No. _____

In The

Supreme Court of the United States

National Organization for Marriage, Inc. and **American Principles in Action, Inc.**, *Petitioners*

v.

Walter F. McKee, et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

Petition for a Writ of Certiorari

John C. Eastman
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
jeastman@chapman.edu
(714) 628-2587

Kaylan L. Phillips
ActRight Legal Foundation
2029 K Street NW
Suite 300
Washington, DC 20006
(202) 683-9405

Counsel for Petitioners

Questions Presented

This Court recently reaffirmed that "[l]aws burdening [political] speech are subject to strict scrutiny." *Citizens United v. FEC*, 130 S. Ct. 876, 882 (2010) ("*Citizens United*"). This case involves a state campaign finance scheme that subjects non-profit organizations to the onerous registration and disclosure burdens imposed on major-purpose political committees, merely for speaking on a pending ballot measure and without meeting this Court's threshold major-purpose test. Four important questions arising under the First Amendment are presented:

1. Whether the onerous burdens imposed on political committees advocating for or against *candidates* may be imposed on non-profit organizations speaking about *ballot measures*.
2. Whether the State may regulate as political committees only those organizations that meet the threshold "major purpose" test established by this Court in *Buckley* and whether the threshold level for such requirements must pass strict or merely exacting scrutiny.
3. Whether an organization may be subjected to political committee status based on the State's interpretation of donor intent.
4. Whether a $100 reporting threshold in the ballot measure context is so low that it does not constitutionally further the State's informational interest.

Parties to the Proceeding Below

The following were appellants below: National Organization for Marriage, Inc. ("NOM") and American Principles in Action, Inc. ("APIA").

The following were appellees below: Walter F. McKee, Andre G. Duchette, Michael P. Friedman, Francis C. Marsano, and Edward M. Youngblood, in their official capacities as members of the Commission on Governmental Ethics and Election Practices; Mark Lawrence, Stephanie Anderson, Norman Croteau, Evert Fowle, R. Christopher Almy, Geoffrey Rushlau, Michael E. Povish, and Neale T. Adams, in their official capacities as Maine district attorneys; and Janet T. Mills, in her official capacity as Maine Attorney General.

Corporate Disclosure

Neither NOM nor APIA have a parent corporation. Both are non-stock corporations so no publicly held company owns 10 percent or more of either corporation's stock.

Table of Contents

Questions Presented i

Parties to the Proceeding Below..... ii

Corporate Disclosure..... ii

Table of Authorities vi

Opinions Below 1

Jurisdiction..... 1

Constitutional and Statutory Provisions 1

Statement of the Case..... 3

Reasons to Grant the Petition 7

I. Whether Political Committee Burdens May Be Imposed in the Ballot Measure Context Is an Important Question to Be Settled by This Court. 7

A. The Decision Below Conflicts with This Court's Employment of Strict Scrutiny in Evaluating Political Committee Burdens. 8

B. The Decision Below Conflicts with Other Circuits. 11

C. Maine's BQC Definition Imposes Political Committee Burdens Absent a Justifiable Governmental Interest. 13

II. Review Is Warranted to Clarify the Thresholds for Organizations That May Be Subjected to Political Committee Burdens. 16

A. Political Committee Status May Not Be Imposed on Groups Lacking *Buckley*'s Major Purpose. 17

B. Maine's BQC Definition Is Unconstitutional Because It Imposes Onerous Political Committee Burdens On Groups Lacking *Buckley*'s Major Purpose.....20

III. Review Is Warranted to Clarify that Groups May Not Be Regulated as PACs Based on the State's Interpretation of Donor Intent.....22

A. The Decision Below Conflicts with Decisions of This Court.....23

B. The Decision Below Upholding Disclosure Requirements Based on Unspecified Donor Intent Conflicts with Other Circuits.....25

IV. Whether a State May Justify a $100 Reporting Threshold in the Ballot Measure Context Is an Important Question of Federal Law that This Court Should Resolve.....26

Conclusion 29

Table of Contents, Appendix

Opinion below, *National Organization for Marriage v. McKee*, 669 F.3d 34 (1st Cir. 2012) 1a

Amended Judgment of the District Court, filed Nov. 14, 2011..... 33a

Judgment of the District Court, filed Feb. 18, 2011 ..... 35a

Decision and Order of the District Court, filed Feb. 18, 2011 ..... 37a

Order Denying Rehearing and Rehearing En Banc, filed Feb. 22, 2012 ..... 70a

U.S. Const. amend. I 72a

U.S. Const. amend. XIV, § 1 ..... 72a

Me. Rev. Stat. 21-A, 1056-B 73a

Me. Rev. Stat. 21-A, 1059 ..... 76a

Me. Rev. Stat. 21-A, 1060 ..... 78a

Me. Rev. Stat. 21-A, 1061 ..... 81a

Me. Rev. Stat. 21-A, 1062-A 81a

Table of Authorities

Cases

Alaska Right to Life Comm. v. Miles,
441 F.3d 773 (9th Cir. 2006) 19

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503 (7th Cir. 1998) 19

Buckley v. American Constitutional Law Foundation.
525 U.S. 182 (1999) 10, 14, 15

Buckley v. Valeo,
424 U.S. 1 (1976) .....passim

California Pro-Life Council v. Getman,
328 F.3d 1088 (9th 2003)..... 12, 18

California Pro-Life Council v. Randolph,
507 F.3d 1172 (9th Cir. 2007) 12

Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,
556 F.3d 1021 (9th Cir. 2009) 27-28

Citizens Against Rent Control v. City of Berkeley,
454 U.S. 290 (1981) 14

Citizens United v. FEC,
130 S. Ct. 876, 882 (2010) .....passim

City of Chicago v. Morales, 527 U.S. 41 (1999)..... 25

Colorado Right to Life Comm. v. Coffman,
498 F.3d 1137 (10th Cir. 2007) 18-19

Doe v. Reed,
130 S. Ct. 2811 (2010) 10-11

FEC v. EMILY's List,
581 F.3d 1 (D.C. Cir. 2009)..... 19

FEC v. Florida for Kennedy Comm., 681 F.2d 1281
(11th Cir. 1982) 19

FEC v. GOPAC, Inc.,
917 F. Supp. 851 (D.D.C. 1996)..... 18

FEC v. Machinists Non-partisan Political League,
655 F.2d 380 (D.C. Cir. 1981)..... 19

FEC v. Massachusetts Citizens for Life,
479 U.S. 238 (1986) .....passim

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449 (2007) .....passim

*FEC v. Central Long
Island Tax Reform Immediately Comm.*,
616 F.2d 45 (2d Cir. 1980)..... 25

FEC v. Survivor Education Fund, Inc.,
65 F.3d 285 (2d Cir. 1995)..... 18, 25

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 25

Human Life of Washington v. Brumsicke,
624 F.3d 990 (9th Cir. 2010) 12-13, 17-18

Kolender v. Lawson, 461 U.S. 352 (1983)..... 25

McConnell v. FEC,
540 U.S. 93 (2003) 17

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 8, 14

Minnesota Citizens Concerned for Life v. Swanson,
640 F.3d 304 (8th Cir. 2010),
pet'n for reh'g en banc granted and opinion vacated (July 12, 2011) 13

N.M. Youth Organized v. Herrera,
611 F.3d 669 (10th Cir. 2010) 19

Nat'l Federation of Republican Assemblies v. United States,
218 F. Supp. 2d 1300 (S.D. Ala. 2002) 19

Nat'l Org. for Marriage v. McKee,
132 S. Ct. 1635 (2012). 6

Nat'l Org. for Marriage v. McKee,
649 F.3d 34 (1st Cir. 2011) 7, 19

Nat'l Org. for Marriage v. McKee,
669 F.3d 34 (1st Cir. 2012) ..... passim

Nat'l Org. for Marriage v. McKee,
723 F. Supp. 2d 245 (D. Me. 2010) 4, 6

Nat'l Org. for Marriage v. McKee, 765 F. Supp. 2d 38,
(D. Me. 2011) ..... passim

Nat'l Org. for Marriage v. McKee,
666 F. Supp. 2d 193 (D. Me. 2009) 5

Nat'l Org. for Marriage v. Secretary of State, Florida,
No. 11-14193 (11th Cir., May 17, 2012) 19

Nat'l Right to Work Legal Def. and Ed. Found. v. Herbert,
581 F. Supp. 2d 1132 (D. Utah 2008) 17, 19

New York Civil Liberties Union v. Acito,
459 F. Supp. 75 (S.D.N.Y. 1978) 17, 19

North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) 27

North Carolina Right to Life v. Leake, 525 F.3d 274 (2008) .....passim

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) 25

Randall v. Sorrell, 548 U.S. 230 (2006) 28

Richey v. Tyson, 120 F. Supp. 2d 1298 (S.D. Ala. 2000)..... 17, 19

Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010) .....passim

Thomas v. Collins, 323 U.S. 516 (1945) 24

Unity08 v. FEC, 596 F.3d 861 (D.C. Cir. 2010)..... 19

United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135 (2d Cir. 1972) 18

Volle v. Webster, 69 F. Supp. 2d 171 (D. Me. 1999)..... 17, 19, 21

Statutes and Constitutional Provisions

U.S. Const. Amend. I .....passim

U.S. Const. Amend. XIV 1

26 U.S.C. § 501(c)(4)..... 3

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
28 U.S.C. § 1343(a)..... 1
Me. Rev. Stat. tit. 21-A, § 1052(5)(A) 7
Me. Rev. Stat. tit. 21-A, § 1053..... 9
Me. Rev. Stat. tit. 21-A, § 1056-B.....passim
Me. Rev. Stat. tit. 21-A, § 1057..... 9
Me. Rev. Stat. tit. 21-A, § 1059..... 2, 9
Me. Rev. Stat. tit. 21-A, § 1060..... 2, 9
Me. Rev. Stat. tit. 21-A, § 1061..... 2, 9-10
Me. Rev. Stat. tit. 21-A, § 1062-A..... 2, 9

Other Authorities

APIA, "About APIA," http://www.americanprinciplesinaction.org/about-apia/..... 3

Carpenter, Dick M. II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, Vol. 13, pp. 567-83 (Spring 2009)..... 15

NOM, "About NOM," http://www.nationformarriage.org/site/c.omL2KeN0LzH/..... 3

Opinions Below

The district court's Order and Opinion (App. 37a) is at 765 F. Supp. 2d 38 (D. Me. 2011). The opinion below (App. 1a) is at 669 F.3d 34 (1st Cir. 2012). The order denying rehearing and rehearing en banc (App. 70a) is not reported.

Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. 1331 and 1343(a). The appellate court had jurisdiction pursuant to 28 U.S.C. 1291. The decision below and judgment were filed January 31, 2012. The motion for rehearing and rehearing en banc filed by the National Organization for Marriage ("NOM") and American Principles in Action ("APIA") was denied on February 22, 2012. Jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions

The First Amendment provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment provides, in relevant part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

> to any person within its jurisdiction the equal protection of the laws.

Me. Rev. Stat. tit. 21-A, § 1056-B ("1056-B") provides (in part)[1]:

> A person not defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of $5,000 for the purpose of initiating or influencing a campaign as defined by section 1052, subsection 1, shall file reports with the commission in accordance with this section. For the purposes of this section, "campaign" does not include activities to influence the nomination or election of a candidate. Within 7 days of receiving contributions or making expenditures that exceed $5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of initiating or influencing a campaign. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fundraisers and decision makers for the committee.

This case also involves Me. Rev. Stat. tit. 21-A, §§ 1059, (App. 76a), 1060 (App. 78a), 1061 (App. 81a), and 1062-A (App. 81a).

---

[1] Full text reproduced in the Appendix at 73a.

Statement of the Case

The definition of marriage is a controversial topic. And Petitioners NOM and APIA are outspoken players in that heated debate. But this case is not about marriage. Nor is this case controversial. This case is about First Amendment liberties put in jeopardy by overreaching State regulations, sometimes based on an *interpretation* of the conduct of third parties.

NOM is a nonprofit corporation organized pursuant to 26 U.S.C. § 501(c)(4). NOM was founded "to protect marriage and the faith communities that sustain it" across the United States. NOM, "About NOM."[2] In furtherance of its mission, "NOM serves as a national resource for marriage-related initiatives at the state and local level." *Id.* NOM's supporters look to it for general information on the importance of preserving marriage as well as specific information on threats to traditional marriage across the country. *Id.*

APIA is a nonprofit corporation organized pursuant to 26 U.S.C. § 501(c)(4). APIA is "dedicated to preserving and propagating the fundamental principles on which our country was founded." APIA, "About APIA."[3]

In 2009, Maine's Governor authorized legislation recognizing same-sex marriage in that state. Traditional marriage supporters initiated a campaign to bring the issue of whether Maine should recognize

---

[2] http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm.

[3] http://www.americanprinciplesinaction.org/about-apia/.

same-sex marriage to the people via a statewide referendum. *See Nat'l Org. for Marriage v. McKee*, 765 F. Supp. 2d 38, 42 (D. Me. 2011) (App. 37a). The ballot question was known as Question 1, or the "People's Veto," and was on the November 2009 ballot. (App. 37a, 44a).

In accordance with its mission, NOM informed its supporters through various emails of the importance of Question 1 in Maine. (App. 37a, 45a). None of the messages was solely about Question 1, however, but included information about marriage issues across the nation as NOM and its supporters have a national focus.[4] NOM also contributed to Stand for Marriage Maine PAC, a registered Maine ballot question committee ("BQC") and discussed these contributions in emails to its supporters.[5] (App. 37a, 45a). The district court noted that NOM does not solicit or accept earmarked or designated contributions. (App. 37a, 46a).

One of NOM's political opponents contacted the Maine Commission on Governmental Ethics and Election Practices ("State") by e-mail, calling for an investigation into NOM's activities in Maine. (App.

---

[4] An example of the language in one such email follows:

> Can you afford a gift of $35, $50 or $100 today to help stop same-sex marriage not just in Maine, but in New Hampshire, Iowa, and other states as well? Please use this hyperlink to make a **secure online donation today!**" Exhibit 5, Second Amended Verified Complaint, Doc. 114-2 at page 3.

(App. 23a).

[5] As a registered BQC, Stand for Marriage Maine PAC reported all of these contributions.

37a, 46a). He based this call on bald assertions that NOM's contributions to Stand for Marriage Maine PAC violated Maine's law. (App. 46a). The State authorized an investigation into whether NOM violated Maine law by not registering itself as a BQC under § 1056-B. (App. 73a). The investigation is ongoing. *Id*.

APIA wanted to engage in speech in Maine and prepared two television scripts relating to its position on Question 1. But the uncertainty as to when the BQC statute would be triggered chilled APIA's speech. (App. 47-48a).

Under § 1056-B, organizations that make expenditures or receive contributions "'for the purpose of initiating or influencing a [ballot-question] campaign'" must "register with the Commission as a BQC within seven days," appoint a treasurer and, among other requirements, begin filing reports disclosing their donors and expenditures. (App. 3-4a) (internal citations omitted).[6]

NOM and APIA filed this constitutional challenge to Maine's BQC provisions on October 21, 2009, along with a request for a temporary restraining order ("BQC Challenge"). The district court denied the temporary restraining order on October 28, 2009. *Nat'l Organization for Marriage v. McKee*, 666 F. Supp. 2d 193 (D. Me. 2009).

---

[6] The State does not limit how much money individuals and groups may contribute to support or oppose a ballot measure. And, so long as the contributions are made to a BQC, the contributor is not subject to any disclosure requirements. But, if those same individuals and groups receive "contributions" (as defined by the State, *infra*) over $5,000, even if no expenditures are made, the BQC statute is triggered.

On December 3, 2009, NOM amended the complaint to bring additional challenges relating to candidate activities ("Candidate Challenge"). Petitioners further amended the complaint on June 25, 2010, in light of this Court's decision in *Citizens United*.

Due to protracted discovery disputes, the district court separated the BQC Challenge from the Candidate Challenge. The district court ruled in favor of the State on the Candidate Challenge on August 19, 2010. *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 245 (D. Me. 2010). The First Circuit affirmed the district court on August 11, 2011. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) ("*NOM-I*"). NOM's petition for writ of certiorari was denied on February 27, 2012. *Nat'l Org. for Marriage v. McKee*, 132 S. Ct. 1635 (2012).

The district court ruled in favor of the State on the BQC Challenge at issue here on February 18, 2011. 765 F. Supp. 2d 38 (D. Me. 2011). (App. 37a). The First Circuit affirmed the decision on January 31, 2012. 669 F.3d 34 (1st Cir. 2012). (App. 1a). On February 22, 2012, NOM and APIA's petition for rehearing or rehearing en banc was denied. (App. 70a).

Reasons to Grant the Petition

I. Whether Political Committee Burdens May Be Imposed in the Ballot Measure Context Is an Important Question to Be Settled by This Court.

Although Maine defines political committee ("PAC")[7] and ballot question committee ("BQC")[8] separately, the organizational and conduct burdens imposed on each are strikingly similar.[9] Maine has created a statutory scheme where those organizations speaking, even incidentally, about ballot questions are subjected to nearly the same requirements as those organizations whose major purpose is to ex-

---

[7] Under Me. Rev. Stat. tit. 21-A, § 1052(5)(A), the term "political action committee" includes:

> 4) Any organization, including any corporation or association, that has as its major purpose initiating or influencing a campaign and that receives contributions or makes expenditures aggregating more than $1,500 in a calendar year for that purpose; and
>
> 5) Any organization that does not have as its major purpose influencing candidate elections but that receives contributions or makes expenditures aggregating more than $5,000 in a calendar year for the purpose of influencing the nomination or election of any candidate to political office.

[8] Me. Rev. Stat. tit. 21-A, § 1056-B, *supra*.

[9] In fact, the requirements are so similar that the BQC Challenge panel incorporated much of the Candidate Challenge panel's analysis into its opinion. *See* App. 1a, 3a ("Our decision in *NOM I* effectively disposes of most of appellants' challenges"). In so doing, the BQC panel did not properly consider the greatly-reduced interests of the State in the ballot-measure context.

pressly advocate for or against candidates. Yet, the State's interest in regulating ballot question speech is significantly narrower than its interests in regulating candidate speech. *See infra* at I(C).

This case thus presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Specifically, whether the State may impose burdensome political committee regulations on those who engage in ballot-measure speech.

A. The Decision Below Conflicts with This Court's Employment of Strict Scrutiny in Evaluating Political Committee Burdens.

In *Citizens United*, this Court held that laws imposing PAC-style requirements are subject to strict scrutiny. 130 S. Ct. at 898; *see also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986) ("*MCFL*") ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). "PACs are burdensome alternatives" to speaking oneself and are subject to "onerous restrictions." *Citizens United*, 130 S. Ct. at 897, 898. The requirements imposed on federal PACs and deemed burdensome by this Court include (1) registration requirements; (2) recordkeeping requirements; and (3) detailed, ongoing, contribution reporting requirements. *Id*. at 897.

Here, Maine requires BQCs to comply with nearly the same requirements as PACs,[10] including:

(1) Registering within seven days of meeting the $5,000 threshold, *id.* at 1056-B, § 1061, *compare with id.* at § 1053 (PAC registration required within seven days of meeting trigger amounts) (App. 73a);

(2) Maintaining detailed records of "all contributions . . . for the purpose of initiating or influencing a campaign and all expenditures made for those purposes" for four years.[11] *Id.* at § 1056-B(4), *compare with id.* § 1057 (PACs required to maintain same information for same period of time) (App. 75a);

(3) Ongoing reporting requirements. *Id.* at § 1056-B, § 1059;[12] *compare with id.* at § 1059, 1060 (PAC expenditure reporting requirements) (App. 76-80a); and

(4) Termination requirements. *Id.* at § 1056-B(1) (stating that a BQC "shall terminate its campaign finance reporting *in the same manner* provided in section 1061." *Id.* (emphasis added). Section 1061 is the termi-

---

[10] Failure to comply with these requirements could result in civil and criminal charges. *See* sections 1062(A)(1) and 1062(A)(8). (App. 81a, 85a).

[11] The district court found the four-year retention policy to be the "outer limit" of what is "permissible." (App. 55a).

[12] Because of the State's vague definition of "contribution," *supra*, BQCs are required to disclose donors who may not have contributed to support or oppose a ballot measure in Maine.

> nation requirement for PACs and absolves organizations of their reporting obligations so long as they "no longer accept any contributions or make any expenditures" and "dispose of any surplus prior to termination." *Id.* § 1061) (App. 81a).

Despite the onerous PAC-style requirements imposed by the BQC statute, the lower court determined that it should be evaluated as a disclosure provision subject only to lower, "exacting" scrutiny review. (App. 9a). Yet this Court recently reaffirmed that laws burdening speech are subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898.[13] The lower court minimized the impact of the imposition of PAC burdens by applying exacting scrutiny and, therefore, is in conflict with decisions of this Court.

---

[13] This Court did employ exacting scrutiny in evaluating Colorado's disclosure requirements for ballot initiative sponsors in *Buckley v. American Constitutional Law Foundation*. 525 U.S. 182, 202-203 (1999). But that law did not involve the imposition of onerous political committee burdens in the ballot measure context. Rather, Colorado required only "the names of initiative sponsors . . . and . . . the amounts they have spent gathering support for their initiatives" to be disclosed, and this Court found that to be related to a "substantial state interest." *Id*. *See also Doe v. Reed*, 130 S. Ct. 2811, 2817 (2010) (applying exacting scrutiny when evaluating disclosure requirements). Here, the State is imposing onerous PAC-style burdens on groups that are speaking about ballot measures. Because of the severity of these burdens on core political speech, strict scrutiny is appropriate.

B. The Decision Below Conflicts with Other Circuits.

The First Circuit's decision is also in conflict with the decisions of other circuit courts. Sup. Ct. R. 10(a). Specifically, the decision by the First Circuit below is in conflict with the Fourth Circuit on the level of scrutiny to be applied to laws that involve disclosure and severely burden speech. *North Carolina Right to Life v. Leake*, 525 F.3d 274, 286 (2008) ("*Leake*").

In *Leake*, the Fourth Circuit explained that "'the consequences' of being labeled a political committee are 'substantial.'" *Id*. at 286. The political committee burdens there, just like here, included, "costly and timely disclosure requirements that essentially allow a state to scrutinize in detail an organization's affairs," "detailed record[keeping] and report[ing of] all disbursements, and reporting requirements where the organization must provide "detailed information about donors." *Id*. (citations omitted).

Those same consequences are borne by BQCs in Maine. And, here, the challenged statute burdens speech so severely that NOM and APIA reasonably concluded that the risk that they may be subjected to the onerous reporting and disclosure requirements was too high, thereby preventing them from exercising their First Amendment rights at all.[14] *See*

[14] The Tenth Circuit recently used exacting scrutiny to evaluate a group of citizens' challenge to Colorado's disclosure requirements. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010). The court noted that "[t]o withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. at 1255 (*quoting Doe v. Reed*, 130 S. Ct. at 2818). Here, NOM and

MCFL, 479 U.S. at 255. ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [the challenged statute] as an infringement on First Amendment activities"). Yet the lower court determined that mere exacting scrutiny was sufficient.

The First Circuit thus joins the Ninth Circuit on the other side of the split. Although the Ninth Circuit, like this Court in *Citizens United*, 130 S. Ct. at 898 and the Fourth Circuit in *Leake*, 525 F.3d at 286, had previously applied strict scrutiny to laws that burden speech, *see California Pro-Life Council v. Getman*, 328 F.3d 1088, 1101, 1104 (9th 2003) (applying strict scrutiny to detailed reporting requirements because political speech was severely burdened); *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1187-89 (9th Cir. 2007) (applying strict scrutiny to a law imposing "political action committee-like requirements on a . . . multi-purpose organization"), that court recently took a change in course, applying lower "exacting" scrutiny in upholding disclosure requirements that burden but do not completely ban speech. *See Human Life of Washington v. Brumsicke*, 624 F.3d 990, 1010 (9th Cir. 2010) ("*HLW*"). The court found "room for debate on th[e] issue [of the appropriate level of scrutiny] given [the

---

APIA did not challenge the BQC disclosure requirements for any organization properly character as a political committee or BQC; they challenged, instead, the State's ability to classify them as a BQC and thereby impose onerous PAC-like registration and disclosure requirements. Nevertheless, even if this case were a challenge to disclosure requirements and subject to exacting scrutiny, the State's law would still be unconstitutional as the State's interest does not outweigh or justify the severe burden placed on NOM and APIA's speech.

Ninth Circuit's] wrestling with the standard of review appropriate in disclosure cases." *Id.* at 1003. Nevertheless, the court determined that, ostensibly pursuant to *Citizens United*, exacting scrutiny should be utilized when reviewing statutes that involve disclosure requirements. *Id.* at 1005.

Finally, the Eighth Circuit just recently vacated a panel decision applying the lower "exacting" scrutiny to a statute imposing PAC-like burdens, granting a petition for rehearing en banc that is currently pending. *Minnesota Citizens Concerned for Life v. Swanson*, 640 F.3d 304 (8th Cir. 2011), *pet'n for reh'g en banc granted and opinion vacated* (July 12, 2011).

The split between the Fourth and Ninth (and, now First) Circuits, coupled with the uncertainty in the Eighth, has resulted in confusion around the country. This case presents an opportunity for this Court to eliminate the confusion and clarify when laws burdening speech, which involve but are not solely pertaining to disclosure, are subject to strict scrutiny.

C. Maine's BQC Definition Imposes Political Committee Burdens Absent a Justifiable Governmental Interest.

Even under a lowered scrutiny, the State must still justify the imposition of political committee burdens.

Here, the State has but one cognizable interest in regulating ballot measure activity at all: the informational interest. As the Tenth Circuit explained, "[t]he legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to ballot-issue campaigns." *Sampson*, 625 F.3d

at 1255-1256. Limits on contributions to candidates are necessary "to avoid the risk or appearance of quid pro quo corruption," the court noted, whereas "[l]imits on contributions to ballot-issue committees, in contrast, are unconstitutional because of the absence of any risk of quid pro quo corruption." *Id.* (citing *Citizens United*, 130 S. Ct. at 901-02; *Buckley*, 424 U.S. at 45-48; *McIntyre*, 514 U.S. at 352 n.15; *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-300 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)). The court then addressed the governmental interests furthered by disclosure requirements (deterrence of violations of contribution limitations; avoidance of quid pro quo corruption; and informational), and acknowledged that only the last is applicable in the ballot-measure context. *Id.* at 1256.

Therefore, the *only* justification the State can offer for regulating speech related to ballot measures is informing the voters about who supports or opposes a given ballot measure. This Court has characterized the informational interest as "allow[ing] voters to place each *candidate* in the political spectrum" and determine "the interests to which a *candidate* is most likely to be responsive and thus facilitate predictions of future performance in office." *Buckley*, 424 U.S. at 67 (emphasis added). This Court's reference to candidates in its explanation of the informational interest illustrates how attenuated the interest is when one moves from the candidate elections to the ballot measure context.[15]

---

[15] *See also*, *Buckley v. American Constitutional Law Foundation*, 525 U.S. at 203; *Sampson*, 625 F.3d at 1259 ("Accordingly,

And even if this Court recognizes that the informational interest can be extended beyond candidates to ballot measures, the State's law must still be tailored to meet that interest. Here, it is difficult to understand how onerous registration, ongoing reporting requirements (even where no speech has taken place), lengthy recordkeeping requirements, and termination requirements further the State's informational interest. *See MCFL*, 479 U.S. at 262 ("The state interest in disclosure . . . can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee"). Instead of imposing burdensome PAC-style requirements, the State could further the informational interest by requiring event-driven, one-time reporting of independent expenditures. This Court has found such disclosure to be adequate and acceptable even in the candidate context. *Citizens United*, 130 S. Ct. at 914. Necessarily, then, the imposition of a broader requirement forcing disclosure of donors who had not contributed for the explicit purpose of financing efforts aimed at influencing a ballot measure election is not closely drawn (and certainly not narrowly tailored) to further whatever informational interests do exist.

This Court should grant this petition to address the issue of whether States may regulate organiza-

---

while assuming that there is a legitimate public interest in financial disclosure from campaign organizations, we also recognize that this interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight"); Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, The Independent Review, Vol. 13, pp. 567-83 (Spring 2009).

tions as political committees based on ballot-measure speech.

II. Review Is Warranted to Clarify the Thresholds for Organizations That May Be Subjected to Political Committee Burdens.

If States may impose PAC-like burdens on non-PAC organizations based on ballot measure (as opposed to candidate support) activities, this Court should clarify that, at a minimum, the threshold tests for determining political committee status in the candidate context (i.e. that the organization is either under the control of a candidate or has affecting the outcome of elections as its "major purpose," *infra*) should apply in the ballot measure context.[16]

The district court, affirmed by the First Circuit, determined that the State may impose PAC-like burdens on entities that do not meet *Buckley*'s major-purpose test. (App. 58-59a) (district court noting that "the Supreme Court has never suggested that the major purpose test applies everywhere—as, for example, in this case involving state regulation of ballot questions only"). (App. 9a) (The First Circuit rejecting the relevance of the *Buckley* "major purpose" test—as it was merely "an artifact of this Court's construction of a federal statute").

In so finding, the First Circuit is in conflict with both the decisions of other circuit courts and with precedent of this Court. This Court's guidance is

---

[16] If anything, the imposition of PAC-status based on ballot measure activity should require a *heightened* threshold due to the State's diminished interest. *Supra* I(C).

imperative to clarify when its major-purpose test applies and to resolve an ever-deepening circuit split.

A. Political Committee Status May Not Be Imposed on Groups Lacking *Buckley*'s Major Purpose.

This Court has required a baseline threshold of regulable activity that must be met prior to an organization being subjected to onerous political committee status and burdens. This test, articulated in *Buckley*, states that political committee status and burdens may be imposed on groups that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79.[17] *See also MCFL*, 479 U.S. at 252 n.6, 262 (plurality); *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).[18]

Courts have formulated two ways by which an organization's major purpose is determined. The first looks to the organization's documents, such as a mission statement or public statements. *See MCFL*, 479

---

[17] This Court also found that only express advocacy must be reported as the campaign laws should only cover "spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80.

[18] This Court has not addressed the major-purpose test in regards to ballot-measure speech. But other courts have applied it in the ballot-measure context. *See Volle v. Webster*, 69 F. Supp. 2d 171, 174-77 (D. Me. 1999); *Nat'l Right to Work Legal Def. and Ed. Found. v. Herbert*, 581 F. Supp. 2d 1132, 1151-54 (D. Utah 2008); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1310-12 (S.D. Ala. 2000); *New York Civil Liberties Union v. Acito*, 459 F. Supp. 75, 84-85, 89 (S.D.N.Y. 1978). *Cf. HLW*, 624 F.3d at 997-98, 1008-09, 1011-12 (applying "*a* major purpose" test instead of "the major purpose" test).

U.S. at 241-42, 253 n.6; *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996). The second looks to the organization's activities to discern whether it spends the majority of its resources on contributions to candidates and/or independent expenditures. *See Colorado Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1152 (10th Cir. 2007).

This threshold "major-purpose test" seeks to ensure that laws imposing the myriad political committee burdens do not chill core political speech. Such thresholds are essential as political committee burdens "may create a disincentive for [non-major-purpose] organizations to engage in political speech." *See MCFL*, 479 U.S. at 252-55 (plurality). "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 477 n.9 (2007) ("*WRTL*") (*citing MCFL*, 479 U.S. at 253-55).

Despite this Court's holdings on the matter, the circuits are split as to whether a major-purpose test even exists and, if so, whether it applies to *state* laws imposing political committee status. And the chasm between the circuits is expanding. On the side recognizing the existence of the threshold test are the Second, Fourth, Seventh, Ninth (prior to 2011), Tenth, Eleventh (prior to 2012), and D.C. Circuits.[19]

---

[19] *See FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972); *North Carolina Right to Life v. Leake*, 525 F. 3d 274, 287 (4th Cir. 2008); *California Pro-Life Council v. Getman*, 328 F.3d at 1101 n. 16 (disclosure and reporting requirements subject to strict scrutiny because not limited to major purpose organizations); *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677-78 (10th Cir. 2010) ("[I]f [plaintiffs]

On the other side are the First and, as of 2011 and 2012, respectively, the Ninth and Eleventh Circuits.[20] Absent this Court's guidance, the circuits courts will continue to fracture, further chilling core political speech because of the uncertainty.[21]

---

are to be deemed political committees it must be under 'the major purpose' test"); *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010); *FEC v. Machinists Non-partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981); *FEC v. EMILY's List*, 581 F.3d 1, 16 n. 15 (D.C. Cir. 2009); *cf. Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 n. 5 (7th Cir. 1998) (acknowledging plaintiff's challenge based on lack of a major-purpose test, but certifying the issue to the state supreme court).

[20] *See NOM-I*, 649 F.3d 34; *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 786-94 (9th Cir. 2006) (no test); *HLW*, 624 F.3d at 1011-12 (questioned whether test exists); *Nat'l Org. for Marriage v. Secretary of State, Florida*, No. 11-14193 (11th Cir., May 17, 2012) (affirming district court holding, *inter alia*, that major-purpose test did not apply).

[21] Several district courts have applied the major-purpose test as well. *See Herbert*, 581 F. Supp. 2d at 1154 ("'*Buckley* did indeed mean exactly what it said when it held that an entity must have the 'major purpose' of supporting or opposing [an election] to be designated a political committee'") (internal citations omitted); *Coffman*, 395 F. Supp. 2d at 1021 (State law assigning PAC status based on flat monetary trigger is not compatible with the major purpose test), *aff'd*, 498 F.3d 1137, 1155 (10th Cir. 2007); *Nat'l Federation of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1330 (S.D. Ala. 2002); *Richey*, 120 F. Supp. 2d at 1327 ("Because the plaintiff's major purpose was not to nominate or elect a candidate, the restrictions could not be justified on the alternate ground that the plaintiff was in fact a political committee."); *Volle*, 69 F. Supp. 2d at 174-77; *Acito*, 459 F. Supp. at 83-85 (explaining the history of, and applying, the major-purpose test).

B. Maine's BQC Definition Is Unconstitutional Because It Imposes Onerous Political Committee Burdens On Groups Lacking *Buckley*'s Major Purpose.

The First Circuit rejected the assertion by NOM and APIA that political committee status (and the onerous burdens that follow) may only be imposed on organizations that meet *Buckley*'s major-purpose test. (App. 9a). This deepens the circuit split on this issue and also presents an important question requiring this Court's guidance. *Supra* at II(A).

The State does not have a cognizable interest in imposing onerous political committee status and burdens in response to ballot measure activities. Even if it did, it certainly does not have an interest in imposing these burdens on groups that do not meet the major-purpose test. *See MCFL*, 479 U.S. at 266 (O'Connor, J., concurring) ("These additional requirements do not further the Government's informational interest in campaign disclosure . . . .").[22]

Nevertheless, States are regulating entities that did not have the major purpose of supporting or opposing ballot measures despite the fact that such regulation is not sufficiently tied to a legitimate State interest, merely on the ground that such efforts further transparency.

---

[22] "Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *MCFL*, 479 U.S. at 254-55 (footnote omitted).

The same transparency concerns were raised, and dispelled, in *MCFL*, with this Court rejecting the notion that onerous disclosure burdens (as opposed to much more limited, event-driven disclosures) were necessary for transparency:

> [T]he FEC maintains that the inapplicability of [the political committee burdens of registration, reporting, and recordkeeping] would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions. We see no such danger. Even if § 441b is inapplicable, an independent expenditure of as little as $ 250 by MCFL will trigger the [event-driven] disclosure provisions . . . . These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions.

MCFL, 479 U.S. at 262.

Moreover, *MCFL* analyzed the political committee organizational and reporting burdens under strict scrutiny. "While that is not an absolute restriction on speech, it is a substantial one." 479 U.S. at 252 (plurality) (requiring a "compelling state interest" and less restrictive means).[23]

This Court should grant this petition in order to provide guidance on the important question of the proper threshold tests for defining organizations as

---

[23] *See also*, *Volle*, 69 F. Supp. 2d at 174 ("general registration and disclosure requirements can now apply only to organizations that are under the control of a candidate or whose 'major purpose' is the nomination or election of a candidate").

political committees, especially based on ballot measure activity alone.

III. Review Is Warranted to Clarify that Groups May Not Be Regulated as PACs Based on the State's Interpretation of Donor Intent.

In addition to the questions of whether the State may regulate organizations as PACs based on ballot measure activities and whether the same (at the very least) threshold political committee status tests in the candidate context should apply in the ballot measure context, this case presents the important question of whether a State may classify a group as a PAC based on unspecified donor intent and perception.

As is stated above, Maine's BQC definition is triggered when a person "receives contributions or makes expenditures, other than by contribution to a political action committee . . . ." § 1056-B. "Contribution" is defined as:

> A. Funds that the contributor specified were given in connection with a campaign;
>
> B. Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating or influencing a campaign;
>
> C. Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating or influencing a campaign when viewed in the context of the con-

> tribution and the recipient's activities regarding a campaign; and
>
> D. Funds or transfers from the general treasury of an organization filing a ballot question report.

§ 1056-B(2)(A). Subsections B and C are problematic because they do not provide the *recipient* with certainty as to when the definition is triggered. Maine's contribution definition also encompasses donations other than those earmarked for passing or defeating ballot measures in Maine. Yet the lower court rejected NOM and APIA's challenge that the contribution definition is unconstitutionally vague and overbroad. (App. 26a, 31a).

A. The Decision Below Conflicts with Decisions of This Court.

The lower court's decision upholding Maine's vague and overbroad contribution definition is at odds with decisions of this Court. In *WRTL*, for example, this Court found that the states may not regulate speech based on the *intent* of the speaker but only based on an objective reading of the *substance* of the speech itself. 551 U.S. at 469. Here, the "contribution" definition impermissibly imposes regulations based not only on the intent of the speaker but the unspecified and indeterminate intent of the *donor* to the speaker. (App. 75a). In upholding this definition, the lower court employed the intent inquiry that was specifically rejected by this Court in *WRTL*. *Id*. at 467-68. The lower court thus upheld a vague law that requires organizations to discern what effect their solicitations have on their donors, an im-

possible task for national organizations such as NOM and APIA.

Moreover, both Subsections B and C use "for the purpose of initiating or influencing" language. But this Court has found the phrase, "for the purpose of . . . influencing," to be unconstitutionally vague. *Buckley*, 424 U.S. at 77.

This Court has explained that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Buckley,* 424 U.S. at 41, n.48 (internal citation omitted). Therefore, this Court limited "contributions" to include those "funds provided to a candidate or political party or campaign committee" or those "earmarked for political purposes." *Id*. at 24, n.24. The *Buckley* Court warned against the danger of speakers being "wholly at the mercy of the varied understanding of [their] hearers and consequently of whatever inference may be drawn as to [their] intent and meaning." 424 U.S. at 43 (*quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945)).[24]

Subsection C is extremely precarious in that it requires NOM and APIA to discern why their donors have given money or, worse, how state enforcement officials might interpret the intent of those donors. While the lower court admitted that this section is "clumsy," it found that NOM and APIA should be able to discern when the definition has been met

[24] And, just because the State ties this subsection to a specific solicitation sent by the speaker does not resolve this issue. *See Buckley*, 424 U.S. at 39-44, 74-76.

based on the "context" of their solicitations. (App. 64a). But these provisions of Maine law lack "the kind of notice that will enable ordinary people to understand what conduct" is regulated, thus "authoriz[ing] and even encourag[ing] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). This is the essence of an unconstitutionally vague statute.

B. The Decision Below Upholding Disclosure Requirements Based on Unspecified Donor Intent Conflicts with Other Circuits.

The First Circuit's decision upholding the contribution definition creates a split between the First Circuit on one side, and the Second[25] and Fourth[26] on the other.

---

[25] *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (discussing public issues "naturally and inexorably" influences elections) (citing *Buckley*, 424 U.S. at 42 n.50). The Second Circuit has also interpreted the phrase "earmarked for political purpose" in federal law to mean donations "that will be converted to expenditures subject to regulation under FECA." *FEC v. Survivor Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995). Applying that logic here, putting aside the other flaws with the challenged statute, no donations to NOM should have been able to trigger BQC status as NOM's activities in Maine (contributing to Stand for Marriage Maine) are not regulated as expenditures under Maine law.

[26] The lower court decision conflicts with the Fourth Circuit by using "factor-based standards to define the boundaries of regulable speech," a methodology expressly rejected by the Fourth Circuit. *Leake*, 525 F.3d at 283; *see also*, *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-13 (4th Cir. 1999).

Yet NOM and APIA's challenge to this unconstitutionally vague statutory definition, including their challenge to the State requiring consideration of the context of a contribution, was met by the lower court holding the section not vague because NOM and APIA should be able to determine "from the entire context of what they are doing that a particular contribution is designed to influence a particular ballot." (App. 64a).

This Court should grant this petition in order to clarify that the State may not burden speech with tests based not on speech itself but on donor's unspecified "intent."

IV. Whether a State May Justify a $100 Reporting Threshold in the Ballot Measure Context Is an Important Question of Federal Law that This Court Should Resolve.

Maine requires BQCs to keep and report "an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of $100 in any election" 21 Me. Rev. Stat. 1056-B(2).[27] As noted above, the State's only cognizable interest in regulating ballot measure activity is the informational interest. *Supra* at I(C).

The lower court addressed whether the $100 threshold was constitutional by inquiring into whether it is "wholly without rationality." (App. 11a). The lower court's use of this rational basis standard of review is at odds with this Court's use of

[27] Notably, exacting scrutiny applies to disclosure requirements, but such scrutiny is still a "strict test." *Buckley*, 474 U.S. at 66. *See also*, *Citizens United*, 130 S. Ct. at 914.

exacting scrutiny when evaluating disclosure requirements. *See Citizens United*, 130 S. Ct. at 914 (*quoting Buckley*, 424 U.S. at 64, 66).

The lower court's "wholly without rationality" review is also in conflict with the Fourth Circuit. *See North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008).[28]

Aside from the appropriate level of scrutiny, the lower court's decision on whether the $100 threshold is justifiable is in conflict with the Ninth Circuit and Tenth Circuits on the substance. In *Sampson*, for example, the Tenth Circuit recognized that "[t]he identities of those with strong financial ties to the candidate are important data in" evaluating the candidate's interests, an informational interest that does not apply in the ballot-measure context, where "[n]o human being is being evaluated." 625 F.3d at 1256; *see also Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) ("As a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.").

Specifically, the $100 threshold at issue here is so low that it ceases to satisfy the purpose of the disclosure in the first place. *See Canyon Ferry*, 556 F.3d at

---

[28] The First Circuit joins the Ninth Circuit in the application of a "wholly without rationality" standard of review. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033-34 (9th Cir. 2009). But *Canyon Ferry* reached a different result on the constitutionality of the threshold. *Id*. at 1034.

1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). As the Tenth Circuit recognized, "the justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initiative." *Sampson*, 625 F.3d at 1249.

Further, the lower court's upholding of the $100 threshold is at odds with this Court's precedent because it is not indexed for inflation. *See Randall v. Sorrell*, 548 U.S. 230, 261 (2006).

This Court's guidance is necessary to clarify the extent of the State's informational interest in the ballot measure context.

Conclusion

For the foregoing reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

John C. Eastman
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
jeastman@chapman.edu
(714) 628-2587

Kaylan L. Phillips
ActRight Legal Foundation
2029 K Street NW
Suite 300
Washington, DC 20006
(202) 683-9405

Counsel for Petitioners

May 22, 2012