

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

---

**No. 04-AA-957**

---

CITIZENS COMMITTEE FOR THE D.C. VIDEO LOTTERY TERMINAL INITIATIVE,

*Petitioner,*

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,

*Respondent,*

and

RONALD L. DRAKE, D.C. WATCH, and D.C. AGAINST SLOTS,

*Intervenors.*

---

On Petition for Review from the District of Columbia Board of Elections and Ethics

---

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION  
OF THE NATIONAL CAPITAL AREA AS AMICUS CURIAE**

---

Arthur B. Spitzer  
American Civil Liberties Union  
of the National Capital Area  
1400 20th Street, N.W. #119  
Washington, DC 20036  
(202) 457-0800

Counsel for Amicus

August 27, 2004

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS .....	1
ISSUE ADDRESSED BY AMICUS .....	3
STATEMENT .....	3
SUMMARY OF ARGUMENT .....	9
ARGUMENT.....	11
I. Circulators’ Advocacy Statements About Education and Healthcare Were Not False and Misleading.....	11
II. The Board’s Action Was Ultra Vires.....	17
II. The Board’s Action Was Unconstitutional .....	20
CONCLUSION .....	24

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page:</u>
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936) .....	19
<i>Atchison v. District of Columbia</i> , 585 A.2d 150 (D.C. 1991) .....	14
<i>Barry v. Little</i> , 669 A.2d 115 (D.C. 1995) .....	1
<i>Boy Scouts of America v. D.C. Commission on Human Rights</i> , 809 A.2d 1192 (D.C. 2002) .....	1
<i>Brown v. Hartlage</i> , 456 U.S. 45 (1982) .....	23
<i>Buckley v. American Constitutional Law Foundation, Inc.</i> , 525 U.S. 182 (1999) .....	11
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	21
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) .....	19
<i>Card v. United States</i> , 838 A.2d 1134 (D.C. 2002) .....	1
<i>Chandler v. City of Aruada</i> , 292 F.3d 1236 (10th Cir. 2002) .....	11
<i>Chandler v. Miller</i> , 520 U.S. 305, 322 (1997) .....	23
<i>Committee for Voluntary Prayer v. Wimberly</i> , 704 A.2d 1199 (D.C. 1997) .....	2
<i>Convention Center Referendum Committee v. D.C. Board of Elections and Ethics</i> , 441 A.2d 889 (D.C. 1981) .....	2
<i>Dean &amp; Gill v. District of Columbia</i> , 653 A.2d 307 (D.C. 1995) .....	2
<i>Edwards v. Hutchinson</i> , 35 P.2d 90 (Wash. 1934) .....	22
<i>Eu v. San Francisco County Democratic Central Comm.</i> , 489 U.S. 214 (1989) .....	21
<i>Foster v. Canan</i> , 661 A.2d 636 (D.C. 1995) .....	2
<i>Gay Rights Coalition of Georgetown University Law Center v. Georgetown University</i> , 536 A.2d 1 (D.C.1987) .....	19
<i>George Washington University v. District of Columbia Board of Zoning Adjustment</i> , 831 A.2d 921 (D.C. 2003) .....	1
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959) .....	19
<i>Guilford Transp. Industries, Inc. v. Wilner</i> , 760 A.2d 580 (D.C. 2000) .....	15
<i>Hessey v. Burden</i> , 615 A.2d 562 (D.C. 1992) .....	2

<i>In re Initiative Petition No. 142</i> , 55 P.2d 455 (Okla. 1936),.....	13
<i>In re Initiative Petition No. 281</i> , 434 P.2d 941 (Okla. 1967) .....	14
<i>In re Initiative Petition No. 347</i> , 813 P.2d 1019 (Okla. 1991) .....	14
<i>In re Stanley Johnson</i> , 691 A.2d 628 (D.C. 1997) .....	1
<i>Kennedy v. District of Columbia</i> , 654 A.2d 847 (D.C. 1994) .....	2
<i>Kent v. Dulles</i> , 357 U.S. 116 (1958) .....	19
<i>McConnell v. Federal Election Comm'n</i> , 540 U.S. 93 (2003).....	21
<i>McFarlin v. District of Columbia</i> , 681 A.2d 440 (D.C. 1996) .....	1
<i>Meyer v. Grant</i> , 486 U.S. 414 (1988) .....	11, 20
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966).....	2
<i>Monitor Patriot Co. v. Roy</i> , 401 U.S. 265 (1971).....	22
<i>Moorehead v. District of Columbia</i> , 747 A.2d 138 (D.C. 2000) .....	1
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	21
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964) .....	20, 21
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928) .....	24
<i>Redman v. Kelty</i> , 795 A.2d 684 (D.C. 2002).....	1
<i>San Francisco Forty-Niners v. Nishioka</i> , 89 Cal. Rptr. 2d 388 (Cal. Ct. App. 1999)...	16
<i>Scolaro v. D.C. Board of Elections and Ethics</i> , 691 A.2d 77 (D.C. 1997), after referral, 717 A.2d 891 (D.C. 1998) .....	2
<i>Shell Oil Co. v. Iowa Dep't of Revenue</i> , 488 U.S. 19 (1988) .....	12
<i>Spector Motor Service v. McLaughlin</i> , 323 U.S. 101 (1944) .....	18
<i>State ex rel. Westhues v. Sullivan</i> , 224 S.W. 327 (Mo. 1920) .....	14
<i>State v. Wheeler</i> , 14 S.E.2d 677 (W.Va. 1941) .....	16
<i>Turner v. D.C. Board of Elections and Ethics</i> , 77 F. Supp. 2d 25 (D.D.C. 1999) .....	2
<i>U.S. Department of Commerce v. U.S. House of Representatives</i> , 525 U.S. 316 (1999) .....	18
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	19
<i>United States v. Pickett</i> , 353 F.3d 62 (D.C. Cir. 2004).....	17
<i>Williams v. Board of Elections and Ethics</i> , 804 A.2d 316 (D.C. 2002).....	9

STATUTES AND REGULATIONS:

18 U.S.C. § 1001(a) ..... 17

18 U.S.C. § 1001(c) ..... 17

District of Columbia Appropriations Act for Fiscal Year 2004,  
Pub. L. No. 108-199, Division C, Title III, § 423,  
118 Stat. 139 (Jan. 23, 2004) ..... 15

D.C. Code § 1-206.02(c) ..... 15

D.C. Code § 1-1001.05(14) ..... 18

D.C. Code § 1-1001.16(c)(1)..... 13

D.C. Code § 1-1001.16(g) ..... 5, 13

D.C. Code § 1-1001.16(k)(1)..... 17

D.C. Code § 1-1001.16(o)(1)..... 17

3 DCMR § 1003.5(a)..... 5

3 D.C.M.R. § 1003.6(i) ..... 18, 19, 23

OTHER AUTHORITIES:

142 Cong. Rec. H11137-01 (statement of Rep. McCollum)..... 17

142 Cong. Rec. S11605-02 (statement of Sen. Specter)..... 17

John E. O'Neill, UNFIT FOR COMMAND: SWIFT BOAT VETERANS  
SPEAK OUT AGAINST JOHN KERRY (Regnery 2004) ..... 21

*Fahrenheit 9/11*..... 21

<http://www.davekopel.com/Terror/Fiftysix-Deceits-in-Fahrenheit-911.htm>..... 21

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

---

No. 04-AA-957

---

CITIZENS COMMITTEE FOR THE D.C. VIDEO LOTTERY TERMINAL INITIATIVE,  
*Petitioner,*

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,  
*Respondent,*

and

RONALD L. DRAKE, D.C. WATCH, and D.C. AGAINST SLOTS,  
*Intervenors.*

---

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION  
OF THE NATIONAL CAPITAL AREA AS AMICUS CURIAE**

---

**INTEREST OF AMICUS**

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan membership organization with more than 400,000 members, dedicated to the protection of individual rights and liberties for all Americans, particularly rights protected by the First Amendment to the Constitution. The American Civil Liberties Union of the National Capital Area is the local affiliate of the ACLU, with nearly 10,000 local members, many of whom are registered voters in the District of Columbia. The ACLU-NCA has often participated in this Court, as counsel for parties or as amicus, in cases presenting important civil liberties issues.<sup>1</sup> In particular, the ACLU-NCA has been involved in a number of cases

---

<sup>1</sup> See, e.g., *George Washington University v. District of Columbia Board of Zoning Adjustment*, 831 A.2d 921 (D.C. 2003) (discrimination based upon student status); *Card v. United States*, 838 A.2d 1134 (D.C. 2002) (peremptory jury strikes based upon perceived religious beliefs); *Boy Scouts of America v. D.C. Commission on Human Rights*, 809 A.2d 1192 (D.C. 2002) (discrimination based upon sexual orientation); *Redman v. Kelty*, 795 A.2d 684 (D.C. 2002) (discrimination based upon disability); *Moorehead v. District of Columbia*, 747 A.2d 138 (D.C. 2000) (municipal liability for acts of Special Police Officers); *In re Stanley Johnson*, 691 A.2d 628 (D.C. 1997) (procedures for involuntary civil commitment); *McFarlin v. District of Columbia*, 681 A.2d 440 (D.C. 1996) (First Amendment rights of panhandlers); *Barry*

involving the initiative and referendum process in the District of Columbia, a process that is often employed to address issues of civil liberties significance, and whose exercise necessarily involves the First Amendment right to freedom of speech. *See, e.g., Convention Center Referendum Committee v. D.C. Board of Elections and Ethics*, 441 A.2d 889 (D.C. 1981) (en banc) (construing scope of initiative exception for “laws appropriating funds”); *Hessey v. Burden*, 615 A.2d 562 (D.C. 1992) (en banc) (standards for initiative challenges); *Committee for Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. 1997) (standards for pre-election constitutional review of initiatives); *see also Turner v. D.C. Board of Elections and Ethics*, 77 F. Supp. 2d 25 (D.D.C. 1999) (federal court proceeding successfully asserting D.C. voters’ right to have their votes on Medical Marijuana Initiative counted and certified); *Scolaro v. D.C. Board of Elections and Ethics*, 691 A.2d 77 (D.C. 1997), *after referral*, 717 A.2d 891 (D.C. 1998) (residency requirements for voters who are students).

This appeal presents an issue of considerable importance. In arrogating to itself the power to disqualify the otherwise-valid signatures of thousands of registered District of Columbia voters because of allegedly false or misleading statements made to some unknown percentage of them in the course of persuading them to sign initiative petitions, the Board of Elections has asserted the right to regulate *political* speech for truth and accuracy. Yet “there is practically universal agreement” that the core purpose of the First Amendment “was to protect the free discussion of governmental affairs” from government regulation. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Followed to its logical conclusion, the Board’s reasoning in this case would authorize the Board to set aside the results of the *balloting* on an initiative on the ground that proponents had mischaracterized the measure in their communications with voters. It might even authorize the Board to set aside the results of a *candidate* election on similar grounds.

---

*v. Little*, 669 A.2d 115 (D.C. 1995) (due process rights of welfare recipients); *Foster v. Canan*, 661 A.2d 636 (D.C. 1995) (right to trial by jury); *Kennedy v. District of Columbia*, 654 A.2d 847 (D.C. 1994) (discrimination based upon personal appearance); *Dean & Gill v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (same-sex marriage).

And—because of a new affidavit requirement created by the Board without statutory authorization—it would certainly authorize the conviction and imprisonment of citizens who circulate initiative petitions upon a finding that their oral advocacy was “false and misleading.” The chilling effect of such a legal regime would truly be glacial.

The ACLU-NCA submits this brief to highlight to the Court the importance of reversing the Board’s misguided decision. In doing so, we stress that the ACLU neither supports nor opposes the Video Lottery Terminal Initiative; its merits are not our concern.

### **ISSUE ADDRESSED BY AMICUS**

Whether the Board of Elections’ disqualification of thousands of otherwise-valid signatures of registered D.C. voters on initiative petitions, on the ground that petition-circulators made false and misleading statements about the initiative to prospective signers, was *ultra vires* and violated the First Amendment.<sup>2</sup>

### **STATEMENT**

On July 1, 2004, the Board of Elections issued to the Citizens Committee for the D.C. Video Lottery Terminal Initiative (the “Committee”) an approved form for gathering signatures for the Video Lottery Terminal Initiative of 2004 (the “VLT Initiative”). Pet. App. 105. Although initiative sponsors have 180 days to collect the necessary signatures, D.C. Code § 1-1001.16(j), the Committee—seeking to meet the deadline for inclusion on the November 2004 General Election ballot—submitted just five days later 3,869 such forms containing 56,044 signatures. Pet. App. 106. The statutory process for review of the petition then commenced, including the consideration of challenges from the three intervenors. After a nine-day evidentiary hearing, the Board concluded that the petition contained only 14,687 qualified signatures, 2,912 below the required number of 17,599. Pet. App. 36.<sup>3</sup>

---

<sup>2</sup> The fact that amicus does not address some other issues presented by the petitioner does not indicate disagreement with the petitioner’s position on those issues.

<sup>3</sup> Curiously, the Board’s official decision does not contain this crucial conclusion. It is contained in the August 5 memorandum to the Board from its Executive Director.

In reaching that conclusion, the Board rejected 753 petition sheets, containing 6,592 otherwise-valid signatures (*i.e.*, signatures of registered D.C. voters that had been collected by *bona fide* D.C. residents who had, in turn, properly completed their required circulators' affidavits) on the sole ground that those sheets had been circulated by persons who were "affiliated with Stars and Stripes." Pet. App. 149. (Stars and Stripes is "a Florida-based professional petition circulation company." Pet. App. 100.) The principal reason for rejecting all signatures collected by persons affiliated with Stars and Stripes was that those circulators had, in the Board's view, made false and misleading statements to potential signers that the initiative "would produce benefits for schools and healthcare." Pet. App. 138; *see generally* Pet. App. 134-141. As Board chairman Wilma A. Lewis explained in her oral announcement of the Board's decision:

Characterizing the initiative as being about schools and health care is deemed by the Board to be a false statement. It's deemed by the Board to be misleading. It's deemed by the Board to be a false statement, a misrepresentation of the initiative. This we consider to be a sales pitch, in effect, a sales pitch that we as a Board found to be misleading.

....

... Because we deem the association of the initiative with schools and health care to be problematic, indeed to be a false statement, we believe that those representations to the public which the individual circulators were encouraged and, indeed, trained to make created a taint on the process that requires that the petition sheets associated with individuals under the rubric of Stars and Stripes, Ross Williams, and Carl Towe should be discounted.

Pet. App. 64-66.

Because we understand that the Board and the intervenors may dispute the fact that a dispositive number of signatures were disqualified because of circulators' speech, we will walk through the Board's decision process step by step.

As already noted, 3,869 petition sheets were submitted on July 6, containing 56,044 signatures. Pet. App. 106.

Eighty-nine sheets were withdrawn by the Committee at the beginning of the hearing, Pet. App. 116, leaving 3,780 sheets.

On July 29 the Committee withdrew another 378 sheets, *id.*, leaving 3,402 sheets.

Ten sheets were rejected because the circulator's names were illegible, *id.* at 117-118, leaving 3,392 sheets.

Five sheets were rejected because they contained more than one circulator's name or address, *id.* at 118, leaving 3,387 sheets.

Twelve sheets were rejected because they contained alterations in the circulator's affidavit, *id.* at 118-119, leaving 3,375 sheets.

Three sheets were rejected because they lacked dates, *id.* at 119-120, leaving 3,372 sheets.<sup>4</sup>

Two hundred ninety-three sheets, which had been signed by six named individuals as circulators, were rejected because those individuals testified that they had signed some sheets that they had not personally circulated or witnessed. *Id.* at 126-129.<sup>5</sup> That left 3,079 sheets.

Sixty sheets that had been signed by three named individuals as circulators were rejected based on testimony by others that they had engaged in misconduct. *Id.* at 130-131. That left 3,019 sheets.

One hundred eighteen sheets that had been signed by two named individuals as circulators were rejected because those individuals asserted their Fifth Amendment right against self-incrimination when called to testify, *id.* at 131-132, leaving 2,901 sheets.<sup>6</sup>

---

<sup>4</sup> The Board's decision notes that 58 additional sheets in this category were withdrawn by the Committee. Pet. App. 120. Why these sheets were withdrawn, and why three additional sheets were rejected by the Board for this reason, is puzzling, given that the petition form did not exist outside the date range during which it was proper to collect signatures. Nevertheless, as the Board ultimately ruled that the petitions fell short by 2,912 signatures, the inclusion of these 61 sheets (with a maximum of twenty signatures per sheet, *see* D.C. Code § 1-1001.16(g) and 3 DCMR § 1003.5(a)) would not have changed the result.

<sup>5</sup> The Board's formal decision does not state the number of sheets collected by one of these individuals (Tenisha Colbert), but that number can be found in the chart appended to the transcript of the Board's oral decision, Pet. App. 75.

<sup>6</sup> Again, the Board's formal decision does not state the number of sheets collected by these individuals, but those numbers can be found in the chart appended to the transcript of the Board's oral decision, Pet. App. 75 & 76.

Fifty-eight sheets were rejected based upon the testimony of two individuals who said their names had been forged on sheets they did not circulate, *id.* at 132-133, leaving 2,843 sheets. That marked the end of the Board’s rejection of signatures for specific reasons.

Although the Board’s formal decision does not indicate how many signatures were left at this point, the Executive Director’s August 5 memorandum to the Board indicates that the remaining number was 21,279. Pet. App. 34. This was 3,680 more signatures than were required to qualify the initiative for the ballot.

The Board then rejected all of the sheets that had been circulated by persons who were affiliated with the Stars and Stripes operation. Pet. App. 134-150. This brought the number of valid signatures down to 14,687, or 2,912 less than required. Pet. App. 36.<sup>7</sup> Thus, 6,592 otherwise-valid signatures were rejected simply because they had been collected by 58 persons affiliated with Stars and Stripes, Inc.<sup>8</sup>

• • • • •

The Board’s explanation of why it rejected these 6,592 otherwise-valid signatures is contained on pages 36 to 51 of its formal decision, Pet. App. 134-149. That explanation leaves no doubt that the Board’s disapproval of the communications made by some circulators to some voters was the primary, if not the sole, basis for the Board’s action.

During most of its discussion (Pet. App. 134-143), the Board focuses exclusively on these communications, under such headings as “False Advertising” (*id.* at 134), “T-Shirts and Associated Sales Pitch” (*id.* at 135), “Communication of Misinformation” (*id.* at 140)

---

<sup>7</sup> The Board’s formal decision also does not contain this number. It can be found in the Executive Director’s memorandum, Pet. App. 36.

<sup>8</sup> The Board’s decision states that it has rejected the sheets submitted by 67 circulators affiliated with Stars and Stripes. Pet. App. 150. Presumably those are the 66 names listed on Pet. App. 75 and 76 and the one name listed on Pet. App. 77. The Board had already rejected the sheets submitted by nine of those 67 circulators (Atkins, Cambbell, Colbert, Darnell, Gerst, Hunter, Mack, Rempson and Squirewell) for the specific reasons noted above. Thus, all of the 753 petition sheets submitted by the 58 other circulators affiliated with Stars and Stripes were rejected for the catch-all reasons set out by the Board at Pet. App. 134-150.

and “Brochures” (*id.* at 142). The Board finds that the message on T-shirts that were worn by some circulators (“Sign Up! For Jobs, Schools, and Healthcare,” *id.* at 134), and the similar “sales pitch” that was used (“concerning the benefits that Initiative Measure No. 68 would bring to education and healthcare,” *id.* at 137), “constituted misrepresentations of Initiative Measure No. 68, and were therefore in violation of the attestation in the circulator’s affidavit that prohibits the making of false statements regarding the Initiative.” Pet. App. 134-135.

For a few pages, the Board discusses the “Lack of Proper Oversight” at the Stars and Stripes operation. *Id.* at 143-146 (section heading). The Board notes that management had a “lackadaisical attitude” about the circulation process, *id.* at 143, that some managers “did not personally review the laws” regarding initiatives or the substance of the VLT Initiative, *id.*, that the recruitment process for circulators “suffered from certain serious weaknesses,” *id.* at 144, that the response to reports of problems was “not sufficiently coordinated,” *id.* at 145, and that management was “splintered [and] uncoordinated,” *id.* at 146. But the Board properly does not suggest that these issues were themselves grounds for invalidating any signatures. Rather, it notes that “these factors undoubtedly contributed to the problems that arose.” *Id.*<sup>9</sup> The Board then discusses “The Proponents’ Response” to the evidence of irregularities, finding it unimpressive. *Id.* at 146-148. Finally, in its Conclusion, the Board summarizes its findings and decides to reject all signatures collected by the Stars and Stripes personnel. *Id.* at 148-150.

---

<sup>9</sup> It is obviously none of the Board’s concern whether a petition operation is well or poorly managed or whether the managers have personally read the D.C. Code or the text of the proposed measure. The Board is not conducting an evaluation of an employee’s job performance, and the D.C. Code does not require that petition drives adhere to some standard of “best practices.” A poorly-managed petition drive might succeed and a well-managed drive might fail; the only question before the Board is whether the petitions that are submitted comply with the legal requirements. Thus, the Board’s discussion of these management issues must be regarded simply as a background explanation of why certain legally significant errors (such as the collection of signatures by non-residents, or—in the Board’s view—the communication of false information) occurred, as the Board itself recognized.

Thus, if one were to eliminate the discussion of voter communications from the Board's explanation for its disqualification of all Stars and Stripes signatures, there would be essentially nothing left to explain that drastic and outcome-determinative action.

The Board's oral announcement of its decision further confirms this conclusion. As Chairman Lewis stated:

In particular, Mr. Ross [*sic*; should be Mr. Ross Williams] testified that he trained individuals to describe the initiative as involving education and health care, and to use the approach of describing the initiative in this fashion if an individual happened to be resistant to the idea of gambling. Gambling, of course, is the primary purpose underlying the initiative as presented, but Mr. Ross [Williams] testified—and it was confirmed by other witnesses—that, in fact, he trained individuals to mention the gambling portion, and if an individual happened to be resistant to the idea, to then follow it up with that it involved education, that it involved health care, and so forth.

Characterizing the initiative as being about schools and health care is deemed by the Board to be a false statement. It's deemed by the Board to be misleading. It's deemed by the Board to be a false statement, a misrepresentation of the initiative. This we consider to be a sales pitch, in effect, a sales pitch that we as a Board found to be misleading.

The testimony was that Mr. Ross Williams did training for most of the people at the Red Roof Inn, including for individuals who reported to Clint Hyatt and/or Mr. Carl Towe. And Mr. Carl Towe was the head of the Stars and Stripes operation.

The Board has, *therefore*, concluded that sheets from individuals associated with the training of Ross Williams and Carl Towe, that is, those associated with Stars and Stripes, Carl Towe who headed it, and Ross Williams, will not be included--in fact, they *will be stricken*.

The concern that this issue has raised is one where the testimony came in from Mr. Williams himself, came in from others who participated in the training, and also those individuals testifying that they made such representations to individuals as they engaged in the signature-gathering process. Because we deem the association of the initiative with schools and health care to be problematic, indeed to be a false statement, we believe that *those representations* to the public which the individual circulators were encouraged and, indeed, trained to make created a taint on the process that *requires that the petition sheets associated with individuals under the rubric of Stars and Stripes, Ross Williams, and Carl Towe should be discounted*.

Pet. App. 64-66 (emphasis added).

To summarize: Stars and Stripes circulators were trained to say that the initiative was “about schools and health care,” but this is a “false statement,” and the Board “has, *therefore*, concluded” that the sheets from Stars and Stripes “will be stricken.” Further, “[b]ecause . . . the association of the initiative with schools and health care” is a “false statement,” the Board believes that “those representations . . . *require*[] that the petition sheets associated with . . . Stars and Stripes . . . should be discounted.” It could hardly be clearer that the basis—or at least the principal basis—for the Board’s action was the public advocacy of circulators urging voters to sign the petition because the initiative would lead to improvements in education and healthcare.<sup>10</sup>

## SUMMARY OF ARGUMENT

### I.

Viewed in their proper context, the communications condemned by the Board are not false and misleading. Predictions about the effects of proposed government policies are universally understood as advocacy, not guarantees, and the Board’s decision points to no evidence that circulators here purported to “guarantee” any particular benefits. Moreover, the official summary of the initiative, formulated by the Board itself, was printed on the front of every signature sheet for any voter to see. The Board’s view about what is appropriate speech is more suited to a stock prospectus than to political speech among citizens on the sidewalk.

---

<sup>10</sup> This case is, therefore, not comparable to or controlled by this Court’s recent decision in *Williams v. Board of Elections and Ethics*, 804 A.2d 316 (D.C. 2002). There, the record showed a pervasive pattern of intentional fraud (*e.g.*, forged and invented signatures) carried out by the people who “coordinated the petition process generally.” *Id.* at 320 (internal quotation marks omitted). Here, by contrast, “[n]otwithstanding allegations of a scheme or plot to violate the District’s election laws, the Board found no evidence in the context of these proceedings that the Proponents set out to intentionally flout the District’s election laws, or that they encouraged Stars and Stripes to do so.” Pet. App. 101. *Williams* does not stand for the proposition that valid signatures of registered voters are to be rejected wholesale whenever the political arguments of initiative proponents become overenthusiastic.

## II.

No statute authorizes the Board of Elections to regulate the political speech of petition circulators. The Board has purported to grant itself that power by adopting a regulation requiring circulators to file affidavits stating that they have not made false statements to persons signing petitions. Such a requirement, when combined with the Board's expansive interpretation of what is "false," bids fair to make a felon out of every enthusiastic petition-circulator. There is no reason to think that the D.C. Council intended to commission the Board as political speech police, and this Court should hold that the Board's effort to commission itself for that role is *ultra vires*.

## III.

The Board's action in rejecting 6,592 otherwise-valid signatures because it found that the political speech to which some of them may have been exposed was false and misleading violated the Constitution. Face-to-face speech between one citizen and another about a ballot measure is "core political speech" entitled to maximum protection under the First Amendment. Just as we do not want—and the First Amendment does not permit—the Federal Election Commission to decide for all of us whether John Kerry earned his medals in Vietnam, so we should not want—and the First Amendment does not permit—the D.C. Board of Elections and Ethics to decide for all of us whether passage of the VLT Initiative is likely to result in substantial funding for education and healthcare. Under the reasoning adopted by the Board in this case, the Board of Elections distributes the ration coupons for speech about ballot measures. Such a scheme is not compatible with the First Amendment.

## ARGUMENT

### **The Board of Elections’ Rejection of 6,592 Otherwise-Valid Signatures Because of the Content of Political Communications Between Circulators and Voters Should be Reversed**

The Board purported to recognize that:

“petition circulation ... is *core political speech*, because it involves *interactive communication concerning political change*.’ [*Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182] at 186 (quoting *Meyer [v. Grant]*, 486 U.S. [414] at 422). First Amendment protection for such activity is, therefore, *at its zenith*. 525 U.S. at 187 (quoting *Meyer*, 486 U.S. at 425 (internal quotations omitted)).” *Chandler v. City of Aruada*, 292 F.3d 1236, 1241 (10th Cir. 2002).

Pet. App. 149 (emphasis in original) (missing parenthesis added). The Board nevertheless believed that it had the authority to parse such “core political speech” for fine degrees of accuracy and to decide, for example, that voters who may have heard that the VLT Initiative would create jobs could have their signatures counted, while the signatures of voters who may have heard that the initiative would generate funds for education had to be thrown out.

The Board’s rejection of otherwise-valid voter signatures because of the content of advocacy statements made to voters was wrong for three reasons: First, those statements were not false and misleading. Second, the Board has no statutory authority to police the content of political debate. Third, any attempt to do so violates the freedom of speech protected by the First Amendment. We discuss these points in turn.

#### **I. Circulators’ Advocacy Statements About Education and Healthcare Were Not False and Misleading**

The Board found that both the T-shirts worn by some circulators and oral statements made by some circulators “that the Initiative ‘was about health care,’” Pet. App. 136, were “designed to induce potential signers to sign the petition based on the representation that the initiative would produce benefits for schools and healthcare.” *Id.* at 138. No doubt they were. The Board then concluded that these statements were false and misleading because

“Initiative Measure No. 68 did not—and could not—make any such promise or guarantee.”

*Id.* But the Board does not suggest that the T-shirts “promised” or “guaranteed” such benefits, nor could it credibly do so. Nor does it cite any evidence that any circulator ever told any voter that passage of the initiative “promised” or “guaranteed” such benefits.

In ordinary conversation, and certainly in political advocacy, a statement that a proposed law or policy will lead to a certain consequence is not intended or understood as a promise or a guarantee. For example, a statement that passage of the McCain-Feingold Act will cause political campaigns to become cleaner (or that it will simply force political money into new and even less savory channels), or a statement that public financing of a baseball stadium in the District will bring economic growth and vitality (or that it will never repay the costs involved), or a statement that replacing D.C. General Hospital with an HMO-type health plan for the poor will provide better health care at lower cost (or that it will provide less care at higher cost), simply cannot be understood as a promise or a guarantee. Neither can a statement that the VLT Initiative will “produce benefits for schools and healthcare.”

“[T]he meaning of words depends on their context.” *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19, 25 (1988). In the context of speech about proposed laws or policies, these sorts of statements are intended, and are universally understood, as optimistic (or pessimistic) predictions and as advocacy. As such, a statement that the VLT Initiative will “produce benefits for schools and healthcare” is entirely reasonable. The proposed initiative itself states that one of its purposes is to “recommend[] that revenues accruing to the District from the operation of video lottery terminals be distributed equally to the District of Columbia Public Schools Fund, the District of Columbia Senior Citizens Prescription Drug Benefits Fund, and the General Fund of the District of Columbia.” Pet. App. 6. It is quite reasonable to think that if the Initiative became law, the D.C. Council would likely follow that recommendation. Indeed, the Board of Elections itself thought this recommendation was such an important part of the initiative that it referred to it in the official summary statement that it formulated for inclusion on the face of every petition sheet. *See id.* It is astonishing

that the Board would refer to proposed educational and healthcare benefits in its own summary of the initiative, and then rule that sidewalk discussion of the same proposed benefits is “false and misleading.”<sup>11</sup>

Moreover, the official summary statement was printed prominently on the front of every petition sheet, as required by law. *See* D.C. Code § 1-1001.16(g)(3). *See also* Pet. App. 152 (sample form). The obvious purpose of this requirement is to guarantee that voters who are solicited to sign an initiative petition will have easy access to a “true and impartial” (D.C. Code § 1-1001.16 (c)(1)) summary of the measure they are being asked to sign. The Board’s supposition that D.C. voters will be seriously misled by a statement that the initiative is “about healthcare” when the official summary, captioned “VIDEO LOTTERY TERMINAL INITIATIVE,” is right before their eyes, supposes a sorry level of attention by voters.<sup>12</sup> Other courts that have been presented with similar issues have held voters to a more responsible standard. In *In re Initiative Petition No. 142*, 55 P.2d 455 (Okla. 1936), a voter challenging a proposed initiative argued, almost identically to the intervenors here, that signatures should be disqualified because “the circulators were instructed by proponents to misrepresent the contents of the petition in order to procure sufficient signatures.” *Id.* at 457. The court rejected that argument, holding that:

---

<sup>11</sup> The Superior Court’s deletion of this sentence from the official summary statement is irrelevant. The official summary statement must by law be “true and impartial,” and “shall not intentionally create prejudice for or against the measure.” D.C. Code § 1-1001.16(c)(1). That is why the Board of Elections, rather than the sponsor, is charged with formulating it. *Id.* By contrast, advocacy by petition circulators need not be impartial and, of course, its whole purpose is to create “prejudice” for the measure, so that voters will sign the petition.

<sup>12</sup> Without expressing an opinion about voters who would sign legal papers without looking at them to see what they are, it is true that the summary statement is printed only on the front of each petition sheet, while signatures are obtained on both sides. To make viewing of the summary statement even more unavoidable, the Board might wish to consider having the summary statement printed on both sides of petition sheets. That would be a narrowly tailored response to a perceived problem. Censoring the speech of circulators is not.

The presumption is to be indulged that the signers read the instrument presented to them. Frequently there is divergency of opinion as to the result of a proposed political measure.

The alleged misrepresentations may be results designed to be accomplished by proponents of the measure and honestly stated by circulators to prospective signers. Courts cannot interfere on collateral matters with action of electors under the theory that some may have been deceived.

*Id.* When the same court was more recently presented with a similar allegation it relied upon its earlier case and added that the voters who sign initiative petitions “are acting in the capacity of legislators. They are members of the largest legislative body in the state,” and are to be treated as responsible actors. *In re Initiative Petition No. 281*, 434 P.2d 941, 953 (Okla. 1967). *See also In re Initiative Petition No. 347*, 813 P.2d 1019, 1033 (Okla. 1991) (“this Court will not interfere with the actions of electors under the theory that some of the signators may have been deceived”). The Supreme Court of Missouri takes the same position: “The parties signed a petition to which was attached the measure itself, and such signers are in no position to question their signatures, any more than one could question the signing of a note which he did not read.” *State ex rel. Westhues v. Sullivan*, 224 S.W. 327, 339 (Mo. 1920).

Apparently the Board’s view is that statements about the benefits to be created by an initiative may only be made if it is “safe to assume” that such benefits will occur. Pet. App. 136 n.18. But if that is the law, then the Board’s ruling that it was permissible for circulators to say that the VLT initiative would lead to the creation of jobs, *id.*, was plainly wrong. The initiative could pass on Election Day and be repealed by the D.C. Council the next morning. *See Atchison v. District of Columbia*, 585 A.2d 150, 154-56 (D.C. 1991). Or it could be

vetoed by Congress, *see* D.C. Code § 1-206.02(c).<sup>13</sup> And economic predictions are by their nature highly uncertain. The Board’s attempt to draw lines between more and less likely results does not inspire confidence in the Board’s skill as a political prognosticator. Happily, that is not a job the Board has been tasked to perform.<sup>14</sup>

Predictions about the consequences of passage of the VLT Initiative are no more or less reliable than predictions about the consequences of other ballot measures. For example, the November 1998 general election ballot contained the D.C. Medical Marijuana Initiative. Proponents of that initiative surely urged voters to sign their petitions by stating, truthfully, that passage of the initiative would decriminalize the use of marijuana for medical purposes under District law—without necessarily pointing out the additional truth that the federal law against possession or use of marijuana would remain in effect. The initiative passed by a landslide, winning 69% of the vote, with a majority in every single precinct.<sup>15</sup> Based on its reasoning here, however, the Board of Elections would have disqualified the petitions based on the proponents’ “misleading” speech.<sup>16</sup>

---

<sup>13</sup> Judging from media reports, it seems more “safe to assume” that one of these events will occur than that the VLT Initiative will ever lead to the creation of jobs (except, of course, jobs for lawyers, as witness this appeal).

<sup>14</sup> It makes no difference whether the Board’s conclusions on these points are labeled “findings of fact.” Because “this case implicates serious First Amendment concerns . . . [w]e must therefore remain mindful of our obligation as an appellate court . . . to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 592 (D.C. 2000) (internal quotation marks and citations omitted).

<sup>15</sup> The election results are posted on the Board of Election’s website at [http://www.dcboee.org/information/elec\\_1998/ini59\\_98.htm](http://www.dcboee.org/information/elec_1998/ini59_98.htm).

<sup>16</sup> Further confounding prognosticators, the Medical Marijuana Initiative has never become effective despite its passage because it has been blocked by congressional “budget riders.” The current rider is in the District of Columbia Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-199, Division C, Title III, § 423, 118 Stat. 139 (Jan. 23, 2004).

In 1940 one Oscar Wheeler was convicted of having obtained the signature of a voter on a nominating petition “by knowingly misrepresenting that the paper in question was in fact a petition . . . to make working conditions better.” *State v. Wheeler*, 14 S.E.2d 677, 678 (W.Va. 1941). Reversing his conviction, the West Virginia Supreme Court observed:

[T]he representation that the [petition] was intended to make working conditions better . . . plainly relates to the future, and since the anticipation of future happenings is merely a matter of opinion, would not be a false statement of fact. It is unnecessary, we believe, to cite authority on that question.

*Id.* In our view, *Wheeler* states the correct rule here and should be followed.<sup>17</sup>

A much more recent case from California illuminates the proper boundaries of the Board of Elections’ power to regulate speech. In *San Francisco Forty-Niners v. Nishioka*, 89 Cal. Rptr. 2d 388 (Cal. Ct. App. 1999), the court rejected an initiative on the ground that the petition contained objectively false information intended to mislead voters. But the speech involved in that case was “not a handbill or campaign flyer—it [was] the official election document subject to various restrictions by the Election Code, including reasonable content requirements of truth.” *Id.* at 396. In that sense, it was like the official Summary Statement of a D.C. initiative. The court in *Nishioka* took pains to emphasize that it could not regulate “the typical hyperbole and opinionated comments common to political debate,” which the initiative’s proponents “were free to speak out in any of the varied available traditional public forums.” *Id.* at 397-398. Here, by contrast, the Board of Elections has asserted the power to regulate precisely “the typical hyperbole and opinionated comments common to political debate” that were in fact made in the traditional public forum of public sidewalks. But hyperbole and opinionated comments are simply not “false and misleading” when they are

---

<sup>17</sup> The real reason Mr. Wheeler was prosecuted and convicted for gathering signatures on a petition was because the person he was seeking to put on the West Virginia ballot was a candidate of the Communist Party. *See id.* *Wheeler* illustrates the dangers inherent in allowing the government to decide what are false statements in a political context: statements by unpopular people are far more likely to be deemed false than statements by popular people—a danger perhaps not altogether absent here.

uttered in the context of political debate and predictions about the anticipated consequences of political change.<sup>18</sup>

## II. The Board's Action Was Ultra Vires

Nothing in the D.C. Code specifically authorizes the Board of Elections to regulate the political speech of petition circulators. In the absence of a clear statutory command to do so, the doctrine of constitutional avoidance should lead this Court to hold that the Board acted beyond its statutory powers here.

The initiative statute authorizes the Board to reject an initiative petition on five, and only five, grounds: that it is not in proper form; that the time for collecting signatures has expired; that the necessary number of signatures has not been obtained; that the petition sheets do not contain the prescribed affidavits of circulators; and that the petition was not circulated by adult D.C. residents. D.C. Code § 1-1001.16(k)(1).<sup>19</sup> Nothing permits the Board to reject a petition based upon the advocacy of its proponents in public forums.

---

<sup>18</sup> Congress itself has recognized that speech in a political context requires more leeway than other speech. The federal False Statement Act makes it a crime knowingly or willfully to “make[] any materially false, fictitious, or fraudulent statement or representation” in “any matter within the jurisdiction of the executive . . . branch of the Government of the United States.” 18 U.S.C. § 1001(a). Statements made to the legislative branch, however, are criminal only if they are made in the context of “administrative matters” or in an “investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress.” 18 U.S.C. § 1001(c). *See United States v. Pickett*, 353 F.3d 62 (D.C. Cir. 2004). Congress understood that political communications with Members and staffers could not be held to a standard of truthfulness comparable to statements made to the FBI or the IRS. *See* 142 Cong. Rec. H11137-01 (September 25, 1996) (statement of Rep. McCollum); 142 Cong. Rec. S11605-02 (statement of Sen. Spector).

<sup>19</sup> Technically, § 1-1001.16(k)(1)(C) allows the Board to reject a petition only for an insufficient number of signatures “on its face.” It is only “[a]fter acceptance of an initiative . . . petition” that the Board turns to the question whether there are sufficient *valid* signatures. D.C. Code § 1-1001.16(o)(1) (emphasis added). Whether the statute intends for the Board to disqualify valid signatures of voters under subsection (o) after it has accepted the petition under subsection (k) is not clear.

Section 1-1001.16(h), in turn, prescribes the six items that must be included in the circulator’s affidavit: the circulator’s name; his or her address; that he was in the presence of each person signing the petition; that according to the best information available to the circulator each signature is genuine; that the circulator is an adult resident of the District; and the dates on which signatures were obtained. Again, nothing in the statute purports to regulate the political speech of the circulator.

The requirement that the circulator sign an affidavit stating that he or she “has not made any false statements regarding the initiative or referendum to anyone whose signature is appended to the petition,” 3 D.C.M.R. § 1003.6(i), is wholly a creation of the Board. In our view, it is an unauthorized and illegitimate creation, at least if it is interpreted—as the Board interprets it here—to make a perjurer out of any circulator who engages in robust political advocacy to persuade voters to sign her petition.<sup>20</sup>

It is true that the Board has the power to “[i]ssue such regulations . . . as are necessary to carry out the purposes” of the election laws entrusted to the Board’s administration. D.C. Code § 1-1001.05(14). But it is not necessary, or appropriate, for the Board to commission itself as political speech police, as it has apparently believes itself to have done through 3 D.C.M.R. § 1003.6(i).<sup>21</sup>

“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.” *U.S. Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (quoting *Spector Motor Service v. McLaughlin*,

---

<sup>20</sup> In view of the Board’s obvious distaste for paid professional petition circulators, it is powerfully ironic that the Board’s self-created affidavit requirement will discourage residents who strongly support the goals of an initiative from becoming volunteer circulators, for fear that their advocacy will either invalidate their petitions or make them criminals.

<sup>21</sup> If it is not clear that this regulation has that effect, just imagine the consequences of requiring candidates for public office to sign a similar affidavit stating “I have not made any false statements to voters regarding my candidacy.” If interpreted as the Board interprets 3 D.C.M.R. § 1003.6(i) here, legislatures would only be able to convene behind bars.

323 U.S. 101, 105 (1944)). Therefore, “if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). *See also Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 49 (D.C.1987) (en banc) (Ferren, J., concurring in the result in part and dissenting in part) (noting “doctrine favoring statutory over constitutional ground for decision when both are independently available”).

This case is an appropriate one for the application of this doctrine. The Board’s statutory authority for promulgating 3 D.C.M.R. § 1003.6(i) is tenuous indeed; there is no reason to believe that the D.C. Council intended to give the Board the constitutionally-prohibited power to police political speech when it granted the general power to make regulations “necessary to carry out the purposes” of administering elections. Where the legislative intent to do so is not clear, the courts should avoid a statutory interpretation that would give government officials constitutionally troublesome powers. *See Greene v. McElroy*, 360 U.S. 474, 507 (1959) (“explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting . . . our laws”); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (declining, in the absence of clear legislative intent, to read statute delegating authority to the Secretary of State as granting authority to limit people’s fundamental right to travel); *United States v. Bass*, 404 U.S. 336, 349 (1971) (“In traditionally sensitive areas . . . the requirement of clear statement assures that the [enacting body] has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”).<sup>22</sup>

---

<sup>22</sup> The petitioner has also suggested that D.C.M.R. § 1003.6(i) is *ultra vires* as applied here, *see* Brief for Petitioner at 31-33. In any event, it is always appropriate for the Court to consider a non-constitutional ground of decision that is presented by the record. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) (Court decides statutory issue raised by amicus rather than reaching constitutional question on which certiorari had been granted.)

### **III. The Board's Action Was Unconstitutional**

Even if authorized by statute, and even if the statements at issue can be characterized as false or misleading, the Board's action was unconstitutional.

As the Supreme Court has noted, “[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. . . . This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Accordingly, such communications are at the “zenith” of First Amendment protection. *Id.* at 425. These teachings are entitled to more than the lip service given to them by the Board.

The speech that the Board was so quick to find false or misleading was, in fact, precisely the sort of speech the Supreme Court was referring to as “core political speech” entitled to the highest level of constitutional protection: speech “expla[ining] . . . why [the measure’s] advocates support it.” While some people may support the VLT Initiative because they expect it to make them rich (either through gambling or through a monopoly license to coin money), others may support it because they foresee a large flow of tax revenue to the education fund, the prescription drug fund and the general fund. “The First Amendment protects [these supporters’] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing,” *Meyer v. Grant*, 486 U.S. at 424, for the First Amendment “was fashioned to assure *unfettered* interchange of ideas for the bringing about of political and social changes desired by the people.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (emphasis added).

Of course, political speech *is* sometimes false or misleading—although it’s often hard to find two people who agree on just which political speech is misleading and why. For two

current examples, note the debates over the accuracy *vel non* of the movie *Fahrenheit 9/11*,<sup>23</sup> and over the accuracy *vel non* of the publications and advertisements by “Swift Boat Veterans for Truth” about Senator Kerry’s actions in Vietnam.<sup>24</sup> Yet no one, amicus sincerely hopes, would suggest that the government could take action against that speech or disqualify a voter’s action—whether the signing of a petition, the making of a contribution, or the casting of a vote—because she had been exposed to one or the other of those communications. Do we really want the Federal Election Commission to decide for all of us whether John Kerry earned his medals? If not, then we should also not want the D.C. Board of Elections and Ethics to decide for all of us whether passage of the VLT Initiative is likely to result in substantial funding for education and healthcare.

If we are to honor our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *Times v. Sullivan*, 376 U.S. at 270, then although a certain amount of “erroneous statement is inevitable . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Election-related speech is not more, but (if anything) less, subject to government regulation than political speech in general. “[T]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Of course the Supreme Court has upheld the regulation of political contributions and expenditures, *see Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which have an indirect

---

<sup>23</sup> See, e.g., <<http://www.davekopel.com/Terror/Fiftysix-Deceits-in-Fahrenheit-911.htm>>.

<sup>24</sup> See John E. O'Neill, UNFIT FOR COMMAND: SWIFT BOAT VETERANS SPEAK OUT AGAINST JOHN KERRY (Regnery 2004).

effect on speech. But it has not approved the direct regulation of political speech, which is what the Board of Elections now seeks to do.

These issues were addressed in the context of an initiative petition in *Edwards v. Hutchinson*, 35 P.2d 90 (Wash. 1934). The plaintiff there sought to enjoin acceptance of an initiative petition on the ground that “corrupt and fraudulent practices have been indulged in pursuant to a conspiracy by the proponents of the initiative measure, by means of which they have deceived and deluded many persons into signing the petition without their knowing the nature of the proposed measure,” and that “the warning which the law requires to be placed at the top of each sheet of an initiative petition has in many instances been covered up and concealed, the title to the proposed act has not been displayed as the law requires,” all “for the purpose of deceiving the public and in an attempt to fraudulently induce voters to sign the initiative petition.” *Id.* at 90-91.

While the court expressed sympathy and “deprecate[d] the use of methods such as are here charged,” it saw “no possibility of granting the desired relief without . . . usurping political powers which have never yet been granted to or assumed by the courts.” *Id.* at 91.

The court explained:

Ever since popular elections were instituted, in every one held, some one, perhaps many voters, have been deceived, and so long as the political field remains free and open, as it should and must if we are to have free popular government, there is no way to prevent prejudices being appealed to, and voters to a greater or less degree will always be deceived.

Manifestly the courts cannot undertake to set aside elections or to interfere with the action of electors upon the theory that some one has been deceived. Attempts to deceive can only be met by publicity and a campaign of education. The courts are powerless, or, if not powerless, an attempt to exercise power would result in confusion worse confounded. These views, we think, are supported by the great weight of authority.

*Id.* at 92.

This old wisdom remains wisdom. The Board of Elections’ view of the law would open a Pandora’s box of administrative and judicial interference with politics and democracy.

Followed to its logical conclusion, the Board's reasoning in this case would authorize the Board to set aside the results of the *balloting* on an initiative on the ground that proponents had mischaracterized the measure in their communications with voters. Why, after all, should the election be held to a lower standard of honesty than the petition drive? The Board's reasoning might even authorize the Board to set aside the results of a *candidate* election on similar grounds. Fraud is fraud. *But see Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (invalidation of election based on false and fraudulent statements of candidate "runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy.").

Moreover, the logic of the Board's position here would certainly authorize the conviction and imprisonment of many citizens who circulate initiative petitions. Under the Board's regulations, a circulator must sign an affidavit swearing that he or she "has not made any false statements regarding the initiative or referendum to anyone whose signature is appended to the petition." 3 D.C.M.R. § 1003.6(i). Such a circulator becomes a perjurer upon a finding that his or her oral advocacy was "false and misleading"—which, according to the Board, includes saying that an initiative will accomplish any beneficial goal when that goal is not "guaranteed." The chilling effect of such a legal regime on the willingness of citizens to engage in political activity would truly be glacial. What sensible person would risk a felony conviction for perjury for the remarks that he or she might make in the course of oral political discussions with other citizens on the sidewalk?

To put the Supreme Court's teachings in the vernacular, in the arena of political speech the cure of government regulation for truth or falsity is worse than the disease of misinformation. No doubt the Board of Elections felt that it was advancing the cause of good government by protecting D.C. voters from inaccurate information. But "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning but without understanding." *Chandler v. Miller*, 520 U.S.

305, 322 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

### **CONCLUSION**

For the reasons stated above, the decision of the Board of Elections to disqualify 6,592 otherwise-valid signatures on the ground that statements made to petition-signers by circulators or persons working with them were false and misleading should be reversed, and the matter should be remanded to the Board with instructions to certify the VLT Initiative to the ballot.

Respectfully submitted,

---

Arthur B. Spitzer  
D.C. Bar No. 235960  
American Civil Liberties Union  
of the National Capital Area  
1400 20th Street, N.W.  
Washington, D.C. 20036  
(202) 457-0800

Counsel for Amicus Curiae

August 27, 2004