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 STEVENS, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

This is not a hard case. It is not about a restriction on voting or on speech and does not involve a classic disclosure requirement. Rather, the case concerns a neutral, nondiscriminatory policy of disclosing information already in the State's possession that, it has been alleged, might one day indirectly burden petition signatories. The burden imposed by Washington's application of the Public Records Act (PRA) to referendum petitions in the vast majority, if not all, its applications is not substantial. And the State has given a more than adequate justification for its choice.

For a number of reasons, the application of the PRA to referendum petitions does not substantially burden any individual's expression. First, it is not "a regulation of pure speech." *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 345 (1995); cf. *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). It does not prohibit expression, nor does it require that any person signing a petition disclose or say anything at all. See *McIntyre*, 514 U. S. 334. Nor does the State's disclosure alter the content of a speaker's message. See *id.*, at 342–343.

Second, any effect on speech that disclosure might have is minimal. The PRA does not necessarily make it more

difficult to circulate or obtain signatures on a petition, see *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 193–196 (1999); *Meyer* v. *Grant*, 486 U. S. 414, 422–423 (1988), or to communicate one's views generally. Regardless of whether someone signs a referendum petition, that person remains free to say anything to anyone at any time. If disclosure indirectly burdens a speaker, "the amount of speech covered" is small—only a single, narrow message conveying one fact in one place, *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 165 (2002); cf. *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). And while the democratic act of casting a ballot or signing a petition does serve an expressive purpose, the act does not involve any "interactive communication," *Meyer*, 486 U. S., at 422, and is "not principally" a method of "individual expression of political sentiment," *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 373 (1997) (STEVENS, J., dissenting); cf. *O'Brien*, 391 U. S., at 377.[1]

Weighed against the possible burden on constitutional rights are the State's justifications for its rule. In this case, the State has posited a perfectly adequate justification: an interest in deterring and detecting petition fraud.[2] Given the pedigree of this interest and of similar regulations, the State need not produce concrete evidence that the PRA is the best way to prevent fraud. See *Crawford* v.

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[1] Although a "petition" is a classic means of political expression, the type of petition at issue in this case is not merely a document on which people are expressing their views but rather is a state-created forum with a particular function: sorting those issues that have enough public support to warrant limited space on a referendum ballot. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 278 (1981) (STEVENS, J., concurring in judgment).

[2] Washington also points out that its disclosure policy informs voters about who supports the particular referendum. In certain election-law contexts, this informational rationale (among others) may provide a basis for regulation; in this case, there is no need to look beyond the State's quite obvious antifraud interest.

Marion County Election Bd., 553 U. S. 181, 191–200 (2008) (opinion of STEVENS, J.) (discussing voting fraud); *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"); see also *Timmons*, 520 U. S., at 375 (STEVENS, J., dissenting) (rejecting "imaginative [and] theoretical" justification supported only by "bare assertion").[3] And there is more than enough evidence to support the State's election-integrity justification. See *ante*, at 8–10 (opinion of the Court).

There remains the issue of petitioners' as-applied challenge. As a matter of law, the Court is correct to keep open the possibility that in particular instances in which a policy such as the PRA burdens expression "by the public enmity attending publicity," *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 98 (1982), speakers may have a winning constitutional claim. "'[F]rom time to time throughout history,'" persecuted groups have been able "'to criticize oppressive practices

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[3]There is no reason to think that our ordinary presumption that the political branches are better suited than courts to weigh a policy's benefits and burdens is inapplicable in this case. The degree to which we defer to a judgment by the political branches must vary up and down with the degree to which that judgment reflects considered, public-minded decisionmaking. Thus, when a law appears to have been adopted without reasoned consideration, see, *e.g.*, *Salazar* v. *Buono*, 559 U. S. ___, ___–___ (2010) (STEVENS, J., dissenting) (slip op., at 22–23), for discriminatory purposes, see, *e.g.*, *Bates* v. *Little Rock*, 361 U. S. 516, 517–518, 524–525 (1960), or to entrench political majorities, see, *e.g.*, *Vieth* v. *Jubelirer*, 541 U. S. 267, 317–319, 324–326, 332–333 (2004) (STEVENS, J., dissenting), we are less willing to defer to the institutional strengths of the legislature. That one may call into question the process used to create a law is not a reason to "disregar[d]" "sufficiently strong," "valid[,] neutral justifications" for an otherwise "nondiscriminatory" policy. *Crawford*, 553 U. S., at 204. But it is a reason to examine more carefully the justifications for that measure.

and laws either anonymously or not at all.'" *McIntyre*, 514 U. S., at 342.[4]

In my view, this is unlikely to occur in cases involving the PRA. Any burden on speech that petitioners posit is speculative as well as indirect. For an as-applied challenge to a law such as the PRA to succeed, there would have to be a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures.[5] Moreover, the character of the law challenged in a referendum does not, in itself, affect the analysis. Debates about tax policy and regulation of private property can become just as heated as debates about domestic partnerships. And as a general matter, it is very difficult to show that by later disclosing the names of petition signatories, individuals will be less willing to sign petitions. Just as we have in the past, I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a sub-

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[4]JUSTICE SCALIA conceives of the issue as a right to anonymous speech. See, *e.g.*, *post,* at 1 (opinion concurring in judgment). But our decision in *McIntyre* posited no such freewheeling right. The Constitution protects "freedom of speech." Amdt. 1; see also *McIntyre*, 514 U. S., at 336 ("The question presented is whether [a] . . . statute that prohibits the distribution of anonymous campaign literature is a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment"). That freedom can be burdened by a law that exposes the speaker to fines, as much as it can be burdened by a law that exposes a speaker to harassment, changes the content of his speech, or prejudices others against his message. See *id.*, at 342. The right, however, is the right to speak, not the right to speak without being fined or the right to speak anonymously.

[5]A rare case may also arise in which the level of threat to any individual is not quite so high but a State's disclosure would substantially limit a group's ability to "garner the number of signatures necessary to place [a] matter on the ballot," thereby "limiting [its] ability to make the matter the focus of statewide discussion." *Meyer* v. *Grant,* 486 U. S. 414, 423 (1988).

stantial burden on speech.[6] A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co.* v. *Knott*, 235 U. S. 23, 26 (1914).

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Accordingly, I concur with the opinion of the Court to the extent that it is not inconsistent with my own, and I concur in the judgment.

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[6] See, *e.g.*, *Bates* v. *Little Rock*, 361 U. S., at 521–522, 523–524; *Buckley* v. *Valeo*, 424 U. S. 1, 69–72 (1976) *(per curiam); Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 98–101 (1982); *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U. S. 182, 197–198 (1999).