No. 06-1084

In The Supreme Court of the United States

TODD RONGSTAD AND
THE VALKYRIE GROUP, LLC,

Petitioners,

v.

JULIE M. LASSA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF CENTER FOR INDIVIDUAL FREEDOM, EVERGREEN FREEDOM FOUNDATION, GOLDWATER INSTITUTE, INDEPENDENCE INSTITUTE, MACKINAC CENTER FOR PUBLIC POLICY, AND RIO GRANDE FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI*

Pursuant to Rule 37.2 of this Court, the following public policy organizations (together, the "Policy Organizations") respectfully submit this *amicus curiae* brief in support of Petitioners.[1]

The Center for Individual Freedom is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association, and religious freedoms.

The Evergreen Freedom Foundation is a non-partisan, public policy research organization based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Its efforts focus on state budget and tax policy, labor policy, welfare reform, education, citizenship, and governance issues.

The Goldwater Institute was founded in 1988 by a small group of entrepreneurial Arizonans with the blessing of Sen. Barry Goldwater. Through research and education, the Goldwater Institute works to broaden the parameters of policy discussions to allow consideration of policies consistent with the founding principles of free societies.

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[1] The Policy Organizations have received consent from counsel of record pursuant to Sup. Ct. R. 37.2, as submitted with this brief. The Policy Organizations affirm, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Independence Institute is a non-partisan public policy research organization based in Colorado that provides policy makers and the public with educational and analytical material addressing a broad spectrum of policy issues from a free-market perspective.

The Mackinac Center for Public Policy is a nonprofit, nonpartisan research organization based in Michigan that promotes sound solutions to state and local policy questions from a market-based perspective.

The Rio Grande Foundation is a research institute dedicated to increasing liberty and prosperity for all New Mexicans by promoting the importance of individual freedom, limited government, and economic opportunity. The Foundation focuses on constitutional liberties, budget and tax policy, and educational reform.

Each of the Policy Organizations regularly comments on controversial issues and the persons, including elected officials, responsible for promoting and implementing them. Each of the Policy Organizations is supported by donations from individuals, many of whom wish to not be publicly identified with a particular ideology, policy or movement. Each of the Policy Organizations believes that public disclosure of the identities of their contributors would make it significantly more difficult for them to raise funds to support their efforts. Each of the organizations believes that, if their contributors were publicly disclosed and subjected to defamation claims for the statements of the organizations, their ability to raise sufficient funds from individuals across the country would be severely compromised.

The fact that the highest court in a state has held that public officials may file suit and immediately compel

disclosure of the anonymous donors to policy organizations directly impacts the interests and continued viability of the *amici*. As such, the Policy Organizations have a vital interest in this case.

SUMMARY OF ARGUMENT

Review is necessary because the Wisconsin Supreme Court's decision is inconsistent with the principles underlying this Court's decision in *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964), because "the rule of law applied by the [Wisconsin] courts is constitutionally deficient for failure to provide the safeguards for freedom of speech . . . that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of [her] official conduct." The approach taken by the Wisconsin Supreme Court will chill speech and association by subjecting policy organizations' donors to defamation suits whether they are responsible for the allegedly defamatory speech or not. This approach is inconsistent with both the strict standards for defamation actions by public officials discussed in *New York Times* and the right of anonymous association recognized in *NAACP v. Alabama*, 357 U.S. 449 (1958), because it permits a public-official plaintiff to impose a particularly damaging judicial remedy on anonymous donors – *i.e.*, stripping them of their anonymity – before the plaintiff has shown actual malice or falsity. In short, it gives some public-official plaintiffs in defamation suits what they want – a mechanism to intimidate and expose donors – without the predicate demonstration that their suit has merit. If this becomes the standard across the nation, it will shut off the

lifeblood of groups like the Policy Organizations and substantially chill political speech. *See* Sup. Ct. R. 10(c).

Review is also warranted because, since *NAACP* in 1958, this Court has recognized that the right of anonymous association necessitates an evidentiary privilege that prevents the disclosure of the names of contributors to or members of political organizations unless the plaintiff can demonstrate a sufficiently important interest in obtaining that information.[2] However, the precise scope of this privilege, the circumstances in which it may be invoked, the burden necessary to demonstrate its applicability, and the party responsible for meeting this burden have never been clearly established by this Court. In the absence of clear national guidelines, federal and state courts have created a patchwork of approaches regarding the scope and operation of the associational privilege. Indeed, the applicable standard can vary within a state based on whether the claim is brought in state or federal court. Definitive guidelines in an area touching upon delicate

[2] Courts often discuss the First Amendment's guarantee of anonymous or private associational activity within the context of attempts to resist discovery regarding such activity. Thus, it has become commonplace to refer to the right of anonymous association as a privilege against compelled discovery. *See T.S. v. Boy Scouts of Am.*, 138 P.3d 1053, 1059 (Wash. 2006) (associational right creates a qualified evidentiary privilege under the civil rules of discovery). However, it is important to remember that what is at issue in this case is not merely the application of a testimonial privilege. Rather, the associational privilege is simply a manifestation of the fundamental First Amendment right to privately associate to promote a political viewpoint. Thus, throughout this brief, the Policy Organizations will refer to the "associational privilege" when discussing this right within the context of a litigant's ability to resist discovery, but will focus generally on the First Amendment right to be free from compelled disclosure of private political activity.

First Amendment rights are therefore necessary so that the vitality of this important constitutional right does not vary from state to state or circuit to circuit. *See* Sup. Ct. R. 10(b) and (c).

Finally, this Court should grant review to determine what those national standards and specifics are. In that regard, this Court should set standards that are consistent with the strong protections for free speech and association contained in *New York Times* and *NAACP*. Thus, this Court should determine that, in defamation suits in which a public official seeks to obtain private donor lists, a defamation suit is, in and of itself, sufficient evidence of a chilling effect that the burden should be on the plaintiff to produce evidence of why compelled disclosure is necessary. Similarly, this Court should hold that policy organizations can be ordered to disclose their donors – and such donors named as defendants – only in the most extreme circumstances. An example of when such disclosure would be constitutionally permissible would be when the public-official plaintiff is able to demonstrate facts that would be sufficient to pierce the corporate veil if the organization engaging in the alleged defamatory activity were a for-profit corporation. Anything less will result in a serious erosion of First Amendment speech and associational rights in this country and significantly mute the voices of speakers like the Policy Organizations. *See* Sup. Ct. R. 10(c).

REASONS FOR GRANTING REVIEW

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S HOLDINGS IN *NEW YORK TIMES v. SULLIVAN* AND *NAACP v. ALABAMA*

This case directly affects the ability of donors to anonymously contribute to organizations that comment on both public policy and the officials who shape that policy. The Respondent here brought a defamation suit against a policy organization that had criticized her in a mailing. She then sought to compel the production of the names of the organization's contributors in order to name them as defendants in the suit, regardless of whether, or to what extent, such contributors played a role in the preparation of the mailing. The trial court permitted the Respondent to discover these names without having to demonstrate that her suit had merit, that she had a compelling need for the identity of these contributors, or that these contributors had the slightest involvement in the production of the mailer besides writing a check to the organization that produced it. The Wisconsin Supreme Court affirmed. This result is at odds with the principle that citizens should be able to criticize their elected officials without official retaliation and the Wisconsin Supreme Court's opinion has provided elected officials wishing to intimidate and harass their ideological opponents with both the ways and means to do so. Because this holding undermines the principles embodied in this Court's decisions in *New York Times* and *NAACP*, this Court should grant the Petition and reverse the Wisconsin Supreme Court.

A. *New York Times* Created Strict Standards For Defamation Suits By Public Officials

This Court's decision in *New York Times* has become the starting point for discussions of the scope of the protections of the First Amendment. Few sentences from this Court are as famous, and justifiably so, as Justice Brennan's statement that courts look at infringements of free speech "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times,* 376 U.S. at 270. In light of this commitment, this Court concluded that criticism of the conduct of public officials "does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *Id.* at 273. For this reason, this Court mandated that, for cases involving claims of libel regarding public officials, a plaintiff must prove that the "statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

It is therefore curious that, given that these bedrock constitutional principles are so universally accepted and applauded, the Wisconsin Supreme Court decided to pay them such little regard. The decision below narrowly applies the principles that underlie the *New York Times* decision and renders that case essentially null by assuming that the purpose of defamation suits by public-official plaintiffs is to go to trial and ultimately prevail by winning the suit and receiving damages. The Wisconsin Supreme Court's decision therefore assumes that the "actual malice" standard is all the protection a speaker needs when he or

she criticizes a governmental official. However, as discussed below, victory and damages are often not the goal of a defamation suit brought by the public-official plaintiff. Thus, having a high level of proof in order to prevail on the merits does little to create a disincentive for harassing and intimidating suits because, under the Wisconsin Supreme Court's rule, a public-official plaintiff may achieve a substantial judicial remedy just by filing suit and undertaking discovery.

B. The Goal Of Defamation Suits By Public Officials Is Often Not To Receive Damages, But To Intimidate And Harass Political And Ideological Opponents

The goal of a public-official plaintiff is not always to recover damages. Often, the purpose of a defamation suit is to intimidate, harass and make it expensive for critics to continue to exercise their free speech rights. A public official may believe that she can insulate herself from criticism by filing suit against her ideological and political opponents, causing them to incur litigation costs. More importantly from the Policy Organizations' standpoint, however, a public official may believe that she can quarantine policy groups and cut off their access to funds by publicly unmasking such groups' supporters and making it expensive and inconvenient for these supporters to continue to contribute to the objects of her wrath. Achieving this goal may often be as satisfying, or more satisfying, than obtaining a judgment and damages against the alleged defamer. This appears to have been the case here, as the plaintiff promptly gave up prosecution of her case once Rongstad had provided the donors' names.

Compelled disclosure is, quite simply, the goal of many defamation suits and the Wisconsin Supreme Court's decision does nothing to dissuade public-official plaintiffs from bringing meritless claims solely to harass and intimidate the donors to policy groups. In fact, the bar set for compelled disclosure by the Wisconsin Supreme Court is so low that the public-official plaintiff may become an increasingly common feature of our political and legal system. As the Delaware Supreme Court put it in the context of anonymous Internet speech:

> A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker "may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes." . . . After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extrajudicial self-help remedies; more bluntly, the plaintiff can simply seek revenge or retribution.
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> . . . .
>
> . . . "The goals of this new breed of libel action are largely symbolic, the primary goal being to silence John Doe and others like him." This "sue first, ask questions later" approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern. . . .

Doe v. Cahill, 884 A.2d 451, 457 (De. 2005) (alteration in original; footnotes omitted; quoting Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 859, 890 (2000)).

Thus, the disincentive this Court created for public officials to use defamation suits to suppress speech by fashioning the difficult "actual malice" standard is fatally undermined by a regime, like the one created in the decision below, in which a plaintiff may obtain relief and discourage criticism without having to demonstrate that they have a viable defamation claim. In short, the Wisconsin Supreme Court, while pretending to follow *New York Times,* has laid out a roadmap for that case to become simply a vestigial organ of constitutional jurisprudence.

C. *NAACP* Holds That Compelled Disclosure Will Result In A Significant Chilling Of Associational Rights

The decision below thus has two pernicious affects. First, it provides public officials with a mechanism by which they can avoid the strictures of the "actual malice" standard, as discussed above. Second, it creates this mechanism at the expense of the associational rights of people who have lent their support to groups that comment on public policy and public officials. In that regard, *New York Times* is not the only case from this Court that the Wisconsin Supreme Court has shunted aside – the court likewise disregarded the principles underlying *NAACP*. Indeed, it could be said that this case stands at the intersection of *New York Times* and *NAACP* and that the court below managed to get both holdings wrong.

In *NAACP,* this Court held that compelled disclosure of private political memberships and activities could significantly affect the exercise of First Amendment free speech rights. *NAACP*, 357 U.S. at 460. As this Court stated:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . 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. Thus, courts generally recognize that the First Amendment prohibits compelled disclosure of private political activities unless the government or a litigant can demonstrate a sufficiently compelling reason to disclose such information.

The court below gave short shrift to this important right. Quite simply, as the Policy Organizations well know, forced disclosure of the private donations to such organizations would have a tremendous chilling effect on the willingness of donors to continue to fund these organizations. This is particularly true of donors to the Policy Organizations, which frequently take controversial stands at odds with the political and business establishment of their respective states and across the nation.

For instance, public school teachers who contribute to organizations that support school vouchers, such as the Evergreen Freedom Foundation and the Mackinac Center,

might well suffer significant professional repercussions if their contributions are disclosed. Similarly, if a government employee was found to have contributed to an organization that advocates limited taxation and smaller government, such as the Independence Institute or Goldwater Institute, this too could have significant negative effects on the employee's career. Because forced disclosure would have a chilling effect on the willingness of donors to fund the organizations, the organizations themselves will have fewer resources with which to convey their message. At this point, the speech and associational rights of both the donor and the donee have been irrevocably compromised and a result far more serious than an award of damages may be visited on any group that runs afoul of a vengeful legislator equipped with a tenacious lawyer. In this way, the decision below gives public officials the means to achieve the very harms this Court sought to avoid in *New York Times* and *NAACP*. Review by this Court is therefore not only warranted, but imperative for the maintenance of free and open discourse in this country.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE SPECIFICS AND SCOPE OF THE RIGHT TO ANONYMOUS ASSOCIATION

While the existence of the right to anonymous association is largely accepted, in *NAACP* this Court did not go into any significant detail about the precise boundaries of this right or the mechanisms by which a party may invoke its protections. As such, federal and especially state courts have fashioned a variety of approaches regarding, among other things, which party bears the burden of going forward regarding the application of the right. Thus, as noted by the Petitioners, the standards by which a defendant may assert

the right of association will vary based on the state in which the public official brings suit. *See* Pet. at 13-17. The Policy Organizations concur and believe that this fact alone warrants that this Court grant the Petition. In that regard, however, the Petition actually understates the level of uncertainty regarding the proper standard.

For instance, the California Supreme Court has held that a presumption of nondisclosure applies to all politically oriented associations, regardless of whether they are politically popular or unpopular. *See Britt v. Superior Court of San Diego County*, 574 P.2d 766, 772 (Cal. 1978) ("If the constitutional protection of associational privacy were to be completely withheld from selected organizations simply because they were not sufficiently unpopular, the inevitable effect would be to deter many individuals, particularly those who may be most vulnerable to retaliation by those opposed to such organizations' aims, from participating in such constitutionally protected activities."). The California state courts therefore assume that forced disclosure will result in damage to First Amendment rights.

In contrast, the Ninth Circuit requires a litigant to demonstrate that disclosure will result in harassment, membership withdrawal, discouragement of new members, or other consequences that objectively suggest an impact on, or chilling of, associational rights. *See Dole v. Local Union 375*, 921 F.2d 969, 972 (9th Cir. 1990). This showing must be based on objective and articulable facts that go beyond broad allegations or subjective fears. *Id.* The Ninth Circuit therefore requires the defendant to *prove* that compelled disclosure will result in damage to First Amendment rights – the exact thing that the California state courts will assume exists.

This already confusing situation for the hapless California litigant is further exacerbated by the operation of Rule 501 of the Federal Rules of Evidence, which provides that state privilege law applies in civil actions where an element of the claim is based on state law, while cases involving federal questions are governed by principles of federal common law.[3] *See Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 n. 10 (9th Cir. 1992).

Thus, when a public official sues a policy organization for defamation in California and seeks disclosure of its donors, the issue of whether the plaintiff or the defendant has the burden of going forward first depends on whether the plaintiff brings the claim in state or federal court. If brought in federal court, the question of burden turns on whether the federal court would find that a defamation suit encompasses specific claims under California state law or whether the issue of privilege is a federal question governed by federal common law. At this point, the right to associational privacy becomes a guessing game and speakers lose any sense of certainty regarding the level of protection of their associational rights.

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[3] Rule 501 provides that "[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

As this Court recognized in *NAACP,* however, the inviolability of privacy in free association is vital to the full expression of First Amendment rights. A patchwork pattern of approaches regarding this necessary right undermines its vitality and the willingness of citizens to place their faith in it. Uncertainty can, in and of itself, create a chilling effect. *Cf. Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 871-72 (1997) (vague rules create an obvious chilling effect on free speech). This Court should grant the Petition and set uniform standards for the invocation of this constitutional right. *See* Sup. Ct. R. 10(c).

III. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT PUBLIC-OFFICIAL PLAINTIFFS MAY ONLY REACH THE DONORS TO POLICY ORGANIZATIONS IN THE MOST EXTREME CIRCUMSTANCES

Of course, should this Court grant the Petition to clarify the proper constitutional standard, it must then articulate what that standard should be. Consistent with *New York Times* and *NAACP*, the right to anonymous association in defamation cases involving public official plaintiffs seeking to compel disclosure of private political activities should be very strong indeed.

A. In Cases Involving Public Officials, Courts Should Presume A Defamation Suit In And Of Itself Constitutes Specific Harm To First Amendment Rights

The Wisconsin Supreme Court required Rongstad to make a preliminary *prima facie* showing of harm to First Amendment rights based on objective and articulable facts

to invoke the First Amendment associational privilege. *Lassa v. Rongstad*, 718 N.W.2d 673, 689-90 (Wis. 2006). The Wisconsin Supreme Court followed the Ninth Circuit on this point. *See id.* at 690 (citing *Brock v. Local 375*, 860 F.2d 346 (9th Cir. 1988); *Dole,* 921 F.2d at 973). Both courts traced this requirement to this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley,* this Court held that minor parties could avoid compelled disclosure of their contributors pursuant to the Federal Election Campaign Act only by proving a reasonable probability that such disclosure would subject them to threats, harassment, or reprisals from either government officials or private parties. *Id.* at 74.

However, this conclusion ignores the fact that a defamation claim in which a public-official plaintiff seeks to compel disclosure of contributors to a policy organization, regardless of whether they played a role in the allegedly defamatory speech, is the very definition of harassment. The Respondent in this case offered no evidence whatsoever that the contributors to the policy organization had any responsibility for the allegedly defamatory speech at all. Nor did she claim that they possessed any unique information relevant to her claims that she could not obtain elsewhere. She simply wished to add them as defendants to her lawsuit. Individuals who merely write checks to policy organizations with whose views they agree do not expect to be held legally responsible for every statement the organization makes, nor do they anticipate having to hire lawyers and defend themselves in defamation actions simply for exercising their right of association. Allowing plaintiffs in defamation suits to compel the disclosure of contributors to policy organizations without any evidence that they played a role in the

allegedly defamatory speech will necessarily chill speech. For this reason, this Court should grant review and hold that the possibility of being named as a defendant in a defamation suit should be presumed to be a *prima facie* showing of harm to the contributors' First Amendment rights.

B. Plaintiffs Should Have The Ability To Name Contributors To Policy Organizations Only In Exceptional Circumstances And Only Upon A Showing Of Compelling Need

In this case, the trial court ordered the disclosure of the contributors to the Alliance for a Working Wisconsin without the plaintiff having proved that these contributors had any role in the allegedly defamatory mailer outside of writing a check to the Alliance. If merely writing a check to a policy organization is enough to subject a contributor to disclosure and being named as a defendant in a defamation suit, then the Wisconsin Supreme Court's decision will stand as a powerful disincentive for people to contribute to groups like the Policy Organizations.

This Court should grant the Petition and hold that only in the most exceptional circumstances may a public-official plaintiff go beyond the policy organization responsible for the allegedly defamatory material. This Court should also recognize, however, that a plaintiff who has actually been defamed should be able to recover compensation for any harm done to her. To balance the First Amendment rights of contributors and the interests of plaintiffs who are actually defamed, this Court should hold that a plaintiff may go beyond the policy group and reach its contributors only in circumstances similar to those

in which courts permit plaintiffs to "pierce the corporate veil" of for-profit corporations. Thus, a plaintiff may reach contributors to an organization, for instance, when there is an absence of formalities regarding normal non-profit existence, such as a lack of directors or members, a failure to file with the Secretary of State's office, or a failure to keep corporate records, or when there is personal use of the non-profit's funds, or an attempt to perpetuate a fraud using the non-profit's corporate vehicle. *See Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984) (listing factors under which courts will disregard the for-profit corporate entity).

Granting the Petition will allow this Court to carefully construct rules for cases such as this that properly balance the ability of a defamed plaintiff to recover damages with the vitally important free speech and associational rights of groups like the Policy Organizations and the individuals that contribute to them. The standards that exist now are both inconsistent with, and insufficiently protective of, First Amendment rights and review by this Court is therefore necessary.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Policy Organizations respectfully request that this Court grant the petition for a writ of certiorari.

DATED: March 7, 2007

Respectfully submitted,

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