassment, as a last-ditch effort to secure a voice. Had Washington voters in 1973 foreseen the effect of the Internet on the PRA, it is unclear whether voters would have passed the PRA in its current form, still unreflective of the technology that changes the meaning and consequences of public disclosure.

Finally and importantly, until recently, before and after the passage of the PRA, Washington government officials have refused to release information identifying signers of referendums or initiative petitions. For example, in 1938, Washington Attorney General Garrison Hamilton wrote a letter to Secretary of State Bell Reeves clarifying that the stance of her office should be refusal when approached by “interested persons” looking to inspect or copy referendum and initiative petitions. Hamilton explained:

It is the public policy of this state that we uphold the secret ballot in every particular and these petitions are, more or less, in effect a vote of those who sign the petitions requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not

121. *Id.*

public records and your office should refuse to permit them to be inspected and copied.¹²²

This indicates that the “ample leeway” states have in structuring their direct democracy mechanisms, as qualified by the Supreme Court in *Reed*, is not created in a vacuum and had already been set up over 70 years ago in Washington State. This stance remained steadfast nearly two decades later in 1956, when Attorney General Don Eastvold informed Washington State Representative Herb Hanson that petitions were not public records and could only be viewed by members of the public in two instances: when present during the canvassing process or if public prosecutors were investigating signature fraud.¹²³ This was due to the private nature of the signer information and an established state policy against disclosure.¹²⁴

Likewise, in 1973—the year in which the PRA was passed—Secretary of State Ludlow Kramer affirmed this position in a letter to Washington State Senator Hubert Donahue, who had requested the names of citizens who signed an initiative petition repealing a law increasing senator salaries:

As far as I am concerned petitions are not public records and are being held in trust by this office. I consider the signing of an initiative or referendum petition a form of voting by the people. Furthermore, the release of these signatures have no legal value, but could have deep political ramifications to those signing. I will not violate public trust.¹²⁵

This statement, reflecting the consistent policies of the state and resulting expectations of its citizens at the time the PRA was passed, should have influenced the reviewing courts in *Reed*. Support for this understanding can be found in the admission by Washington State Attorney General Robert McKenna that petitions were generally not requested and furnished in response until 2006 or so, signaling a public understanding that such documents were not meant for public consumption until the Secretary of State’s break with consistent state policy.¹²⁶

122. Complaint at 62a, *Doe v. Reed*, 661 F. Supp. 2d 1194 (W.D. Wash. 2009) (No. 05456-BHS).

123. *Id.* at 63a–66a.

124. *Id.*

125. *Id.* at 67a.

126. Transcript of Oral Argument at 21, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

The essential values currently animating disclosure policies should not have radically changed from those deemed important during the decades leading up to and at the passage of the PRA. Courts should then give deference to the position taken by Secretary of State Kramer, who arguably had the most intimate and direct understanding of the PRA, since it was implemented and first interpreted during his tenure. Technology, on the other hand, has changed, and in a way that severely distorts the purpose of the PRA, judging from the undeniably consistent policy of Washington State officials in the past with regard to the disclosure of petitioner information. Public officers alone possess power to protect their constituents from individuals looking to peruse petitions for purposes other than those related to overseeing government conduct, and should therefore promote disclosure policies that effectively protect citizens.

*D. Unanticipated Consequences: Harassment
Following Internet Disclosure*

Just as Washington voters in 1973 did not anticipate how future technology advancements would pervert the PRA, the Washington State Legislature did not anticipate it might have to legislatively address the capacity of the Internet to quickly spread personal information and, in turn, potentially subject Washington petition signers to harassment. Although the Supreme Court analyzed *Doe v. Reed* as a facial challenge rather than an as-applied challenge—which would more properly address the potential for harassment in the case at hand—potential harassment resulting from disclosure remains a necessary consideration in shaping public disclosure laws.¹²⁷ Legislatures must be proactive since it is nearly impossible to provide a remedy for signers after their information is disclosed and spread to an irremediable extent via the largely-unregulated Internet. Further, the Supreme Court held instances of harassment directed against individuals or groups in earlier cases to be acceptable evidence for later as-applied cases in which the same unpopular views were the focus.¹²⁸

127. See *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958) (noting that the risk of harassment and reprisal against individuals exercising their First Amendment right to association is a legitimate reason supporting the protection of anonymous speech and privacy in political activity that might be unpopular); see also Transcript of Oral Argument at 61–62, *Reed*, 130 S. Ct. 2811 (No. 09-559) (arguing that an as-applied harassment challenge is relevant to a broader challenge).

128. See *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

Even before Petitioners lost in the Supreme Court, the R-71 campaign manager for PMW, Larry Stickney, his identity already publicly revealed through media attention following *Reed*, received so many threats against him and his family via email and phone that he had his children sleep in the living room of his home, away from windows, and he called the local sheriff for protection.¹²⁹ Examples of instances of harassment likely to play out in the R-71 context as a result of reviewing courts, and now the PRA, mandating disclosure, already occurred in California following the popular passage of the Proposition 8 Amendment to the California Constitution. Eightmaps, mentioned earlier, is a website that uses personal information gleaned from the petition, including names, occupations, work addresses, and home addresses of persons who donated money to the anti-gay marriage cause in order to create a comprehensive map of California with clickable red dots, each representing a donor and his or her corresponding personal information.¹³⁰ Using an Internet program like Mapquest or Google Maps, which create user-friendly maps of and door-to-door directions to and from specific destinations, eightmaps creates a map identifying the areas in which donors to the Proposition 8 campaign live or work, or, if provided, their exact addresses. This website has inspired many cases of vandalism, harassment, and threats, as evidenced by the 70-odd declarations submitted by Petitioners in *Reed*. One man said he received several emails from people he did not even know, harassing him because his email address was posted on this website.¹³¹ Another individual said some of his coworkers confronted him, accusing him of “donating to hate.”¹³² A disclosure law as construed by the Supreme Court and the Ninth Circuit forces a citizen to choose between participating in a democratic process and protecting himself or herself from harassment resulting from the powerful capabilities of the Internet. Forcing petition signers to reveal the details of their residences in addition to their ideological views in order to participate in a democratic process surely cannot be the intention of a disclosure law. As one professor said:

The key here is developing a process that balances the sometimes competing goals of transparency and privacy. Both goals

129. See Brief of Plaintiffs-Appellees at 48, *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) (Nos. 09-35818, 09-35826), available at <http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71Information.aspx>.

130. See PROP 8 MAPS, <http://www.eightmaps.com> (last visited Jan. 29, 2010).

131. Stone, *supra* note 88.

132. *Id.*

are essential for a healthy democracy and I think we are currently witnessing, as demonstrated by eightmaps, how the increased accessibility of personal information is disrupting the delicate balance between them.¹³³

As this reform shows, the professor's hope that privacy and transparency can be balanced to develop a healthier democracy is not unrealistic and is even ideal since both interests are essential to a well-functioning democracy.

III. PROPOSED LEGISLATIVE REFORM: RECOGNIZING THE INTERNET AS A PROBLEM TO TRANSFORM IT INTO A SOLUTION

From 1995 to 2010, a period of less than 15 years, Internet usage in the U.S. increased from just over 10% of the population using the Internet to nearly 80%.¹³⁴ We take for granted that with Internet access we can discover whatever we can think of, whenever we think to look for it, without a thought as to whether such information was intended to be made public. Having the world revealed to an individual is an empowering consequence of the Internet, but also has a potentially less empowering, reciprocal component: the individual can just as easily be revealed to the world.¹³⁵

In *Reed*, the U.S. Supreme Court addressed whether the Washington State PRA could constitutionally direct public disclosure in a manner that would reveal the identities of referendum petition signers. Because the PRA was passed well before anyone could imagine “the instantaneity with which people can now transmit information”¹³⁶ via the Internet, the role of this revolutionary technology must be considered to adequately answer questions such as those presented in *Reed*—a case after which the need for the Washington State Legislature to take the necessary step in reconciling the needs of open government and individual privacy is more pronounced than ever.¹³⁷ Accordingly, the two-part reform presented below accounts for the role the Internet has played in transforming our ability to receive and disseminate information, and aims to ac-

133. *Id.*

134. *Internet Adoption Over Time*, PEW RESEARCH CENTER'S INTERNET & AM. LIFE PROJECT, <http://www.pewinternet.org/Static-Pages/Trend-Data/Internet-Adoption.aspx> (last visited May 10, 2011).

135. See Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085, 1147 (2002).

136. *Too Much Media, L.L.C. v. Hale*, No. MON-L-2736-08, 2009 WL 2578521, at *7 (N.J. Super. Ct. Law Div. Sept. 10, 2010).

137. See YUDOF, *supra* note 108, at 111–38.

commodate the right to anonymous political speech as well as the need for transparency of the political process and protection against referendum fraud.

*A. Signer Details on Washington State Referendum Petitions
Should be Exempt from Disclosure*

The first part of this reform proposes a revision to Washington State's PRA to explicitly exclude from public disclosure personal information that petition signers are legally required to disclose on referendum and initiative petitions. To implement this reform, the Washington State Legislature should simply amend Section 42.56.230 of the PRA, titled "Personal information,"¹³⁸ which follows Section 42.56.210, titled, "Certain personal and other records exempt."¹³⁹ Currently, "Personal information" is comprised of six subsections and is preceded by text reading, "The following personal information is exempt from public inspection and copying under this chapter"¹⁴⁰ The legislature should implement a seventh subsection that refers to what is currently section 29A.72.130 of the Washington Revised Code, which directs the form of referendum petitions, but with this proposal would be section 29A.72.130(1), as explained in the next section of this Note. The new subsection of the PRA would exempt from public disclosure information required when signing a referendum petition, and would exempt:

(7) Personal information of a signer of any initiative or referendum petition required by Wash. Rev. Code § 29A.72.130(1), including name, address, city, and the county in which the signer is registered to vote, except when disclosure is requested via the partial disclosure procedure outlined in Wash. Rev. Code § 29A.72.140.¹⁴¹

138. WASH. REV. CODE § 42.56.230 (2010).

139. *Id.* § 42.56.210.

140. *Id.* § 42.56.230.

141. Although Wash. Rev. Code § 29A.72.140 (2010) currently briefly mentions the warning statement state referendum petitions must include on petition sheets presented to citizens in order to alert the public to the consequences of fraudulently signing, *Id.*, in the context of the proposed reform § 29A.72.140 would become a section describing the website by which Washington State residents can enter personal information to discover if their signature was properly verified on a particular petition. This change will be explained in more detail in the following section of this Note.

This simple exemption protects the privacy and First Amendment interests of petition signers. Practically, it would enable Washington citizens to anonymously sign referendum petitions without fear that their political views and personal information would later be spread via the Internet and thus potentially subjecting them to harassment. This amendment, however, completes only half of the work of this proposed reform, and cannot be implemented without further amendments to the PRA that would preserve disclosure and transparency of the political process—the original purpose of the PRA.

B. Incorporating an Online Partial Disclosure System into Washington State's Referendum Petition Statutes

The second part of this reform proposes that the Washington legislature mandate the creation of an electronic interface, available over the Internet, which would allow Washington citizens to easily verify whether their names were properly or improperly included on a particular referendum petition. A point raised by Justice Alito during oral argument of *Doe v. Reed* instructs this reform. Not only was Justice Alito the only Justice during oral argument to ask Counsel for the State any questions about the electronic nature of disclosure in this case, but he also appeared to be the only Justice to recognize the need to balance the goals of transparency and privacy when the Internet was otherwise an unfettered mechanism of disclosure.¹⁴² Justice Alito noted that if the

142. In fact, it is striking that the word "Internet" was uttered only four times in the entire 57-minute long oral argument before the U.S. Supreme Court: once by each of the attorneys arguing and twice by Justice Samuel Alito. Transcript of Oral Argument at 8:14, 41:17, 42:5, 50:6, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559). It is worth noting that even though Justice Alito is not the youngest member of the court (Chief Justice Roberts and Justice Sotomayor are both 56 and Justice Kagan is 51; Justice Alito is 61 years old), his interest in how technology affects the law was sparked many decades ago when he wrote the final report for a privacy conference hosted by a mentor professor at his undergraduate institution, Princeton University. He wrote in a section titled "Privacy and the Computer," "[t]he cybernetic revolution has greatly magnified the threat to privacy today," and concluded the report, "[w]e must begin now to preserve privacy, and the first step is for Americans to understand the threats to privacy we now face and the threats inherent in our technological society." Samuel Alito, Conference on the Boundaries of Privacy in Am. Soc'y 2, 7 (Jan. 4, 1972).

Regarding the Justices' grasp of the effects of technology on legal analysis, consider the following: following the April oral argument in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010), which held that the city's review of officers' text messages on city-issued pagers was reasonable and thus did not violate the Fourth Amendment, the Supreme Court was reamed in the media for its inability to grasp simple technology. See Kimberly Atkins, *Technical Difficulties at the Supreme Court*, DC DICTA (Apr. 19, 2010, 1:30 PM), <http://lawyersusaonline.com/dcdicta/2010/04/19/technical-difficulties-at-the-supreme-court-2> (making fun of Justice Ken-

real interest here was in preventing fraud and if petitions are now verified in a digital format, the state could easily set up a website in which citizens can enter personal information to see if their names were signed on a petition by someone who was not them.¹⁴³ “Why does this all have to be put out on the internet?” he asked.¹⁴⁴ He then asked if creating a website in which voters would have to plug in some kind of private identifying information in order to be able to see whether they were added to a petition would also suffice to serve the interest against fraud while protecting the anonymity of the signers. Attorney General McKenna confirmed that it would.¹⁴⁵

In addition, Attorney General McKenna mentioned during oral argument that petitions signed and submitted in recent years were digitized before the Secretary of State performed a validating check to root out duplicate signatures and to ensure that all signers were registered voters.¹⁴⁶ It follows that it would be feasible to create a publicly accessible, digitized search engine that Washington State citizens could use for personal verification without impeding upon the privacy of other petition signers. Just as voters can plug in their names and dates of birth to determine whether they are registered to vote in Washington State, they could similarly perform the same act with regard to referendum petitions.¹⁴⁷ The identifying information should not be a birthday since that seems easily discoverable through websites such as Facebook; it could be a social security number, a driver’s license number—anything that would allow only the individual to determine whether the presence or absence of his or her signature on a referendum petition is legitimate. This would allow for transparency in the referendum petition process while removing the invasive elements of disclosure that conflict with individual privacy and First Amendment rights.

The Washington State Legislature would enact the latter portion of this reform by modifying sections 29A.72.130 and 29A.72.140 of the Washington Revised Code, which currently establish guidelines for the referendum signature petition gathering process. Under

nedy’s question of whether a text can “say, ‘Your call is important to us, and we will get back to you?’” but singling out Justice Alito for stumping counsel with a question as to whether an employee could delete a text in a way that would prevent his employer from retrieving the text from the wireless carrier); Ashby Jones, *Our Tech-Savvy Supreme Court*, WALL ST. J.L. BLOG (Apr. 19, 2010, 5:56 PM), <http://blogs.wsj.com/law/2010/04/19/our-tech-savvy-supreme-court> (mocking Justice Scalia for asking whether one could print out a text).

143. Transcript of Oral Argument at 49, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559).

144. *Id.* at 50.

145. *Id.* at 49–51.

146. *Reed*, 130 S. Ct. at 2827 (Alito, J., concurring).

147. *Id.*; see also *My Vote: Personalized Voter Information*, WASH. SEC’Y OF STATE, <http://wei.secstate.wa.gov/osos/VoterVault/Pages/MyVote.aspx> (last visited Feb. 6, 2011).

this reform, however, the legislature would incorporate both sections into a single numbered statute—an amended section 29A.72.130—under the single heading, “Referendum petition requirements.” The amendment would leave unchanged the current titles of sections 29A.72.130 (“Referendum petitions–Form”) and 29A.72.140 (“Warning statement–Further requirements”), but these titles would become subheadings that instead would fall under lettered subsections of section 29A.72.130 (becoming section 29A.72.130(1) and section 29A.72.130(2), respectively). Section 29A.72.130 of the Washington Revised Code, currently titled, “Referendum petitions–Form,” addresses what the text of a petition, as shown to a potential signer, should be; what the text of an additional declaration printed on the back side of the petition, to be signed by the signature gatherer, should be; and what additional information is required of a signer (printed name, address, city, and county in which the signer is registered to vote).¹⁴⁸ This reform would not change the text or substance of this law, but would designate it instead as section 29A.72.130(1) of the Washington Revised Code.

The pre-reform section 29A.72.140, titled, “Warning statement—Further requirements,” currently mandates that every referendum petition contain a prominent “Warning” section that clearly explains the legal consequences to signers of including any false information or falsely signing for another individual.¹⁴⁹ The reformed version would maintain the wording and substance of this statute section as it currently stands, except the location of the section would be designated instead as section 29A.72.130(2).

Under this reform, the amended section 29A.72.140, would be titled, “Protected disclosure & signer verification process,” and would be new in substance and text. It would describe the aforementioned electronic interface, to be hosted by the Washington Secretary of State website, stating its purpose as enabling individuals to verify whether their names were properly or improperly included on a particular referendum petition. In addition, the amended section 29A.72.140 would include simple instructions explaining how to use the verification website. It would read as follows:

- (1) The signatures and identifying information included in this petition by an individual signer may be verified by that, and only that, individual signer at the Office of the Washington Secretary of State website,

148. WASH. REV. CODE § 29A.72.130 (2010).

149. *Id.* § 29A.72.140.

hosted at [<http://www.appropriateaddress.com>], when the signer enters and submits his or her social security number.

- (2) The signature gatherer must include on the signature and identifying information side of the petition a box at least two (2) inches in height displaying the website address [<http://www.appropriateaddress.com>] at which signers and non-signers alike can verify whether their signature was properly excluded from or included in a particular petition.

Because the government is obligated to ensure that its legislative processes are responsive to both the threats of widespread disclosure to privacy, as well as to the needs of monitoring representative government, the proposed reform places the onus on the Washington State Legislature to amend the PRA and related portions of the referendum petition statutes to create an easy, non-invasive method of searching referendum petitions. The reform would use a method similar to that of interfaces currently used by websites like KTN and WhoSigned, but would be distinguishable by requiring the entry of information likely known only by the individual to whom it pertains, such as a social security number or voter registration ID, thereby calling up in a search (or not, if the signer was not verified as signing the petition) only the information pertaining to that specific individual who possesses the required identifying information. This proposal would avoid disclosing names and other private identifying information in potentially damaging ways which currently expose petition signers to harassment or simply to exposure they do not want.

CONCLUSION

This Note demonstrates that the two rights at stake in *Doe v. Reed*—the right to anonymous expression and the right to transparency in a corruption-free government—are not necessarily forever mired in irremediable conflict. But *Reed* demonstrates that if courts and lawyers continue to overlook the legal challenges inherent in rapid technological development, unanticipated when the laws regulating the implicated freedoms were drafted, some freedoms previously taken for granted will be irrevocably lost. Without legislative action, particularly in the context of referendum petitions, widespread disclosure of personal information via the Internet at the expense of anonymity will be assured.

To avoid the destruction of either competing fundamental right, this Note provides a solution in the structure of a legislative reform that balances the conflicting desires of signers to keep their political expression anonymous, and of citizens to root out fraud and increase accountability in quasi-legislative processes. When legislatures begin to update laws to account for the Internet's modification of rights implicating political expression, privacy, and disclosure, legislatures must balance interests with an eye toward compromise rather than toward prioritization in which one right trumps the other.¹⁵⁰ If, as in *Reed*, public access always subordinates individual privacy and political anonymity, the latter liberties will be lost and likely never restored. As expressed by Professor Kang:

Historically, privacy issues have been an afterthought. Technology propels us forward, and we react to the social consequences only after the fact. But the amount of privacy we retain is—to use a decidedly low-tech metaphor—a one-way ratchet. Once we ratchet privacy down, it will be extraordinarily difficult to get it back. More disturbingly, after a while, we might not mind so much. It may dawn on us too late that privacy should have been saved along the way.¹⁵¹

Reed aptly illustrates Professor Jerry Kang's concerns and exemplifies the risk that the Internet poses to privacy with regard to political expression. If legislatures such as Washington State's fail to act soon to retain the protection traditionally granted to those supplying personal information that is required when expressing political support of a contentious ballot issue, it will eventually become close to impossible to recover such lost privacies in the future.

150. Justice Stevens eloquently and reasonably emphasized the importance of considering the possibility of accommodating two seemingly conflicting fundamental rights. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Stevens, J., dissenting). He wrote, “[W]hen constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.” *Id.*

151. Kang, *supra* note 7, at 1286.