

U.S. Supreme Court to Consider Access to Identities

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January has been a prolific month on the U.S. Supreme Court docket for cases raising First Amendment or other media issues. In addition to the Citizens United and Presley decisions addressing limits on corporate political speech and access to jury voir dire proceedings, the Supreme Court earlier this month agreed to hear a case out of the Ninth Circuit involving public access to the petitions that put in place a controversial Washington ballot initiative. The petitions were sought under a state sunshine law in an effort to learn the identities of those who supported placing the initiative on the ballot. The case therefore presents an interesting collision of the First Amendment rights to speak anonymously and to peaceably assemble and state sunshine laws.

We previously reported on the Doe v. Reed case, which the Supreme Court stayed while considering the petition for certiorari it ultimately granted this month. The case relates to Referendum 71, a ballot initiative that appeared on the November 2009 ballot in the State of Washington and was intended as a vehicle for overturning a law, passed earlier in 2009 by the Washington legislature, that granted legal rights to domestic partners equivalent to those enjoyed by married couples. The initiative passed with slightly above 53% of the vote, a result that upheld the law.

The dispute in Doe v. Reed involves the question of whether the signed petitions that ultimately allowed Referendum 71 to appear on the ballot constitute public records 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.

The district court issued a preliminary injunction barring release of the names, concluding that "supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." The Ninth Circuit reversed, holding that signing one of the petitions at issue does not constitute anonymous speech because the petitions are not created in a way that is designed to protect confidentiality. It held further that the district court erred in applying strict scrutiny to Washington's sunshine law, and, when intermediate scrutiny is

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applied, the sunshine law passes muster because "each of the State's asserted interests is sufficiently important to justify the PRA's incidental limitations on referendum petition signers' First Amendment freedoms."

The fact that the Supreme Court agreed to hear the case may signal that the Ninth Circuit ruling's days are numbered. If that occurs, a sweeping decision affirming the right to speak anonymously would appear to be an important First Amendment victory. However, the outcome here -- in which a third party has asserted a constitutional challenge to a sunshine law -- has troubling implications for those in the newsroom. Reporters face enough trouble securing materials under state public records statutes without interference from third parties. Reversal of the Ninth Circuit's decision may encourage court challenges to public records laws by third parties such as public employees or private entities contracting with or seeking money from public agencies. We will watch closely for the outcome in this case, which is set to be argued in April.