No. 00-1737

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE, ETC.

Petitioners,

v.

STRATTON, OHIO ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE ELECTRONIC PRIVACY INFORMATION CENTER, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO AND 14 LEGAL SCHOLARS IN SUPPORT OF WATCHTOWER BIBLE, ETC, Petitioners

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, amici hereby request leave to file the accompanying amicus curiae brief. Such brief is submitted in support of a partial reversal of the Sixth Circuit opinion.

Petitioner Watchtower Bible has consented to the filing of this brief. Respondent Stratton, Ohio has not consented.

As set forth in the accompanying brief, the Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. The American Civil Liberties Union

("ACLU") is a nationwide, nonprofit, nonpartisan organization that has defended the First Amendment rights of numerous controversial speakers, including the Jehovah's Witnesses, since the ACLU's founding in 1920. The ACLU of Ohio is one of the statewide affiliates. The interest of the amici legal scholars is also set forth in the accompanying brief.

This case concerns a First Amendment freedom of speech claim brought by Watchtower Bible against the Village of Stratton, Ohio, alleging that the Village's ordinance requiring registration and identification prior to and during door-to-door petitioning violates the right of anonymity affirmed by the Court in cases such as *McIntyre v. Ohio Elections Commission*. 514 U.S. 334 (1995).

Amici have long held anonymity to be a core value protected by the First Amendment, essential to personal privacy, political liberty and intellectual freedom, because it protects those with unpopular ideas from retaliation and suppression. The Sixth Circuit's determination that the right to remain anonymous does not include the right to remain anonymous while going door-to-door to engage in political or religious speech is inconsistent with the existence of this right. Accordingly, amici respectfully request leave to file the accompanying amicus curiae brief.

Dated: November 28, 2001

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

INTEREST OF THE AMICI CURIAE[1]

All *amici curiae* represented in this brief have acquired considerable practical experience addressing constitutional issues. The ruling of the court of appeals at issue here threatens the First Amendment rights of anonymity and freedom of association that these *amici* strive to protect. It also conflicts with the Court's decisions in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), and *NAACP v. Alabama*, 357 U.S. 449 (1958), which together provide for a right of anonymity in speech and association.

Public Interest *Amici*

Amicus the Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

Amicus the American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to protecting the principles of liberty and equality embodied in the Constitution and our nation's civil rights law. Since its founding in 1920, the ACLU has appeared before the Court in numerous free speech cases, including *McIntyre v. Ohio*, where the Court once again upheld the right to engage in anonymous speech under the First Amendment. The

[1] In accordance with Rule 37.6 it is stated that no monetary contributions were made for the preparation or submission of this brief.

American Civil Liberties Union of Ohio is a statewide affiliate of the national organization.

Legal Scholars *Amici*

Anita L. Allen, Professor of Law and Philosophy, University of Pennsylvania.

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Christine L. Borgman, Professor and Presidential Chair in Information Studies, University of California, Los Angeles.

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Julie E. Cohen, Professor of Law, Georgetown University Law Center.

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SUMMARY OF THE ARGUMENT

Anonymity is a core First Amendment value that enables the expression of political ideas, participation in the political process, membership in political associations, and the practice of religious belief without fear of government intimidation or public retaliation. The Court has recognized the significant role that anonymity plays in the publication of unpopular ideas. It has also recognized that the right to withhold one's affiliation with an unpopular political association is a critical element of free association.

As such, any government action that infringes upon this right must be subjected to strict scrutiny. The Stratton ordinance, which requires those going door-to-door to register with the Village and to identify themselves prior to and during petitioning, forces Petitioners to sacrifice their anonymity and chills activity protected by the First Amendment.

Petitioners seek the opportunity to go door-to-door in accordance with their religious belief to discuss matters of religious concern without fear of government intimidation or public retaliation. Petitioners do not engage in commercial solicitation or in any other activity that could reasonably subject them to claims of fraud or libel. Moreover, Petitioners remain subject to trespass laws, as does any person who approaches the home of another. A local ordinance that compels disclosure of identity in these circumstances is subject to strict scrutiny even though it may appear content-neutral. Such an ordinance impermissibly burdens protected activity.

To uphold the registration requirement for people who engage in door-to-door solicitation for purely religious purposes, as required by their faith, would chill protected religious activity and violate the right of anonymity that the Court has repeatedly safeguarded.

ARGUMENT

I. The Sixth Circuit's Determination that the Challenged Restriction on Anonymous Petitioning is Not Subject to Strict Scrutiny is Erroneous

In order to engage in any door-to-door service in the Village of Stratton, whether it is solicitation, commercial canvassing, ministry, or campaigning, an individual is required to obtain a "Solicitation Permit" from the Mayor's office. *See* Ordinance § 116.03(a). In order to obtain the required permit, individuals must identify themselves and the reason for their petitioning, which includes identification with an organization (for example, to note one's participation in "the Jehovah's Witness ministry"). *See* Ordinance § 116.03(b)(1)-(5); *see also* Petition for a Writ of Certiorari at 4, *Watchtower Bible and Tract Society of New York, et al. v. Village of Stratton, Ohio* (No. 00-1737) (2001). The registration forms required by the Village are public records as defined by Ohio law. *See* OHIO REV. CODE ANN. § 149.43(A)(1) (West 2001). In addition, the ordinance requires that Petitioners produce their permit upon the demand of individual homeowners. Failure to do so can lead to revocation of the license and disqualification from being granted a future license; in addition, failure to obtain a permit constitutes a misdemeanor. *See* Ordinance § 116.06,.99.

The Sixth Circuit analyzed the First Amendment challenge to these mandatory disclosure requirements under the intermediate level of judicial scrutiny applicable to time, place and manner regulations. *See Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 240

F.3d 553, 562 (6th Cir. 2001). The court justified this level of scrutiny on the following grounds: (1) that the Supreme Court has never held that hybrid rights claims are subject to strict scrutiny; and (2) that the canvassers have little remaining First Amendment right to anonymity. *See id.* This approach mischaracterizes the right at issue, underestimates the burden imposed by the Stratton ordinance, and mischaracterizes the Court's relevant precedents.

Whether circulating a petition, distributing a handbill, or canvassing door to door, a speaker has the right to remain anonymous to prevent private or government retaliation. Violations of that right represent a form of compelled speech that triggers strict scrutiny. *See Buckley v. ACLF*, 525 U.S. 182, 199 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Additionally, the Stratton ordinance is subject to strict scrutiny because it infringes upon the right of anonymous association that the Court has long protected, *see NAACP v. Alabama*, 357 U.S. 449, 461 (1958), but which the Sixth Circuit ignored entirely. Finally, unlike the Sixth Circuit, the Court has held that ordinances infringing upon multiple Constitutional rights ("hybrid rights" cases) are subject to strict scrutiny. *See Employment Division v. Smith*, 494 U.S. 872, 881 (1990).

Under strict scrutiny, a restriction on First Amendment rights will be upheld only if it is narrowly tailored to serve an overriding state interest. See *McIntyre*, 514 U.S. at 348. The Village of Stratton's asserted interests in passing the ordinance were to "protect residents from fraud and undue annoyance in their homes." *See Watchtower Bible*, 240 F.3d at 566. As discussed, *infra* Part III, the Stratton ordinance is not narrowly tailored to these government

interests (even assuming the interests are compelling); therefore, the Stratton ordinance must be overturned as a violation of the First Amendment.

A. Infringement on Anonymous Petitioning is Subject to Strict Scrutiny

The Sixth Circuit analyzed the Stratton ordinance under intermediate scrutiny because the court held that the ordinance did not implicate the First Amendment right to distribute a political message anonymously. Adopting a waiver theory that has no support in the Court's case law, the Sixth Circuit held that "individuals going door-to-door to engage in political speech 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 Bible*, 240 F.3d at 563. Based on that assumption, the Sixth Circuit attached no constitutional significance to the fact that the ordinance "requires political canvassers to reveal the remainder of their identities, i.e. their names." That approach is irreconcilable with both *Talley v. California* and *McIntyre*. *See McIntyre*, 514 U.S. at 334, *Talley v. California*, 362 U.S. 60 (1960). Each case involved an anonymous leafleter, like petitioners here. In neither case, however, did the Court even suggest that the leafleter forfeited her anonymity by handing out the leaflets in person. To the contrary, the Court recognized that the compelled disclosure of one's name represents a unique abridgement of the right to anonymous speech. *See McIntyre*, 514 U.S. at 334, *Talley*, 362 U.S. at 65.

This point was made explicitly in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), where the Court unanimously overturned the portion of a Colorado statute that required people handing out petitions wear nametags. *Id* at 199, 209, 206, 217. As the Court explained:

> [T]he name badge requirement 'forces circulators to reveal their identities at the same time they deliver their political message,' it operates when reaction to the circulator's message is immediate and 'may be the most intense, emotional, and unreasoned.' … The injury to speech is heightened for the petition circulator because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is the greatest.

Id at 182 (citations omitted).

The Court thus unanimously held that a government action that infringes upon the right to anonymity at the moment that a message is delivered, despite the fact that the speaker is face to face with those to whom the message is being delivered, must be analyzed under the strictest scrutiny. That is precisely the situation here. The Stratton ordinance forces the canvassers to reveal their personal identity at the moment when they are face to face with the person to whom they are delivering an unpopular message, thus exposing them to the potential retaliation and social ostracism against which the right of anonymity is designed to protect.

Moreover, as the Court noted in *McIntyre*, mandatory disclosure is a form of compelled speech and subject to strict scrutiny on those grounds as well. The reason for this is clear. "[T]he identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." *McIntyre*, 514 U.S. at 348. Thus compelled speech requirements, like content-based restrictions on speech, trigger strict scrutiny under this Court's well-established precedents. *See Wooley v. Maynard*, 430 U.S. 705 (1977).

B. Requiring Disclosure of Identity with a Controversial Organization is Subject to Strict Scrutiny

Additionally, state action that infringes upon the First Amendment freedom of association is subject to the most exacting scrutiny, as more fully explained below. *See NAACP*, 357 U.S. at 460-61. Strict scrutiny must be applied even where the ordinance only indirectly implicates freedom of association. *See id.* at 461. The Stratton ordinance requires Petitioners to surrender their anonymity by revealing not only their identity but also their association with a religious group.

The Sixth Circuit utterly disregarded the effect that the Stratton ordinance had upon Petitioners' freedom of association, and thus erroneously analyzed the ordinance under intermediate scrutiny.

C. Infringement upon Religious and Charitable Activity, when Combined with Infringement upon

other Constitutional Rights has been Subject to Strict Scrutiny by the Court

Finally, the Sixth Circuit analyzed the Stratton provision under intermediate scrutiny on the assumption that the "hybrid" infringement imposed by this regulation did not justify strict scrutiny. However, in *Employment Division*, the Court specifically limited its holding that a claim for religious exemption from neutral and generally applicable laws doesn't trigger strict scrutiny by noting that prior cases applying strict scrutiny had involved "hybrid" claims of precisely the sort raised here. 494 U.S. at 881.

In addition to a myriad of cases in which the Court determined unconstitutional a state law infringing upon both the freedom of religion and the freedom of speech, *see, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 304-07 (1940); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), the Court has also expressly reserved the possibility of a hybrid case in which the validity of the religious challenge was strengthened by the laws' corresponding infringement upon freedom of association. *See Smith,* 494 U.S. at 881 ("And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.").

Because the Stratton ordinance implicates not only freedom of religion, but also freedom of speech and freedom of association, it must be subject to a more exacting level of judicial scrutiny, and because the ordinance is not narrowly tailored to the government's asserted interests in protecting its citizens from fraud and annoyance in their homes, *see*

infra Part III, it cannot survive the strict scrutiny that is required.

II. Anonymity is a Core First Amendment Value that Enables the Expression of Ideas and Freedom of Association Without Government Intimidation or Fear of Retaliation

A. The First Amendment Protects Anonymous Speech

1. The Framers Intended to Safeguard the Right to Distribute Literature Anonymously

The First Amendment states, "the government … shall make no law … abridging the freedom of speech, or of the press." U.S. CONST., AMDT 1. The Court has looked to tradition as one of its tools for interpreting the meaning and intention behind these rights, because traditional use "'implies the favorable judgment of experience.'" *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 605 (1982), quoting *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 589 (1980) (Brennan, J., concurring). "There is little doubt that the Framers engaged in anonymous political writing." *McIntyre*, 514 U.S. at 360 (Thomas, J., concurring). The most famous example of anonymous political writing, in fact, occurred during the ratification of the Constitution, when the Federalist Papers were published under the pseudonym Publius. *See id.* Moreover, that tradition was nonpartisan. In response to the refusal by several Federalist papers to publish anonymous works, outraged Anti-

Federalists declared that this action would "reverse the important doctrine of the freedom of the press." *Id*. at 365.

This tradition of anonymous literature stretches well beyond political writing.

> "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

Id. at 341-42 (citations omitted). This historical evidence clearly reveals a "respected tradition of anonymity in the advocacy of political causes." *Id*. at 340. "The recognition that anonymity shelters constitutionally-protected decisions about speech, belief, and political and intellectual association—decisions that otherwise might be chilled by unpopularity or simple difference—is part of our constitutional tradition." Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STANFORD L. REV. 1373, 1425 (2000).

Prior decisions by the Court have strongly affirmed that anonymity is a core First Amendment value. In *Talley*, the Court noted that anonymous publications "have played an important role in the progress of mankind." 362 U.S. at 64.

> There can be no doubt that [] an identification requirement would tend to restrict the freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulating, the publication would be of little value."

Id. While invalidating a ban on anonymous pamphleteering in *McIntyre*, the Court noted that: "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." 514 U.S. at 357. Anonymous speech "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals

from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id*. at 357.

The Stratton ordinance threatens this historically protected right of anonymity by forcing those who voice their message by going door-to-door to surrender their anonymity. The ordinance, §116.03, requires that Petitioners obtain a "Solicitation Permit" before they are authorized to petition door to door in the Village of Stratton. The registration forms necessary to obtain such a permit require that the individual disclose her name, address, and affiliation. These registration forms ultimately are public records.[2] In addition, §116.04 requires that Petitioners produce their permit upon the demand of individual homeowners. Failure to comply with either requirement constitutes a misdemeanor. Ordinance §116.99.

The Jehovah's Witnesses have historically relied upon the Court to safeguard their rights to free speech, free press, freedom of religion, and freedom of association from state or local efforts to prohibit constitutionally protected activity.[3] Central to the Jehovah's Witness religion is the belief that members must perform a public ministry by going door to

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[2] According to the Ohio Revised Code § 149.43(A)(1), a "public record" means any record that is kept by any public office. The police department is a public office as defined by § 149.011(A). A registration application for a Solicitation Permit is a document that identifies police procedures or operations, namely the monitoring of those who want to engage in any door-to-door activity, and therefore are public records as defined by § 149.011(G). *See* OHIO REV. CODE ANN. § 149.43(A)(1),(G) (West 2001).

[3] Between 1938 and 1945, the Jehovah's Witnesses participated in 45 cases before the Court, winning 36 of them. *See* HENRY J. ABRAHAM, FREEDOM AND THE COURT 236 (4th ed., Oxford Univ. Press 1982).

door to voice their faith and offer people religious instruction. The Stratton ordinance forces Petitioners to either sacrifice their constitutional right to anonymity or be subjected to criminal sanctions. Such a choice places Petitioners between Scylla and Charybdis, a dilemma the Court has long refused to sanction. See *Wooley*, 430 U.S. at 710. The Court must therefore determine that the Stratton ordinance unconstitutionally infringes upon Petitioner's First Amendment right to anonymity.

2. Forcing Speakers to Reveal their Identity Violates Freedom of Speech

Anonymity is essential to the freedom to participate in dissident groups and to express unpopular views. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91 (1982); *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *Talley v. California*, 362 U.S. 60, 65 (1960); *NAACP v. Alabama*, 357 U.S. at 462. Identification requirements "extend beyond restrictions on time and place—they chill discussion itself." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 628 (1976) (Brennan, J., concurring in part). The importance of anonymity lies in the speakers' ability to speak her message without fear of retaliation for voicing an unpopular viewpoint. The fear of reprisal an identification requirement would engender "might deter perfectly peaceful discussions of public matters of importance." *Talley*, 362 U.S. at 64. Therefore, "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id*.

Although anonymity has historically been framed as important to political discussions, its significance and scope is far broader. Anonymity is a necessary component in people's ability to form ideas outside the watchful eye of their neighbors, as well as the government.

Anonymity is central to the flourishing of a pluralistic society, because it permits engagement in ideas and beliefs outside of the mainstream without fear of retribution. For example, in *Buckley v. ACLF*, the Court held that the statutory requirement that those circulating political petitions wear identification badges "inhibits participation in the petitioning process" because it limits the number of people willing to petition for organizations, and the degree to which they were willing to do so. *See Buckley v. ACLF*, 525 U.S. 182, 197-98 (1999). In particular, individuals are often reluctant to be identified by name "to face the recrimination and retaliation that bearers of petitions on 'volatile' issues sometimes encounter." *Id*. at 198.

The Jehovah's Witnesses go door to door to advocate their religion, though many may disagree with their beliefs. *See Cantwell*, 310 U.S. at 309-10 (1940). Forcing Petitioners to reveal their identity may well deter members of the religion from exercising their First Amendment rights out of fear that they will be forced to endure the recrimination that has historically plagued the delivery of their message. Petitioning door-to-door without obtaining a permit subjects the individual to criminal sanctions for failure to abide by the requirements of Chapter 116. Many Jehovah's Witnesses may choose to remain silent rather than to communicate a constitutionally protected message in a manner that might be construed unlawful. This chilling effect is heightened by the

threat that the ordinance might be discriminatorily enforced. *See Reno v. ACLU*, 521 U.S. 844, 872 (1997); *see also Watchtower Bible*, 240 F.3d at 561 (summarizing evidence presented by the petitioner in support of their argument that the ordinance was enacted to restrict Jehovah's Witnesses, and was being discriminatorily enforced).

B. The First Amendment Protects Privacy of Association

The "close nexus" between the First Amendment freedoms of speech and assembly assures a freedom to engage in association for the advancement of beliefs and ideas. *See NAACP*, 357 U.S. 449, 460 (1958). Effective advocacy of both public and private viewpoints—central to the First Amendment—is "undeniably enhanced by group association." *Id*. Freedom of association is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. *Id*., citing *De Jonge v. Oregon*, 299 U.S. 353, 364; *Thomas v. Collins*, 323 U.S. 516, 530 (1992). The freedom of association encompasses the right to privacy of that association, and therefore prevents compelled disclosure of membership in an organization. *NAACP*, 357 U.S. at 459. Such a right is necessary to the freedom of expression, which depends upon the unrestricted flow of ideas, because the "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id*. at 462.

Because "anonymity is a shield from the tyranny of the majority," anonymity in one's association is as important

as anonymity in one's speech. *McIntyre*, 514 U.S. at 357. Forced disclosure of one's association with a group chills the freedom of assembly because of the fear of the consequences of exposure of one's association with an unpopular group; therefore, the freedom to associate depends upon privacy in one's associations. *See NAACP*, 357 U.S. at 462. Privacy of association is especially vital where revelation of membership has exposed members to physical, social, or economic threats or hostility. *See id*; *see also Shelton v. Tucker*, 364 U.S. 479 (1960). In order to protect this privacy, the Court has held that compelled disclosure of one's membership in an organization engaged in advocacy of a particular belief interferes with the freedom of assembly. *See NAACP*, 357 U.S. at 462.

In *NAACP*, the petitioner NAACP refused to comply with a court order mandating disclosure of the organization's member lists on the grounds that to do so would violate the First Amendment freedom of association. The Court held that the right to freedom of association encompasses both the right of an organization to keep private its list of members, as well as the right of the members to withhold their connection with the organization. *Id*. at 459. Such a right is necessary to ensure the free flow of ideas—"whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"—because the "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id*. at 462. The Court said:

> We think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective efforts to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and the consequences of this exposure.

Id. at 462-63.

Just as compelled disclosure of its membership lists chilled freedom of association in *NAACP*, so does Stratton's ordinance unconstitutionally inhibit Petitioner's freedom of association.

The Jehovah's Witnesses have a well documented history of state and social discrimination, which is best illustrated by the many cases brought before the Court and in the language of the Stratton ordinance. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (holding unconstitutional as applied a municipal ordinance that was interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (holding unconstitutional as applied a city ordinance that was used to discriminate against the public preaching of Jehovah's Witnesses); *Jones v. Opelika*, 316 U.S. 584, 617 (1942) ("We need not shut our eyes to the possibility that use may again be

made of such taxes, either by discrimination in enforcement or otherwise, to suppress the unpalatable views of militant minorities such as Jehovah's Witnesses.") (Murphy, J., dissenting); *Cantwell*, 310 U.S. at 309-10; *McConkey v. Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682 (1942); *see also* Petition for a Writ of Certiorari at 3, *Watchtower Bible and Tract Society of New York* (No. 00-1737) (2001) (documenting evidence of blatant anti-Jehovah's Witness sentiment underlying the enactment of the Stratton ordinance).

As the Court explained in *Buckley v. Valeo*, 424 U.S. 1, 71 (1976), where the threat posed to First Amendment freedoms of speech and association by government disclosure requirements are "so serious and the state interest furthered by disclosure so insubstantial that the Act's [disclosure] requirements cannot be constitutionally applied." *Id*.

The right of the members of an association to withhold their connection with the association is properly assertable by the association itself, because "[t]o require that it be claimed by the members themselves would result in nullification of the right at the very moment of assertion." *Id*. at 460. Not only are the association and its members "in every practical sense identical," compelling disclosure of member lists directly effects the association because it diminishes financial support and membership." *Id*. at 459-60. Therefore, the Petitioner may properly assert a freedom of association claim for those members of its religion that practice door-to-door petitioning in Stratton, Ohio.

III. The Ordinance Fails Strict Scrutiny Because it is Not Narrowly Tailored to Protect Stratton's Interests in Preventing Fraud and Annoyance

A. The Interest in Fraud Prevention does Not Justify a Flat Ban on Anonymous Petitioning

A state's interest in preventing fraud—although valid—is insufficient to justify a flat ban on anonymous speech, where the state has less intrusive means of accomplishing the same interest. In *McIntyre*, Ohio's "interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information" was insufficiently compelling to justify a ban on anonymous speech. 514 U.S. at 349. Similarly, in *Buckley v. ACLF*, the Court held that the restrictions on anonymous petitioning significantly inhibited First Amendment freedoms, and were not warranted by the Colorado's interests in, *inter alia,* fraud detection. 525 U.S. at 192.

The Sixth Circuit upheld the Stratton ordinance, asserting that the ban on anonymous petitioning was necessary to prevent "criminals posing as canvassers." *Watchtower Bible*, 240 F.3d at 566-67. In *Talley*, the Court struck down a California statute prohibiting the distribution of anonymous handbills. 362 U.S at 60. Although the State claimed the regulation was necessary "to identify those responsible for fraud, false advertising and libel," the ordinance was not limited to prevention of such evils, but instead prohibited all anonymous pamphleteering—even speech that was not fraudulent or libelous. *Talley*, 362 U.S. at 64. A state cannot assume that anonymity is a shield for fraud

or criminal activity, this Court cautioned, because "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." *McIntyre*, 514 U.S. at 357. California had no evidence that anonymous pamphleteering was the root of rampant fraudulent or libelous activity. *See Talley*, 362 U.S. at 64. Just as the state's interest in fraud and libel prevention was insufficient to justify the regulation in *Talley*, Stratton's interest in fraud prevention is insufficient to justify the Village's ban on anonymous petitioning. A state can regulate fraud directly, *see* Part IIIB, "But [a state] cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech." *McIntyre*, 514 U.S. at 357.

The requirement that potential canvassers must register with the Office of the Mayor, by completing a form that requires, *inter alia*, the canvasser's name and home address, as well as a description of the organization for which the individual is canvassing, is just as overbroad as the requirement that a canvasser reveal her identity to any homeowner who asks. In purpose and effect it is easily distinguishable from the "affidavit" requirement implicitly upheld in *Buckley v. ACLF*.[4]

Specifically, the Court has repeatedly acknowledged the government's strong interest in ensuring that the election process is free from corruption and fraud. *See Buckley v. Valeo*, 424 U.S. at 66-67 (1976). The challenged regulation in this case plainly has no relation to the electoral process,

[4] The statute at issue in *ACLF* required those gathering signatures for election petitions to attest to the accuracy of the signatures they gathered by adding their own names and address. 525 U.S. at 198. The Tenth Circuit decision upholding that requirement was left undisturbed by the Court. *Id.*

and has not been shown to be narrowly tailored to the state's asserted interest. To the contrary, the Stratton ordinance requires a Solicitation Permit for all forms of door-to-door canvassing, including pure political and religious expression of the sort involved here. In doing so, the ordinance restricts not only commercial solicitation—a possible avenue for fraudulent communications—but also a substantial amount of speech unrelated to the prevention of fraud. The ordinance, therefore, is not narrowly tailored to promote the state's legitimate interest in protecting its citizens from fraudulent communications.

B. The Village Retains the Ability to Prosecute where a Homeowner Objects to the Solicitation Without Violating Constitutionally Protected Activity

It is important to note that the Petitioner asserts no right to absolute immunity from state investigation, and no right to disregard state laws. *See NAACP*, 357 U.S. at 463. The Village of Stratton seeks to protect its residents "from fraud and undue annoyance in their homes." *Watchtower Bible*, 240 F.3d at 566. The Constitutional flaw in the ordinance lies not in its ends but in its means. *See supra*, Part IIIA. The Village has other, less intrusive means of protecting its citizens. Indeed, the Court has frequently identified alternatives—short of outright of anonymous speech—by which a state can seek to limit fraud. *See McIntyre*, 514 U.S. at 350 n.12; *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980).

The Sixth Circuit cited *Frisby v. Schultz* for the proposition that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free society." However, the Court has held that the dangers posed by intrusion into one's home "can so easily be controlled by traditional legal methods, leaving to 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." *See Martin v. Struthers*, 319 U.S. 141, 147 (1943).

The Village of Stratton has adequately served the privacy interests of its citizens by providing that any homeowner can file a No Solicitation form with the Mayor's office. *See Watchtower Bible*, 240 F.3d at 558. Petitioners are subject to common law trespass actions if they fail to honor the homeowner's stated wishes. In addition, the Village can pass laws prohibiting petitioning or solicitation under false pretenses or conveying fraudulent messages: "fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." *Village of Schaumburg*, 444 U.S. at 637. "Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made." *Riley v. National Federation of the Blind*, 487 U.S. 781, 803 (1988). Because other laws do not infringe upon Petitioners' freedom of association or speech, and adequately serve to protect the State's interests, the Village retains its ability to protect its stated interests without

depriving Petitioners of the right to engage in constitutionally protected activity.

CONCLUSION

Petitioners seek the opportunity to go door-to-door in accordance with their religious belief to discuss matters of religious concern without fear of government intimidation or public retaliation. The right to do so is protected by the First Amendment. The contrary judgment of the Sixth Circuit should therefore be reversed for the reasons stated herein.

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Respectfully submitted,

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