SUPREME COURT OF THE UNITED STATES

No. 09–559

JOHN DOE #1, ET AL., PETITIONERS *v.* SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.

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

[June 24, 2010]

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring.

I write separately to emphasize a point implicit in the opinion of the Court and the concurring opinions of JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE BREYER: In assessing the countervailing interests at stake in this case, we must be mindful of the character of initiatives and referenda. These mechanisms of direct democracy are not compelled by the Federal Constitution. It is instead up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit legislation by popular action. States enjoy "considerable leeway" to choose the subjects that are eligible for placement on the ballot and to specify the requirements for obtaining ballot access (*e.g.*, the number of signatures required, the time for submission, and the method of verification). *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 191 (1999). As the Court properly recognizes, each of these structural decisions "inevitably affects—at least to some degree—the individual's right" to speak about political issues and "to associate with others for political ends." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788 (1983). For instance, requiring petition signers to be registered voters or to use their real names no doubt limits the ability or willingness of some individuals to undertake the expres-

sive act of signing a petition. Regulations of this nature, however, stand "a step removed from the communicative aspect of petitioning," and the ability of States to impose them can scarcely be doubted. *Buckley*, 525 U. S., at 215 (O'Connor, J., concurring in judgment in part and dissenting in part); see also *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 345 (1995) (contrasting measures to "control the mechanics of the electoral process" with the "regulation of pure speech"). It is by no means necessary for a State to prove that such "reasonable, nondiscriminatory restrictions" are narrowly tailored to its interests. *Anderson*, 460 U. S., at 788.

The Court today confirms that the State of Washington's decision to make referendum petition signatures available for public inspection falls squarely within the realm of permissible election-related regulations. Cf. *Buckley*, 525 U. S., at 200 (describing a state law requiring petition circulators to submit affidavits containing their names and addresses as "exemplif[ying] the type of regulation" that States may adopt). Public disclosure of the identity of petition signers, which is the rule in the overwhelming majority of States that use initiatives and referenda, advances States' vital interests in "[p]reserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 788–789 (1978) (internal quotation marks and alterations omitted); see also *Citizens United* v. *Federal Election Comm'n*, 558 U. S. ___, ___ (2010) (slip op., at 55) ("[T]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages"); Brief for Respondent Washington Families Standing Together 34 (reporting that only one State exempts initiative and referendum petitions from public disclosure). In a society "in which the citizenry is the final

judge of the proper conduct of public business," openness in the democratic process is of "critical importance." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 495 (1975); see also *post*, at 4 (SCALIA, J., concurring in judgment) (noting that "[t]he public nature of federal lawmaking is constitutionally required").

On the other side of the ledger, I view the burden of public disclosure on speech and associational rights as minimal in this context. As this Court has observed with respect to campaign-finance regulations, "disclosure requirements . . . 'do not prevent anyone from speaking.'" *Citizens United*, 558 U. S., at ___ (slip op., at 51). When it comes to initiatives and referenda, the impact of public disclosure on expressive interests is even more attenuated. While campaign-finance disclosure injects the government into what would otherwise have been private political activity, the process of legislating by referendum is inherently public. To qualify a referendum for the ballot, citizens are required to sign a petition and supply identifying information to the State. The act of signing typically occurs in public, and the circulators who collect and submit signatures ordinarily owe signers no guarantee of confidentiality. For persons with the "civic courage" to participate in this process, *post*, at 10 (opinion of SCALIA, J.), the State's decision to make accessible what they voluntarily place in the public sphere should not deter them from engaging in the expressive act of petition signing. Disclosure of the identity of petition signers, moreover, in no way directly impairs the ability of anyone to speak and associate for political ends either publicly or privately.

Given the relative weight of the interests at stake and the traditionally public nature of initiative and referendum processes, the Court rightly rejects petitioners' constitutional challenge to the State of Washington's petition disclosure regulations. These same considerations also

mean that any party attempting to challenge particular applications of the State's regulations will bear a heavy burden. Even when a referendum involves a particularly controversial subject and some petition signers fear harassment from nonstate actors, a State's important interests in "protect[ing] the integrity and reliability of the initiative process" remain undiminished, and the State retains significant discretion in advancing those interests. *Buckley*, 525 U. S., at 191. Likewise, because the expressive interests implicated by the act of petition signing are always modest, I find it difficult to see how any incremental disincentive to sign a petition would tip the constitutional balance. Case-specific relief may be available when a State selectively applies a facially neutral petition disclosure rule in a manner that discriminates based on the content of referenda or the viewpoint of petition signers, or in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue. Accordingly, courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process. With this understanding, I join the opinion of the Court.