No. 09-559

IN THE
Supreme Court of the United States

JOHN DOE #1, *ET AL.*,
Petitioners,
v.
SAM REED, WASHINGTON SECRETARY OF STATE, *ET AL.*
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FREE SPEECH DEFENSE AND EDUCATION FUND, INC., FREE SPEECH COALITION, INC., UNITED STATES JUSTICE FOUNDATION, CITIZENS UNITED, NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC., INSTITUTE ON THE CONSTITUTION, DOWNSIZE DC FOUNDATION, GUN OWNERS FOUNDATION, CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, *ET AL.* IN SUPPORT OF PETITIONERS

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American Conservative Union
American Target Advertising, Inc.
Citizens in Charge Foundation
Citizens United
Citizens United Foundation
ClearWord Communications Group, Inc.
Conservative Legal Defense and Education Fund
The Constitution Party National Committee
Downsize DC Foundation
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Public Advocate of the United States
The Richard Norman Company
60 Plus Association
U.S. Border Control
U.S. Border Control Foundation
U.S. Justice Foundation
Young America's Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

These *amici curiae* form a coalition of interested nonprofit and for profit corporations committed to the proper construction of the Constitution and laws of the United States. Most of these *amici* have filed *amicus curiae* and/or party litigant briefs in the past in cases before federal courts, including this Court.[1]

The following *amici curiae* are nonprofit organizations exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"):

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[1] It is hereby certified that the parties have consented to the filing of this brief, that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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The following *amicus curiae* is a national political party:

- The Constitution Party National Committee (www.constitutionparty.com)

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The *amici curiae* believe that their brief will be of assistance to the Court, bringing to its attention relevant matter concerning the application of the republican form of government guarantee found in Article IV, section 4 of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and the principle of anonymity not fully addressed by the parties.

SUMMARY OF ARGUMENT

Pointing to the Washington State referendum process as "legislative" in nature, respondents deny that protected speech interests would be infringed by the forced public disclosure of the names and addresses of referendum petition signers. But freedom of speech is no stranger to the legislative process, taking form in the Speech and Debate clause of the United States Constitution, and in state constitutions, freeing legislators from oversight by the other two branches of government. Failure to apply this freedom that forbids Washington State's public disclosure of referendum petition signers would threaten the integrity of the legislative process.

The case of a state referendum presents a situation somewhat different from certain other cases, such as Buckley v. American Constitutional Law Foundation, McIntyre v. Ohio Elections Commission, and Meyer v. Grant, where this Court has applied its Fourteenth Amendment due process incorporation doctrine to impose the First Amendment's freedom of speech upon the states. Here, the First Amendment is being applied to those engaged in exercising a state legislative power. Such application is supported because freedom of speech in the legislative process is part of the protection afforded to every state under the guarantee of a republican form of government, set forth in Article IV, section 4, of the U.S. Constitution. As a constitutionally-protected right applicable to the states, it is a protected privilege and immunity of U.S. citizenship under the Fourteenth Amendment.

As this case involves an application of the constitutional anonymity principle in a new area — state referendum petition signers — the Court's ruling should be informed by an understanding of the breadth and purposes of the anonymity principle. The anonymity right is found in the First Amendment's freedoms of the press and assembly and association. It has broad application to those who would exercise their rights as sovereign people, including participation in elections and legislation by secret ballot. The anonymity principle is a bulwark against the Washington Secretary of State's unwarranted action to place the names and addresses of Referendum 71 petition signers into the public domain.

ARGUMENT

I. FREEDOM OF SPEECH PRINCIPLES APPLY TO THE WASHINGTON REFERENDUM 71 PROCESS.

By Article II, section 1 of the Washington State Constitution (hereinafter "Wash. Const."), "the people" have "vested" the state's legislative authority in "a senate and house of representatives," while "reserv[ing] to themselves the power ... to approve or reject at the polls any act, item, or part of any bill, act, or law passed by the legislature." In order to exercise this referendum power, section 1(b) requires the filing of a petition containing the "valid signatures ... equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state." *See also* Revised Code of Washington (hereinafter "RCW") § 29A.72.150. After official verification of a sufficient number of valid signatures, the referendum measure is submitted to a vote by secret ballot at the next general election. *See* RCW § 29A.72.250.

"'A **referendum** ... is an exercise of the reserved power of the people to **legislate**....'" State *ex rel.* Heavey v. Murphy, 982 P.2d 611, 615 (Wash. 1999) (emphasis added). In the court below, the State contended that because a referendum is "a legislative act, *i.e.*, that it is an integral part of the exercise of the legislative power reserved to the people by the Washington Constitution," the signing of a referendum petition is not "speech," and therefore, a petition signer

has no right to the freedom of speech secured by the Constitution. Doe #1 v. Reed, 586 F.3d 671, 677 n.9 (9th Cir. 2009). The State is mistaken. As the Washington Supreme Court has ruled, "the people in their legislative capacity remain subject to the mandates of the Constitution." Belas v. Kiga, 959 P.2d 1037, 1040-41 (Wash. 1998).[2]

The freedom of speech is no stranger to the legislative process. To the contrary. The freedom of speech was first constitutionally secured to the people's elected legislative representatives, not to the people themselves. Section 9 of the 1689 English Bill of Rights provided "[t]hat the freedom of speech ... in parliament, ought not to be impeached or questioned in any court or place out of parliament." Sources of Our Liberties ("Sources"), p. 247 (R. Perry & J. Cooper, eds., American Bar Foundation: Rev. Ed., 1978). Long the subject of contention between the Parliament and the Tudor and Stuart kings, this hard-earned freedom became "'indispensable and universally acknowledged." *See* Kilbourne v. Thompson, 103 U.S. 168, 202 (1881). Thus, the 1689 Bill of Rights simply "confirmed the principles for which the Commons had been struggling by its declaration that speeches and debates in Parliament could not be brought into question outside that body." Sources at 235.

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[2] "While the **power** of direct legislation is reserved to the people in the constitution itself, the **exercise of that power** is subject to other pertinent constitutional provisions." *See* P. Trautman, "Initiative and Referendum in Washington: A Survey," 49 *Wash. L. Rev.* 55, 70-71 (1973) (emphasis added).

In America, in several state constitutions and the federal bill of rights, the people took the freedom of speech one step further, securing it to themselves. *See, e.g.,* Article XII, Constitution of Pennsylvania (1776) (reprinted in Sources, p. 330), and First Amendment, United States Constitution (1791) (reprinted in Sources, p. 432). As James Madison explained:

> In the United States, [t]he people, not the government, possess the absolute sovereignty.... Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. [IV The Debates in the Several State Conventions, pp. 369-70 (1866) (reprinted in Sources, p. 426.]

Even though America's founders secured the freedom of speech to the people, they did not by that act withdraw that freedom from the people's elected legislative representatives. Rather, the "great and vital [legislative] privilege [of] the freedom of speech and debate," as Joseph Story described it, "was in full exercise in our colonial legislatures, and now belongs to the legislature in **every State** in the Union as a constitutional right." 1 J. Story, Commentaries on the Constitution, § 866, p. 630 (5th ed. 1891) (emphasis added). Envisioned in America as a necessary corollary to protecting the liberties of the people, the 1780 Constitution for the Commonwealth of Massachusetts stated:

> The freedom of ... speech ... in either house of the legislature is **so essential to the rights of the people**, that it cannot be the foundation of

> **any** accusation or prosecution, **action** or complaint, in any other court or place whatsoever." [Article XXI, Constitution of Massachusetts (Oct. 25, 1780), reprinted in Sources, p. 377 (emphasis added).]

Prior to the adoption of the First Amendment, constitutional security for the freedom of speech took form in Article I, section 6, of the United States Constitution, which provides that "for any speech or debate in either House," Senators and Representatives "shall not be questioned in any other Place." As the Supreme Court ruled in 1972:

> The Speech or Debate Clause was designed to assure a co-equal branch of the government **wide freedom of speech**, debate, and deliberation **without intimidation or threats from the Executive Branch**. [United States v. Gravel, 408 U.S. 606, 616 (1972) (emphasis added).]

Refusing to "take a literalistic approach in applying the privilege," the Supreme Court's "consistent approach" has been "to implement [the Clause's] fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.*, 408 U.S. at 617-18. In short, the freedom of speech secured to persons acting in their legislative capacity is an essential feature of the separation of powers, protecting persons exercising legislative power from executive actions "that directly impinge upon or threaten the legislative process." *Id.*, 408 U.S. at 616.

In this case, the Washington Secretary of State, a member of the state's executive branch,[3] has exercised his powers in a way that would both "impinge" and "threaten" the legislative process initiated by Referendum 71. Construing the state's Public Records Act (hereinafter "PRA") to require public disclosure of Referendum 71 petitions, the Secretary announced his intention to honor the request to provide such petitions to two organizations that "stated publicly that they intended to place the names and addresses of R-71 petition signers on the Internet to encourage 'uncomfortable conversations.'" *See* Petitioners' Brief, pp. 8-9. In anticipation of such confrontations, RCW § 29A.72.130 — the statute establishing the "form" of a referendum petition — also provides protection for the circulator of that petition, stating that "RCW § 9A.46.020 applies to any conduct constituting harassment against a petition signature **gatherer**." (Emphasis added.) RCW § 9A.46.020 would permit any opponent of a referendum petition to "confront" the "signature gatherer" so long as the opponent did not "knowingly" threaten bodily injury, physical property damage, confinement, or any other like threat.

After signatures have been gathered, however, Washington State statutes place severe restrictions on access to the petitions, limiting the number of persons allowed to view the signers' names, addresses and other vital information, forbidding the copying of the petitions, and focusing the view of the petitions to

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[3] Article III, section 1, Wash. Const.

determine only their validity and numerical sufficiency. *See* RCW § 29A.72.230. Should a dispute remain after the secretary-supervised review, then the petitions may be reviewed in the state courts for the sole purpose of ascertaining whether the "referendum petition contains or does not contain the requisite number of signatures of legal voters...." RCW § 29A.72.240.

"[D]epart[ing] from nearly 70 years of precedent ... that petitions are not public records subject to disclosure,"[4] the Secretary of State has unconstitutionally elected to use his executive power to put the names, addresses and other information contained in the referendum petitions into the hands of persons who would place that information on the Internet for the purpose of confronting the petition signers — a confrontation that would occur completely **outside** the petition process, and hence, totally outside the legislative process. By such action, the Secretary has misused his executive power, placing each signer in jeopardy of being "questioned" outside the "place" of his exercise of legislative power, thereby "threaten[ing] to control his conduct as a legislator." *See* Gravel, 408 U.S. at 618. As applied to the petition signers' exercise of legislative power, the freedom of speech protects the signers from such executive oversight as "directly impinge[s] upon or threaten[s] the legislative process." *Id.*, 408 U.S. at 616.

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[4] Petitioners' Brief, p. 9 n.18.

II. THE FREEDOM OF SPEECH GUARANTEED BY THE FIRST AMENDMENT APPLIES TO STATE REFERENDUM PROCESSES.

This is not the ordinary case wherein this Court may, without hesitation, apply its Fourteenth Amendment incorporation doctrine to impose the First Amendment's guarantee of freedom of speech upon the states, as it did in the closely-analogous cases of Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), and Meyer v. Grant, 486 U.S. 414 (1988). In each of those cases, this Court identified the activity at issue to be individual "political discourse" in relation to a political campaign. *See* Meyer, 486 U.S. at 421-24; McIntyre, 514 U.S. at 336-38; Buckley, 525 U.S. at 201-04. None, however, involved activity that, itself, was the exercise of state governmental power, giving rise to the State's argument here that its referendum process by which state legislative power is exercised is immune from First Amendment standards. *See* Doe #1, 586 F.3d at 677 n.9.

The Ohio law at issue in McIntyre "prohibite[d] the distribution of anonymous campaign literature." Although the question before the Court concerned the constitutionality of that law as applied to the distribution of leaflets opposing "an imminent referendum on a proposed school tax levy," Mrs. McIntyre's actions were totally unrelated to the referendum process itself. *See* McIntyre, 514 U.S. at 336-37. Although Meyer and Buckley addressed the

constitutionality of Colorado statutes governing the state's initiative process, the subjects of both cases were laws applying to the petition "circulators," who, like Mrs. McIntyre, were not exercising legislative power. *See* Meyer, 486 U.S. at 421 ("The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change."); Buckley, 525 U.S. at 192 ("[A]s in Meyer, the restrictions in question significantly inhibit communication with voters about proposed political change....").

In this case, however, petitioners are persons who signed the Referendum 71 petition, and according to that act helped forward the petition on a course that, by state constitutional design, is a process by which laws are enacted in the State of Washington. *See* Wash. Const., Article II, §§ 1(b) and 1(c). At stake in this case, then, is whether the referendum process is such an integral part of the polity constituted by the citizens of the State of Washington for the governance of one of the fifty independent and sovereign states in the federal union that the First Amendment guarantee of the freedom of speech does not apply, as the State has argued (*see* Doe #1, 586 F.3d at 677 n.9); or whether the First Amendment guarantee of the freedom of speech extends even to the state referendum process.

As pointed out in Part I of this Argument, the freedom of speech establishes a jurisdictional barrier between a person who is exercising a legislative function and a person who is exercising executive

power, if the latter exercise threatens "the integrity or independence" of the legislative process. *See* Gravel, 408 U.S. at 625. In this case, the very purpose of the state's PRA is to force disclosure of information in the custody of the government to "**maintain control over the instruments** that they have created." *See* RCW § 42.56.030 (emphasis added). As applied here, the Secretary of State has made a decision to release to the public certain records to enable Referendum 71 opponents to confront referendum signers, exercising control over the signers by questioning them in a "place" outside the legislative verification process provided in RCW §§ 29A.72.230-29A.72.250.

As the petitioners have so ably argued, by extending the state's PRA to the names and addresses of the signers of the Referendum 71 petition, the Secretary of State has broken down the jurisdictional door, subjecting the petition signers to the twin threats of "'violence and insidious corruption,'"[5] the "two great natural and historical enemies of all **republics.**" Petitioners' Brief, pp. 14-15, 22-23 (emphasis added). While Ex Parte Yarbrough, 110 U.S. 651, 663 (1884), relied upon by petitioners, concerned a threat posed to the "general government" and, "the proper discharge of the great function of legislating for that government" — and therefore, the constitutional power of Congress to protect the national republic — the principles stated therein are equally applicable to the states under the Article IV, section 4 "guarantee to every State in the Union a Republican Form of Government."

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[5] *See* Petitioners' Brief, pp. 2-12.

As William Rawle observed in the early nineteenth century, the Article IV, section 4 guarantee made each state's form of government a matter of national concern:

> The Union is an association of the people of republics; its preservation is calculated to depend on the preservation of those republics. The people of each pledge themselves to preserve that form of government in all. [W. Rawle, A View of the Constitution of the United States (hereinafter "Const. View") (2d ed. 1829), as reprinted in 4 The Founders' Constitution, p. 571 (Kurland, P. & Lerner, R., eds., Univ. of Chi. Press: 1987).]

The guarantee of a republican form of government was considered to be the "corner stone of the [people's] liberties." *See* St. G. Tucker, View of the Constitution of the United States, p. 302 (Liberty Fund, Indianapolis: 1999). *See also* The Federalist No. 43, pp. 225-26 (Carey, G. & McClellan, J., eds.: Liberty Fund: 2001). As Joseph Story asserted, without the Guaranty Clause, a "successful faction might erect a tyranny on the ruins of order and law" that would "trample upon the liberties of the people." 3 J. Story, Commentaries on the Constitution, § 1814, p. 594 (5th ed. 1891). Indeed, the founders' commitment — that the right of the people to determine how they will be governed — was so strong, and their fear of the monarchical spirit so great that it overcame any doubts about conferring upon the federal government the power to ensure that each state would have and retain a republican form of government. *See* "Records

of the Federal Convention," reprinted in 4 The Founders' Constitution at 559-560. *See also* W. Rawle, Const. View, reprinted in 4 The Founders' Constitution at 572.

At the very heart of the fight for the freedom of speech in the English Parliament was the issue of civil sovereignty. Queen Elizabeth I and King James I claimed that the parliamentary privilege of free debate existed by the grace of the crown, the nation's sovereignty residing in the person of the queen or the king. Thus, members of Parliament could be forced to give an account of their views to the supreme executive power. *See* Sources at 234-35. With the restoration of the monarchy in the Glorious Revolution of 1688, the Bill of Rights divested the monarchy of its sovereign claims over the speeches and debates of the people's elected representatives in Parliament. *Id.* So central was this divestiture of sovereignty that Blackstone could write in his 1765 Commentaries that "this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament." I W. Blackstone, Commentaries on the Laws of England, p. 160 (Univ. of Chi., Facsimile ed: 1765).

As Joseph Story observed in his Commentaries, the freedom of speech in the exercise of legislative power in the Mother Country — being a "claim of immemorial right" — gave birth to its being secured "to the legislature of every State in the Union." 1 Joseph Story's Commentaries, p. 630. In his "Lectures on Law," James Wilson summarized the prominent place occupied by this great freedom:

> The liberal provision, which is made, by our constitutions, upon this subject, may be justly viewed as a very considerable improvement in the science and the practice of government. [J. Wilson, "Lectures on Law," reprinted in 2 The Founders' Constitution, p. 331.]

With "such a great cloud of witnesses,"[6] there can be no doubt that the freedom of speech — secured to the English parliamentarians, the colonial legislatures, the original state legislatures, and the United States Congress — would be part of the woof and warp of the republican form of government secured to the states by Article IV, section 4. It would be a mistake, however, to view this freedom as an institutional guarantee. Rather, as Chief Justice Parsons wrote of the article of the Massachusetts Constitution guaranteeing freedom of speech in "either house of the legislature":

> In considering this article, it appears to me that the privilege secured by it is not so much the **privilege** of the house as an organiz[ed] body, as of each individual member composing it .... For he does not hold this **privilege** at the pleasure of the house; but derives it from the will of the people, expressed in the constitution.... [Coffin v. Coffin, 4 Mass. 1 (1803), reprinted in 2 The Founders' Constitution at 338 (emphasis added).]

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[6] Hebrews 12:1 (KJV).

When the petitioners in this case signed the Referendum 71 petition, they did so in their capacity as citizens of the state. Their Washington citizenship, however, is secondary, made possible by their first being citizens of the United States. *See* Fourteenth Amendment, section 1, U.S. Constitution. As dual citizens, petitioners have "two political capacities ... each protected from incursion by the other." U.S. Terms Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). As American citizens, petitioners have certain privileges and immunities that attach to their national citizenship that cannot be abridged by the state. One of those privileges is the guarantee that the state government in which he, a U.S. citizen, resides is republican in form. As demonstrated above, that government, republican in form, would guarantee to the individual, freedom of speech in the exercise of legislative power.[7] As James Wilson observed:

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[7] Although the general principles of a republican form of government have consistently been ruled by this Court as "political questions," such rulings do not preclude this Court from adjudicating claims of right anchored in specific individual guarantees, such as the freedom of speech as asserted in this case by Petitioners. Certain "republican form" claims may not be judicially enforceable, such as the allocation of political power within a state (*see* Pacific States v. Oregon, 223 U.S. 118 (1912)), or the recognition of a State's "lawful government" (Luther v. Borden, 48 U.S. (7 How.) 1 (1849)). There are, however, other privileges and immunities of a republican form that are matters of enduring principle for which there are "judicially discoverable and manageable standards." *See* Baker v. Carr, 369 U.S. 186, 216 (1962). This case is one of them.

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is **indispensably necessary**, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense. [J. Wilson, "Lectures on Law," reprinted in The Founders' Constitution, p. 331 (emphasis added).]

By forcibly placing petitioners' names and addresses into the public domain, the Washington Secretary of State would rob petitioners of this personal liberty. Applying the First Amendment principle of anonymity, however, would protect it.

III. FORCED DISCLOSURE VIOLATES THE TIME-HONORED RULE OF ANONYMITY WHICH PROTECTS THE CIVIL SOVEREIGNTY OF THE PEOPLE.

The instant case involves application of a time-honored attribute of a republican form of government — the right to political anonymity. Here, the right to anonymity is being invoked in a new context — to protect against the disclosure of the identities of signers of a petition to put a referendum on a state ballot. By a brief review of how the right to anonymity protects a sovereign people from the tyranny of both the government and the mob, these *amici* seek to

assist the Court in making an informed and principled decision in this new area.

The American principle of anonymity developed into a standard quite different from anything that existed in England. Where sovereignty is vested in a monarch, the government can be expected to assert the power and right to know everything that happens in the society which could undermine the government. Of particular interest to monarchs is the identity of those subjects who would dare to criticize their government. In Talley v. California, 362 U.S. 60 (1960), Justice Black recounted the manner in which the English system suppressed dissent by forcing dissenters to reveal their identities:

> The obnoxious **press licensing law** of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old **seditious libel cases** in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.... Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. [*Id.*, 362 U.S. at 64-65 (emphasis added).]

Freed from the English monarch, sovereignty in the United States has always been vested in the people.

The right to govern is not divinely conferred; rather, "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Declaration of Independence. Government officials serve — they do not rule. Government officials do not embody the government — they only are loaned the reins of government for a season.

In a constitutional republic, anonymity protects the people's full participation in the people's business, because the people are the principals and the government officials are their agents and representatives. Anonymity has a rich heritage from the founding era onward, as revealed by a short excerpt of that history, as told by Justice Stevens:

> That [anonymity] tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms. [McIntyre v. Ohio Elections Commission, 514 U.S. 334, 343 n.6.]

The American principle of anonymity, restricting what government officials can force us to reveal about our activities to them or to others, is constitutionally grounded in First Amendment freedoms of press and association. Its application ranges from pamphlets to television ads, from grassroots lobbying to memberships in voluntary societies, from public policy litigation to the process by which we select our government officials. And, as to the states, it is also grounded in the federal constitutional guarantee of a

republican form of government and the privileges and immunities guarantee of the Fourteenth Amendment, where it protects the people of Washington as they exercise their right to legislate under state law.

A. Guaranteed Anonymous Entry and Participation in the Marketplace of Ideas

The story of the First Amendment's press guarantee has been researched, retold, and applied repeatedly by this Court in numerous recent cases[8] but still one should never lose sight of its central place in a government that is republican in form. In his classic statement of the guarantee, Sir William Blackstone averred: "The liberty of the press is indeed essential to the nature of a free state." IV Blackstone's Commentaries at 151. Thus, Blackstone confidently asserted: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." *Id*. at 151-52.

Among the "sentiments" that such a freeman had a "right" to disclose to, or withhold from, the "public" was his true identity. So long as the king controlled the press by the exercise of a power to require a man to obtain a license before he could communicate his sentiments to the public, however, he had to disclose his identity to the king. Thus, in the first instance, the liberty of the press consisted in denying to the

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[8] *See, e.g.,* McIntyre v. Ohio Elections Commission, 514 U.S. at 358-72 (Thomas, J., concurring).

government the power of "laying no *previous* restraints upon publications." *Id.* at 151 (italics original).

1. No Compelled Identification to the Government

In 1938, this Court held "invalid on its face" a city ordinance requiring a person before distributing any written "literature of any kind ... without first obtaining written permission from the City Manager of the City of Griffin [Georgia]." Lovell v. Griffin, 303 U.S. 444, 447 (1938). Refusing to consider the purported interests of the city to maintain "public order," or "littering," the Court found that the very "character" of the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* at 451. Sixty-four years later, in Watchtower v. Village of Stratton, 536 U.S. 150 (2002), the Court struck down another municipal ordinance that required one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name. Justice Stevens explained:

> [i]t is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. [*Id.* at 166.]

In short, by its no-licensing rule, the freedom of press prohibits the government from requiring a person to

identify himself to government before entering the marketplace of ideas, because every freeman has the right of self-censorship, free from the heavy hand of a government-imposed licensing system.

2. No Compelled Identification to the Public

In Talley v. California, 362 U.S. 60 (1960), the Court struck down a Los Angeles City ordinance requiring those who disseminate hand-bills to state, on their face, the identity of those who printed, wrote, compiled, manufactured, and distributed them. Justice Black explained the Court's concern:

> There can be no doubt that such an **identification requirement** would tend to restrict freedom to distribute information and thereby restrict freedom of expression....
>
> **Anonymous** pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either **anonymously** or not at all.... Even the Federalist Papers ... were published under **fictitious names**. It is plain that **anonymity** has sometimes been assumed for the most constructive purposes. [*Id*. at 64-65 (emphasis added).]

Thirty-five years later, in McIntyre v. Ohio Elections Commission, the Court struck down an Ohio election statute which prohibited distribution of political

campaign literature not containing the name and address of the person or campaign official issuing the literature. Justice Stevens explained:

> [T]he interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an **author's decision to remain anonymous**, like other decisions concerning omissions or additions to the content of a publication, is ... protected by the First Amendment. [*Id*. at 342 (emphasis added).]

The McIntyre rule protects the sovereignty of the individual against forced disclosure of his identity even if the purpose of the disclosure requirement is to make the market participant accountable to one other than a government official.

B. The Freedom to Assemble and Advocate Anonymously

Justice Harlan's decision in NAACP v. Alabama *ex rel*. Paterson, 357 U.S. 449 (1958), provides an eloquent explanation of how principles of anonymity are grounded in freedom of association, and how they apply irrespective of the particular tactic chosen by government to undermine dissent. In addressing an effort by the Attorney General of Alabama to force disclosure of the membership list of the NAACP of Alabama, Justice Harlan wrote that "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably

enhanced by group association.... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters...." *Id*. at 460. He continued, "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association...." *Id*. at 462.

Justice Harlan recognized that "abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id*. at 461. An "unconstitutional intimidation of the free exercise of the right to advocate" can manifest itself with "a congressional committee investigating lobbying and of an Act regulating lobbying.... The governmental action challenged may appear to be totally unrelated to protected liberties [such as] [s]tatutes imposing taxes." *Id*. at 461. He drew upon a powerful and painful historical lesson when he found "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs [to be] of the same order" as a "'requirement that adherents of particular religious faiths or political parties wear identifying arm-bands.'" *Id*. at 462. By the power of this illustration, Justice Harlan teaches us that principles of anonymity are not second-order concerns which can be disregarded or suppressed, but are standards indispensable to both the protection of individual liberty and the preservation of our republic.

Federal law sometimes requires forced disclosures of the identity of political actors to the government or third parties, triggering principles of anonymity. For

example, section 203(b)(1) of the Labor Management Reporting and Disclosure Act requires the filing of reports with the Secretary of Labor by:

> Every person who pursuant to any agreement or arrangement with an employer **undertakes activities** where an object thereof is, directly or indirectly ... (1) to **persuade employees** to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing. [29 U.S.C. § 433(b) (emphasis added).]

Additionally, civil litigation also can lead to discovery demands which require evaluation of principles of anonymity. One important case illustrating those principles involved both statutory disclosures and discovery in a civil case.

In May 1973, the AFL-CIO, eleven other national and international labor unions, and some of their affiliates sued the National Right to Work Legal Defense and Education Foundation, Inc. (hereinafter "NRWLDEF") for, *inter alia*, failing to report to the Secretary of Labor under section 203(b)(1). NRWLDEF operated as an independent legal aid organization which had a long history of successfully fighting against compulsory unionism. *See* International Union, UAW v. National Right to Work Legal Defense and Education Foundation, Inc., 590 F.2d 1139 (D.C. Cir. 1978), *further proceedings*, 584 F.Supp. 1219 (D.D.C. 1984), *aff'd*, 781 F.2d 928 (D.C. Cir. 1986).

In the ensuing litigation, the plaintiff unions sought to obtain the Foundation's contributor list, resulting in a discovery battle over the unions' demand for the names and addresses of all employers and businesses that contributed to the Foundation during a certain period. "The Foundation refused to disclose the identities of any contributors, asserting constitutional privileges against disclosure and contending that disclosure would result in reprisals against contributors." *Id.*, 590 F.2d at 1145.

The district court ordered the Foundation, *inter alia*, to identify "the thirty-seven donors who contributed between $500 and $5,000 in 1971," as well as certain 1972 donors of smaller amounts, and "to disclose the names and addresses of the fifty largest contributors to the Foundation in 1972 and 1973 who were not identified in the Foundation's own records as employers or businesses." The Foundation refused, and the district court, entering adverse findings as Rule 37 sanctions, found that the Foundation had violated the second proviso to 29 U.S.C. section 411(a)(4) (1976). *Id.*, 590 F.2d at 1145-46.

On appeal, the D.C. Circuit held that the Foundation had "asserted a substantial claim of constitutional privilege," citing Justice Harlan in NAACP v. Alabama, 357 U.S. at 462 ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute ... a restraint on freedom of association...."). "Without doubt, the association itself may assert the right of its members and contributors to withhold their connection

with the association." International Union v. NRWLDEF, 590 F.2d at 1152.[9]

C. Freedom to Participate in Elections Anonymously

Americans cherish the secret ballot. They often do not want their family members and neighbors, much less the agents of their government, to know or record the candidates for whom they vote. All 50 states eventually adopted the secret ballot in an effort to curb voter intimidation and election fraud. *See* Burson v. Freeman, 504 U.S. 191, 206 (1992). At the turn of the 20th Century, one observer wrote:

> We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end.
>
> In earlier times our polling places were frequently, to quote the litany, "scenes of battle, murder, and sudden death." This also has come to an end, and until night-fall, when the

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[9] The political value in obtaining the contributor list of an adversarial organization has not diminished with time. More than 30 years after International Union v. NRWLDEF was decided, UAW President Ron Gettelfinger expressed his continuing frustration with NRWLDEF donor anonymity when he stated at a press conference: "We've also been up against National Right-To-Work Legal Defense Foundation, who we don't even know who they are because **we can't find out who their contributors are**." (Emphasis added.) http://transcripts.cnn.com/TRANSCRIPTS/0812/12/cnr.02.html (transcript, Dec. 12, 2008).

> jubilation begins, our election days are now as peaceful as our Sabbaths.
>
> The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls. [Burson at 204, quoting W. Ivins, The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association 316 (1906).]

Indeed, it would be difficult to dispute Justice Stevens' conclusion that the anonymity principle is "best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation." McIntyre v. Ohio Elections Commission, 514 U.S. at 343.

However, as Congress has made raising and spending funds to influence elections more and more a public spectacle, the right to a secret ballot has been eroded for those who wish to do more to influence an election than merely cast their vote. One astute commentator observed that with the posting on the Internet of the names, addresses, occupations, and employers of his campaign-contributing neighbors, he could virtually "peer ... inside the voting booth, the sanctum sanctorum of democratic freedom":

> True, a donation isn't a ballot. But the two are so closely related that revealing the former seems tantamount to revealing the latter. For me, giving and voting are parts of the same process. Because I can afford to, I back up my ballot with a small contribution. I see it as a

> civic responsibility.... Now I don't know if I'll contribute again. Because in doing so, I'll be broadcasting my beliefs to anyone who has a modem. [F. Bernstein, "An Online Peek at Your Politics," N.Y. TIMES, Oct. 4, 2000, at A35.]

Despite the virtual identity between the secret ballot and the anonymous campaign contribution, federal and state government officials have elevated their own desire to perpetuate their incumbency over the interests of the sovereign people.[10] And in the process, these officials have departed from the principle of anonymity in the promulgation of campaign finance regulations. For example, the Federal Election Campaign Act of 1971, as amended (hereinafter "FECA"), as modified by the Bipartisan Campaign Reform Act of 2002 (hereinafter "BCRA"), contains numerous provisions requiring the disclosure of contributions and expenditures made with respect to federal elections.[11]

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[10] "Over 50 percent of Americans believe that politicians want disclosure requirements so they can see who is giving money to their challengers. By a two-to-one margin, Americans believe that incumbents use agencies to harass the supporters of challengers." J. Miller, Monopoly Politics (Hoover Inst. Stanford Univ.: 1999), pp. 104-105.

[11] The FEC website contains an eight-page listing of the various types of reporting required to be made in 2010 — on a monthly or quarterly basis. Other reports may be due prior to or after primary elections, and after general or other elections. *See* http://www.fec.gov/pdf/2010reports.pdf. Individuals or organizations that receive contributions or make expenditures in excess of $50,000 in a calendar year must file electronically. Reporting responsibilities are imposed upon various types of

To date, this Court has never addressed a facial challenge to these FECA/BCRA reporting and disclosure requirements.[12] From Buckley v. Valeo, 424

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political committees, including: (i) authorized committees of candidates (including House candidates, Senate candidates; and Presidential candidates); (ii) state, district, and local party committees that engage in reportable "federal election activity;" (iii) national party committees; and (iv) political action committees (including both separate segregated funds and nonconnected committees). Additionally, any individual or organization that makes an Independent Expenditure or disbursements for "electioneering communications" must disclose those expenditures. Bundling activity by federally-registered lobbyists must be reported. Political organizations that have annual gross receipts over $25,000, but which are not required to register with the FEC, are required to register and file reports in similar fashion to the Internal Revenue Service (hereinafter "IRS") using IRS Forms 8871 and 8872. *See* http://www.irs.gov/charities/political/article/0,,id=109644,00.html

[12] In McConnell v. FEC, 540 U.S. 93 (2003), a direct challenge to the BCRA's "electioneering communication" reporting and disclosure requirements was made by Congressman Ron Paul (R-TX), Gun Owners of America, Inc., RealCampaignReform.org (now DownsizeDC.org,), Citizens United, *et al.* The Paul plaintiffs invoked Freedom of the Press principles and authorities, arguing that:

> the enforcement mechanism employed by FECA/BCRA to assure compliance with individual contribution limits **intrude upon the editorial function of** candidates and their campaign committees, requiring **disclosure of the identities** of their major "publishers,' *i.e.,* their individual contributors of more than $200. [Brief for Appellants Congressman Ron Paul, et al. (July 9, 2003), U.S. Supreme Court, No. 02-1747, p. 49 (emphasis added).]

Unfortunately, the Court never gave meaningful consideration to the Freedom of the Press arguments, brushing aside all Press arguments raised by the Paul plaintiffs with a dismissive

U.S. 1 (1976) to Citizens United v. FEC, 558 U.S. __, slip op. p. 50 (Jan. 21, 2010), the campaign finance forced disclosure rules have been considered only with respect to an "as applied" challenge, thereby limiting the anonymity principle vis-a-vis minor fringe organizations that pose no real threat to the established political order. Citizens United, slip op., pp. 54-55.

Only Justice Thomas has dissented, citing recent examples where mandatory disclosures of the names of donors have resulted in property damage, threats of physical violence or death. Justice Thomas rejected the view that "'[d]isclaimer and disclosure ... requirements impose no ceiling on campaign-related activities, and do not prevent anyone from speaking'" stating:

> Of course they do. Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights. [Citizens United, slip op., pp. 4-5, Thomas, J., dissenting (italics original).]

As Justice Thomas pointed out more particularly in his concurring opinion in McIntyre v. Ohio Elections Commission, the First Amendment press guarantee secures an absolute right of "anonymous speech," not

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footnote. McConnell, 540 U.S. at 209 n.89.

one subject to the balancing of interests of any purported need of government-enforced disclosure to ensure an informed public. *Id.*, 514 U.S. at 358-71. While Justice Thomas expressed immediate concern in Citizens United that such forced disclosure gives rise to the real threat of mob rule (Citizens United, slip op., pp. 1-4, Thomas J., dissenting), as have petitioners here (Petitioners' Brief, pp. 2-7), he also contended that "mandatory disclosure and reporting requirements" expose citizens to "the threat of retaliation from *elected officials*." Citizens United, slip op., p. 4 (italics original).

This latter threat is especially relevant here, where the people of Washington have reserved to themselves the power to reject laws enacted by the state "at the polls" through the referendum process. *See* Wash. Const., Article II, section 1. Article I, section 19, of the Washington Constitution provides that "[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." And Article VI, section 6, of that constitution provides that "[a]ll elections shall be by ballot," and mandates that the legislature "provide for such method of voting as will secure to every elector absolute secrecy in preparing or depositing his ballot." By his departure from 70 years of precedent protecting the anonymity of referendum petition signers, the Secretary of State has undoubtedly placed these constitutional guarantees in jeopardy and, thereby, abridged petitioners' privilege of freedom of speech in the legislative process, in violation of the Fourteenth Amendment.

CONCLUSION

The decision of the court of appeals should be reversed, with instructions to make permanent the injunction against disclosure of the names of the Referendum 71 petition signers.

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