No. 09-559

IN THE

Supreme Court of the United States

JOHN DOE #1, JOHN DOE #2, and
PROTECT MARRIAGE WASHINGTON,
Petitioners,

v.

SAM REED *et al.*,
Respondents.

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

BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, 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 former

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

general counsel to the National Republican Senatorial Committee. CCP'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. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

This Court has made clear that any activity that furthers candidate campaigns for elective office must be disclosed. *Citizens United v. Fed. Election Comm'n,* No. 08-205, slip op. at 50–55, 558 U.S. __, 2010 WL 183856 (Jan. 21, 2010).

The Court must now make clear that the constitutional line between publicly disclosed activity and anonymous speech and association is not to be drawn between elections and issues. The line already drawn, and to be respected and preserved, is between candidate elections on the one hand, and elections about issues and issue advocacy on the other.

Like mandatory disclosure in candidate elections, anonymity in issue elections and referenda protect citizens from corruption and abuse from officeholders or opponents who would punish citizens for opposing their policy preferences. Citizens learn something of the relative merits of a candidate by knowing who supports him; candidates, possessing freewill, may change positions after the election to reward election contributors. But citizens learn little about the relative merits of policy referenda by knowing which of their fellow citizens supports it—and abusive officeholders and opponents learn too much.

Mandatory disclosure always carries costs. Recent history demonstrates that donors to ballot proposition campaigns are subjected to retribution by officials and others who make use, either directly or derivatively, of government-compelled disclosure data.

Where disclosure of political speech furthers compelling interests, as in candidate elections, the burdens disclosure places on political speech may be justified, with limited exception. *See generally Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982). And filing privately with the Washington State officials allows the government to investigate and prevent fraud. Where, however, mandatory disclosure does not further compelling interests, as in the case of ballot issue advocacy and referenda, the impositions on First Amendment rights are not justifiable. Mandatory disclosure of ballot issue advocacy would further none of the informational, anti-corruption, or compliance interests enunciated in *Buckley* and *McConnell*.

In *Buckley*, this Court permitted mandatory disclosure of independent express advocacy of candidates in order to further "informational" (but not anti-corruption) interests. The Court conditioned this allowance of mandatory disclosure on its being constitutionally narrowed to avoid issue advocacy. *Buckley v. Valeo*, 424 U.S. 1, 79–80 (1976). The government's claim that ballot issue advocacy can now be subject to compelled disclosure to further the same informational interest constitutes a "constitutional 'bait and switch.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, ("*WRTL II*"), 551 U.S. 449, 127 S.Ct. 2652, 2673 (2007).

Because the petition signature disclosure provisions are unconstitutional as-applied to any petition signer,

the Doe plaintiffs need not demonstrate a "reasonable probability" that they will suffer "threats, harassment, and reprisals" under *Brown*.

ARGUMENT

I. INTRODUCTION

This Court has made clear that any activity that furthers candidate campaigns to elective office must be disclosed. *Citizens United*, slip op. at 50–55. This is the upshot of *McConnell* and *Citizens United*. The Court accepted Congress' assertion that the full range of electioneering communication provisions further elections for purposes of disclosure. But, the Court held, the electioneering communication's ability to further elections was no basis for banning their funding by corporate sources. *Id.* at 50.

The Court must now make clear that the constitutional line between publicly disclosed activity and anonymous speech and association is not to be drawn between elections and issues. The line already drawn, and to be respected and preserved, is between candidate elections on the one hand, and elections about issues and issue advocacy on the other.[2]

To compel public disclosure in issue campaigns—such as ballot propositions, initiatives, or referenda—is tantamount to opening needlessly the secret ballot, for there is little difference between the public

[2] *Amicus* CCP concedes that a candidate recall initiative may compel a different result, because the recall of a candidate may be the equivalent of an additional candidate election. But while the election is about issues—as is clearly the case with Washington's R-71 referendum—anonymity, not public disclosure, must be protected to protect the democratic process from gradual destruction.

knowing who signed a petition for a ballot initiative and who voted for one.

Furthermore, to compel public disclosure in issue campaigns is to elevate unwisely and shamefully the *ad hominem* argument to a constitutional command. It offends, let alone endangers, the American system of popular sovereignty to state that Americans cannot know *what* they think of same-sex marriage initiatives (or any other ballot issue) without knowing precisely *who* supports same-sex marriage. Ballot initiatives, unlike candidates for office possessing freewill, are words on a page. They do not change once enacted in the way a candidate changes positions once elected. "The premise of our system" of popular sovereignty "is that the people are not foolish but intelligent, and will separate the wheat from the chaff." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 695 (1990) (Scalia, J., dissenting); overruled in *Citizens United*, slip op. at 50. Once the Doe plaintiffs have disclosed privately to Washington authorities to prevent fraud, the informational and anti-corruption interests of *Buckley* are not furthered by public disclosure. Indeed, the anti-corruption interest is better served by anonymity, as the recent California Prop 8 pushback demonstrates, as only the latest example.

II. LIKE DISCLOSURE IN CANDIDATE ELECTIONS, ANONYMITY BEYOND CANDIDATE ELECTIONS PROTECTS CITIZENS FROM CORRUPT OFFICE-HOLDERS AND ABUSIVE OPPONENTS

In proposals to disclose ballot issue referenda, we witness two canons of political law on an apparent collision course: that government corruption is cured by disclosure; 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 these canons, applied in context, each work toward the same purpose: to protect citizens from corrupt and abusive officeholders and hostile opponents. Anonymity in ballot issue referenda, like disclosure in candidate elections, advances the overriding government interest at the root of all campaign finance regulation: preventing corruption or its appearance. *Buckley*, 424 U.S. at 25.

Many believe that "[l]iberty cannot be preserved without a general knowledge among the people." John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE (1765), *reprinted in* Thomas Paine, *Common Sense* 99, 108–10 (Edward Larkin ed., Broadview Press 2004). But many have missed the import in Adams's full quote: "Liberty cannot be preserved without a general knowledge among the people, who have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean *the characters and conduct of their rulers*." Adams, *supra* (emphasis added). Far from benefiting democracy, mandatory disclosure is harmful when it illuminates the inner workings of communication by and between citizens about issues and referenda, potentially subjecting those citizens to both official and unofficial harassment and intimidation. Because mandatory disclosure for ballot issue advocacy does not illuminate the characters or conduct of public officials, any public interest in such disclosure is substantially diminished. Mandatory disclosure improperly applied in this way becomes a tool of abuse by government and hostile opponents, rather than a tool to prevent abuse of government.

Proper disclosure schemes, like those for candidate campaign contributions, protect citizens from abuse of office by officials who have freewill and can confer benefits on large contributors (and pain on opponents) by passing future legislation. Disclosure regimes for direct lobbying activities, in which paid consultants engaged in face-to-face meetings with officeholders, protect citizens in a similar manner. Disclosure of ballot issues, however, does not further these goals. Rather, protecting the right to speak and associate anonymously with fellow citizens in referenda elections (not candidate elections) protects citizens from abusive officeholders or hostile opponents by reducing the officeholder's ability to retaliate against those who would oppose his policy preferences. Anonymity for activity short of candidate elections is supported by a long line of cases. *See Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton,* 536 U.S. 150, 166, 168 (2002) (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341–42 (1995)) ("'[d]ecision to favor anonymity may be motivated by fear of economic or official retaliation'"); *Talley v. California,* 362 U.S. 60, 64–65 (1960) ("[g]roups and sects . . . throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," and "identification and fear of reprisal might deter . . . discussions of public matters of importance").

Further, citizens learn something of the relative merits of a candidate by knowing who supports his election. The "sources of a *candidate's* financial support . . . alert the voter to the interests to which a *candidate* is most likely to be responsive." *Buckley,* 424 U.S. at 66–68 (emphasis added). Compelling disclosure of those sources "facilitate[s] predictions of future performance in office[,]" and "may discourage

those who would use money for improper purposes . . . before or after the election." *Id.* at 67. And citizens learn much about the legislative process by knowing who is paying consultants to meet with officeholders directly. *See* Lobbying Disclosure Act of 1995, 109 Stat. 691 (codified at 2 U.S.C. § 1601 *et seq.*). Citizens, however, learn little about the relative merits of a referendum by knowing which of his fellow citizens supports it. Referenda do not change once enacted; little "informational interest" is furthered. Asserting otherwise is an argument from *ad hominem* that does little to advance knowledge or debate. Abusive officeholders and hostile opponents, however, are provided with too much information—the information needed to abuse their official position or to retaliate against political opposition. Disclosure regimes for issue advocacy provide abusive officeholders and opponents with knowledge of which individuals support which issues. The possibilities for retaliation and intimidation impose too high a cost for too little benefit in our constitutional republic, which depends for its survival upon a vibrant and "unfettered interchange of ideas." *Roth v. United States*, 354 U.S. 476, 484 (1957).

III. THE DANGER OF RETRIBUTION IS REAL

This Court has been reminded, of late, of the hoary tale: politics coincides with retribution or threats of it. *See Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (per curiam) (staying broadcast of Proposition 8 trial; recognizing harassment directed at Proposition 8 supporters). Political retribution is ubiquitous. The role of the Court is to diminish retribution by protecting anonymity where public disclosure would

further no important or compelling government interest.

The Doe Plaintiffs may have to disclose their names privately to Washington state officials to aid in the policing of fraud. But once fraud is addressed, public disclosure cannot vindicate the anti-corruption and informational interests discussed in *Buckley*. Public disclosure furthers these interests only for candidate campaigns.

IV. COMPELLING PUBLIC DISCLOSURE OF REFERENDA SIGNERS FURTHERS NO IMPORTANT OR COMPELLING GOVERNMENT INTEREST

The First Amendment provides the "broadest protection to . . . political expression" to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley*, 424 U.S. at 14 (quoting *Roth*, 354 U.S. at 484). This protection extends to "political association," individuals joining together to advocate for positions they believe in, "as well as to political expression." *Buckley*, 424 U.S. at 15. This Court "did not suggest" that the corruption interest "extend[s] beyond campaign speech" about candidates. *WRTL II,* 127 S. Ct. at 2672-73. *See also Buckley,* 424 U.S. at 80 (disclosure provision "[a]s narrowed . . . does not reach all partisan discussion[;] it only requires disclosure of . . . expenditures that expressly advocate a[n] election result" for candidates).

Accordingly, federal disclosure provisions for political speech, which are instructive in adjudicating state cases, have always been tied to elections. "The first federal disclosure law was enacted in 1910," reaching "political committees and . . . organizations

operating to influence congressional elections." *Id.* at 61 (internal citations omitted). The Federal Corrupt Practices Act of 1925 mandated disclosure for "political committees, defined as organizations that accept contributions or make expenditures 'for the purpose of influencing'" a Presidential campaign. *Buckley,* 424 U.S. at 62. Both laws were replaced by provisions in the Federal Election Campaign Act of 1971, as amended, *id.*, and Congress added to them in BCRA, legislation dedicated to the regulation of campaigns for federal office. *See generally McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

Similarly, in *United States v. Harriss,* 347 U.S. 612 (1954), this 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 357 n.20 (emphasis added). The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.* (requiring lobbyists to make detailed disclosures about their direct lobbying efforts), operates to cure the same appearance. The regulated lobbying activities do not include attempts to advocate issues or referenda with fellow citizens. 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) (internal citations omitted).

Referenda signers pose no threat of *quid pro quo* corruption. Candidates (human beings with freewill) are not up for election in ballot referenda. Any potential for ballot petitioners to become part of a fraud is handled by private disclosure to the Secretary of State. *See* Petitioner's Brief at 14.

This leaves the Court to consider the informational interests first recognized and justified in *Buckley* and needed to depart from the norm of anonymity. It is plain that *Buckley's* informational interests apply only to those elections where it is possible to illuminate who supports candidates, candidates who can deviate from stated platforms and reward supporters once elected. The informational interests help to place candidates in the "political spectrum" more precisely than can be done by platforms and party affiliation. *Buckley,* 424 U.S. at 67. They have no application to referenda campaigns. (A different result may occur in the case of candidate-recall elections, as those may be viewed as an additional election for candidates to office. But that question is not before the Court in this case).

The first interest is the "informational interest." *Buckley*, 424 U.S. at 81. 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 federal office." *Id.* at 66–68 (emphasis added). The R-71 petition signatures in question are not speech about candidates, only referenda. Therefore, compelling Doe to disclose his true name will not provide the public with information as to "where political campaign money comes from" or on "how [money] is spent by [a] candidate." *Id.*

The second interest is to "deter actual corruption and [its] appearance . . . by exposing large contributions and expenditures to the light of publicity." *Id.* But the terms "contributions" and "expenditures" discussed in *Buckley* derive from the Federal Election Campaign Act of 1971, as amended, Pub. L. 92-225, Feb. 7, 1972. Each subsumes the phrase "made… for

the purpose of influencing an[] election" to federal office, *see* 2 U.S.C. §§ 431(8) & (9), and not for some other purpose. That "critical phrase" was narrowed in *Buckley's* discussion of the disclosure requirements at § 434(c) to express advocacy, which ensured that its reach was unambiguously related to candidate campaigns. 424 U.S. at 80–81. Candidates and officeholders are not corrupted by referenda campaigns.

The third interest in disclosure is to "gather[] the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 66–68, which are inapplicable to issue and referenda campaigns.

Thus, requiring the names and addresses of citizens engaged in ballot issue advocacy does not further any of the informational, anticorruption, or compliance interests upheld as compelling in *Buckley*. There is no government interest recognized by this Court that is furthered by mandatory disclosure of ballot advocacy.

V. THE QUESTION IS NOT CLOSED BY *BELLOTTI*

There is no apparent government interest recognized by this Court that is furthered by compelling the disclosure of political speech for or against referenda. This issue was discussed but not decided in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978). *See McIntyre*, 514 U.S. at 353–54 (*Bellotti*'s comments "on the prophylactic effect of requiring the identification of the source of corporate advertising [for referenda elections]" were "*dicta*"). Some suggest that this Court already determined the constitutionality of disclosure in ballot-initiative campaigns in *Citizens Against Rent Control v. City of 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. The Court, however, did not. In *Citizens Against Rent Control*, the appellants challenged contribution limits to ballot initiative committees in Berkeley Ordinance § 203, and did not challenge the disclosure provisions of § 112. Therefore, when the City of Berkeley claimed that the contribution limits must be upheld as a "prophylactic measure to make known the identity of supporters and opponents of ballot measures," *see id.* at 298–99, this Court had no opportunity to decide whether Berkeley's § 112 was constitutional, or to decide whether the government may compel the disclosure of communications for or against ballot initiatives or referenda. *Id.* at 291–93 (explaining that only the contribution limitations and not the disclosure requirements, had been challenged).

Because candidates—human beings possessing freewill and a potential to be corrupted—are not on the ballot, compelling the disclosure of information on the funding of ballot initiatives or referenda does not "aid voters in evaluating those who seek federal office," *Buckley*, 424 U.S. at 66, and does not deter corruption. And, because this Court has invalidated limits on contributions to ballot-initiative committees as a restraint on the rights of speech and association, *see Citizens Against Rent Control*, 454 U.S. at 299, disclosure would not aid in the enforcement of contribution limits. *See Buckley*, 424 U.S. at 66–68.

As Chief Justice Rehnquist stated, reviewing another section of BCRA, "[i]n this noncandidate-related context, this goal" of enabling viewers to evaluate the message transmitted "is a far cry from the govern-

ment interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of federal candidates." *McConnell*, 540 U.S. at 361–62 (Rehnquist, C.J., dissenting) (reviewing BCRA § 504, which amends federal communications law to require broadcast stations to keep records of requests to purchase airtime for issues of national importance).

Buckley's informational interest—reviewed as it was in the context of candidate campaigns—is not furthered by mandatory disclosure of issue advocacy, even in ballot-initiative or referenda campaigns. What did California's voters learn of the relative merits of same-sex versus traditional marriage, or of the wording and import of Proposition 8, by knowing that Richard Raddon gave $1500 to Yes on [Proposition] 8? *See* 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. *Amicus* suggests the answer is: Nothing. What did those eager to retaliate against the supporters of Prop. 8 learn? Everything they needed to know.

Justice Scalia, dissenting in *McIntyre,* has written that there is no "right" to engage in anonymous electioneering, *McIntyre*, 514 U.S. at 371–85 (Scalia, J., dissenting). To reach this conclusion, he addressed three questions: "[w]hether protection of the election process justifies limitations that cannot constitutionally be imposed generally," *id.* at 378; "[w]hether a 'right to anonymity' is such a prominent value . . . that even protection of the electoral process cannot be purchased at its expense," *id.* at 379; and finally "[w]hether the prohibition of anonymous campaigning is effective in protecting. . . democratic elections." *Id.* at 381.

First, it is true that compelling the identity of issue advocates "cannot constitutionally be imposed generally." *Id.* This makes it all the more important for this Court reaffirm the line between elections for candidates and elections for issues and referenda.

Second, Justice Thomas has written of the importance and "prominen[ce]" of anonymity in securing debate in and outside of issue elections. *See McIntyre*, 514 U.S. at 371 (Thomas, J., concurring) ("[W]eight of the historical evidence" indicates that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political . . . issues in anonymous fashion").

Third, it is the failure to protect anonymous campaigning in ballot initiatives and referenda that is killing democratic elections, not protecting them. *See* Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support,* SACRAMENTO BEE, Nov. 12, 2008, (available at <http://www.sacbee.com/1089/story/1391705.html>).

VI. THIS COURT HAS ALREADY INVALIDATED CONGRESSIONAL ATTEMPTS TO COMPEL THE DISCLOSURE OF ISSUE ADVOCACY ON CONSTITUTIONAL GROUNDS

Furthermore, this Court will not write on a blank slate. In *Buckley,* this Court narrowed the statutory definition of "political committee" to avoid *vagueness* and an *impermissible* intrusion into issue discussion. 424 U.S. at 79.[3] But the Court also narrowed the

[3] The *Buckley* Court in protecting issue advocacy from disclosure was well aware that express advocacy and issue advocacy both have an "effect" on elections, and saw this fact as little reason to curtail issue advocacy. 424 U.S. at 42 ("the distinction

definition of "expenditure" in the Act's disclosure requirements for independent speakers to cure *overbreadth* and thus to prevent an *unconstitutional* intrusion into issue discussion.

> But when the maker of the expenditure is . . . an individual other than a candidate or a group other than a "political committee[,]" the *relation of the information sought to the purposes of the Act may be too remote.* To insure that the reach of § 434(e) is *not impermissibly broad*, we construe "expenditure" for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. *This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate*.

Buckley, 424 U.S. at 79–80 (emphasis added) (footnote omitted). The Court noted that only through narrowing could the provision "bear[] a sufficient relationship to a substantial governmental interest," for § 434(e) would "not reach all partisan discussion" and would "only require[] disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80.

Indeed, the *Buckley* Court seemed proud that its narrowing would "increase[] the fund of information" by "shed[ding] the light of publicity on spending . . .

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between discussion of issues and candidates and advocacy of election or defeat . . . may often dissolve in practical application. Candidates . . . are intimately tied to public issues[,] campaign on the basis of their positions on . . . issues, [and the] campaigns themselves generate issues of public interest").

[that] would *not otherwise* be reported because it takes the form of independent expenditures." 424 U.S. at 81 (emphasis added). This extension, however, invokes Chief Justice Roberts's warning of the "constitutional 'bait and switch'" *WRTL II*, 127 S. Ct. at 2673. The potential for "bait and switch" is no less before this Court in its review of the ballot signature provisions here. *Buckley* saved the disclosure of independent expenditures from unconstitutionality only by ensuring that that disclosure would *not* reach issue advocacy under the government's asserted informational interest. It would be improper "bait and switch" to hold now that issue advocacy in ballot referenda must be disclosed to further the same interest.

VII. THE DOE PLAINTIFFS NEED NOT DEMONSTRATE THAT THEY WILL BE SUBJECT TO THREATS, HARASSMENT, OR REPRISALS BECAUSE COMPELLED PUBLIC DISCLOSURE IS UNCONSTITUTIONAL AS-APPLIED TO ANY BALLOT PETITION SIGNER

In *Brown v. Socialist Workers '74 Campaign Committee*, this Court had to determine whether an otherwise constitutional disclosure requirement, related to candidate elections, could be applied to a political party committee that "historically has been the object of harassment by government officials and private parties." 459 U.S. 87, 88 (1982). The Court affirmed the finding of the district court, following the rationale in *Buckley*. *See generally Brown,* 459 U.S. at 92–102. But Washington's referendum petition disclosure provisions are not otherwise valid disclosure provisions. Ballot issue referenda are not related to candidate elections. Therefore, the Doe

plaintiffs need not demonstrate a reasonable probability that they will be subject to threats, harassment, or reprisals by operation of the disclosure provisions. It is enough for the Doe plaintiffs to demonstrate that the disclosure provisions are unconstitutional as applied to any plaintiffs signing ballot petitions.

Furthermore, there are practical problems with *Brown*'s "reasonable probability" inquiry. People such as Proposition 8 supporter Richard Raddon did not know at the time they first decided to speak that they would be targeted, nor could they—and it is highly unlikely that any court would have granted their request to remain anonymous on the authority of *Brown*. But with the knowledge they could likely be targeted comes questions. Is each ballot signer supposed to march into court and say he or she is likely to face reprisals, or should he wait for ballot organizers to do so on his behalf? If he may proceed on his own, would the proceedings be sealed?

Have the activities of Accountable America now made it possible for any right-leaning ballot organizer or ballot signer to demonstrate a reasonable probability of threats, harassment, and intimidation? *See Brown*, 459 U.S. at 93–94, 98–102; Michael Luo, *Group Plans Campaign Against G.O.P. Donors,* N.Y. TIMES, Aug. 8, 2008, at A15. Surely such a demonstration, if successful, would swallow *Buckley's* rule and disclosure, even in candidate elections, for whole categories of contributors and donors. This is why such a broad demonstration will never be successful in a district court, and why the purported protection of *Brown* would be no comfort to signers of ballot initiative petitions—and why the threats, harassment, and intimidation from Accountable

Americas everywhere would proceed apace, with their targets including ballot petition signers.

This Court should resist the temptation to uphold mandatory disclosure for issue advocacy on the belief that *Brown* will provide adequate protection to the chilled donor.

The line this Court must affirm is between compelled public disclosure for candidate campaigns and anonymity for campaigns involving ballot issues and referenda.

CONCLUSION

For the foregoing reasons, the opinion of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted

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