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Supreme Court takes up Wash. case involving disclosure of petition signatures

By Janet I. Tu Seattle Times staff reporter

The U.S. Supreme Court this week will hear a Washington state case that could decide whether signing a petition for a ballot measure is a private, political act or whether the names of those signers can be made public.

The case stems from the contentious battles over Referendum 71, in which traditional-marriage supporters last year unsuccessfully sought to overturn an expanded state domestic-partnership law that grants "everything but marriage" benefits to gay and lesbian couples.

Those who backed the repeal effort are trying to shield the petitioners' names from disclosure, saying they could be harassed if their identities are revealed.

Some gay-rights supporters had requested the names and said they would post them on the Internet. Washington Secretary of State Sam Reed says such information is subject to disclosure upon request, as required by the state's Public Records Act.

The Supreme Court, which hears arguments in the case on Wednesday, is expected to decide whether disclosing the names would violate the signers' First Amendment rights.

If the court rules it does, that would likely keep private not only Referendum 71 petitions but all referendum and initiative petitions in this state and potentially those in two dozen other states that allow citizens to put measures on the ballot.

Across the country, legal scholars, governments and interest groups are watching the case closely.

About 25 friend-of-the-court briefs have been filed, representing dozens of organizations. Those supporting disclosure of petitioner names include 23 states, media organizations (including The Seattle Times and most of the state's daily newspapers) and gay-rights groups. Those against disclosure include traditional-values organizations, think tanks and individual-rights groups.

Experts say the case could impact campaign-finance and disclosure laws, and gay-rights groups are looking for clues as to how the justices might rule on gay marriage or other related issues.

The Supreme Court has never ruled on what it means to sign a ballot-measure petition: Is it core political speech that can be anonymous, or is it a public process akin to legislators making law?

Representing those who want to keep the names secret is James Bopp Jr., an Indiana attorney who has filed about 100 lawsuits across the country challenging campaign-finance or disclosure rules. Bopp is working on behalf of Protect Marriage Washington, the group that sought to put Ref. 71 on the ballot and brought the case now before the Supreme Court.

"When public disclosure laws like those in Washington force people to reveal themselves, individuals cannot speak without worrying about threats to themselves, their families, or their jobs," he said.

Representing the state is Attorney General Rob McKenna, who calls the lawsuit a direct challenge to the transparency needed for people to trust their government.

The state's disclosure laws impose a "modest burden" on petition signers, compared with the "very compelling, very strong government and public interest in transparency, accountability and fraud protection," he said.

Core beliefs

Doe v. Reed, as the case is called, is the latest of Bopp's high-profile lawsuits.

He was a key figure in winning a landmark Supreme Court decision earlier this year that lifted decades of restrictions on how much corporations can spend in federal elections. In that case, Citizens United v. Federal Election Commission, the court found that corporations have the same rights as individuals to political speech under the First Amendment.

Bopp says the same philosophy underlies all his cases: the belief that government should not regulate political speech, and that campaign-donation limits and disclosure laws restrict people's speech.

His argument before the Supreme Court on Wednesday "his sixth time before the court" will follow along those lines.

If the court says petition signers' names are public "especially in cases where there's the potential for harassment" it might chill people's willingness to take part in the referendum and initiative process, he said.

Doe v. Reed marks McKenna's third time arguing before the Supreme Court.

He won his previous two cases, defending the state's "top two" primary system, and defending a state law requiring public-sector unions to get permission from dissident members before using their dues for political causes.

Washington has a tradition of openness in government, he said, ever since voters in 1972 overwhelmingly approved an initiative that created the state's Public Records Act.

McKenna's strategy, in part, is to argue that Bopp is presenting a broad challenge that says disclosing any initiative or referendum petition on any subject "not just Ref. 71" violates the petitioners' First Amendment right. That means Bopp has to prove that under no circumstances would disclosure be constitutional "a very high standard to meet, McKenna contends.

A brief filed by the National Conference of State Legislatures in support of McKenna's position noted that out of 24 states that allow citizen referendums or initiatives, 23 disclose petition signatures as public records.

First Amendment

In deciding the case, the justices first will have to determine if there is indeed a First Amendment interest at stake.

If there is, then the court would weigh citizens' free-speech rights against the state's interests in transparency of the political process and fraud prevention. (McKenna argues that making the signatures public helps make sure they come from verified voters.)

The court likely will have to consider whether petition signers would indeed face a threat of harassment if their names are released, said Richard Hasen, a Loyola Law School law professor who specializes in election law.

He notes that four political-science professors submitted a brief saying they couldn't find any evidence petition signers in Washington state or elsewhere had been harassed as a result of disclosing their names.

But another brief filed in support of shielding signatures by the American Civil Rights Union spoke of threats and harassment after names were posted online of campaign contributors to Proposition 8, a 2008 ballot issue that banned gay marriage in California.

Eugene Volokh, a University of California, Los Angeles, law professor who specializes in First Amendment law, thinks the court is likely to decide in favor of allowing disclosure.

In essence, he said, the court could say there's a First Amendment right to anonymous speech *about* elections but not necessarily the right to anonymous participation *in* elections.

That means the state could tell its citizens: If you want your signature to have some direct legal effect, be prepared to have your name be public.

"I'm inclined to say that the state should be free to do that," Volokh said.

But Stewart Jay, a University of Washington law professor who specializes in constitutional law, thinks the court will go the other way.

While the Supreme Court has never ruled on what it means to sign a ballot petition, it has ruled that gathering petition signatures is core political speech, protected under the First Amendment, Jay said.

"I would be surprised if the court found that signing a petition was not a form of political speech protected by the First Amendment," he said.

Furthermore, the court has a tradition of protecting anonymity for political actions such as leafleting and publishing handbills, especially related to elections, he said.

Depending on the decision, what some fear and others welcome is that it may lay the groundwork for future cases seeking to dismantle campaign-finance or disclosure laws, making it more difficult for people to see who's backing which ballot measures.

"What the anti-gay groups are attempting to do is get a sweeping constitutional rule that will allow them to continue to operate in secret in terms of ballot measures all across the country," said Anne Levinson, chairwoman of Washington Families Standing Together, which campaigned to keep the state's expanded domestic-partnership law.

Bopp is upfront that he has a 10-year plan if only in his head for now to dismantle the country's campaign-finance laws.

He sees it as a series of cases that could "ultimately fully restore the First Amendment protections ... for Americans to participate in politics without government trampling all over them."

The Supreme Court is expected to issue its decision by the end of June.

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