

Doe v. Reed and the Future of Disclosure Requirements

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Introduction

In *Doe v. Reed*, the Supreme Court waded into the contentious politics of gay marriage to decide whether government-mandated disclosure of petition signatures in a referendum violates the First Amendment.¹ The issue arose in the context of a Washington State referendum to repeal a recently enacted gay marriage law. Under Washington's version of the Freedom of Information Act, petition signatures must not only be disclosed to state officials for verification, they may also be publicly disclosed, along with the signers' addresses, to anyone who requests them. Fearing threats and harassment of the type that occurred during the debate over California's Proposition 8, the proponents of the Washington referendum and a group of petition signers sought to block public disclosure of the petitions, arguing that disclosure would violate the First Amendment.

The Supreme Court answered the question narrowly. Construing the plaintiffs' challenge as a facial attack—a challenge to petition-signature disclosure as such, regardless of the subject of the referendum or the precise burdens plaintiffs face—the Court ruled against them and held that states have the authority to require the disclosure of the identities of those who sign petitions to have issues placed on the ballot.

On its face, *Doe* is unexceptional. The Supreme Court has long recognized that states have the authority to regulate the process of

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¹ *Doe v. Reed*, 561 U.S. —, 130 S. Ct. 2811 (2010).

elections.² Every state that allows laws to be passed by initiative or referendum requires proponents to circulate petitions and obtain the requisite number of signatures before the issue may be placed on the ballot.³ The Court's decision in *Doe* can thus be seen as a recognition that states must have some discretion to determine how to validate signatures in order to maintain the integrity of their elections. And, mindful that disclosure implicates First Amendment rights, the Court sent the case back to the district court to allow the plaintiffs to try to prove, in a subsequent as-applied challenge, that disclosure would violate their First Amendment rights by chilling their speech and their ability to associate for political purposes.⁴

But as is so often the case with Supreme Court decisions, there is much more to this story than meets the eye. Not only is *Doe* at the heart of a heated cultural battle over gay marriage, it is the latest skirmish in a broader war over the future of campaign finance and election laws. That conflict reached a crescendo with the recent and highly controversial decision in *Citizens United v. FEC*, in which the Court struck down the ban on corporate funding of independent electioneering ads. Although the Court upheld disclosure laws in principle, it left many questions about disclosure unanswered. For example, how burdensome may disclosure laws be? In *Citizens United*, the Court upheld relatively straightforward disclosure laws for those who engage in independent advocacy.⁵ It struck down as unduly burdensome, however, a requirement that corporations run independent political ads only through separate political action committees or "PACs."⁶ Many of the PAC regulations serve the purpose of disclosure, so there is obviously some limit to the burden that government may impose in the name of disclosure.⁷

² See, e.g., *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191–92 (1999) ("States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process."); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections and ballots.").

³ See Initiative & Referendum Institute, *What Are Ballot Propositions, Initiatives, and Referendums?*, available at <http://www.iandrinstitute.org/Quick%20Fact%20-%20What%20is%20I&R.htm> (last visited August 12, 2010).

⁴ *Doe*, 130 S. Ct. at 2821.

⁵ *Citizens United v. FEC*, 558 U.S. ____, 130 S. Ct. 876, 914–16 (2010).

⁶ *Id.* at 897.

⁷ Compare 2 U.S.C. § 434(f) (2006) (upheld by *Citizens United*, 130 S. Ct. at 914-16) and § 434(c) (disclosure requirements substantially similar to section 434(f) that apply

Another unanswered question about disclosure is what purposes may the laws serve and in what contexts are they constitutionally permissible. In *Citizens United*, the Court held that disclosure laws inform the public about who is speaking and help citizens make informed choices in the political marketplace.⁸ But the Court has only clearly endorsed disclosure of funding sources in the candidate context.⁹ It remains to be seen whether the same analysis will apply to laws requiring the disclosure of funds spent to support or oppose ballot initiatives and referendums, where the Court has made clear that there is no possibility of corruption, the primary interest that justifies campaign finance laws in the candidate context.¹⁰

These questions are especially important as Congress and the states grapple with the implications of *Citizens United*. President Obama and many other voices on the left harshly criticized the decision,¹¹ and congressional Democrats swiftly moved to counter its effects with new legislation. Dubbed the “DISCLOSE Act,” the proposed legislation seemed designed more to impede corporate efforts to speak during elections than to provide the public with information about those efforts.¹² Indeed, the bill largely exempted unions,¹³ provided a special carve-out for the NRA and similar

to independent expenditures by persons “other than political committees”) with §§ 432, 433, 434(a) (detailed administrative, organizational, and continuous reporting requirements applicable only to PACs).

⁸ *Citizens United*, 130 S. Ct. at 914–15.

⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (describing one of the goals of the informational interest as “alert[ing] the voter to the interests to which a *candidate* is most likely to be responsive and thus facilitat[ing] predictions of future performance *in office*” (emphases added)).

¹⁰ See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296–98 (1981); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790–91 (1978).

¹¹ See, e.g., Robert Barnes, Alito Dissents on Obama Critique of Court Decision, *Wash. Post.*, Jan. 28, 2010, at A6 (noting Obama’s criticism of *Citizens United* during his State of the Union address, and the accompanying Democratic applause).

¹² DISCLOSE Act, H.R. 5175, 111th Cong. § 101 (2010); see also Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010) (requiring corporations to seek shareholder preapproval for expenditures for political speech).

¹³ H.R. 5175 § 101 (banning corporations that have contracts with the government of \$7 million or more from engaging in express advocacy or electioneering communications, but not applying similar restrictions to unions that bargain with the government for salaries and benefits). The companion bill in the Senate is S. 3628 (2010).

groups,¹⁴ prevented companies that had accepted Troubled Asset Relief Program funds from spending money on independent ads,¹⁵ and imposed harsher disclosure obligations on corporations than had preexisted *Citizens United*.¹⁶ Senator Chuck Schumer, one of the bill's cosponsors, helped erase any doubts of the bill's purpose when he pointed out to supporters that the act's "deterrent effect should not be underestimated."¹⁷ President Obama echoed Schumer's sentiment when he said that DISCLOSE would help "reduc[e] corporate and even foreign influence over our elections."¹⁸ Although DISCLOSE failed to pass, supporters have vowed to introduce it again,¹⁹ and at least 11 states have enacted legislation designed to deal with the implications of *Citizens United*.²⁰

Thus, *Doe* comes at a time of great controversy over campaign-finance laws and the growing realization among reformers that disclosure is one area in which the courts may take a more deferential approach. Unfortunately, the Court's decision in *Doe* sheds little

¹⁴ *Id.* § 211(c) (exempting currently established groups with 500,000 dues-paying members and at least one member in each state).

¹⁵ *Id.* § 101.

¹⁶ *Id.* §§ 201-02 (broadening the definitions of express advocacy and electioneering communication subject to reporting requirements and bans); *Id.* § 211(a), (b) (broadening donor disclosure requirements for organizations speaking about candidates); *Id.* § 214 (imposing multiple new disclaimer requirements on broadcast ads). See generally Center for Competitive Politics, Policy Briefing: "DISCLOSE Act": H.R. 5175 and S. 3628 (July 22, 2010), available at http://www.campaignfreedom.org/docLib/20100527_DISCLOSEpolicybriefing.pdf.

¹⁷ See Jess Bravin & Brody Mullins, New Rules Proposed on Campaign Donors, Wall St. J., Feb. 12, 2010 (quoting Senator Schumer (D-NY)). Representative Hank Johnson (D-GA) made this point even more blatantly when he told fellow House Democrats that if they vote against DISCLOSE "we will see more Republicans getting elected." Real Clear Politics Video, Dem Congressman: We Must Have Campaign Finance Disclosure to Stop Republicans from Getting Elected (June 24, 2010), available at http://www.realclearpolitics.com/video/2010/06/24/dem_congressman_we_must_have_campaign_finance_disclosure_to_stop_republicans_from_getting_elected.html.

¹⁸ Remarks by the President on the DISCLOSE Act (July 26, 2010) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-disclose-act>).

¹⁹ Dan Eggen, Bill on Political Ad Disclosures Falls Short in Senate, Wash. Post, July 28, 2010, at A3 ("Schumer vowed to try again.").

²⁰ Nat'l Conference of State Legislatures, Life after *Citizens United*, <http://www.ncsl.org/default.aspx?tabid=19607> (last visited August 12, 2010) (listing 11 states with updated laws as of August 10, 2010).

light on what will happen in future cases. Indeed, the decision is perhaps more important for what it did not say than for what it did. The Court scrupulously avoided going beyond the narrow question of whether public disclosure of all petition signatures in a referendum was per se invalid under the First Amendment. The decision says nothing about the constitutionality of laws that require disclosure of those who contribute money to support or oppose ballot initiatives. Twenty-four states and many local jurisdictions have such laws on the books.²¹ The laws have been challenged, but the Supreme Court has not yet taken up the issue. However, in light of ballot issue controversies such as California's Proposition 8—in which both sides of the gay marriage issue sought to intimidate opponents²²—it seems likely that a case will reach the Court some day soon.

Although the Court's decision in *Doe* itself tells us little about what the future may hold, four justices wrote separately to express their views about the majority decision and the as-applied challenge on remand. Examining those opinions may shed light on how the Court will rule in a future case.

Part I of this article describes the factual background of the case. Part II discusses the Chief Justice's majority opinion. Part III examines the concurring and dissenting opinions with an eye toward understanding what the Court is likely to rule in the as-applied challenge, should it return to the Court, and in any future challenges to other ballot issue disclosure laws.

I. Background

Like California's Proposition 8, the Washington referendum at issue in *Doe* sought to revoke recent recognition of gay marriage rights. In May 2009, Washington's legislature passed a law treating

²¹ See Initiative & Referendum Institute, *supra* note 3.

²² See Citizens United, 130 S. Ct. at 916 (citing Brief for Inst. for Justice as Amicus Curiae in Support of Appellant on Supplemental Question at 13, 17–19) (noting that “donors to certain causes,” including those supporting proposition 8, “were blacklisted, threatened, or otherwise targeted for retaliation,” and calling this a “cause for concern”); Lisa Leff, Proposition 8 Backers Target Businesses, Associated Press, Oct. 23, 2008 (describing how businesses listed as donors on website of anti-Proposition 8 group received letters from pro-Proposition 8 group asking for money and threatening boycotts over their support of gay marriage).

same-sex domestic partnerships essentially the same as opposite-sex marriages.²³ Almost immediately after passage, however, a group known as Protect Marriage Washington began working on a referendum to repeal the law.²⁴

Washington, like most states that allow legislative action through initiative and referendum, requires proponents to qualify their issue for the ballot by submitting petitions signed by a certain number of registered voters. Under Washington law, proponents must gather enough signatures to equal four percent of the votes cast in the preceding gubernatorial election. Petitions must also include the addresses of the signers.²⁵

Washington law also requires the state's secretary of state to verify petition signatures. The secretary's office takes a statistical sample of the submitted signatures and compares them against the signatures on the voter registration cards, removing non-matching signatures, signatures with no valid voter registration, and any duplicate signatures.²⁶ If the sample does not verify that a sufficient number of valid signatures were submitted within an acceptable margin of error, the entire list of petition signatures must be verified.²⁷ This process allows petition-signature information to be disclosed only to the secretary of state and to a court in any subsequent suit challenging the validity of signatures, but it does not permit full public disclosure of signatures.²⁸

In July 2009, Protect Marriage Washington submitted petition signatures to the secretary of state.²⁹ The number of signatures was close to the minimum number necessary to place the referendum on the ballot, requiring examination of the entire list.³⁰ After checking

²³ Doe, 130 S. Ct. at 2816 (citing S. Bill 5688, 61st Leg., Reg. Sess. (Wash. 2009)).

²⁴ *Id.*

²⁵ *Id.* (citing Wash. Const. art. II, § 1(b)).

²⁶ Wash. Rev. Code § 29A.72.230 (2010); Wash. Admin. Code §§ 434-379-010, -020 (2010).

²⁷ Wash. Admin. Code § 434-379-010 (2010).

²⁸ Wash. Rev. Code § 29A.72.230.

²⁹ Doe, 130 S. Ct. at 2816.

³⁰ Sam Reed, Washington Secretary of State, Certification of Referendum 71 (Sept. 2, 2009), available at <http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Documents/R-71%20Certification.pdf>.

each signature, the secretary certified that a sufficient number were valid and placed the measure on the November 2009 ballot.³¹

In the meantime, several groups had announced their intention to invoke Washington's Public Records Act to obtain the names and addresses of petition signers and to publicly disclose the information in an online, searchable database.³² Passed in 1972, the PRA is a fairly typical state freedom-of-information-type act in that it makes any records deemed "public records" available for release to the general public.³³ Originally, petition signatures were not considered "public records" and thus were not subject to disclosure under the PRA.³⁴ However, in 1998 the secretary of state reversed that interpretation and made petition signatures subject to public disclosure.³⁵ To make a request, one simply asks the secretary of state for specific and identifiable records, which may be received as physical photocopies or as digital copies.³⁶

In July and August 2009, six organizations and individuals made PRA requests for the petition signatures from the gay marriage repeal referendum.³⁷ The organizations included the Associated Press, the Washington Coalition for Open Government, and two groups called WhoSigned.org and KnowThyNeighbor.org.³⁸ WhoSigned.org, working with KnowThyNeighbor.org, promised to put the names and addresses in an online, searchable database with the avowed purpose of allowing gay marriage supporters "to use its

³¹ *Id.*

³² See Washington Secretary of State, Referendum 71 Litigation in Federal Court, <http://wei.secstate.wa.gov/osos/en/initiativesReferenda/Pages/R-71Information.aspx> (last visited August 12, 2010).

³³ Doe, 130 S. Ct. at 2815; *Id.* at 2826 (Alito, J., concurring).

³⁴ See *id.* at 2826 (Alito, J., concurring) (discussing secretary of state's position, between 1973 and 1998, that petition signatures were not public records subject to disclosure); Wash. Rev. Code § 29A.72.230 (2010) (permitting observers of the signature verification process but prohibiting the recording of names and addresses).

³⁵ Brian Zylstra, The Disclosure History of Petition Sheets, Washington Secretary of State Blogs: From Our Corner (Sept. 17, 2009), <http://blogs.sos.wa.gov/FromOurCorner/index.php/2009/09/the-disclosure-history-of-petition-sheets>; Doe, 130 S. Ct. at 2826 (Alito, J., concurring).

³⁶ Washington Secretary of State, Public Records, <http://www.sos.wa.gov/publicrecords/> (last visited July 29, 2010).

³⁷ See Washington Secretary of State, *supra* note 32.

³⁸ See *Id.*

online tools to find the names of people they know” and to engage in “uncomfortable” conversations.³⁹ Announcing the release of similar signatures in Arkansas, KnowThyNeighbor.org said it “expect[ed] that many petition signers will be confronted about their actions as their names are discovered on the website by family members, friends, coworkers, customers, and acquaintances.”⁴⁰

In July 2009, Protect Marriage Washington and some of the individuals who had signed the petition sued the secretary of state in federal court challenging the release of the names and addresses of the petition signers as a violation of the First Amendment.⁴¹ The complaint asserted two counts, one broad and one narrow. The first count attacked the application of the PRA to ballot issues and referendums at all. In essence, it claimed that the post-1998 interpretation of the PRA, under which petition signatures were considered “public records,” was unconstitutional. The second count claimed that applying the PRA to the referendum at issue was unconstitutional.⁴² Along with their complaint, the plaintiffs filed a motion to enjoin the release of the signatures pending the resolution of the case.

The plaintiffs relied on a line of Supreme Court cases beginning with *NAACP v. Alabama*, in which the Court blocked efforts by the State of Alabama to obtain NAACP membership lists as a violation of the right of association under the First Amendment.⁴³ The theory of the plaintiffs’ case in *Doe* was simple: the groups seeking disclosure had openly admitted that their purpose was to intimidate individuals who wished to sign the petitions. This result would necessarily chill plaintiffs’ speech and thus violate their First Amendment rights.⁴⁴

³⁹ KnowThyNeighbor.org Blog, Press Release, KnowThyNeighbor.org Partners with WhoSigned.org in Washington State (June 1, 2009), <http://knowthyneighbor.org/blogs.com/home/2009/06/knowthyneighbororg-partners-with-whosignedorg-in-washington-state.html>.

⁴⁰ KnowThyNeighbor.org Blog, Press Release, Names of Anti-Gay Petition Signers Posted Online (Apr. 28, 2009), <http://knowthyneighbor.org/blogs.com/home/2009/04/press-release-names-of-arkansas-antigay-petition-signers-posted-online.html>.

⁴¹ *Doe v. Reed*, 661 F. Supp. 2d 1194, 1195–96 (W.D. Wash. 2009).

⁴² *Id.* at 1196.

⁴³ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–66 (1958).

⁴⁴ See Pls.’ Mem. in Support of Mot. for TRO and Prelim. Inj. at 26–28, *Doe v. Reed*, 661 F.Supp.2d 1194 (W.D. Wash. 2009) (No. C09-5456BHS).

The district court accepted this argument, applying the highest level of, or “strict,” scrutiny and holding that the release of names and addresses of petition sponsors under the PRA in general unjustifiably burdens political speech.⁴⁵ The Court thus issued an injunction based on the plaintiffs’ broader claim that the application of the PRA to any referendum petitions violated the First Amendment without reaching their narrower claim that the application of the PRA in this instance was unconstitutional. As a result, only the broader claim was at issue in the resulting appeals.⁴⁶

The U.S. Court of Appeals for the Ninth Circuit reversed. Construing the PRA as a “regulation that has an incidental effect on expressive conduct,” it applied a lesser form of First Amendment scrutiny, under which the government has more leeway to regulate. It found the burden on First Amendment rights to be sufficiently justified by the state’s interest in preventing fraud or mistake in the petition process and providing voters with information about who signed the petitions.⁴⁷ With release of the petition signatures imminent, the plaintiffs sought a stay of the Ninth Circuit’s order from Justice Anthony Kennedy, sitting as circuit justice for the Ninth Circuit. The stay was granted⁴⁸ and remained in effect after the Supreme Court accepted the case for review in January 2010.⁴⁹

In November 2009, Washington voters rejected the referendum, affirming the legislature’s extension of marriage rights to gay couples.⁵⁰ The lawsuit, however, continued.

II. The Majority Opinion in *Doe*

The Court’s decision in *Doe* is a good illustration of the fact that the outcome of a constitutional case often depends as much on how the Court characterizes the law and the right at issue as it does on what arguments are made about those subjects. The Supreme Court

⁴⁵ See *Doe*, 661 F. Supp. 2d at 1203–05.

⁴⁶ *Id.* at 1205.

⁴⁷ *Doe v. Reed*, 586 F.3d 671, 678–80 (9th Cir. 2009). The panel stayed the injunction without opinion, noting only that the lower court had applied “an incorrect legal standard.” The opinion issued several days after the Supreme Court stayed the panel’s judgment. See Petitioners’ Brief at 11, *Doe v. Reed*, 130 S. Ct. 2811 (2010).

⁴⁸ *Doe v. Reed*, 130 S. Ct. 486 (2009).

⁴⁹ *Doe v. Reed*, 130 S. Ct. 1133 (2010).

⁵⁰ *Doe*, 130 S. Ct. at 2816.

has long recognized that the states must have the authority to regulate the process of elections to ensure their fairness and to prevent fraud. At the same time, it has also recognized that election regulations will often implicate First Amendment rights such as freedom of speech and association.⁵¹ The difficulty in these cases is deciding how to reconcile these competing interests.⁵²

The facts of *Doe* provided what seemed to be a relatively easy answer to this dilemma, for the law at issue in *Doe* was not a typical regulation of the election *process*, it was a generally applicable public records statute. As Justice Clarence Thomas pointed out in his dissent, the plaintiffs “do not argue that the Constitution allows them to support a referendum measure without disclosing their names *to the State*.”⁵³ Instead, they challenged the designation of signature information as a “public record” under the PRA, which made the information subject to disclosure to anyone who asked for it.

The Court could have decided *Doe* simply by recognizing this distinction. Indeed, that is precisely the approach Justice Thomas would have taken. As he saw it, although the state has the constitutional authority to verify signatures, it does not follow that the state may make signatures and addresses available to everyone. Doing so, according to Justice Thomas, imposes a severe burden on First Amendment rights to speech and political association and is entirely unnecessary, because the state can easily verify signatures without such disclosure.⁵⁴ Accordingly, Justice Thomas would have applied strict scrutiny to the application of the PRA to signature information and invalidated this practice as vastly broader than necessary to achieve the state’s legitimate interest in regulating the election process.⁵⁵

⁵¹ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–58 (1997); *Anderson v. Celebrezze*, 460 U.S. 780, 786–87 (1983); *Storer v. Brown*, 415 U.S. 724, 738 (1974).

⁵² See, e.g., *Timmons*, 520 U.S. at 358–59 (The Court must weigh the “character and magnitude” of burdens of state election law on associational rights against the need for “reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”).

⁵³ *Doe*, 130 S. Ct. at 2837 (Thomas, J., dissenting) (emphasis in original).

⁵⁴ See *id.* at 2837, 2839–41.

⁵⁵ *Id.* at 2839–44.

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On the other end of the spectrum, Justice Antonin Scalia, who concurred in the judgment, would have held that signing a petition receives no First Amendment protection at all.⁵⁶ In his view, signing a petition to place a referendum on the ballot is a legislative act rather than an exercise of First Amendment rights.⁵⁷ In keeping with his dissent in *McIntyre v. Ohio Elections Commission*,⁵⁸ Justice Scalia expressed skepticism that the First Amendment protects a right of anonymity at all.⁵⁹ Even if a right to anonymous speech exists, however, there can be no right to anonymously participate in lawmaking, in Justice Scalia's view. "[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."⁶⁰

Chief Justice John Roberts's majority opinion⁶¹ took a position between these poles. The majority recognized, along with Justice Thomas, that signing a petition constitutes protected speech under the First Amendment, because the individual is expressing a view that either the law should be repealed or the matter should at least be put to a vote.⁶² Nevertheless, the majority was willing to grant far more leeway to the state than Justice Thomas would have granted it. The majority characterized the PRA in this context not as a general public records provision that was redundant of preexisting and more specific election process laws but as a necessary part of those laws.⁶³ As the Court stated, "[w]e allow States significant flexibility in implementing their own voting systems."⁶⁴ Moreover, as a disclosure

⁵⁶ See *id.* at 2832 (Scalia, J., concurring in the judgment) ("I doubt whether signing a petition that has the effect of suspending a law fits within 'the freedom of speech' at all.").

⁵⁷ *Id.* (contrasting a "general right to 'speak' anonymously about a referendum" with the "disclosure . . . of those who took this legislative action").

⁵⁸ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371–78 (1995) (Scalia, J., dissenting) (arguing on originalist grounds against a First Amendment right to anonymous speech).

⁵⁹ *Doe*, 130 S. Ct. at 2832–33 (Scalia, J., concurring in the judgment).

⁶⁰ *Id.* at 2837.

⁶¹ Joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor.

⁶² *Doe*, 130 S. Ct. at 2817.

⁶³ See *id.* at 2818–19.

⁶⁴ *Id.* at 2818.

provision, the PRA “do[es] not prevent anyone from speaking.”⁶⁵ The Court thus applied what it has termed “exacting scrutiny,” rather than the strict scrutiny Justice Thomas would have applied. Under this standard there must be a “substantial relation between the disclosure requirement and a sufficiently important governmental interest” and “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”⁶⁶

The case thus came down to two questions. First, is the state’s interest in requiring disclosure of all the petition signatures and addresses sufficiently important? Second, does the state’s interest outweigh the burden on the plaintiffs’ First Amendment rights?

The state asserted two interests to justify its application of the PRA to signature information: “preserving the integrity of the electoral process” and “providing information to the electorate.” If there is a standard interest states offer to justify their election laws, preserving the integrity of elections is it.⁶⁷ The phrase is a catchall that covers laws designed to prevent fraud or mistake and to promote transparency and accountability of the election process.⁶⁸ The Supreme Court has often found this interest sufficient to justify reasonably tailored election laws.

The informational interest is more controversial, however. It boils down to the idea that the government should try to educate voters about issues by requiring those who support or oppose initiatives and referendums to disclose information about themselves.⁶⁹ In *Doe*, that meant disclosing the identities and addresses of those who signed petitions to place the referendum on the ballot. The state and the other respondents argued that this information would provide

⁶⁵ *Id.* (quoting *Citizens United*, 130 S. Ct. at 914).

⁶⁶ *Doe*, 130 S. Ct. at 2818 (internal quotations and citations omitted). Although the Court referred to “exacting scrutiny,” it has used that term in the past to refer interchangeably to intermediate and strict scrutiny. Compare *Citizens United*, 130 S. Ct. at 914, and *Doe*, 130 S. Ct. at 2818, with *McIntyre*, 514 U.S. at 347 (1995) (stating that exacting scrutiny requires an overriding state interest and narrow tailoring).

⁶⁷ See, e.g., *Buckley v. Am. Constitutional Law Found.* 525 U.S. 182, 191–92 (1999); *Anderson v. Celebrezze*, 460 U.S. at 788 n.9 (collecting cases).

⁶⁸ *Doe*, 130 S. Ct. at 2819.

⁶⁹ See, e.g., *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104–06 (9th Cir. 2003); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1314 (S.D. Ala. 2000) (citing *Buckley*, 424 U.S. at 66–67).

voters with “insight into whether support for holding a vote comes predominantly from particular interest groups, political or religious organizations, or other group[s] of citizens.”⁷⁰

The informational interest has most often been offered as the justification for state laws that require people who finance efforts to speak out for or against ballot initiatives or referendums to disclose their identities.⁷¹ The idea is that requiring this sort of disclosure provides voters with what amounts to a sort of endorsement, albeit an unwilling one, from those who fund speech for or against initiatives and referendums.⁷² The theory seems to be that if voters will not educate themselves about the issues, perhaps they will educate themselves about what other people think about the issues. Why spend time trying to figure out the issues, after all, when you can consult the secretary of state’s website and learn what your neighbor thinks about them?

The reality is debatable, not least because voters seldom consult disclosure information and the media rarely report any of it.⁷³ It seems that voters either can already figure out what interests line up on each side of an issue or simply do not care. Still, debate rages on in the academy about the utility of using contributor and other information as “cues” to help better educate voters.⁷⁴

⁷⁰ Doe, 130 S. Ct. at 2824 (Alito, J., concurring) (quoting Brief of Resp’t Wash. Families Standing Together at 58 and citing Brief of Resp’t Reed at 46–48).

⁷¹ See, e.g., *Cal. Pro-Life v. Getman*, 328 F.3d at 1092; *Richey v. Tyson*, 120 F. Supp. 2d at 1302.

⁷² See, e.g., Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence through Heuristic Cues and “Disclosure Plus,”* 50 *UCLA L. Rev.* 1141, 1164 (2003) (arguing that disclosure should be widely broadcast to “inform [voters] who supports which side of a ballot question and help them to understand in a quick, familiar manner what the ballot question is really about”); Elizabeth Garrett, *Commentaries on Bruce Ackerman and Ian Ayres’s Voting with Dollars: A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 *U. Rich. L. Rev.* 1011, 1035 (2003) (“A focus on these notorious groups is important for any assessment of disclosure statutes because these groups are the most likely to strongly resist publicity. . . . Thus, mandatory disclosure of campaign spending may be the only way to provide voters with credible signals based on notorious-group-support.”).

⁷³ See Dick M. Carpenter, *Institute for Justice, Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 11–13 (2007), available at <http://www.ij.org/publications/other/disclosurecosts.html>; Dick M. Carpenter, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 *Indep. Rev.* 567, 579 (2009), available at http://www.independent.org/pdf/tir/tir_13_04_6_carpenter.pdf.

⁷⁴ See, e.g., James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion in Elements of Reason* 153, 155–63 (Arthur

What is far less debatable are the implications of the informational interest. Justice Samuel Alito described them effectively in his concurrence:

The implications of accepting such an argument are breathtaking. Were we to accept respondents' asserted informational interest, the State would be free to require petition signers to disclose all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships. Requiring such disclosures, however, runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association.⁷⁵

Perhaps to avoid these breathtaking implications, the majority in *Doe* avoided the informational interest altogether simply by deciding that the far less controversial and more constitutionally sound interest in preserving the integrity of elections—that is, preventing fraud and mistake—would suffice. The Court's analysis of this interest is questionable, and, indeed, Justice Thomas did question it in dissent by pointing out that the state could easily ensure the validity of petition signatures by simply cross-referencing that information—which it keeps in digitized form—with voter registration information and then checking for duplicate signatures.⁷⁶ The state's desire to backstop its own efforts at signature verification through on-demand public disclosure was therefore, in Justice Thomas's view, a "blunderbuss approach" that went far beyond anything the state needed to do to prevent fraud.⁷⁷

Nevertheless, as the majority noted, the Court has often given states wide latitude to implement their own election laws. The secretary of state's own verification procedures might not catch every invalid signature, the Court noted, and disclosure helps prevent

Lupia et al. eds., 2000) (discussing the academic literature supporting the cognitive heuristics theory, and its shortcomings).

⁷⁵ *Doe*, 130 S. Ct. at 2824 (Alito, J., concurring).

⁷⁶ See *id.* at 2840–41 (Thomas, J., dissenting). Justice Alito also expressed strong doubts about the strength of the state's interest in the integrity of the petition-gathering process and the availability of alternative mechanisms. See *id.* at 2825–27 (Alito, J., concurring).

⁷⁷ *Id.* at 2840 (Thomas, J., dissenting).

some types of fraud that are difficult to detect.⁷⁸ These points may not have addressed all of Justice Thomas's arguments, but the majority was applying only intermediate scrutiny, under which being wrong is not necessarily the same thing as being unconstitutional.⁷⁹

The Court thus turned to the final question to decide whether the state's interest outweighed the burden on the plaintiffs' rights. Here, the plaintiffs faced difficulty based on the nature of the claim on which they had prevailed in the lower courts. They had claimed both that applying the PRA to any initiative and referendum petitions violated the First Amendment and that applying it to the petitions at issue in their case violated the First Amendment by chilling their rights to speech and association. The district court ruled for the plaintiffs only on the former claim, however, which resulted in only that claim coming before the Supreme Court. Thus, the majority felt constrained to treat the plaintiffs' claim as a facial challenge, meaning that they had to show that public disclosure would not only chill their speech in this instance, but that it would chill the speech of petition signers in a typical referendum or ballot issue election.⁸⁰

Most initiatives and referendums are not controversial, noted the Court. Although the plaintiffs could show a potential for harassment and intimidation in a referendums concerning gay marriage, "typical referendum petitions 'concern tax policy, revenue, budget, or other state law issues.'"⁸¹ According to the Court, the plaintiffs had little to offer in response to the state's claim that disclosure of a typical petition involved only modest burdens on the right of association.⁸² It thus felt compelled to reject their broad challenge and to remand back to the district court to allow the plaintiffs the opportunity to demonstrate that the PRA violates the First Amendment as applied to them.

Here, again, however, Justice Thomas's dissent seemed a ready response to the majority's approach. The PRA is not part of the typical set of election regulations that Washington has long used to

⁷⁸ *Id.* at 2820 (Roberts, C.J.) (majority opinion).

⁷⁹ *Id.* at 2820 n.2.

⁸⁰ *Id.* at 2821.

⁸¹ *Id.* (quoting Br. for Resp't Wash. Families Standing Together at 36).

⁸² *Id.*

validate signatures. It is a generally applicable freedom-of-information statute that was interpreted to apply to petition signatures only in 1998, several decades after enactment.⁸³ One might just as easily argue that state income tax returns should be subject to the PRA, but one hopes that such a “blunderbuss” approach to rooting out tax fraud would be met with somewhat more skepticism than the majority expressed for the state’s argument in *Doe*. It is not clear why that should be so, however. As Justice Thomas pointed out, signing a petition is an exercise of both freedom of speech and freedom of association—rights the Court has long held may be regulated only narrowly and only where the government demonstrates a compelling interest. As the Court has said, “the tie goes to the speaker, not the censor.”⁸⁴

Alas, when it comes to election process laws, the tie apparently goes to the state.

III. What Does the Future Hold?

The Court’s decision in *Doe* raises two immediate questions: what comes next for the plaintiffs—who return to the district court to litigate their as-applied challenge—and what are the implications of the decision for future challenges to disclosure laws? The first question appears easier to answer, at least from the Supreme Court’s perspective, because five justices wrote or joined concurrences that seemed clearly to take the position that the plaintiffs should lose their as-applied challenge. However, one of them was Justice John Paul Stevens, who has since been replaced by former Solicitor General Elena Kagan (whose views on the subject of disclosure are unknown).

The second question—the implications for future challenges to disclosure laws—is more difficult, at least outside of the strict context of disclosure laws that apply to petition signatures. Within that context, the answer is relatively straightforward. The states have substantial discretion to choose the means of implementing their election process regulations, meaning that challenges to the public disclosure of petition signatures are subject to intermediate (or

⁸³ *Id.* at 2826 (Alito, J., concurring).

⁸⁴ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

“exacting”) rather than strict scrutiny. Unless challengers can demonstrate that public disclosure substantially burdens the rights of all who wish to sign a petition, they are stuck with as-applied challenges. While one can certainly take issue with the majority’s approach, as Justice Thomas did, the outcome of the decision is not terribly surprising. As stated above, the Court has long given the states discretion to implement their election process laws, and in the candidate context, as-applied challenges that require case-specific harm are the rule for disclosure laws.⁸⁵

Outside the narrow context of laws that regulate the process of elections, however, it is very difficult to detect any implications of *Doe* at all. Indeed, about the only inference one can draw from *Doe* is that the majority and the various concurring justices *wanted* to avoid any implications for other types of disclosure laws. They could have broadly embraced disclosure in the initiative and referendum context—for example, by extolling the virtues of disclosure as a means of educating voters about issues—but they did not. And the only concurring justice to discuss an issue that would apply to disclosure laws more broadly was Justice Alito, who rejected the so-called informational interest as fundamentally illegitimate and at odds with the First Amendment. The informational interest is the primary grounds on which states have defended laws requiring the disclosure of those who spend money for speech supporting or opposing ballot issues and referendums.⁸⁶ Yet not one justice took issue with Justice Alito’s position or attempted to defend the informational interest. All stayed focused on the question of whether the disclosure of petition signatures violated the First Amendment, not whether other types of disclosure laws might.

A. The As-Applied Challenge

The majority decision in *Doe* offered little insight into the remaining as-applied challenge other than to state, quoting *Buckley v. Valeo*, that to prevail, the plaintiffs must show “a reasonable probability that the compelled disclosure [of personal information] will subject

⁸⁵ See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982) (holding that disclosure requirements were unconstitutional as applied to Socialist Workers Party based on evidence that supporters would be subject to reasonable probability of threats, harassment, or reprisals).

⁸⁶ See, e.g., *Cal. Pro-Life*, 328 F.3d at 1101; *Richey*, 120 F. Supp. 2d at 1312–15.

them to threats, harassment, or reprisals.”⁸⁷ However, five justices—Stevens, Scalia, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor—indicated in separate concurrences that they did not believe the plaintiffs could prevail. Justices Sotomayor and Stevens wrote the principal concurrences arguing that the plaintiffs are unlikely to prevail in their as-applied challenge. Justices Ginsburg and Stevens joined in Justice Sotomayor’s concurrence and Justice Breyer joined in Justice Stevens’s concurrence. Justice Scalia wrote separately, expressing his view, which no other justice joined, that the First Amendment does not protect the right to anonymously sign a referendum petition at all.

Both Justice Sotomayor and Justice Stevens began by noting the narrow context in which the case arose. For Justice Sotomayor, the case fell “squarely within the realm of permissible election-related regulations” as opposed to more general laws that implicate the “communicative aspect of petitioning.”⁸⁸ Likewise, in Justice Stevens’s view, *Doe* merely involves the disclosure of information already in the state’s possession, which the state requires to prevent petition fraud.⁸⁹ Thus, both justices emphasized, as did the majority, that states have broad latitude to legislate for the purpose of ensuring the integrity of their elections.⁹⁰ As a result, according to these justices, the plaintiffs will bear a heavy burden in their as-applied challenge.⁹¹

For Justice Sotomayor, plaintiffs would be able to prevail in an as-applied challenge only in “the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control.”⁹² Justice Stevens similarly viewed plaintiffs’ success on the as-applied challenge as “unlikely.”⁹³ Despite the evidence of harassment for petition signers, including harassing and threatening e-mails, veiled threats, and

⁸⁷ *Doe*, 130 S. Ct. at 2820 (quoting *Buckley*, 424 U.S. 1, at 74 (alterations in original)).

⁸⁸ *Id.* at 2828 (Sotomayor, J., concurring).

⁸⁹ *Id.* at 2829–30 (Stevens, J., concurring).

⁹⁰ *Id.* at 2828 (Sotomayor, J., concurring); *id.* at 2829–31 (Stevens, J., concurring).

⁹¹ *Id.* at 2829 (Sotomayor, J., concurring); *id.* at 2831 (Stevens, J., concurring).

⁹² *Id.* at 2829 (Sotomayor, J., concurring).

⁹³ *Id.* at 2831 (Stevens, J., concurring).

the prospect of boycotts,⁹⁴ Justice Stevens saw the burden on First Amendment rights as “speculative as well as indirect.”⁹⁵ Like Justice Sotomayor, he believed that only a threat that “cannot be mitigated by law enforcement measures” would suffice to justify preventing disclosure of petition signatures.⁹⁶

In striking contrast to Justices Stevens and Sotomayor, Justice Alito argued in his solo concurrence that the plaintiffs have “a strong argument that the PRA violates the First Amendment” as applied to them.⁹⁷ Justice Alito recognized the central paradox with using as-applied remedies to address a chilling effect—by the time the remedy is available, the chilling effect has already occurred, thus rendering the remedy too little, too late. As Justice Alito put it, an “as-applied remedy becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking.”⁹⁸ Accordingly, Justice Alito stressed that the standard for as-applied challenges from *Buckley*—which required plaintiffs to show only a “reasonable probability” that disclosure will lead to threats, harassment, or reprisals—was meant to be a realistic standard that plaintiffs could actually meet.⁹⁹ In his view, the evidence plaintiffs had produced along with the evidence of threats and harassment from Proposition 8 in California was easily enough to justify blocking disclosure in this case. “Indeed, if the evidence relating to Proposition 8 is not sufficient to obtain an as-applied exemption in this case, one may wonder whether that vehicle provides any meaningful protection for the First Amendment rights of persons who circulate and sign referendum and initiative petitions.”¹⁰⁰

One may indeed wonder about the utility of as-applied challenges in cases like *Doe* when Justices Sotomayor and Stevens are setting the standards. To wit, it is not at all clear that the standard they advocate—under which plaintiffs must show a reasonable probability of serious and widespread harassment that the state is unwilling

⁹⁴ Br. of Pet'rs., *supra* note 47, at 10–11.

⁹⁵ Doe, 130 S. Ct. at 2831 (Stevens, J., concurring).

⁹⁶ *Id.*

⁹⁷ *Id.* at 2823 (Alito, J., concurring).

⁹⁸ *Id.* at 2822.

⁹⁹ *Id.* at 2822–23 (quoting *Buckley*, 424 U.S. at 74) (emphasis in original).

¹⁰⁰ *Id.* at 2823–24.

or unable to control—is an as-applied standard at all. An as-applied challenge is supposed to focus on harm to the plaintiffs themselves, yet the Sotomayor-Stevens standard requires harm that is *widespread*. A standard is not as-applied simply because one uses the phrase “as-applied,” especially if the class of individuals whose rights must have been violated amounts to everyone. It is not clear how large a group of people must have suffered harassment for it to become “serious and widespread,” but judging by the views of Justices Sotomayor and Stevens, it is clearly a much larger group than was at issue here. With the added condition that the state must be unable or unwilling to control the harassment, the Sotomayor-Stevens standard starts to sound suspiciously like a facial, rather than an as-applied standard.

One may also wonder why Justice Alito did not simply sign on to Justice Thomas’s dissent. It seems unlikely that an as-applied standard will ever suffice in a situation like *Doe*, for those who are truly concerned about harassment are far more likely to avoid exercising First Amendment rights than to bring a lawsuit to enjoin a disclosure law. Indeed, this is a large part of the reason that chilling-effect rulings tend to be facial—because the existence of the law and the possibility of sanctions or some other injury to First Amendment rights are enough to prevent their exercise in the first place.¹⁰¹ Justice Thomas appears to be the only member of the Court who recognized this point.

Unfortunately for the plaintiffs in *Doe*, the merits or demerits of these points are secondary to the fact that, unless Justice Kagan takes a different approach from Justice Stevens, they likely will not be able to find the votes to prevail.

B. Future Disclosure Challenges

It may come as small consolation to the plaintiffs in *Doe*, but one silver lining of the case for those who oppose disclosure laws is that the case provides little support for anything other than the disclosure of petition signatures. The majority upheld this disclosure on the

¹⁰¹ See, e.g., *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” (internal citations omitted)).

same grounds that it has often upheld election process regulations. Even the concurring justices who obviously supported disclosure focused narrowly on laws that, in Justice Sotomayor's words, fall "squarely within the realm of permissible election-related regulations."¹⁰² Justice Stevens was even more adamant about the narrow context of the case: "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."¹⁰³ The law at issue "is not 'a regulation of pure speech. . . . It does not prohibit expression, nor does it require that any person signing a petition disclose or say anything at all.'"¹⁰⁴ "The PRA does not necessarily make it more difficult to circulate or obtain signatures on a petition . . . or to communicate one's views more generally."¹⁰⁵ And although signing a petition is an expressive act, according to Justice Stevens, it "does not involve any 'interactive communication' . . . and 'is not principally' a method of 'individual expression of political sentiment.'"¹⁰⁶

Every one of these points on which Justice Stevens distinguished *Doe* would arguably apply to a "classic disclosure requirement," such as a law requiring those who speak out for or against ballot issues or referendums to disclose anyone who contributes to their efforts. Typical disclosure laws of this sort do indeed require speakers to disclose information as a condition of speaking, and, indeed, even require associational speakers to register with the government prior to speaking.¹⁰⁷ These laws can be burdensome, thus making it more difficult for speakers to get out their messages, and the types of speech that trigger such laws—typically anything that costs money, such as print or broadcast ads or even flyers, post cards, or yard signs—are unquestionably methods by which individuals express political sentiments.¹⁰⁸ Indeed, even Justice Scalia, who

¹⁰² *Doe*, 130 S. Ct. at 2828 (Sotomayor, J., concurring).

¹⁰³ *Id.* at 2829 (Stevens, J., concurring).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 2830.

¹⁰⁶ *Id.*

¹⁰⁷ Jeffrey Milyo, Institute for Justice, Campaign Finance Red Tape: Strangling Free Speech & Political Debate 2 (2007), available at http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf.

¹⁰⁸ *Id.* at 8–10, 14–18 (in experiment based on typical disclosure laws, finding that participants on average completed only 41 percent of the required tasks correctly, and describing participants' frustration while trying to complete the forms and their belief that this would deter political activity).

opposes the idea that the First Amendment protects a right of anonymity, recognized a distinction between disclosure laws that apply to “legislative action,” like the one in *Doe*, and those that apply “to political speech” during an election.¹⁰⁹

Finally, any states defending future challenges to contributor disclosure laws will have to grapple with Justice Alito’s point that the so-called informational interest logically leads to mandatory disclosure of all sorts of other demographic information, such as race, sex, financial status, religion, and much more. Knowing whether those who support a ballot issue are predominantly black or rich or Republican or Muslim tells us far more about their interest-group affiliation than knowing their identities, addresses, and employers. If educating voters about interest groups in elections is the goal, then this sort of information would logically be subject to disclosure as well. Yet, as Justice Alito pointed out, the “State’s informational interest paints such a chilling picture of the role of government in our lives that at oral argument the Washington attorney general balked when confronted with the logical implications of accepting such an argument.”¹¹⁰ Anyone supporting contributor disclosure laws in the future will have to do more than balk.

Conclusion

Doe is in many ways a frustrating case because the Court decided much less than many on both sides of the campaign-finance divide were expecting and perhaps hoping for. That frustration is perhaps more the fault of the spectators than the Court, but the expectations were understandable in light of the Court’s greater protections for First Amendment freedoms and greater skepticism for laws that burden speech in recent cases, most notably, *Citizens United*.

Unfortunately, the Court’s approach to disclosure laws has always been somewhat of a compromise position between the two extremes of campaign-finance law, one being that the government should have the same amount of discretion to regulate speech as it does other things like the right to property and to contract and the other being that the opening words of the First Amendment—“Congress shall make no law”—mean what they say. Thus, as the Court put

¹⁰⁹ *Doe*, 130 S. Ct. at 2833 n.3 (Scalia, J., concurring in the judgment).

¹¹⁰ *Id.* at 2824–25 (Alito, J., concurring) (internal citations omitted).

it in *Doe*, “disclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking.”¹¹¹

However, few restrictions on speech actually “prevent anyone from speaking.” Most impose burdens of varying degrees. One can argue that disclosure laws are typically the less burdensome alternative, but that is highly debatable. In *Citizens United*, for instance, the Court declined to require corporations to speak through PACs, many of whose restrictions are designed to facilitate full disclosure.¹¹² And if one takes the rights to anonymous speech and association that the Court protected in cases like *McIntyre* and *NAACP v. Alabama* seriously, it is hard to understand how requiring the disclosure of a speaker’s identity as a condition of speaking is constitutionally acceptable. The Court recognized in *Buckley* that a cap on the amount one wishes to spend on speech amounts to a ban on speech for everyone who wishes to spend more than the cap.¹¹³ By the same token, mandatory disclosure should amount to a violation of the rights of anyone who does not wish to disclose their identity when they speak. Stating up front that disclosure is “less burdensome” or does not “prevent anyone from speaking” simply assumes, at the outset, that disclosure does not violate First Amendment rights. This approach treats anonymous speech and association as second-class rights under the First Amendment, which is not only contrary to cases like *McIntyre* and *NAACP v. Alabama*, it is also inconsistent with a long national tradition of speaking and associating anonymously.¹¹⁴ It also finds no support in the text of the First Amendment, which does not bar government merely from banning speech outright; it prevents laws that “abridge” the freedom of speech.

Justice Thomas’s approach to disclosure is thus the far better one, especially in cases like *Doe*. There is much to say for simplicity in First Amendment cases, and Justice Thomas’s dissenting opinion in

¹¹¹ *Id.* at 2818 (majority opinion) (quoting *Citizens United*, 130 S. Ct. at 914).

¹¹² See *Citizens United*, 130 S. Ct. at 897–98.

¹¹³ See *Buckley*, 424 U.S. at 19 n.18 (“Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.”).

¹¹⁴ See, e.g., *McIntyre*, 514 U.S. at 341–43 (discussing the tradition of anonymous speech in the founding era and since, in the realms of literature and politics); *id.* at 360–70 (detailed discussion of historical basis for the right to speak anonymously about politics).

Doe was as elegantly simple as it was based in common sense. The plaintiffs were not challenging election process laws as such, so the Court could have ruled for them and kept its election process precedents intact. In light of modern technology, the state's argument that it needed the public's help to verify signatures is almost laughable.¹¹⁵ Indeed, public disclosure under the PRA is not automatic; someone must make a request for signatures. What happens if no one requests signature information in a given referendum election? Must the state conclude that that election lacked integrity and throw out the results? *Doe* involved individuals and groups who made clear that they wished to use disclosure laws for exactly the reasons that the Supreme Court has prevented disclosure in the past—to intimidate those who wish to take a political position and express certain views.¹¹⁶ Despise those views if you wish, but recognize, as Justice Thomas did, that if we take First Amendment rights seriously, *all* speakers must be protected from what amounts to state-sponsored harassment and intimidation.

Despite the Court's less-than-principled approach to First Amendment rights in *Doe*, those who favor greater protections for speech during elections can at least take heart in this: Although the Court did not give them the principled protections for privacy of association that they wanted, it did not foreclose the possibility that those protections will come in a case in which the states have fewer grounds for regulating than in *Doe*. Optimists can say that they live to fight another day; pessimists can wait for the other shoe to drop. But both will have to wait for the next disclosure case before claiming vindication.

¹¹⁵ See *Doe*, 130 S. Ct. at 2840–42 (Thomas, J., dissenting) (referring to public disclosure as a “blunderbuss approach” to furthering interest in reliability of petition-gathering process); see also *id.* at 2827 (Alito, J., concurring) (questioning strength of state's interest in detecting fraud and mistakes, in light of other, less burdensome alternatives).

¹¹⁶ See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–66 (1958) (holding that compelled disclosure of membership violated speech and associational rights, based on evidence that past disclosure led to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility”).