

No. 09-559

IN THE
Supreme Court of the United States

JOHN DOE #1, ET AL.,

Petitioners,

v.

SAM REED, WASHINGTON SECRETARY OF STATE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* BRENNAN CENTER
FOR JUSTICE, THE CENTER FOR RESPONSIVE
POLITICS, AND THE SUNLIGHT FOUNDATION
IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE

The Brennan Center for Justice at NYU School of Law (“Brennan Center”) is a non-partisan institute that seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation and to ensure that public policy and institutions reflect the diverse voices and interests that make for a robust democracy.¹ The Brennan Center’s Money in

¹ This brief is filed with the consent of the parties. The letters of consent have been filed with the Court. Pursuant to this Court’s Rule 37.6, *Amici* affirm that no counsel from a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief,

Politics Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution.

The Center for Responsive Politics ("CRP" or "The Center") is a non-partisan, non-profit 501(c)(3) research group that tracks the flow of money to federal candidates and political parties, analyzes money's impact on public policy, and makes this information available to the public. The Center was founded in 1983 by two U.S. Senators—Republican Hugh Scott of Pennsylvania and Democrat Frank Church of Idaho. Nearly from its inception, the Center has played a unique role in the world of money and politics, converting the raw data collected by the Federal Election Commission (FEC) from federal candidates, parties and political action committees, and creating from it easy-to-understand profiles of candidates, industries, and the money that flows to Congress. CRP's data is widely used and respected by news organizations, the academic community, and by political professionals from all points on the ideological spectrum. While the Center's core work focuses on political finance research and analysis, CRP also advocates effective disclosure and enforcement of the nation's campaign finance laws. The Center filed a brief as *amicus curiae* in the Supreme Court's consideration of *McConnell v. FEC*.

The Sunlight Foundation was founded in 2006 with the non-partisan mission of using the revolutionary power of the Internet to make

and that no person other than *Amici* and its counsel made such a monetary contribution.

information about Congress and the federal government more meaningfully accessible to citizens. Through its projects and grant-making, Sunlight serves as a catalyst for greater political transparency, thus making the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since its founding, the Foundation has assembled and funded an array of Web-based databases and tools, including OpenCongress.org, FedSpending.org, OpenSecrets.org, and EarmarkWatch.org, that make millions of bits of information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. The Sunlight Foundation has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

SUMMARY OF ARGUMENT

Petitioners ask this Court to invalidate the Washington State Open Records Act at least to the extent it requires disclosure of the identities of signatories to petitions to place initiatives on the ballot in that State. The Act's stated purpose is to foster open government and to allow the citizens of Washington to ensure that their government operates responsibly: "The people insist on remaining informed so that they may maintain control over the instruments that they have created." WASH. REV. CODE § 42.56.030 (2009); *see also Livingston v. Cedeno*, 186 P.3d 1055, 1058 (Wash. 2008) (en banc) ("The primary purpose of the public records act is to provide broad access to public records to ensure government accountability."). In some tension with this public interest in open and transparent government, Petitioners assert an interest in keeping their political participation private, citing a fear of a spectrum of reprisals ranging from social ostracism to demonstrated hostility, and even harassment. This case undoubtedly raises sensitive and serious questions, requiring the Court to strike a balance among interests of constitutional significance – the public's interest in open government and robust public debate and the individual's interest in maintaining privacy for ballot-related activities. The purpose of this submission by amici is not to urge the Court to reach a particular resolution of the claims before it, but rather to direct the Court's attention to the broader disclosure interests that could be affected by its disposition of this case.

In this regard, it is important to recognize that what this case does not involve is an issue that goes to the heart of our constitutional guarantee of democratic self-governance – the necessity of disclosure when money is spent on political campaigns and candidates. Money in politics is different in kind from other election regulation issues. Where money is spent to influence the outcome of elections, vigilance is required to ensure that influence-peddling does not corrupt our democracy and that voters are empowered to make informed decisions about how such spending may have influenced their candidates and laws. “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” L. Brandeis, *Other People’s Money* 62 (National Home Library Foundation ed. 1933), *quoted in Buckley v. Valeo*, 424 U.S. 1, 67 (1976). Accordingly, this Court has consistently recognized that special constitutional and public interests arise in the context of disclosure laws that bring to light the too-often hidden flow of money through our political system. A clear and unbroken line of Supreme Court authority holds that campaign finance disclosure provisions serve anti-corruption and informational interests critical to a vibrant and functioning election system. *Buckley v. Valeo*, 424 U.S. at 1, *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (“*Buckley II*”), *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003). Indeed, this Court’s recent *Citizens United* decision specifically reaffirmed the necessary role of campaign finance disclosure laws in our democracy.

Ignoring this ruling, as well as the unique constitutional context of money in politics, Petitioners attempt to elide the distinction between campaign finance disclosure laws and other forms of public disclosure laws that do not directly implicate political spending, such as the application of the Act at issue here. Indeed, Petitioners go further, devoting the first six pages of their brief to extra-record factual submissions regarding a law and an issue that is not before this Court – the effect of California’s campaign finance disclosure laws on contributors to that state’s Proposition 8 campaign. Petitioners devote additional pages of their brief to other supposed factual consequences of campaign finance disclosure laws, and conflate case law from the campaign finance context with other disclosure laws without any apparent regard for the unique interests that come into play when money enters the realm of politics. (Petitioners’ Brief, filed February 25, 2010, 43-48 (“Pet. Br.”)) Petitioners thus invite the Court to fashion a radically broad and hitherto undiscovered right to anonymous speech that would overturn decades of this Court’s precedent by refusing to differentiate between laws requiring disclosure of other activities and laws that disclose the uniquely problematic workings of money in politics.

Amici urge the Court to reject this improper invitation. As a procedural matter, with regard to the sphere of campaign finance disclosure regulations, neither the factual allegations nor the constitutional issues raised by Petitioners are properly before this Court. With respect to the actual issue presented here, the Court may, and indeed should, address the constitutionality of the

Washington statute, and the possible disclosure of the names of the individuals who signed the ballot initiative petitions in question, without reaching the separate factual and legal questions interests to be weighed in evaluating disclosure requirements aimed at monetary influence on the electoral process. More fundamentally, the curtain of privacy that is appropriate to the voting booth should not be drawn to hide the workings of money in politics from public scrutiny and from political accountability. Petitioners' broadest argument, if accepted, could usher in a new dark age for our politics, where corruption could flourish undetected and voters mark ballots in ignorance.

ARGUMENT

- I. The Nation's Constitutional Tradition has Consistently Recognized that Transparency Concerning Money in Politics is Essential for the Proper Working of Democracy.

As James Madison once wrote:

[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

Letter from James Madison to W.T. Berry (Aug. 4, 1822), reprinted in 9 *The Writings of James Madison* 103 (Gaillard A. Hunt ed., 1910). Since this country's founding, its constitutional tradition has recognized transparency concerning money in politics to be a vital anti-corruption tool and a key feature of participatory democracy.

As Professor Zephyr Teachout has explained in an article exploring the historical roots of the constitutional anti-corruption principle, corruption was a primary concern of the constitutional framers. Indeed, at the start of the Constitutional Convention George Mason proclaimed that "if we do not provide against corruption, our government will soon be at an end." Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L. Rev* 341, 348 (2009).

Concerns about corruption were not limited to unlawful acts like bribery. The Framers understood political corruption as an expansive concept.

To the delegates [at the Constitutional Convention] political corruption referred to self-serving use of public power for private ends, including, without limitation, bribery, public decisions to serve private wealth made because of dependent relationships, public decisions to serve executive power made because of dependent relationships, and use by public officials of their positions of power to become wealthy.

Id. at 373-74; see also Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 Colum. L. Rev. 501, 509 (2002) (discussing concern that executive with access to the treasury as well as to offices could “corrupt legislators and free itself from popular oversight”). The delegates’ corruption concern was thus not limited to bribery or other unlawful acts. At the Constitutional Convention, for example, Gouverneur Morris “explicitly said that the corruption concern encompassed lawful abuses of power, not merely unlawful abuses or ‘usurpation.’” Teachout at 376 (citing Notes of James Madison (July 19, 1787), in 2); *The Records of the Federal Convention of 1787*, at 52 (Max Farrand ed., rev. ed. 1966) (1937); see also Teachout 363-64 (2009). Disclosure is required to bring such corrupting abuses to light.

As the nation developed, and the framers' concerns regarding the corrupting potential of money in politics proved well-founded, the use of a secret ballot – now considered a hallmark of the country's electoral system – developed in response to concerns about combating the influence-peddling that can arise when money enters the political sphere. At the time of the adoption of the Constitution, the country was a smaller, agrarian nation. Most of the population lived in small towns where there was no expectation of privacy around the exercise of political power and voting was typically done in public. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992); *see also* Eldon Cobb Evans, *A History of the Australian Ballot System in the United States* 1-10 (1917). During the late 1800s, however, as the population increased and migrated to urban areas, political corruption began to rapidly increase. Non-secret voting was perceived as the root of the problem. By allowing party bosses to check on how individuals voted and refuse to pay if an individual's vote did not match his promise, a non-secret ballot enabled vote buying. *See Burson*, 504 U.S. at 200; Evans, at 10-14, 21. Until the late 1800's, votes were regularly traded for money. As one contemporary writer described:

This sounds like exaggeration, but it is truth . . . that the raising of colossal sums for the purpose of bribery has been rewarded by promotion to the highest offices in the Government; that systematic organization for the purchase of votes, individually and in blocks, at the polls, has become a

recognized factor in the machinery of the parties; that the number of voters who demand money compensation for their ballots has grown greater with each recurring election.

Burson, 504 U.S. at 201 n.6 (quoting J. Gordon, *The Protection of Suffrage* 13 (1891)). As a direct response to this practice, states increasingly adopted a secret ballot. By 1910, the last state adopted the private ballot for most elections. John C. Fortier & Norman J. Ornstein, *The Absent Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 490 (2003).

The universal adoption of the secret ballot as a tool to combat corruption and enhance public faith in government coincided with the first federal law mandating disclosure of election-related spending. In 1910, Congress enacted the Federal Corrupt Practices Act, the first federal law to establish public disclosure of federal campaign spending. *Buckley v. Valeo*, 424 U.S. at 61. While upholding these provisions in 1975, the Court for the first time expressly sanctioned the use of disclosure as a tool to combat corruption:

Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied. When to this is added the requirement contained in section 244,

that the treasurer's statement shall include full particulars in respect of expenditures, it seems plain that the statute as a whole is calculated to discourage the making and use of contributions for purposes of corruption.

Burroughs v. United States, 290 U.S. 534, 548 (1934). As illustrated below, since *Burroughs*, the Court has repeatedly upheld disclosure requirements.

II. Contrary to Petitioners' Contentions, This Court Has Not Recognized A Right To Spend Money Anonymously in Political Campaigns

The Court has never recognized a general right to spend money anonymously in elections. To the contrary, from *Buckley v. Valeo*, 424 U.S. 1, to *Citizens United v. Fed. Election Comm'n*, No. 08-205, Slip. Op. (Jan 21, 2010) (558 U.S. ___, 2010 WL 183856 (2010)),² this Court has repeatedly upheld disclosure and disclaimer provisions relating to campaign contributions and independent expenditures in both ballot measure and candidate elections. *Buckley v. Valeo*, 424 U.S. 1; *Buckley II*, 525 U.S. 182 (ballot measures); *Bellotti*, 435 U.S. 765 (ballot measures); *McConnell*, 540 U.S. 93; *Citizens United*. Petitioners nonetheless rely heavily on *Buckley v. Valeo*, 424 U.S. 1 and

² Citations to *Citizens United v. Fed. Election Comm'n*, No. 08-205, Slip. Op. (Jan 21, 2010) (558 U.S. ___, 2010 WL 183856 (2010)) are to the Slip Opinion herein.

McIntyre v. Ohio Elections Comm., 514 U.S. 334 (1995), to support their claim of a general right to anonymity in the political process that is broad enough to defeat disclosure of political spending. Pet. Br. at 24-25. Neither case supports this broad proposition.

In *Buckley v. Valeo*, 424 U.S. 1, contrary to Petitioner's claims, the Court did not articulate a "general privacy interest" in political spending. Pet. Br. at 24-26. To the contrary, the Court recognized the seriousness of the interests served by the disclosures set out in federal law and upheld them against claims of infringement of constitutional rights. In doing so, the Court also acknowledged the "possibility" that disclosure "c[ould] seriously infringe on privacy of association and belief". 424 U.S. at 64. In those circumstances, "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied," *id.* at 71, the Court crafted an exemption to disclosure.

But this narrow, as applied exemption was conceived of as having very limited applicability. The specific challenge before the Court in *Buckley v. Valeo* was the application of general disclosure requirements on contributions to and expenditures related to minority parties. The Court rejected this claim because of the lack of "record evidence" to support allegations of harassment or intimidation. *Id.* at 31. And the discussion relied upon by Petitioners was in the context of minority parties where, the Court observed, governmental interests supporting disclosure may be lessened and potential damage to associational rights might be heightened.

Id. at 70. What the Court expressly declined to do was to create any sort of untethered privacy right that could defeat the compelling interests in disclosure it had just articulated. And in fact, the Court declined the invitation to create any sort of blanket exemptions from disclosures of expenditures and contributions for minority parties or anyone else. *Id.* at 74.

The Court's decision in *McIntyre* provides no more of a underpinning for Petitioners' overly broad claims of a right of anonymous political activity. Like *Buckley v. Valeo*, it simply allows for an extremely narrow and fact-specific exemption to disclosure. At issue in *McIntyre* was an as-applied challenge to a state law that required a disclaimer on all campaign literature, regardless of the volume of such literature. *Id.* at 336, 339. Plaintiff was a lone pamphleteer who had distributed personally crafted leaflets at a public meeting to oppose a referendum on a school tax levy. *Id.* at 337. In holding that the provision was unconstitutional as applied to her, the Court took great care to delineate the boundaries of its decision, and distinguished direct regulation of leaflets from regulation of financial disclosures. *Id.* at 355 (“[I]dentification of the author against her will . . . reveals unmistakably the contents of her thoughts on a controversial issue. Disclosure of an expenditure and its use . . . reveals far less information.”) The Court also clarified that its decision did not address the more expensive medium of broadcast communications but addressed “only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed.” *Id.* at 338 n.3. In addition, the Court expressly reaffirmed the

constitutionality of disclosure requirements of contributions and expenditures in candidate elections previously upheld in *Buckley v. Valeo*, noting that those requirements contained a threshold that excluded *de minimis* spending. *Id.* at 355-56. The Court also reaffirmed its prior stated approval of disclosure of corporate spending in ballot measure elections articulated in *Bellotti*. *Id.* at 353-54.

Thus, contrary to Petitioner's characterization of the case as establishing a broad right to anonymous speech, *McIntyre* instead represents a narrow opinion that expressly does not consider these broader financial disclosure issues. *Id.*³ Indeed, as Justice Ginsburg wrote in concurrence, "appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process 'might justify a more limited identification requirement.'" *Id.* at 358.

³ The Ninth Circuit has adopted this approach to disclosure. In *Canyon Ferry Road Baptist Church of East Hampton, Inc. v. Unsworth*, 556 F.3d 1021, 1034-35 (9th Cir. 2009), the Ninth Circuit held that a Montana disclosure provision that required reporting of *de minimis* levels of in-kind expenditures in support of a ballot measure to be reported was unconstitutional as applied to a Church. The Court held that disclosure of *de minimis* amounts of support was not sufficient to achieve the government's goal to inform voters.

III. The Public's Interests in Combating Corruption and Empowering Voters to Make Informed Decisions Apply With Special Constitutional Significance to Disclosures of Political Spending.

As this Court repeatedly has recognized, the First Amendment interests of political actors are not the only constitutional interests this Court must consider. When political spending is regulated to ensure the integrity of the democratic system, “constitutionally protected interests lie on both sides of the legal equation... [because such regulations] seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action.” *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 400-01 (2000) (Breyer, J. concurring). The public has a constitutional stake in the question of who is paying for its laws. *Buckley II*, 525 U.S. at 214 (Thomas, J. concurring) (“I am willing to assume...that Colorado’s interest in having this information made available to the press and its voters [] before the initiative is voted upon...is compelling. The reporting provision ... ensures that the public receives information demonstrating the financial support behind an initiative proposal before voting.”).

By conflating case law concerning disclosure in the campaign finance context and disclosure in other contexts, the Petitioners fail to recognize the unique public interests that justify the incidental burden that disclosure of election-related spending may impose on the political activities of people and

corporations. Indeed, the Court in the seminal case of *Buckley v. Valeo* recognized that disclosure of campaign spending is “the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.” 424 U.S. at 68 (footnote omitted).

Since *Buckley v. Valeo*, the Court has consistently recognized that disclosure of political spending: (1) “deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity;” (2) “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 federal office;” and (3) “[is] an essential means of gathering the data necessary to detect violations of the contribution limitations.” 424 U.S. at 66-68; *accord McConnell*, 540 U.S. at 196 (affirming compelling governmental interests in “providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions”). On these bases, this Court, along with lower federal courts and state courts, has consistently upheld robust campaign finance disclosure regimes. *Buckley v. Valeo*, 424 U.S. at 61-62; *Nixon*, 528 U.S. 377; *Buckley II*, 525 U.S. 182; *McConnell*, 540 U.S. 93; *Citizens United*.

This Court’s decision in *Buckley II* aptly demonstrates key distinctions between the differing governmental interests present in disclosure related to monetary political activity and disclosure related to identity of political speakers with no financial

component. In *Buckley II*, the Court was called upon to decide the constitutionality of Colorado regulations of the ballot initiative process – the process under which laws are enacted by ballot referenda. 525 U.S. at 186. Some of the regulations required name tags and other on-site identification of ballot circulators, the people who approached voters to gain petition signatures, even though the ballot circulators were required to file affidavits with the state disclosing their identification at the time they submitted their petitions. Others required that those ballot circulators be registered Colorado voters and meet other criteria. The Court had little trouble striking down most of those regulations as an unjustified burden on the First Amendment protected speech right to circulate ballot petitions. *Id.* at 197, 200.

The Court declined, however, to upset the state requirements mandating disclosure of the names of proponents of ballot initiatives and the amount spent to collect signatures for their petitions. *Id.* at 203-04. That disclosure requirement informed voters “of the source and amount of the money spent by proponents to get a measure on the ballot; in other words, voters will be told who has proposed a measure, and ‘who has provided funds for its circulation.’” *Id.* at 203 (internal quotations and citations omitted). As the *Buckley II* Court concluded:

To inform the public where the money came from, we reiterate, the State legitimately requires sponsors of ballot initiatives to disclose who pay petition circulators, and how much.

Id. at 204. *Buckley II* aptly demonstrates that the Court recognizes that the public's interest in combating corruption and informing the electorate apply with special force to disclosures of campaign finance information. *Id.*

A. Anti-Corruption Interest

In numerous campaign finance disclosure cases over the decades, the Court has, reaffirmed the wisdom of Justice Louis Brandeis oft-cited insight that “Sunlight is said to be the best of disinfectants.” L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933), *quoted in Buckley v. Valeo*, 424 U.S. at 67. *Accord Buckley II*, 525 U.S. at 223; *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 277 (D.D.C. 2003). This Court has consistently upheld broad disclosure requirements of campaign finance activity even in instances in which the state would be constitutionally barred from imposing direct burdens on the campaign finance activity subject to the disclosure requirements.

The Court in *Buckley v. Valeo* explained that transparency of monetary contributions in elections both directly combats corruptions and empowers the citizenry and press to detect and respond to improper uses of money in politics and in governing. 424 U.S. at 67. The Court stated that such disclosures served to “discourage those who would use money for improper purposes either before or after the election” and that “a public armed with information about a candidate's most generous supporters is better equipped to detect any” special favors after the election is over. *Id.* The Court held

that these interests were “sufficiently important to outweigh the possibility of infringement [of the exercise of First Amendment rights], particularly when the ‘free functioning of our national institutions’ is involved.” *Id.* at 66.

Over the years, facts have amply borne out the Court’s prediction, as a press and voting public have used disclosure laws to hold elected officials accountable for apparent undue influence. For example, in 1997, the President of Amway and his wife collectively contributed \$1 million to the Republican Party. The press reported widely on this, linking it to an eleventh-hour intervention by the Republican Speaker of the House to push a tax bill that provided Amway with a tax break worth \$280 million. Davis Hess & Robert Rankin, *Clinton Pledges Line-Item Vetoes: Some Special Favors in the Tax-Cut and Budget Bills Would be Rejected*, The Philadelphia Inquirer, Aug. 7, 1997 at A1; David Hess & Charles Pope, *In The Tax Bill There’s A Gift Just For Tobacco Industry*, The Philadelphia Inquirer Aug. 1, 1997 at A1. Disclosure also enabled the Senate Ethics Committee to hold Senator Alan Cranston accountable for his improper conduct in the infamous Keating 5 scandal of the 1980’s. The Ethics Committee rebuked Senator Cranston after discovering that he intervened with regulators on behalf of a Savings and Loan while soliciting almost \$1 million for his campaign and affiliated voter registration groups. Without disclosure, the Ethics Committee may have never discovered this improper dealing. Helen Dewar, *Panel Votes To Rebuke Cranston*, The Washington Post, November 20, 1991 at A1.

More than twenty years after *Buckley v. Valeo*, in *McConnell*, eight Justices of this Court concluded that government interests were sufficiently strong to support disclosure of money used to fund a newly created category of campaign related spending--electioneering communications. *McConnell* held those interests were "providing the electorate with information, deterring actual corruption, avoiding the appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. *McConnell* also upheld disclosure requirements relating to donations of "hard money" to political parties⁴ stating, "[t]he Government's strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA." *Id.* at 156. Although the Court in *Citizens United* struck down many of the restrictions on funding applicable to electioneering communications, it expressly upheld the statute's disclosure requirements pertaining to these electioneering communications. (Slip Op. at 50-52.)

Following this Court's lead, State and lower federal courts have also consistently upheld

⁴ Hard money, generally speaking, is money that is subject to contribution limits and disclosure requirements that may be used directly by campaigns and political parties for any election-related purpose. In contrast, soft money, generally speaking, refers to funds contributed to candidates or political parties that are restricted in their use -- and funds that are not uniformly subject to contribution limits or disclosure requirements. *McConnell*, 540 U.S. at 122-23.

campaign finance disclosure statutory schemes, and recognized that that disclosure serves anti-corruption interests. *Ohio Right to Life Soc’y, Inc. v. Ohio Elections Comm’n*, No. 2:08-cv-00492, 2008 WL 4186312, at *6 (S.D. Ohio Sept. 5, 2008) (upholding Ohio’s campaign finance disclosure law because it was supported by the same compelling interests in preventing corruption and the appearance of corruption that were recognized in *McConnell*); *Koerber v. Federal Election Comm’n*, 583 F. Supp. 2d 740, 746 (E.D.N.C. 2008) (upholding disclosure requirements since they bore a “strong” correlation to the interests recognized in *Buckley v. Valeo* and *McConnell*); *Libertarian Party of Alaska, Inc. v. State*, 101 P.3d 616, 623 (Alaska 2004) (upholding Alaska’s “soft money” disclosure requirements); see *Colorado Right To Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1144 (10th Cir. 2007) (upholding against a facial challenge a requirement that nonprofit organizations disclose disbursements for electioneering communications over a \$1,000 threshold); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 791 (9th Cir.), *cert. denied* 549 U.S. 886 (2006) (upholding as constitutional Alaska’s registration and financial reporting requirements for all non-PAC groups, even if they are small nonprofit political organizations of the type contemplated in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)); *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000) (holding that groups whose major purpose is not electioneering may nevertheless be required to disclose “express advocacy”). It cannot be disputed that disclosure is the *sine qua non* of combating corruption.

B. Voter Informational Interest

Another vital interest behind disclosure requirements that the Court has repeatedly recognized over the last thirty years is providing “the electorate with information ‘as to where political campaign money comes from and how it is spent,’ thereby aiding electors in evaluating those who seek their vote.” *Buckley II*, 525 U.S. at 202 (quoting *Buckley v. Valeo*, 424 U.S. at 66). Information about elections, candidates, funding of candidates and issues, is indispensable to the functioning of a democracy in which the voters decide who runs the government. As described by the *Buckley v. Valeo* Court, disclosure of financial contributions and spending “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,” and helps facilitate predictions of future performance in office. 424 U.S. at 66-67; see also *Bellotti*, 435 U.S. at 792 n. 32 (“Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected”); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (“[T]here is no risk that the ... voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known.”).

Contrary to Petitioners’ arguments to this Court, this fundamental public interest in disclosure is not undermined by non-peer reviewed “studies”

containing polls of “voters” and whether they accessed specific records. Pet. Br. at 44 ⁵ It is, however, incontrovertible that the institutional press, the internet press, academia and many publicly inclined not for profit organizations have made widespread use of the data generated by the longstanding public disclosure requirements, and that these reports have been disseminated widely both before and after elections. This kind of information has been used for indispensable reporting during elections, revealing the depth and nature of support for particular candidates, parties or causes.

For example, Petitioners chronicle the alleged harassment that occurred as a result of disclosure during California’s Prop 8 election in their brief but they completely ignore the vital information that was disseminated to voters as a result of disclosure in that case. In the months leading up to the election, the press, relying on disclosure reports,

⁵ The “study” that is cited by Petitioners is actually a public opinion poll commissioned by the Institute of Justice and filled with stories of citizens who allegedly were damaged in some way by having to comply with election related regulations. Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007)(available at www.ij.org/publications/other.disclosurecosts.html). It is respectfully submitted, however, that before such material whose methodology and integrity cannot be easily verified is relied upon for such sweeping conclusions as that disclosure provisions do not inform voters, it should be properly authenticated, introduced into evidence and its proponents and provenance be subject to cross-examination. Pet. Br. at 45. This is especially true as this conclusion contravenes decades of this Court’s precedents, common sense, and the public record.

reported that nearly one-third of the \$15 million raised in support of Prop 8 was raised by the Mormon Church. Mark Schoofs, *Mormons Boost Antigay Marriage Effort: Group Has Given Millions in Support of California Fund*, Sept. 20, 2008 available at online.wsj.com/article/SB122186063716658279.html?mod=googlenews_wsj. Certainly this information was of vital importance to California voters seeking to make an informed decision regarding how to vote on this proposition.

As a further example, during the 2008 presidential campaign, for example, the data available allowed reporters to scrutinize both the Obama and McCain campaigns' funding sources. See e.g. Michael Luo, *Family's Donations to McCain Raises Questions*, New York Times, August 7, 2008 (discussing the donations connected to one extended Jordanian family in California to John McCain, Hillary Rodham Clinton and Rudolph Giuliani); Jeanne Cummings, *Big Pharma Veers to the Left*, Politico, September 23, 2008, available at www.politico.com/news/stories/0908/13766.html (reporting that to date 'the drug companies have given a total of \$17 million, with half (\$8.5 million) going to Democrats and half (\$8.5 million) going to the old allies"). In particular, the Obama campaign widely publicized its claim that it had raised a significant amount of money from small donors. Information obtained from campaign finance disclosures enabled reporters to analyze that information. See Michael Luo & Griff Palmer, *Fictitious Donors Found in Obama Finance Records*, New York Times, October 10, 2008 (addressing concerns, after false names were discovered on the

candidate Obama's campaign finance records, that the Obama campaign was not vetting its "unprecedented flood of donors" properly) *available at*

www.nytimes.com/2008/10/10/us/politics/10donate.html?_r=1&scp=1&sq=fictitious%20donors&st=cse;

Kimberly Kindy & Sarah Cohen, *The Donors Who Gave Big and Often*, The Washington Post, January 18, 2009 at A02 ("Nearly 100 wealthy families and power couples contributed at least \$100,000 each to help Barack Obama over the past two years.")

This kind of data and the reporting on it also sheds light on the wider picture of political activism in this country. Politico.com reported, for example, that women gave triple the amount of money to presidential candidates in 2008 than they did in 2000. Jeanne Cummings, *Women Donors Triple Contributions*, Politico, September 23, 2008, *available at*

www.politico.com/news/stories/0908/13767.html.

Despite Petitioners' "study" claiming that the public does not access campaign finance data, the widespread use and dissemination of this data is undeniable.⁶ For example, the website opensecrets.org, run by *Amicus*, The Center for Responsive Politics, counted over 15 million visitors

⁶ Petitioners' arguments here are mutually contradictory. On the one hand they claim that information generated by disclosure is so widespread and pervasive that it leads to an ongoing and urgent danger to privacy. Pet. Br. at 46-47. On the other, they contend, the information is so insignificant that it is buried in government archives and utterly fails to fulfill its intended purpose of informing voters. Pet. Br. at 44. Petitioners are certainly incorrect in their latter contention.

in 2007. Opensecrets.org aggregates and synthesizes large amounts of campaign related information made public through disclosure requirements in a format that is easy to use by both the public and the press. www.opensecrets.org/about/tour.php. According to searches in Westlaw's ALLNEWS database the website's campaign finance data has been used in news and opinion articles in more than 10,000 instances.⁷

As the above examples demonstrate, campaign finance disclosures are essential to enable the press to perform its function as the watchdog of government. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("the basic assumption of our political system [is] that the press will often serve as an important restraint on government. ... and an informed public is the essence of working democracy."). Such a role is not possible if the important facts concerning funding and influence are hidden from both the press and the public.

The public interest in financial information relating to elections is not limited to campaign contributions, but also extends to information about

⁷ A search made on March 2, 2010, in the Westlaw ALLNEWS database for the website's administering organization, the Center for Responsive Politics, generated over 10,000 instances in which the website's campaign finance data has been used in news and opinion reports and articles. Other websites that generate reports and articles from campaign finance disclosure data include the Campaign Finance Institute, www.cfinst.org/, National Institute on Money in State Politics www.followthemoney.org, and politico.com.

the funding of individual expenditures. While there are no limits on the amounts that may be spent independently in connection with an election, independent expenditures, like campaign contributions, trigger disclosure requirements under the federal statutes.⁸ These disclosure requirements ensure that voters, opposing candidates, and the public understand the full context of an election for public office—who supports the candidate, who opposes the candidate, the basis published for that position and information helpful to evaluating that publicly acknowledged position. *McConnell*, 540 U.S. at 196-97 (2003); see *Citizens United*, *supra*, Slip Op. at 51, 52, 55. In *McConnell*, the Court relied upon the extensive factual record that had been developed in the court below and cited examples of how the system had been abused to permit corporations and labor unions to fund advertisements designed to influence elections while concealing their identities from the public. The Court quoted from the District Court’s opinion the wry observation that “Plaintiffs never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public,” and characterized the position before it as ignoring “the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.” *Id.* at 197, *quoting*

⁸ The disclosure requirements for independent expenditures require that expenditures above specific thresholds within a certain time period before an election or primary be reported to the Federal Election Commission. See *e.g.*, 2 U.S.C. § 434(f)(1)&(f)(2).

McConnell v. FEC, 251 F. Supp. 2d at 237. The *McConnell* Court further noted that disclosure requirements concerning the funding of electioneering communications were constitutional, both because they do not limit speech and because they inform the electorate:

As the District Court observed, amended FECA § 304's disclosure requirements are constitutional because they "d[o] not prevent anyone from speaking." Moreover, the required disclosures "would not have to reveal the specific content of the advertisements, yet they would perform an important function in informing the public about various candidates' supporters *before* election day."

540 U.S. at 201 (internal citations omitted)(emphasis in original).

Lower courts have also found that disclosure serves an informational interest for voters. A Washington federal district court concluded that disclosure of spending on ads about ballot issues was constitutional because of the public's right to cast an informed vote:

Accordingly, the Court rejects [plaintiffs'] contention that there is a bright-line rule prohibiting the regulation of "issue advocacy" and holds that the state's compelling interests in informing the electorate and protecting contributors justify requiring "political

committees” to report on and disclose all expenditures made “in support of, or opposition to ... a ballot proposition.” This holds even when “expenditure” is defined to include some advocacy as to the “issue” underlying the proposition, as long as such regulations are limited to the specific issue on which the public’s vote is being sought.

See also Human Life of Washington, Inc., v. Brumsickle, No. 008-0590-JCC, 2009 WL 62144, at *18 (W.D. Wash. 2009), *appeal docketed* No. 09-35128 (9th Cir. 2009); *see also California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1189 (9th Cir. 2007) (California’s campaign finance disclosure law serve an informational interest).

This critical need for public information about the forces affecting elections in this country are stymied when financial interests hide behind false and innocuous sounding names to disguise their true identity and agendas.⁹ One recent example of this

⁹ Troublingly, the incidence of undisclosed corporate political spending appears to be increasing. For example, a recent New York Times article about the effects on the funding of elections that followed this Court’s decision in *Wisconsin Right to Life v. Federal Election Comm’n*, 546 U.S. 410 (2006), concluded that “After the 2006 Wisconsin Right to Life decision, there was no sudden surge in direct corporate spending on issue advertising. Electioneering communications spending by nonprofit groups that did not identify their donors, however, increased sharply. Of the \$98.7 million in electioneering communications reported in the 2004 cycle, virtually all was accompanied by identification of at least some donors. In the 2008 cycle, over one-third of the \$116.5 million reported was

occurred when the U.S. Chamber of Commerce gave a substantial donation to a group with a benign sounding name that did not comply with applicable disclosure requirements. *Voters Educ. Comm. v. Washington State Public Disclosure Comm'n*, 166 P.3d 1174 (2007). The Chamber had given \$1.5 million dollars to a group called the “Voters Education Committee” which in turn spent the money on political television advertisements criticizing Deborah Senn, a candidate for Attorney General of Washington, without registering as a political committee or disclosing information about its contributions and expenditures. *Id.* at 1177. Concluding that the organization should have been registered as a political action committee under Washington law, the court explained that “these disclosure requirements do not restrict political speech—they merely ensure that the public receives accurate information about who is doing the speaking.” *Id.* at 1189.

The record in before the Court in *McConnell* contained many examples of interests that veiled their federal political expenditures with misleading names. There, the Court found that the “The Coalition-Americans Working for Real Change” was a business organization opposed to organized labor and “Citizens for Better Medicare” was funded by the pharmaceutical industry. 540 U.S. at 128, 197. Wealthy individuals have used similar tactics. For

not accompanied by donor identification.” Griff Palmer, *Decision Could Allow Anonymous Political Contributions by Businesses*, The New York Times, Feb. 27, 2010, available at www.nytimes.com/2010/02/28/us/28donate.html?pagewanted=1

example, Texas millionaires and brothers Charles and Sam Wyly spent approximately \$25 million on advertisements endorsing George W. Bush during the 2000 primaries. They did so, however, in secrecy, using the name of “Republicans for Clean Air” to shield their involvement. *McConnell v. FEC*, 251 F. Supp. 2d at 232.

In short, the real need of the voters to understand what issues, which institutions, and whose money are actually at play in an election creates a critical disclosure interest not necessarily implicated in the disclosure of petition signatures at issue in the present case.

**C. *Citizens United* Reaffirmed the Critical
Governmental Interests in Requiring
Transparency of Money in Politics**

Just a few months ago, this Court issued an important ruling that reaffirmed by the disclosure requirements for independent expenditures against a claim of constitutional burdens on association and infringement of privacy interests. In *Citizens United*, the Court expressly based this part of its ruling joined by eight justices upon the key governmental and societal interests in providing the electorate with information. The Court made clear that:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions

and give proper weight to different speakers and messages.

Slip Op. at 55. While simultaneously ruling that such expenditures are deserving of the broadest First Amendment protection and striking down long standing federal statutes prohibiting corporations and labor unions from engaging in such independent expenditures, this Court emphasized the importance of transparency in the remaining campaign regulatory system. The Court accordingly rejected the challenge to the provisions mandating disclosure of independent expenditures. *Id.* at 52. In doing so, the Court held that disclosure must be substantially related to a “sufficiently important” government interest. *Id.* at 51 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)), and the Court found sufficient the government’s interest in informing the public on the sources of election-related spending. *Id.* (citing *Buckley v. Valeo*, 424 U.S. at 66).

The Court also explicitly recognized the Internet’s key role in facilitating transparency in the context of money and politics. While Petitioners have emphasized what they believe are the negative possibilities in the free availability of information on the Internet (Pet. Br. at 46-49), they completely overlook the Internet’s enormous capacity to streamline access to information that previously would have been available only to scholars or government officials and would not have been sufficiently timely to help voters evaluate candidates or election issues. Modern technology makes disclosures immediate and informative, thereby enabling citizens, for example, to learn about candidate’s financial support prior to an election.

Citizens United (“With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”). The Internet also provides rapid access to corporate financial disclosures that allow shareholders to determine whether their corporations’ political speech, in the form of independent expenditures, advances their corporations’ legitimate interests. Slip Op. at 55.

This Court in *Citizens United* concluded that disclosure requirements coupled with the ready availability of information on the Internet rendered some of the concerns that had motivated Congress to ban certain kinds of spending less valid:

Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “‘in the pocket’ of so-called moneyed interests.” 540 U. S., at 259 (opinion of SCALIA, J.); see MCFL, *supra*, at 261. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. *Id.*

In our First Amendment tradition, secrecy is the exception, transparency is the constitutional rule.

IV. In the Campaign Finance Context, This Court Has Required a High Burden of Proof to Warrant an Exemption from Disclosure.

Although the issue is not properly before the Court,¹⁰ the Petitioners broadly claim that a blanket exemption from disclosure is warranted for all “intimidated groups” based on “proof of intimidation against supporters of traditional marriage” in California. *See* Pet. Br. at 33-34. By making this broad claim – without regard for whether such disclosure requirements occur in the special context of campaign finance – however, Petitioners ignore the special interests underlying campaign finance disclosure laws, as explained above.

The United States Constitution embodies the principle that “debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see also New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) (“The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference.”). Accordingly, as

¹⁰ The Petitioner’s complaint has two counts -- the first broadly alleges that the disclosure law is unconstitutional as applied to referendum petitions, the second alleges that the disclosure law is unconstitutional as applied to Petitioners because they face a reasonable probability of harassment. Pet. Br. That second count was not reached by either lower court and is thus not before the Court in this appeal of the preliminary injunction motion. Pet. Br. at 10-14.

a general rule, the mere possibility of reprisal in response to political speech does not justify depriving voters of valuable information about campaign-related spending. *See Buckley*, 424 U.S. at 68 (acknowledging that disclosure may prevent some individuals from engaging in political activity and may subject others to harassment or retaliation); *see also McConnell*, 251 F. Supp. 2d at 247 (D.D.C. 2003) (“Although these groups take stands that are controversial to segments of the public, and may believe that they are targeted because of the positions they take, none has provided the Court with a basis for finding that their organization, and thereby their membership, faces the hardships that the NAACP and SWP were found to suffer by the Supreme Court.”). While actual intimidation and harassment are reprehensible, and robust anti-intimidation and harassment laws can and should deter and punish such conduct, cloaking political spending in anonymity would undermine other values of constitutional significance. What this Court said seventy years ago remains equally true today:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the

probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

In rare situations, however, exemption from disclosure may be necessary to protect the First Amendment freedoms of particular groups or individuals and prevent the “consequent reduction in the free circulation of ideas.” *Buckley v. Valeo*, 424 U.S. at 71. To warrant exemption, those seeking an exception must first show a “reasonable probability” that they will face “threats, harassment, or reprisals” as a result of disclosure. *Citizens United*, Slip. Op at 54. If a reasonable probability of harm is established, then the Court undertakes a balancing test to determine whether “the threat to the exercise of First Amendment rights is so serious” that it outweighs the state’s interest in the contested disclosure. *Buckley v. Valeo*, 424 U.S. at 71; *see also NAACP v. Alabama*, 357 U.S. 449, 466 (1958). This inquiry is necessarily highly sensitive to the facts and circumstances of each case. *See, e.g., Buckley v. Valeo*, 424 U.S. at 71-74 (examining record and refusing to apply blanket exception for minor parties due to myriad factors affecting whether exception is appropriate).

In the campaign finance context, because of the several compelling state interests implicated, the threat to First Amendment rights must be substantial in order to tip the balance of equities in favor of exemption. For example, in *Brown v.*

Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982), after reviewing an extensive record of pervasive and extreme harassment against plaintiff Socialist Workers Party and its members, the Court concluded that:

[T]he District Court properly concluded that the evidence of private and government hostility toward the SWP and its members establishes a reasonable probability that disclosing the names of contributors and recipients will subject them to threats, harassment, and reprisals. There were numerous instances of recent harassment of the SWP both in Ohio and in other states. There was also considerable evidence of past government harassment . . . [T]he evidence suggests that hostility toward the SWP is ingrained and likely to continue.

Id. at 100-101. Not surprisingly, the Court has only once found cause for an exception from campaign finance disclosure laws due to harassment. *Compare Brown*, 459 U.S. at 101-102 *with Citizens United*, Slip Op. at 54-55 (rejecting claim for exemption from disclosure); *McConnell*, 540 U.S. at 199 (refusing to exempt parties from disclosure despite their “expressed concerns” of harassment); *Buckley v. Valeo*, 424 U.S. at 69-74 (concluding that the “substantial public interest in disclosure” “outweighs the harm generally alleged”).

Amici do not attempt to assess whether the particular fears of reprisal alleged by Petitioners here do or do not warrant an exemption from the Act at issue today. *Amici* do, however, submit that if this Court were to issue such an exemption – on the grounds that the First Amendment protects the anonymity of petition signatures – such a ruling should not extend to the sphere of campaign finance disclosures.

CONCLUSION

Because we believe that a constitutional democracy cannot deprive the electorate of the tools and knowledge to educate itself about the forces operating in the political arena – the most basic facts about the funding of candidates, elections, and referenda, we urge this Court to craft a resolution to the dispute before it in this particular case without impinging upon existing constitutional doctrine regarding disclosure laws in the sphere of money in politics.

Respectfully submitted,

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