No. 99-929

In The

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE – THE INITIATIVE AND REFERENDUM INSTITUTE – IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Initiative and Referendum Institute is a non-profit, non-partisan, education and research organization that promotes and defends the initiative and referendum process.[1] The mission of the Initiative and Referendum Institute is to study the mechanisms of direct democracy, develop clear analyses of the strengths and weaknesses of various systems, and disseminate that information as broadly as possible. The Institute seeks to educate the public about the initiative process and its effects on the political, fiscal and social fabric of our society. The Institute also endeavors to provide effective leadership in litigation – defending the initiative and referendum rights of citizens against legal challenges that would seek to weaken or abolish such rights.

The Institute has filed this brief to defend the amendments to Article VIII of the Missouri Constitution that were passed by popular initiative on November 5, 1996 (hereinafter "Article VIII"), because the voters of Missouri have used the initiative to reinforce the role of citizens in the process of constitutional transformation. The instruction of representatives and the provision of information to voters regarding representatives' voting records allows citizens to press for necessary reforms and to effectively participate in democratic government. This case also implicates another right of paramount importance

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, or its members, made a monetary contribution to the preparation and submission of this brief.

in any democratic republic – the right of the people to speak collectively through their government. Because the Institute is particularly interested in ensuring that the First Amendment continues to protect the initiative and referendum process, this brief is limited to the First Amendment issues presented in this case.

SUMMARY OF ARGUMENT

This case involves two competing free speech claims, the right of the people to speak through their government versus the right of representatives and candidates to avert the supposed negative consequences of this speech. The Eighth Circuit erred by failing to give due weight to the right of the people to speak collectively. The Eighth Circuit also erred in holding that Article VIII unconstitutionally compels the speech of representatives and candidates. For a compelled speech violation of the First Amendment to exist, the following three elements must be present: (1) the actions of the state must demonstrably compel or coerce speakers to express a particular point of view, (2) the coercion of speech must be enforced by some punishment or penalty, (3) the speaker must be deprived of adequate opportunity to disassociate himself from the message that the state would have him bear. The Eighth Circuit erred in concluding that the first two elements existed; and it did not even consider the third element. The empirical evidence regarding the effects of ballot labels strongly suggests that they are not coercive. Moreover, the Supreme Court has acknowledged that merely being stigmatized by state speech, without more, is not a penalty violative of the First Amendment.

The Eighth Circuit also erred in holding that official commentary by the state on a candidate's behavior is a severe restriction on First Amendment rights that necessitates strict scrutiny. Rather, as a reasonable, nondiscriminatory ballot law, Article VIII should be subjected to the less exacting test of whether it serves an important regulatory interest of the state. Moreover, even if Article VIII were found to be a severe restriction, triggering strict scrutiny, it would withstand such scrutiny. The state's interest in fostering an informed electorate is a compelling one, as is the interest of Missouri citizens in pressing for constitutional reform to increase the integrity of elected officials. Article VIII is narrowly tailored to serve these interests, as it is the only practical way to counter the deceptive tactics practiced by candidates and incumbent representatives on the term limits issue.

The people of Missouri also have a collective right under the First Amendment to speak regarding the conduct of representatives and candidates. The Supreme Court has acknowledged that such speech rights of the majority exist. Furthermore, because the ballot is the state's property, the state retains a substantial amount of discretion over what speech occurs on it.

ARGUMENT

I. BALLOT LABELS AND TERM LIMIT PLEDGES DO NOT COMPEL OR PUNISH SPEECH

The U.S. Court of Appeals for the Eighth Circuit treated Missouri's Article VIII instruct-and-inform law as an instance of compelled speech, holding that it violated the First Amendment rights of political candidates.

Gralike v. Cook, 191 F.3d 911, 917-21 (8th Cir. 1999). However, the Eighth Circuit failed to adequately consider all of the issues that must be addressed in establishing a claim of government compulsion of individual speech. For a compelled-speech violation of the First Amendment to exist, the following three elements must be present: (1) the actions of the state must demonstrably compel or coerce speakers to express a particular point of view, (2) the coercion of speech must be enforced by some punishment or penalty, (3) the speaker must be deprived of adequate opportunity to disassociate himself from the message that the state would have him bear. In this case, the Eighth Circuit erred in concluding that the first two elements existed; and it did not even consider the third element.

A. Missouri's Article VIII Does Not Compel or Coerce the Speech of Representatives or Candidates

At the outset, it must be noted that the Eighth Circuit's description of what Article VIII requires is somewhat misleading. Article VIII does not "force candidates to speak in favor of term limits." *Id.* at 917. With respect to incumbent candidates, Article VIII is in no way concerned with what the candidate *says*. It is solely concerned with how the candidate votes and follows other procedural instructions. An incumbent candidate need not ever mention the phrase "term limits" in order to avoid the ballot label. He may even speak openly against term limits and urge all of his fellow representatives to vote against term limits, while casting his own vote in

accordance with his instructions. Although the instructions contained in Article VIII direct representatives to vote a particular way and to take certain procedural actions, the instructions do not urge representatives to say anything or to espouse any point of view. Similarly, a non-incumbent candidate may choose to say nothing about term limits or to speak stridently against term limits without triggering the ballot label. He need only sign a pledge to take certain actions in order to follow the peoples' instructions. Although there may be an element of protected speech in the casting of a vote or the signing of a pledge, Article VIII in no way compels a candidate to publicly advocate a point of view.

At the core of the Eighth Circuit's compelled speech holding is the assumption that the Article VIII ballot labels would actually operate to coerce the speech of candidates. "The ballot labels are a serious sanction, which we believe is sufficient to coerce candidates to speak out in favor of term limits rather than risk the political consequences associated with being labeled on the ballot." *Id.* at 919. However, the Eighth Circuit provided no evidence of any sort to support this assumption. The Court was apparently unaware that empirical evidence was available. Instead, the Eighth Circuit offered a mere guess as to how the labels might affect the behavior of politicians in the real world.

The Eighth Circuit guessed wrongly. If, as the Eighth Circuit supposed, the Article VIII ballot labels were sufficiently coercive, one would assume that candidates would be unable to resist the pressures created by the labels. In fact, the available evidence indicates that candidates were quite willing to disregard their Article VIII instructions. In February 1997, Missouri Congressional

Representative Jo Ann Emerson not only voted contrary to her instructions, she declared on the floor of the House her intention to do so, stating, "if that means I invoke a misleading scarlet letter, so be it." 143 Cong. Rec. E277 (daily ed. Feb. 13, 1997) (statement of Rep. Emerson).[2] She was not the only member of Congress who expressed the view that disregarding the instructions was a perfectly feasible option. Florida Representative Bill McCollum urged Members of Congress from the nine states operating under similar instruct-and-inform laws to vote contrary to their instructions and to "take the risk and the chance of facing up to [term limits advocates]." *Id.* at H420. Plainly, these representatives did not regard the ballot labels to be particularly coercive.

If the Eighth Circuit's assumption were correct, one would also expect non-incumbent candidates operating under instruct-and-inform laws to be coerced into signing the term limits pledge. Here again, the empirical evidence indicates the contrary. In 1998 and 1999, the state of California held three special elections to fill vacant state legislative seats. The elections were held in the wake of California's Proposition 225 instruct-and-inform law, which was adopted by California voters on June 2, 1998.[3] These three elections provide the only existing evidence regarding the effect of an instruct-and-inform law on

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[2] *Cited in* Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 24 n.93 (1999).

[3] The California law is, in all relevant respects, virtually identical to Missouri's Article VIII. *See Bramberg v. Jones*, 20 Cal. 4th 1045, 1050-53, 978 P.2d 1240, 1243-45 (1999).

non-incumbent candidate behavior. The effect was not at all what the Eighth Circuit supposed it to be. In California's Ninth District special primary election for the office of State Senator, held on September 1, 1998, four of the five candidates refused to sign the term limits pledge and consequently received the ballot labels by their names. *Sample Ballot & Voter Information Pamphlet, County of Alameda, Calif., Sept. 1, 1998* (Alameda County, Calif., Registrar of Voters). In the February 2, 1999, Sixteenth District special primary election for State Representative, three of the four candidates refused to pledge to support term limits and ran with the ballot labels by their names. *Sample Ballot & Voter Information Pamphlet, County of Alameda, Calif., Feb. 2, 1999* (Alameda County, Calif., Registrar of Voters). The third election was the general election in the Sixteenth District, between two candidates already counted. Of the nine candidates running for office in the two primary elections, only two took the pledge to support term limits. The overwhelming majority of candidates, seven of nine, withstood the supposedly coercive threat of the ballot label. Thus, the available empirical evidence strongly suggests that the ballot labels do not have a coercive effect on candidates' decisions to sign the pledge or not.

Article VIII involves commentary by the people on an incumbent candidate's voting record or on a non-incumbent candidate's silence. As described above, this commentary did not exert a coercive effect on candidate behavior in practice. But is the effect coercive in theory? Although this case presents a novel question in the area of compelled speech, there are relevant precedents that consider the coerciveness of government speech in other

contexts. In such cases, the Supreme Court has taken into account the fortitude of the individual who must endure the speech. For example, in the case of *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court rejected the argument that having legislators endure the religious speech of a state chaplain violated the Establishment Clause. In so holding, the Court noted that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' . . . or peer pressure. . . . " *Id.* at 792 (internal citations omitted). In contrast, where the individuals exposed to public prayer are minors, the Court has acknowledged that they may be more susceptible to coercion: "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity. . . . " *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

In the present case, the candidate, in addition to being an adult, is also a public figure. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court recognized that public figures are expected to endure a greater amount of coercive or derogatory speech than are ordinary citizens.

> If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' *Craig v. Harney*, 331 U.S. 367, 376 (1947) . . . , surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

376 U.S. 254, 273. The same reasoning applies in the present case. Candidates for public office are adults who choose to enter the treacherous, turbulent waters of political campaigns and elections. *See id.* at 273, n.14. A thick

skin is required. Candidates are expected to take and defend positions on a wide range of issues, many of which they would probably rather not discuss. Candidates for public office must also endure criticism from a variety of sources. Clearly, this type of individual may be expected to withstand many influences, including commentary by citizens in the form of a ballot label. With this consideration in mind, it is not surprising that seven out of nine candidates in the California elections brushed the pledge aside even though they would face the ballot labels. Given the type of individuals involved, the ballot labels cannot be assumed to be inherently coercive.

The Eighth Circuit found the labels to be "particularly harmful because they appear on the ballot, an official document produced by the state." *Gralike*, 191 F.3d at 918. Government property, however, is regularly made a vehicle for speech of the majority. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding display of creche on government property); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (upholding display of menorah on government property). In *Lynch*, the Court noted the long history of executive orders and other official announcements by Presidents and Congress proclaiming Christmas and Thanksgiving National Holidays in religious terms. *Id.* at 676. The Eighth Circuit supposed that the ballot labels would create the impression of official disapproval, because they appear on state-produced documents. *Gralike*, 191 F.3d at 918-19. By this logic, the mere fact that the creche in *Lynch* was displayed on government property would have created a public impression of official approval of Christianity.

B. Informational Ballot Labels Do Not Constitute Punishment of Representatives or Candidates

The Eighth Circuit contended that a ballot label commenting on a candidate's decision not to take a term limits pledge amounted to punishment: "we believe that the Missouri Amendment in fact threatens a penalty that is serious enough to compel candidates to speak – the potential political damage of the ballot labels." *Gralike* at 918. This conclusion is flawed analytically, empirically, and as matter of precedent.

Analytically, the Eighth Circuit failed to precisely identify the source of the "penalty" faced by a candidate. The primary penalty that the candidate fears, and presumably seeks to avoid, is electoral defeat. However, under Article VIII, the state does not respond to a refusal to pledge by handing the candidate electoral defeat. Rather, the state provides factual information to the voters. The penalty, if it occurs, is not delivered by the state. The penalty is the result of a series of unconcerted private choices by citizens in the voting booth. Thus, private citizens administer the penalty. And they do so without any certainty that the penalty will actually occur when the votes are counted.

The distinction between the state imposing a penalty and the state providing information that may or may not lead to the private imposition of a penalty is a critical one. The Court has recognized that the Constitution affords individuals little protection against such privately-imposed penalties. In *Paul v. Davis*, 424 U.S. 693, 706 (1976), the Court held that the labeling of a person as an "active shoplifter" is not a punishment by the state

sufficient to trigger procedural or substantive due process protection. This labeling informed private decisions that severely inhibited the plaintiff's ability to enter businesses or obtain employment. *Id.* at 697. However, the Court recognized the distinction between public and private punishment, quoting Justice Jackson's concurrence in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), where he dismissed the consequences resulting from being designated a "subversive" as "sanctions applied by public disapproval, not by law." *Paul*, 424 U.S. at 703-704 (*citing McGrath*, 341 U.S. at 183-184). The same may be said in the present case. An electoral loss suffered by a candidate would be the result of public disapproval expressed at the polls, not a legal penalty imposed by the state.

Empirically, the conclusions of the Eighth Circuit are deeply flawed. The Eighth Circuit not only supposed that few candidates would risk not signing the pledge (an incorrect assumption, as discussed above), but also assumed that those who did take the risk would suffer grave "political damage." *Gralike*, 191 F.3d 918. Once again, the Eighth Circuit's unsupported assumption about electoral behavior was well off the mark. The available empirical evidence indicates that the ballot labels are not determinative of election outcome. In two of the three special elections in California in 1998 and 1999, the winners were candidates who had refused to take the term limit pledge and who received ballot labels next to their names. In the Ninth District special primary election for State Senator, the winner was Don Perata, who had declined to take the pledge and had received a ballot label under his name. *Alameda County Special Primary*

Election, Sept. 1, 1998, Summary Report (Alameda County, Calif., Registrar of Voters (Sept. 4, 1998)). And in the Sixteenth District special primary election for State Representative, the winner was Elihu Harris, who also had refused to take the term limit pledge and had received a ballot label under his name. *Alameda County Special Primary Election, Feb. 2, 1999, Summary Report* (Alameda County, Calif., Registrar of Voters (Feb. 4, 1999)). This empirical evidence suggests strongly that, in the real world, the Article VIII ballot label is not determinative of electoral outcome. Indeed, party labels, which are mandated on ballots across the country, correlate much more closely with victory or defeat at the polls. The Eighth Circuit made an evidently erroneous assumption when it linked the Article VIII ballot labels to defeat at the polls. This assumption is critical to the Eighth Circuit's holding. Without a significant probability of defeat at the polls, there is no penalty – not even one imposed by individual private citizens.

The Eighth Circuit's analysis of the relevant Supreme Court precedents in this area is also flawed. For a compelled speech claim to be valid, there must be some penalty or punishment that forces the individual to speak. *See Wooley v. Maynard*, 430 U.S. 705, 707-708 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). Indeed, it is difficult to imagine how speech could be "compelled" without the threat of some sort of sanction to do the compelling.[4] Yet, the Eighth Circuit

[4] Of course, compulsion can be produced with a carrot, as well as a stick. However, it seems rather unlikely that a constitutional violation would be found where a state rewarded a select few citizens who spoke as directed by the state. The "compelled" speaker would be better off after speaking, and the rest of the citizenry would have experienced no infringement of their speech rights.

asserted that "compelled speech has never been limited to those cases in which the state seeks to impose or compel speech through threat of financial or criminal sanction." *Gralike*, 191 F.3d at 918. In support of its contention, the Eighth Circuit misleadingly quoted *Miami Herald*, 418 U.S. at 258: "Even if a newspaper would face no additional costs to comply . . . the Florida statute [compelling speech] fails to clear the barriers of the First Amendment. . . . " *Gralike*, 191 F.3d at 918. However, the reason that the additional cost was irrelevant was because, under the Florida statute, editors of newspapers that did not allow criticized political candidates a right of reply already faced civil liability and the possibility of being charged with a first-degree misdemeanor. *Miami Herald*, 418 U.S. at 244. The compulsion generated by such penalties was an "intrusion into the function of editors." *Id.* at 258. Criminal prosecution and exposure to civil liability is precisely the type of tangible punishment that the First Amendment prohibits. Nothing in *Miami Herald* suggested that ethereal "penalties," like ballot labels, should trigger First Amendment scrutiny.

The Eighth Circuit's references to compelled speech cases are largely inapposite to the case at hand. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Miami Herald*, 418 U.S. 241 (1974); *Wooley*, 430 U.S. 705 (1977); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S.

507 (1991); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). Whether it was expulsion, revocation of a utility monopoly or license, or some financial or criminal penalty, in all of the cited cases the speaker faced tangible punishment. Unlike the laws at issue in those cases, Article VIII merely requires the candidate to endure a message describing his official conduct. This can hardly be regarded as a punishment. If so, it is a punishment endured daily by public officials across the nation. Most political entities in the United States publicize the votes of office-holders and the political contributions made to candidates. Where controversial issues and large contributions are concerned, the dissemination of this information is a source of some consternation to politicians. But it is necessary to encourage responsible behavior by elected representatives.

The Supreme Court has never found a violation of the First Amendment where a state responds to the actions of individuals by communicating information on state property. In *Paul*, the Court held that the distribution of flyers identifying the plaintiff as an "active shoplifter" did not constitute a punishment by the state sufficient to trigger procedural or substantive due process protection. 424 U.S. at 706 (1976). Despite the stigma of being branded an "active shoplifter," the Court rejected the claim that the state may not publicize a record of an official act such as an arrest. *Id.* at 713. Voting records of representatives, like arrests, are official acts that the state has a right to publicize. Although *Paul* was decided on substantive and procedural due process grounds, the Court indirectly addressed the First Amendment. In *Paul*, the Court reviewed the many opinions written by the Justices in *Joint Anti-Fascist Refugee Comm.*

v. McGrath, 341 U.S. 123 (1951). In *McGrath*, the Court considered whether the Attorney General, purporting to act in pursuance of an Executive Order, could designate certain groups as "communist" or "subversive." The Court in *Paul* approvingly quoted Justice Reed's dissent in *McGrath*, in which he argued that a stigmatizing designation of an organization by the state, without more, did not "subject them to any punishment or deprive them of liberty of speech or other freedom." *Paul*, 424 U.S. at 704 (*citing McGrath*, 341 U.S. at 202). The clear import of *Paul* is that merely being stigmatized by the state is not a penalty of constitutional dimension. Moreover, being labeled an "active shoplifter," or "subversive" is undoubtedly more mortifying than being labeled an opponent of term limits.

It may be argued that Article VIII creates a state-inflicted stigma coupled with a loss of employment, which *Paul* suggested is a penalty serious enough to trigger constitutional protection. *Id.* at 701. However, losing an election is more analogous to not being hired than to being fired. And candidates certainly have no constitutional right to be elected. Plus, as noted above, electoral defeat would not be the result of state action, but rather the result of a series of unconcerted private choices by individual citizens at the polls.

Paul also required a connection between the state-imposed stigma and the loss of employment. *Id.* at 709. If *Paul* is the standard, the respondent should be required to demonstrate some nexus between the ballot label and losing the election. This standard would require the polling of voters in an attempt to determine whether a majority was persuaded by the ballot labels to vote against the

candidate. This standard, however, draws too much of an analogy between normal employment and holding elected office. Plainly, there are pronounced differences between the two situations.[5] Moreover such an analogy completely ignores the necessary interplay of free speech and voting that is essential in a democratic republic. To the extent that speech about a candidate leads to voter retribution against the candidate, it is a consequence that the First Amendment contemplates. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (*citing Stromberg v. California*, 283 U.S. 359, 369 (1931)).

C. Representatives and Candidates Have Adequate Opportunity To Disassociate Themselves From the Pro-Term Limits Message

The Court, in evaluating whether a person has been compelled to speak, has considered the degree to which the "objectionable" message will be associated with the person and whether the person can disavow any connection with the message. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 576-77

[5] For example, employees can expand their prerogatives and powers by bargaining with employers, whereas representatives cannot; and representatives are chosen to govern those who choose them, whereas employees rarely exercise authority over their employers.

(1995). In *PruneYard*, the Court reviewed whether a state constitutional provision protecting the right of high school students to distribute pamphlets in a shopping mall unconstitutionally compelled the speech of the shopping mall owner. The Court held that an owner of a shopping mall could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." *Id.* at 87.

In the present case, a candidate can easily disassociate himself from the state's message. There is nothing to prevent the representative from denouncing term limits. He can sign the pledge while publicly declaring that congressional term limits are undesirable. He can state his opposition to term limits in every speech that he gives and in every piece of campaign literature that he produces. He can reiterate his opposition to term limits in the myriad questionnaires that he receives from newspapers and interest groups. Similarly, an incumbent candidate can easily disassociate himself from the pro-term-limits message while still following his instructions from the voters of Missouri. He can cast his vote for term limits and simultaneously explain to the public that he is only doing so in order to comply with the people's instructions. He can loudly criticize any term limits proposal, and he can even urge his fellow legislators to vote against term limits. There are innumerable opportunities for candidates to state their position on the term limits issue. Because Article VIII in no way affects what a candidate says and what he declares his position on term limits to be, disassociation from the pro-term-limits message is easily achieved.

The Eighth Circuit also attempted a slight twist on the compelled speech argument. It suggested that if a candidate resists his instructions and declines to sign the pledge or vote in favor of term limits, then the label that failed to compel him becomes compelled speech itself. In other words, voters who read the message, "Declined to pledge to support term limits," will ascribe to the candidate the view that he does not support term limits. That, according to the Eighth Circuit, is also compelled speech. *Gralike*, 191 F.3d at 919.

However, this theory collapses quickly under its own weight. If it is unconstitutional for the state to speak about an individual whenever that speech has the effect of encouraging others to (correctly or incorrectly) ascribe a point of view to that individual, then some rather absurd conclusions must follow. A state could not print party labels below candidates' names on ballots. The label "Independent" placed below the name of a candidate who did not wish to declare a party might cause voters to assume that the candidate is a moderate, when in fact he is not. An incumbent governor (the spokesman for the state) could not speak about his opponent in an upcoming election. After all, such speech might cause voters to misunderstand what his challenger's views really are. Moreover, under the Eighth Circuit's theory, the state in *Paul* would be deprived of its right to distribute flyers identifying someone as an "active shoplifter," because people might incorrectly ascribe to the identified person the view that he enjoys shoplifting, when in fact he dislikes it. Or consider Justice Rehnquist's hypothetical billboard in *Wooley*, 430 U.S. at 721 (1977) (Rehnquist J., dissenting) (arguing that state-sponsored billboard

proclaiming "Live Free or Die" would not compel speech). Presumably, the state could permissibly erect a billboard displaying the caption, "Disregarded Voters' Instructions on Term Limits," followed by a list of candidates' names. Under the Eighth Circuit's compelled speech theory, however, persons viewing this billboard might ascribe a point of view to a candidate and thereby compel the speech of the candidate. Plainly, the Eighth Circuit's definition of compelled speech encompasses far too much activity.

II. THE EIGHTH CIRCUIT ERRED IN APPLYING STRICT SCRUTINY RATHER THAN THE FLEXIBLE STANDARD OF REVIEW APPROPRIATE FOR WEIGHING FIRST AMENDMENT CHALLENGES TO ELECTION LAWS

In deciding which standard of review to apply in this case, the Eighth Circuit asserted simplistically that because speech is regulated and because Article VIII is "content-based," then strict scrutiny applies. *Gralike*, 191 F.3d at 919-920. However, this reasoning predicates two debatable assumptions. The awkward language used by the Eighth Circuit belies this difficulty: "the Amendment burdens candidates' right to free expression by compelling them to state or act in such a way as to *portray a position* on the § 16 term limits proposal." *Id.* at 919 (emphasis added). As noted above, Article VIII does not restrict a candidate in the position that he "portrays." He may speak adamantly against term limits while acting in accordance with the voters' wishes, he may say nothing, or he may disregard his instructions with the knowledge

that voters will be informed of his action. Article VIII does not entail any scrutiny of the candidate's speeches or statements about term limits. It looks solely at the candidate's voting, or in the case of a non-incumbent, his decision whether to pledge to vote a certain way in the future. The second dubious assumption in the Eighth Circuit's reasoning is that Article VIII "is content-based because it addresses the issue of term limits, completely ignoring all other issues." *Id.* at 919-920. The mere fact that Article VIII is limited in scope to the term limits issue does make it a content-based law. By this reasoning, a more comprehensive instruct-and-inform law covering every imaginable issue would not be content-based.

However, even if the Eighth Circuit's two assertions were correct, Article VIII would not automatically be placed under strict scrutiny. The Supreme Court has produced a substantial body of case law concerning the regulation of the content of election ballots. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding a state's ban on multi-party, or "fusion" candidates); *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding a state law that completely prohibited write-in votes in primary and general elections); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (striking down a state's early filing deadline for independent candidates for President). In such cases, individuals challenging the ballot regulations have asserted First Amendment rights. The Court has acknowledged that with elections, there inevitably must exist a significant amount of regulation as to what is printed on ballots. The Supreme Court has recognized the danger of voter confusion and candidate fraud that might otherwise occur: "As a practical matter, there must be a substantial

regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The Court's understanding that it must allow the states room to regulate the content of election ballots has led it to articulate a specialized form of analysis in such cases. A sliding scale is used when scrutinizing candidates' First Amendment claims in this context. Courts must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate 'against' the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (*citing Anderson*, 460 U.S. at 789). The appropriate level of scrutiny depends on whether the regulation is a "severe" restriction or a "reasonable, nondiscriminatory restriction" of First and Fourteenth Amendment rights. *Id.* If it is the former, strict scrutiny is applicable; if it is the latter, the state need only present an "important regulatory interest" to justify the restriction. *Id.*

It cannot be seriously contended that a mere ballot label that conveys information to voters constitutes a "severe" restriction on the exercise of First and Fourteenth Amendment rights. At worst, the ballot label is an inconvenience to representatives who would rather not have their conduct brought to the attention of voters. As noted above, it in no way restricts what the candidate may say about term limits or any other issue. Nor does it discriminate against any class of candidates: each candidate may choose whether or not to take actions triggering the label, just as he may choose his party. In weighing

this tenuous injury against the interest of the state in communicating information about elected officials to voters, the state's interest clearly outweighs the rights of the respondent. The people of Missouri decided that term limits is an important enough constitutional reform to necessitate instructions to candidates and representatives. Because candidates may easily obscure their voting and their position on this issue, the people of Missouri deemed it necessary to provide factual information on the ballot about candidates' actions. They decided that having that information on the ballot was just as useful as knowing the candidate's party. It was more useful than knowing the candidate's occupation or city of residence – information provided on many ballots across the country. Because there is no severe restriction on the First Amendment rights of the candidate, and the state has an important interest in communicating this information to voters, Article VIII survives the appropriate First Amendment scrutiny.

III. EVEN IF ARTICLE VIII IS REVIEWED UNDER STRICT SCRUTINY, THE LAW SERVES A COMPELLING STATE INTEREST AND IS NARROWLY TAILORED TO SERVING THAT INTEREST

Even if Article VIII were to be considered a severe restriction on First Amendment rights and strict scrutiny were to be applied, it would withstand such scrutiny. The citizens of Missouri expressed at least two compelling interests when they voted to enact Article VIII: an interest in informing themselves about the actions of their elected representatives, and an interest in enacting the reforms embodied in a congressional term limits amendment.

With respect to the first interest, the Supreme Court has recognized the importance of providing information to voters. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expression of the popular will in a general election." *Anderson*, 460 U.S. at 796. Although the Court in *Anderson* only acknowledged that the state's interest in fostering informed voting was "important and legitimate," without considering whether the interest rose to the compelling level, *id.*, there can be little doubt that voters have a compelling interest in demanding information that they deem relevant regarding candidates for political office.[6] Such information is essential to the vitality of representative democracy. Without it, elections become little more than a charade, devoid of meaningful expression of voter preferences.

The second compelling interest possessed by the citizens of Missouri is their interest in pressing for a constitutional reform that they favor. The U.S. Constitution contemplates that "We the People" have some role in its

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[6] The obvious exception to this principle would occur where a state printed on the ballot information identifying a candidate's race, which the Court has held to violate the Equal Protection Clause of the Fourteenth Amendment. *Anderson v. Martin*, 375 U.S. 399 (1964). In the present case, however, the Equal Protection Clause does not operate to shield candidates who decline to sign the term limits pledge. If it did, then the provision of party information on ballots would be similarly vulnerable to Equal Protection challenge. In many states and cities, one political party enjoys overwhelming public support. In such environments, candidates who identify themselves with a disfavored party would undoubtedly prefer that party information not be displayed on the ballot.

creation and amendment. U.S. Const. preamble. In order to secure the constitutional reform that they seek, Missouri citizens must direct their representatives to act on their behalf. Reformers who favor term limits often point to the corrupting influence that long congressional terms exert on office holders. Regardless of whether the reformers have come up with an effective cure for the corruption that they perceive, they have a compelling interest in attempting to improve the integrity of the political system. A similar state interest was present in *Buckley v. Valeo*, 424 U.S. 1 (1976). In that case, the Court found that the public interest in reducing the appearance of corruption in representative government was a sufficient interest to override First Amendment concerns regarding campaign contribution limits. *Id.* at 27. "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26. In enacting Article VIII, Missouri voters expressed their belief that long incumbency also undermines the integrity of our system of representative democracy. Whether they are correct or not, they have a compelling interest in pursuing the reform that they desire.

Article VIII is narrowly tailored to serving these compelling interests. The Eighth Circuit credulously suggested that voluntary programs, such as debates and voter information guides, could adequately serve the voters' interest in obtaining information regarding the candidates' support for congressional term limits. *Gralike*, 191 F.3d at 921. This suggestion ignores the fact that if a

candidate declines to participate in such voluntary programs, he may continue to conceal his actions or intentions with respect to term limits. Or, he may simply mischaracterize his own voting record. Moreover, this suggestion grossly underestimates the obfuscation that occurs when candidates are asked to take a position on term limits. Representatives often voice support for term limits when stumping before the voters even though they obstruct term limits when in Congress. This sleight of hand was best demonstrated when, "[i]n February 1997, representatives obscured their opposition to congressional term limits by voting on several variations of the amendment, allowing them to vote in favor of at least one, secure in the knowledge that none would pass."[7] Voluntary debates and information pamphlets are ineffectual against such deceptive behavior. Ballot labels are therefore necessary to inform voters whether or not their representatives have complied with their instructions. Drawing a line in the sand, in the face of such doublespeak, allows citizens to bring accountability back to public office. The use of ballot labels guarantees that all voters will receive the desired information regarding their representatives and candidates. Because the state will be unable to reach as many voters through other means, such as voter information guides or debates, the ballot label is narrowly drawn to advance the citizens' compelling interests.

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[7] Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 6 (1999).

IV. MISSOURI'S ARTICLE VIII BALLOT LABEL IS ITSELF CORE POLITICAL SPEECH OF THE PEOPLE, PROTECTED BY THE FIRST AMENDMENT

In the debates of the First Congress regarding the proposal of what would become the Bill of Rights, James Madison considered an explicit "right to instruct" provision to be unnecessary. He recognized that the proposed freedom of speech that would become part of the First Amendment would adequately protect the right of the people to speak collectively in the form of constituent instructions.[8] While it is may seem odd that the body politic can hold First Amendment rights, such a view was consonant with political thought at the time of the founding. "Public liberty was . . . the combining of each man's individual liberty into a collective governmental authority. . . . "[9] Indeed, "public liberty was most fully realized when the people themselves exercised their role in government." *Id.* at 25. Through the use of ballot labels and constituent instructions, the people of Missouri are exercising a public liberty to communicate specific information related to the conduct of public figures. It is core political speech that is, itself, protected by the First Amendment. The labels provide information that the majority of voters wish to receive on a matter of great public concern. As the Court noted in *Buckley*, such information on the attributes of political candidates should be given the broadest protection by the First Amendment.

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[8] *Id.* at 69, citing 1 *Annals of Cong.* 766 (Joseph Gales ed., 1789).

[9] Gordon S. Wood, *The Creation of the American Republic 1776-1787*, 24 (2d ed. 1998).

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." 424 U.S. at 14.

In *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court acknowledged that such speech rights of the majority exist and that when the government speaks for the majority it may regulate the content of its own expression. *Id.* at 833 ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker. . . . "). Moreover, the Court has noted that the First Amendment recognizes "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (*citing Maher v. Roe*, 432 U.S. 464, 475 (1977)). The ballot label is not a direct interference with speech rights, but merely commentary regarding a course of action that the representative or candidate chose not to take. This commentary is speech. Representatives and candidates are still free to speak and vote as they wish, but there is no guarantee they may do so without comment. And this has been so since the First Amendment was ratified. "[T]here is practically universal agreement that a major purpose of th[e] [First] Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates. . . . " *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*citing Mills v. Alabama*, 384 U.S. 214, 218 (1966)). If a candidate objects to Article VIII and to the message conveyed on the ballot labels, the appropriate remedy is found at the ballot box, not the courtroom. The

candidate is free to attempt to persuade the people of Missouri to withdraw their instructions and to rescind Article VIII. "When the government speaks . . . to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S.Ct. 1346 (2000).

The long-standing practice of legislative censure of government officials is a form of collective speech that is, in some ways, analogous to Article VIII. In censuring, the members of the legislature collectively exercise their First Amendment speech rights to comment on the actions of a government official.[10] The condemned conduct of the official may or may not, itself, involve expressive activity. Censure differs from the Article VIII ballot labels in that it is unambiguously critical, rather than merely informative, and it creates a permanent legislative record of the condemnatory message. The U.S. House and the Senate each have passed more than a dozen resolutions criticizing the misconduct of presidents and other high-ranking officials.[11] The most notable instance occurred when the Senate censured President Andrew Jackson for firing his Treasury Secretary for refusing to carry out his instructions to withdraw national bank funds and deposit them in state banks.[12] In addition to resolutions of censure, the

[10] Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 377 (1999).

[11] Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. RICH. L. REV. 33, 35 (1999).

[12] *Id.* at 35-36.

House and Senate have passed thousands of resolutions expressing opinions on various matters of public concern.[13] Taken together, resolutions of censure and resolutions merely expressing collective opinion represent a long tradition of government speech that is informative, critical, or both.

Respondent cites *Timmons v. Twin Cites Area New Party*, 520 U.S. 351, 363 (1997), for the proposition that "[b]allots serve primarily to elect candidates, not as fora for political expression." Res. Brief on Petition for Writ of Cert. 19. *Timmons*, however, is inapposite because it dealt with candidates wishing to express views on the ballot. Here the state, as opposed to a candidate, is speaking on the ballot. A contrary holding in *Timmons* effectively would have enabled candidates to appropriate state property for their own use. The Court's opinion still left room for the state to speak on its own property. Precisely because the ballot is the state's property, the state must have a substantial amount of control over what is placed on it. Nothing in *Timmons* suggested that the body politic may not use the ballot for political expression. Indeed, it may be inferred from *Timmons* that states retain considerable discretionary control over the content that may be placed on the ballot.

[13] *Id.* at 36.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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