Supreme Court Upholds Washington Public Records

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In a case we first flagged back in October of 2009, the Supreme Court last week handed down its decision in Doe v. Reed, a case involving a First Amendment challenge to Washington state's public records act. The case presented an interesting collision of interests for the media, but the Court held 8-1 that the First Amendment did not prevent the disclosure, pursuant to the PRA, of the identities of those citizens who signed a petition seeking to place a referendum on the ballot.

When the Court granted cert in January, we described the case as follows:

The dispute in Doe v. Reed involves the question of whether the signed petitions that ultimately allowed Referendum 71 [a ballot initiative seeking to overturn a law that granted legal rights to domestic partners equivalent to those enjoyed by married couples] to appear on the ballot constitute public records that are subject to disclosure under Washington law as public records. Nearly 138,000 names appear on these petitions. The plaintiffs brought suit in federal court, contending that those who had requested the petitions had indicated they would publish the list of names on the Internet. Making the list available under public records laws, according to the plaintiffs, threatened to chill the First Amendment activity of supporters of Referendum 71. The plaintiffs assert that 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.

As we wrote back then, upholding the PRA would constitute an important victory for government reporters, for whom public records laws are a core part of their newsgathering activities. And yet, the opposite ruling might help boost claims of First Amendment support for anonymous speech, which more and more news outlets find themselves asserting these days.

In a welter of concurring opinions (and one dissent), the Court explored all angles of the case, finally holding that the petitioners' facial challenge to the PRA failed because the state had a sufficient interest in enacting laws designed to preserve electoral integrity. The PRA, the Court held, was not a prohibition on speech, but rather was a disclosure requirement in the voting context, meaning that it was reviewed under a less exacting standard than "strict scrutiny." Chief Justice Roberts, for the Court, wrote that giving the public access to petition records provided a

crucial check on the government's efforts to count and validate those signatures, and that such a check was sufficiently related to the state's interest in electoral integrity.

Justice Alito concurred insofar as the case was a facial challenge, but made it clear that he would rule differently on an as-applied challenge if the petitioners can show a "reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals" from the government or the public.

Justice Scalia, also concurring, said that the petitioners had no First Amendment right to non-disclosure. Justice Scalia pointed out that those who signed the petition had not done so anonymously -- indeed had they done so their "signatures" would not have counted. Because they were only now seeking to have that action be anonymous, Scalia called this " a sort of partial anonymity" not worthy of First Amendment protection.

Justice Thomas took the opposite view in his dissent, writing that the First Amendment interest in anonymous speech trumped the state's purported concerns about electoral integrity. In Justice Thomas' view, the proper standard was strict scrutiny, and, under that standard, the PRA could not constitutionally force the disclosure of petition information because "there will always be a less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process."