No. 99-929

IN THE

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, *et al.*,

Respondent.

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

REPLY BRIEF FOR PETITIONER

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202)736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor

JAMES R. MCADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

* Counsel of Record

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In their brief, Respondents demonstrate that they do not understand the essential import of the present case.[1] This is not a case about the right of the State to coerce Senators and Representatives on routine legislative matters. This case is about something much more fundamental: the "manner" in which the State conducts elections to promote the State electorate's strongly held preference to enact an amendment to the United States Constitution making representative democracy more responsive to the voters. Because the exercise of this right does not infringe on any constitutional rights or coerce

[1] Despite the fact that Respondents previously claimed that this case presented myriad constitutional concerns, Resp. Br. in Opp. 3 & 6, they now attempt to muddle the case by proposing a single, misleading question. Resp. Br. i. But this Court granted certiorari on three questions raising four distinct constitutional issues, and each of these questions must be resolved to determine the validity of the provisions of Article VIII as they relate to incumbent and non-incumbent candidates.

speech by candidates, Missouri's Article VIII is constitutional in its entirety. Accordingly, the attempt by Respondents, the United States and the Eighth Circuit to undermine Missouri's popularly adopted effort to enhance the quality of representation of federal officials should be rejected and the holding below reversed.

I. THE FRAMERS' REJECTION OF A PROPOSED CONSTITUTIONAL INSTRUCTION PROVISION IS IRRELEVANT BECAUSE ARTICLE VIII'S INSTRUCTION, UNLIKE THOSE IN THE PROPOSED PROVISION, IS NOT BINDING.

Notwithstanding that the court of appeals purported to find Article VIII in violation of four different constitutional provisions, Respondents devote significant attention (Resp. Br. 21-32) to an argument not grounded in any existing constitutional provision, i.e., that the Framers rejected a proposal to allow the States to instruct congressional representatives. Their argument is irrelevant both legally and factually. It is certainly strange to argue that the failure to adopt a particular constitutional amendment says anything about whether the exercise of a particular power by the people of a State is prohibited. *See* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125, 1133 (1983); *see also Burns v. United States*, 501 U.S. 129, 136 (1991) ("[n]ot every silence is pregnant") (alteration in original) (internal quotation marks omitted). Moreover there is no comparison between the constitutional provision the Framers declined to enact and Article VIII. At the time, instructions were formally binding. 1 *Annals of Congress* 763, 764 (Joseph Gales ed., 1789). A Representative who failed to act in accordance with their instructions would be deemed to have violated the Constitution itself. *Id.* at 764. Further, it was believed by many that any law passed in violation of the instructions of a majority of the Representatives would be of no force. *Id.* at 767.

In part, it was because of the legally binding nature of the proposed instruct provision that Madison opposed it. Madison believed that the people had no right "to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions." *Id.* at 766. Thus, as Respondents accurately contend, Madison was against binding instructions. Resp. Br. 22-23.

His opposition to binding instructions was not the only reason Madison opposed the instruct provision. He was also against it because he thought instructions, if non-binding, were redundant. To the extent the proposed instruct provision merely acknowledged the right of the people to instruct their Representatives, who were then free to disregard the instructions at their peril, such a provision was unnecessary. It was already provided for by the First Amendment.[2] 1 *Annals of Congress* at 766.

The instructions in Article VIII are the same as those that Madison already believed to be protected by the Constitution. They are not the type of binding instructions that he and the other Framers rejected. Missouri's instructions merely inform the State's congressional delegation of their constituents' wishes. The Senators and Representatives remain free to vote as they deem appropriate. In sum, Respondents' focus on the Framers' actions concerning congressional instructions provides no constitutionally textual basis for challenging Article VIII and does nothing to undermine the extensive history of the use of instructions set out in Petitioner's opening brief. Pet. Br. 10-17.

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[2] Alexander Hamilton observed that in the Constitution "the people surrender nothing; and as they retain everything they have no need to particular reservations." *The Federalist No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Despite this, Respondents erroneously contend that the people's failure to include an unnecessary reservation of right precludes them from issuing non-binding instructions to their representatives. Resp. Br. 13 n.9.

II. ARTICLE VIII IS A VALID EXERCISE OF THE ELECTIONS CLAUSE, AND IT DOES NOT VIOLATE ARTICLE V OR PRINCIPLES OF FEDERALISM.

Article VIII was passed pursuant to the people's delegated power to regulate the manner of elections to promote democratic values. It was put on the ballot by the people of Missouri. It was voted on and approved by the people of Missouri.[3] And it was placed in the State Constitution by the people of Missouri. While the Elections Clause purports to grant federal power to the State Legislatures as Respondents contend, this point overlooks the basic fact that all power in our system emanates from the people. *The Federalist No. 22*, at 152 & *No. 84*, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Here the people exercised an aspect of that power – the right to instruct their congressional delegation and the right to receive timely and accurate information about the behavior of federal candidates.

Apparently recognizing these inherent rights, Respondents and their *amici* fail to argue that the people lack the right to alter the form of their government pursuant to Article V by instructing their delegates to Congress. *See* Resp. Br. 47-50. Instead, Respondents argue that it is the State that will place the information on the ballot that allegedly coerces members

[3] In their briefs, Respondents and the Missouri League of Women Voters (LWV) raise a purely academic issue. They point out that "a majority of voters in a particular congressional district may *not* have voted in favor of term limits." LWV Br. 11; *see also* Resp. Br. 41. Thus, a candidate who votes against the people's term limits proposal "may be following the instruction of a majority of the voters in her district," but she will have a ballot notation placed after her name. LWV Br. 12; *see also* Resp. Br. 41. This issue is not presented here because Article VIII was passed by the voters in each of Missouri's Congressional Districts. *Official Manual of the State of Missouri 1997-1998*, at 103 & 591 (Jim Grebing ed., 1997). As a result, no candidate in Missouri will be faced with the choice hypothesized by the Respondents and LWV.

of Congress into proposing a constitutional amendment. Concededly, it is the Secretary of State who is actually responsible for physically placing the information on the ballot, but she acts solely at the behest of and as an agent for the electorate. She places ballot information next to an incumbent candidate's name if, and only if, the candidate meets one of the people's criteria specifically outlined in Article VIII, Section 17(2)(a-g);[4] and next to a non-incumbent's name if, and only if, the candidate refuses to take the pledge offered by the people as set forth in Article VIII, Section 18. In either case, the Secretary has no discretion, and her duties are purely ministerial.

Further, the only role played by the judiciary is to ensure that the Secretary of State exercises no discretion, and that she simply performs the duties assigned to her by the citizenry. If either an elector or an elected official believes that the Secretary either improperly placed or improperly failed to place a ballot notation, then he or she may challenge the matter before the Missouri Supreme Court.[5] And the

[4] The United States apparently misunderstands these provisions of the Missouri Constitution. In its brief, it claims that "[a]n incumbent candidate could scarcely make speeches in Congress against the term limits amendment and escape the ballot label, since the Amendments instruct Members to use *all* of their delegated powers to pass the amendment." U.S. Br. 20 (emphasis in original). While the instruct provision of Article VIII does direct elected officials to use all of their powers; it is separate from the inform provision. Under the inform provision, a ballot label will only be placed after an official's name if he fails to engage in the eight specified behaviors described in Section 17(2). And Section 17(2) does not in anyway inhibit an elected official's right to speak freely. Thus, an elected official who merely speaks out against term limits escapes the imposition of the ballot notation. Unfortunately, the failure to differentiate between the instruct and the inform provisions of Article VIII is a common mistake. It was made by the district court, the court of appeals, and now by the United States itself.

[5] The United States claims this procedure will require Senators and Representatives to "justify" their actions to the judiciary, and thus it runs

court will base its decision only on the factors contained in Sections 17(2) and 18. No impermissible executive or judicial action is taken;[6] these government officials simply assure that the electorate has before it the accurate information requested.

Respondents seem to suggest that because federal legislators have national responsibilities exceeding the geographical boundaries of their districts or states, that legislators enjoy autonomy from their constituents. Resp. Br. 33. Federal legislators, once elected, are free to ignore their constituents' wishes during their term and this autonomy continues unabated under Article VIII. But this autonomy ends when the legislator seeks re-election. At that moment, autonomy yields to accountability. *See The Federalist No. 57*, at 352 (James Madison) (The Constitution's protections "would be found very insufficient without the restraint of frequent elections. Hence . . . the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people."). All Missouri voters have done is decide that, while making their political decisions, they want to know whether their autonomous legislators have behaved in a fashion inconsistent with their constituents' wishes. Such knowledge does not violate principles of federalism and is entirely consistent with the Elections Clause.

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afoul of the Speech or Debate Clause. U.S. Br. 24. But the United States misunderstands Missouri's procedure. If an elected official failed to perform the duties outlined in Mo. Const. art. VIII, § 17(2)(a)-(g), no amount of justification or rationalization will prevent the placement of ballot information after his name. And if an elected official actually performs the duties cited in Article VIII, no amount of professed or apparent animus to the people's proposed Term Limits Amendment will result in the placement of ballot information after his name.

[6] Because Article VIII does not involve any impermissible action by either the executive or judicial branch, it does not violate the Speech or Debate Clause. *United States v. Johnson*, 383 U.S. 169, 179 (1966).

Respondents are correct in noting that, pursuant to the Elections Clause, only the "State Legislature" may regulate the "Times, Places and Manners of holding Elections." Resp. Br. 12 (quoting U.S. Const. art. I, § 4, cl. 1). Thus, the State may pass laws "governing just 'the *mechanics* of congressional elections.'" Resp. Br. 13 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)) (emphasis in Resp. Br.). Though Respondents properly acknowledge the grant of power, their argument that the delegation is inadequate to support Article VIII fails because they do not appreciate the breadth of the grant in Article I, Section 4.

Initially, seizing on the "State Legislature" language of the Elections Clause, Respondents contend that Article VIII is invalid because it was passed by popular referendum and not by a State Legislature. Resp. Br. 12-13 n.8. They distinguish *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), in which this Court recognized that an elections law passed by the people and not the State Legislature was valid, by noting that Congress, by statute, had there expressly approved use of the referendum process. Thus, Respondents argue that, in the absence of Congressional action, only a State Legislature may pass a law impacting federal elections. This argument is without legal merit. As this Court has explained:

> It is manifest that the Congress had no power to alter Article 1, section 4, and that the Act of 1911, in its reference to state laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision. And it was because of the authority of the State to determine what should constitute its legislative process . . .

under the Elections Clause that the regulation in *Davis* was sustained. *Smiley v. Holm*, 285 U.S. 355, 372 (1932). In Missouri the people are included in the legislative process. *See* Mo. Const. art. III, § 49. And as this Court noted, that is the State's right. *Smiley*, 285 U.S. at 372-73. Therefore,

Article VIII is not invalid simply because it was passed by the people.

Nor did the people exceed the authority granted by Article I, Section 4. As mentioned, the people may regulate the "manner" and "mechanics" of elections. U.S. Const. art. I, § 4, cl. 1; *Foster v. Love*, 522 U.S. 67, 69 (1997). This is a "broad power." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986)). Moreover, there is no reason for the Court to artificially restrict the authority of the State because Article I, Section 4 contains its own safety valve by which Congress can override any election procedure the State imposes. Thus, the structure of Article I, Section 4 indicates that the States were granted extensive power in the election process. And Article VIII falls well within the sweep of that power.

Article VIII is merely a regulation on the manner and mechanics of elections. It regulates what information appears on the ballot. Thus, it is similar in kind to other ballot-oriented regulations, such as the placement of party labels and nicknames on the ballot. And this Court has never found the placement of these items on the ballot to be unconstitutional.[7]

In fact, in rejecting an assertion that party labels mislead voters, the Court stated that "[t]o the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candi-

[7] Respondents contend that, pursuant to the Court's holding in *Timmons*, the Elections Clause "plainly forbids" the people from communicating to themselves on their own ballot. Resp. Br. 19. This is a wholly incorrect reading of *Timmons*. In *Timmons*, the Court held that it was constitutionally sound for a State to curtail a political party's use of the ballot as a communicative tool. But the fact that a State *may* curtail an activity does not remotely suggest the conclusion that a State *must* curtail an activity. And, the *Timmons* Court did not issue a mandate requiring States to stamp out any attempt to use the ballot as a communicative tool.

dates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986). Article VIII does nothing more. And despite the fact they bore the burden of demonstrating that Article VIII was not a regulation of the manner of elections, Respondents offered no evidence to the District Court to the contrary. J.A. 27-28.

Instead, in a new attempt to rebut Article VIII's validity, Respondents try to incorporate into Article I, Section 4, the definition of time, place, and manner utilized by this Court in its First Amendment jurisprudence. Resp. Br. 13-14 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). This Court has never used the First Amendment's definition of time, place and manner when interpreting the Elections Clause. Nor is there any indication that the Court even considered the Elections Clause when it developed its First Amendment content-neutrality doctrine. The mere coincidence of language proves nothing. The Constitution is replete with examples of the same language being infused with different meanings. To use an example relevant to the present action, this Court has interpreted State Legislatures to mean only State Legislatures for the purposes of Article V, *Hawke v. Smith*, 253 U.S. 221, 227 (1920), while it has interpreted State Legislature to include actions by the people themselves for the purposes of the Elections Clause.[8] *Davis*, 241 U.S. at 568-569; *Smiley*, 285 U.S. at 372.

Like all forms of interpretation, the Court must consider context. Here the Constitution granted the States broad power to regulate the process of elections, which inherently includes

[8] Similarly, for the purposes of the Due Process Clause, this Court has found the word "person" to include corporations, *Minneapolis & St. Louis Railway v. Beckwith*, 129 U.S. 26, 28 (1889); but it does not count corporations as persons for the purposes of the Fifth Amendment's Self-Incrimination Clause. *Doe v. United States*, 487 U.S. 201, 206 (1988).

the content of the ballot itself. The Constitution then delegates to Congress the power to check the State if the former decides in its unfettered discretion that certain ballot forms are inappropriate. In that context, there is no room for additional judicial oversight based on content. Thus, there is no reason to incorporate concepts derived from a very different constitutional context to restrict the State's otherwise sweeping power. Accordingly, the use of similar language is dispositive of nothing. And in the absence of any evidence that this Court or the Framers ever intended to utilize the First Amendment definition of time, place and manner when interpreting the Elections Clause, no purpose is served by importing alien doctrines designed for different purposes into Article I, Section 4.

But even if the Court were to look to First Amendment principles in defining Article I, Section 4, Article VIII would still pass constitutional muster. Respondents and their *amici* allege that Article VIII is not content neutral because it would require the State to look at the content of a candidate's speech. But a statute may still be content neutral even though it requires an analysis of the content of the speaker's speech. *Hill v. Colorado*, ___ U.S. ___, 120 S. Ct. 2480, 2492 (2000). If the analysis is brief and designed to simply determine the applicability of the statute, then the statute is content neutral. That is all that occurs under Article VIII; the Secretary of State reviews the alleged "speech" of Congressional candidates[9] to determine whether ballot information is applicable. This activity does not take Article VIII out of the content-neutral rubric.

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[9] As Petitioner demonstrated in her initial brief, Article VIII does not even regulate speech. Pet. Br. 32-34. Instead, it is a simple comment on behavior. *See, e.g., Spallone v. United States*, 493 U.S. 265, 302-03 n.12 (1990) (Brennan, J., dissenting) ("[w]hile the act of publicly voting on legislation arguably contains a communicative element, the act is quintessentially one of governance;" and thus not protected by the First Amendment).

III. THE BALLOT INFORMATION PROVIDED FOR IN ARTICLE VIII DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF CONGRESSIONAL CANDIDATES.

Article VIII does not run afoul of the First Amendment; it does not compel speech, it does not even regulate speech. To the extent it affects speech at all, the effect is minimal and is outweighed by the citizens' interest in passing Article VIII. Despite these facts, Respondents argue that the people violate a candidate's First Amendment rights by commenting on her actions or inactions.[10]

A. The State Does Not Compel Speech By Providing Information On The Ballot.

Apparently recognizing that Article VIII does not include any specific fine or criminal penalty, Respondents argue that Article VIII's ballot information compels speech because it threatens a politician's "livelihood." Resp. Br. 18.[11] But it is

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[10] Respondents contend that the ballot information provisions of Article VIII violate only their free speech rights. Thus, Respondents are not challenging Article VIII, Sections 15, 16, and 17(1) on First Amendment grounds. This same observation would appear to apply to Respondents' Speech or Debate and Qualifications Clauses claims. It is unclear whether Respondents continue to assert that these sections of Article VIII violate federal Article V, or whether they limit their Article V attack to Sections 17(2), 18 and 19 of Missouri's Article VIII.

[11] Similarly recognizing that the State has a strong interest in ensuring an informed electorate, *see Tashjian*, 479 U.S. at 220, Respondents also attack the quality of the information provided by Article VIII – labeling it "pejorative," Resp. Br. 34, and "misleading," Resp. Br. *passim* (dissecting the information to focus on only one of its parts). But this labeling is not analysis and the language the people employed is undeniably truthful. The non-incumbent candidate either took the pledge or did not. The incumbent candidate either engaged in the legislative behaviors about which the public had an interest or not, and if not, thereby failed to follow the voters' instructions. There is nothing misleading.

not the information that threatens a politician's livelihood; it is, if anything, the politician's failure to respond to the will of his constituency that has such an impact. The inclusion of ballot information will not prevent the candidate from appearing on the ballot, nor will it bar the candidate from service in Congress. The ballot information simply educates the voters who then put the information to whatever use they see fit. If any negative action is taken as a result of that education, it will be taken by the voters themselves.

This distinction between the State actually imposing the penalty, and the State providing information that may result in a penalty imposed by others is a crucial one. In *Paul v. Davis*, 424 U.S. 693 (1976), this Court recognized that the Constitution affords people little protection from such privately imposed penalties. In *Paul*, a government official passed out fliers branding Davis "an active shoplifter." As a result, Davis claimed he experienced difficulty in gaining employment, i.e., his livelihood was damaged. The Court concluded that Davis had no claim. The Court stated that:

Though Article VIII's two informational sentences are not distinguished by Respondents in their analysis, the sentence for non-incumbents is neutral and the sentence for incumbents cannot be accurately labeled pejorative because of one negative phrase. Voters will not see "disregarded voters' instructions" in a vacuum; they are smarter than that. *See Rice v. Cayetano*, ___ U.S. ___, 120 S. Ct. 1044, 1060 (2000) (It is presumed that citizens will "cast a principled vote."). Rather, the electorate will see that the object of each informational sentence is "term limits." This information is provided equally to supporters and opponents of the term limits amendment to act on or ignore.

In any event, the term "pejorative" is unanalytical. It cannot substitute for coercion without proof that the ballot information in fact coerces speech. And Respondents' two-page summary judgment motion does not remotely prove that there is an unacceptable impact on speech. *See, e.g., Nixon v. Shrink Missouri Gov't PAC*, ___ U.S. ___, 120 S. Ct. 897, 907-08 (2000) (mere conjecture is inadequate to carry a First Amendment burden).

> "It may be assumed that the listing is hurtful to their prestige, reputation and earning power. . . . This designation, however, does not prohibit any business of the [individual], subject [him] to any punishment or deprive [him] of liberty of speech or other freedom."

Id. at 704 (alterations and omission in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 202 (1951) (Reed, J., dissenting)). To the extent Davis suffered any penalty, it was "applied by public disapproval, not by law." *Paul*, 424 U.S. at 704 (quoting *McGrath*, 341 U.S. at 183-84 (Jackson, J., concurring)). As a result, Davis had no claim against the government for being labeled an "active shoplifter."

Similarly, Article VIII does not give rise to a compelled speech claim.[12] The inclusion of ballot information does not bar the candidate from service in Congress. Voters still make the decision, among all the available choices, who will serve in Congress; they simply make that electoral decision with the benefit of the information they requested. And, as the Court recognized in *Paul*, neither Respondents, nor anyone else, has the constitutional right to be free from the public's sentiment.

B. Even If Ballot Information Compelled Speech, The People's Interest In An Informed Electorate Outweighs Any Minor Effect The Information Has On A Candidate's Speech.

To the extent it regulates speech at all, the ballot information should not be subjected to this Court's strict scrutiny test. As the Court made clear in *Timmons*, there is no one test

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[12] It is interesting to note that in a compelled speech case, where the government actually attempted to compel speech by a private party, the Court noted that "the State may itself publish" the information it wanted the public to have. *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988). Respondents seemingly reject this proposition.

for determining whether an election law affecting speech violates the First Amendment. 520 U.S. at 358-59 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). *See also Nixon*, ___ U.S. ___, 120 S. Ct. at 903 (declining to apply a label that encompasses "[p]recision about the relative rigor of the standard" to be applied). An application of strict scrutiny is particularly inappropriate "where constitutionally protected interests lie on both sides of the legal equation." *Nixon*, 120 S. Ct. at 911 (Breyer, J., concurring). Though there is not a specific test, the essence of the analysis is the balancing of the burden the election law places on the plaintiff's rights against the nature of the government's interests. *Timmons*, 520 U.S. at 358-59.

Despite the Court's call for the application of a balancing test in the area of elections law, Respondents claim that Article VIII should be subjected to strict scrutiny. They rely on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), for this assertion, but this reliance is misplaced. In *McIntyre*, the Court concluded that because the statute at issue, a ban on anonymous pamphleting, did not regulate "the mechanics of the electoral process," the "ordinary litigation" test for elections cases did not apply. *Id.* at 345.

Unlike the pamphleting ban at issue in *McIntryre*, Article VIII regulates the mechanics of elections. It regulates what information will appear on the ballot. Thus, it is similar in kind to other ballot-oriented regulations, such as the placement of party labels and nicknames on the ballot.[13] As a result, Article VIII is subject to this Court's balancing test.

[13] Respondents argue that ballot information provisions of Article VIII are much different from the placement of party labels on the ballot. Resp. Br. 14-15 n.12. They contend that by placing party labels on the ballot, the State is communicating nothing. It is doubtful that Democrats and Republican candidates in the South believed this in the early part of the Twentieth Century. Moreover Respondents' other arguments undercut this point. Respondents argue that, by placing ballot information concerning term limits on the ballot, the State is communicating that this is an important issue worth basing a vote on. Resp. Br. 15. This argument carries equal weight as to party labels. By placing party labels on the ballot, the State is communicating that party affiliation, or lack thereof, is an important matter on which a vote should be based. In fact, party affiliation is considered such an important consideration, Missouri law allows voters to use it as the sole basis for casting a ballot. *See* Mo. Rev. Stat. § 115.439.1(1) (1994) (allowing voters to vote a straight, party-line ticket). Thus, if Respondents' arguments are true, then the ballot information of Article VIII is no more a violation of the Constitution than party labels.

Article VIII, if it places any burden at all, places only a minimal burden on the free speech rights of candidates for Congress. Candidates can speak as they please. The only two things that will prompt the people to place ballot information next to a candidate's name are: the incumbent candidate's behavior in Congress and the non-incumbent candidate's failure to take the pledge. Thus, the people comment on only the narrowest range of activities, and the magnitude of any possible restriction on speech created by Article VIII is, at most, small.[14]

Further, as to incumbent candidates the restriction is lessened still by the fact that they, as government employees, do not enjoy complete First Amendment protection for their actions taken within the scope of employment. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 390 (1987) ("The burden

[14] Further, as Petitioner demonstrated in their initial brief, Pet. Br. 37, this restriction is further narrowed by the candidate's opportunity to disassociate herself from the ballot notation. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). Respondents claim that candidates are deprived of the opportunity to disassociate themselves because the voters will not receive the message until the crucial moment of voting. Resp. Br. 42-43. This argument neglects Missouri law. In the weeks prior to the election, a sample ballot is published in the various newspapers of Missouri. Mo. Rev. Stat. § 115.127.2 (Supp. 1999). And if an area is not serviced by a newspaper, then a sample ballot will be mailed to the voter's homes. *Id.* § 115.127.4 (Supp. 1999). Therefore, voters generally will know the ballot's contents before the election. And as the voters will be aware of the contents of the ballot, candidates will have an opportunity to disassociate themselves from any information contained thereon.

of caution employees bear with respect to the words they speak will vary with the extent of authority and accountability the employee's role entails."). This Court has long recognized the right of the government, within limits, to constrain the speech of its employees. For example, it is well within the rights of the Department of Justice to require its attorneys to take positions with which they disagree, and to fire those lawyers who refuse to do so. Such control is necessary to ensure the proper functioning of government. Similarly, an incumbent candidate's employers, his or her constituents, enjoy some measure of control over the content of his governmental "speech." This control helps explain Justice Brennan's dissent in *Spallone*, 493 U.S. 265 at 302-03 n.12 (1990) (Brennan, J., dissenting). He recognized that though "the act of publicly voting on legislation arguably contain[ed] a communicative element, the act is quintessentially one of governance" and thus not protected by the First Amendment.

On the other side of the balance, the people have a strong interest in preserving Article VIII. By passing Article VIII, the people of Missouri announced to the world that they wanted the Constitution amended. This voice of the people must be heard to ensure the integrity of our government because "[c]itizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 843 (1995) (Kennedy, J., concurring) (internal quotation marks omitted) (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 513 (1939) (opinion of Roberts, J., joined by Black, J., and joined in relevant part by Hughes, C.J.)). For a government is only valid if it responds to the will of the people. *The Federalist No. 22*, at 152 (Alexander Hamilton). By passing Article VIII, the people simply voiced their will. And preserving the people's voice in government is not only an important interest; it is a paramount interest.

Beyond the people's right to provide information, they also possess a right to receive information vital to their electoral choices. There "can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Tashjian*, 479 U.S. at 220 (internal quotation marks omitted). This assertion is true because, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

The right to provide and receive information are critically related to the people's involvement in government. They provide the people with a real opportunity to engage in the "[d]iscussion of public issues and debate on the qualifications of candidates [that is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. No interest could be more compelling. Therefore, the people's interest in passing Article VIII outweighs the minimal effect Article VIII may have on the free speech rights of candidates for Congress.

* * * * * * * *

In the final analysis, all of the Respondents' and the United States' objections boil down to one concept: the people cannot be trusted to govern themselves. In fact, an informed electorate "undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." Resp. Br. 46. The people are simply too ill-tempered, uneducated and volatile to be entrusted with facts that allow them to make informed choices. Fortunately, our Framers did not adhere to this pseudo-monarchist principle. Instead, they recognized that it was self-evident "[t]hat whenever any Form of Government becomes destructive of these ends [life, liberty and the pursuit of happiness] *it is the Right of the People to alter or to abolish it*." *The Declaration*

of Independence para. 2 (1776) (emphasis added). In fact, Thomas Jefferson knew of:

> no safe depository of the ultimate powers of society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education.

American Quotations, 179 (Gorton Carruth & Eugene Ehrlich eds., 1992). It is on the people's "good sense we may rely with the most security for the preservation of a due degree of liberty." 1 *Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826*, at 514 (James Morton Smith ed., 1995).

That is what the people of Missouri sought by passing Article VIII: education and information. And by its opinion, the Eighth Circuit denied the people the information they took extraordinary electoral steps to secure and deserve to receive. It is now up to this Court to return to the people their voice in government, and grant them the information they regard as vital in attempting to secure a more representative democracy for all people.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202)736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor

JAMES R. MCADAMS*
Chief Counsel for Litigation
TINA M. CROW HALCOMB
J. ERIC DURR
Assistant Attorneys General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioner

* Counsel of Record

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