No. _____

In The
Supreme Court of the United States

INDEPENDENCE INSTITUTE,

Petitioner,

v.

BERNIE BUESCHER, SECRETARY OF STATE,
STATE OF COLORADO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments forbid Colorado from imposing registration, administrative, and continuous reporting regulations on policy organizations that comment on state ballot measures but do not have the support or opposition of such measures as their central major purpose.

2. Whether Colorado's disclosure requirements for donors to ballot measure campaigns in which there is no chance of *quid pro quo* corruption violate the right to engage in anonymous speech and association.

PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

Petitioner is the Independence Institute, a Colorado non-profit corporation and plaintiff-appellant below. It has no parent corporation and no publicly held company owns stock in it.

Respondent is Bernie Buescher in his official capacity as Secretary of State, State of Colorado, defendant-appellee below.

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The decision of the Colorado Supreme Court denying certiorari was issued June 1, 2009, and is not reported in P.3d but is reprinted in the Appendix ("App.") at 96. The decision of the Colorado Court of Appeals was issued November 26, 2008, and appears at 209 P.3d 1130. App. 1. The Colorado District Court's order of May 3, 2007, granting Respondent's motion for summary judgment and denying Petitioner's motion for the same is reprinted at App. 33, but is not otherwise published. The Administrative Law Judge's decision finding that Petitioner is not an "issue committee" appears at App. 42 and is not otherwise published.

JURISDICTION

Petitioner seeks review of the judgment and opinion issued by the Colorado Court of Appeals on November 26, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) after the Supreme Court of Colorado denied Petitioner's request for review by that court on June 1, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no

law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Fourteenth Amendment states that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

The Colorado Constitution includes the following definition:

> "Issue committee" means any person, other than a natural person, or any group of two or more persons, including natural persons:
>
> (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or
>
> (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

COLO. CONST. art. XXVIII, § 2(10)(a); App. 105. Additional provisions of the Colorado Constitution regulate the contributions issue committees may accept and establish the reporting regulations to which they are subject. These provisions are reproduced in the Appendix. COLO. CONST. art. XXVIII; App. 99-126. Statutory provisions likewise impose contribution, expenditure and reporting conditions on issue committees. These provisions are reproduced in the Appendix. COLO. REV. STAT. §§ 1-45-108, 109, 111.5 (2008); App. 127-141. Finally, the Colorado Secretary of State has adopted regulations that affect the application of these constitutional and

statutory provisions. These provisions are reproduced in the Appendix. 8 COLO. CODE REGS. § 1505-6(1), (3)-(4) (2006); App. 142-162.

STATEMENT OF THE CASE

The State of Colorado extends its campaign finance regulations far beyond what this Court's precedents have allowed. This approach has resulted in inconsistent protections for free speech and association, varying from jurisdiction to jurisdiction. Under Colorado law, any group of persons "supporting or opposing" a ballot issue must comply with registration, administrative and reporting requirements regardless of whether the group's primary or central purpose is campaign activity. The law thus imposes significant burdens on groups that wish to speak out about ballot issues. The law also denies contributors the right to engage in anonymous speech and association once they have contributed as little as $20 to the organization. Petitioner, the Independence Institute, a state-based policy organization, became ensnared in the laws when it spoke out against two tax and finance referenda in 2005.

A. Factual Background

Petitioner Independence Institute (the "Institute") is a non-profit policy research organization located in Colorado. App. 164. It has served the same mission since its founding over two decades ago: "educate the

public about the benefits of the free market and the dangers of expansive government." App. 2. Its educational work includes commenting on proposed legislation, including initiatives. App. 167.

In the spring of 2005, the Colorado Legislature referred two taxing and financing issues – Referenda C and D – to the November ballot. App. 2. Both referenda affected, to varying degrees, Colorado's "Taxpayer Bill of Rights" (TABOR) and were designed to allow the state to keep and spend more money than it otherwise would have been able to under TABOR. App. 2. Believing the referenda would weaken TABOR, the Institute set out to educate the public about the State's budget shortfall, TABOR's benefits, and the referenda's impact on taxes and government spending. App. 168-169. The Institute published issue papers and op-eds about the referenda and collected information about the measures (both pro and con) and made it available on a website, www.taxincrease.org. App. 168-169. It also aired three radio advertisements concerning the measures. The advertisements did not urge a vote for or against the referenda, or for anyone to contact any elected officials, but instead urged listeners to go to the taxincrease.org website. App. 169.[1]

Campaigns for and against the referenda were intense. On August 4, 2005, Richard Evans, a

[1] The texts of the advertisements are reproduced at App. 53-57.

member of the campaign organization "Vote Yes on C and D," filed a complaint against the Institute with the Colorado Secretary of State. App. 3. The complaint alleged that the Institute was an "issue committee" within the meaning of the Colorado Constitution and Colorado's Fair Campaign Practices Act and therefore needed to comply with those laws and the regulations promulgated pursuant to them. App. 3.

Under Article XXVIII of the Colorado Constitution, an "issue committee" is a corporation or group comprised of two or more persons "(I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or[2] (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." COLO. CONST. art. XXVIII, § 2(10)(a); App. 105. The definition's use of the indefinite article "a" to modify "major purpose" means that organizations can have multiple major purposes, any one of which can trigger issue committee status. That is, the definition is not confined to organizations with a central organizing purpose of supporting or opposing ballot measures, but includes groups that occasionally engage in ballot measure advocacy. The law does not contain any guidance on how much

[2] Respondent has issued an administrative rule that interprets this provision in the conjunctive so that both sections (I) and (II) must be met before a group may be considered an "issue committee." *See* 8 COLO. CODE REGS. § 1505-6 (1.7(b)), reproduced at App. 144.

ballot measure advocacy might establish "a major purpose" and thereby trigger the law's registration and disclosure obligations.

The consequences of being designated an "issue committee" under Colorado law are substantial. Issue committees must register with the Secretary of State; set up a separate bank account for contributions related to ballot issues; track and report their contributions, including names and addresses of each person who has contributed $20 or more; track and report any expenditures made and any obligations entered into by the committee; and track and report the employer and occupation of anyone who contributes more than $100 to the committee. COLO. REV. STAT. § 1-45-108 & -109; App. 127-140. It must appoint a registered agent. COLO. REV. STAT. § 1-45-108(3)(b); App. 132. In its registration statement, the organization must also disclose the specific "purpose or nature of interest of the committee," and it may spend money only in connection with the ballot issues covered by that specific purpose, unless it amends its registration statement. COLO. REV. STAT. § 1-45-108(3); App. 132.[3]

[3] As of the date of this Petition, Colorado law requires an issue committee to register with the State prior to accepting or making any contributions, so an organization that could be classified as an issue committee must predict in advance whether its activities include "a major purpose" of supporting or opposing a ballot measure. COLO. REV. STAT. § 1-45-108(3); App. 132. However, as of September 1, 2009, issue committees must instead register within ten days of accepting or making

(Continued on following page)

The burden of complying with these rules made the matter very significant for the Institute, and it hired lawyers to defend against the complaint. App. 170. The complaint resulted in an administrative hearing because, under Colorado law, the mere accusation that an organization is an "issue committee" automatically subjects that organization to an administrative hearing. *See* COLO. CONST. art. XXVIII, § 9(2)(a); App. 121-122. After considering "the relative value assigned to the credible evidence," the Administrative Law Judge concluded that the Institute was not an issue committee because of its long existence and variety of activities. App. 72. This evidence showed that the Institute did not have "a major purpose" of opposing Referenda C and D and the ALJ therefore dismissed the complaint. App. 82. Each party bore its own costs and fees. App. 82.

B. Procedural Background

Before the Institute prevailed in the administrative hearings, it filed the present suit in Colorado state court against Respondent,[4] the state official charged with enforcing the issue committee provisions, challenging the constitutionality of Colorado's regulations. The Institute alleged, among other

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contributions or expenditures in excess of $200 to support or oppose any ballot measure. App. 182.

[4] Mr. Evans was originally a defendant to this suit, but was voluntarily dismissed.

things, that the definition of "issue committee" in the Colorado Constitution is vague and overbroad under the First and Fourteenth Amendments to the U.S. Constitution. App. 105-106. It also alleged that the disclosure requirements in COLO. REV. STAT. § 1-45-108 represented an unconstitutional infringement on the right to engage in anonymous speech and association. App. 127-134.[5]

The parties cross-moved for summary judgment. Before the motions were resolved, the Secretary issued "emergency" rules creating a new breed of regulated entity, "multi-purpose issue committees," addressing organizations whose activities placed them between an unregulated organization and a fully regulated "issue committee." 8 COLO. CODE REGS. § 1505-6(4.15) (2007); App. 157-158. The new rules modified, but did not remove, regulations on organizations whose sole major purpose was not the support or opposition of ballot measures. Under the Secretary's rules, "multi-purpose issue committees" must (i) report only those contributions made to support or oppose a ballot issue, (ii) segregate into separate accounts those contributions accepted to

[5] Prior to the resolution of the administrative hearing, Respondent moved to dismiss the Institute's claims on the basis of the doctrine of primary jurisdiction. App. 40. After the Administrative Law Judge dismissed the administrative complaint, the district court issued an order that denied the motion, but provided that "[the court's] determination in this action shall be limited to . . . facial challenges and shall not extend to any as-applied challenges." App. 40.

support or oppose a ballot issue, and (iii) for any general donations that are used for support of or opposition to a ballot issue, place them in a separate account and report them as contributions from the committee to itself. App. 157-158.

The district court denied the Institute's motion for summary judgment and granted Respondent's motion. App. 33-39. The Institute appealed and the Colorado Court of Appeals upheld the district court's conclusions on the substantive constitutional issues. App. 1-32. In particular, the court of appeals found that the use of the term "a major purpose" in the definition of "issue committee" did not render the provision unconstitutionally vague or overbroad. App. 12-20. In doing so, the court explicitly disagreed with the decision of the Fourth Circuit in *North Carolina Right to Life v. Leake,* 525 F.3d 274, 289 (4th Cir. 2008) ("*NCRTL*"). App. 13-20. In that case, the Fourth Circuit addressed a law that defined "political committee" using the term "a major purpose." The Fourth Circuit concluded that this phrase was impermissibly vague and overbroad. *NCRTL,* 525 F.3d at 289-90. The Colorado court instead adopted the reasoning in the dissenting opinion of Judge Michael in *NCRTL*. *See NCRTL,* 525 F.3d at 328-29 (Michael, J., dissenting); App. 15-17. In particular, the Colorado court concluded that the law was not vague because, in identifying "a major purpose" or "the major purpose" of an organization, the government would consider the same evidence in determining whether ballot measure advocacy

constitutes a considerable or principal portion of the organization's total activities. App. 17. The court noted that to determine whether an organization has "a major purpose" of engaging in ballot measure advocacy, the organization "could look to and compare" the purposes stated in its charter, articles of incorporation, and by-laws; the purposes of its activities and annual expenditures; and the scope of issues addressed in its print and electronic publications. App. 17. The court also concluded that the phrase "a major purpose" was not unconstitutionally overbroad because Respondent's "multi-purpose issue committee" rules, combined with the court's fact-specific inquiry of its vagueness analysis, "provide sufficient guidance as to when a multi-purpose group has 'a major purpose' of supporting or opposing a ballot measure." App. 19-20.

The Colorado court also rejected the Institute's anonymous speech claims. App. 23-28. The court concluded that the Institute had not presented any evidence that the compelled disclosure of its contributors would subject such contributors to threats, harassment, or reprisals from other government officials or private parties. App. 27.

The Institute sought review at the Colorado Supreme Court, which, in a divided order, declined to review the appellate court's decision. App. 96-97. Chief Justice Mullarkey and Justice Eid dissented and would have granted review on the questions of whether the definition of "issue committee" in Article XXVIII was vague or overbroad and whether the

disclosure requirements violated the right to engage in anonymous speech and association. App. 96-97.

REASONS FOR GRANTING THE WRIT

The decision of the Colorado Court of Appeals that the definition of "issue committee" in Article XXVIII of the Colorado Constitution was not vague or overbroad conflicts with this Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 79 (1976), which held that political committee regulation may only reach organizations whose central organizing purpose is "the nomination or election of a candidate." The decision below also conflicts with, among others, the decision of the United States Court of Appeals for the Fourth Circuit in *NCRTL*, which held that this Court meant what it said in *Buckley* when it concluded that political committee regulation may only extend to organizations "the major purpose" of which is campaign related. Certiorari is therefore appropriate under Supreme Court Rule 12(b) & (c).

This Court should also grant the Writ because the decision below concluded that Colorado's registration and disclosure laws, which apply to issue committee donors, do not violate the right to engage in anonymous speech and association, an important question of federal law that has not been, but should be, settled by this Court. Alternatively, the decision below conflicts with this Court's decision in *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995),

which recognized that anonymous speech and association are fundamental rights and, outside of the candidate context, any regulations affecting them must be narrowly tailored to promote a compelling government interest. Put another way, there is an inherent tension between this Court's decision in *McIntyre* and other cases protecting anonymous speech and dicta from other decisions from this Court discussing the informational value of such disclosure laws in the ballot measure context. This tension has led lower courts, including the court below, to grant such dicta primacy over the holdings of *McIntyre* and other cases. As on-line information regarding citizens' political contributions to controversial ballot measures increasingly enables harassment and retribution by ideological opponents, it is now time for this issue to be definitively settled by this Court and Certiorari is therefore appropriate on this issue under Supreme Court Rule 12(c).

I. REVIEW IS REQUIRED BECAUSE THE LOWER COURT DID NOT FOLLOW THIS COURT'S DECISION IN *BUCKLEY* REGARDING THE DEFINITION OF POLITICAL OR ISSUE COMMITTEE, CAUSING A SPLIT BETWEEN IT AND THE FOURTH CIRCUIT AND CREATING INCONSISTENT PROTECTIONS FOR FREE SPEECH ACROSS THE COUNTRY.

A. *BUCKLEY* ESTABLISHED A CLEAR STANDARD FOR WHEN AN ORGANIZATION MAY BE REGULATED AS A POLITICAL OR ISSUE COMMITTEE.

In *Buckley,* this Court considered the reporting requirements for "political committees" and others in Sections 434(a) and (e) of the Federal Election Campaign Act of 1971 (FECA). In so doing, this Court interpreted the term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. The Court adopted this interpretation from two lower court decisions construing the term "political committee" not to apply to organizations that do not campaign for candidates. *Id.* at 79 n.106 (citing *U.S. v. Nat'l Comm. for Impeachment,* 469 F.2d 1135, 1139-42 (2d Cir. 1972) and *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973) (three-judge panel), *vacated as moot, Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975)). In each of those cases, the lower courts

narrowly defined "political committee" to apply only to those groups "organized or at least authorized by a particular candidate and whose principal focus is a specific campaign" in order to comply with Congress's primary concern in passing the law and to avoid "serious constitutional issues" that could result in a "dampening effect on first amendment rights and the potential for arbitrary administrative action." *Nat'l Comm. for Impeachment,* 469 F.2d at 1140-42; *see also Jennings,* 366 F. Supp. at 1057 (concluding that the judges were "in full agreement" with the decision in *National Committee for Impeachment*). As the Second Circuit explained, this interpretation was necessary to ensure that "every position on any issue . . . and any comment upon it in, say, a newspaper editorial or an advertisement would [not] be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with." *Nat'l Comm. for Impeachment,* 469 F.2d at 1142.[6]

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[6] The Institute does not argue that the political speech of organizations having "the major purpose" of nominating or electing candidates can be regulated in all instances or that the burden of such regulation cannot be accounted for in considering the constitutionality of government restrictions on political or issue committees. Rather, the Institute's position is that the question of whether, or to what extent, an organization may be regulated as a political or issue committee should not even arise unless that organization has as its central purpose election-related activities. In other words, having "the major purpose" is a condition precedent for political or issue committee status in the first place and an organization that does not have as its

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This Court has continued to use the *Buckley-Jennings-National Committee for Impeachment* interpretation of "political committee." *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 262 (1986) ("*MCFL*") ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.");[7] *McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 170 n.64 (2003) (citing *Buckley*). Similarly, the Federal Election Commission has recognized that this Court adopted the major purpose test because the test allowed the Court to avoid issues of vagueness and overbreadth. *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (In *Buckley, "*the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose 'major purpose' is the nomination or election of a Federal candidate can be considered 'political committees' under the Act. The court deemed this necessary to avoid the

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central organizing principle campaign-related activities cannot be regulated as a political or issue committee at all.

[7] In *MCFL,* this Court noted that MCFL was not a "political committee" under *Buckley* because its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *MCFL,* 479 U.S. at 253 n.6. This Court also noted that, under the law at issue in that case, "all MCFL independent expenditure activity is . . . regulated as though the organization's major purpose is to further the election of candidates." *Id.* at 253.

regulation of activity 'encompassing both issue discussion and advocacy of a political result.'") (quoting *Buckley,* 424 U.S. at 79); *see also Shays v. Fed. Election Comm'n*, 511 F. Supp. 2d 19, 26 (D.D.C. 2007) (noting that, "In *Buckley*, the Court addressed constitutional concerns that the statutory definition of 'political committee' was overbroad and, to the extent it incorporated the definition of 'expenditure,' vague as well.").

B. *BUCKLEY'S* STANDARD IS THE LAW IN THE SECOND AND FOURTH CIRCUITS AND HAS BEEN APPLIED BY FEDERAL DISTRICT COURTS ACROSS THE COUNTRY.

It should come as no surprise then that when the Fourth Circuit addressed a state statute that diluted this requirement for political committees, the court struck it down as vague and overly broad. In *NCRTL*, the court examined a state statute that, like Colorado's Article XXVIII, extended "political committee" status to any two or more individuals who have "a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." *NCRTL,* 525 F.3d at 286. Like the Institute, the plaintiffs in *NCRTL* argued that the use of the definite article was crucial to the constitutionality of the statute and that extending political committee regulation to a group that had more than one major purpose of supporting or

opposing the nomination of a clearly defined candidate violated this Court's decision in *Buckley*. As the Second Circuit did in *National Committee for Impeachment*, the Fourth Circuit concluded that the term "political committee" must be defined in a narrow way if the government is to avoid vagueness and overbreadth problems.

The Fourth Circuit noted that:

> If organizations were regulable merely for having the support or opposition of a candidate as "*a* major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley's* "unambiguously campaign related" test, but it would also subject a large quantity of ordinary political speech to regulation.

Id. at 287-288 (emphasis in original). The court held that "we are convinced that the Court in *Buckley* did indeed mean exactly what it said when it held that an entity must have '*the* major purpose' of supporting or opposing a candidate to be designated a political committee." *Id.* at 288 (emphasis in original). The court then concluded that, unless *Buckley's* holding is strictly adhered to, it would be impossible for organizations to know when one of their purposes was sufficiently "major" to bring them within the reach of the statute and that such an amorphous law would leave such groups subject to partisan or

ideological abuse. *Id.* at 290.[8] This reasoning applies with even greater force to Colorado's law, because groups supporting or opposing ballot measure issues are, by definition, engaged in issue advocacy.

Other decisions have likewise held that only those groups with a central organizing purpose of campaigning can be required to become political committees. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, No. 08-1977, 2009 WL 2408735 at *6 (4th Cir. Aug. 5, 2009) ("The major purpose test is intended to exempt from regulation organizations that expend or contribute money for express advocacy but do not have as the major purpose of their existence the election or defeat of a particular candidate."); *Ctr. for Individual Freedom, Inc. v. Ireland,* 613 F. Supp. 2d 777, 795 (S.D.W.V. 2009) (applying *NCRTL* and holding that a statute that applied political committee status to organization "the purpose" of which was campaign-related meant the law was more narrow than the law at issue in *NCRTL*); *Broward Coalition of Condominiums, Homeowners Ass'ns & Cty. Orgs. Inc. v. Browning,* 2008 U.S. Dist. LEXIS 91591, at *41 (N.D. Fla. Oct. 29, 2008) (applying

[8] The exposure to such partisan or ideological abuse is compounded in Colorado because of the law's requirement that a complaint automatically result in an administrative hearing. *See* COLO. CONST. amend. XXVIII, § 9(2)(a); App. 121-122. Thus, the mere accusation that an organization is an "issue committee" subjects that organization to a burdensome administrative hearing, and depending on the result of that hearing, significant administrative, disclosure, and reporting requirements.

NCRTL and holding that "The Supreme Court has made absolutely clear that the burdensome structural and reporting requirements that apply to PACs may *only* be visited on groups 'the major purpose of which is the nomination or election of a candidate.'") (quoting *Buckley,* 424 U.S. at 79)); *Nat'l Right to Work Legal Defense & Educ. Found., Inc.,* 581 F. Supp. 2d 1132, 1153 (D. Utah 2008) (applying *NCRTL* and concluding that, "Utah does not even attempt to comply with *Buckley's* 'major purpose' requirement, and has pushed the reach of political committee regulation beyond constitutional limits.").

C. THE DECISION BELOW CONFLICTS WITH THE FOURTH CIRCUIT'S DECISION IN *NCRTL* AND ESTABLISHES AMBIGUOUS, OVERLY BROAD STANDARDS THAT CAN HAVE GRAVE CONSEQUENCES FOR FREE SPEECH ACROSS THE COUNTRY.

Nonetheless, despite this Court's and the lower federal courts' clear guidance that only organizations whose principal focus is unambiguously campaign focused may be constitutionally regulated as political committees, the State of Colorado extends its campaign finance regulations to organizations with only "a major purpose of supporting or opposing any ballot issue or ballot question." COLO. CONST. art. XXVIII, § 2(10)(a). The Colorado Court of Appeals found that this formulation was not vague or overbroad. App. 10-20. In so doing, the court adopted the dissenting view

of Judge Michael in *NCRTL*, who concluded that there was nothing in *Buckley* that said that the definite article was required. *NCRTL,* 525 F.3d at 309 (Michael, J., dissenting); App. 15.

The court did not, presumably because it could not, state what weight multi-purpose organizations such as the Institute (or its ideological or political opponents when they seek to have the Institute declared an "issue committee") are to give to each factor, nor did the court explain how to determine when an organization has too many factors weighing against it, or how long these factors must be in place, before an organization is transformed into an issue committee.[9] But the court of appeals' test, like Judge Michael's test in *NCRTL*, ignores the fact that speakers, such as the Institute, must be able to determine in advance not whether they, themselves,

[9] The court also concluded that the last-minute rules issued by Respondent limited the disclosure and termination requirements for "multi-purpose issue committees" and overcame any problems with overbreadth in the law. App. 19. However, these standards merely altered the consequences of regulation; they did not change the fact that the law expands far beyond the organizations this Court said could be regulated as political committees in *Buckley*. In other words, Respondent's regulations merely attempt to mitigate the severity of the constitutional violation; they do not cure it. Indeed, Respondent's last-minute regulations actually demonstrate how amorphous and prone to abuse the Colorado law's standards are. The fact that Respondent felt compelled to adopt regulations radically altering the extent and consequences of the law itself suggests that the law sets no concrete, easily comprehensible standards.

think they have a major purpose, but whether, as a matter of law, they do. The legal consequences of having "a major purpose" may be determined by the government or potential complainants regardless of what the Institute itself concludes about its activities. None of the court of appeals' test, Judge Michael's dissent, or the approach taken by the ALJ provide any objective or predictable means of deciding whether a group is an issue committee before an enforcement action may be brought against it. In other words, the question of whether one of a group's purposes is "major" is a matter of opinion, while the question of whether a group's primary organizing principle is campaigning is not.

Even with the clear impact on free speech and free association inherent in such an amorphous standard, the decision below is not the only case rejecting *NCRTL*. The Colorado court's approach is similar to the conclusion adopted by another federal district court. *See Human Life of Wash. v. Brumsickle*, 2009 U.S. Dist. LEXIS 4289 (W.D. Wash. Jan. 8, 2009) (adopting Judge Michael's dissent in *NCRTL* and concluding that any vagueness problems can be addressed because "parties can request prior interpretations from" the regulatory agency). That case is currently on appeal before the Ninth Circuit.

The decision below thus conflicts with the narrowing interpretation adopted by this Court and employed by the Fourth Circuit. Unless this split is resolved, the residents of some states, like Colorado and Washington, will be subject to vague, overbroad

regulations on their ideological and issue-oriented activities in a way that residents of other states, such as North Carolina and Florida, are not. But the First Amendment mandates that the entire country be able to engage in free speech and free association without having to guess as to when one of their "major purposes" pushes them too far towards regulation. This Court's review is therefore necessary to (i) reaffirm that only organizations that have election-related activities as their central organizing purpose are subject to regulation as political or issue committees, and (ii) to provide clear standards to protect free speech and association for issue-oriented organizations across the entire nation.

II. REVIEW IS NECESSARY TO RESOLVE WHETHER THE GOVERNMENT MAY REQUIRE DISCLOSURE OF CONTRIBUTORS TO BALLOT MEASURE CAMPAIGNS THAT HAVE NO POSSIBILITY OF *QUID PRO QUO* CORRUPTION.

A. THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW REGARDING THE APPLICATION OF DISCLOSURE RULES IN THE BALLOT MEASURE CONTEXT.

This case implicates two disparate themes in this Court's free speech jurisprudence.

First, in *McIntyre v. Ohio Elections Commission,* this Court struck down a law that required the

disclosure of one's identity on written election communications. 514 U.S. 334, 357 (1995). This Court held that individuals have a right to anonymous speech and that a law requiring them to disclose their views on controversial issues violated that right. *Id.* "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id*. at 342. This Court also emphasized the importance of anonymity in protecting the rights to speech and association. "Anonymity is a shield from the tyranny of the majority" that "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92 (1982); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Britt v. Superior Court of San Diego,* 574 P.2d 766, 771 (Cal. 1978) (noting that "numerous cases establish that compelled disclosure of an individual's private associational affiliations and activities . . . poses one of the most serious threats to the free exercise of this constitutionally endowed right.").

Second, this Court has nonetheless upheld various mandatory disclosure requirements for contributions in political candidate elections. *See, e.g., McConnell*, 540 U.S. at 196-99; *Buckley*, 424 U.S. at 68 (assuming that "disclosure requirements certainly

in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption Congress found to exist"). This Court has not, however, specifically addressed whether the mandatory disclosure of political contributions in the ballot measure context is constitutionally permissible. This Court has suggested in dicta, though, that disclosure in such circumstances may be valuable "so that the people will be able to evaluate the arguments to which they are being subjected." *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 792 n.32 (1978); *accord Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999); *Citizens Against Rent Control v. City of Berkley*, 454 U.S. 290, 299-300 (1991). This was despite this Court's recognition that ballot measure elections do not present the same opportunity for *quid pro quo* corruption present in candidate elections and that the government has less interest in regulating speech in such circumstances. *See, e.g., Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.").

The court below found the dicta from *Bellotti*, *American Constitutional Law Foundation,* and *Citizens Against Rent Control*, to be more persuasive than the reasoning of *McIntyre*. App. 26-27.[10] The Colorado

[10] The court was also persuaded by the Ninth Circuit's decision in *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1101 (9th Cir. 2003), which held that express ballot

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court held that, because the Institute had not demonstrated that compelled disclosure of its contributors would subject them to threats, harassment or reprisals from government officials or private parties, the Colorado statute was constitutional. App. 27. The court never examined whether the government had met its burden of demonstrating either a compelling government interest in disclosure or whether the Colorado statute was narrowly tailored to achieve that interest. *See Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) ("[T]he *Government* must prove that applying [the law] furthers a compelling governmental interest and is narrowly tailored to achieve that interest.") (emphasis in original).

The inherent tension between this Court's decision in *McIntyre*, on one hand, and the holdings of *McConnell* and *Buckley* and the dicta discussed above, on the other, has led courts, such as the court below, to give primacy to disclosure over the fundamental right to engage in anonymous speech and association in the ballot measure context. The

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measure advocacy may be regulated, provided that the state has a compelling interest and that the regulations are narrowly tailored to advance the relevant interest. App. 27. The Ninth Circuit, after remanding *Getman*, ultimately concluded that disclosure of contributions to organizations promoting ballot measures was supported by a compelling government interest and that California's regulations were narrowly tailored to achieve that interest. *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178-87 (9th Cir. 2007).

Institute believes that this tension fundamentally undermines the rights recognized in *McIntyre* and this Court should resolve this disparity by recognizing, as it has in the past, that ballot measure elections do not present the same concerns about *quid pro quo* corruption that candidate elections do and that the government's interest in disclosure recognized in *Buckley* applies only to candidate elections. *See Brown*, 459 U.S. at 92 (stating that the Court in *Buckley* found three interests sufficient to justify mandatory disclosure: "enhancement of voters' knowledge about a candidate's possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations.")[11]

B. THE CONSTITUTIONALITY OF LAWS MANDATING DISCLOSURE IN THE BALLOT MEASURE CONTEXT IS A RECURRING ISSUE OF SIGNIFICANT IMPORTANCE ACROSS THE COUNTRY.

Two recent trends have highlighted the importance of this Court's resolving the tension in its precedents in favor of affirming the fundamental First Amendment right to anonymous speech and association in the ballot measure context. First,

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[11] This Court recently affirmed that preventing corruption or the appearance of corruption is the only legitimate and compelling government interest thus far identified for restricting campaign finances. *Davis v. Fed. Election Comm'n*, __ U.S. ___, 128 S. Ct. 2759, 2773 (2008).

technological developments have lowered the cost of identifying one's political opponents and publicizing their identities. Second, ballot measures often involve the most controversial issues of the day, including same-sex marriage, government assistance for undocumented immigrants, assisted suicide, and embryonic stem cell research. In combination, these two trends have produced conscious efforts to chill speech.

Advocates have begun using the disclosure information posted on government websites to launch campaigns of harassment and retribution against contributors to the opposing side in controversial ballot campaigns. *See Protect Marriage Washington v. Reed*, No. 09-5456BHS (W.D. Wash. July 29, 2009) (granting temporary restraining order against disclosure of individuals' identities who oppose gay marriage); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199-1205 (E.D. Cal. 2009) (documenting the retaliation faced by supporters of California's recent Proposition 8, including death threats, harassing emails and phone calls, broken windows, and economic retaliation); John R. Lott, Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, WALL ST. J., Dec. 26, 2008; Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, ROCKY MOUNTAIN NEWS, Nov. 30, 2008 (business picketed and boycotted based on CEO's personal donation); Associated Press, *John Kerry Grills Belgium Ambassador Nominee Over Swift Boat Donation*, Feb. 28, 2007 ("A Senate hearing that began with glowing tributes to a St.

Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.").

The potential for such harassment increases in the ballot measure context because, unlike a contribution to a candidate, a contribution to a ballot measure committee directly discloses the contributors' views on what may be an extremely contentious issue, raising the chances that ideological opponents will use that information to select specific targets for harassment. *See Brown*, 459 U.S. at 96 n.14 ("The preservation of unorthodox political affiliations in public records substantially increases the potential for harassment above and beyond the risk that an individual faces simply as a result of having worked for an unpopular party at one time."). This trend certainly suggests that this Court's conclusion in *Buckley* that disclosure imposes a minimal infringement on the right of association simply does not apply in the ballot measure context, especially in light of recent technological changes.

The easy accessibility of information about one's political leanings, address, employer, and occupation, and the increasing abuse of that information, makes review by this Court all the more pressing. The lower courts have been applying contradictory standards and generally failing to give the right to engage in anonymous speech and association its proper respect. At the very least this Court should grant the petition here, vacate the decision of the Colorado Court of Appeals, and remand this case to the trial court with

instructions to consider whether Respondent can demonstrate a compelling government interest in the disclosure of contributors to ballot measure campaigns and whether, or to what extent, Colorado's law is narrowly tailored. *See Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (striking down the application of Montana's disclosure laws for "incidental committees" in the ballot measure context where organization's election-related activities were *de minimis*).

CONCLUSION

For the reasons stated, Petitioner Independence Institute respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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