

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: JOSEPH McINTYRE, EXECUTOR OF ESTATE OF  
MARGARET McINTYRE, DECEASED, Petitioner v.  
OHIO ELECTIONS COMMISSION

CASE NO: No. 93-986

PLACE: Washington, D.C.

DATE: Wednesday, October 12, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH McINTYRE, EXECUTOR OF :  
ESTATE OF MARGARET McINTYRE, :  
DECEASED, :  
Petitioner :  
v. : No. 93-986  
OHIO ELECTIONS COMMISSION :  
- - - - -X

Washington, D.C.  
Wednesday, October 12, 1994

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:01 a.m.

APPEARANCES:  
DAVID A. GOLDBERGER, ESQ., Columbus, Ohio; on behalf of  
the Petitioner.  
ANDREW L. SUTTER, ESQ., Assistant Attorney General of  
Ohio, Columbus, Ohio; on behalf of the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	DAVID A. GOLDBERGER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ANDREW L. SUTTER, ESQ.	
7	On behalf of the Respondent	27
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 93-986, Joseph McIntyre v. the Ohio  
5 Elections Commission.

6 Mr. Goldberger.

7 ORAL ARGUMENT OF DAVID A. GOLDBERGER

8 ON BEHALF OF THE PETITIONER

9 MR. GOLDBERGER: Mr. Chief Justice and may it  
10 please the Court:

11 The issue in this case is whether the First  
12 Amendment permits the State of Ohio to criminalize  
13 petitioner's anonymous leafleting in public places because  
14 they're unsigned leaflets, urge members of her community  
15 to vote against a tax increase in a local referendum.

16 QUESTION: You're not saying that that's why the  
17 leaflets were made punishable, because they urge somebody  
18 to vote a particular way.

19 MR. GOLDBERGER: It seems to me, Your Honor,  
20 that it's the contention of the State of Ohio that  
21 anonymous political leaflets are unprotected when the  
22 leaflets address voters, so indeed it was a combination of  
23 the anonymity and the fact that the leaflets were  
24 addressed to voters in a coming election.

25 QUESTION: Because -- you say that's the only

1 place where the Ohio statute applies, is when the leaflets  
2 are addressed to voters?

3 MR. GOLDBERGER: According to the -- it's when  
4 they -- they address voters on a referendum issue, or on  
5 an election, if that's the thrust of the Court's question.  
6 These are not -- it's not an anonymous -- a flat  
7 prohibition on all anonymous leafleting, it's a flat  
8 prohibition on all anonymous election-related leafleting,  
9 and in specific, the holding of the court below addressed  
10 the portion of the statute which prohibited anonymous  
11 leafleting with respect to referenda.

12 The events leading to this case began on  
13 April 27th and 28th of 1988. An open forum was held at  
14 the Westerville middle schools on both of those nights to  
15 discuss the merits of a tax levy which was on the May 3rd  
16 ballot.

17 The petitioner, Margaret McIntyre, distributed  
18 her leaflets to persons attending the meeting. The  
19 leaflets were classic leaflets in the tradition of America  
20 street corner leafleters, were produced on her home  
21 computer, and duplicated at a local copy store. They were  
22 critical, sharply critical of school officials, and urged  
23 readers to vote against the tax levy.

24 A school official, J. Michael Hayfield, saw  
25 them, approached her, said that they were unlawful because

1 they did not contain her name, and she said she was  
2 allowed by law, she thought, to distribute the leaflets.

3 The tax levy was defeated a week later. It was  
4 put on the ballot a few months later and defeated again,  
5 and a few months after that it went on the ballot and  
6 finally passed.

7 QUESTION: Well, what sort of a town is  
8 Westerville? What size? Is it by itself, or is it a  
9 suburb?

10 MR. GOLDBERGER: Westerville is a suburb of  
11 Columbus, Ohio. It's -- I don't know the precise  
12 population, Your Honor, but I'd assume it's 40,000 or  
13 50,000 individuals. It is not a tiny little borough in  
14 the rural areas of Ohio.

15 QUESTION: Mr. Goldberger, had the flier of  
16 Ms. McIntyre related to a congressional election, and if  
17 it cost more than \$250 to produce, there would have been  
18 certain Federal requirements, would there not, of  
19 disclosing the expenditure to the FEC and her identity in  
20 making an expenditure, and so forth?

21 MR. GOLDBERGER: Your Honor, under 441(d) of the  
22 Federal Election Campaign Act, there is a disclosure  
23 requirement with respect to expenditures to produce  
24 leaflets. It does extend --

25 QUESTION: Now, do you take the position that

1 that kind of a requirement is valid? There's no First  
2 Amendment violation?

3 MR. GOLDBERGER: No. I believe, Your Honor,  
4 that a disclosure requirement on any leaflet, when the  
5 leaflet is constitutes core political speech or is pure  
6 speech, would violate the First Amendment.

7 QUESTION: Well, that wasn't my question. I  
8 don't think the Federal statute requires the disclosure on  
9 the leaflet.

10 MR. GOLDBERGER: I believe it --

11 QUESTION: I think it requires furnishing  
12 information to the FEC that I have spent X amount of  
13 dollars in connection with a political campaign, and that  
14 identity is then a matter of record. I suppose the public  
15 can learn who has made expenditures.

16 MR. GOLDBERGER: Your Honor --

17 QUESTION: It doesn't have to appear on the  
18 leaflet. Now, do you take the position that that violates  
19 the First Amendment?

20 MR. GOLDBERGER: No, we do not, Your Honor, but  
21 I -- with all due respect, I do believe 441(d) includes a  
22 requirement that the name appear on the face of the  
23 leaflet. We do not believe that the expenditure  
24 disclosure requirements are by any means, when  
25 appropriately framed, unlawful or unconstitutional, but



1 we --

2 QUESTION: What about a requirement on a  
3 television ad that the identity of the people running the  
4 ad be shown?

5 MR. GOLDBERGER: I believe that's a different  
6 kind of a case, Your Honor, because television is a  
7 conduit for a great variety of communication, and there's  
8 a potential for confusion when a viewer is watching  
9 television as to who's saying what and under what  
10 circumstances.

11 In addition, television as a form of  
12 broadcasting is governed by the Federal Communications  
13 Act, and I believe is subject to a separate and distinct  
14 set of rules.

15 QUESTION: So that we do have an interest in  
16 knowing who is the speaker?

17 MR. GOLDBERGER: You do have an interest in  
18 knowing a situation in which there may be confusion,  
19 because the speaker appears to be someone other than whom  
20 the speaker actually is, but that --

21 QUESTION: Well, suppose Mrs. McIntyre had hired  
22 other people to put out the leaflets, might there not have  
23 been confusion there?

24 MR. GOLDBERGER: Well, I don't believe so, Your  
25 Honor, because the leaflets are -- they speak for

1 themselves.

2           When you watch television, you are hearing  
3 communications from a whole -- a large number of people as  
4 you're viewing the television screen, and in lots of  
5 situations, if you watch Saturday Night Live, for example,  
6 there's a lot of confusion as to whether you're watching  
7 an advertisement or whether you're watching a comedy skit.

8           (Laughter.)

9           QUESTION: But your typical TV ad isn't that  
10 way. I mean, there's no doubt for that 30 seconds you're  
11 watching a commercial add for Joe Doe.

12           MR. GOLDBERGER: Well, it seems to me, Your  
13 Honor, under those circumstances, if there's clarity as to  
14 who the vehicle is, I believe that there's -- there  
15 shouldn't be an absolute necessity to place it on the  
16 screen. But I would respectfully differ with the Court.  
17 I do believe there's likely to be confusion under those  
18 circumstances. Moreover, you're dealing with political  
19 advertisements which substantially exceed the cost of the  
20 campaign expenditure disclosure minimums.

21           QUESTION: What if you just said on the  
22 television screen, vote no on the referendum for the  
23 Westerville middle school?

24           MR. GOLDBERGER: It seems to me that to the  
25 extent there's an interest in anonymity and there's no

1 confusion as to who is speaking, in light of the fact that  
2 you have the television serving as the conduit, that is  
3 arguably constitutionally protected.

4 QUESTION: Well, if the State showed that there  
5 were confusion as to who were handing out leaflets, would  
6 there then be a requirement of anon -- of named persons?

7 MR. GOLDBERGER: It seems to me if you had a  
8 statute -- well, you have statutes which deal with  
9 election fraud and misrepresentation. We're not really  
10 challenging those statutes here.

11 QUESTION: Well, I'm positing an assumption  
12 where there are a lot of leaflets going around and  
13 somebody's confused about who's writing the leaflets.

14 MR. GOLDBERGER: I don't believe that's the  
15 business of the State, Your Honor.

16 QUESTION: Well then, that's not the answer to  
17 the question between, asking you to distinguish between  
18 television and pamphlets.

19 MR. GOLDBERGER: Well, that assumes that  
20 television is governed by the same set of ground rules  
21 that are applicable to pamphlets. I believe because of  
22 the Federal Communications Act and the Red Lion decision,  
23 this Court has decided that there are separate sets of  
24 ground rules that are applicable.

25 QUESTION: What has spectrum scarcity got to do

1 with this issue? I mean, that's the basic rationale for  
2 the distinction.

3 MR. GOLDBERGER: Well, Red Lion is not only a  
4 spectrum scarcity case, Your Honor, it's also a case which  
5 deals with the problem of having a conduit of  
6 communication going into the home which -- there is an  
7 immediate impact in which there is a potential for  
8 confusion.

9 QUESTION: Well, isn't there an equal potential  
10 for confusion when I walk up to the polling place and I'm  
11 handed 6 or 8 or 10 or 12 leaflets saying, vote for this,  
12 that, or the other person or issue on the way up to vote?

13 MR. GOLDBERGER: Your Honor, I believe that the  
14 voters are capable of deciding for themselves. They  
15 operate in a political climate --

16 QUESTION: You just did not see my puzzlement  
17 last September when I was on my way into the primary.

18 (Laughter.)

19 QUESTION: Let's be concrete about the Ohio  
20 statute. It does say that any radio or television ad  
21 designed to influence the voters in an election must  
22 identify either the speaker or the financial sponsor. Is  
23 that constitutional sometimes, always, never?

24 MR. GOLDBERGER: In my view, Your Honor, it is  
25 constitutional in the context of broadcasting, because I

1 believe broadcasting poses a separate question.

2 QUESTION: That's all it applies to, is radio  
3 and television advertising.

4 MR. GOLDBERGER: That's correct.

5 QUESTION: So you can, in any and all radio and  
6 television ads, the State legitimately can require  
7 identification of the speaker?

8 MR. GOLDBERGER: I believe that -- I believe  
9 that's true, but I think it's important to keep in mind  
10 that these are not political ads. The difference between  
11 a commercial ad, or a political advertisement on a  
12 television, is that it is paid for -- paid for in sums  
13 that exceeds the expenditure disclosure minimums, and  
14 there is a very different kind of a State interest  
15 involved when large sums of money are involved in the  
16 election process.

17 QUESTION: Well, Mr. --

18 QUESTION: Well, then, if Ohio had a ceiling on  
19 the amount of money that -- it said, Ms. McIntyre can do  
20 her flier as long as she's not spending over \$500 on it,  
21 that would be okay?

22 MR. GOLDBERGER: In a broadcast, or just on the  
23 flier? No, I don't --

24 QUESTION: You said the thing was the spending  
25 of money, substantial amounts of money. Suppose this very

1 same statute, but it has a dollar limit under which you  
2 don't have to disclose your name.

3 MR. GOLDBERGER: That would track 441(d), Your  
4 Honor. As we read 441(d), I believe that the appropriate  
5 disclosure is not on the face of the leaflet, but it is to  
6 the appropriate election commission. However, because  
7 this Court has taken the position that expenditure  
8 disclosure requirements are appropriate under some  
9 circumstances, I think it's a judgment call for the court  
10 as to whether or not it would also require disclosure on  
11 the face of the leaflet.

12 QUESTION: Well, Mr. Goldberger --

13 MR. GOLDBERGER: I believe that should be  
14 unconstitutional.

15 QUESTION: -- the statute 441(d) does say that  
16 whenever a person makes an expenditure for the purpose of  
17 financing communications for an election, such  
18 communication shall clearly state the name of the person  
19 making it. Now, if that -- if it means what it says, and  
20 if we have upheld that statute generally in Buckley, where  
21 does that leave you?

22 MR. GOLDBERGER: Your Honor, 441(d) addresses  
23 the question of expenditures. This is a question of pure  
24 speech. This is not a disclosure requirement which  
25 addresses the question of expenditures. Ohio's laws say,

1 all persons shall put their names on their leaflets. It  
2 does not frame it in terms of people who will make  
3 expenditures, and --

4 QUESTION: But this is less restrictive than an  
5 expenditure statute. The statute Justice O'Connor is  
6 telling you about has two restrictions, (a) limitation of  
7 expenses, and (b) a disclosure.

8 MR. GOLDBERGER: I --

9 QUESTION: Are you saying that the State can do  
10 the greater and not the lesser.

11 MR. GOLDBERGER: No, I -- I'm not sure I  
12 understand the Court's question.

13 QUESTION: Well, you're saying that you would  
14 assume -- I interpreted this from your answer -- that if  
15 there were an expenditure limitation, that a disclosure  
16 requirement might be valid.

17 MR. GOLDBERGER: Well, a disclosure requirement,  
18 I believe a disclosure requirement to the election  
19 commission would be appropriate. I don't believe such a  
20 disclosure requirement ought to be required on the face of  
21 the leaflet when the leaflet is pure speech and is  
22 completely protected.

23 QUESTION: Do you think it's constitutional to  
24 require that anytime anybody prints a leaflet they  
25 disclose that to an elections commission?

1 MR. GOLDBERGER: No, I believe that's not so. I  
2 believe that it is appropriate, or consistent with this  
3 Court's decision in Buckley, however, that when someone  
4 expends a certain amount of money in excess of a threshold  
5 minimum, that they can be compelled to disclose the  
6 expenditure to the election commission.

7 QUESTION: So the constitutionality of such a  
8 prohibition would depend on some minimum to be selected by  
9 the legislature?

10 MR. GOLDBERGER: No --

11 QUESTION: Could the legislature suggest 25 --  
12 choose \$25?

13 MR. GOLDBERGER: I believe, Your Honor, that the  
14 minimum has constitutional -- has a constitutional element  
15 to the extent that it is a minimum which interferes with  
16 the ability of street corner leafleters to disseminate  
17 their views and to articulate their views, and for others  
18 that have a legitimate basis for remaining anonymous  
19 because of their fear of retaliation, the kind of  
20 retaliation which the justice below suggested might have  
21 existed in this case, that there is anonymity and that any  
22 threshold requirement has to leave room for that  
23 anonymity.

24 The State's central arguments that -- the  
25 Ohio -- I beg your pardon. The Ohio supreme court rested



1 its decision on the fact that this case and this statute  
2 should be reviewed by a relaxed level of scrutiny.

3 It took the position that because 3599.09 is an  
4 election regulation, it is not -- it not need be reviewed  
5 by the usual high level of scrutiny that this Court  
6 applies to First Amendment communications, and those  
7 communications that ordinarily occur in the election  
8 context.

9 It rejected Talley, in short, on grounds that  
10 petitioner's leaflets addressed voters on discrimination,  
11 while Talley addressed passers-by. Excuse me. It  
12 rejected petitioner's leaflets because it addressed voters  
13 in a referendum, while Talley addressed passers-by on the  
14 issue of race discrimination.

15 The Ohio supreme court was wrong. 3599.09 is  
16 invalid because it is not a regulation of the mechanics of  
17 the election process, it is a regulation of pure speech.  
18 It interferes with the flow of speech to inform voters, it  
19 deters criticisms of public -- it deters criticisms of  
20 public officials by those individuals who would prefer to  
21 remain anonymous because of a fear of potential  
22 retaliation. It --

23 QUESTION: What about the First Bank of Boston,  
24 the Bellotti case, where the Court said that that law was  
25 unconstitutional but a disclosure requirement would be

1 okay? Are you drawing a line between individuals like  
2 McIntyre and corporations?

3 MR. GOLDBERGER: I believe that the Court should  
4 draw a line between individuals like McIntyre and  
5 corporations.

6 QUESTION: What about rich individuals versus  
7 poor corporations?

8 MR. GOLDBERGER: It seems to me --

9 (Laughter.)

10 MR. GOLDBERGER: It seems to me, Your Honor,  
11 that those matters can be handled through expenditure  
12 disclosure requirements. This Court has sustained them in  
13 Buckley, and to the extent the Court treats them as valid  
14 requirements under the First Amendment, the rich speaker  
15 can be reached under the First amendment, and I might add,  
16 the State of Arizona has used precisely this approach.

17 It has repealed a statute much like 3599.09, and  
18 replaced it with an expenditure disclosure requirement and  
19 a disclosure requirement on the face of leaflets which is  
20 limited to political committees, and requires only the  
21 disclosure of the names of major donors to those political  
22 committees where the donor has contributed a very  
23 substantial sum of money.

24 As a consequence, and the sections, the relevant  
25 sections are cited in footnote 2 of the State's brief --

1 QUESTION: Under the Arizona statute, do you  
2 have to disclose the names of major donors on the leaflet  
3 itself?

4 MR. GOLDBERGER: As I read the new statute, Your  
5 Honor, you disclose the name of one donor, the major  
6 donor, one or two donors who have contributed a  
7 substantial sum of money on the leaflet. I'm not arguing  
8 that that's a valid requirement. What I am suggesting is  
9 that the State of Arizona has taken a step back from the  
10 flat ban of statutes like 3599.09.

11 QUESTION: But you suggest it may not have been  
12 a useful step, if you\* --

13 MR. GOLDBERGER: Well, it seems to me --

14 QUESTION: -- it's constitutional.

15 MR. GOLDBERGER: I don't have any difficulty in  
16 compelling the name of the political committee to be  
17 placed on the leaflet, and I also don't have any  
18 difficulty with substantial contributors being compelled  
19 to disclose their expenditures and contributions to the  
20 Election Campaign Commission.

21 QUESTION: Well, certainly some of our cases  
22 have said that organizations couldn't be required to  
23 disclose the names of their members, the NAACP, for  
24 example.

25 MR. GOLDBERGER: That's correct, Your Honor, and

1 we rely on those cases, but I believe that the State  
2 statute in Ohio contains no exception whatsoever, and the  
3 difficulty with the statute is that it's a flat ban on  
4 anonymous leafleting.

5 QUESTION: Well, why can't it be justified on  
6 the possibility of fraud, libel, slander, that obtains in  
7 that sort of thing, and that the identification permits  
8 that sort of action where it's warranted?

9 MR. GOLDBERGER: Well, it seems to me, Your  
10 Honor, that the State has valid libel and fraud laws, and  
11 it can use those laws. The diff --

12 QUESTION: Well, but how can it use them if it  
13 doesn't know who published the statement?

14 MR. GOLDBERGER: Well, first of all, Your Honor,  
15 to quote the -- well, first of all, to quote the State's  
16 brief, prevaricators cannot be expected to point a beacon  
17 at their own lies. Those who are engaged -- and that's  
18 page 18 -- and those who intend to defraud or lie in one  
19 way or another are hardly likely to deal with putting  
20 their -- are hardly likely to put their names on the  
21 pamphlets.

22 QUESTION: To prevaricate isn't the only thing.  
23 How about someone who libels?

24 MR. GOLDBERGER: Well, Your Honor, libel is  
25 unlikely in a referendum election, or at least the kind of

1 libel that this Court should be -- how do you -- it is --  
2 I believe it's impossible to libel a referendum, to the  
3 ex --

4 QUESTION: What if you said the school  
5 superintendent has deliberately misrepresented the need  
6 for this budget bill?

7 MR. GOLDBERGER: Well, I will say that I believe  
8 that sounds a great deal like political advocacy to me.  
9 To the extent that libel is -- he has a libel action, he  
10 can file his libel action. These are matters that ought  
11 to be corrected in the --

12 QUESTION: He can't file it against an anonymous  
13 leafleter if he doesn't know who wrote the leaflet.

14 MR. GOLDBERGER: But he will find out, if  
15 necessary, by going to the -- if a disclosure requirement  
16 is imposed, by going to the Election Campaign --

17 QUESTION: But the State of Ohio hasn't chosen a  
18 disclosure --

19 MR. GOLDBERGER: No. On the contrary, they've  
20 chosen a flat ban on all anonymous leaflets.

21 QUESTION: Well, and I'm saying, what's wrong  
22 with it, because if the thing is libelous, the person who  
23 is libeled ought to know who it was so that he can have  
24 some recourse.

25 MR. GOLDBERGER: Your Honor, I will agree that

1 there is a State interest in ferreting out individuals who  
2 have engaged in libel which affect the election process,  
3 but I don't believe that the court can do it at the  
4 expense of individuals who are engaged in pure speech, who  
5 wish to remain anonymous, and who will otherwise not  
6 distribute their leaflets or make their political  
7 statements in political literature.

8 QUESTION: In this case, she didn't wish to  
9 remain anonymous. Wasn't the testimony that she meant to  
10 put her name on the leaflet?

11 MR. GOLDBERGER: That's true. She was -- she  
12 stated that when she appeared pro se before the election  
13 commission. However --

14 QUESTION: You never made a claim, I take it,  
15 that there was any such interest as was recognized in  
16 NAACP in Alabama.

17 QUESTION: Or Brown v. Social Workers. The very  
18 identity of the person would leave that person exposed to  
19 danger.

20 MR. GOLDBERGER: Well, going into this thing, it  
21 didn't appear that that was the case, and her position  
22 was, before the commission, that she had attempted to  
23 comply with the statute, and it was basically a trap for  
24 the unwary.

25 But as events unfolded, the complaint against

1 her wasn't filed until a year after the leafleting  
2 actually occurred, and three election referenda later,  
3 when it finally passed. At that point, the school  
4 officials who she had criticized initiated and pressed the  
5 proceedings against her. She had, as a consequence she  
6 has a fine, or had a fine that still is a valid fine.

7 Moreover, she and every other resident of the  
8 village or City of Westerville are now on notice that when  
9 they take on school officials in these tax levy referenda,  
10 they do so knowing that the school officials are going to  
11 fight back, and very hard.

12 QUESTION: Wouldn't she have been in exactly the  
13 same position if she didn't have to put her name on the  
14 leaflet, but she did have to register with the election  
15 commission so that mean school official that -- could have  
16 found out her name that way?

17 MR. GOLDBERGER: Well, Your Honor, there are  
18 going to be -- in my view, individuals who do not expend  
19 sufficient funds to make them legitimate targets of  
20 campaign expenditure laws should be left alone, and she  
21 would not have -- making a leaflet on a home computer,  
22 duplicating at the local copy store would not have placed  
23 her within the reach of an appropriately drafted statute.

24 QUESTION: So you would have no difficulty with  
25 a procedure where, if there were a libelous pamphlet, the

1 attorney for the plaintiff could take the deposition of  
2 everybody who made a disclosure to the financing  
3 authorities and asked them, did you print this leaflet,  
4 what leaflets have you printed?

5 MR. GOLDBERGER: Well, it seems to me, Your  
6 Honor, when you have -- if you have -- now, we're talking  
7 New York Times v. Sullivan libel, I assume, but to the  
8 extent that you have some kind of a criminal libel, you  
9 have law enforcement tools which are readily available  
10 with or without these kinds of statutes, and anyone can be  
11 asked by an appropriate law enforcement official who --

12 QUESTION: Well, I'm not familiar with  
13 proceedings in which policemen help plaintiffs' lawyers  
14 enforce civil libel actions.

15 MR. GOLDBERGER: Oh, I see. I misunderstood the  
16 question.

17 QUESTION: And it seems to me that's an even  
18 worse specter.

19 MR. GOLDBERGER: Well, Your Honor, I don't  
20 believe it's the function of the State election laws to  
21 help civil libel litigants. The function of the State  
22 election laws --

23 QUESTION: I thought you were justifying the  
24 answers to some of your questions and to some of these  
25 problems that we confront by saying that there are public



1 disclosure requirements for many, many pamphlets.

2 MR. GOLDBERGER: But the purpose of any public  
3 disclosure requirement, Your Honor, is to assist the State  
4 in making sure that there is not an election fraud which  
5 will affect the outcome of an election. The purpose of  
6 those statutes is not to provide a civil action or  
7 facilitate a civil action by someone who has a complaint  
8 about the contents of an election leaflet.

9 I would like to reserve the rest of my time.

10 QUESTION: Can I ask a question? The -- think  
11 of the ordinary case, where I think you'd say yes, the  
12 State can in fact tell people that they can pay -- spend,  
13 contribute no more than X amount, right. We agreed that  
14 they can do that in certain circumstances.

15 MR. GOLDBERGER: Right.

16 QUESTION: Now, suppose the State has an  
17 enforcement mechanism, and I think this is a question  
18 that's been asked before, but I -- the enforcement  
19 mechanism says, you have to sign a paper, send it to the  
20 commission, and say you've spent no more than \$10,000.  
21 You agree they could do that.

22 And moreover, we want a list of everything  
23 you've spent the \$10,000 on. I take it you say they could  
24 do that.

25 MR. GOLDBERGER: I would prefer they couldn't,

1 but I think the Court has said that.

2 QUESTION: All right. Yes, fine, and moreover,  
3 just to be sure, I don't want you just to have the list  
4 mentioning it by general title. I want you to attach, as  
5 Appendix 1, the actual leaflets that you've sent. I take  
6 it you think they could do that.

7 And my question obviously, is, they can do all  
8 that, what's the difference -- I mean, I feel there is  
9 some difference, perhaps, but you --

10 MR. GOLDBERGER: Well, I don't believe they  
11 can -- I don't think they can do that under circumstances  
12 in which the individual can legitimately claim a need for  
13 anonymity.

14 QUESTION: Oh, so in other words, they could  
15 say, "We want a list of all the \$10,000 worth of stuff you  
16 spent it on," but they can't say, "and attach the  
17 pamphlets."?

18 MR. GOLDBERGER: I believe -- well, at that  
19 point we would be dealing with this Court's holding in  
20 *Brown v.* --

21 QUESTION: But what's the -- what is the  
22 practical, that is the functional -- what's the reasoning  
23 by which it would make sense to say, you can in fact list  
24 all these things by name, you have to list, I spent the  
25 \$10,000 on A, on B, on C, but the commission can't say,

1 and attach as appendix 1 the actual pamphlet so we know  
2 that you really did it?

3 MR. GOLDBERGER: I believe, Your Honor, that is  
4 the problem that this Court faced in the disclosure  
5 requirements with respect to the unpopular political  
6 parties. At a certain point, the State cannot  
7 constitutionally require it.

8 QUESTION: Because --

9 MR. GOLDBERGER: Because of the interest in  
10 anonymity, and to the extent that there is an interest,  
11 she must be left alone. The difficulty --

12 QUESTION: But you have not made an anonymity  
13 claim. I mean, you told us that your client did not make  
14 any -- I said NAACP -- any Brown kind of claim.

15 MR. GOLDBERGER: Yes, but we're now -- the  
16 questions that have been put to me, Your Honor --

17 QUESTION: No, but your answer, as I understood,  
18 your answer to that question is that the point of limit  
19 comes when the individual can assert that kind of a Brown  
20 anonymity claim, and you don't assert it in this case.

21 MR. GOLDBERGER: Your Honor, because the statute  
22 is a flat ban, the statute falls of its own weight. We  
23 are -- I am being put -- questions are being put to me on  
24 a hypothetical statute which would be formed -- framed and  
25 formed in the form of a disclosure, expenditure disclosure

1 requirement, and that is a separate question.

2 QUESTION: So you're saying that in this case --  
3 let's take this case, that if there were an identification  
4 requirement, but the law provided in any case in which an  
5 individual can make a specialized showing of danger from  
6 disclosure, some State official can excuse the individual  
7 from compliance, that that would be a constitutional  
8 statute?

9 MR. GOLDBERGER: Your Honor, to the extent that  
10 Buckley v. Valeo allows expenditure disclosures, it would  
11 seem to me that to the extent that the State is trying to  
12 learn about expenditure disclosure and -- expenditures in  
13 election, and not trying to regulate the content of  
14 protected leaflets, yes, it would be a valid requirement,  
15 to the --

16 QUESTION: Well, would that be the proper  
17 inference from the statute that I just described to you,  
18 that the State's motives were benign, not malign?

19 MR. GOLDBERGER: Well, if it's not benign, I  
20 don't understand why they're asking for the information,  
21 why they need the information.

22 QUESTION: No, but in the case of my  
23 hypothetical, in which the statute contains the circuit  
24 breaker, would you infer by virtue of the circuit  
25 breaker's existence that the State's interest was a

1 constitutionally cognizable one?

2 MR. GOLDBERGER: I believe so in candidate  
3 elections. I have my doubts, sir, in referendum  
4 elections, because of the fact that you cannot libel a  
5 referendum.

6 QUESTION: Thank you, Mr. Goldberger.  
7 Mr. Sutter, we'll hear from you.

8 ORAL ARGUMENT OF ANDREW J. SUTTER  
9 ON BEHALF OF THE RESPONDENT

10 MR. SUTTER: Mr. Chief Justice, and may it  
11 please the Court:

12 I think the Court's dialogue with Mr. Goldberger  
13 demonstrates just how much this case is controlled by  
14 Bellotti and Buckley.

15 In Bellotti, we have footnote 32, which  
16 specifically states, in the heart of a case in which  
17 campaign contributions, or a limitation on campaign  
18 contributions was struck down, that the effective vehicle  
19 in these instances is a disclosure statute, one where the  
20 advertiser, the person circulating the handbill or making  
21 the television advertisement, discloses his or her  
22 identity.

23 There's no distinction between those  
24 circumstances and these. In fact, Bellotti was --

25 QUESTION: -- \*distinction between big spenders

1 and little spenders? If you take the campaign act as a  
2 model, even if the limits are pretty low, there are  
3 limits. You go below those limits, you don't have to  
4 disclose.

5 MR. SUTTER: Justice Ginsburg, in Buckley, the  
6 Court recognized how low the thresholds really were before  
7 someone had to report, but the Court said in that case  
8 that that was a legislative call. In Bellotti, the  
9 whole --

10 QUESTION: Where to draw the line, not --

11 MR. SUTTER: Where to draw the line.

12 QUESTION: Did the Court say there didn't have  
13 to be any line, so that people who don't spend any money  
14 still have to report?

15 MR. SUTTER: Well, Your Honor, in Bellotti the  
16 Court decided that there was no distinction, especially in  
17 the context of ballot measure elections, between  
18 corporations and individuals, that their First Amendment  
19 rights were coextensive, so I don't understand how there  
20 could be a principled basis upon which one could require a  
21 corporation to disclose just because they were better  
22 heeled and might be able to communicate more effectively.

23 QUESTION: My distinction wasn't in terms of the  
24 character of the identity, but of -- does there need to be  
25 some point below which, if you're not -- if the concern is

1 big spending, mustn't you have some limit to leave out the  
2 little people like Ms. McIntyre?

3 MR. SUTTER: No, Your Honor, because the only  
4 concern before the Court in Buckley was not just campaign  
5 contributions and expenditures, some sort of threshold to  
6 distinguish big money from small money, the Court  
7 specifically recognized, as a distinct and independent  
8 compelling interest, the disclosure of information that  
9 was important to the electorate to help them evaluate  
10 candidates.

11 In this case -- and in that instance, it was the  
12 associates of the candidate. In the case at bar, this  
13 State statute does the same thing in the context of a  
14 referendum. It identifies the person who is circulating  
15 literature opposing or promoting a ballot issue, and it  
16 provides the name of that person as information to the  
17 electorate, and I contend there's no distinction between  
18 that interest in a ballot measure election and the  
19 interest of disclosing the associations of a candidate in  
20 a candidate election.

21 QUESTION: What interest do you want to rely on  
22 here to support the State's ban?

23 MR. SUTTER: Your Honor, there are two. One is  
24 the deterrence of fraud, and the other is --

25 QUESTION: Are there other statutes in Ohio that

1 deal with fraud and that could be used to prosecute  
2 someone who put out a fraudulent campaign paper?

3 MR. SUTTER: Yes, there are, Your Honor, but  
4 these circumstances are very similar to Buckley, for  
5 example, where the Court recognized the existence of  
6 bribery statutes. Certainly, bribery statutes could have  
7 been enough to defeat, or was a minimum restriction on  
8 speech that could have been utilized to deter campaign  
9 candidate corruption, but nevertheless, the Court still  
10 upheld disclosure.

11 In Burson, the Court recognized in Tennessee  
12 that there were voter intimidation laws on the books that  
13 could have been utilized to deter the same sort of evil  
14 conduct that the Court was trying to deter in Burson, but  
15 nevertheless upheld the campaign free zone.

16 QUESTION: I mean, I guess you'd say that Ohio  
17 could require, had we been back in those days, the  
18 disclosure of the writers of all of the Federalist Papers.

19 MR. SUTTER: No, Your Honor. We think this is a  
20 much more limited statute that addresses only campaign  
21 literature or broadcast media.

22 QUESTION: Well, they were circulated in support  
23 of a referendum on whether the Constitution should be  
24 adopted or ratified. You would say it would have been  
25 perfectly okay to require disclosure.



1 MR. SUTTER: Your Honor, the circumstances then  
2 were somewhat different. We think that the protections of  
3 the First Amendment make a difference, but if today the  
4 Federalist Papers were being circulated, we would argue  
5 that the State had a compelling interest in requiring the  
6 speakers to place their name on the literature.

7 There would be no difference, and that is our  
8 point here. There is no principled way to distinguish  
9 different types of campaign literature, distinguishing the  
10 well heeled, or those who are capable of communicating  
11 more effectively, with those who do so on a smaller level.

12 This Court has recognized that there's really --  
13 there's no justification for treating or restricting the  
14 rights of groups, for example, to the advantage of  
15 individuals. In Berkeley, in Bellotti, the Court  
16 recognized that there are First Amendment rights  
17 associated with groups being able to go over and -- go out  
18 and speak together, and that there was no distinction made  
19 there.

20 There wasn't a tier of protected rights  
21 established so that groups or effective speakers would be  
22 able -- that the State would place more restrictions on  
23 their speech than on individuals.

24 QUESTION: Your interests are the deterrence of  
25 fraud and informing the electorate? Those are your two

1 interests?

2 MR. SUTTER: Yes, Your Honor. We think that  
3 this statute serves a parallel interest as the statute in  
4 Buckley, where the Court said that information important  
5 to the voter, information that enables the voter to place  
6 a candidate in the political spectrum --

7 QUESTION: How about Mrs. McIntyre's address?  
8 Should that have been on? Wouldn't that have helped  
9 inform the electorate?

10 MR. SUTTER: Yes, Your Honor, and that's  
11 required by the law.

12 QUESTION: All right, and how about her partisan  
13 affiliation?

14 MR. SUTTER: Your Honor, we think there is a  
15 point at which too much information would cross the line.

16 QUESTION: The public gets confused by too much  
17 information.

18 MR. SUTTER: No, Your Honor --

19 (Laughter.)

20 MR. SUTTER: -- but we are not ignoring or  
21 denying that there's an interest in political speech here.  
22 certainly the State couldn't require Margaret McIntyre to  
23 fill up the literature to the point that it eliminated  
24 room for her message. What we are saying here is that all  
25 this statute does is, it makes a minimum amount -- it

1 requires a minimum amount of disclosure, enough to  
2 identify the speaker.

3 One of the points that came up during the course  
4 of Mr. Goldberger's argument is that this type of law is  
5 actually less intrusive of First Amendment rights than  
6 campaign finance laws are, and we would submit, especially  
7 for someone like Margaret McIntyre.

8 In our instance, the person puts their name and  
9 address on the page of their advertisement, they mass  
10 produce it, they distribute it, they never come in contact  
11 with the Government, there are no burdensome filing  
12 requirements.

13 In the Buckley case --

14 QUESTION: Well, Mr. Sutter, I would have  
15 thought if the First Amendment stood for anything at all,  
16 it stood for my right to put out a flier at a local school  
17 board election on an issue that I cared about without  
18 identifying myself.

19 I mean, it just -- I think it's quite remarkable  
20 to say that Ohio can just totally ban this. I mean, what  
21 does the First Amendment protect if not that kind of core  
22 political speech?

23 MR. SUTTER: Your Honor, the State would  
24 acknowledge that there's core political speech involved  
25 here, but there's a difference, we think, between the

1 ability to deliver --

2 QUESTION: But what kind of test do we employ?  
3 Is it strict scrutiny?

4 MR. SUTTER: Your Honor, the court below --

5 QUESTION: And do you think the court below  
6 applied strict scrutiny?

7 MR. SUTTER: No, Your Honor, the court did not  
8 apply strict scrutiny, but under the circumstances, we  
9 believe, regardless of what test the court applies,  
10 whether it be the flexible standard under Anderson v.  
11 Celebrezze, or strict scrutiny, this statute passes  
12 constitutional muster because it serves compelling  
13 interests.

14 QUESTION: Well, do you think it's appropriate  
15 to apply a flexible standard to core political speech?

16 MR. SUTTER: Your Honor, I think when there's a  
17 competing interest of equal importance, as there is in  
18 this case, protecting the right to vote, that a flexible  
19 approach has appeal in that it permits the court to  
20 measure the amount of intrusion against the interest of  
21 the State, but under the circumstances, the court never  
22 has to reach that question, because we believe that the  
23 statute involves serves compelling State interests, and  
24 addressing --

25 QUESTION: Do you --

1 MR. SUTTER: Yes, Your Honor.

2 QUESTION: -- recognize that to be compatible  
3 with the First Amendment there would at least have to be  
4 an exception for the Socialist Worker Party kind of case,  
5 where the person said, if I put my name -- if I put my  
6 name on this piece of literature, I may be subject to  
7 assault, or some danger?

8 MR. SUTTER: Your Honor, that really goes to an  
9 overbreadth question, and we do believe --

10 QUESTION: Well, suppose Ms. McIntyre, instead  
11 of saying, "Here I am, I want my neighbors to know what I  
12 think," had said, "I want to get across this message, but  
13 I'm going to be in grave danger if I am so bold as to  
14 oppose this powerful principal, or superintendent of the  
15 school district." -- suppose that were her position.

16 MR. SUTTER: Your Honor, we think that the Ohio  
17 courts would construe the statute in constitutional  
18 fashion, just as this Court did in the Buckley case.

19 QUESTION: Does there have to be an exception of  
20 that type?

21 MR. SUTTER: We think that that would be  
22 appropriate. We don't think it's fatal --

23 QUESTION: Necessary. Appropriate is not what  
24 we decide. Would it be necessary?

25 MR. SUTTER: We would concede even necessary,

1 but we don't think it's fatal to the constitutionality of  
2 the statute that it's silent on the subject, any more than  
3 it was fatal to the statute in Buckley.

4 We think that that's a question, when the facts  
5 present themselves, that the Ohio courts will deal with  
6 appropriately, that they will give it the appropriate  
7 constitutional construction, but here, there is no  
8 evidence of retaliation. There is no evidence of fear.

9 Mrs. McIntyre testified at the Ohio Elections  
10 Commission hearing that some of the leaflets that she  
11 circulated indeed contained her name and address, that she  
12 had intended to include them in all of her brochures, on  
13 all her leaflets, so this does not raise the specter of  
14 legitimate fear of retaliation.

15 The similarities between -- yes, Your Honor.

16 QUESTION: So if someone feared retaliation and  
17 wanted to keep anonymity, they'd go to a court and file a  
18 lawsuit? I assume the official on the other side should  
19 have some opportunity to be heard.

20 MR. SUTTER: Your Honor, I think there would be  
21 an opportunity for something like a Jane Doe lawsuit, but  
22 I don't think this is so different --

23 QUESTION: Sounds to me like that would deter at  
24 least a rather shy person.

25 MR. SUTTER: Your Honor --

1 (Laughter.)

2 MR. SUTTER: I think the Court -- I can't stand  
3 here and argue to the Court that there aren't prospects or  
4 possibilities for deterrence of speech, for chilling of  
5 speech, but that was exactly the circumstances in Buckley.

6 The Court recognized that the campaign finance  
7 disclosure requirements could chill speech, but the Court  
8 hesitated in striking down the statute on the prospect,  
9 the speculation of potential harm, and instead decided  
10 that on a case-by-case basis, where there would be an  
11 opportunity to demonstrate harm, that that would render  
12 the statute not applicable to those particular  
13 circumstances, and all we are asking is for the same sort  
14 of discretion to be extended to the State courts.

15 We think there's very little difference between  
16 the Buckley circumstances. The parallels are remarkable,  
17 and I think that the Court has identified through the  
18 course of this argument some of the dangers to existing  
19 statutory law if the petitioner's side prevails.

20 QUESTION: Mr. Sutter --

21 MR. SUTTER: Yes, Your Honor.

22 QUESTION: Justice O'Connor brought up the  
23 tradition of pamphleteering, going back to the Federalist  
24 Papers. I was thinking of a case that we had last term,  
25 the City of Ladue case.

1 MR. SUTTER: Yes, Your Honor.

2 QUESTION: About, it was traditional, accepted  
3 that you could have unobtrusive signs on your own  
4 property. Isn't there the same kind of venerable  
5 tradition attached to the lone leafleter in this country?

6 MR. SUTTER: I think there is a tradition. I  
7 think the aspect of anonymity changes the perspective of  
8 the case. We're not saying, and didn't say to Margaret  
9 McIntyre, that she couldn't speak, that she couldn't hand  
10 out literature, that she couldn't say whatever she wanted  
11 in that literature.

12 All we're saying is, because of the  
13 countervailing State interest in protecting the electoral  
14 process, that we may -- that the State may require her to  
15 provide the public with access to a limited amount of  
16 pertinent information to help them make better educated  
17 electoral choices, and I think that under the  
18 circumstances where you have these competing interests,  
19 that the Court has recognized in the past that  
20 occasionally First Amendment core speech has to yield to  
21 this greater interest, especially whereas here, it is a  
22 minimal intrusion.

23 QUESTION: Well, your argument, basically I  
24 guess you make two arguments. One is that you will either  
25 deter fraud, or you'll make it easier to detect and



1 prosecute fraud, and you will allow voters to evaluate  
2 what is said on the kind of the theory of, from whence it  
3 comes. What do you say about the argument that somebody  
4 who really wants to thwart those interests is simply not  
5 only going to lie once but lie twice, and put down the  
6 wrong name and address?

7 MR. SUTTER: Well, Your Honor, we can't  
8 completely control the conduct of anyone under these  
9 circumstances.

10 QUESTION: No, but is there reason to believe  
11 that this is going to be effective in the cases that you  
12 posit?

13 MR. SUTTER: Yes, we do, and it's been followed  
14 on a regular basis. I mean, there's very robust political  
15 activity in Ohio, and this disclaimer has, this  
16 attribution requirement has been placed on literature.

17 I don't think the State can determine what it's  
18 going to try to deter, or how it's going to regulate,  
19 based on those who would try to evade the law, otherwise  
20 that would be true of almost any criminal or civil  
21 enforcement statute.

22 QUESTION: No, but the State's interest has to  
23 be evaluated in a realistic fashion, and I guess you're  
24 telling me you have found no instances, there are no  
25 instances on the record or disclosed in any of the amicus

1       briefs here, in which that kind of double fraud has been  
2       perpetrated, and therefore has rendered the State's  
3       interest one of hope, rather than of realistic  
4       expectation.

5               MR. SUTTER: There's nothing in this record to  
6       demonstrate that. I suppose it could happen, but I don't  
7       think that would be sufficient to invalidate the scope of  
8       the law. The State can't regulate under those  
9       circumstances, if they're going to be concerned about who  
10      will try to evade it.

11              And this statute here -- another similarity that  
12      I'd like to point out with the Buckley case is that in  
13      Buckley the Court struck down limitations on expenditures,  
14      identifying that as intruding on core political speech,  
15      but it retained -- it validated the disclosure  
16      requirement, and that's the same sort of statute that we  
17      have here.

18              If one looks at Buckley and Bellotti, especially  
19      at the Bellotti footnote, that authorizes this kind of  
20      attribution, it links Buckley and Bellotti. It cites  
21      Buckley for the same proposition that the State is citing  
22      it for today, and that has two important characteristics.  
23      One is that Buckley addressed not just groups but  
24      individuals, and it links them in a way that they are both  
25      disclosure statutes, that they are both constitutional.

1 I think the Court asked before whether we could  
2 require Mrs. McIntyre and others to file with the Ohio  
3 Elections Commission. Well, we think we could, but we  
4 have chosen a different vehicle that we think is less  
5 intrusive.

6 QUESTION: Do you want to say anything more  
7 about the strength of the State's interest in requiring  
8 this? In my mind at the moment you're saying well, there  
9 are really three, basically. One is the -- we don't want  
10 them to lie, and we want to know who's lying, so that  
11 assumes that the person who sends out a pamphlet lying is  
12 going to tell the truth about who's doing it. That  
13 strikes me as a little weak.

14 The second is that, well it will help us enforce  
15 the disclosure laws, but you can get quite far enforcing  
16 those disclosure laws, I take it, by simply requiring  
17 people to stick within a list and listing their  
18 expenditures in some way or other. If so, does that leave  
19 you with the thing, well, a group of people, namely the  
20 voters of the State of Ohio, say, we want to know who's  
21 putting out this leaflet, and the person who's putting it  
22 out says, well, I don't want to tell you, and if that's  
23 the conflict, doesn't the First Amendment require us to  
24 come down in favor of the individual?

25 I'm putting that purposely, because I want to

1 get your responses to -- what I've done is try to minimize  
2 the strength, and you'll try to maximize it.

3 MR. SUTTER: All right. I'll do my best, Your  
4 Honor.

5 (Laughter.)

6 MR. SUTTER: I'll start backwards, if I may.  
7 First, I think the Court has articulated the interest that  
8 was recognized in Buckley that there was an independent  
9 justification for upholding the disclosure laws, and that  
10 was to provide information to the electorate, important  
11 information to help them evaluate the candidates.

12 And I think it's striking in the context of  
13 Buckley that the Court not only required disclosure of  
14 identity, but disclosure of associations, a much more  
15 severe restriction and disclosure requirement than just  
16 placing your own name and address on your literature, so  
17 we think that this regulation is even less demanding and  
18 less intrusive of First Amendment rights.

19 Then the campaign finance requirements of  
20 Buckley --

21 QUESTION: Mr. Sutter, what's the pedigree of  
22 provisions like this? I gather they didn't have any in  
23 1787. When's the first one that you know about?

24 MR. SUTTER: Your Honor, I believe that these  
25 laws started to appear in the early portion of the 20th

1 Century, around 1910, 1915, at the same time that other  
2 types of campaign reform was underway, as the Court noted  
3 in Burson, with the Australian ballot procedure, and these  
4 particular statutes have extended on through the years.  
5 That's where they began as part of an effort to -- an  
6 election campaign reform.

7 QUESTION: And they go back that far.

8 MR. SUTTER: Yes, Your Honor. Some statutes in  
9 1912, the -- there is a case discussing the Ohio statute,  
10 the predecessor to the Ohio statute, as early as 1922, but  
11 the statute was in existence for years before that, and  
12 that's, I think, a good point, is that this is all part of  
13 the same reform movement in electoral politics.

14 The Court recognized in Buckley that the  
15 disclosure requirement was part of Congress' effort at  
16 total disclosure.

17 QUESTION: Do you think the disclosure  
18 requirement in Buckley was intended to help the voter  
19 evaluate the message that was being paid for by the  
20 political organization?

21 MR. SUTTER: Yes, Your Honor. That's explicit  
22 in Buckley. The Buckley -- the Buckley court identified  
23 three compelling interests, each of which would justify  
24 the law, and one of them was to help evaluate the  
25 candidate's position by placing him in the political

1 spectrum.

2 And how did they do that? How do campaign  
3 finance laws do that? They do that by requiring the  
4 candidate to reveal not just his name, and his address,  
5 and the way he or she may have spent money, but in terms  
6 of parties --

7 QUESTION: Where he gets the money, yes.

8 MR. SUTTER: His associations. That's a far  
9 more --

10 QUESTION: But didn't Buckley focus on  
11 candidates, support of candidates as distinguished from  
12 issues?

13 Indeed, didn't the Court say in Buckley that  
14 there would be concern if the provision were interpreted  
15 to reach groups, instead of candidate-supporting groups,  
16 groups engaged purely in issue discussions?

17 MR. SUTTER: Your Honor, the Court did say that,  
18 but in the context of Buckley, the first answer is that  
19 there are no referenda or initiatives, actual issues that  
20 go on the ballot, in Federal law.

21 The other answer is, and the one that I think  
22 gets directly to the point, is that I think what the Court  
23 was talking about there, and why they narrowed the statute  
24 to express advocacy, is something that this statute  
25 doesn't regulate, which is the general discussion of

1 political events in society.

2 This statute doesn't reach beyond campaign  
3 literature, and I think that's what the Court was  
4 concerned about in Buckley. They were concerned that --  
5 \*unless I get attacked here -- they were concerned by this  
6 whole notion of it spreading beyond campaign literature to  
7 just general discussion. That's why, in the normal course  
8 of events, the Federalist Papers as they actually  
9 appeared, as they actually were utilized, wouldn't have  
10 been affected by this law, because it was not in the  
11 context of a popular election.

12 QUESTION: No, but it was surely was to support  
13 or defeat an issue of some importance.

14 MR. SUTTER: Yes, Your Honor, but it was not  
15 designed --

16 QUESTION: And that's what your statute pertains  
17 to.

18 MR. SUTTER: Your Honor, what this statute  
19 pertains to, it's not attempting to control public  
20 discussion of public policy or foreign affairs.

21 QUESTION: To promote the adoption or defeat of  
22 any issue.

23 MR. SUTTER: Yes, Your Honor. In Ohio, an issue  
24 is what appears on the ballot. It is the actual question  
25 that the electorate goes to the polls to address. It is

1 in the context of a popular election. The whole statutory  
2 scheme is directed toward campaign activity. It is an  
3 election law.

4 Now, it may regulate political speech, but it's  
5 still an election law -- it only comes up in that  
6 context -- just as provisions against trying to bribe an  
7 electorate or an election official is a campaign election  
8 law.

9 We don't think there has been a principled  
10 justification articulated either by Mr. Goldberger today,  
11 or in petitioner's brief, that would distinguish the  
12 Buckley situation and the Bellotti situation from the case  
13 at bar, and if the Court has no further questions, I'll --

14 QUESTION: Of course, the Bellotti situation, it  
15 was just a footnote comment. It wasn't any part of the  
16 holding.

17 MR. SUTTER: Your Honor, but it follows -- in  
18 every single one of the Court's decisions limiting  
19 campaign contributions and expenditures to one extent or  
20 another, the Court makes a point --

21 QUESTION: Bellotti is not one of those cases.

22 MR. SUTTER: But the Court makes a point -- in  
23 Buckley, in Bellotti, in Citizens Against Rent Control v.  
24 Berkeley, the Court makes a point of indicating that  
25 disclosure requirements are the least intrusive method for



1 regulating elections in this way.

2 They mention it time -- the Court mentions it  
3 time and time again, as if it's a running theme that  
4 disclosure -- a message to the public, to the, as you  
5 might, the legislatures of all the States, saying that  
6 disclosure is appropriate, and that's what Ohio has chosen  
7 to do here.

8 We can't serve these compelling interests, I  
9 don't think, serve them both in the same statute, any more  
10 narrowly. All we're asking for here is a minimal amount  
11 of additional information so that the electorate can  
12 evaluate the campaign message.

13 QUESTION: You know, in this context, though, it  
14 almost seems that on -- when the leaflet speaks to the  
15 merits of a particular issue, as this does, that the  
16 electorate can take into consideration the fact that there  
17 is no identification of the speaker attached to the  
18 message and can conclude, if it wishes, that therefore it  
19 should be discounted.

20 I'm not sure how strong the State's interest is  
21 in forcing the information on the electorate. I mean, as  
22 a voter, I can say, well, here's an anonymous flier, and  
23 if they don't care enough to put their name on it, I'm  
24 going to toss it in the waste basket. I don't see why the  
25 State's interest is so strong.

1 MR. SUTTER: Your Honor, I think that is a  
2 difficult question, and one that the legislature wrestled  
3 with, and I think this Court in a way wrestled with it in  
4 Buckley. I mean, the circumstances were the same.

5 If one eliminates from the Buckley scenario the  
6 limitations on campaign expenditures, or the limitation on  
7 campaign contributions, that there still remains this  
8 independent compelling State interest of disclosure of  
9 information.

10 QUESTION: Mr. Sutter, we're entitled to assume,  
11 aren't we, that the people of Ohio like this law?

12 MR. SUTTER: Can we assume --

13 QUESTION: Yes.

14 MR. SUTTER: Yes, Your Honor. The General  
15 Assembly --

16 QUESTION: I mean, it's their legislature that  
17 adopted it.

18 MR. SUTTER: Yes, and there hasn't been any --

19 QUESTION: So I mean, in the normal course of  
20 events, I guess most people in Ohio like this.

21 MR. SUTTER: Your Honor, there haven't been any  
22 initiatives or referenda on the ballot to repeal it.

23 QUESTION: And presumably would rather know who  
24 is putting out these pamphlets than not know.

25 MR. SUTTER: I think that's correct, and that

1 reflects --

2 QUESTION: -- \* most people in Ohio don't know a  
3 thing about the existence of this law?

4 (Laughter.)

5 MR. SUTTER: Your Honor, I wouldn't want to  
6 speculate either way, but I would say that the vast  
7 majority of legislators in the Congress think that this is  
8 important legislation.

9 They think that it outweighs any interest in  
10 anonymity because it doesn't affect the person's right to  
11 speak, and I think, Your Honor, Justice O'Connor, that  
12 here the State perhaps could have decided not to do this,  
13 but that doesn't minimize the interest.

14 The State still had the interest in providing  
15 this sort of limited information to help voters evaluate  
16 ballot issues. There's really no difference. I mean,  
17 ballot issues affect the electorate's life as much as  
18 legislative decisions by the legislature.

19 Thank you.

20 QUESTION: That's why. Why? That was my  
21 question before, and I wrote down the answer -- Buckley.

22 MR. SUTTER: Buckley.

23 QUESTION: Yes, I got that answer. I want to  
24 know if there's anything more than that. That is to say,  
25 if you have the voters of the State of Ohio who say, we

1 really would like to know who is putting this out, and you  
2 have a person who says, I really don't want to tell you.

3 All right, now, why is it that the Constitution  
4 comes down on the side of the voters of Ohio, given the  
5 First Amendment?

6 MR. SUTTER: Your Honor, the First Amendment  
7 protects speech, but it doesn't necessarily say that the  
8 State can never regulate anonymous speech.

9 QUESTION: So in other words, if the person --  
10 you could have a law which says, if, by the way, you put  
11 an argument in an election campaign, you must legally put  
12 the counterargument. That might be a very nice law, but I  
13 mean, is that con -- he says, I don't want to tell you the  
14 arguments against my position --

15 MR. SUTTER: Your Honor, I think that's the  
16 Tornillo case.

17 QUESTION: I just want to tell you the ones for  
18 it.

19 MR. SUTTER: I think that's the Tornillo case,  
20 but these statutes, that sort of scenario is drastically  
21 different. We're not trying to control the content.  
22 We're not trying to make someone say, "I have my position,  
23 and now I'm going to articulate my opponent's." All I'm  
24 asking for is that you identify yourself and then say  
25 whatever you want.

1                   If Margaret McIntyre had observed the law here,  
2 she never would have found herself before the Ohio  
3 Elections Commission. It was not -- it was not that she  
4 had disclosed her identity, it was her failure to disclose  
5 her identity.

6                   QUESTION: That's true of most of the cases that  
7 we get here.

8                   (Laughter.)

9                   MR. SUTTER: Your Honor, but it does go to this  
10 whole question of retaliation, and it goes to this whole  
11 question of what the real intrusion was as far as First  
12 Amendment speech is concerned.

13                   Thank you.

14                   CHIEF JUSTICE REHNQUIST: Thank you,  
15 Mr. Goldberger.

16                   The case is submitted.

17                   (Whereupon, at 12:00 noon, the case in the  
18 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

JOSEPH McINTYRE, EXECUTOR OF ESTATE OF MARGARET McINTYRE, DECEASED, Petitioner v. OHIO ELECTIONS COMMISSION

CASE NO.: 93-986

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Ann Marie Federico

(REPORTER)