No. 00-1737

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., ET AL.,

Petitioners,

v.

VILLAGE OF STRATTON, ET AL.,

Respondents.

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

BRIEF AMICUS CURIAE OF REALCAMPAIGNREFORM.ORG, INC., FREE SPEECH DEFENSE AND EDUCATION FUND, INC., LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, CAPITOL HILL PRAYER ALERT FOUNDATION, U.S. JUSTICE FOUNDATION, GUN OWNERS OF AMERICA, INC., AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

**Counsel of Record*
Attorneys for Amici Curiae

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

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INTEREST OF AMICI CURIAE

The *amici curiae*, RealCampaignReform.org, Inc., Free Speech Defense and Education Fund, Inc., Lincoln Institute for Research and Education, Capitol Hill Prayer Alert Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] All of the *amici* were established for public education purposes related to participation in the public policy process, and are tax-exempt under section 501(c)(3) or section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. The First Amendment issues presented in this case directly impact the right of individuals and organizations to express their views on educational, social and political topics and issues, as well as religious matters, and are of extreme interest and importance to these *amici*. In the past, most of the *amici* have conducted research on other issues involving constitutional interpretation and filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

SUMMARY OF ARGUMENT

The court of appeals majority decision below is in direct conflict with this Court's recent First Amendment anonymity decisions in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), and Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999), as well as in its seminal anonymity decision, Talley v. California, 362 U.S. 60 (1960). It also stands at odds with this Court's freedom of the press decisions in Near v. Minnesota, 283 U.S. 697 (1931), Lovell v. Griffin, 303 U.S. 444 (1938), Martin v. City of Struthers, 319 U.S. 141 (1943), and Miami Herald Publishing Co., Inc. v. Tornillo, 418 U.S. 241 (1974).

At issue in this case is a provision in the Village of Stratton, Ohio Ordinance No. 1998-5 that forces disclosure of the names and addresses of door-to-door canvassers, and of their affiliated organizations, to the village mayor in order to obtain a permit to promote or explain any religious, political, social or other "cause." Also at issue is a provision that, upon the request of any police officer or of a person canvassed, forces disclosure of the name of a canvasser who has obtained a door-to-door permit.

Astonishingly, a majority of the court of appeals below concluded that neither provision implicated this Court's First Amendment anonymity ruling in McIntyre, *supra*, for the sole reason that "individuals going door-to-door ... are not anonymous [because] they reveal ... their physical identities ... to the residents they canvass." Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 240 F.3d 553, 563 (6th Cir. 2001). Yet, in both McIntyre and in Buckley, this Court applied its First Amendment anonymity principle to cases in which persons were engaged in activity revealing their physical identities.

By sidestepping McIntyre and Buckley, the court of appeals majority subjected the Stratton ordinance to only "intermediate scrutiny," as if its provisions forcing disclosure of door-to-door canvassers were simple "time, place and manner" regulations. Had the court followed this Court's lead in applying the anonymity principle, it would have been required to subject the Stratton ordinance to "strict scrutiny."

Accordingly, the record below provides no basis for a finding that the forced disclosure provisions were compelled by any legitimate governmental interest. Although the Village of Stratton claimed that such disclosure was designed to protect its residents from fraud and false statements, neither the legislative history nor the text of the ordinance was so limited, as required by McIntyre and Talley.

And, although the Village of Stratton also claimed that such disclosure was necessary to protect residential privacy, the ordinance is not narrowly tailored to that end. Rather than providing straightforward protection for any resident who simply puts up a sign indicating that uninvited solicitors and canvassers are not welcome, the ordinance requires residents to register with the village mayor in order to make sure that they do not appear on an official list of residents "willing" to hear such uninvited guests. Such a convoluted scheme actually undermines the right of residents to exercise their First Amendment rights as provided in Martin v. City of Struthers, *supra*.

Finally, the Stratton ordinance is unconstitutional because it violates the principle of anonymity embedded in the freedom of the press. Because the ordinance requires a permit before a person may engage in door-to-door First Amendment activities, it operates as a prior restraint upon communicative activities, not as a content-neutral "time, place or manner" regulation

governing the orderly and peaceful use of public property. As a prior restraint on free speech, the ordinance forces disclosure of applicant communicators' identities and affiliations in the same way, and for the same purpose, as the hated English licensing acts, contrary to the prior restraint principle of the freedom of the press.

Additionally, the ordinance seizes editorial control from door-to-door canvassers, forcing them to disclose their names to police officers and residents upon request. As the freedom of the press protects newspapers and periodicals from having to disclose the names of their reporters in relation to a published story and the names of their editors in relation to an opinion piece, so that same freedom protects a door-to-door canvasser from disclosing his "name, address and serial number." In short, the Stratton ordinance crosses the barrier erected by the freedom of the press, in failing to guard the editorial function of the people against government intrusion.

Unless struck down, the Stratton ordinance will undermine the indispensable First Amendment principle of anonymity long recognized by this Court, and deeply rooted in the freedom of press.

ARGUMENT

INTRODUCTION

This case concerns the application of the First Amendment anonymity principle to an Ohio village's comprehensive ordinance providing for public registration, including the required disclosure of the names and addresses of both "canvassers" and private residents, as part of a scheme to control residential door-to-door communications "promoting ...

or explaining any cause," whether it be religious, educational, political, electoral, social, or otherwise.

At stake in this case is the principle of anonymity, recently affirmed by this Court in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) ("McIntyre") and Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999) ("Buckley"), as applied to an ordinance requiring a person to register, and disclose his name, address, and organizational affiliation, in order to obtain a permit to engage in "canvassing" from door-to-door, even where his purpose is merely to promote or explain a cause without any design to sell any product or service, or otherwise to solicit any funds. Also at stake is whether the principle of anonymity will tolerate an ordinance requiring a door-to-door canvasser to make known his name and organizational affiliation upon request of "any police officer or by any person solicited."

Resolution of these issues in this case also involves the constitutional right of a resident in a city, town or village to post a "No Solicitation" sign upon his or her private residence to protect the resident from unwanted solicitors, without having both to register with the village mayor and to post a "No Solicitation" sign that meets village standards, in order to avoid being placed on a list of residents "willing" to receive uninvited solicitors and canvassers at the door of their homes.

For over 60 years, this Court has viewed with suspicion any local ordinance requiring a permit before a person may communicate ideas within the city, having recognized that such ordinances "strike[] ... at the very foundation of the freedom of the press by subjecting it to license and censorship" (Lovell v. Griffin, 303 U.S. 444, 451 (1938)):

> The struggle for the freedom of the press was primarily directed against the power of the licensor.... [T]he liberty of the press became initially a right to publish "**without** a license what formerly could be published only **with** one." [T]his freedom from previous restraint upon publication ... was a leading purpose in the adoption of [the freedom of the press] provision. [Id., 303 U.S. at 451-52 (emphasis original, notes omitted).]

Likewise, for nearly 60 years, this Court has looked askance at any local ordinance that substitutes the judgment of the government for that of the individual householder, having recognized that the right of the freedom of speech and the press "necessarily protects the right to receive" the communication of another unfettered by any government intrusion:

> Freedom to distribute information to **every citizen wherever he desires to receive it** is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be **fully** preserved. The dangers of distribution can be so easily controlled by traditional legal methods, **leaving each householder the full right to decide whether he will receive strangers as visitors**, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas. [Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943) (emphasis added).]

By intruding upon the right of a canvasser to go door-to-door unhindered by the prior restraint of a city permit, and by precluding the right of a householder to receive or reject that canvasser uninhibited by the prior restraint of a city registration requirement, the Village of Stratton, Ohio ("Stratton") has trampled not only upon the constitutionally-protected right of

the Jehovah's Witnesses to shield their identity from the watchful eye, and coercive power, of village officials as they go door-to-door promoting and explaining their religious cause, but also upon the constitutionally-protected right of the village residents to decide for themselves whether to listen to those who wish to speak, associate with those whom they want to visit, and read whatever they choose from among the publications that may be offered to them, without the mayor's prior approval.

I. THE STRATTON VILLAGE ORDINANCE VIOLATES THIS COURT'S RULINGS PROTECTING ANONYMITY UNDER THE FIRST AMENDMENT.

Within the past decade, this Court has reaffirmed the First Amendment principle of anonymity in two significant cases. In both cases, the Court found the principle of anonymity protective of "political speech" occurring in places frequented by the public. McIntyre, *supra*, 514 U.S. at 343; Buckley, *supra*, 525 U.S. at 198-99. The McIntyre court found an Ohio law, requiring the name and address to be printed on printed "campaign literature," to have violated the ruling in Talley v. California, 362 U.S. 60 (1960), which had previously "embraced a respected tradition of anonymity in the advocacy of political causes," as protected by the First Amendment:

> The Ohio statute [like the ordinance in Talley] contains no language limiting its application to fraudulent, false or libelous statements; to the extent, therefore, that Ohio seeks to justify [its statute] as a means to prevent dissemination of untruths, its defense must fail for the same reason given in Talley. [McIntyre, *supra*, 514 U.S. at 344.]

In Buckley, this Court unanimously ruled that a Colorado law requiring a name identification badge to be worn by initiative petition circulators violated the McIntyre rule. Writing for the court, Justice Ginsberg concluded that Colorado's interest in protecting the "integrity" of the electoral process did not outweigh the constitutional right prohibiting "compelled disclosure" of the circulators' names. Buckley, *supra*, 525 U.S. at 201-04.

In this case, Stratton claims that its interest in protecting its residents from "fraudulent solicitation" and intrusions upon residential "privacy" justifies the compelled disclosure of the names and addresses of door-to-door canvassers who are simply "promoting or explaining a cause," both prior to engaging in such canvassing activity and during such activity, if requested either by a "police officer" or by a person canvassed. *See* Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 240 F.3d 553, 561, 563, 566 (6th Cir. 2001) ("Watchtower v. Stratton").

As was true of the Ohio statute in McIntyre, and the city ordinance in Talley, the Stratton ordinance is not limited to "fraudulent, false, ... libelous" or otherwise impermissible representations or communications, but extends to any and all communications "promoting ... or explaining any ... cause." Watchtower v. Stratton, *supra*, 240 F.3d at 564. And, as true of the Colorado forced disclosure law struck down in Buckley, found to be unconstitutional because it was unnecessary to protect the integrity of the electoral process, the Stratton ordinance likewise is unconstitutional, not only because it is unnecessary to protect the legitimate interest of residential privacy, but also because it actually interferes with private residents' First Amendment rights.

A. Neither the Legislative History nor the Text of the Stratton Ordinance is Limited to Stopping False or Fraudulent Purveyors.

Any statute or ordinance requiring disclosure of the name and address of a person engaged in communicative activity cannot be justified by a "generalized" claim that the statute or ordinance is designed to prevent fraudulent or false statements. McIntyre, *supra*, 514 U.S. at 344, n. 7. As Justice Harlan wrote in his concurring opinion in Talley:

> [I]t will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification .... [Talley v. California, *supra*, 362 U.S. at 66-67 (Harlan, J., concurring).]

Thus, this Court insisted in McIntyre that, to be justified as a measure against fraud or false statements, a statute or ordinance requiring disclosure of a communicator's name and address must be "limited in its application to those evils" evidenced either "in the text or legislative history." McIntyre, *supra*, 514 U.S. at 343.

Neither of the courts below followed this rule. The district court failed entirely, neither addressing the anonymity issue nor citing the McIntyre rule. *See* Watchtower Bible and Tract Society v. Village of Stratton, 61 F. Supp. 2d 734 (S.D. Ohio 1999). The court of appeals majority attempted to sidestep McIntyre completely, asserting that the "anonymity" principle did not apply because "individuals going door-to-door ... are

not anonymous by virtue of the fact that they reveal a portion of their identities — their physical identities — to the residents they canvass." Watchtower v. Stratton, *supra*, 240 F.3d at 563. But that approach ignores the very essence of the anonymity principle espoused by this Court in McIntyre and Buckley. As is clearly evident in McIntyre, Ms. McIntyre revealed her "physical identity" as she "distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio." McIntyre, *supra*, 514 U.S. at 337. Likewise, the paid circulators in Buckley revealed their physical identities to persons whose signatures they solicited. Buckley, *supra*, 525 U.S. at 197-98. There is no hint in either case that such revelations forfeited the constitutional right to be free from a law forcing the disclosure of one's name. To claim, as the court of appeals majority did, that the Jehovah's Witnesses brought themselves out from underneath the protection of the anonymity principle by "going door-to-door," thereby "reveal[ing] a portion of their identities" (Watchtower v. Stratton, *supra*, 240 F.3d at 563) is patently wrong.

This error, however, enabled the court of appeals majority to conclude "that the governmental interests the Village seeks to promote [included] protecting its residents from fraud" without the kind of exacting review of the legislative record or the statutory text required by this Court when the principle of anonymity is at issue. Instead, the court of appeals majority accepted, as the "reason" for the ordinance, "after-the-fact" statements from Stratton's mayor and village solicitor that they were "aware of problems in other Ohio cities with door-to-door fraud when it passed the ordinance." Watchtower v. Stratton, *supra*, 240 F.3d at 566. Just because the city fathers claimed in the litigation below that they were "aware" of "door-to-door" fraud at the time of the enactment of the ordinance does not mean that the Stratton ordinance was enacted for that purpose. And just because they testified that they were aware of such

fraud elsewhere does not mean that they could enact such an ordinance without examining if such fraud threatened the Village of Stratton. Rather, as the McIntyre Court indicated, there must be evidence that a city's "actual experience" with door-to-door solicitation triggered the enactment of its ordinance, and that the ordinance was carefully and explicitly limited to dealing with fraud. McIntyre, *supra*, 514 U.S. at 334, n.7.

There is not the slightest suggestion that the court of appeals majority sought to discover whether the Stratton ordinance was prompted by any "actual experience" of village residents with door-to-door purveyors of fraud. By failing to engage in the kind of strict scrutiny of the legislative history commanded by McIntyre, the court of appeals easily pushed aside evidence that the ordinance might have been precipitated by the mayor's opposition to the door-to-door witness of the Jehovah's Witnesses, rather than by "awareness" of "several groups" who, in other Ohio cities, "perpetrate frauds by going door-to-door posing as solicitors or canvassers." *See* Watchtower v. Stratton, *supra*, 240 F.3d at 561, 566.[3]

Not only did the courts below fail to grapple with the actual legislative history of the Stratton ordinance, but they failed to examine the text of the ordinance to determine if it was carefully tailored to address only Stratton's legitimate interests

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[3] Instead of examining this conflicting evidence to ascertain whether the Stratton ordinance was really prompted by an "awareness" of door-to-door fraudulent and false solicitors, the courts below simply sanitized the administration of the ordinance, ordering the mayor to "delete any reference to Jehovah's Witnesses" from its "No Solicitation Form." Id., 240 F. 3d at 559. But entering an order to guard against the prejudicial enforcement of an ordinance certainly does not establish that the ordinance was rooted in a real concern about fraud and false statements, as the McIntyre ruling commands.

in preventing "fraud, misrepresentation or false statements." According to Section 116.06(c) of the ordinance, a permit, whether it is sought by a commercial solicitor or religious or political canvasser, may be denied if the mayor finds "[f]raud, misrepresentation or false statements made [by the applicant] in the course of conducting the activity."[4] The court of appeals majority correctly observed that Section 116.06(c) protects the residents of Stratton from persons using a religious or political cause as a "cover" for the perpetration of a commercial fraud. Watchtower v. Stratton, *supra*, 240 F.3d at 566-67. But the powers conferred upon the mayor by Section 116.06(c) are not limited to such commercial concerns.

Rather, the Stratton ordinance empowers the mayor to apply the same criteria of "fraud, misrepresentation and false statement" to religious or political canvassing, as to magazine subscription solicitations or the selling of pots and pans. In doing so, the ordinance utterly ignores the distinction that this Court laid down years ago between an ordinance governing uninvited "peddlers or hawkers" going door-to-door "soliciting orders for the sale of goods, wares and merchandise," and one targeting door-to-door canvassers promoting or explaining a cause containing "no element of the commercial." Breard v. Alexandria, 341 U.S. 622, 641-43 (1951).

While this Court has since ruled that commercial speech enjoys First Amendment protection, it has also noted that such speech is not "wholly undifferentiated from other forms." Therefore, commercial speech is not governed by the same rules as political or religious speech, including "the prohibition against prior restraints." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771,

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[4] *See* Appendix E to Petition for a Writ of Certiorari herein. The Stratton ordinance is set forth as Appendix E (pp. 58a, *et seq*.) to the Petition.

n. 24. (1976). Although commercial speech may not be "provably false, or even wholly false," a statute may still prohibit such speech if it is "only deceptive or misleading" without running afoul of the First Amendment. Id., 425 U.S. at 771-772. In contrast, false defamatory statements about public officials or public figures may not be the basis of a libel suit unless those statements are about "facts," not "opinions." As Justice Powell once observed:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries, but on the competition with other ideas." [Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).]

If the First Amendment dictates that defamatory "false opinions" may not be excluded from the marketplace by judges and juries, then surely the making of a nondefamatory "false statement," without regard to whether it is a statement of fact or one of opinion, cannot be the basis for a mayoral denial of a permit for a political canvasser to go door-to-door. Yet, that is what is authorized by Section 116.06(c) of the Stratton ordinance. Additionally, even false statements of fact are not actionable in a defamation suit, unless made intentionally, recklessly or negligently. *See* Id., 418 U.S. at 375-76. Nevertheless, under Section 116.06(c) the mayor may deny or revoke a permit for making any "misrepresentation or false statement" without regard to fault.

Moreover, Section 116.06(c) empowers the mayor to deny or revoke a permit to a religious canvasser if, in his opinion, that canvasser is perpetrating a religious "fraud." This Court closed the door to such government supervision of religious claims nearly 60 years ago:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men..... Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.... Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with determining whether those teachings contained false representations. [United States v. Ballard, 322 U.S. 78, 86-87 (1944).]

By failing to distinguish between commercial and religious and political speech, the Stratton ordinance has failed to differentiate between a constitutionally-legitimate justification for imposing a prior restraint in order to protect people from commercial fraud, and a constitutionally-illegitimate justification for imposing a prior restraint, including the forced disclosure of identity, in order to protect people from a political or religious "false" statement.

Moreover, the Stratton ordinance has failed to limit the mayor's scope of authority to only concerns related to "fraud, misrepresentation and false statements." According to Section 116.03(b)(6), the mayor may require, in addition to a "brief description of the nature and purpose of a applying canvasser's "cause," "[s]uch other information concerning the Registrant and its ... purpose as may be reasonably necessary to accurately describe the nature of the privilege desired." Additionally, Section 116.06(a) authorizes the mayor to deny or revoke a permit if he determines that the "information" provided by a Registrant is "incomplete."

The courts below found this grant of power so broad that they limited the mayor's power, with respect to Jehovah's Witnesses registrants, to requiring "only [a] 'note on the application that [they] seek[] to canvass as part of the Jehovah's Witnesses.'"

Watchtower v. Stratton, *supra*, 240 F.3d at 559. Had the courts below applied the McIntyre rule, they would have known that a special rule limiting the discretion of a government official to one class of applicants does not cure the unconstitutional intrusion upon the right to communicate without having to disclose one's identity. Had the courts below followed McIntyre, they would have concluded that Section 116.03(b)(6), when coupled with 116.06(a), demonstrates that the Stratton "ordinance plainly applies even when there is no hint of falsity." *See* McIntyre, *supra*, 514 U.S. at 344.

Thus, even though Sections 116.03(b) and (c) authorize denial of a permit upon evidence of fraud or false statement, the mayor's authority is not limited to the danger of purveyors of fraudulent information or false statements. Hence, as was true of the California ordinance in Talley and the Ohio statute in McIntyre, the Stratton ordinance requiring disclosure of the name and address of the person seeking permission to "promote or explain a cause" cannot be justified as a measure designed to combat fraud and misrepresentation.

B. The Stratton Ordinance is Not Narrowly Tailored to Protect the Legitimate Interest of Residential Privacy.

As was true of both the Ohio ordinance in McIntyre, *supra*, 514 U.S. at 344, and the Colorado statute in Buckley, *supra*, 525 U.S. at 186, the Stratton ordinance does contain one limitation. It applies only to door-to-door solicitations on private property. The limited scope of the Stratton ordinance does not, however, justifying excepting it from the First Amendment anonymity principle. To the contrary, the ordinance's permit system further undermines it.

To be sure, the court of appeals majority examined the ordinance to ascertain whether it protected Village "residents from ... undue annoyance in their homes," and determined that it did. The court observed that the "State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free society" and that the ordinance's registration provisions would serve as a deterrent against those who would go door-to-door "ignor[ing] a resident's wishes." Watchtower v. Stratton, *supra*, 240 F.3d at 565-66. But it conducted its analysis on the assumption that the Jehovah's Witnesses either had no First Amendment anonymity interest, or had so undermined that interest by appearing in person at the residential door that it need not be weighed in the balance. As pointed out above, this was clear error.

According to McIntyre and Buckley, a person does not lose his First Amendment protection from forced disclosure of name and address just because he shows his face to another person in the process of communicating with that person. Thus, Stratton's claim that forced disclosure of the name and address of the communicator was necessary to protect the integrity of private residents must be subjected to exacting scrutiny, just as this Court subjected the state claims of electoral integrity in those earlier cases, upholding such disclosure "only if it is narrowly tailored to serve an overriding state interest." McIntyre, *supra,* 514 U.S. at 343-46. *See also* Buckley, 525 U.S. at 204-05. The court of appeals majority below utterly failed to apply this test.

As interpreted and applied by the courts below, the ordinance provides that any person, no matter who they may be, "political candidates, Christmas carolers ... campaigners for social issues" (Watchtower v. Stratton, 240 F.3d at 570 (Gilman, J., dissenting)), must first register with the mayor, disclosing the

potential solicitor's name and address, in order to secure the mayor's permission not only to go door-to-door generally, but to each specific residential door within the village limits. Indeed, according to the text of Section 116.03(b)(5) of the ordinance, any person seeking the mayor's permission to promote or explain a cause from door-to-door is required, at that time, to include on his Solicitor's Registration Form "[t]he specific address of each private residence at which the Registrant intends to engage" in such conduct. Upon compliance, Section 116.04 of the ordinance provides that "[e]ach Registrant ... shall be furnished a Solicitation Permit," which authorizes the Registrant to visit only those premises "listed on the Registrant's Solicitor's Registration Form."

Finding this provision to be an "an onerous regulation that could potentially violate the exercise of constitutional rights," the court of appeals majority nonetheless agreed with the district court, ruling that "this problem was cured by the "Village allowing a Registrant to attach to the Registration Form a list of **willing** Village residents which is provided by the Mayor's office, ... a voluntary measure taken by the Village prior to the lawsuit." Watchtower v. Stratton, 240 F.3d at 559 (emphasis added). Instead of curing the problem, however, the judicially-approved change of the ordinance has only made it worse.

In order for the mayor to furnish to a registering solicitor "a list of willing Village residents," he must know which residents are willing to receive various types of uninvited solicitors and canvassers and which are not. There is no evidence that the mayor surveyed village residents to assemble an accurate list of each individual resident's desire, much less that the mayor kept an up-to-date list. Instead, Section 116.07(a) of the ordinance requires that a resident (or a residence's owner), in order to avoid being placed on the mayor's "willing resident" list, must

"register ... its property" with the mayor as required by Section 116.07(b). Section 116.07(b) requires the property owner or occupant to complete a "'No Solicitation Registration Form' at the office of the Mayor," containing: (1) "[t]he name and address of the owner or occupant who wishes to prohibit" uninvited canvassing and solicitation; (2) "[t]he specific address of each property at which the owner or occupant prohibits such conduct"; and (3) a "written and signed statement" giving notice of his desire to prohibit such conduct, the posting of a sign meeting minimum city standards, and specifying any exceptions to such prohibition.

Any resident or property owner of Stratton who does not comply with this section will appear on the mayor's list as a "willing" listener. *See* Watchtower v. Stratton, *supra,* 240 F.3d at 558. Armed with such a list, an intrepid solicitor or canvasser, licensed by the mayor, would knock on the door of every private residence on the list, assuming that any sign posted on the property to the contrary does not apply to him. After all, the ordinance provides explicit protection **only** for those residents who fill out a No Solicitation Form at the mayor's office, **and** post a No Solicitation sign meeting city standards. *See* Section 116.07(d). And, as the court of appeals majority admitted, only those residents who have filed a "No Solicitation Form" with the mayor's Office receive the protection of the ordinance. Watchtower v. Stratton, 240 F.3d at 558. Thus, instead of protecting the privacy of every resident in Stratton, the ordinance protects only those residents who have taken the time to go down to the mayor's office, fill out the No Solicitation Form, and secure the permission of the mayor to post a "visible" No Solicitation sign on their property. Only by meeting these requirements will the mayor have taken their names **off** the mayor's list of "willing Village residents," a list furnished to each solicitor or canvasser who secures a Solicitation Permit from the city.

Such a convoluted system of registration and permission is not designed to honor each village resident's individual decision to permit, or turn away, unwanted canvassers. Rather, it puts the power of decision in the hands of the mayor who decides that, if a resident has not filled out an official No Solicitation Form, then the resident must be "willing" to listen to uninvited solicitors and canvassers. Not only does the ordinance not provide protection to the unregistered resident, it may even undermine statutory protections that might otherwise be available to such residents, even if they have posted a no solicitation sign. According to Ohio Revised Code ("ORC") Section 2911.21, a person is guilty of a criminal trespass if he "recklessly enter[s] or remain[s] on the land or premises of another, as to which notice against unauthorized access or presence is given..." Surely, evidence that a canvasser entered upon the property of another in reliance upon the mayor's list indicating that a particular resident is "willing" to listen to his cause would undermine any claim by that resident that the uninvited canvasser had "recklessly entered or remained" on his property, even if that resident had posted some kind of no soliciting sign. Moreover, ORC Section 2911.21 requires that any sign posted by a resident must be posted "in a manner reasonably calculated to come to the attention of potential intruders." If a resident has failed to register with the mayor and posted a sign meeting city standards, then a court or jury could find that the resident has not met this statutory criterion, especially in light of the mayor's practice to furnish to "licensed" canvassers a list of "willing" residents containing that unregistered resident's address.

Additionally, by its terms, Section 116.07(a) provides that an "owner ... of private property," even though not an "occupant" thereof, may register the owned property with the mayor and, thereby, stop solicitations upon that property, not because the

occupant does not want them, but because the owner does not. Thus, the ordinance may prohibit solicitors and canvassers from calling on some residents who would welcome such uninvited calls.

Because the ordinance is both under-inclusive, being unprotective of some residents who desire no solicitation, and over-inclusive, being protective of an owner who is not the actual occupant of a residence, the ordinance fails the McIntyre anonymity test, which requires that, to force disclosure of a communicator's identity, the regulation must be "narrowly-tailored to serve an overriding interest." 514 U.S. at 343-46. Such a narrowly tailored ordinance would simply forbid any unauthorized person from going uninvited upon the private property of another who has posted a visible "no trespassing" or "no solicitors" sign. *See, e.g.*, ORC Section 2911.21(3)[5]. Such a straightforward prohibition would not only preserve the constitutional rights of religious and political canvassers, but those of the householder, "leav[ing] the decision as to whether distributers [sic] of literature may lawfully call at a home where it belongs — with the homeowner himself." Martin v. Struthers, *supra*, 319 U.S. at 148.

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[5] The current Ohio criminal trespass statute contains the following prohibition: "No person, without privilege to do so, shall do any of the following: ... (3) Recklessly enter or remain on land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access...."

II. THE STRATTON VILLAGE ORDINANCE VIOLATES THE PRINCIPLE OF ANONYMITY EMBEDDED IN THE FREEDOM OF THE PRESS.

In McIntyre, Justice Thomas, concurring in the judgment, found the anonymity principle reflected in "the historical evidence ... that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the "freedom of the press." McIntyre, *supra*, 514 U.S. at 361 (Thomas, J., concurring). Moreover, the anonymity principle predated the era of America's founding.

Writing in his COMMENTARIES ON THE LAWS OF ENGLAND, published in 1769, Sir William Blackstone asserted that the liberty of the press was established in England in 1694. IV W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ("BLACKSTONE'S COMMENTARIES") 152, n. 2 (U. of Chicago Press facsimile edition: 1769). Prior to that time, no person could lawfully publish anything without having first secured a license to do so from the crown. As Blackstone explained it:

> The art of printing, soon after it's [sic] introduction, was looked upon ... as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated ... by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of starchamber which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licenses. [Id.]

In 1643, the poet John Milton challenged this English system of licensing, "attack[ing] government censorship in a well-reasoned treatise entitled *Areopagitica: A Speech of Mr. John*

Milton for the Liberty of Unlicensed Printing, to the Parliament of England[6] ..., which he did not bother to register," as required by the existing licensing laws. W. DAVIS, HISTORY, THOUGHT & CULTURE 1600-1815, at 25-26 (Univ. Press of America: 1993). Milton's defense of the liberty of the press was nearly contemporaneous with a strict licensing ordinance issued in 1637 by the Star Chamber, the terms of which "provided an elaborate scheme of licensing designed to prevent the appearance of unlicensed books," including the requirement that "**all books were to bear the names of the printer and the author**." SOURCES OF OUR LIBERTIES 242 (Perry, ed., Amer. Bar. Found.: N.Y.U. Press 1972) (emphasis added).

Fifty years after Milton published his *Areopagitica* treatise, the English Parliament allowed a successor licensing act to expire. Id., at 243, 305. Seventy-five years after that, Blackstone wrote with confidence that "[t]he liberty of the press is indeed essential to the nature of a free state." IV BLACKSTONE'S COMMENTARIES at 151. Blackstone explained that the liberty of the press "consists" of two governing principles. First, the civil government may "lay no *previous* restraints upon publications" (emphasis original); and second, "[e]very freeman has an undoubted right to lay what sentiments he pleases before the public." Id. Otherwise, Blackstone concluded:

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[6] Milton's eloquent support of the freedom of the press remains unsurpassed: "...[T]hough all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter. Her confuting is the best and surest suppressing.... What a collusion is this, whenas we are exhorted by the wise man to use diligence *to seek for wisdom as for hidden treasures* early and late, that another order shall enjoin us to know nothing but by statute." J. Milton, *Areopagitica*, reprinted in 3 HARVARD CLASSICS 227-28 (Collier & Son: N.Y.: 1909).

> To subject the press to the restrictive power of a licenser, as was formerly done ... is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." [Id. at 152.]

Yet in 1998, 220 years after Blackstone wrote these words, Stratton enacted its Ordinance No. 1998-5, in which it placed in one man, the mayor, the "restrictive power of a licensor," empowering him to deny permission to any person who sought to go door-to-door to "promot[e] ... or explain[] ... any cause," if he decided that the person seeking permission was promoting a "fraudulent" or "false" cause or making statements that "misrepresented" that cause. *See* Sections 116.04 and 116.06(c). Further, as was the case with the 1637 Star Chamber's restrictive licensing scheme, which required disclosure of the author and printer of the book to be published, the Village of Stratton required the person seeking the mayor's permission to publish his views to disclose not only his name, but the name of the organization that he represents. As was true of the Star Chamber's 17th Century attempt to exercise control over printing, so it is true that Stratton Village's 20th Century attempt to exercise control over door-to-door disseminations violates the freedom of the press.

A. The "No Prior Restraint Principle" of the Freedom of the Press Precludes the Forced Disclosure of a Publisher's Name to the Government.

As noted above, a central feature of the press licensing system in 17th Century England was the required disclosure of the names of both the printer and the author as a prerequisite for the issuance of a license. Indeed, a licensing system, by its very nature, requires such a disclosure. It is not surprising, therefore, that the Stratton ordinance requires a person seeking

the mayor's permission to canvass door-to-door to reveal not only his name and address, but also the name and address of the organization with which the individual communicator is affiliated. Section 116.03(b)(1) and (3).

The court of appeals majority below concluded that such forced disclosure was a "helpful" tool in "preventing fraud," a useful measure "in its attempt to turn away perpetrators [of fraud] posing as Jehovah's Witnesses." Watchtower v. Stratton, *supra*, 240 F.3d at 566-67. This finding cuts the very heart out of the freedom of the press. As Blackstone noted, the press guarantee was deliberately designed to limit the government to punishing an individual's committing "fraud" **after** it has been perpetrated, not **before** by imposing prior restraints upon **all** publishers, legitimate and illegitimate alike. The court of appeals majority simply ignored this venerable rule, joining ranks with the Star Chamber, by ruling that it was perfectly legitimate for Stratton to take "reasonable" steps to "deter" fraud by requiring registration and licensing. Id.

Since the 1930's, this Court has consistently enforced a rule against statutes and ordinances that impose a prior restraint upon publications.[7] In Near v. Minnesota, 283 U.S. 697, 713

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[7] "'Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.' ... The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" New York Times Co. v. United States, 403 U.S. 713, 714 (1971). "[T]he First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjectures that untoward consequences may result. Our cases ... have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war.'" Id., 403 U.S. at 726-27 (Brennan, J., concurring). The Stratton village mayor and solicitor may have declared war upon uninvited solicitors and canvassers. But that is not the kind of war this court has had in mind. *See* Near v. Minnesota,

(1931), Chief Justice Hughes proclaimed that it was the "essence of censorship" for government officials to place a "previous restraint" upon a publication in order to stop the dissemination of libelous statements:

> Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.... The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. [Id., 283 U.S. at 718-19, 720.]

Under the Stratton ordinance, a mayor is empowered to deny a license to a door-to-door political canvasser, even one campaigning for office seeking to defeat the incumbent mayor, himself. All a mayor need do is conclude that a political opponent is spreading "false statements" about his person or his official conduct, and he could either deny or revoke the license. *See* Section 116.06(c). In doing so, a mayor could deprive his opposition of one of the most recognized and effective means of a successful campaign for public office. *See* Martin v. Struthers, *supra*, 319 U.S. 146; SHADEGG, S., HOW TO WIN AN ELECTION, p. 137 (Taplinger Pub. Co. 1964).

In fact, a mayor's discretion to deny or revoke a license on the ground of "fraudulent or false" conduct in relation to a "cause," whether it be political, religious, social or otherwise," is reminiscent of the kind of discretionary power granted to the City Manager of Griffin, Georgia, which was found to have

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283 U.S. 697, 716 (1931).

violated the freedom of the press over 70 years ago. *See* Lovell v. Griffin, 303 U.S. 444 (1938). While the Stratton ordinance does not grant to its mayor completely unbridled and open-ended discretion as the Griffin, Georgia city ordinance did, Chief Justice Hughes' observation that the Griffin ordinance comprehensively applied to "any literature," regardless of its content, led him to conclude that the ordinance "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." Id., 303 U.S. at 451. Similarly, because the Stratton ordinance applies to the promotion or explanation of "any ... cause" (Section 116.01), it too strikes at the very heart of that same freedom.

Yet, the court of appeals majority virtually ignored the Near and Lovell precedents. It appears that the majority simply equated a law requiring a "permit prior to going door-to-door" with a law "requiring an individual to obtain a permit prior to engaging in speech in a public forum." Watchtower v. Stratton, *supra*, 240 F.3d at 560. The two kinds of permits, however, are quite different.

Generally, a law requiring a permit to use the public street for a parade, or a publicly-owned auditorium, or other government-owned facility does not implicate the freedom of press, because it is not a **license to publish**, but rather a **license to use** a public facility. So long as such laws are "content-neutral," limited to regulating "time, place and manner" issues, they are constitutional regulations of the orderly and peaceful use of government property. *Compare*, *e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) *with* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). Whenever a law requires a license to disseminate ideas, even in a public place, the law implicates the freedom of the press. Lovell v. Griffin, *supra*, 303 U.S. at 452 ("Liberty of circulating is as essential to that freedom as liberty of

publishing; indeed, without the circulation, the publication would be of little value.") And with the freedom of the press comes the concomitant protection of anonymity, as evidenced in Talley v. California, *supra,* 362 U.S. at 62-65.

By its express terms, the Stratton ordinance does not purport to be a "time, place and manner" licensure scheme governing the use of government property. Rather, its express purpose is to license communicative conduct. Just because the license is limited to door-to-door solicitors and canvassers does not transform it into a time, place and manner regulation. First of all, the terms of the ordinance are not limited to time, place and manner concerns, in that Section 116.06 authorizes the denial or revocation of a permit if a mayor concludes that a permit seeker or holder has engaged in "fraud, misrepresentation or false statements" in relation to the cause being promoted or explained. Concerns about the content of a communication have no place in a time, place and manner law. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written ... is subject to reasonable time, place or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech ... (citations omitted).")

Equally important, the ordinance applies only to door-to-door communicative activity, which this Court recognized as far back as 1943 to be a direct regulation of the very act of publication:

> While door to door distributors may either be a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. [Martin v. Struthers, *supra,* 319 U.S. at 145.]

Like the regulation of leafleting in Talley, the regulation of door-to-door communications implicates the principle of anonymity embraced by the freedom of the press:

> The obnoxious press licensing law of England, which was also enforced in the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes. [Talley v. California, *supra*, 362 U.S. at 64-65.]

For the same reasons, Stratton may not require the forced disclosure of the name and address of a person and his affiliated organization in order to obtain a permit to go door-to-door to promote or explain a cause.

B. The "No Editorial Function Principle" of the Freedom of the Press Precludes Forced Disclosure of the Communicator's Name to the Recipient.

According to Blackstone, the liberty of the press not only protects freedom from prior restraints, but also guarantees the right of "[e]very freeman to lay what sentiments **he pleases** before the public." IV BLACKSTONE'S COMMENTARIES, *supra*, at 151 (emphasis added). As this Court ruled in Miami Herald Publishing Co., Inc. v. Tornillo, 418 U.S. 241 (1974), it is not for the government to require a newspaper publisher to print a reply from a person criticized by that newspaper:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public

> officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press.... [Id., 418 U.S. at 258.]

This constitutional freedom from editorial control by the government surely extends with equal vigor to the newspaper front and editorial pages which traditionally contain stories from unidentified reporters and opinions by unsigned editorialists. Just as the government may not require a newspaper to print replies to articles critical of public officials or candidates for office, so also the government may not require the disclosure of the names of reporters and editorial writers. Otherwise, the government would breach the "barriers of the First Amendment because of its intrusion into the function of editors." Id., 418 U.S. at 258.

As a newspaper enjoys the full protection of the freedom of the press, including the right not to disclose which reporter wrote which story and which editor wrote which editorial, so the Jehovah's Witnesses have the right to protect the identity of their individual canvassers. After all, the freedom of the press does not just favor the established commercial, institutional press, but "every freeman" as Blackstone has attested. *See also* Lovell v. Griffin, *supra*, 303 U.S. at 452 ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty.... The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.")

Yet, the Stratton ordinance breaches this anonymity barrier, requiring anyone who secures a door-to-door solicitation permit

from the mayor to "carry upon his person his permit [and] exhibit [such permit] whenever he is requested to do so by any police officer or by any person who is solicited." Section 116.04. The permit, in turn, contains the registrant's name and information indicating "that the applicant has registered as required ...." Id. Forcing a permittee to display his Solicitation Permit requires him to abandon his constitutionally-protected "editorial function" to decide whether or not to communicate anonymously, as the registration requirements of the Stratton ordinance make his name and address and affiliated organization a matter of public record.

CONCLUSION

In sum, the Stratton ordinance entrusts its mayor with broad powers to prevent possible wrongdoing by some, but it does so in such a way that any such prevention can only be achieved at the unacceptable cost of depriving essential liberties to all. For the reasons stated, the decision of the court of appeals should be reversed, with instructions to strike down the ordinance in its entirety.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

**Counsel of Record*
Attorneys for Amici Curiae

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070