

Supreme Court Stays Appellate Ruling Requiring

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The U.S. Supreme Court took action today in a high-profile public records dispute, issuing a stay of a Ninth Circuit ruling that requires the release of the names of those who petitioned to include a referendum on the ballot in the State of Washington this November. The dispute relates to Referendum 71, a ballot initiative that would overturn a Washington law, passed this year, granting legal rights to domestic partners equivalent to those enjoyed by married couples. The initiative was launched by a conservative group that opposes same-sex marriage.

In order to appear on the November ballot, supporters of Referendum 71 were required to secure in excess of 120,000 signatures on petitions. They achieved that benchmark by the July deadline. Shortly after the petitions were submitted, supporters of Referendum 71 filed suit in federal court in Washington, seeking a temporary restraining order that would block the release of the names appearing on the petitions. Opponents of Referendum 71 had requested access to the names under Washington's public disclosure act.

According to the plaintiffs, those who had requested the list of names had indicated they would publish the list on the Internet. In the federal lawsuit, the plaintiffs contended that making the list available under public records laws threatened to chill the First Amendment activity of supporters of Referendum 71. The plaintiffs contend those who petitioned to include Referendum 71 on the November ballot would face harassment from opponents of the ballot measure if their names were made publicly available.

This case therefore presents an interesting intersection of the statutory right to access public records and the First Amendment right to speak and participate in the political process anonymously. In response to the plaintiffs' lawsuit, the federal district judge issued in July a temporary restraining order and later in September a preliminary injunction blocking the release of the petitioners' names. According to the September decision, the plaintiffs' legal theory is as follows:

In Count I of the complaint, Plaintiffs allege that the Washington Public Records Act, RCW 42.56.001, violates the First Amendment as applied to referendum petitions because the act is not narrowly tailored to serve a compelling governmental interest. In Count II, Plaintiffs

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allege that the Public Records Act is unconstitutional as applied to R-71 because “there is a reasonable probability that the signatories of the R-71 petition will be subjected to threats, harassment, and reprisals.”

In its ruling, the district court concluded that "supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." The court went on to conclude that the public nature of the petition verification process (which may be observed by initiative opponents and proponents alike so long as information contained on the petitions is not recorded) meant that public disclosure of the names on the petitions was not necessary as a check on the integrity of the referendum process.

The State of Washington appealed the decision entering a preliminary injunction to the Ninth Circuit Court of Appeals, which, in an order released October 15, reversed the district court's decision and required the release of the list of petitioners. The Ninth Circuit has not yet issued a written decision, but rather has indicated that a full written opinion will follow in due course. In arguing its case to the Ninth Circuit, the State of Washington maintained that the list of names should be publicly available under Washington's public disclosure law because the referendum process is more akin to the legislative process than to the secret ballot.

The case took a new twist today when Justice Anthony Kennedy issued a short order staying the Ninth Circuit's decision while the U.S. Supreme Court decided whether to take up the matter. Justice Stevens was the only Justice who indicated he would have denied the stay request. We will follow this case closely as it proceeds.