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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA QuotingFOR JOBS AND FAIR COMPETITION, et al., **Plaintiffs,** **vs.** **DONNA NORRIS, et al.,** **Defendants.**	**Case: 09CV0897-BEN-JMA** **The Honorable Roger T. Benitez** **Plaintiffs' Response to Intervenor State of California's Memorandum of Points and Authorities in Support of Motion for Summary Judgment** Date: August 8, 2011 Time: 10:30 a.m. Courtroom: 3 **ORAL ARGUMENT REQUESTED**

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Introduction[1]

Intervenor State of California (the "State") contends that "the local initiative process in California is wide-open, easy-to-use, and robust."[2] (State MSJ at 1.) Unfortunately, this says little about the constitutionality of the laws that govern the initiative process. The question is not whether the system works despite its constitutional deficiencies, for the First Amendment contains no qualifiers: "Congress shall make *no* law . . . abridging the freedom of speech." U.S. Const. amend. I (emphasis added). Rather, the question is whether the laws governing the initiative process infringe the Constitutional rights of the people. As explained below, they do, and thus cannot stand.

As explained in *Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment* ("MSJ"), California Elections Code (the "Code") Sections 342, 9202, 9205, and 9207 as incorporated into the City of Chula Vista Charter (the "Charter") Section 903 are unconstitutional both facially and as applied to the Plaintiffs.[3] As enforced by the City's officers, these provisions require that proponents of ballot initiatives be natural persons, thereby banning both incorporated and unincorporated associations from offering their own initiative petitions (the "Natural Person Requirement"). They also require that proponents of initiative petitions publically reveal their names at the point of contact with the voters (the "Reveal Yourself Requirement"). The State of California, which intervened in this action, has failed to carry its burden of proving that

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[1] This memorandum responds to *Intervenor State of California's Memorandum of Points and Authorities in Support of Motion for Summary Judgment* ("State MSJ"). The facts upon which Plaintiffs rely are set forth in full in *Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment* (Dkt. 54-2) ("Facts").

[2] The fact that Californians are more likely to use the initiative process than the residents of any other state, (State MSJ at 1), is of no consequence. The Ninth Circuit has rejected the notion that "popularity" and "custom" can save an otherwise unconstitutional law. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003) ("We recognize that Washington voters are long accustomed to a blanket primary and acknowledge that this form of primary has gained a certain popularity among many of the voters. Nonetheless, these reasons cannot withstand the constitutional challenge presented here.").

[3] In this memorandum, "Plaintiffs" refers collectively to plaintiffs Chula Vista Citizens for Jobs and Fair Competition ("Chula Vista Citizens"), Lori Kneebone, Larry Breitfelder, and Associated Builders and Contractors of San Diego, Inc. ("ABC").

these requirements, which ban and burden the speech of the Plaintiffs and all other similarly situated, pass constitutional scrutiny. (*See* State MSJ). Consequently, this Court should deny the State's motion and grant Plaintiffs' motion.

Argument

I. The Requirement that Proponents Must Be Natural Persons Is Unconstitutional.

As explained in Plaintiffs' MSJ, the Natural Person Requirement is unconstitutional for five reasons. (1) It bans political speech. (MSJ at 2-3.) (2) It bans unincorporated and incorporated associational speech on the basis of the identity of the speakers in violation of *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). (*Id*. at 3-4.) (3) It requires unincorporated and incorporated associations that want to engage in political speech to do so by proxy, which the First Amendment will not tolerate. (*Id*. at 4.) (4) It creates an unconstitutional condition. (*Id*. at 4-6.) And (5), it fails strict scrutiny. (*Id*. at 6-7.) The State's arguments in favor of the Natural Person Requirement fail to rebut (and in some cases affirm) the bases upon which this Court should find the Natural Person Requirement unconstitutional.

A. The State Impermissibly Prohibits Associational Speakers From Speaking Solely Because They Are Non-Natural Persons.

The circulation of an initiative petition is "core political speech." *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). The State does not suggest otherwise. And, the State concedes that Chula Vista Citizens and ABC ("Association Plaintiffs") have First Amendment rights, most notably the right to free speech. (State MSJ at 15.) *See also Citizens*, 130 S.Ct. at 899. Yet, puzzlingly, the State contends that the Natural Person Requirement "put[s] no limit on the associational plaintiffs' speech." (State MSJ at 15.) The State is wrong. Not only does the Natural Person Requirement *limit* political speech by reducing the number of speakers allowed to speak, it completely *bans* entity political speech, including that of the Associational Plaintiffs.

The State argues the Natural Person Requirement "does not prohibit the [A]ssociational [P]laintiffs (or anyone else) from acting as a proponent of [an initiative]," because Chula Vista Citizens and ABC are free to be an "advocate" for any initiative, and are therefore a "proponent" in

the dictionary sense of the word. (State MSJ at 15.) As the State surely knows, Code Section 342 provides for a "legal" definition of an initiative "proponent." The Associational Plaintiffs have brought this law suit to exercise their constitutional right to speak as the "legal" proponent of their own initiatives, not merely to "argue in support" of another's initiative. So, while the State may argue otherwise, the fact remains that *no* association of citizens is allowed to speak by offering a ballot initiative to the voters. The Natural Person Requirement is thus a ban on the speech of incorporated and unincorporated associations.[4] The First Amendment will not tolerate such bans. *Citizens*, 130 S. Ct. at 911. (*See also* MSJ 2-3.)

However, the State reasons that it may permissibly ban the speech of unincorporated and incorporated associations because "the California Constitution defines the initiative power as the power of *electors*." (State MSJ 13) (emphasis added).[5] In other words, the State concedes it bans the Associational Plaintiffs from speaking solely because they are not electors, i.e. natural persons. This is impermissible under the First Amendment. The political speech of incorporated and unincorporated associations cannot "be treated differently under the First Amendment simply

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[4] The Natural Person Requirement is an outright ban on political speech notwithstanding the fact that an associations' members may speak for it. (*See* MSJ at 2-3.) Speech-by-proxy is not a constitutionally permissible alternative, because it does not allow associations *themselves* to speak. *Citizens*, 130 S. Ct. 897 (holding that speech-by-proxy, PAC alternative was still a ban on corporate speech, since the corporation itself was not allowed to speak.) Nor is it permissible to force the Associational Plaintiffs to choose between their constitutional rights to free speech and freedom of association. (MSJ at 4-6.) Yet, the Natural Person Requirement forces this unconstitutional choice. (*Id*.)

[5] The State explains that the initiative and referendum power was adopted near the turn of the 19th century in response to governmental corruption at the hands of "moneyed special interest groups," namely, the Southern Pacific Railroad, who "controlled local public officials and state legislators." (State MSJ at 14.) Essentially, California's turn-of-the-century government was corrupted by corporate *money*. The initiative power was granted as a means to "propose and to enact laws which the legislature may have refused or neglected to enact." (*Id*.) Thus, while the constitutional amendment that established the power of initiative may have used the term "electors," the State has shown that it did so simply in contrast to *government officials*. The initiative power was designed to allow someone other than the *legislators* to enact legislation. Chula Vista Citizens, as an unincorporated association of California citizens, is precisely someone other than the legislature. They wish to propose initiatives as an association on matters that are of importance to them and the voters of the City, which the City's officials have refused or neglected to address.

because such associations are not 'natural persons.'" *Citizens United*, 130 S. Ct. at 900. Instead, there is a "First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity." *Id*. at 902. The Natural Person Requirement stands in direct defiance of this Constitutional principle and cannot stand.

The "purpose and effect" of speech bans like the Natural Person Requirement "is to prevent corporations . . . from presenting both facts and opinions to the public." *Id*. at 907. So, not only is "[a]n outright ban on political speech . . . not a permissible remedy," *id*., but the State's attempts to silence corporate voices directly obstructs the purpose of the initiative power. As the State explains, the initiative was designed to provide a means "to propose and to enact laws which the legislature may have refused or neglected to enact." (State MSJ at 14.) Corporations are uniquely equipped to do just that: "Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and *elected officials*." *Citizens United*, 130 S. Ct. at 912 (emphasis added). Government may not "distinguish[] among different speakers, allowing speech by some but not by others, *id*. at 898, or "dictat[e] the . . . speakers who may address a public issue," *id*. at 902. "When the Government . . . command[s] where a person may get his or her information or what distrusted source he or she may not hear it uses censorship to control thought." *Id*. at 908. This is unlawful. *Id*.

As much as the State's argument can be read as an endorsement of a general government policy to forbid incorporated and unincorporated associations from proposing ballot initiatives, California case law demonstrates otherwise, providing numerous examples of corporations and associations being considered a proponent of a ballot initiative. *See, e.g.*, *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013, 1019 (1992) ("The proponent and circulator of the initiative, and petitioner here, is a nonprofit corporation known as Riverside Citizens for Responsible Behavior[.]"). *See also Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal.App.4th 141, 144 (1993); *U.S. v. City of Oakland and Nuclear Free Oakland, Inc.*, 958 F.2d 300, 301 (1992); *Coalition for Fair Rent v. Abdelnour*, 107 Cal.App.3d 97, 101 (1980); *Alliance for a Better Downtown Millbrae v. Wade*, 108 Cal.App.4th 123, 127 (2003). But even if this were not the

case, the Natural Person Requirement is still unconstitutional because "the Government cannot restrict political speech based on the speaker's corporate identity." *Citizens United*, 130 S. Ct. at 902.

The First Amendment protects speech regardless of the speaker. *Id*. at 899. Yet, the State bans associations of citizens from speaking solely because they are non-natural persons. The Natural Person Requirement is therefore unconstitutional under the First and Fourteenth Amendments.

B. The Natural Person Requirement Fails Strict Scrutiny Because The State Has No Compelling Interest To Justify It.

The Natural Person Requirement completely bans the political speech of unincorporated and incorporated associations. "Laws that burden political speech are subject to strict scrutiny." *Citizens United*, 130 S. Ct. at 898. Under strict scrutiny review, the burden is on the State to prove the Natural Person Requirement "furthers a compelling interest and is narrowly tailored to achieve that interest." *Fed. Elections Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) ("*WRTL-II*"). The State has proven no compelling interest in the Natural Person Requirement. Indeed, it has none. The law is therefore unconstitutional.

The State does not directly assert any specific interest it contends justifies the Natural Person Requirement's ban on political speech. However, the State essentially reasons that the power to propose initiative petitions must be limited to natural persons because the initiative power was established as a reaction to the corruption of certain state legislators at the hands of now-defunct railroad corporation over 100 years ago.[6] (State MSJ at 13, 13 n.9.) The State has not met its burden of proving a compelling interest in its law.

Citizens United held that the *only* interest that can justify limits on political speech is the

[6] The State's argument implies that an initiative proposed by a corporation somehow has the power to corrupt government officials. (State MSJ at 13-14.) Aside from there being no risk of corruption in ballot measure initiatives, *Citizens United* made clear that there is nothing inherently dangerous or corrupting about the corporate form. *Citizens United*, 130 S. Ct. at 904-908. *See also* James Bopp, Jr., and Joseph E. La Rue, *The Game Changer: Citizen United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 First Amend. L. Rev. 251, 325 (Winter 2011) (explaining that a major principle of the *Citizens United* decision was that the corporate form is neither dangerous or corrupting). Thus, speech that is inherently non-corrupting when undertaken by a natural person (an initiative petition), cannot become corrupting when the speaker has simply assumed the corporate form.

interest in preventing quid-pro-quo corruption. *Citizens*, 130 S. Ct. at 901, 909. *See also id.* at 903-913 (rejecting all other purported 'interests'). However, the risk of quid-pro-quo corruption is "not present" in popular votes on public issues, such as initiatives. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203 (1999) ("*ACLF*"). Therefore, the City has no constitutionally cognizable interest in limiting associational ballot measure speech.

The State also attempts to justify its ban on speech by pointing to other electoral rights enjoyed only by natural persons, such as voting, running for public office, and signing an initiative petition. (State MSJ at 15.) Plaintiffs do not here challenge these laws. And, the State may very well have a compelling and constitutionally cognizable interesting in prohibiting all non-natural persons from exercising these other activities protected by the First Amendment. However, only the Natural Person Requirement is under scrutiny in this matter and to pass the strict scrutiny test the State must prove a compelling interest in *this* law. As explained above, the State does not have one. The Natural Person Requirement therefore fails strict scrutiny and is unconstitutional.

C. The Natural Person Requirement Results In A Less Informed Electorate.

In addition to being an impermissible ban on political speech, the Natural Person Requirement stifles the State's purported interest in "providing information to the electorate." (State MSJ at 12.) In its arguments in support of the Reveal Yourself Requirement, discussed *infra*, the State asserts that the decision as to who will be an initiative's proponent is an "important one" because, in the State's view, "[a] voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption." (State MSJ at 8) (quoting *Brown v. Superior Court*, 5 Cal.3d 509, 522 (1971).) Yet, by requiring that all initiative proponents be natural persons, the State prevents voters from knowledge that may further this goal. As was the case with Chula Vista Citizens and ABC, the true advocate and financial sponsor of an initiative is often an incorporated or unincorporated association. (Facts ¶¶ 2, 36.) But, the Natural Person Requirement does not permit these true advocates to serve as proponents. Consequently, they are not required to reveal their identity at *any* stage of the initiative process. Code § 9202 (requiring the initial Notice of Intention filed with the Clerk to bear the name of the proponent). The identity that must appear

on all petitions is that of a private citizen, who will almost always be unknown to the vast majority of voters. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348-49 (1995) (stating that the identity of a unknown, private citizen does not help a reader evaluate a document's message). The Natural Person Requirement thus makes citizens considering whether they should sign initiative petitions less informed than they otherwise could be, because it allows the true financial backers of initiatives to remain in the shadows. But as the *Buckley* Court recognized, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices . . . is essential . . . ." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Thus, apart from being an unconstitutional ban on political speech, the Natural Person Requirement results in a less informed electorate by hiding the identity of an initiative petition's true advocate.

The Natural Person Requirement is an impermissible ban on speech. (MSJ at 2-3.) It also discriminates on the basis of the speakers' identity. (*Id*. at 3-4.) It forces incorporated and unincorporated associations to speak by proxy. (*Id*. at 4.) It creates an unconstitutional condition. (*Id*. at 4-6.) And it fails strict scrutiny because the is no compelling interest in banning associations of citizens from offering initiative petitions. (*Id*. at 6-7.) For each of these reasons, the Natural Person Requirement is unconstitutional under the First and Fourteenth Amendments.

II. The Requirement That Proponents Disclose Their Identity On the Circulated Version Of the Initiative Petition Is Unconstitutional.

California law forces all initiative petition proponents to reveal their identities on each page of their petition at the point of contact with the voters**.** *See* Code § 9207. This requirement is unconstitutional for two reasons. It prohibits, without constitutional justification, anonymous petition-circulation speech as the petition circulates among the voters. (MSJ at 8-20.) And it is an impermissible, content-based proscription of political speech. (*Id*. at 20-21.) The State has failed to provide a compelling justification for this requirement, as is required to survive constitutional scrutiny. Consequently, the Reveal Yourself Requirement is unconstitutional.

A. The Reveal Yourself Requirement Imposes Severe, Not "Minimal," Burdens on First Amendment Rights.

The State concedes that the Reveal Yourself Requirement produces a burden on First

Amendment rights, but contends that burden is "minimal." (State MSJ at 8.) The State also contends that this requirement "place[s] no burden on any particular individual" because "no one is forced to be a proponent" and "there will almost certainly be others." (*Id.* at 8.) However, "[o]ur form of government is built on the premise that *every* citizen shall have the right to engage in political expression and association." *NAACP v. Button*, 371 U.S. 415, 431 (1963) (emphasis added). So, "[i]f any individual is uncomfortable playing [the] role [of a proponent]," (State MSJ at 8), because the State has compelled the public disclosure of his identity, that individual's "right to engage in political expression and association" has been severely burdened.

The Reveal Yourself Requirement burdens speech, because it denies proponents of initiative petitions the right to anonymity at the point of contact with voters, which the First Amendment guarantees. (MSJ 8-10.) It also chills speech, because some would-be proponents will not offer initiative proposals if they must identify themselves at the point of contact with voters. (Facts ¶ 64.) And, forcing proponents to self-identify at the point of contact with voters increases the risk that an initiative will fail because voters will judge it unfairly based on the identity of its proponents.[7] (Facts ¶ 73.) These are not "minimal" burdens as the State suggests. Rather, they are severe, because they decrease participation in the initiative process, resulting in less speech on public issues, which "occupies the highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983). "[S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed." *Meyer*, 486 U.S. at 423.

The State attempts to down play the First Amendment burden by stating that "[n]o one has ever suggested that an initiative proposal has failed for want of a proponent." (State MSJ at 8.) However, "the costs of non-participation do not manifest themselves; disclosure leads citizens to decide not to do something. Thus the effects of disclosure often will not leave data behind to be measured and analyzed." John Samples, Cato Unbound, *The Costs of Mandating Disclosure*,

[7] Plaintiffs do not ask for the law to guarantee their success in placing their initiative on the City's ballot. Rather, they ask that the law not interfere with their choice as to how to most effectively communicate their message, which the First Amendment guarantees them. *See Meyer*, 486 U.S. at 242. ("The First Amendment protects [Plaintiffs'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

http://www.cato-unbound.org/2010/11/10/john-samples/the-costs-of-mandating-disclosure/ (last visited July 25, 2011); *See also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 10-238, 2011 WL 2518813, *15 (U.S. June 27, 2011) (explaining that "it is never easy to prove [that someone chose not to speak]") (quotation and citation omitted). But in this case we do know that the Reveal Yourself Requirement has chilled speech. Larry Breitfelder will never again offer an initiative petition if this requirement is still enforced. (Facts ¶ 64.) Plaintiffs' decision to "bear the burden[s]" imposed by the Reveal Yourself Requirement in order to get their Initiative on the ballot "does not make the law any less burdensome." *Arizona Free Enterprise*, 2011 WL 2518813 at *15. As shown below, the Reveal Yourself Requirement both burdens and chills petition circulation speech. Because it cannot satisfy constitutional scrutiny, this Court should declare it unconstitutional.

B. Plaintiffs' Have A First Amendment Right To Circulate Initiative Petitions Anonymously At The Point Of Contact With Voters.

No recent decision has abrogated the right of proponents to engage in anonymous petition circulation at the point of contact with voters. (MSJ 9-10.) The State's reliance on *Doe v. Reed*, 130 S. Ct. 2811 (2010), is misplaced. *Doe* did not consider anonymous petition circulation. Rather, *Doe* considered whether public disclosure of those who *signed* initiative petitions was constitutionally permissible. *Id*. at 2815-16. Despite the burdens of compelled disclosure, the *Doe* Court upheld the public disclosure of petitions signers because it allowed the public to verify that enough registered voters signed the petition to qualify it for the ballot. *Id*. at 2821. But that interest does not support the identification of proponents at the point of contact with voters because the "[d]isclosure of a circulator's name and address will not establish whether signatures on a petition he submits are forged." *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000) ("*WIN*"). Because *Doe* relied on an inapplicable interest to uphold disclosure of identities not at issue here, it is not authority to uphold the Reveal Yourself Requirement.

Nor may the State rely on *Citizens United v. FEC*. *Citizens United* upheld on-ad disclosure for expenditures in *candidate* elections. 130 S. Ct. at 913-14. But the interests supporting disclosure in candidate elections do not apply to ballot measure speech. (*See* MSJ at 9); *infra* at17-20. *See also Bellotti*, 435 U.S. at 790 (government interest in deterring corruption is not present in ballot measure

context); *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) ("[T]he justifications for requiring disclosures in a candidate election may not apply, or may not apply with as much force, to a ballot initiative."). And, *Citizens United* said nothing about forced identification of speakers advocating ballot measures.

Petition circulation is "core political speech" for which the First Amendment's protection is "at its zenith." *ACLF*, 525 U.S. at 186-87 (quoting *Meyer*, 486 U.S. at 422, 425). And, the Supreme Court and the Ninth Circuit have recognized that the First Amendment's protection for petition circulation includes protection for *anonymous* circulation. *ACLF*, 525 U.S. at 197-200; *WIN*, 213 F.3d at 1132 (same). (*See also* MSJ at 8-10.) Undergirding this protection for anonymous petition circulation speech is the Supreme Court's determination that the First Amendment protects anonymous political speech to voters about ballot measures. *McIntyre* 514 U.S. at 342. The Ninth Circuit has explicitly extended *McIntyre*'s reasoning to protect the anonymous speech of *associations* in the ballot-measure context. *See ACLU v. Heller*, 379 F.3d 979 (9th Cir. 2004).

While *Citizens United* and *Doe v. Reed* have upheld disclosure in other contexts, those decisions have not altered the rule of *McIntyre* and *Heller* that anonymous ballot-measure speech is protected by the First Amendment. Nor have they changed the rule of *ACLF* and *WIN* that those who circulate petitions may do so anonymously at the point of contact with voters.

C. The Reveal Yourself Requirement Burdens and Chills Speech By Impermissibly Banning Anonymous Petition Circulation At The Point of Contact With Voters.

The issue before this Court is the same as the issue in *ACLF* and *WIN*—whether government may ban anonymous petition circulation at the point of contact with voters. Those decisions recognize that bans on anonymous petition-circulation burden and chill speech. *ACLF*, 525 U.S. at 198-200; *WIN*, 213 F.3d at 1138. (*See also* MSJ at 10-12.) Initiative petitions tend to be controversial. At the very least, they advocate for a change in the status quo. Some people, like plaintiff Larry Breitfelder, are unwilling to circulate petitions when they must reveal their identities at the point of contact with voters. (Facts ¶ 64); *ACLF*, 525 U.S. at 198-99. Forcing proponents to do so "discourages participation in the petition circulation process." *ACLF*, 525 U.S. at 200. This

"significantly inhibit[s] communication with voters about proposed political change," *id*. at 192, and reduces the pool of those willing to circulate petitions, *id*. at 198, thereby chilling speech, *id*. The Ninth Circuit has recognized that bans on anonymous petition-circulation are "broad intrusion[s], discouraging truthful, accurate speech by those unwilling to disclose their identities and applying regardless of the character or strength of an individual's interest in anonymity." *WIN*, 213 F.3d at 1138. This "chills speech by inclining individuals toward silence." *Id*.

Both *ACLF* and *WIN* relied heavily on *McIntyre*, which identified "two distinct reasons why forbidding anonymous political speech is a serious, direct intrusion on First Amendment values." *Heller*, 378 F.3d at 989. First, "[t]he decision to engage in anonymous speech 'may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.'" *Id*. (quoting *McIntyre*, 514 U.S. at 341-42). Plaintiffs wish to speak anonymously at the point of contact with voters for nearly all of these reasons. (Facts ¶ 62 (stating that Mr. Breitfelder believes that during his campaign for Chula Vista City Council he was subjected to reprisals as a result of being publicly identified as a proponent of the Initiative at the point of contact with voters); *id*. ¶ 60 (stating that Mr. Breitfelder felt it was an invasion of his privacy to reveal himself at the point of contact with the voter because he was not the financial sponsor of Plaintiffs' initiative); *id*. ¶ 65 (stating that Ms. Kneebone feared harassment from union-members after revealing her name on the petition that was circulated among the voters).) Forcing proponents to identify themselves at the point of contact with the voters, when they prefer not to, is therefore a burden on speech.

The State focuses solely on the Reveal Yourself Requirement's impact on privacy, (State MSJ at 8-10), and ignores the second reason given by *McIntyre* for why bans on anonymous speech intrude on First Amendment rights: "Anonymity may allow speakers to communicate their message when preconceived prejudices concerning the message-bearer, if identified, would alter the reader's receptiveness to the substance of the message." *Heller*, 378 F.3d at 990. *See also McIntyre*, 514 U.S. at 342. Such concerns are especially relevant with regard to circulation of initiative petitions. The success of Plaintiffs' initiatives, like all initiatives in the City, hinges on their ability to secure the

nearly 14,000 signatures necessary to qualify a measure for the ballot. Thus, anonymous petition circulation is especially important to Plaintiffs, and all proponents, because "they want to make sure that it is their *ideas*, rather than their *identity*, that is evaluated by the voters when they are asked to consider their initiative petitions." (Facts ¶ 73.) But, the Reveal Yourself Requirement does not permit initiatives to be judged on their message alone. By banning anonymity at the point of contact with voters the City "interferes with [the voters'] evaluation by requiring potentially extraneous information at the very time the [voter] encounters the substance of the message." *Id*. at 994. This hinders proponents' ability to garner the required signatures because voters may "prejudge [their] message simply because they do not like its proponent," *McIntyre*, 514 U.S. at 342, thereby "limiting their ability to make the matter the focus of [city-wide] discussion." *Meyer*, 486 U.S. at 423.

Plaintiffs' concerns are not merely conjectural. Mr. Brietfelder has staked out well-known political positions in the City of Chula Vista. (Facts ¶ 61.) He believes he is well-known as "anti-union." (*Id*.) This creates a real risk that the presence of his name on initiative petitions he circulates will "alter the reader's receptiveness to the substance of the message," *Heller*, 378 F.3d at 990, hindering his ability to acquire signatures. He does not want his identity to cloud the eyes of voters as they consider initiative petitions he presents, nor refuse to sign his petition simply because he is the proponent. (*Id*. ¶ 73.) However, the Reveal Yourself Requirement does not allow Mr. Breitfelder to communicate his message in the way he prefers. Rather, it dictates what he must say by requiring his name appear on the petition. Nor does Mr. Breitfelder want to be subjected to reprisals as a result of publicly identifying at the point of contact with voters. Mr. Breitfelder believed this happened during his campaign for City Council as a result of being identified as a proponent of the Fair and Open Competition in Contracting Initiative when it was circulated. (*Id*. ¶ 62.) Forcing proponents to identify themselves at the point of contact with the voters, when they prefer not to, is therefore a burden on speech.

Forcing proponents to identify themselves at the point of contact with the voter burdens speech for another reason. Like the Plaintiffs, most proponents must hire professional circulators in order to secure the massive number of signatures necessary to qualify an initiative for the ballot. (Facts ¶ 39-40, 43, 67-68.) Circulators sometimes "misbehave[]," (*id*. ¶ 63), or make

"misrepresentations" when they ask voters to sign petitions, (Johnson Declaration, Ex. 7 42:25.) Proponents cannot control what these circulators say and do. Yet, the presence of a proponent's name and signature on each initiative petition makes it appear as though the proponents endorse the words and actions of the circulator. This burdens speech because it discourages participation in the initiative-petition process.

The State points to several instances where Mr. Breitfelder was a public advocate for Proposition G. (State MSJ at 10.) However, in the examples provided by the State, Mr. Breitfelder was not required to adopt the speech of an unknown circulator. The speech was his own. The same is true with regard to the disclosures proponents must make to the City Clerk, Code § 9202, and in a newspaper of general circulation, Code § 9025, prior to circulating a petition. These disclosure are made in "controlled situations," that allow a proponent to control the message he endorses. (Ex. 7 48:7.) The same is not true when the petition is circulated among the voters because the proponent cannot control what the circulators say and do. This causes Mr. Breitfelder concern: "If [a circulator] did innocently or not do something that could be interpreted as misrepresentation and my name was there, I would—I would feel ashamed by that." (Facts ¶ 63.)

Mr. Breitfelder will never again be an initiative proponent if he must reveal his identity at the point of contact with the voters. (*Id.* ¶ 64.) And, although she is unsure if she will offer initiatives in the future, Ms. Kneebone wishes her name had not been revealed at the point of contact with the voters. (*Id.* ¶ 65.) Just as in *ACLF* and *WIN*, the Reveal Yourself Requirement both burdens and chills petition-circulation speech and so must be subjected to constitutional scrutiny.

D. The Reveal Yourself Requirement Fails Scrutiny And So Is Unconstitutional.

1. The Reveal Yourself Requirement Is Subject To, And Fails, Strict Scrutiny.

a. The Reveal Yourself Requirement Is Subject To Strict Scrutiny Because It Imposes Severe Burdens On Political Speech.

The level of constitutional scrutiny is not determined by merely labeling the Reveal Yourself Requirement as a "disclosure law" as the State suggests. (State MSJ at 11) *See also Button*, 371 U.S. at 429 ("[A] State cannot foreclose the exercise of constitutional rights by mere labels."). Rather, it is the severity of the burden on political speech that dictates the level of scrutiny.

The Supreme Court's *ACLF* decision perfectly demonstrates this principle. One regulation at issue in *ACLF* was a requirement that initiative sponsors file detailed monthly reports, which compelled the *disclosure* of each paid circulators' name and address and the total amount paid to each circulator. *ACLF*, 525 U.S. at 201. The Court found this disclosure requirement analogous to the required reporting of campaign-related payments in *Buckley v. Valeo*. *Id*. at 201-02. Because this type of disclosure does not severely burden speech, the Court applied "exacting scrutiny." *Id*. *See also Citizens*, 130 S. Ct. at 914 (finding that the disclosure of those persons funding electioneering communications "do[es] not prevent anyone from speaking" and applying exacting scrutiny). Like the disclosures in *ACLF* and *Citizens United*, the disclosure of those who signed referendum petition in *Doe* "[did] not prevent anyone from speaking" and this regulation was therefore subject to "exacting scrutiny." *Id*. In fact, it is *ACLF*'s application of "exacting scrutiny" to the less onerous monthly reporting requirement to which the *Doe v. Reed* Court cites for its assertion that disclosure requirements are subject to "exacting scrutiny." *Doe*, 131 S. Ct. at 2818.

Also at issue in *ACLF* was a requirement that forced petition circulators to reveal their identity at the point of contact with voters, i.e. *disclose* their names. *ACLF*, 525 U.S. at 197. The Supreme Court determined that this requirement actually prevented speech because it made potential circulators unwilling to circulate petitions. *Id*. at 197-98.[8] The Court noted that the "now-settled approach" is that "state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest," i.e. they must survive strict scrutiny. *Id*. at 192 n. 12 (internal citation and quotation omitted). Because this requirement imposed severe burdens by preventing speech, it was subject to strict scrutiny, which it failed.[9] *Id*.

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[8] In *McIntyre v. Ohio Elections Commission*, the Supreme Court determined that a ban on anonymous speech to voters about ballot measures is a "regulation of pure speech." 514 U.S. at 345. In *ACLF*, the Supreme Court found that forcing circulators to identify themselves at the point of contact with voters is even "more severe than was the restraint in *McIntyre*." *ACLF*, 525 U.S. at 199.

[9] The Tenth Circuit, whose decision was affirmed in *ACLF*, has explicitly reaffirmed the levels of scrutiny applied to the various regulations at issue in *ACLF*. The Tenth Circuit applied "exacting scrutiny" to the requirement that initiative proponents file reports revealing each circulator's name and address. *Campbell v. Buckley*, 203 F.3d 738, 744-45 (10th Cir. 2000). But, the Tenth Circuit "applied strict scrutiny to [the requirement that circulators identify themselves as they

The Ninth Circuit's decision in *ACLU v. Heller* further demonstrates that the severity of the burden on speech dictates the level of scrutiny even where the law requires disclosure. The law at issue in *Heller* required financial sponsors to "*disclose* their identities on any election-related publication." *Heller*, 379 F.3d at 989 (emphasis added). The Ninth Circuit found such on-publication disclosure to be a "serious, content-based, direct proscription of political speech," *id*. at 993, that was "considerably more intrusive" than disclosing one's identity at a later time, *id*. at 992, as was required in *Citizens United* and *Doe*. Due to the severity of these burdens, the court applied strict scrutiny, and struck the law. *Id*. at 1002.

In contrast, the ballot measure law challenged in *Prete v. Bradbury* is an example of a "lesser burden." It did not dictate speech nor force one to give up anonymity, but rather banned per-signature payments for petition circulators. *Id*. at 951. The plaintiffs argued the law would reduce the pool of available circulators, but they were unable to identify a single petition circulator who would not work because of the ban on per-signature payments. *Id*. at 964. The plaintiffs thus failed to establish that their speech was severely burdened. *Id*. They had only established a "lesser burden" on the initiative process itself, so the regulation was subject to exacting scrutiny. *Id*.

Similarly, in *Doe v. Reed*, the Supreme Court determined that disclosing the names of petition-signers imposed only "modest burdens." *Id*. at 2821. Exacting scrutiny was therefore appropriate in that case. *See Arizona Free Enterprise*, 2011 WL 2518813 at *9. ("Laws that burden political speech are subject to strict scrutiny," but "we have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny.").

The Reveal Yourself Requirement, like those restrictions in *ACLF* and *Heller*, imposes severe burdens on petition-circulation speech, which is "core political speech." *Pest Committee v. Miller*, 626 F.3d 1097, 1106 (9th Cir. 2010) (quoting *Meyer*, 486 U.S. at 421). It forces proponents to surrender their right to anonymously circulate an initiative petition. *WIN*, 213 F.3d at 1132; *ACLF* 525 U.S. at 197-200 (same). It forces proponents to speak and dictates what they must say by

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circulate petitions]," finding it "imposed a 'severe' burden on First and Fourteenth Amendment rights." *Id*. at 744.

requiring proponents to identify themselves on their initiative petitions as they are circulated. *See Heller*, 379 F.3d at 987 (on-publication disclosure is a content-based restriction on speech). It also hinders proponents' ability to gather the required amount of signatures because voters may "prejudge [their] message simply because they do not like its proponent," *McIntyre*, 514 U.S. at 342, thereby "limiting their ability to make the matter the focus of [city-wide] discussion." *Meyer*, 486 U.S. at 423. And, in requiring proponents' signatures on the petition it may make it appear to the voters that the proponents endorse the words and actions of the petition circulators.

Most importantly, the Reveal Yourself Requirement actually chills speech by "discourag[ing] participation in the circulation process." *ACLF*, 525 U.S. at 200. Larry Breitfelder will never again offer an initiative petition so long as the Reveal Yourself Requirement is enforced, and Lori Kneebone is uncertain whether she will be willing to do so. (Facts ¶¶ 64, 66.) Regulations such as this, that "reduce the quantum of speech" or "the available pool of circulators or other supporters of a[n] . . . initiative" require this Court to apply strict scrutiny. *Pest Committee*, 626 F.3d at 1106. *See also Prete*, 438 F.3d at 961 (explaining that ballot measure laws imposing severe burdens on speech are subject to *strict* scrutiny, while those imposing lesser burdens are subject to exacting scrutiny.)

b. The Reveal Yourself Requirement Is Subject To Strict Scrutiny Because It Is A Content-based Regulation Of Political Speech.

The Reveal Yourself Requirement is subject to strict scrutiny because it is also a content-based regulation of political speech. (MSJ at 20-21.) In the ballot measure context, "[t]he identity of the speaker is no different from other components of the document's content that the author is free to include or exclude." *McIntyre*, 514 U.S. at 348. A prohibition on anonymous ballot measure speech is thus "a direct regulation of the content of speech," *id*. at 345, because it forces speakers to conform their message to the government's desired content. *See also Heller*, 378 F.3d at 987 (ruling that bans on anonymity in the ballot measure context "affect the content of the communication itself" and force the speaker to conform to the government's "prescribed criteria"); *Prete*, 438 F.3d at 968 n.24 (laws regulating what can or cannot be said in the ballot measure context are content-based restrictions).

The Reveal Yourself Requirement dictates the content of proponents' speech and so is a

content-based regulation subject to strict scrutiny, *Heller*, 378 F.3d at 987; *Prete*, 438 F.3d at 968 n.24, which it fails. *See supra* Parts 17-20. It is therefore unconstitutional.

2. Neither Of The State's Purported Interests Is Compelling.

The State contends the Reveal Yourself Requirement is supported by two interests: (1) providing information to the electorate; and (2) preserving the integrity of the electoral process. Neither interest is compelling and thus cannot support a ban on anonymous petition circulation at the point of contact with the voter under strict scrutiny review.

The State's first purported interest – providing information to the electorate – is not compelling in the ballot measure context. (State MSJ at 12.) The legitimate reasons for requiring disclosure in candidate elections do not apply in the ballot measure context. (MSJ at 15.) *Buckley v. Valeo* explained, information regarding the sources of contributions and expenditures in candidate campaigns "allows voters to place each candidate in the political spectrum" and will "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance." 424 U.S. at 67 (emphasis added). This interest cannot support disclosure of the identity of proponents of ballot measures. Unlike elected candidates, adopted ballot measures cannot "be responsive" to anyone. In the ballot-measure context, "[n]o human being is being evaluated," but rather "when a ballot issue is before the voter, the choice is whether to approve or disapprove of discrete governmental action." *Sampson* , 625 F.3d 1247, 1257. To "judge the precise effect of a measure," (State MSJ at 12), a voter need only look to the text of the measure itself and the "true and impartial" title and summary of its purpose and effect that the City Attorney must prepare and include on the petition. Code §§ 9203, 9207. The Reveal Yourself Requirement cannot be supported by an interest in providing information to the electorate because voters do not need to know the identity of proponents to predict "the future performance" of ballot measures. Because compelled identification of proponents at the point of contact with voters cannot further *Buckley*'s informational interest, that interest is insufficient to support the Reveal Yourself Requirement.

But even if such an interest was valid, any informational interest in ballot measure disclosure is limited to financial sponsors. "[T]he information to be disclosed is the identity of persons financially supporting or opposing a candidate or ballot proposition." *Canyon Ferry Road Baptist*

Church v. Unsworth, 556 F.3d 1021, 1032 (9th Cir. 2009). Neither plaintiff-proponent made any financial contribution to their initiative, (Facts ¶¶ 36, 54), thus disclosing their identity cannot support the Reveal Yourself Requirement.

The State's second interest – preserving the integrity of the electoral process – is also insufficient to support the Reveal Yourself Requirement. (State MSJ at 12.) In *Doe v. Reed*, the Supreme Court found that disclosure of voters signing ballot measure petitions would preserve the integrity of the electoral process by allowing the public to verify the signatures on a petition, thereby "ensuring that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures." *Doe*, 131 S. Ct. at 2820. But ferreting out fraudulent and invalid signatures has no application to compelled disclosure of proponents' identities. *WIN*, 213 F.3d at 1139 (explaining that "[d]isclosure of a circulator's name and address will not establish whether signatures on a petition he submits are forged."). Therefore, this interest cannot support the Reveal Yourself Requirement.

However, the State contends this interest is not limited to preventing fraud and extends more generally to promoting transparency and accountability. (State MSJ at 12.) But when the *Doe* Court spoke of an interest in promoting transparency and accountability it did so in regards to "*government* accountability and transparency." *Doe*, 131 S. Ct. at 2819 (emphasis added). Naturally, we demand greater transparency and accountability from the *government*, not from private citizens.[10] Publically disclosing the names of petition signers made the government's signature verification process more transparent. It also helped to hold the government accountable. Public verification of signatures helped to ensure the government "placed only referenda placed on the ballot . . . that garnered enough valid signatures." *Id*. This interest cannot support disclosure of proponents' identities. The

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[10] At least one district court has recognized that the government's interests identified in *Doe v. Reed* have limits. *See Utahns for Ethical Gov't v. Barton*, 2:10-CV-333, 2011 WL 1085754 (D. Utah Mar. 21, 2011). The government's interest in preserving the integrity of the electoral process by preventing fraud and ferreting out invalid signatures is not implicated when the government is not actively verifying petition signatures. *Id*. at *5. And, the government's interest in fostering transparency and accountability is limited to fostering *government* transparency and accountability. *Id*. at *6-7. "[W]here the public has been the primary actor and the government has not yet taken action [this interest] loses force." *Id*.

Reveal Yourself Requirement does not make the government more transparent. Rather, it makes private citizens more transparent by forcing them to reveal their identity at the same time they deliver their political message. To argue that the political views of private citizens are the government's business and are subject to public inspection is to turn to the entire American model of government on its head. Because compelled disclosure of a proponent's identity at the point of contact with the voter cannot make the government more transparent and accountable, this interest is insufficient to support the Reveal Yourself Requirement.[11]

3. The Reveal Yourself Requirement Is Not Narrowly Tailored.

Even if an informational interest supports the Reveal Yourself Requirement, it is not narrowly tailored to that interest because it is not the least restrictive means to inform voters as to who has proposed an initiative petition. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (laws must employ the least restrictive means to survive strict scrutiny.) The State argues that "there is no conceivable objection to a law that requires petition-signers to be informed who the proponents are." (State MSJ at 12.) But Plaintiffs have not objected to the State's requirements that proponents publically identify themselves on two occasions prior to circulating petitions, in filings made with the City Clerk, Code § 9202, and in a local newspaper, Code § 9205. Those filings are available to the electorate and satisfy the State's purported interest in informing voters. They are therefore the "least restrictive means" for accomplishing the State's informational interest (assuming one exists). The State even concedes that "by the time proponents' names are printed on initiative petitions, their identities are already known." (State MSJ at 8.) Requiring proponents to identify themselves on their petitions at the point of contact with voters is therefore not necessary and so is not narrowly tailored. *ACLF*, 525 U.S. at 192 (holding Colorado's requirement that petition circulators identify themselves at the point of contact with the voters unconstitutional where Colorado required identification at other, less intrusive times).

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[11] As explained in Plaintiffs' MSJ, *Buckley*'s anti-corruption and enforcement interests do not support the Reveal Yourself Requirement either because there is no risk of corruption in ballot measures. *Bellotti*, 435 U.S. at 790 ; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298 (1981).

On-publication disclosure is "considerably more intrusive" than reporting at other times. *Heller*, 378 F.3d at 992. And, any informational interest is served by "a panoply of . . . other requirements that have not been challenged." *WIN*, 213 F.3d at 1139. Because the State can accomplish its purported goal of informing voters as to who has proposed an initiative petition through means less restrictive on speech the Reveal Yourself Requirement is not narrowly tailored and is therefore unconstitutional.

4. Even If Exacting Scrutiny Review Is Proper, The Requirement Fails.

The State's justification for the Reveal Yourself Requirement is based on its view that it is subject it to "exacting scrutiny." (State MSJ at 11-12.) But as explained *supra*, requirements that force those who circulate initiative petitions to reveal their identity at the point of contact with the voter impose "severe burdens" on speech and are therefore subject to strict scrutiny. *ACLF*, 525 U.S. at 192 n. 12 (internal citation and quotation omitted). *See also supra* Part II.A. But, even if "exacting scrutiny" is the proper standard of review, the Reveal Yourself Requirement still fails because there is not the requisite "substantial relation" to a "sufficiently important interest." *See Doe*, 130 S. Ct. at 2818. Neither of the State's interests are constitutionally cognizable. *See supra* Part II.D.2. But even if the State's interest in providing information to the electorate was valid in the ballot measure context, the Reveal Yourself Requirement is not substantially related to that interest. As was the case in *WIN*, the State's informational interest is served by a "panoply of . . . other requirements that have not been challenged here." *WIN*, 213 F.3d at 1139. Prior to circulating a petition, proponents must publically identify themselves on filings with the City Clerk, Code § 9202, and in the newspaper, Code § 9205, which adequately serves any informational interest. Nowhere in its brief does the State explain why those required disclosures are insufficient to satisfy the State's interest. Instead, it concedes that "by the time proponents' names are printed on initiative petitions, their identities are already known." (State MSJ at 8.) As the petition circulates, the government's interest is therefore non-existent. But the burden on speech is severe. *ACLF*, 525 U.S. at 192 n. 12. And speech has been chilled. Larry Breitfelder will never again offer an initiative petition so long as the Reveal Yourself Requirement is enforced, and Lori Kneebone is uncertain whether she will do so. (Facts ¶¶ 64, 66.) Thus, the State is incorrect in stating that "the strength of the governmental interest . . . reflect[s] the

seriousness of actual burden on First Amendment rights." (State MSJ at 12) (quoting *Doe*, 130 S. Ct. at 2818). Just the opposite is true.

The State has "failed to demonstrate that it is necessary to burden [Plaintiffs'] ability to communicate their message in order to meet its concerns." *Meyer*, 486 U.S. at 426. The Reveal Yourself Requirement thus fails exacting scrutiny. It is unconstitutional under the First and Fourteenth Amendments.

III. The Definition of "Proponent" Is Unconstitutionally Vague.

Code Section 342 defines "proponent" of a municipal initiative as "the person or persons who *publish* a notice of intention or intention to circulate petition, or, where publication is not required, who file petitions with the elections official or legislative body." The State's only reason as to why Section 342's definition of "proponent" is not vague is that it uses "common English words and is easy to comprehend." (State MSJ at 17.) But this is not the case. Plaintiffs and the City have interpreted "publish" in significantly different ways. Plaintiffs believe "publish" to mean the act of paying to have the notice of intention published in the newspaper, as Code Section 9205 requires. (Facts ¶¶ 36, 46.) This is the most natural way to read the statute for two reasons. First, publishing the notice requires payment of a fee to the newspaper. (Facts ¶ 36.) Thus, the person who pays the publication fee can most reasonably be said to have published the notice because there are no other means to cause publication to occur.[12] Second, the statute provides one set of rules for municipalities incorporating Section 9205's newspaper publication requirement and another for municipalities that do not require publication. However, the City and the State have interpreted this common English word differently, and maintain that even in municipalities requiring publication, the proponent is the natural person who signs and files the notice with a local elections official, as required by Section 9202 (*Id*. ¶¶ 45, 47.) But if the proponent is *always* the person or persons "who file petitions with the elections official or legislative body," Code Section 342, it would make providing two definitions

[12] The Ninth Circuit explained that "in the ballot issue context, the relevant informational goal is to inform voters as to who backs or opposes a given initiative *financially* . . . ." *Canyon Ferry*, 556 F.3d at 1033. Thus, Plaintiffs' interpretation of Section 342 is entirely consistent with this determination.

of "proponent" unnecessary. By providing two definitions, the legislature likely contemplated that the proponent could be someone other than the person "who file petitions with the elections official or legislative body." Code Section 342. *See also Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) (Courts must "mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous."). As the statute provides, that other person is the person or persons who "publish" the notice in the newspaper. And, as explained, "publish" is most naturally interpreted to mean the act of paying to have the notice published. *See supra.* If Plaintiffs are right, the true proponent of Plaintiffs' initiative was Chula Vista Citizens, since they paid for the publication. (*Id*. ¶¶ 36, 54; *see also id*. ¶¶ 37-38, 46.) Others might reasonably disagree with both the Plaintiffs and the City. Someone might think the publisher is the person who delivers the notice of intention to the newspaper and instructs the newspaper to publish it, regardless of who pays. Another might think the publisher is whoever originated the proposed initiative, regardless of who signed the notice or paid for newspaper publication.

Identifying an initiative's proponent is paramount to those wishing to initiate legislation because the State requires the proponent's identity to appear on the circulated petition if the signatures on it are to be accepted by the local elections official. But, the law does not provide sufficiently clarity as to what action makes one the 'publisher' of the notice of intent to circulate and therefore the proponent of the initiative. The City's and Plaintiffs' differing, yet reasonable interpretations of "proponent" show that people of "common intelligence must necessarily guess at its meaning and differ as to its application." *In re Doser*, 412 F.3d 1056, 1062 (9th Cir. 2005). The definition of "proponent" is therefore unconstitutionally vague. *Id*.

IV. The Requirement That The Petition "Bear A Copy" Of The Notice Of Intention And the Title And Summary Prepared By The City Attorney Is Unconstitutionally Vague.

Code Section 9207 provides that "[e]ach section of the petition shall *bear a copy* of the notice of intention and the title and summary prepared by the city attorney" (the "Circulated Version"). The State defends this provision as being "straightforward." (State MSJ at 17.) But the divergent interpretations of this provision by the parties to this case show otherwise.

The City interprets Section 9207 to require that the Circulated Version be a one hundred percent, exact copy of the notice of intention required to be filed with the Clerk by Section 9202 (Clerk's Version), including containing the name and signature of the proponent. (*See* Facts ¶¶ 45, 47.) Yet Code Section 9202 does not indicate a one hundred percent, exact copy is necessary. In fact, the City has not always enforced this requirement. It has accepted petitions bearing typeset signatures rather than actual signatures in the past. (Baber Declaration, Exhibits 1 & 2.) But whether signatures are required at all is not clear from the language because the statute only requires the Circulated Version be "substantially" in the required form, Code Section 9202, which indicates something less than a one hundred percent, exact copy should suffice. Plaintiffs believe such a reading is appropriate, but it is not possible to tell what information may be permissibly omitted from the notice. Plaintiffs believe that their Circulated Version, which omitted only the identifying information and signatures of the proponents, is "substantially" in the required form and so meets the requirement that the petition shall "bear a copy" of the notice of intention. (Facts ¶ 41.) Both the Plaintiffs' and the City's interpretations are reasonable, but according to the State neither interpretation is correct. The State maintains rather that Section 9207 requires the Circulated Version to contain the printed names of the proponents, but not their signatures. (State MSJ at 8 n. 7.) If this requirement is straightforward as the State suggests, the City would surely have been able to interpret it correctly. But it did not. As the State admits, the City incorrectly advised the Plaintiffs their petition must bear both the names and signatures of the proponents.[13] (State MSJ at 8; Facts ¶ 47.)

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[13] The State points out that the Clerk's error is harmless because Plaintiffs' First Petition did not bear the names or signatures of the proponents and was therefore properly rejected even under a correct reading of the statute. (State MSJ at 18.) But whether Plaintiffs' petition was properly rejected is irrelevant to the vagueness inquiry. Even the City Clerk could not interpret the law correctly as it is written. It is therefore vague and unconstitutional.

But, the Clerk's error was actually not harmless. Because Chula Vista Citizens paid to have the Newspaper Version published, they believed they were a lawful proponent of the First Petition pursuant to Code Section 342. (Facts ¶ 37.) Believing they were a lawful proponent, Chula Vista Citizens disclosed their identity on the First Petition, as required by Code Section 9207. (*Id.* ¶ 38.) Had Chula Vista Citizens been allowed to exercise its First Amendment right to offer an initiative petition, Plaintiffs' petition would have complied with the State's interpretation of this provision and the Clerk should have accepted it. But she would have still rejected it because she incorrectly read the statute to require the signatures of the proponents.

Plaintiffs' First Petition was partly rejected on this basis. (Facts ¶ 47.)

This case implicates a widely-incorporated state law that touches on "core political speech." *Meyer*, 486 U.S. at 421-22. Those hoping to have their initiatives placed on the ballot are at the mercy of the elections official to whom the petition must be submitted. Proponents cannot know how this provision will be interpreted by each official. *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) ("Statutes that are insufficiently clear are void . . . to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers.") If the Chula Vista Clerk, whose "ministerial duty" it is to "ensure compliance with all procedural mandates of the California Elections Code," (Facts ¶ 45), "must necessarily guess at [this laws] meaning," it is clearly vague, *In re Doser*, 412 F.3d at1062.

V. The Requirement That the Various Versions of the Notice of Intention Be "In Substantially the Following Form" as the Example Provided Is Unconstitutionally Vague.

Code Section 9202 requires that the Clerk's Version, the Circulated Version, as well as the version of the notice of intention that must be published in the newspaper pursuant to Code Section 9205 (the "Newspaper Version"), shall be "in substantially the following form" as the example provided. This provision fails to provide the type of clarity required of laws impacting First Amendment freedoms. *See Foti*, 146 F.3d at 638. ("when First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required."). Even the City Clerk was confused as to how closely one's notice of intention to circulate must conform to the example. *See supra* Part IV.

Again, the State claims this requirement is "simple" and "the 'in substantially the following form' language provides leeway to accept notices with minor but inconsequential variations in language." (*Id.*) But such an interpretation is not clear from the actual language of the statute, which uses only the language "in substantially the following form." And the interpretations of this language by those charged with enforcing these statutes vary greatly from the State's interpretation. The Chula Vista Clerk required the Plaintiffs' Circulated Version to be a one hundred percent, exact copy of the notice, including the names and signatures of the proponents. Many, including the State Attorney General, consider a proponent's signature to be unnecessary and rather minor and inconsequential.

(State MSJ at 8 n. 7.) But the Chula Vista Clerk disagrees and requires it be included on all notices. (Facts ¶ 47.) Other elections officials interpret this provision differently than the City and the State. The City Clerk of the City of San Marcos, which also incorporates the California Elections Code as its own, has accepted initiative petitions that were circulated without *either* the names or signatures of the proponents. (Glaser Declaration, Exhibit 1) (*Cf.* Facts ¶¶ 45, 47 (showing Plaintiffs' initiative was rejected for failure to include both the names and signatures of the proponents on the Circulated Version).) The First Amendment protects anonymously petition circulation. But, due to arbitrary enforcement of the Code, only some of California's citizens are allowed to exercise this right.

The citizens of California cannot know what this law requires of them. But it is imperative that they know, because initiative petitions deemed to have not complied with the requirements of Section 9202 will not be accepted and processed. (*See* Facts ¶¶ 45, 47.) Because people "common intelligence must necessarily guess at its meaning and differ as to its application[,]" the requirement that the Clerk's Version, Newspaper Version, and Circulated Version be "in substantially the following form" as the example provided is unconstitutionally vague. *In re Doser*, 412 F.3d at 1062.

The State is incorrect that the challenged statutes have had no "real and substantial" deterrent effect on political expression. (State MSJ at 16.) Plaintiffs' interpretation of the challenged statutes proved fatal to their First Petition. The City Clerk interpreted the relevant provisions differently than Plaintiffs, and rejected their petitions, (*id*. ¶¶ 45, 47), deterring the expression of Plaintiffs and the more than 23,000 voters who signed their petition, (*id*. ¶ 44.) This is both real and substantial.

Conclusion

For the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment.

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Respectfully Submitted,

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PROOF OF SERVICE

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