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

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), The National Right to Work Legal Defense Foundation, Inc. respectfully moves for leave to file the attached brief as *amicus curiae* supporting Petitioner. In accordance with Supreme Court Rule 37.2(a), on May 3, 2019 Amicus Foundation sent notification of its intent to file its brief to Respondent's counsel of record via the email address provided on this Court's docket. Respondent did not respond to that email. On May 9, 2019, Amicus Foundation sent a second email to Respondent's counsel via the email address listed on its Waiver of Right to Respond, but did not receive a response to that notification either. Petitioner's counsel filed a blanket consent.

The Foundation has been the nation's leading charitable legal aid organization fighting against compulsory unionism abuses since 1968. In furtherance of this mission, Foundation staff attorneys have provided free legal aid to individuals in numerous First Amendment cases that have come before this Court. *E.g.*, *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

The Foundation has a particular interest in the outcome of this case because it occasionally provides free legal assistance to workers with regard to ballot propositions. *See*, *e.g.*, *Hill v. Ashcroft*, 526 S.W.3d 299, 305 (Mo. Ct. App. 2017) (Foundation Staff Attorney W.

James Young represented plaintiff workers challenging initiative summaries prohibiting state Right to Work law).

Indeed, the Foundation has had to fight similar vague unconstitutional campaign finance disclosure laws that chill speech and associational freedoms in the context of ballot propositions. *See Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1154–55 (D. Utah 2008) (holding certain Utah disclosure laws unconstitutional facially and as applied to the Foundation's offering of free legal aid to teachers opposed to a ballot initiative). If the Washington Supreme Court's decision stands, the Foundation and other legal aid charities could face similar litigation in the future.

The Foundation has also provided legal aid in many First Amendment cases involving state laws that burden free speech and association and the proper level of constitutional scrutiny that this Court applies to those laws. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2464–65 (analyzing the level of scrutiny applied to compelled expressive association claims.) Thus, the Foundation has an interest in the proper level of scrutiny that this Court applies to disclosure laws that restrict freedom of speech and association and can provide this Court with a unique perspective on the level of scrutiny that it should apply in this case.

For these reasons, Amicus Foundation respectfully requests that this Court grant its request to file the attached brief.

Respectfully submitted,

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May 13, 2019

QUESTIONS PRESENTED

1. Do Washington campaign finance statutes Wash. Rev. Code §§ 42.17A.255 and 42.17A.005 violate Due Process under the Fifth and Fourteenth Amendments because they are vague as applied to legal services provided to citizens engaged in litigation pertaining to proposed initiative petitions when no campaign or election ever occurred?

2. Does Washington's enforcement action under the Fair Campaign Practices Act, Wash. Rev. Code §§ 42.17A.255 *et seq*. violate the First Amendment to the United States Constitution—made applicable to the States through the Fourteenth Amendment to the United States Constitution—when it is extended to cover legal fees for litigation concerning Washington's local ballot initiative process where no campaign or election ever occurred?

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INTEREST OF *AMICUS CURIAE*[1]

The National Right to Work Legal Defense Foundation, Inc. has been the nation's leading charitable legal aid organization fighting against compulsory unionism abuses since 1968. In furtherance of this mission, Foundation staff attorneys have provided free legal aid to individuals in numerous First Amendment cases that have come before this Court. *E.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018); *Harris v. Quinn*, 573 U.S. 616 (2014); *Knox v. SEIU, Local 1000*, 567 U.S. 298 (2012); *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177 (2007).

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Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission.

laws that chill speech and associational freedoms in the context of ballot propositions. *See Nat'l Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1154–55 (D. Utah 2008) (holding certain Utah disclosure laws unconstitutional facially and as applied to the Foundation's offering of free legal aid to teachers opposed to a ballot initiative). If the Washington Supreme Court's decision stands, the Foundation and other legal aid charities could face similar litigation in the future.

The Foundation has also provided legal aid in many First Amendment cases involving state laws that burden free speech and association and the proper level of constitutional scrutiny that this Court applies to those laws. *See*, *e.g.*, *Janus*, 138 S. Ct. at 2464-65 (analyzing the level of scrutiny applied to compelled expressive association claims.) Thus, the Foundation has an interest in the proper level of scrutiny that this Court applies to disclosure laws that restrict freedom of speech and association and can provide this Court with a unique perspective on the level of scrutiny that it should apply in this case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Washington Supreme Court's opinion implicates two fundamental constitutional principles that warrant this Court's review. First, its opinion upholding Wash. Rev. Code §§ 42.17A.255 and 42.17A.005 ("Washington's disclosure law") discarded essential due process principles: laws regulating free speech

and association must provide fair notice and not be susceptible to arbitrary and discriminatory enforcement. *See* Pet. Br. 13–24.

Second, this Court has ruled that disclosure laws like Washington's must meet a form of "exacting scrutiny." Amicus Foundation agrees with petitioners that the Washington Supreme Court misapplied that standard here. *See* Pet. Brief 28–36. The Foundation, however, also urges this Court to take this case and reevaluate the proper level of scrutiny that should apply to disclosure laws burdening free speech and association rights. Since this nation's founding, anonymity and privacy have been an important part of engaging in political speech and association. Disclosure laws burden these rights and thus should be subject to a "least restrictive means" test.

REASONS FOR GRANTING THE WRIT

I. The Washington Supreme Court's Holding Warrants This Court's Review Because It Raises Serious Due Process Concerns.

A. The Fourteenth Amendment's Due Process Clause requires state laws to provide fair notice of what conduct is illegal and to not be susceptible to arbitrary and discriminatory enforcement.

James Madison famously wrote, under the pseudonym "Publius," that "[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot

be read, or so incoherent that they cannot be understood." The Federalist No. 62, p. 381 (J. Madison) (C. Rossiter ed. 1961). The Constitution embodies Madison's warning through the Fifth and Fourteenth Amendment Due Process Clauses' protection against vague laws. And this Court has heeded the warning since the founding. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223–28 (2018) (Gorsuch, J., concurring) (analyzing the history of due process and its protection against vague laws through the void for vagueness doctrine).

Two fundamental due process rationales animate the Constitution's void for vagueness doctrine. First, governments must provide fair notice in the law so those subject to regulation know what is required before being deprived of life, liberty, or property. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). As this Court has long recognized, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citation omitted); *see also Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) ("because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.") (footnote omitted).

Second, clear laws are necessary because governments, like Washington's here, are accountable to the people and cannot enforce laws in an arbitrary or discriminatory manner. *See Fox Television Stations*, 567 U.S. at 253; *Grayned*, 408 U.S. at 108–09 ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.") (footnote omitted). That is a real necessity, because there will always be those who will use the power of government to punish unpopular groups and ideas they disfavor. *See Cramp v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 368 U.S. 278, 287 (1961) ("[i]t would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human.").

When freedom of speech and association are involved, rigorous adherence to these fundamental principles is necessary to ensure that ambiguity in the law does not chill the exercise of First Amendment rights. *See Fox Television Stations*, 567 U.S. at 253–54; *Dimaya*, 138 S. Ct. at 1228–29 (Gorsuch, J., concurring) ("[The Supreme Court] has . . . expressly held that a 'stringent vagueness test' should apply to [laws] abridging basic First Amendment freedoms.") (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)); *Cramp*, 368 U.S. at 287 ("The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question oper-

ates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution . . . [s]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.") (citation and internal punctuation omitted).

Adherence to these principles triggers a strong presumption that ambiguous and vague laws burdening freedom of speech and association are unconstitutional. *See NAACP v. Button*, 371 U.S. 415, 432 (1963); *see also Buckley v. Valeo*, 424 U.S. 1, 77 (1976) ("[w]here First Amendment rights are involved, an even 'greater degree of specificity' is required.") (citation omitted).

B. Washington's disclosure law does not provide fair notice and, in this case, led to arbitrary enforcement.

The Washington Supreme Court's decision here ignored both of these fundamental due process tenets. First, Washington's campaign disclosure law is ambiguous and vague, and thus does not provide the regulated public, including Petitioners, fair notice of what conduct violates the law.

Indeed, all three levels of Washington's state court system found the statute ambiguous. The trial court found the statute "ambiguous and vague" when declaring it unconstitutional. Pet. App. A71. The intermediate appellate court found the statute "ambiguous" and described the statutory scheme as "confusing." Pet. App. A47–A48. The Washington Supreme

Court found the disclosure law's language "ambiguous" and that it created "tension as to the noted local initiative procedures in that the second prong of [the Washington disclosure law]" because it "expressly applies to both state and local initiatives, but its final phrase, 'before circulation for signatures,' seems at odds with the local initiative procedures . . . ." Pet. App. A11–12.

Yet both the intermediate appellate court and the Washington Supreme Court contorted the law's text to apply to Petitioners. Perhaps most disturbingly, the Washington Supreme Court's opinion presumed the ambiguous law was constitutional before using legislative history and statutory purpose to rewrite it. As the dissenting justices below pointed out:

> The majority resolve[d] [the] ambiguity against the speaker and in favor of the government. But resolving an ambiguity in a statue implicating free speech against the speaker and in favor of the government violates controlling precedent of [the Washington Supreme Court] and of the United States Supreme Court.

Pet. App. A22.

If the state court system cannot figure out what the law means without rewriting the statutory language, how is an "ordinary" person of intelligence supposed to conform to Washington law?

Second, the Washington disclosure law is susceptible to arbitrary enforcement. The record here shows

as much. While enforcing the law against Petitioners, Washington did not bring a civil enforcement action against the labor union that funded the legal aid organization opposing the ballot initiative here. *See* Pet. Br. 7 n.5, Pet. App. A37, A68–A69 & A123–A142.

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As a member of this Court recently noted, "[v]ague laws invite arbitrary power." *Dimaya*, 138 S. Ct. at 1223 (Gorsuch, J. concurring). This case is a prime example of that warning. The Court should grant the writ and reaffirm that foundational principles of due process do not allow states like Washington to arbitrarily enforce vague laws.

II. The Washington Supreme Court's Holding Warrants This Court's Review Because It Raises Serious First Amendment Concerns.

As noted above, the Foundation agrees with Petitioners that Washington's Supreme Court misapplied the "exacting scrutiny" test this Court has determined appropriate in the campaign finance context. *See* Petitioner's Br. 28-37. And the Foundation agrees with Petitioners that there will be pernicious burdens places on its, and its donors', free speech and association rights if the Washington Supreme Court's decision is allowed to stand. *See id.* at 36.

But the Foundation also believes that this case implicates a broader threat to free speech and association rights because of the lower constitutional scrutiny disclosure laws like Washington's receive. *See*

Pet. App. A18. In *Citizens United*, this Court held disclosure laws do not require the government to prove the law is the "least restrictive means." Rather, the Court required the government merely show a law is "substantially related to a sufficiently important governmental interest." *Citizens United v. Fed. Election Comm.,* 558 U.S. 310, 319 (2010) (internal punctuation and citation omitted).

This lower constitutional threshold threatens people's privacy and their right to speak anonymously—which is often times required for exercising freedom of speech and association. As this Court has recognized, disclosure laws have "[t]he potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. And can chill the exercise of those rights because people fear retribution. *See id.* at 237 ((Burger, C.J. concurring in part, dissenting in part) ("[r]ank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy.").

Thus, this Court should take this case and hold that disclosure laws are subject to a *higher* standard of "exacting scrutiny"—one that includes a least restrictive means analysis.

A. Anonymity and privacy are essential to freedom of speech and association.

An important part of freedom of speech and association is the right of the individual to maintain his or

her anonymity and privacy. *See McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 342 (1995) ("an 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.").

But freedom to speak and associate anonymously is not just inherently essential, it is sometimes required to exercise the First Amendment rights of free speech and association. History has shown "that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out." *Gibson v. Fla. Legislative. Investigation Comm.*, 372 U.S. 539, 571 (1963) (Douglas, J., concurring.) "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." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460, 462 (1958). And, if this Court does not protect anonymity, there will likely be a chilling effect on free speech and association. *See Talley v. California*, 362 U.S. 60, 65 (1960) ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.")

History shows it not a speculative claim that if this Court does not protect anonymous speech and association, government will burden First Amendment rights. After the NAACP opened a regional office in

Alabama in 1951, for example, the state attorney general sought to enjoin it from conducting activities in the state and demanded that it disclose a list of its members. When the NAACP resisted, an Alabama court charged the organization with contempt. In reversing that decision, this Court recognized that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment[.]" *Patterson*, 357 U.S. at 460; *see also Citizens United*, 558 U.S. at 480–84 (Thomas, J., concurring in part, dissenting in part) (citing various instances of retaliation for individuals exercising their First Amendment rights). Without the NAACP's ability to protect its members' anonymity, who knows what persecution the members would have suffered.

B. This Court should apply an "exacting scrutiny" standard that requires a "least restrictive means" analysis to disclosure laws that burden freedom of speech and association.

Because the right to *anonymous* speech and association is fundamental to exercising the rights of free speech and association, this Court must protect those rights through exacting judicial review. This Court has done that in most First Amendment cases by holding that to be constitutional infringements upon First Amendment speech and associational rights must

meet at least an exacting—if not strict—First Amendment scrutiny that includes a least restrictive means test.

For example, just last term, this Court subjected compelled expressive association to "exacting scrutiny"—which included a least restrictive means test. *Janus*, 138 S. Ct. at 2464–65 ("[u]nder 'exacting' scrutiny . . . a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'"); *see also Knox*, 567 U.S. at 309–10; *Patterson*, 357 U.S. at 461.

Yet, as noted above, this Court in *Citizens United*, with little analysis, upheld a lower standard of judicial review for disclosure requirements that burden core, fundamental First Amendment rights. *See* 558 U.S. at 366–67 ("[t]he Court has subjected [disclosure] requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.") (internal punctuation and citation omitted). This, however, is not in line with the text, history, or purpose of the First Amendment. *See McIntyre,* 514 U.S. at 358–71.

Thus, the Court should take this case and hold that disclosure laws burdening First Amendment rights are subject to the same least restrictive means exacting scrutiny analysis that other laws burdening First Amendment rights receive.

CONCLUSION

For all these reasons, and those stated by the Petitioners, the Court should grant the Petition.

Respectfully submitted,

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