No. 09-154

In The
Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., et al.,
Petitioners,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, et al.,
Respondents.

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

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

DEBORAH J. DEWART
620 E. SABISTON DRIVE
SWANSBORO, NC 28584
(910) 326-4554
debcpalaw@earthlink.net

JAMES L. HIRSEN
Counsel of Record
505 S. VILLA REAL DRIVE
SUITE 208
ANAHEIM HILLS, CA 92807
(714) 283-8880
hirsen@earthlink.net

Counsel for Amicus Curiae

September 4, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the Petition for Writ of Certiorari should be granted.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics*, and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Americans have a vital interest in safeguarding their cherished, time-honored rights to associate and petition the government for redress of grievances without fear of retaliation or prosecution. A representative form of government stands on the ability of citizens to communicate effectively with their

---

[1] Counsel of record for all parties have consented to the filing of this brief and have received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

elected legislators who will vote on legislation concerning the issues that impact their lives.

Recent headlines exemplify the importance of preserving these rights. The federal government has proposed major health care reform. Citizens across the country have organized to voice their opinions and concerns on both sides of the issue. People gather to talk and they disseminate information over the internet. But in early August 2009, the White House began to solicit reports to an e-mail address, flag@whitehouse.gov, in order to collect data about allegedly "fishy" information on the web. Because of grave concerns about the First Amendment and the Privacy Act, the Association of American Physicians & Surgeons, Inc. and the Coalition for Urban Renewal & Education recently joined forces to file suit against the Obama Administration in the U.S. District Court for the District of Columbia. *AAPS et. al. v. Executive Office of the President*, Civil Action No. 09-1621-EGS, (D.D.C. filed Aug. 26, 2009), *available at* http://www.aapsonline.org/aaps-eop-complaint.pdf. Health care is a vitally important issue to every American. If "the people" cannot discuss their questions and voice their opinions to one another and their representatives--without fear of being "reported" to the federal government--the First Amendment is in dire straits.

This newly filed federal case poses issues similar to those raised in the Petition. Speech is chilled when people are compelled to make disclosures, whether they are "reported" to a White House e-mail address or required to register with the state and make extensive disclosures of financial transactions and personal data. Both situations implicate the right to associate and

speak freely with elected officials concerning pending legislation.

I. THIS COURT SHOULD GRANT REVIEW TO HALT TWO TROUBLING TRENDS: EXPANDING REGULATION OF PROTECTED POLITICAL SPEECH AND JUDICIAL REDRAFTING TO SALVAGE STATUTES THAT ARE OVERLY BROAD OR VAGUE.

The troubling *McConnell* ruling upset considerable precedent by blurring the line between express advocacy and issue advocacy, calling it a "line in the sand drawn on a windy day." *McConnell v. FEC*, 540 U.S. 93, 126, n. 16 (2003). The *McConnell* Court went so far as to deny that there is any constitutional right to engage in issue advocacy. *Id.* at 192-193. This decision addressed political candidates but its implications spill over into the lobbying arena, where a line is needed to distinguish direct contacts with legislators from the myriad of other activities where ordinary citizens communicate their views about the issues that form the subject matter of legislation. Issue advocacy conveys information and educates. That information may focus on a legislative issue, take a position, and urge others to contact public officials. *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 127 S.Ct. 2652, 2667 (2007). Nevertheless, *McConnell* escalated the troubling trend toward increased regulation of political speech generally--including pure issue advocacy.

A. Legislatures Have Vastly Expanded Disclosure Requirements And Other Regulations That Burden Even *Indirect* Political Activities.

Government regulations cast an ever wider net over political speech, encompassing *independent* expenditures and *indirect* attempts to influence legislation that pose no significant threat of corruption and serve no compelling government interest. The pending *Citizens United* case concerns core political speech about candidates. *Citizens United v. Fed. Elections Comm'n,* No. 08-205 (U.S. filed Aug. 14, 2008). This new petition concerns speech *to* those candidates, once elected, about the important public issues they will address when they vote on legislation. This Court should address both aspects of political speech to guard the First Amendment rights of American citizens. In a representative government, the people must be able to communicate freely with those they have elected to represent them as well as other members of the public who share similar concerns.

The first issue set forth in the Petition shows the breadth of the problem. Disclosures are mandated even for "opinion articles, issue advertisements, and letter writing campaigns"--ordinary components of free speech that do not necessarily involve any direct contact with legislators. What if an attorney is retained to draft an academic article or "white paper" supporting a position relevant to pending legislation? This could be deemed an "opinion article" subject to disclosure. Even letter writing campaigns generated within the boundaries of a voluntary association have been captured by overreaching disclosure

requirements, trampling classic First Amendment rights of speech and association. *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n,* 761 F.2d 509 (8th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

A Ninth Circuit case earlier this year illustrates the chilling impact of imposing disclosure regulations on grassroots lobbying. *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). A small church was classified an "incidental political committee" under Montana law, subject to extensive disclosures. A church member used her own paper to make less than fifty copies on the church's copier of a petition to collect signatures to place a proposed constitutional amendment on the ballot in November. The church also broadcast a film, "Battle for Marriage," in connection with its regular Sunday evening service. The service was open to the public, and five radio stations aired public service announcements about the film without charge to the church. The church also photocopied and distributed fliers about the film, using bulletin inserts and its lobby. The petition was circulated among church attendees one Sunday to collect signatures. There was no express advocacy for any political candidate--only classic issue advocacy on a matter of serious concern to the church and its members. The Ninth Circuit held that the church's First Amendment rights had been violated. *Id.* at 1028. This case demonstrates both the stifling effect of disclosure laws and the trend toward increasingly burdensome regulation of ordinary political speech. If the nominal, one-time expenditures of a small church can trigger extensive disclosure requirements and require litigation in federal court, the First Amendment is in trouble.

B. Courts Sometimes Engage In Extensive Rewriting In Order To Salvage Laws That Burden Indirect Political Speech.

There is an equally troubling trend in the courts to facially uphold regulations that burden independent political expenditures or indirect lobbying activities. But often they can only do that through a cut-and-paste job, extensively revising the statutory language and creating uncertainty for future litigants.

The trend dates back many decades. In *Rumely*, this Court wisely concluded that the Regulation of Lobbying Act could not compel the secretary of the Committee for Constitutional Government (CCG) to disclose to a congressional committee the names of those who made bulk purchases of its books for further distribution. The CCG distributed printed material in order to indirectly influence legislation. *United States v. Rumely*, 345 U.S. 51 (1953). In order to reach its conclusion, this Court construed the phrase "lobbying activities" to mean "representations made directly to the Congress, its members, or its committees," excluding attempts "to saturate the thinking of the community." *Id.* at 47. But the Act expressly applied to all persons soliciting or receiving money to be used principally "to influence, *directly or indirectly*, the passage or defeat of any legislation by the Congress of the United States." 2 U. S. C. § 266 (b). *Id.* at 54 (emphasis added). The Court rewrote the statute in order to save it.

Similar revisions occurred the next year in *United States v. Harriss*, 347 U.S. 612 (1954). The Court restricted the reach of the Federal Regulation of Lobbying Act, 2 U.S.C.S. §§ 261-270, to direct

communications with members of Congress. But as Justice Douglas pointed out in his dissent, words had to be "added and subtracted" from the Act "to produce that result" because it was specifically applicable to funds solicited, collected, or received "to influence, *directly or indirectly*, the passage or defeat of any legislation" by Congress. *Id.* at 629 (Douglas, J., dissenting) (emphasis added).

> The words "direct communication with Congress" are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. *But the Court not only strikes out one whole group of activities -- to influence "indirectly" -- but substitutes a new concept for the remaining group -- to influence "directly."* To influence "directly" the passage or defeat of legislation includes any number of methods -- for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the "buttonholing" of Congressmen. To include the latter while excluding the former is to rewrite the Act.
>
> *Id.* at 631 (Douglas, J., dissenting) (emphasis added)

Not all courts have followed the revisionist tactics of *Rumely* and *Harriss*. For example, the Eighth Circuit declined to rewrite a disclosure statute it found "easy to understand," in spite of its burden on pure issue advocacy. *Minnesota Citizens Concerned for Life, Inc. v. Kelley,* 427 F.3d 1106 (8th Cir. 2005). The Fourth Circuit invalidated a statute imposing intrusive reporting requirements on pure issue

advocacy--refusing to rewrite it by striking a portion of the statutory "political committee" definition. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999). More recently, the Fourth Circuit again struck down burdensome reporting requirements for the same issue advocacy group. *North Carolina Right To Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

Legislatures and courts both need guidance from this Court in order to return clarity and simplicity to the First Amendment. The current state of affairs "blankets with uncertainty" the entire field of campaign politics, "compelling the speaker to hedge and trim." *North Carolina Right to Life, Inc. v. Bartlett, supra*, 168 F.3d at 713, citing *Thomas v. Collins,* 323 U.S. 516, 535 (1944).

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARD APPLICABLE TO DISCLOSURE REQUIREMENTS FOR CORE POLITICAL SPEECH.

This Court has long recognized the high hurdle that legislators must jump to burden First Amendment liberties. Any such attempt at restriction:

> ...must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly

> discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.
>
> *Thomas v. Collins, supra,* 323 U.S. at 530

Moreover, in drawing lines between regulable and protected expression, courts must err on the side of protecting speech rather than suppressing it. *Fed. Election Comm'n v. Wisc. Right to Life, Inc. supra,* 127 S.Ct. at 2559.

But the bar has been lowered and clarification is badly needed. In order to justify restrictions on indirect lobbying, the Eleventh Circuit relied heavily on one of its own earlier decisions that expressed uncertainty about this Court's standards:

> Some disagreement has appeared lately among members of the Supreme Court on exactly how high the threshold for facial invalidation should be set. As we understand it, some Justices interpret Supreme Court precedent to indicate that a statute is not facially invalid unless there is *no* set of circumstances in which it would operate constitutionally; others contend the cases require only that a statute would operate unconstitutionally in *most* cases.
>
> *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir.1996)

The *Meggs* ruling also declared that *Harriss* failed to apply strict scrutiny to lobbying restrictions--but found

the government had "sufficient" interests. *Id.* at 460. This confusion in the Eleventh Circuit clashes with established standards of this Court. A law that burdens speech should be invalidated if it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

A. Disclosure Requirements Should Be Subjected To Exacting Scrutiny And Struck Down Because The Governmental Interest In "Self-Protection" Is Not Compelling.

Where legislation facially burdens First Amendment rights, the normal presumption of constitutionality should operate within a much narrower scope. *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). A rational basis is inadequate to justify such burdens. Although *Carolene Products* did not expressly address the level of scrutiny required for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," it did enumerate other constitutional rights and case citations suggesting that exacting scrutiny would most likely be appropriate. *Id.* at 152, n. 4. Even the Eleventh Circuit has admitted that facial challenges are more likely to succeed where First Amendment rights are implicated. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs, supra*, 87 F.3d at 459, n. 2.

In spite of the uncertainty that *Meggs* alleged concerning this Court's threshold for facial challenges,

there has been repeated affirmation that compelled disclosures can create significant encroachments on First Amendment rights and must therefore survive exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 64, 68 (1976); *Davis v. FEC*, 128 S. Ct. 2759, 2774-2775 (2008). The invasion of privacy is substantial where financial data is required, because "financial transactions can reveal much about a person's activities, associations, and beliefs." *Buckley v. Valeo, supra*, 424 U.S. at 66, citing *California Bankers Assn. v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Compelled disclosures of political associations and beliefs, similarly, "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982), citing *Buckley v. Valeo, supra*, 424 U.S. at 64. The Florida statutes (§§ 11.045 and 112.3215) require extensive disclosures concerning both lobbyists and the speakers they represent--disclosures about financial transactions as well as political associations and beliefs. Exacting scrutiny is desperately needed.

When the government abridges fundamental liberties, it is always with the noblest of objectives--"dictators promise to bring order, not tyranny" and "zealous policemen conduct unlawful searches in order to put dangerous felons behind bars." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting). Lobbying restrictions are no exception.

The Eleventh Circuit asserted that legislators have a compelling interest in self-protection. *Fla. Association of Prof'l Lobbyists, Inc. v. Division of*

Legislative Information Services, 525 F.3d 1073, 1080 (11th Cir. 2008). *Harriss*, similarly, defended the Lobbying Act as a means for elected representatives to evaluate the pressures on them so that "special interest groups masquerading as proponents of the public weal" would not drown out the voice of the people. *United States v. Harriss, supra*, 347 U.S. at 625. That seemingly honorable goal was echoed thirty years later in *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n, supra,* 761 F.2d 509. *Meggs* went so far as to proclaim that the governmental interests are even more compelling for indirect lobbying where the sources are more difficult to identity. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs, supra*, 87 F.3d at 461. The Eleventh Circuit reiterated that questionable conclusion in the current case. *Fla. Association of Prof'l Lobbyists, Inc. v. Division of Legislative Information Services, supra,* 525 F.3d at 1080.

But this Court credits the people of America's democracy with intelligence. There is "no such thing as too much speech" because "the people are not foolish but intelligent, and will separate the wheat from the chaff." *Austin v. Michigan Chamber of Commerce, supra*, 494 U.S. at 695 (Scalia, J., dissenting). The people are able to evaluate conflicting arguments. *Id.* at 706 (Kennedy, J., dissenting). They can even evaluate anonymous campaign literature. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 349, n. 11 (1995). That is because "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 349, n. 11, citing *Abrams v. United States*, 250 U.S. 616, 630 (1919). Surely, if the common, ordinary people of America have such intelligence, the professional politicians elected to public office to represent them also possess

the ability to evaluate arguments and separate truth from fiction--regardless of the speaker's identity or the funds spent to package and disseminate the message.

Only the most compelling of government interests can justify a severe intrusion on the ability of the people to communicate with their representatives, including the freedom to associate and hire assistance. Years ago, this Court upheld the requirement that the Communist Party of the United States register under the Subversive Activities Control Act, because the goverment was "menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 96 (1961). Unlike the Florida lobbying restrictions, the grave danger posed here is a truly compelling interest that justifies requiring disclosures.

B. Florida's Burdensome Disclosure Requirements Leave People To Speak At Their Own Peril, Risking Retaliation And Gambling On A Favorable Court Ruling In A Later "As Applied" Challenge.

The far-reaching Florida disclosure provisions place the people and their agents in an untenable position. Either they must reveal sensitive information and risk danger to themselves, their employees, and/or their families--particularly if pending legislation is controversial--or ignore the law and hope for a successful court decision in the future. In America today, there are numerous "hot button" issues. Some of the cases cited in the Petition involve pro-life

groups: *Minnesota Citizens Concerned for Life, Inc. v. Kelley,* 427 F.3d 1106 (8th Cir. 2005); *North Carolina Right to Life, Inc. v. Bartlett, supra,* 168 F.3d 705; *North Carolina Right To Life, Inc. v. Leake, supra,* 525 F.3d 274. One case involves gun rights: *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n, supra,* 761 F.2d 509. Cases in past decades have involved heated civil rights topics: *NAACP v. Alabama,* 357 U.S. 449 (1958); *NAACP v. Button,* 371 U.S. 415 (1963). The recent Ninth Circuit case described in Section I involved the battle over defining marriage: *Canyon Ferry Baptist Church v. Unsworth, supra,* 556 F.3d 1021. Passions become inflamed on both sides of such pressing public issues, and mandatory disclosures create unnecessary risks that stifle communication with elected representatives.

Harris minimized the dangers associated with lobbying restrictions, dismissing concerns as "hypothetical borderline situations...conjured up in which such persons choose to remain silent because of fear of possible prosecution" and calling the restraint "at most an indirect one resulting from self-censorship." *United States v. Harriss, supra,* 347 U.S. at 626. But only a year earlier, a concurring Justice of this Court recognized the severe restraint associated with compelling a publisher to register with the government and disclose the identities of persons who purchased his books and other papers. *United States v. Rumely, supra,* 345 U.S. at 57 (Douglas, J., concurring).

"Self-censorship" is no minor concern. It has the earmarks of a prior restraint on speech that the First Amendment cannot tolerate. The Constitution safeguards "at the least the liberty to discuss publicly

and truthfully all matters of public concern *without previous restraint or fear of subsequent punishment.*" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978) (emphasis added). This Court has acknowledged the severe burden and chilling effect of forcing a speaker to risk prosecution--or rely on the vicissitudes of case-by-case litigation--to engage in protected political speech. *Fed. Election Comm'n v. Wisc. Right to Life, Inc., supra,* 127 S.Ct. at 2681; *Virginia v. Hicks, supra*, 539 U.S. at 119. If disclosures truly serve a compelling government interest, it is imperative that they be "narrowly drawn to prevent the supposed evil"--and no more. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

Selective enforcement against unpopular causes is a real danger where statutes burdening the First Amendment are not narrowly tailored. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (it would dangerous to allow public school officials to censor any student speech that interferes with the school's "educational mission"). "A statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however even-handed its terms appear." *NAACP v. Button, supra*, 371 U.S. at 435-436. This is equally true of a statute that deters associations and speech for the purpose of influencing legislation. The First Amendment was designed "to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society." *McIntyre v. Ohio Elections Commission, supra*, 514 U.S. at 357. Throughout history, persecuted groups have sometimes had to conceal their identities in order to criticize oppressive practices. *ACLU of Nev. v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004) (striking

down statute requiring certain groups or entities publishing any material or information relating to election, candidate, or any question on ballot to reveal publication names). Moreover, both the people and their elected representatives are entitled to have access to protected speech that might be suppressed if it were subject to onerous disclosures.

III. THIS COURT SHOULD GRANT REVIEW TO SAFEGUARD THE FIRST AMENDMENT RIGHTS TO PETITION THE GOVERNMENT AND TO FREELY ASSOCIATE WITH OTHERS.

The First Amendment guarantees an inseparable cluster of rights to free speech, press, association, assembly, and petition for redress of grievances. These are not identical but are closely related and thus "coupled in a single guaranty." *Thomas v. Collins, supra,* 323 U.S. at 530. The Florida disclosure requirements for lobbying activities implicate all of these rights, but particularly burden the rights of petition and association. "The government cannot be trusted to assure, through censorship, the 'fairness' of political debate." *Austin v. Michigan Chamber of Commerce, supra*, 494 U.S. at 679-680 (Scalia, J., dissenting). That central truth of the First Amendment applies to restrictions on the ability of the people to associate and communicate with their elected representatives.

A. The Right To Grassroots Lobbying Is Rooted In The Right To Petition The Government.

The right to petition the government parallels lobbying activities. Justice Jackson's dissenting opinion in *Harriss* recognizes this connection:

> The *First Amendment* forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other *First Amendment* rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.
>
> *United States v. Harriss, supra*, 347 U.S. at 635 (Jackson, J., dissenting)

Justice Jackson would have left rewriting of the Lobbying Act to Congress in light of the "delicate and difficult task" of regulating professional lobbying without abridging the constitutional right of petition. *Id.* at 636 (Jackson, J., dissenting).

The right to petition government may not be the subject of many modern cases, but it has ancient roots pre-dating the Constitution, which did not create the right but merely safeguards it against government infringement. *Hague v. CIO*, 307 U.S. 496, 512 (1939). More than a century ago, this Court affirmed it as an essential attribute of citizenship "found wherever civilization exists." *United States v. Cruikshank*, 92 U.S. 542, 551 (1876).

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.
>
> *Id.* at 552.

Citizenship in the United States, with its representative system of government, would have little value if it did not embrace the right to discuss legislation and communicate with lawmakers. *Hague v. CIO, supra*, 307 U.S. at 513. "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

Two cases in this Court in the 1960s examined the right to petition in the context of the Sherman Antitrust Act. In *Noerr*, the complaint alleged that the railroads had used a publicity campaign to restrain trade and monopolize certain freight business. The campaign encouraged the adoption of new laws and law enforcement practices that would harm the trucking business. This Court ruled that the Sherman

Act could not be used to prohibit an association of persons to attempt to influence legislation, even though the proposed new law might produce a monopoly or restrain trade. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 136. The Act could not be stretched so as to regulate political activity and encroach on the freedom of petition--it could only regulate business activity. *Id.* at 137-138. In a similar case a few years later, this Court said that:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.
>
> *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)

Moreover, this Court found the right to petition broad enough to include the distribution of propaganda by third parties in a manner that appears to be the expression of views by independent persons and groups. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 140-142. This third-party technique is comparable to the artificially stimulated letter campaigns that *Harriss* swept within the definition of direct lobbying. *United States v. Harriss, supra*, 347 U.S. at 620.

Communication between the people and their legislators is vital to both of them. Lawmakers are deprived of a valuable source of information if the people's speech is stifled. The people have a

corresponding right to communicate with those they have elected to represent them and vote on their behalf.

B. The First Amendment Protects The Right To Associate With Others And Pool Resources For More Effective Communication.

In modern America, association is imperative to facilitate effective lines of communication between citizens and their representatives. Individuals can write letters or make phone calls, but a lone voice is more likely to be drowned out than a well-organized effort by people who share common concerns and unite to express their opinions.

But such efforts inevitably require the assistance of others and a corresponding financial outlay:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others.... Division of labor requires a means of mediating exchange, and in a commercial society, that means is supplied by money.
>
> *McConnell v. FEC, supra*, 540 U.S. at 251, 252 (Scalia, J., dissenting)

The right to spend money and to pool financial resources is crucial to effective free speech in modern America. *Id.* at 252 (Scalia, J., dissenting). This Court recognized that reality when it held that the First

Amendment encompasses the right to use paid petition circulators. *Meyer v. Grant*, 486 U.S. 414 (1988).

The government regulates money in many legitimate ways. There are laws requiring payment of income and other taxes, laws prohibiting bribery, laws against prostitution. However, the Florida lobbying statutes target money used for speech, and that is improper:

> [W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.
>
> *McConnell v. FEC, supra*, 540 U.S. at 252 (Scalia, J., dissenting)

In line with that principle, this Court has consistently rejected attempts to selectively tax the press. A state cannot impose a special use tax on the ink and paper used for publications. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). A tax on newspaper advertisements, similarly, violates the First Amendment. *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).

The lobbyist petitioners in this case utilize many techniques that invoke association rights, including the organization of rallies and demonstrations, communications with association members, and other strategies. Petition, 7. Minnesota regulations upheld in the Eighth Circuit severely chilled communications between the members of a voluntary association by

imposing burdensome disclosures. *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n, supra,* 761 F.2d 509. That case involved the common technique of stimulating a letter-writing campaign to influence legislation on a matter of shared concern among association members. While that method is disparagingly referred to as an "artificially stimulated" campaign, individual speakers are not compelled to participate but merely encouraged and provided with helpful information to make their own views known to public officials.

Well-financed speech may be successful in reaching the ears of public officials and persuading them. But that is no reason to shut down or impose excessive burdens on the exercise of First Amendment rights. *Austin v. Michigan Chamber of Commerce, supra*, 494 U.S. at 705 (Kennedy, J., dissenting). Nor is the source of a speaker's funds relevant to either his right to speak or the right of others--society or legislators--to hear what he has to say. *Id.* at 707 (Kennedy, J., dissenting).

CONCLUSION

This Court would surely affirm the desirability of facilitating political participation by ordinary citizens:

> The Supreme Court decisions thus far with respect to preserving the integrity of the electoral and legislative processes appear to attempt to balance competing interests in such a way as to promote a societal value of increasing the opportunity, effectiveness, and thus the encouragement for participation in the

> democratic process by ordinary citizens vis-a-vis the more wealth or organized "special" interests.
>
> Jack Maskell, *Grassroots Lobbying: Constitutionality of Disclosure Requirements* at 12, (Cong. Research Serv. Jan. 12, 2007) *available at* http://assets.opercrs.com/rpts/RL33794_20070112.pdf

However noble this goal may be, "ordinary citizens" often need to organize and pool resources in order to have a meaningful voice in the complex political machinery of modern America. "Special interest groups" are often associations composed of ordinary citizens who share one or more common concerns. Moreover, "artificially stimulated letter writing campaigns" provide ordinary citizens with the very tools they need for effective expression, including names and contact information for their legislators and opportunities to sign petitions as part of a larger group.

This Court should grant review to halt the troubling trend toward unconstitutional regulation and assure the people of their fundamental rights to speak freely about the issues of the day.

Respectfully Submitted,

JAMES L. HIRSEN
Counsel of Record
505 S. Villa Real Drive, Ste. 208
Anaheim Hills, CA 92807
(714) 283-8880
hirsen@earthlink.net

DEBORAH J. DEWART
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae