Nos. 08-1389 & 08-1415

In the United States Court of Appeals for the Tenth Circuit

KAREN SAMPSON, NORMAN FECK, LOUISE SCHILLER, TOM SORG, WES CORNWELL, and BECKY CORNWELL,

Plaintiffs-Appellants/Cross-Appellees,

v.

BERNIE BUESCHER,

Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
The Honorable Richard P. Matsch, District Judge
District Court No. 06-CV-01858-RPM-MJW

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS, INDPENDENCE INSTITUTE, NATIONAL TAXPAYERS UNION & SAM ADAMS ALLIANCE SUPPORTING PLAINTIFFS URGING AFFIRMANCE AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* hereby make the following disclosures:

The Center for Competitive Politics ("Center") is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code. The Center has no parent corporation and issues no stock. There are no publicly held corporations that own ten percent or more of the stock of the Center.

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STATEMENT OF *AMICI CURIAE* [1]

The Center for Competitive Politics ("Center") is a non-profit, non-partisan 501(c)(3) organization founded in 2005 by Bradley A. Smith, a professor of law at Capital University Law School and a former chairman of the Federal Election Commission, and Stephen M. Hoersting, a campaign finance attorney and a former general counsel of the National Republican Senatorial Committee. The Center's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Independence Institute ("Institute") is a non-profit, non-partisan 501(c)(3) organization founded in 1985 as a state-based think tank located in Colorado. The Institute is established upon the eternal truths of the Declaration of Independence. As a non-partisan public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders, the Institute is involved in local, state, national, and international issues, including ballot measures.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

The National Taxpayers Union ("NTU") is a non-profit, non-partisan 501(c)(4) organization founded in 1969 to promote lower taxes and smaller government at all levels—local, state, and national. NTU has 362,000 members nationwide. NTU publishes an analysis of state ballot issues each election cycle, and, last year successfully challenged and received a preliminary injunction against Florida's election laws that would have compelled NTU to submit to disclosure requirements because of its distribution of ballot issue guides analyzing voter referenda in that State.

The Sam Adams Alliance ("Alliance") is a non-profit, non-partisan 501(c)(3) organization founded in 2006 that seeks to inspire, train, and link allies to advance individual and economic liberty through a strategic combination of new media tools and traditional communications. To accomplish this mission, the Alliance frequently partners with state and local organizations and activists that suffer under costly and burdensome campaign finance regulations that interfere with their rights to speak out and associate together in support of or opposition to ballot measures, legislation, and other issues affecting their communities.

Amici are interested in this case because it involves the regulation and restriction of free speech and association concerning ballot questions, thus hindering political competition, communication, and information.

SUMMARY OF THE ARGUMENT

In laws and regulations compelling the registration, reporting, and disclosure of support for ballot "issue committees," we witness two canons of political law on an apparent collision course: that government corruption is cured by disclosure,[2] and that the right of individuals to speak and associate freely depends upon their ability to do so anonymously. But the conflict is a false one because each canon, applied properly, works toward the same purpose: protecting citizens from corrupt and abusive political opponents.[3] Anonymity of ballot question speech, like disclosure of candidate speech, advances the government interest at the root of all campaign finance regulation: preventing corruption or its appearance.

Like state regulation of any core political speech and association, Colorado's disclosure regime for "issue committees" is subject to strict scrutiny, and cannot be sustained absent a compelling governmental interest advanced through narrowly tailored means. Indeed, the Supreme Court has held that ballot issue advocacy is "at the heart of the First Amendment's protection," and that "no form of speech is entitled to greater constitutional protection."

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[2] *See* footnote 4, *infra*.

[3] *Amici* agree with Plaintiffs that the private enforcement of Colorado's campaign finance laws against "issue committees" is unconstitutional and should be struck down. *See* Pls.' Corrected Opening Br. 33-42; *see also* Aplt. App. 429-439, 1286-1295, 2187-2193. *Amici* focus this brief, however, on the unconstitutionality of the disclosure regime imposed on "issue committees."

None of the three interests in mandatory disclosure recognized by the Supreme Court—the anti-corruption, enforcement, and informational interests—supports the application of compelled disclosure to "issue committees." Rather, the Supreme Court has limited those disclosure interests to the candidate context.

Moreover, mandatory disclosure of support for or against ballot questions imposes unconstitutional costs and burdens: distracting voters from the ballot measure itself, as well as its merits and faults; providing political opponents with means for personal and professional retaliation against those who associate together and speak out concerning ballot propositions; and exposing citizens and "issue committees" to legal risk through necessary compliance with a complex and burdensome disclosure regime.

ARGUMENT

I. NO STATE INTEREST SUFFICIENT TO OVERRIDE FIRST AMENDMENT RIGHTS SUPPORTS THE REGULATION OF "ISSUE COMMITTEES"

A. Compelled Disclosure Regimes Are Subject to Strict Scrutiny

In its seminal campaign finance decision, *Buckley v. Valeo*, 424 U.S.1 (1976), the Supreme Court announced that the "[d]iscussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution," and, accordingly, the "First Amendment affords the broadest protection to such political expression 'to assure [the] unfettered interchange of

ideas for the bringing about of political and social changes desired by the people.'" *Id.* at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Thus, disclosure of campaign contributions is a narrow exception to the general rule that anonymous speech is entitled to full protection under the First Amendment. *See*, *e.g.*, *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton* ("*Watchtower*"), 536 U.S. 150, 160-69 (2002) (invalidating registration for door-to-door canvassing); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 197-205 (1999) (invalidating registration, badge, and disclosure requirements for petition circulators); *McIntrye v. Ohio Elections Comm'n*, 514 U.S. 334, 341-57 (1995) (upholding right to anonymous pamphleteering on ballot referendum); *Talley v. California*, 362 U.S. 60, 64-66 (1960) (striking down handbill identification requirement); *NAACP v. Alabama*, 357 U.S. 449, 460-66 (1958) (preventing compelled disclosure of NAACP's membership lists); *Thomas v. Collins*, 323 U.S. 516, 529-40 (1945) (labor organizers cannot be required to register).

The Supreme Court has been even clearer that free speech and association concerning ballot measures "is at the heart of the First Amendment's protection," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), and, therefore, "[n]o form of speech is entitled to greater constitutional protection," *McIntrye*, 514 U.S. at 347. For this reason, Colorado's regulation of speech and association

concerning ballot questions through compelled disclosure for "issue committees" is subject to strict scrutiny. *See id.* ("When a law burdens core political speech [and association], we apply 'exacting scrutiny, and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.") (citation omitted); *Citizens Against Rent Control v. City of Berkeley* ("*Berkeley*"), 454 U.S. 290, 294 (1981) (same); *Bellotti*, 435 U.S. at 786 (same). In *Buckley*, the Supreme Court emphasized "that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64 (citations omitted); see also *id.* (citing *NAACP*, 357 U.S. at 463) ("significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest," rather "the subordinating interests of the State must survive exacting scrutiny").

The District Court, however, failed to subject Colorado's "issue committee" disclosure[4] regime to strict scrutiny—or to any heightened level of constitutional scrutiny. Instead, the District Court held that *Plaintiffs* bore the burden of "demonstrat[ing] that there are sufficient adverse effects to warrant *some level of scrutiny*." Slip Op. at 38 (emphasis added) (Addendum A to Pls.' Corrected

[4] In this brief, *Amici* will use the term "disclosure" to refer to the registration, reporting, and disclosure requirements imposed on "issue committees." *See generally* COLO. CONST. art XXVIII, §§ 3(9), 7; COLO. REV. STAT. § 1-45-108; 8 COLO. CODE REGS. §§ 1505-6-2, 1505-6-3, 1506-6-4.

Opening Br.). In doing so, not only did the District Court turn the First Amendment—which always places the burden on the State to prove that any regulation of core political speech and association is supported by a compelling interest and is narrowly tailored—on its head, but also ignored or dismissed ample law and evidence demonstrating that Colorado's disclosure requirements are unconstitutional as applied to any "issue committee" under that "well-nigh insurmountable" standard. *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

B. Colorado Lacks a Compelling Interest in Regulating "Issue Committees"

There is no compelling interest recognized by the Supreme Court that is furthered by mandatory disclosure of political speech and association for or against ballot questions. This issue was discussed but not decided in *Bellotti*, 435 U.S. at 792, n.32 (1978). *See McIntyre*, 514 U.S. at 353-54 (*Bellotti*'s discussion of the "prophylactic effect of requiring the identification of the source of . . . advertising [for ballot propositions]" was "dicta").[5] However, the Court has recognized three

[5] Some suggest the Supreme Court already determined the constitutionality of disclosure for ballot referenda campaigns in *Berkeley,* 454 U.S. 290 (1981), where it said "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing [and], if it is thought wise, legislation can outlaw anonymous contributions." *Id.* at 299-300. But appellants challenged only the contribution limits to ballot initiative committees in Berkeley ordinance § 602, and did not challenge the disclosure provisions of § 112. Therefore, when Berkeley claimed the contribution limits must be upheld as a "prophylactic measure to make known the identity of supporters and opponents of ballot measures," *id.* at 298, the Court merely answered that the identities are made known through the disclosure provisions of ordinance § 112, *see id.* at 298-99. The Court had no opportunity to decide whether § 112 was constitutional, or to decide whether the government may compel the disclosure of support for or against ballot propositions. *Id.* at 291-93.

interests that can, in limited circumstances, justify compelled disclosure. None of those are applicable here.

The first recognized state interest is to "deter actual corruption and [its] appearance . . . by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. But the terms "contributions" and "expenditures" discussed in *Buckley* derive from Federal Election Campaign Act. Each subsumes the phrase "made . . . for the purpose of influencing an[] election for … *office*," s*ee* 2 U.S.C. §§ 431(8) & (9) (emphasis added), and not for elections unrelated to candidates. Candidates and officeholders are not corrupted by ballot initiative campaigns. If donors were nonetheless forced to disclose, there would be no "'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed." *Buckley,* 424 U.S. at 64 (citation omitted).

Similarly, in *United States v. Harriss,* 347 U.S. 612 (1954), the Supreme Court "upheld limited disclosure requirements for lobbyists," because "[t]he activities of lobbyists who have *direct access to elected representatives*, if undisclosed, may well present the appearance of corruption," *McIntyre,* 514 U.S. at 356 n.20 (emphasis added); *see also Berkeley*, 454 U.S. at 296-97 ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment," namely "the perception of undue influence of

large contributors to a *candidate*.") (emphasis in original). The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601, *et seq.*, which requires lobbyists to make disclosures about their direct lobbying efforts, operates to cure the same appearance. But the lobbying activities regulated do *not* include attempts to convince fellow citizens to support or oppose ballot measures. Rather they are '"representations made directly to the Congress, its members, or its committees' . . . and do[] not reach . . . attempts 'to saturate the thinking of the community.'" *United States v. Rumely,* 345 U.S. 41, 47 (1953) (citations omitted).

Because candidates—possessing free will and a potential to be corrupted—are not the electoral subject of ballot measures, mandatory disclosure of the funding of ballot questions does not "aid voters in evaluating those who seek [elected] office," *Buckley,* 424 U.S. at 66, and does not deter corruption or its appearance.

The second recognized state interest in disclosure is to "gather[] the data necessary to detect violations of the contribution limitations." *Id.* at 68. The Supreme Court, however, has already invalidated limits on contributions to ballot issue committees as an unconstitutional restraint on the rights of speech and association, *see Berkeley*, 454 U.S. at 299, and Colorado law imposes no such limits, *see generally* COLO. CONST. art. XXVIII, § 3; COLO. REV. STAT. § 1-45-

103.7. Therefore, disclosure would not aid in the enforcement of contribution limits.

The final state interest recognized by the Supreme Court in forcing the disclosure of political speech is the "informational interest." *Buckley,* 424 U.S. at 81; *see also id.* at 66-67. Indeed, of the interests in disclosure identified by the *Buckley* Court, only the "informational interest" could even arguably apply to "issue committees" because the Court has held (1) that the threat of corruption or its appearance is not raised in the context of ballot questions decided directly by the voters, *see*, *e.g.*, *Berkeley*, 454 U.S. at 298 (quoting *Bellotti*, 435 U.S. at 790), and (2) struck down contribution limits on groups organized to support or oppose ballot measures, thus doing away with any enforcement interest, *see Berkeley*, 454 U.S. at 296-297 & 299.[6] But as *Buckley* demonstrates, the "informational interest," is limited solely to the candidate context.

Disclosure "provides the electorate with information" as to how "'political campaign money . . . is spent *by the candidate*' in order to aid the voters in evaluating *those who seek* [*elected*] *office*." *Buckley*, 424 U.S. at 66-67 (citation omitted) (emphasis added). "Sources of a *candidate's* financial support . . . alert the voter to the interests to which *a candidate* is most likely to be responsive[,] facilitate predictions of future performance *in office*" by the candidate, and "may

[6] Again, Colorado does not impose contribution limits on "issue committees." *See generally* COLO. CONST. art. XXVIII, § 3; COLO. REV. STAT. § 1-45-103.7.

discourage those who would use money for improper purposes . . . before *or after* the election." *Id.* at 67 (emphasis added).

The crucial point made by *Buckley* is that disclosure is justified only in the context of *candidate* elections. It is worth repeating that the Supreme Court explicitly tied the "informational interest" to candidates by stating that "disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by *the candidate*' in order to aid the voters in evaluating *those who seek* [*elected*] *office*." *Id.* at 66 (emphasis added).[7] The Court went on to emphasize that such disclosure

> allows voters to place *each candidate* in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of *a candidate's* financial support also alert the voter to the interests to which *a candidate* is most likely to be responsive and thus facilitate predictions of future performance in office.

Id. (emphasis added).

The theme uniting the three interests sufficient to sustain mandatory disclosure is that they all address the primary compelling interest identified to uphold campaign finance regulations—namely, "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence

[7] Although the *Buckley* Court made it clear that the "informational interest" in disclosure applied only to the candidate context, the Supreme Court reaffirmed that limitation a few years later by describing the interest as the "enhancement of voters' knowledge about *a candidate's* possible allegiances and interests." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92 (1982).

of large financial contributions *on candidates' positions and on their actions if elected to office*." *Id.* at 25 (emphasis added). This is precisely why the Court, when faced with the question of disclosure in the ballot referendum context, held that the "informational interest is plainly insufficient to support the constitutionality of [a] disclosure requirement." *McIntyre*, 514 U.S. at 349.

Mandatory disclosure for ballot proposition campaigns carries heavy burdens for citizens that would participate in politics, and, unlike disclosure in candidate races, does not further the ability of citizens to monitor the performance of their elected officials. When compelled disclosure is used to expose communication by and between citizens about ballot questions, potentially subjecting those citizens and organizations to official and unofficial harassment and intimidation, it is harmful; and because it does not illuminate the character or conduct of candidates or officeholders, any public interest in such disclosure is substantially diminished. Mandatory disclosure improperly applied in this way becomes a tool of abuse by government, rather than a tool to prevent the abuse of government. *Buckley*'s "informational interest"—explicated in the context of candidate campaigns—is not furthered by compelled disclosure for ballot measure campaigns. Parker North's voters would not have learned much about the relative merits of annexation versus no annexation, or of the wording and import of that ballot question, by knowing that Plaintiffs contributed anything to pay for "No

Annexation" yard signs. But those tempted or eager to retaliate against annexation opponents would have learned everything they would need to know.

Requiring the names, addresses, and monetary commitments—not to mention the employment information—of citizens engaged in ballot issue advocacy does not substantially relate to any of the informational, anti-corruption, or enforcement interests upheld as sufficiently compelling in *Buckley*. As Chief Justice Rehnquist stated in reviewing a section of the Bipartisan Campaign Reform Act: "In this noncandidate-related context, this goal" of enabling viewers to evaluate the political message transmitted "is a far cry from the government interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of . . . *candidates*." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 362 (2003) (Rehnquist, C.J., dissenting) (emphasis added).

Thus, none of the three interests identified by the Supreme Court as sufficiently compelling to support compelled disclosure can do so in the context of ballot questions.

II. COLORADO'S COMPELLED DISCLOSURE REGIME IMPOSES ILLEGITIMATE PERSONAL AND PROFESSIONAL COSTS ON POLITICAL SPEAKERS

In *Buckley*, the Supreme Court recognized that strict scrutiny of compelled disclosure laws was necessary because of the burdens these laws placed on free speech and association, "even if any deterrent effect of First Amendment rights

arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." 424 U.S. at 65 (citations omitted).

The Court held that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for 'financial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id.* at 66 (citation omitted). This is especially true with respect to support for or against ballot questions because, unlike contributions to a candidate who may support or oppose many varying issues, *see*, *e.g.*, *id.* at 21, disclosure of support for or against a ballot measure exposes an individual's personal beliefs with respect to that specific issue.

Mandatory disclosure laws inhibit the free flow of information and rights of speech and association in three ways: first, by forcing speakers to disseminate information in ways that are not, in the speakers' judgment, most effective; second, by raising concerns about private or official retaliation; and third, by exposing speakers to legal risk created by the laws.

A. Compelled Disclosure for "Issue Committees" Distracts From the Information and Arguments Concerning Ballot Questions, and Fails to Legitimately or Significantly Inform Voters

The Supreme Court has discussed and empirical research has shown why there is no sufficiently compelling governmental interest supporting mandatory

disclosure for "issue committees." Compelled disclosure of those who support or oppose a ballot measure distracts from the issue itself, as well as from the legitimate information and arguments supporting or opposing the ballot question. Mandatory disclosure shifts the focus of those who will decide the issue—namely, the voters—away from what is at stake to assessing whether to vote with "friends" or against "enemies." By doing so, compelled disclosure does not legitimately inform voters about the merits and faults of the ballot questions they will decide, but rather illegitimately causes voters to weigh these issues through the lens of their prejudices.

This is precisely why the Supreme Court made it clear—in the ballot referendum context—that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Rather, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. Mandatory disclosure is, in essence, the government dictating to speakers how to present their message to the public. The compelled disclosure of those who support or oppose ballot issues detracts from the legitimate discussion necessary for direct democracy.

The *Bellotti* Court emphasized this by rejecting the contention that "the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process." *Id.* at 792 n.29. Rather, the Court ruled that "far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for '"the widest possible dissemination of information from diverse and antagonistic sources."'" *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

Similarly in *McIntyre*, when the Ohio Elections Commission had fined McIntyre for "distribut[ing] . . . unsigned leaflets" concerning a voter "referendum on a proposed school tax levy," 514 U.S. at 337, 338, the Supreme Court reversed, holding that "Ohio's informational interest" with respect to those who supported or opposed the ballot measure "is plainly insufficient to support the constitutionality of [the] disclosure requirement," *id.* at 349. In explaining that ruling, the Court reasoned that

> [i]nsofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude. . . . The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make . . . disclosures she would otherwise omit.

Id. at 348 (citations and footnote omitted). And the Court observed that, while the identity of the source may be helpful in evaluating ideas, "'the best test of truth is the power of the thought to get itself accepted in the competition of the market.' . . . People are intelligent enough to evaluate the source of an anonymous writing." *Id.* at 349 n.11 (citations omitted).

Thus, the Court made it clear that, in the context of ballot questions, the focus of the electorate should not be on who is speaking but on what is being said. This is why the Court approved of McIntyre's decision not to disclose, stating that,

> quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.

Id. at 342. In short, the Supreme Court has explained that compelled disclosure functions as a First Amendment vice, rather than a virtue, when it comes to ballot measures decided through the exercise of direct democracy.

B. Compelled Disclosure for "Issue Committees" Raises Privacy, Association, and Speech Concerns

Mandatory disclosure imposes constitutionally significant personal and professional costs on those who would exercise their free speech and association rights. One need not look too far into the past to find examples of the privacy, association, and speech concerns raised by the compelled disclosure of support for

or against ballot questions. Indeed, in the wake of California's Proposition 8 banning same-sex marriage, disclosure of ballot initiative contributions has been shown to be a powerful retributive device that can be used to expose, harass, intimidate, and even personally and professionally harm citizens who decided to add their political voices and pocketbooks to the ballot referendum debate.

For example, Scott Eckern, formerly the artistic director of the California Musical Theatre, was forced to resign after his $1,000 donation to support Proposition 8, "sparked criticism from theater workers and the gay, lesbian, bisexual and transgender community." Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support*, SACRAMENTO BEE, Nov. 12, 2008 (available at http://www.world-news.com/article/314710/). Eckern said he was "disappointed that my personal convictions have cost me the opportunity to do what I love most . . . to continue enriching the Sacramento arts and theatre community." *Id.* Of course, the fact that Eckern supported the passage of Proposition 8 was public knowledge because his contribution, unlike his vote, was subject to mandatory disclosure.

Similarly, Richard Raddon, former director of the Los Angeles Film Festival, resigned after "being at the center of controversy" for giving "$1,500 to Proposition 8." Rachel Abramowitz, *Film fest director resigns: Richard Raddon steps down over reaction to his support of Prop. 8.*, L.A. TIMES, Nov. 26, 2008, at

E1. Raddon, a Mormon, gave for religious reasons. *Id.* After his contribution was "made public online," Film Independent was "swamped with criticism from No on 8 supporters." *Id.* One fellow board member noted that, "someone has lost his job and possibly his livelihood because of privately held religious beliefs." *Id.*

Indeed, the harassment and intimidation has "cut both ways," explained National Public Radio's "Morning Edition." Peter Overby, *Groups Seek To Shield Gay-Marriage Ban Donations*, NPR MORNING EDITION, Jan. 29, 2009 (available at http://www.npr.org/templates/story/story.php?storyId=99989765). In the heat of the Proposition 8 campaign, "ProtectMarriage.com," a group supporting the ballot initiative, "wrote to big donors to the gay rights group Equality California. The letter noted the contributions [opposing Proposition 8] and respectfully requested that donors correct this error with a big check to ProtectMarriage." *Id.* Ominously, the letters warned those who refused to make the requested "correct" contributions "would have their names published." *Id.*

A recognition of the chilling effect imposed by fear of both private and official retaliation against donors was behind the Supreme Court's *NAACP* decision fifty years ago. Today's high tech world makes such fears even more real. The existence of reliable data from the internet makes blacklists far easier to compile. "Years ago we would never have been able to get a blacklist that fast and quickly," said one opponent of Proposition 8. Richard Abowitz, *Where's the*

Outrage? Online., LAS VEGAS WEEKLY, Jan. 8, 2009 (available at http://www.lasvegasweekly.com/news/2009/jan/08/wheres-outrage-online/). Unprecedented contributor information is publicly available because of disclosure laws, and such data is widely and immediately available via the internet in formats that permit easy manipulation for intimidation and retribution. *See* Brad Stone, *Disclosure: Magnified On the Web*, N.Y. TIMES, Feb. 8, 2009, at BU3. Indeed, many of the "targets of [post-Proposition 8] harassment blame a controversial and provocative Web site, eightmaps.com,"[8] which "takes the names and ZIP codes of people who donated to the ballot measure—information California collects and makes public under state disclosure laws—and overlays the data on a Google map." *Id.* Using the site, "[v]isitors can see markers indicating a contributor's name, approximate location, amount donated and, if the donor listed it, employer. That is often enough information for interested parties to find the rest—like an e-mail or home address." *Id.* Using sites like eightmaps.com, "information collected through disclosure laws intended to increase the transparency of the political process, magnified by the powerful lens of the Web, may be undermining the same democratic values that the regulations were to promote." *Id.*

[8] Eightmaps.com is not alone in using disclosure reports to provide online maps and other information that can be used for illegitimate purposes. For instance, the popular Huffington Post site helpfully supplies visitors with maps to donors' homes. *See*, *e.g.*, http://fundrace.huffingtonpost.com/neighbors.php?type=name&lname=smith&fname=bradley&search=Search.

What has happened in California with Proposition 8 could just as easily occur based on Colorado's disclosure regime. Indeed, since Plaintiffs registered as an "issue committee" after being sued by their primary issue opponent and sponsor of the ballot question, the compelled disclosure registration and reporting information for their "No Annexation" issue committee has been available via the Secretary of State's web site, at http://www.sos.state.co.us/cpf/CommitteeDetailPage.do?coId=20065638891; *see also* COLO. REV. STAT. §§ 1-45-109(4)-(5)).

Plaintiffs' expert, Dr. Dick M. Carpenter, confirmed through a scientific public opinion survey that voters understand the personal and professional costs that result from the revelation of their support for "issue committees" because of compelled disclosure. *See generally* Dick M. Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, Mar. 2007 (available at http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf); Aplt. App. 988-1023 (Carpenter Decl.). After randomly polling 2,221 individuals in six states, including Colorado, Dr. Carpenter found that more than 56% of respondents would oppose online disclosure by the government of their own personal information ("name, address, and contribution amount") if they supported a ballot issue committee, *see* Carpenter, *Disclosure Costs*, at 7 (Survey Question 4), 8; Aplt. App. 999-1000 (Carpenter Decl. ¶¶ 30 (Survey Question 4), 31); and he found that the respondents' opposition increased to more than 71% if their

"employer's name [w]ould be posted" as a result of their support, *see* Carpenter, *Disclosure Costs*, at 7 (Survey Question 5), 8; *see* Aplt. App. 999-1000 (Carpenter Decl. ¶¶ 30 (Survey Question 5), 31). Similarly, Dr. Carpenter found that most respondents' would "think twice" before contributing to ballot issue committees if that would result in the compelled disclosure of their personal and/or employer information. *See* Carpenter, *Disclosure Costs*, at 7 (Survey Questions 6 & 7), 8; Aplt. App. 1000-03 (Carpenter Decl. ¶¶ 30 (Survey Questions 6 & 7), 33-38. Thus, Dr. Carpenter concluded that mandatory disclosure of contributor and employer information based on support for ballot issue committees imposes "a chilling effect on political speech and association." Carpenter, *Disclosure Costs*, at 13. As Dr. Carpenter stated in his declaration: "requiring the disclosure of citizens' identities, personal information, and employers' names appears to foment reluctance to contribute to issue campaigns and thereby 'speak' or 'associate' during the political process as it relates to ballot issue campaigns." Aplt. App. 1003 (Carpenter Decl. ¶ 39); Carpenter, *Disclosure Costs*, at 9.

Of course, the threats to "issue committee" supporters' privacy, association, and speech that were exhibited in the aftermath of California's Proposition 8, and which were reflected in the opposition to disclosure found by Dr. Carpenter, are only exacerbated under Colorado's disclosure regime because of the extremely low thresholds that trigger mandatory disclosure. Specifically, under Colorado law,

"[a]ll . . . issue committees . . . shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more," COLO. REV. STAT. § 1-45-108(1)(a)(I); and, "[i]n the case of contributions made to a[n] . . . issue committee . . ., the disclosure required by this section shall also include the occupation and employer of each person who has made a contribution of one hundred dollars or more to such committee," COLO. REV. STAT. § 1-45-108(1)(a)(II).

Disclosure concerns are also particularly acute with respect to "issue committees" because ballot measures often raise the most controversial and contentious of public issues, *e.g.*, same-sex marriage, affirmative action, euthanasia, marijuana legalization, English as the official language, etc. While Colorado's citizens should inform themselves about the ballot questions they will directly decide, as well as the arguments for and against, that does not mean that fellow Coloradans, using the power of the State, have the right to compel the disclosure of what their neighbors personally believe about those issues. The cost of and threat to the privacy, association, and speech rights protected by the First Amendment is too high a price to pay for compelled disclosure of ballot issue advocacy.

C. Compelled Disclosure for "Issue Committees" Discourages Speech and Association Through the Burden of Compliance

Compelled disclosure subjects political speakers to a complicated regulatory regime that imposes costs on political activity. As *Amici* will argue in the following section, this burden is substantial and discourages participation most significantly at the grassroots level.

Thus, at the same time that mandatory disclosure fails to advance any of the compelling state interests recognized in *Buckley* or its progeny, it imposes significant First Amendment burdens on citizens: by forcing them to speak in ways that may be less effective than they would choose on their own; by distracting listeners from arguments on the merits; by chilling speech with fears of retaliation; and by needlessly subjecting speakers to a complicated regulatory regime that discourages political involvement.

III. COLORADO'S COMPELLED DISCLOSURE REGIME IS UNCONSTITUTIONAL AS APPLIED TO ANY "ISSUE COMMITTEE" BECAUSE IT IS UNDULY BURDENSOME

The District Court upheld Colorado's disclosure regime as applied to Plaintiffs, or any "issue committee," after notice of a ballot question election, *see* Slip Op. at 15, 35, despite observing that the "restriction[s] on citizens' freedoms to associate and communicate [are] not supportable by any rational government

purpose," *id.* at 26.[9] By upholding the burdensome disclosure requirements for "issue committees," the District Court's decision not only flies in the face of constitutional law but also empirical evidence and research.

Under Colorado's campaign finance regime, there is little, if any difference, between the burdensome registration, reporting, and disclosure obligations imposed on "issue committees," and those imposed on "candidate committees," "political committees," and "political parties," all of which are directly involved with *candidate*—rather than *issue*—advocacy. *See*, *e.g.*, COLO. CONST. art. XXVIII, §§ 3(9), 7; COLO. REV. STAT. § 1-45-108. However, the Supreme Court has explicitly limited disclosure regimes to those committees directly connected to *candidate* advocacy. *See*, *e.g.*, *Buckley*, 424 U.S. at 79 ("'political committee[s]' . . . only encompass organizations that are *under the control of a candidate or the major purpose of which is the nomination or election of a candidate*") (emphasis added); *see also Federal Election Comm'n v. Mass. Citizens for Life*, *Inc.* ("*MCFL*"), 479 U.S. 238, 252-256 & n.6 (1986) (striking down federal disclosure regime as applied because it "regulated [an issue group] as though the organization's *major purpose is to further the election of candidates*) (emphasis

[9] In their opening brief and below, Plaintiffs detailed how burdensome the disclosure regime is for "issue committees." *See* Pls.' Corrected Opening Br. at 10-12 (citing COLO. CONST. art. XXVIII, §§ 2(5)(a), 2(8)(a), 2(10)(a), 3(9), 7, 10(2)(a); COLO. REV. STAT. §§ 1-45-108(2)(a)(I)-(III), 1-45-108(3), 1-45-109(4)-(5); 8 COLO. CODE REGS. § 1505-6-2.5), 18-20 (citations omitted); *see also* Aplt. App. 407-09, 440-45, 1297-1302, 2158-59, 2162-65, 2193-2201 (citations omitted).

added). Indeed, in *MCFL*, the Supreme Court made it clear that burdensome disclosure regimes—like Colorado imposes on "issue committees"— though "not an absolute restriction on speech," are "substantial" and unconstitutional as applied to issue groups because such regulations "may create a disincentive for [issue] organizations to engage in political speech." *MCFL*, 479 U.S. at 252, 254.

The Supreme Court's *MCFL* ruling has particular significance here because, like Plaintiffs, MCFL was a small "group of like-minded persons [who] s[ought] . . . to support the dissemination of their political ideas." *Id.* at 255. Unfortunately, in doing so, MCFL found itself subject to federal disclosure requirements that mandated "[d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records," *id.* at 254, quite similar to Colorado's disclosure requirements for "issue committees," *compare id.* at 253-54 (detailing the federal disclosure regime), *with* the authorities cited in footnote 9, *supra*. As a result, the Court struck down the disclosure requirements as applied to MCFL because they "impose[d] administrative costs that many small entities may be unable to bear, and "require[d] a far more complex and formalized organization than many small groups could manage." *MCFL*, 479 U.S. at 254-55. Specifically, the Court held that "the avenue . . . left open" by the federal disclosure regime for MCFL's speech and association was "more burdensome than the one it foreclose[d]." *Id.* at 255. And, because the disclosure regime's "practical effect

may be to discourage protected speech," that was "sufficient to characterize [the disclosure requirements] as an infringement on First Amendment activities." *Id.* In short, the undue burden of disclosure led the Court to conclude that "it would not be surprising if at least some [issue] groups decided that the contemplated activity was simply not worth it," *id.* at 255, and to hold that, "[w]hile the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification," *id.* at 263.

Colorado's disclosure regime mimics the federal scheme struck down by the Supreme Court in *MCFL*. That alone means that "issue committees" cannot be subject to the full panoply of registration, reporting, and disclosure requirements currently provided for in Colorado's constitution, laws, and regulations. But empirical evidence and research—indeed, even admissions from the Office of Colorado's Secretary of State—also demonstrate the unconstitutional burden imposed on "issue committees."

"The Secretary of State's office itself frankly admits [that] the '[l]aws and rules relating to campaign and political finance are often complex and unclear.'" Pls. Corrected Opening Br. at 18 (quoting Aplt. App. 748 (first sentence of guidance to registered agents); citing Aplt. App. 750-51 (first sentence of guidance on "Campaign and Political Finance Reporting"), 762 (Heppard Dep. 36:20-21). That is precisely what Becky Cornwell—the registered agent for the "issue

committee" Plaintiffs established after being sued—discovered when she began to attempt to comply with Colorado's disclosure requirements. As Cornwell stated in her declaration, the disclosure regime imposed on "issue committees" is

> difficult to understand and I constantly worried about being sued for even the smallest error. Particular points—like non-monetary contributions—were counterintuitive; the forms were hard to follow; . . . and getting questions answered often took several days and sometimes did not yield correct answers at all.

Aplt. App. 490 (Becky Cornwell Decl. ¶ 8). Indeed, in her declaration, Cornwell relates in detail the incredible burden she endured in attempting to comply with Colorado's disclosure regime. *See generally* Aplt. App. 489-96 (Becky Cornwall Decl. ¶¶ 7-22). And, as research of one of Plaintiffs' experts, Dr. Jeffrey Milyo, demonstrated, Ms. Cornwell's experience is not only typical but would be universally shared. *See generally* Jeffrey Milyo, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Oct. 2007 (available at http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf); Aplt. App. 1053 (Milyo Decl. ¶¶ 8-9), 1055-61 (Milyo Decl. ¶¶ 16-36), 1084-1100 (Milyo Dec. ¶¶ 99-139).

Specifically, Dr. Milyo "conducted experiments using actual disclosure forms and instructions [for ballot issue committees] from three states: California, Colorado, and Missouri," Milyo, *Campaign Finance Red Tape*, at 5; *see also* Aplt. App. 1087 (Milyo Decl. ¶ 106), 1092 (Milyo Decl. ¶ 119). In those experimental

sessions, groups of individuals were presented with hypothetical fact patterns concerning activities involving a ballot issue committee, and the individuals were then asked to comply with the applicable registration, reporting, and disclosure laws for whichever state they were assigned, including Colorado. *See* Milyo, *Campaign Finance Red Tape*, at 5-6; Aplt. App. 1087 (Milyo Decl. ¶ 106), 1092 (Milyo Decl. ¶ 119). The experimental scenario was "loosely based upon the circumstances" encountered in this case, and "include[d] only one expenditure item and a handful of small and large contributions, including non-monetary and anonymous donations." Milyo, *Campaign Finance Red Tape*, at 5-6; *see also* Aplt. App. 1092-93 (Milyo Decl. ¶ 120). As Dr. Milyo reported in his declaration, limited to the Colorado experimental subjects,

> the average overall score for all subjects was 50.1% correct. . . . Only one subject scored better than 75% correct . . . [and]only 44% of subjects were able to correctly complete more than half the selected requirements, and another 5.7% could not correctly complete even one quarter of the selected requirements.

Aplt. App. 1097 (Milyo Decl. ¶¶ 132-33).[10] As a result of his experimental findings, Dr. Milyo concluded "that ordinary citizens do indeed find these [ballot issue committee] regulations to be quite burdensome and complex." Aplt. App. 1099 (Milyo Decl. ¶ 136). In fact, Dr. Milyo went even further, explaining that

[10] In his published research report, including the experimental outcomes for all three tested states, Dr. Milyo noted that "[a]ll 255 participants in this experiment would be subject to legal penalties if they were in fact responsible for complying with disclosure regulations" because no one achieved full compliance. Milyo, *Campaign Finance Red Tape*, at 8.

> I only asked subjects to file a single disclosure report; in practice, issue committees must meet multiple filing deadlines throughout the year. *Given that the experimental subjects found the task of correctly reporting a few transactions to be an extremely difficult and frustrating experience, it follows that the exercise of complying with the full gamut of state disclosure regulations in practice is all the more onerous and intimidating.*

Id. (emphasis added). Similarly, in his published research report, which included results from all three tested states, Dr. Milyo stated: "There should be no doubt that state disclosure laws for ballot measure committees are indeed 'overly burdensome and unduly complex'; the compliance experiment demonstrates that ordinary citizens, even if highly educated, have a great deal of difficulty deciphering disclosure rules and forms." Milyo, *Campaign Finance Red Tape*, at 21.

Dr. Milyo's research provides ample evidence of the unconstitutional burden—indeed, the practical impossibility—of complying with the disclosure regime imposed by Colorado on "issue committees." A conclusion echoed by the experience of Plaintiff Becky Cornwell.

CONCLUSION

For the reasons stated above, this Court should affirm in part and reverse in part the decision of the District Court, and thus declare Colorado's campaign finance regulation of "issue committees" unconstitutional as applied to these Plaintiffs and any "issue committee."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS, INDPENDENCE INSTITUTE, NATIONAL TAXPAYERS UNION & SAM ADAMS ALLIANCE SUPPORTING PLAINTIFFS URGING AFFIRMANCE AND REVERSAL** complies with the type-volume limitation, as well as the typeface and type style requirements, set forth in Federal Rules of Appellate Procedure 29(d) and 32(a)(5)-(7). This brief uses a proportionally spaced Times New Roman 14 point typeface, and contains 6,998 words (less than the 7,000 word limit), as determined using the "word count" feature of Microsoft Word software.

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