Nos. 00-1737

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., *et al.*,

Petitioners,

v.

VILLAGE OF STRATTON, *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Freedom is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association, and religious freedoms. Of particular importance to the Center in this case are constitutional protections for the freedom of speech and association, including each citizen's freedom to engage in anonymous speech and association on politics, religion, culture, and other matters of interest.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

STATEMENT

This case involves an attempt by the Village of Stratton, Ohio, to regulate persons who go door-to-door to promote or explain, among other things, political, religious, or social causes or organizations. While a number of the provisions, such as the requirement to obey a person's posted desire not to receive solicitations and penalties for fraud committed by solicitors or commercial salespersons, are sensible restrictions on wrongful conduct, the only issue on appeal is whether the First Amendment forbids the further requirement that speakers wishing to go door-to-door disclose their names and addresses in a permit application and display the permit containing their names if asked by a person to whom they are speaking. The Jehovah's Witnesses, having experienced harassment in Stratton before, and sensibly fearing further harassment, challenged the Village's disclosure requirements as a violation of their First Amendment right to engage in anonymous speech. Both the District Court and the Sixth Circuit rejected that challenge, largely ignoring the teachings of this Court regarding the importance of anonymity in preserving the freedom of speech.

SUMMARY OF ARGUMENT

The freedom of individuals anonymously to express potentially unpopular ideas and viewpoints is a significant and valuable component of the First Amendment. Anonymity is frequently a necessary shield protecting unpopular speakers from harassment and intimidation by a hostile government or public. History has repeatedly demonstrated the value of that shield, and our public discourse is far richer for its existence. Speakers who have chosen anonymity have forced hostile opponents to confront the ideas expressed rather than the individuals expressing them. Because anonymity provides the requisite security for individuals to speak freely, compelling speakers to disclose their identities to a potentially hostile government and public abridges the freedom of speech. Laws

compelling such disclosure thus should be subject to strict scrutiny.

Regarding the particular disclosures compelled in this case, the interests identified by the Sixth Circuit do not justify the First Amendment burden imposed by the Village of Stratton. Incapable of finding any direct connection between the compelled disclosures and the fraud-prevention and privacy interests asserted by the Village, the Sixth Circuit instead held that the broad prophylactic disclosure requirement was justified as an indirect means of facilitating the enforcement of other direct prohibitions on fraud and invasion of privacy. But an identical and equally tenuous enforcement interest was raised and rejected in *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995), and should be rejected here as well. The Sixth Circuit's attempt to distinguish *McIntyre* on the ground that the interest in anonymity is minimal where speakers have already disclosed their physical identity simply ignores the fact that Mrs. McIntyre also had disclosed her physical identity by handing out her leaflets in person at a public meeting, yet was still found to have a right to refrain from further revealing her name on those leaflets.

ARGUMENT

In addressing whether the First Amendment prohibited the Village of Stratton from requiring individuals to obtain and display a permit containing their name in order to engage in door-to-door speech and advocacy, the Sixth Circuit speculated that "individuals going door-to-door to engage in political speech are not anonymous by virtue of the fact that they reveal a portion of their identities – their physical identities – to the residents they canvass." *Watchtower Bible and Tract Society of New York, Inc.* v. *Village of Stratton*, 240 F.3d 553, 563 (CA6 2001). The court failed to see any added value in preserving name-anonymity, and held that the requirement that speakers reveal their names does not "rise[] to the level of impinging on First Amendment protected speech the Court

sought to protect" in *McIntyre*. *Id*. The Sixth Circuit further distinguished *McIntyre* on the ground that this Court there applied strict scrutiny, whereas the disclosure requirement in this case was being analyzed under intermediate scrutiny.

The Sixth Circuit erred both in the lack of constitutional value it placed on keeping one's name anonymous and in its attempts to distinguish *McIntyre*. The disclosure of an individual speaker's name is a significantly greater burden on speech than the mere disclosure of physical appearance arising from handing out literature or engaging in conversation. Furthermore, the compelled disclosure in this case should have been analyzed under strict scrutiny, though given the interests allegedly served by the disclosure requirement it cannot survive *any* level of First Amendment scrutiny.

I. ANONYMOUS SPEECH SERVES ESSENTIAL FIRST AMENDMENT PURPOSES AND WARRANTS STRONG PROTECTION.

Individual anonymity often is a necessary prerequisite to the exercise of fundamental individual rights. In the voting context, for example, the secret ballot is a primary guarantor of an individual's freedom to exercise the franchise without fear of retaliation by potentially hostile government or private actors. *McIntyre*, 514 U.S. at 343 ("This tradition [of anonymity] is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation."); *Burson* v. *Freeman*, 504 U.S. 191, 199-206 (1992) (plurality opinion) (discussing the right to vote and the development of the secret ballot as the solution to voter intimidation and election fraud).

So too in the context of speech and association, anonymity often is an essential element of protection for an individual's free exercise of First Amendment rights. As this Court has repeatedly recognized, the deprivation of anonymity poses a significant burden upon and deterrent to both speech

and association, particularly where an individual associates with a controversial group or voices an unpopular idea. In *NAACP* v. *Alabama*, for example, this Court observed that

> [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 * * *. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. 449, 462 (1958). Likewise in connection with speech, this Court has recognized that the "decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. And as this Court noted in *Talley* v. *California*, 362 U.S. 60, 64 (1960), "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[2]

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[2] Anonymity also implicates the persuasive and informational character of speech, altering, for better or worse, how listeners will receive any given message. "[A]n advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." *McIntyre*, 514 U.S. at 342. Alternatively, a listener may discount a message based on the unwillingness of a speaker to include in that message his identity or organizational affiliation. Such effects, however, are a function of the content and communicative impact of the speech and the utility of such content is for the speaker and the listener to judge, not for the government to dictate. *See id.* ("[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.").

> Anonymity is a shield from the tyranny of the majority. *See generally* J. Mill, On Liberty and Considerations on Representative Government 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.

McIntyre, 514 U.S. at 357.

The protective function of anonymous speech is particularly relevant for persons seeking to keep their names anonymous even while they might be willing to speak in person and thus disclose their physical appearance. Access to a person's name provides far more avenues for retaliation and harassment than does temporary exposure of a person's physical appearance. For example, if an anonymous canvasser encounters severe hostility from a listener, he can simply end the conversation and walk (or run) away. While it is surely possible that he may later encounter and be recognized by the hostile listener, that risk would seem somewhat limited if they are not otherwise acquainted and do not frequent the same locations. A canvasser forced to disclose his name to a listener who then turns out to be hostile has a legitimately greater concern that the speaker will trace him by means of his name and potentially identify his address, telephone number, employment, and other personal information. Rather than being able to retreat from such hostility, the speaker risks having the hostility brought to him. And where it is the government that is hostile to the speaker's message, there are even more options for gathering information, and avenues for harassment and retaliation, once the speaker's name is on file. Such risks are materially greater than the risks associated with simple physical recognition.

This Court has recognized the added risks and burdens of compelled name disclosure in the recent case of *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182

(1999). There, in the context of circulators collecting signatures for an initiative petition, and a requirement that they display badges with their names on them, this Court observed that "the name badge requirement 'forces circulators to reveal their identities at the same time they deliver their political message,' * * * it operates when reaction to the circulator's message is immediate and 'may be the most intense, emotional, and unreasoned.'" *Id*. 198-99 (quoting court of appeals decision below, citation omitted). Loss of name anonymity, even where a speaker will already be physically revealed, thus poses a significant deterrent to speech and to speakers. *See id*. at 197-98 (discussing evidence in the district court showing that: name badges "'inhibit[] participation in the petitioning process'"; "'[W]ith [circulators'] name on a badge, it makes them afraid.'"; and that a name badge requirement "'very definitely limited the number of people willing to work for [petition organizers] and the degree to which those who were willing to work would go out in public'").

The loss of name-anonymity in the context of personal interaction is thus especially burdensome to the exercise of First Amendment rights:

> The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest. * * * For this very reason, the name badge requirement does not qualify for inclusion among the "more limited [election process] identification requirement[s]" to which we alluded in *McIntyre*.

Id. at 199 (*quoting* 514 U.S. at 353) (brackets in *Buckley*); *see also id.* at 217 (O'Connor, J, concurring in the judgment in part and dissenting in part) ("I agree with the Court that requiring petition circulators to wear identification badges, specifically name badges, * * * should be subject to, and fails, strict scrutiny. * * * The identification badge introduces into the one-on-one dialogue of petition circulation a message the

circulator might otherwise refrain from delivering, and the evidence shows that it deters some initiative petition circulators from disseminating their messages.").[3] Given the significant concerns about harassment and hostility, name-anonymity provides an important level of security that allows the freedom of speech to be exercised.

The value of having the choice to remain anonymous in preserving the freedom of speech can be seen by the numerous instances throughout history where speakers felt the need for anonymity in order to express potentially unpopular ideas or viewpoints. As this Court observed in *Talley*, 362 U.S. at 64, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Likewise in *McIntyre*, this Court recalled that "[g]reat works of literature have frequently been produced by authors writing under assumed names," citing to Mark Twain, O. Henry, and the numerous pseudonyms used by Benjamin Franklin. 514 U.S. at 341 (footnote omitted).

Anonymity has likewise played a central role in public advocacy. In a thorough and compelling historical discussion of the Framer's views regarding anonymous speech, Justice Thomas's opinion in *McIntyre* offered ample evidence that anonymity plays an important role in shielding speakers who

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[3] This Court in *Buckley* v. *ACLF* analyzed the badge requirement in the context of the assumed validity of an affidavit requirement that required a statement of the circulator's name and address when the petition was finally submitted. While this Court suggested in *dicta* – having denied the cross-petition for review on the issue, 525 U.S. at 191 n. 10 – that the affidavit requirement might be permissible, it did so in the context of regulating the elections process, which, as the quoted passage indicates, constitutes a unique situation that raises especially compelling interests central to the democratic process and gives States some additional leeway. *Id*. at 191. The interest in ensuring a fair election process is not even remotely analogous to the interests in this case. And this Court's rejection, as a violation of anonymity, of the requirement that circulators be listed by name in payment reports suggests that even in the elections context, *id*. at 204, the dicta regarding affidavit disclosures ought not be over-read.

voice potentially unpopular views, and that the Framers viewed the choice to remain anonymous as a component of the freedom of speech and the press. "There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of 'Publius,' are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution." 514 U.S. at 360 (Thomas, J., concurring in the judgment). Another famous example of the significance of anonymity in protecting speech is the 1735 Zenger trial, which revolved around the publication of anonymous political pamphlets criticizing the Crown Governor of New York and which "signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind." *Id*. at 361

Various rebuffed attempts to force the identification of an anonymous author likewise demonstrate the significant interrelation between anonymity and the freedom of speech and the press. *See, e.g., id.* at 361-62 (discussing opposition, on free-press grounds, to an attempt in the Continental Congress to force disclosure of the identity of "Leonidas," who had criticized the government in an article in the Pennsylvania Packet); *id*. at 362 (discussing defense in the New Jersey State Assembly against an effort to force a publisher to reveal the author of an anonymous attack by "Cinncinatus" on the Governor and the College of New Jersey); *id*. at 362-63 (discussing letters by the Governor of New Jersey under the pseudonym "Scipio" supporting anonymity in public discourse as part of the freedom of the press). Those early views regarding the nature of free speech and a free press give content and context to the phrases "freedom of speech" and "of the press" as later used in the First Amendment and protected from abridgment.

This Court has likewise recognized the historical role of anonymity in political and economic discussion. *See, e.g.*,

Talley, 362 U.S. at 64-65 (discussing anonymous speech surrounding the ratification of the Constitution); *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938) (anonymous pamphlets "have been historic weapons in the defense of liberty").[4]

Recognizing that anonymity has great value in allowing the freedom to express potentially unpopular viewpoints and is intertwined with both historical and present understanding of the freedoms of speech, association, and the press, however, is not to say that it may never be abused for improper purposes. As Justice Scalia has correctly observed, anonymity "facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity." *McIntyre*, 514 U.S. at 385 (Scalia, J., dissenting). The majority in *McIntyre* likewise observed that the "right to remain anonymous may be abused when it shields fraudulent conduct." 514 U.S. at 357.

However, notwithstanding that "political speech by its nature will sometimes have unpalatable consequences, * * * in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *Id*. (*citing Abrams* v. *United States*, 250 U.S. 616, 630-631 (1919) (Holmes, J., dissenting)). Indeed, the potential for abuse is an inherent risk of every freedom, and the remedy for such abuse must be to attack it directly rather than to extinguish the freedom prophylacticly. As "Publius" noted regarding the "dangerous vice" of "faction" in a democracy, one method of removing the causes of faction is "by destroying the liberty which is essential to its existence." Federalist No. 10, The

[4] While jurists may differ on whether constitutional history and text establish merely the general right to be protected, or whether each particular safeguard of that right must have historical antecedents, in this case there is no conflict in the result under either approach.

Federalist Papers 54-55 (Van Doren ed., Easton Press Edition 1979). But it

> could never be more truly said than of [that] remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts fire its destructive agency.

Id. at 56. It would likewise be folly to abolish the option of anonymity in speech, which is essential to true freedom of speech, in order to eliminate the occasional unscrupulous act that it may facilitate.[5] This Court has long held that "[b]road prophylactic rules in the area of free expression are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) (citations omitted). Instead of sweeping prophylaxis, the Constitution requires that we respond directly against the wrongdoing itself, even if that is made more difficult by the anonymity. As this Court has "reaffirm[ed] simply and emphatically," the "First Amendment does not permit the State to sacrifice speech for efficiency." *Riley* v. *National Fed'n of the Blind of North Carolina*, 487 U.S. 781, 795 (1988); *id*. at 803 (Scalia, J., concurring in part and concurring in the judgment) ("Where core First Amendment speech is at issue, the State can assess

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[5] While anonymous speech may well be capable of being abused for unlawful purposes, based on the sparse evidence in this case such abuse is by far the exception rather than the rule. Here there actually is no evidence of such abuse at all, but only the anticipation of abuse based upon an uninformative discussion of unspecified problems with solicitors elsewhere in Ohio. *See Watchtower*, 240 F.3d at 566. There is no indication that anonymity was a component of such problems or that Ohio authorities were unable, due to anonymity, to enforce against any substantive legal violations by such solicitors.

liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made.").[6]

The consequence of the practical and historical interrelation between anonymity and First Amendment freedoms is that laws restricting anonymity and compelling disclosure of a speaker's identity should be subject to strict scrutiny. Such heightened scrutiny is required in this case for several reasons. First, as in *McIntyre*, the disclosure requirement here "is a regulation of pure speech." 514 U.S. at 345. The law applies to persons who wish to do nothing more than initiate a conversation "promoting" or "explaining" any "organization or cause." *Watchtower*, 240 F.3d at 558. Such a direct regulation of speech, unlike a regulation of conduct that incidentally burdens speech, is subject to strict scrutiny. *See Buckley* v. *ACLF*, 525 U.S. at 209 (Thomas, J., concurring in the judgment) ("The challenged badge requirement * * * directly regulates the content of speech" by requiring "that all petition circulators disclose, at the time they deliver their political message, their names and whether they were paid or unpaid. Therefore, the regulation must be evaluated under strict scrutiny.").

Second, although the disclosure requirement is arguably viewpoint-neutral, "it is a direct regulation of the *content* of speech," compelling speakers to convey specific information; in this case their names. *McIntyre*, 514 U.S. at 345 (emphasis added) (discussing Ohio law compelling disclosure of identi-

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[6] Despite any limited potential for abuse, the freedom to speak anonymously must be the rule. Abrogation of that freedom must be rigorously justified by the state, rather than, as some might suggest, an exception to be justified in specific instances by the speaker as being "needed to avoid 'threats, harassment, or reprisals.'" *McIntyre*, 514 U.S. at 385 (Scalia, J., dissenting) (*quoting NAACP* v. *Alabama*, 357 U.S. 449 (1958)). Placing such a burden on speakers who – as in this case -- may well fear the very authorities to whom they must justify their concerns would likely compound the problem and open up additional avenues for harassment.

fying information of sponsoring organization).[7] Furthermore, the categories of speech subject to the permit and disclosure requirements are "defined by their content," *id*., in that, for non-commercial matters, they cover only promoting or explaining an organization or cause, but not other common forms of door-to-door speech unrelated to organizations or causes.[8]

Third, at least as applied to advocacy of political or religious organizations and causes, the disclosure regulations burden core First Amendment speech. *See, e.g.*, *Meyer* v. *Grant*, 486 U.S. 414, 420 (1988) ("a limitation on political expression [is] subject to exacting scrutiny"); *Lovell*, 303 U.S. at 452 (referring, in a case involving distribution of literature by Jehovah's Witnesses, to the "vital importance of protecting this essential liberty" of distributing pamphlets and finding the licensing ordinance "void on its face").

Ignoring the lessons of *McIntyre*, the Sixth Circuit declined to apply strict scrutiny and looked to cases involving permit requirements rather than disclosure laws in order to apply the less rigorous scrutiny for time-place-manner restrictions and restrictions on conduct having incidental effects on speech. *See Watchtower*, 240 F.3d at 560 & n. 4 (citing *For-*

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[7] While this Court should apply strict scrutiny even if the requirement is viewpoint neutral, just as in *McIntyre* the disclosure requirement here arguably "places a more significant burden on advocates of unpopular causes than on defenders of the status quo." 514 U.S. at 345 n. 8.

[8] It is, one supposes, remotely *conceivable* that the Village would apply its permit and disclosure requirements to the frequent unexpected speech that daily occurs at front doors, but it is not likely. Imagine needing a permit to knock on doors in Stratton asking: "Have you seen Timmy, I think he was around here playing with Johnny?"; "Have you seen my dog Buddy, I last saw him chasing Millie around the corner?"; "Can I borrow a cup of sugar?"; or "My car broke down, would you mind calling a tow truck for me?" Insofar as speech of such content is excluded from the permit and disclosure requirements, then the ordinance is content based. And if, absurdly, such speech *is* included, then the ordinance is intolerably burdensome to speech.

syth County v. *Nationalist Movement*, 505 U.S. 123 (1992), *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *United States* v. *O'Brien*, 391 U.S. 367 (1968)). The court of appeals then concluded that the ordinance was "content neutral and of general applicability, and hence, subject to intermediate scrutiny" because there was "no indication that the *ordinance* distinguishes between favored and disfavored speech; it requires all individuals seeking to canvass to register irrespective of the content of their message." *Watchtower*, 240 F.3d at 561 (citations omitted).

Even assuming – doubtfully – that such reasoning is valid as applied to the permit requirement in general and the "No Soliciting" option given to residents, it simply has no application to the further *disclosure* requirement at issue here, which is a direct content-based restriction on pure speech unrelated to commercial transactions or other non-speech conduct. The disclosure requirement thus must be receive strict scrutiny.

II. THE ALLEGED INTERESTS IN THIS CASE DO NOT JUSTIFY RESTRICTING ANONYMOUS SPEECH.

Against the significant First Amendment protection for anonymous speech, the Village asserted, and the Sixth Circuit accepted, not a direct interest in preventing harm from anonymity *per se*, but rather an indirect interest in aiding the enforcement of other direct prohibitions against fraud and undue annoyance. The court of appeals acknowledged that other provisions of law provide criminal and civil penalties for improper conduct and allow residents to indicate a desire not to be solicited by registering and posting such desire. *Watchtower*, 240 F.3d at 566 & n. 9. The Sixth Circuit determined, however, that the disclosure requirement indirectly furthered the enforcement of such direct provisions by "requiring identification from the canvasser prior to canvassing so that if he does ignore the wishes of the residents, the Village has information that will assist it in prosecuting the canvasser, thereby adding to the likelihood that a canvasser will be deterred from

canvassing such residents." *Id*. at 566 n. 9; *see also id.* at 566 ("The ordinance's registration requirements also likely deter Jehovah's Witnesses from canvassing homes with No Solicitation Signs and forms because they are aware that the Village now has information – name, address, organization or cause – helpful in apprehending someone who ignores a resident's wishes."); *id*. at 567 (ordinance deters "individuals from committing fraud because they know the Village has information that would make it easier to apprehend them were they to do so").

The court also suggested that disclosure aids in determining, at the initial permitting stage, "whether canvassers are in fact affiliated with an organization such as Jehovah's Witnesses or are instead perpetrators of fraud using a Jehovah's Witnesses claim as cover," by providing "the Village with information helpful in making this assessment" and thus the ability "to turn away perpetrators posing as Jehovah's Witnesses." *Id*. at 566-67.

Those asserted interests, however, are indistinguishable from the interests rejected by this Court in prior cases on anonymity, and cannot sustain the Village's sweeping disclosure requirement. In *Talley*, for example, the Los Angeles disclosure requirement was defended as "providing a way to identify those responsible for fraud, false advertising and libel." 362 U.S. at 64; see also *id.* at 66 (Harlan, J., concurring) (law claimed to "aid in the detection of those responsible for spreading" unlawful material). But this Court rejected that defense as inadequate because the law at issue applied to large quantities of lawful speech and was not limited to the unlawful speech that was the underlying concern. *Talley*, 362 U.S. at 64. As Justice Harlan explained in his concurrence,

> it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience

> with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have.

362 U.S. at 66-67 (footnote omitted).

Similarly in *McIntyre*, this Court rejected a sweeping disclosure requirement, holding that to the extent Ohio sought to defend the requirement "as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley*" because "the ordinance plainly applies even when there is no hint of falsity or libel." 514 U.S. at 344. Such a "blunderbuss approach" to preventing the misuse of anonymous speech by prohibiting all uses of a general category of anonymous speech was found unacceptable under the First Amendment. *Id*. at 357. While government "may, and does, punish fraud directly," it "cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." *Id*.

As in *McIntyre*, the disclosure requirement here merely "serves as an aid to enforcement of the specific prohibitions and as a deterrent to the making of false statements by unscrupulous prevaricators." 514 U.S. at 350-51. While that may be a legitimate interest in general, it is insufficient to overcome the First Amendment burden created by a law broadly restricting entirely lawful and protected anonymous speech.

Furthermore, the Sixth Circuit too casually assumed that the Village's disclosure requirement would actually have a material effect on a genuine problem. In a significant understatement of the matter, the court recognized that evidence for the supposed problem with fraud and undue annoyance – prior to enactment of the unchallenged stricter penalties in the Village ordinance – was "by no means overwhelming." 240

F.3d at 566. It then merely asserted that the disclosure requirement would be effective in deterring and enforcing against fraudulent and unduly annoying solicitation. *Id*. at 566-67. But as this Court recognized in *McIntyre*, anonymity "does not necessarily protect" a wrongdoer "from being held responsible" for illegal conduct. 514 U.S. at 352. And given that a person contemplating illegal conduct is more apt than legitimate speakers simply to falsify the information disclosed for the permit, the deterrent and enforcement value as to such wrongdoers is doubtful. Neither the Village nor the Sixth Circuit has explained why it would be more difficult to enforce its substantive prohibitions against anonymous speakers "than against wrongdoers who might use false names and addresses in an attempt to avoid detection." *Id*. at 353.[9]

Perhaps recognizing the inadequate weight of the interests asserted in support of the disclosure requirement, when the Sixth Circuit briefly addressed *McIntyre* itself, it sought to downplay the constitutional burden imposed by the disclosure requirement by arguing that because canvassers already "reveal a portion of their identities – their physical identities – to the residents they canvass," the further disclosure of their names does not "rise[] to the level of impinging on First Amendment protected speech the Court [in *McIntyre*] sought to protect." *Watchtower*, 240 F.3d at 563. The court of appeals' purported distinction of the right protected in *McIntyre*, however, is curious given that name-anonymity was *precisely* the right endorsed in *McIntyre* in the exact circumstances where she had chosen to disclose only her physical identity by

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[9] Indeed, if canvassers are indeed out canvassing a neighborhood and improperly ignore a "No Soliciting" sign, a simple phone call could alert police in ample time to intercept them as they continued on their path. And if they commit fraud by misrepresenting matters to the persons being solicited, they are just as likely to misrepresent the information required to be disclosed. In the end, disclosure is a far greater burden to honest canvassers for unpopular causes who disclose accurate information than it is to frauds with no such scruples.

distributing "leaflets to persons attending a public meeting." 514 U.S. at 337. It is likewise precisely the right protected in *Buckley* v. *ACLF* in the context of petition circulators engaged in interactive speech on a one-to-one basis with members of the public. 525 U.S. at 199. Indeed, forbidding anonymity in the context of the "less fleeting encounter[s]" in *Buckley* and in this case is a restraint on speech "more severe than was the restraint in *McIntyre*." *Id*. at 199. And as discussed above, *supra* at 6-8, name-anonymity raises unique concerns that are not diminished by a speaker's willingness to disclose his physical appearance through direct interaction. The Sixth Circuit's distinction thus wholly lacks merit.

The Sixth Circuit's further attempt to distinguish *McIntyre* based on the supposed application of intermediate scrutiny is equally unavailing. As noted above, *supra* at 12-14, while intermediate scrutiny might arguably be appropriate for a number of the requirements enacted by the Village, it has no application to the disclosure requirement at issue here. Furthermore, given the speculative harms alleged, the tenuous connection between those harms and the disclosure requirement, and the significant burden on protected anonymous speech, the disclosure requirement would fail constitutional muster even under intermediate scrutiny.

Door-to-door canvassing "is one of the most accepted techniques" of engaging in core First Amendment speech." *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943). It is a traditional means of communication of all sorts of ideas and views, and "is essential to the poorly financed causes of little people." *Id*. Where such causes are unpopular, however, canvassers may sensibly choose to keep their personal identities anonymous in order to avoid the lingering consequences of harassment and retaliation that such causes are apt to breed. Having the choice to remain personally anonymous thus allows for the exercise of the freedom of speech and that choice may not be deprived through government edict. The Sixth Circuit ignored that basic constitutional principle and

thus did a disservice to individual freedom for the sake of speculative gains in law enforcement efficiency regarding a problem not even remotely evident in this case. The Constitution requires far more before allowing government to tread on First Amendment rights.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully Submitted,

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