No. 18-1293

IN THE

Supreme Court of the United States

EVERGREEN FREEDOM FOUNDATION
D/B/A FREEDOM FOUNDATION,
PETITIONER,

V.

STATE OF WASHINGTON,
RESPONDENT.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF FOR THE CATO INSTITUTE AND THE INSTITUTE FOR FREE SPEECH AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Does Washington's enforcement action under its campaign-and-election regulation violate the First Amendment when it is extended to cover legal fees for litigation concerning a local ballot initiative process where no campaign or election ever occurred?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Founded by Bradley A. Smith, former Chairman of the Federal Election Commission, the Institute for Free Speech is a nonpartisan, nonprofit organization that defends the rights to free speech, assembly, press, and petition. It represents *pro bono* individuals and civil society groups in cases raising First Amendment objections to the regulation of core political activity.

This case concerns *amici* because it involves arbitrary and unjustified restrictions on political speech and association, which lies at the core of First Amendment protection.

INTRODUCTION AND SUMMARY OF ARGUMENT

Few things could be more democratic than the events that led to this case, and few things are less democratic than the restrictions that the Washington Supreme Court has now placed on socially beneficial *pro bono* legal work in the Evergreen State.

Concerned citizens from three non-chartered municipalities were upset with how they were being

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[1] Rule 37 statement: All parties were timely notified of and consented to this brief's filing. No party's counsel authored any of this brief; *amici* alone funded its preparation and submission.

governed. Using the citizen-driven initiative process, they followed procedures they thought could help change the policies. They collected signatures from the community and filed them alongside the proposed initiatives, believing that the non-charter cities would either adopt the initiatives or place them on the ballot, as seems to be required by state law. *See* Wash. Rev. Code §§ 35.17.260, 35A.11.100. As is more fully described in the petition, however, one city council did nothing, one directed the city attorney to determine the initiatives' validity, and one declared them invalid. Pet. at 6.

The concerned citizens then filed lawsuits arguing that the cities' actions were illegal. The Freedom Foundation provided *pro bono* legal work on these cases. The cases were unsuccessful: no campaigns for the ballot initiatives ultimately occurred. Nevertheless, that *pro bono* legal work to try to initiate a ballot initiative has here been labeled a "campaign expenditure."

But this Court's well-delineated rationales for campaign restrictions cannot apply outside of campaigns without running afoul of the First Amendment. The Court has continually said that campaign restrictions are restrictions on political speech and political assembly that are primarily justified by two state interests: preventing *quid pro quo* corruption and citizens' informational interests. *See Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."); *id.* at 367 ("In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in

'provid[ing] the electorate with information' about the sources of election-related spending.").

The *quid pro quo* corruption interest doesn't apply here because no matter how much *pro bono* legal work is given to an initiative—one that never even made it to the ballot—it's unlikely to return the favor. And the informational interest doesn't apply because there was no election, despite the concerned citizens' valiant efforts to create one. Citizens were never asked to vote on anything. No campaign was begun to try to influence citizens to vote in a certain way. Unless the informational interest has become completely unmoored from elections—which would be a radical revision of this Court's precedents—then the Washington Supreme Court validated a vague and cumbersome campaign restriction that serves no legitimate purpose while stifling and chilling democratic engagement.

The First Amendment broadly protects political expression to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Free speech fosters political change, holds officials accountable, and otherwise sustains a healthy democracy. Whether at the federal, state, or local level, citizen activism facilitates such interchanges and is thus vital to our democracy. Requiring private individuals to disclose their legal representation *for a non-campaign* impedes robust political speech and hampers a politically active citizenry.

Moreover, as applied here, Washington's regulatory scheme disproportionately favors certain types of speakers and restricts political speech for everyone else. Despite engaging in pervasive political activism, unions are free to go without reporting their own

lawyers as expenditures, while non-politician citizen activists are forced to disclose theirs. Such an intrusive regulation subjects activists and their lawyers to public abuse and harassment, with no legitimate purpose other than furthering a false "transparency."

Perhaps most concerning, Washington's law chills speech for both citizen activists and lawyers. There is "practically universal agreement" that the central purpose of the First Amendment was "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Speech is intimately related to money and legal services, so disclosure rules effectively burden anyone who dares ask a lawyer's help in getting a measure placed on a ballot. Such burdens discourage political speech, disincentivize *pro bono* legal work, and harm the valuable discourse that our political system needs to sustain itself.

This Washington law also leads to bizarre results that do little to reduce corruption. If anything, it permits elected officials to reduce their accountability to voters and may even allow corruption to fester. Sophisticated organizations with an abundance of resources can easily navigate these laws, while concerned citizens are left with a distinct lack of "resources necessary for effective advocacy." *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) (per curiam). Moreover—and it feels strange to have to spell this out—a ballot initiative can't be corrupted, at least not in the *quid pro quo* sense. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.") No matter what you do for a ballot measure, it will not love you back.

The Court has a chance here to clarify the scope and purpose of campaign finance restrictions. States cannot hinder political speech for individuals and *pro bono* attorneys while favoring preferred groups, like unions. Not only would curtailing Washington's law energize our democracy and reduce corruption, it is also what the First Amendment requires.

ARGUMENT

I. THE FIRST AMENDMENT BROADLY PROTECTS POLITICAL SPEECH

"[T]he central purpose of the [First Amendment] was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Free speech "is needed for republican government" and "informs voters about the conduct of elected officials, thereby helping voters to hold officials responsible at election time." John Samples, *Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn* Citizens United, Cato Inst. Policy Analysis No. 724 (Apr. 23, 2013), at 2. "Officials in power have every reason to fear speech. It fosters change, not least in elections. Elected officials have strong reasons to find acceptable ways to suppress free speech." *Id.* at 3.

The Founders believed that "a dependence on the people is no doubt the primary control on the government." *The Federalist* No. 51, at 316 (Madison) (Garry Wills ed., 2003). The people, through elections and activism, keep politicians accountable to voters, which in turn constrains government power. If people are punished for voicing political opinions, the Madisonian

nightmare of government without restraint becomes possible. That's why a "major purpose" of the First Amendment is "to protect the free discussion of governmental affairs," *Mills*, 384 U.S. at 218, by limiting state interference with the marketplace of ideas, especially political ideas. Free and open debate is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 15.

Furthermore, the First Amendment protects political speech regardless of the nature or identity of the speaker. Americans don't lose their rights upon becoming activists, or coming together and forming associations, be they unions, non-profit advocacy groups, for-profit corporations, law firms, or any other group. *See, e.g.*, Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707–08 (2011). Requiring lawyers and clients to disclose their legal representation as a campaign expenditure—particularly when the "campaign" in question is simply a ballot measure proposal—impedes robust political speech and thus robs our democracy of the vibrancy and dynamism it would otherwise have.

Indeed, restricting the liberty to engage in political activism because such engagement somehow injures the political system is fundamentally contrary to the constitutional structure of rights and powers. As Madison wrote, "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 to fire its destructive agency." *The Federalist* No. 10, at 51–52 (Madison) (Garry Wills ed., 2003). And as this Court held, "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or

associations of citizens, for simply engaging in political speech." *Citizens United*, 558 U.S. at 313.

While states have the authority to regulate their own elections, that regulation must be consistent with the First Amendment's protections. Certainly, states can't weaponize campaign-finance laws to restrict non-election speech. Washington's scheme runs counter to the foundational principle that free and robust political debate—whose protection lies at the First Amendment's core—is essential to our democracy. The Founders simply did not want speech to be subject to restrictions on financial support or services, which provide the means for political debate. *See generally* David. M. Rabban, *Free Speech in Its Forgotten Years* (1997). Legal representation likewise facilitates political speech, especially when such representation allows people to express their opinions and navigate the complexities of local ballot measures.

When individuals propose ballot measures, they are engaging in political speech protected by the First Amendment. Likewise, lawyers or firms that represent them or provide legal counsel are assisting in that speech. Washington's strange application of campaign-finance law to non-campaigns undermines a central purpose of the First Amendment and merits review.

II. WASHINGTON'S LAW SERVES NO RELEVANT GOVERNMENTAL INTEREST, CHILLS SPEECH, DISCOURAGES *PRO BONO* WORK, AND CREATES SERIOUS LEGAL-ETHICS CONCERNS

One could be forgiven for reading the opinion below and not realizing that the "independent expenditure" reporting discussed throughout constituted *pro bono*

legal advice. The majority makes little mention of the fact that legal services, provided for free, are at issue—instead treating Washington's application of its campaign-finance laws against Petitioner as if the legal group were a run-of-the-mill political actor.

But this is hardly so. Petitioner merely acted, consistent with its tax status under 26 U.S.C. § 501(c)(3), by representing its clients in a series of lawsuits designed to place initiatives on the ballot in a few municipalities. Pet. 6. Washington believes this action is the same as an independent expenditure, and, over significant dissent, the state's supreme court agreed. Pet. App. A1-A34.

Treating *pro bono* legal services as the functional equivalent of large financial expenditures from ideological, partisan, or self-interested entities was error. While this Court has blessed the mandatory disclosure of certain independent expenditures or large financial contributions, "[i]n for a calf is not always in for a cow." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358 (1995) (Ginsburg, J., concurring). Indeed, other parts of Washington's campaign-finance laws expressly recognize that legal services are different—generally exempting regularly employed legal services from being reported as contributions for "candidate[s] or authorized committee[s] if the person paying for the services is the regular employer of the individual rendering the services and if the services are solely for the purpose of ensuring compliance with state election or public disclosure laws." Wash. Rev. Code Ann. § 42.17A.005.

In the "campaign finance" context, "[d]isclosure chills speech." *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016) (Brown, J.). Yet, at least for large contributions and certain expenditures, this First

Amendment injury is tolerated because it deters *quid pro quo* corruption and "helps voters to define more of the candidates' [or ballot question's] constituencies." *Buckley*, 424 U.S. at 81. Neither interest is served by forcing the reporting of *pro bono* services, while chilling the provision of such services will impose significant harms.

As a threshold matter, there is no anti-corruption interest at stake with a ballot measure. "Any regulation" invoking that interest "must . . . target" the "direct exchange of an official act for money." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014). Unsuccessfully placed ballot measures, unlike elected candidates, cannot engage in this trade. *See also Citizens Against Rent Control/Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 297 (1981) ("*Buckley*['s anticorruption rationale] does not support limitations on contributions to committees formed to favor or oppose *ballot measures*.") (emphasis in original); *id.* at 297 (""The state interest in preventing corruption of officials, which provided the basis for [this] Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here.'") (quoting with approval *C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978)); *see also*, *Emily's List v. FEC*, 581 F.3d 1, 6 (D.C. Cir. 2009) (Kavanaugh, J.) ("Importantly, the [Supreme] Court has emphasized that the anti-corruption rationale is not boundless.") (collecting cases).

Nor will the informational interest be advanced by such forced disclosure. After all, in the context of representing political actors, a *pro bono* lawyer's basis for representation may be (and often is) an interest in the rule of law, the vindication of liberties, or merely seeking to use her expertise to help those in need. It is *not*

inevitably a sign that the attorney agrees with the mission of their client. *See*, *e.g.*, *Nat'l Socialist Party v. City of Skokie*, 432 U.S. 43 (1978); *see also* American Civil Liberties Union, *ACLU History: Taking a Stand for Free Speech in Skokie*, https://tinyurl.com/kwqed9d (noting that not all of the ACLU's membership agreed with taking the case, but nonetheless it demonstrated the "ACLU's unwavering commitment to principle"). Yet, Washington insists that some *pro bono* legal work for political efforts must now be reported as if that service demonstrates a substantial financial interest in an election outcome. Far from informing the voters, such reports more likely confuse the electorate by cluttering campaign reports with misleading references to legal work instead of information about actual funders and actual expenditures made to influence votes.

Since the state cannot demonstrate that infringing the associational freedom of lawyers giving *pro bono* legal advice would sufficiently advance either of these important interests, its disclosure rules cannot survive First Amendment scrutiny in this context.

The state supreme court's decision, if left to stand, will work real harm. It will discourage lawyers from providing *pro bono* advice to clients in any jurisdiction that seeks to clone Washington's aggressive regime.[2]

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[2] When a speech regulation is upheld, it is not uncommon to see similar—and even broader—laws taken up elsewhere. For example, after this Court upheld the "electioneering communications" regulation in the Bipartisan Campaign Reform Act, *McConnell v. FEC*, 540 U.S. 93 (2003), states created an avalanche of "electioneering communications" laws of their own. Brennan Ctr. for Justice, *States Expand Definition of Electioneering Communication to Guard against Corruption* (Feb. 7, 2013), https://tinyurl.com/yxwnthxc ("Consequently, 25 states have adopted

Cf. Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting) ("[O]ur overriding duty [is] to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness, overbreadth, and unbridled discretion to limit their exercise").

This dynamic will dry up necessary, and often vital, legal services. Without legal guidance, many Americans may decide that exercising their First Amendment rights simply isn't worth the expenditure of considerable time, energy, and resources.[3] This chill will only become more intense if citizens simply contemplating a political act—such as how to get a ballot measure on the ballot—cannot even consult a lawyer without having to run a gauntlet of campaign laws.

The *Buckley* Court cautioned that campaign finance restrictions "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. That is the case here. Effective advocacy is harmed by laws

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electioneering communication definitions, most of which extend to media beyond the federal definition").

[3] Even the question of how to report the value of *pro bono* legal advice is difficult. The reporting lawyer presumably cannot put down "zero" as the hourly rate. Does the attorney simply choose what she considers her hourly rate? Or must she figure out the market rate in the area the committee operates, as lawyers must when seeking fees in Civil Rights Act? 28 U.S.C. § 1988(b). Or does the statutory rate of the Equal Access to Justice Act control? 28 U.S.C. § 2412(d)(2)(A)(ii). Given the financial penalties at stake for misreporting, this is not a trivial question. Was. Rev. Code Ann. § 42.17A.750 ("A person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each violation").

that make it more difficult to obtain legal work to help navigate the regulatory morass of campaign-finance restrictions, or that makes it more difficult to challenge regulatory overreach. It limits the scope of activism and harms activists' ability to seek legal counsel.

Beyond chilling speech for citizen activists, the Washington law discourages lawyers from taking on *pro bono* work and does violence to the canons of legal ethics. *Pro bono* is perhaps "the profession's highest calling," providing lawyers with the opportunity to help clients who may not have the financial means to retain counsel. David Lash, "4 Reasons Solo And Small Firm Lawyers Can, And Often Do, Participate In Pro Bono Work (And Debunking Other Pro Bono Myths)," *Above the Law*, Oct. 13, 2016, https://tinyurl.com/y4wvt42b. *Pro bono* "is not only good for the soul, but it can also be good for the career." Brian J. Murray, "The Importance of Pro Bono Work in Professional Development," *Am. Bar Ass'n*, Nov. 16, 2018, https://tinyurl.com/y52u4nrm. It offers young lawyers—and even seasoned ones—the opportunity to interact with clients, develop skills, and explore a wide array of legal topics. *Id.* It is for good reason that Washington's Rules of Professional Conduct state that "[e]very lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay." Wash. R.P.C. 6.1.

Pro bono work provides numerous tangible benefits for lawyers and their communities. Accordingly, many state bars, firms, and law schools encourage or even mandate *pro bono* service. Yet the Washington Supreme Court's decision below does precisely the opposite, dissuading lawyers from offering advice on anything related to local politics, despite the state's Rule

of Professional Conduct's encouraging every attorney to "aspire to render at least thirty (30) hours of pro bono publico service per year." *Id*.

When lawyers are forced to disclose their representation of politically active clients as if it were campaign spending, it also intrudes on their privacy and could expose them to hostility and harassment. It also contravenes a different part of Washington's Rules of Professional Conduct, which holds that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." Wash. R.P.C. 1.2(b). Reporting risks conflating legal advice given to get a measure on the ballot with the lawyer's personal endorsement of the cause itself. This works against Comment 5 to that Rule, which clarifies that "[l]egal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities."

Washington wants to use its sovereign powers to suggest precisely the opposite: lawyers giving free legal services to campaigns are, in fact, financial players in the state's political sphere and their legal advice is coterminous with the work of citizen activists. Ironically, given that many legal issues are not resolved with just a billable hour or two, Washington's law will likely make *pro bono* attorneys need to be four, five, or even six-figure "campaign" spenders.

Lawyers faced with the proposition of being listed as a significant spender in support of unpalatable or unpopular groups of clients will inevitably balk at the

prospect of "assist[ing] in the provision of legal services to those unable to pay." Wash. R.P.C. 6.1. In such circumstances, attorneys, firms, and non-profits may decide that *pro bono* work is more trouble than it's worth—especially if they are forced to decide between opening themselves up to political attacks and falling victim to complaints like the one filed against the petitioner here.

It is unfortunate that the prudent practice of some political activism—particularly the process of seeking to place a measure on the ballot—probably requires retaining counsel. Washington would rather risk driving those actors from the debate by treating *pro bono* services as if they are large campaign expenditures. Doing so furthers no significant governmental interest, chills speech, and goes against the grain of the legal-ethics regime adopted by the state's own courts.

III. THE STATE COURT INCORRECTLY APPLIED *BUCKLEY* TO POLITICAL SPEECH OUTSIDE OF AN ELECTION

Our democracy is full of individuals and groups commenting on political questions, speaking to politicians, proposing legislation, criticizing and praising officials, and much more. Such is the lifeblood of a democracy based on the free exchange of ideas. Because restricting political donations and spending "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," *Buckley*, 424 U.S. at 19, this Court has tried to cabin those restrictions to compelling state interests. In particular, the Court has tried to ensure that campaign restrictions are applied only to actual campaigns.

Whether speech in the form of money is a campaign "contribution" or "expenditure" depends on if there is even a campaign. The citizens here weren't running for elected office; they weren't donating to candidates; and they weren't running a public information campaign to would-be voters. They merely tried to get a measure put on the ballot. And the *pro bono* legal work in question merely challenged arguably illegal actions by the municipalities. This action should not justify the state's subjecting citizens and *pro bono* lawyers to the full force of campaign-finance law. The citizens of Washington have no more interest in knowing who's providing *pro bono* legal work outside of a campaign than they do in knowing who put up a billboard criticizing the governor a week after the election is over.

Like contributions and expenditures, a law firm's *pro bono* representation of a citizen activist facilitates political speech and is thus protected by the First Amendment. Still, a lawyer representing a citizen *pro bono* is not the same as a politician receiving a campaign contribution. The act of giving legal advice to citizens attempting—and failing—to put a measure on the local ballot is not an electoral campaign by any definition other than the one Washington invented here.

Washington's effort to redefine campaigns and contributions in this way is absurd and dangerous to First Amendment freedoms. The Court should thus disregard the lower court's construction of *Buckley*. The mere act of putting a measure on a local ballot is not subject to campaign finance law. Washington's law, which applies restrictions to non-electoral activism, is an overreaching restriction on political speech.

CONCLUSION

The law at issue goes beyond allowable campaign restrictions and endangers the system of *pro bono* legal representation. This Court should grant the petition to address these issues.

Respectfully submitted,

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