

## Public Disclosure of Referendum Petition Signatures

*Doe v. Reed (Benjamin H. Settle, W.D. Wash. 3:09-cv-5456)*

Persons who signed a referendum petition filed a federal complaint seeking to enjoin the state's releasing the identities of the over 138,500 signatories. The district court held a proceeding that afternoon and a hearing on the following day, which the state defendants chose not to attend. The court issued a temporary restraining order and held a preliminary-injunction hearing a little more than a month later. The district court granted a preliminary injunction, but the court of appeals reversed it. At the beginning of its term, the Supreme Court stayed the reversal, reinstating the injunction, but the Supreme Court affirmed the court of appeals' reversal at the end of the Supreme Court term. On remand, the district court denied the plaintiffs' as-applied challenge and lifted the injunction. After the petitions were released on the internet, the court of appeals determined that the case was moot.

*Subject:* Ballot measures. *Topics:* Ballot measure; intervention.

Protect Marriage Washington and two anonymous persons filed a federal complaint in the Western District of Washington's Tacoma courthouse, which serves the state's capital, for declaratory and injunctive relief on July 28, 2009, seeking to protect the identities of over 138,500 Washington residents who signed a referendum petition.<sup>1</sup> Referendum 71, planned for the November 2009 election, sought to overturn legislation granting domestic partners rights and responsibilities more similar to those of married partners.<sup>2</sup> With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.<sup>3</sup>

The court assigned the case to Judge Benjamin H. Settle, who held a courtroom proceeding at 4:20 p.m. on the day that the case was filed, instructed the plaintiffs to serve the defendants, and set a hearing on a temporary restraining order for the following afternoon.<sup>4</sup> The defendants, Washington's secretary of state and his public-records officer, did not appear at the July 29 hearing.<sup>5</sup> Several members of the news media were at the proceeding, but not so many as to cause any difficulties.<sup>6</sup>

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1. Complaint, *Doe v. Reed*, No. 3:09-cv-5456 (W.D. Wash. July 28, 2009), D.E. 2; *Doe v. Reed*, 561 U.S. 186, 193 (2010); *Doe v. Reed*, 586 F.3d 671, 675–76 (9th Cir. 2009); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1196 (W.D. Wash. 2011); see W.D. Wash. Civ. R. 5(e)(1) (assigning cases in Thurston County to the Tacoma courthouse).

2. *Doe*, 561 U.S. at 191; *Doe*, 586 F.3d at 673, 674–75; *Doe*, 823 F. Supp. 2d at 1197.

3. Motion, *Doe*, No. 3:09-cv-5456 (W.D. Wash. July 28, 2009), D.E. 3.

4. Docket Sheet, *id.* (July 28, 2009) (D.E. 1).

Tim Reagan interviewed Judge Settle for this report by telephone on October 30, 2012.

5. Temporary Restraining Order, *Doe*, No. 3:09-cv-5456 (W.D. Wash. July 29, 2009), D.E. 9.

6. Interview with Hon. Benjamin H. Settle, Oct. 30, 2012.

Finding “a colorable First Amendment claim,” Judge Settle temporarily enjoined the defendants “from releasing the names, addresses, or other contact information of those individuals who signed the Referendum 71 petition.”<sup>7</sup> Judge Settle set a preliminary-injunction hearing for September 3.<sup>8</sup>

On August 6, the secretary moved to join as defendants entities that had requested disclosure of the signatories.<sup>9</sup> Judge Settle determined that the entities could seek intervention if they wished.<sup>10</sup> On August 27<sup>11</sup> and September 1,<sup>12</sup> two of the entities moved to intervene.

On August 28, Washington Families Standing Together (WAFST) moved to intervene because the temporary restraining order was impairing its state-court challenge to the secretary’s certification of the referendum for the November ballot.<sup>13</sup> On September 3, Judge Settle modified the temporary restraining order to permit WAFST access to signature information for purposes of challenging the referendum so long as WAFST did not publicly disclose the signatories’ identities.<sup>14</sup>

At the September 3 hearing, Judge Settle denied without prejudice one motion to intervene because it was defectively filed and granted the others.<sup>15</sup> On September 16, he again denied intervention to the pro se defective filer because the filer’s interests were adequately represented by other parties.<sup>16</sup>

On September 10, applying strict scrutiny to Washington’s Public Records Act (PRA), Judge Settle granted the plaintiffs a preliminary injunction.<sup>17</sup>

An appeal was heard on October 14,<sup>18</sup> and the court of appeals reversed the injunction on October 15.<sup>19</sup> A week later, the court issued its opinion:

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7. Temporary Restraining Order, *supra* note 5; *Doe*, 586 F.3d at 676; *see* Lornet Turnbull, *Judge Bars Release of Names on Petitions*, Seattle Times, July 30, 2009, at B1.

8. Temporary Restraining Order, *supra* note 5.

9. Joinder Motion, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Aug. 6, 2009), D.E. 23.

10. Order, *id.* (Aug. 24, 2009), D.E. 33.

11. Intervention Motion, *id.* (Aug. 27, 2009), D.E. 36.

12. Intervention Motion, *id.* (Sept. 1, 2009), D.E. 58.

13. Intervention Motion, *id.* (Aug. 28, 2009), D.E. 43; *see* Janet I. Tu, *Foes Sue to Block Referendum 71*, Seattle Times, Aug. 28, 2009, at B1 (reporting on state court case).

14. Order, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Sept. 3, 2009), D.E. 59; *see* *Names on R-71 Petitions Stay Hidden as Judge Studies Case*, Seattle Times, Sept. 4, 2009, at B1.

15. Docket Sheet, *supra* note 4 (D.E. 62); Preliminary Injunction at 2, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Sept. 10, 2009), D.E. 63.

16. Order, *Doe*, No. 3:09-cv-5456 (W.D. Wash. Sept. 16, 2009), D.E. 73, *summarily aff’d*, Order, *Doe v. Reed*, No. 09-35832 (9th Cir. Nov. 1, 2010).

17. Preliminary Injunction, *supra* note 15; *Doe v. Reed*, 561 U.S. 186, 193 (2010); *Doe v. Reed*, 697 F.3d 1235, 1237 (9th Cir. 2012); *Doe v. Reed*, 586 F.3d 671, 676 (9th Cir. 2009); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1196 (W.D. Wash. 2011); *see* Janet I. Tu, *R-71 Signatures Kept Private*, Seattle Times, Sept. 11, 2009, at A1.

18. *Doe*, 586 F.3d at 676; *see* *Both Sides Make Case on R-71 Signatures*, Seattle Times, Oct. 15, 2009, at B3.

19. Order, *Doe v. Reed*, Nos. 09-3518, 09-35826, and 09-35863 (9th Cir. Oct. 15, 2009); *Doe*, 697 F.3d at 1237; *see* Lornet Turnbull, *Release Signatures, Court Says, But Appeal Planned*, Seattle Times, Oct. 16, 2009, at B1.

The district court’s analysis was based on the faulty premise that the PRA regulates anonymous political speech. . . .

To the extent the district court did not rely exclusively on anonymous speech cases, the district court nonetheless erred in applying strict scrutiny.

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We conclude that each of the State’s asserted interests is sufficiently important to justify the PRA’s incidental limitations on referendum petition signers’ First Amendment freedoms.<sup>20</sup>

On October 20, the Supreme Court stayed the court of appeals’ ruling and reinstated Judge Settle’s injunction.<sup>21</sup>

On June 24, 2010, however, the Supreme Court affirmed the court of appeals’ decision, concluding that disclosure of referendum petitions in general does not violate the First Amendment.<sup>22</sup> “We leave it to the lower courts to consider in the first instance the signers’ more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court.”<sup>23</sup>

On October 17, 2011, Judge Settle denied the plaintiffs’ as-applied challenge and lifted the injunction.<sup>24</sup> On October 23, 2012, the court of appeals denied an appeal as moot: “The petitions are now available in original and in searchable form on the internet.”<sup>25</sup>

On November 3, 2009, the voters preserved expanded rights and responsibilities for domestic partners.<sup>26</sup>

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20. *Doe*, 586 F.3d at 677, 680 (applying intermediate scrutiny); *see Doe*, 561 U.S. at 193.

21. *Doe v. Reed*, 558 U.S. 967 (2009); *see Lornet Turnbull, All Petition Signatures a Secret—For Now*, *Seattle Times*, Oct. 21, 2009, at A1; William Yardley, *Justices Uphold Ban on Releasing Names on a Petition*, *N.Y. Times*, Oct. 21, 2009, at A22.

22. *Doe*, 561 U.S. at 191; *Doe*, 697 F.3d at 1238; *see Adam Liptak, Secrecy Rejected on Ballot Petitions*, *N.Y. Times*, June 25, 2010, at A22; Janet I. Tu & Kyung Song, *High Court Ruling Won’t End Fight Over Ref. 71*, *Seattle Times*, June 25, 2010, at A1.

23. *Doe*, 561 U.S. at 191.

24. *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011); *Doe*, 697 F.3d at 1238; *see Lornet Turnbull, Ruling Leads to Release of Ref. 71 Signers’ Names*, *Seattle Times*, Oct. 18, 2011, at B1.

25. *Doe*, 697 F.3d at 1238.

26. *See Janet I. Tu, Ref. 71 Certified for Ballot, but Legal Battle Not Over Yet*, *Seattle Times*, Sept. 3, 2009, at B1; Janet I. Tu, *State Voters Expand the Rights of Same-Sex Couples*, *Seattle Times*, Nov. 6, 2009, at A1; Lornet Turnbull, *Domestic Partner Measure Kicks In*, *Seattle Times*, Dec. 3, 2009, at A1.