Jim Bopp, Jr. (Indiana State Bar No. 2838-84)*
Joe La Rue (Ohio State Bar No. 80643)*
Noel Johnson (Wis. State Bar. No. 1068004)**
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Lead Counsel for Plaintiffs

Charles H. Bell, Jr. (SBN 060553)
Brian T. Hildreth (SBN 214131)
BELL, McANDREWS, & HILTACHK, LLP
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 445-7757
Facsimile: (916) 442-7759
Local Counsel for Plaintiffs

Gary D. Leasure (SBN 211160)
Workman Leasure, LLP
12626 High Bluff Drive # 150
San Diego, California 92130
Telephone: (858) 720-1992, Ext. 202
Facsimile: (858) 720-1990
Local Counsel for Plaintiffs

** Admitted pro hac vice on June 16, 2009 by order of the Honorable Roger T. Benitez.*
*** Admitted pro hac vice on March 11, 2011.*

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CHULA VISTA CITIZENS FOR JOBS AND FAIR COMPETITION, et al., **Plaintiffs,** **vs.** **DONNA NORRIS, et al.,** **Defendants.**	**Case: 09CV0897-BEN-JMA** **The Honorable Roger T. Benitez** **Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment** **ORAL ARGUMENT REQUESTED**

Plaintiffs' Memorandum of Points and Authorities In Support of Motion for Summary Judgment

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Introduction

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") (collectively, "Plaintiffs") seek summary judgment on all counts of their Verified Complaint. At issue is the constitutionality of the City of Chula Vista's enforcement position regarding California Elections Code (the "Code") Sections 342, 9202, 9205, and 9207 as incorporated into the City of Chula Vista Charter (the "Charter") Section 903. As enforced by the City's officers, these provisions require that proponents be natural persons, thereby banning both incorporated and unincorporated associations from undertaking their own initiative petitions. They also require that proponents of initiative petitions publically disclose their identity at the point of contact with the voters.

Argument[1]

Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Plaintiffs satisfactorily demonstrate their injury, and no dispute exists as to the material facts supporting their challenge. Consequently, this matter is ripe for legal resolution and the Plaintiffs are entitled to judgment as a matter of law.

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

The provisions of the California Elections Code apply in Chula Vista. Charter § 903. (Facts ¶ 13.) The City interprets the Code to require that proponents of initiative petitions be natural persons. This infringes the First and Fourteenth Amendments[2] by denying associations the freedom to engage

[1] The relevant facts, which gave rise to this lawsuit, are laid out in full in *Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment* ("Facts").

[2] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Fourteenth Amendment makes the First Amendment applicable to the States. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

in initiative-petition political speech (the "Natural Person Requirement"). (Facts ¶¶ 26-26, 74.) The City's enforcement position is based on its interpretation of two provisions of California law. First, Code Section 342 provides that the "'[p]roponent or proponents of an initiative or referendum measure' means, for [municipal] initiative and referendum measures, the person or persons who publish a notice or intention to circulate petitions . . . ." Second, Code Section 9202 requires proponents of initiative petitions to sign and file a notice of their intent to circulate a petition with the City Clerk. (Facts ¶ 14.) The City interprets these provisions as requiring that proponents be natural persons, since (in its view) only natural persons may sign and publish a notice.

The Natural Person Requirement is unconstitutional for five reasons.[3] It bans political speech. *See infra* Part I.A. 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). *See infra* at Part I.B. It requires corporations and other associations that want to engage in political speech to do so by proxy, which the First Amendment will not tolerate. *See infra* at Part I.C. It creates an unconstitutional condition. *See infra* at Part I.D. It fails strict scrutiny. *See infra* at Part I.E.

A. The Natural Person Requirement Impermissibly Bans Political Speech.

Initiative petitions are "core political speech." *Prete v. Bradbury*, 438 F.3d 949, 961 (9th Cir. 2006); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Banning political speech during the critical pre-election period is impermissible. *Citizens*, 130 S. Ct. at 911. Yet the Natural Person Requirement does just that: it bans the political speech of incorporated and unincorporated associations during the pre-election period. No association is allowed to speak by offering a ballot initiative to the voters. Instead, all associations must either convince one of their members to speak by proxy on their behalf,

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[3] In Court-ordered supplemental briefing, the Plaintiffs assert that California law may be construed to allow associations to be proponents. (*See* Doc. 37.) The Intervenor State of California argues that California law requires proponents to be natural persons. (*See* Doc. 38.) The City took no position. (*See* Doc. 39.) If California law allows non-natural persons to be proponents, this Court need only decide whether the City's enforcement position is constitutional. But if Code Sections 342 and 9202 require that proponents be natural persons, this Court should declare California Elections Code Sections 342 and 9202 unconstitutional to the extent that they require proponents of ballot initiatives to be natural persons.

or remain silent. But speech-by-proxy is not a constitutionally permissible alternative, because it does not allow associations *themselves* to speak. *Id*. at 897 (holding that speech-by-proxy, PAC alternative was still a ban on corporate speech, since the corporation itself was not allowed to speak). *See infra*, Part I.C. The Natural Person Requirement is thus an outright ban on the speech of incorporated and unincorporated associations notwithstanding the fact that an associations' members may speak for it. But "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Citizens*, 130 S. Ct. at 911. The Natural Person Requirement is therefore unconstitutional.

B. The Natural Person Requirement Impermissibly Bans Disfavored Speakers' Speech.

The First Amendment protects speech regardless of the speaker, *id*. at 899, even when speakers are corporations, *id*. at 900 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978)). The political speech of incorporated and unincorporated associations cannot "be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens*, 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. Government may not "distinguish[] among different speakers, allowing speech by some but not others," *id*. at 898, or "dictat[e] the . . . the speakers who may address a public issue," *id*. at 902. Doing so "deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id*. at 899. This is impermissible under the First Amendment. *Id*. Consequently, "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id*. at 913 ("return[ing] to the principle established in *Buckley* and *Bellotti*").

Despite the First Amendment's intolerance for governmental discrimination against speakers on the basis of their identity, the City's Natural Person Requirement prohibits incorporated and unincorporated associational speakers from offering ballot measure initiatives for no other reason than their identity as non-natural persons. 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. Such laws cannot stand: "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy." *Id*. at 911. The Natural Person

Requirement is therefore unconstitutional under the First and Fourteenth Amendments.

C. The Natural Person Requirement Impermissibly Requires Speech-By-Proxy.

Forcing incorporated and unincorporated associational speakers to speak by proxy is unconstitutional. *Citizens United* held a ban on corporate general-fund independent expenditures to be an "outright ban" on corporate speech notwithstanding the fact that corporations could speak by proxy by creating PACs to speak on their behalf. *Id*. at 897. The Court explained that PACs "do[] not allow corporations to speak" because "[a] PAC is a separate association from the corporation." *Id*. Forcing corporations to engage in speech-by-proxy by employing PACs was a "burdensome" and "onerous" alternative that the Court held unconstitutional. *Id*. at 897-98, 913.

Like the speech-by-proxy requirement held unconstitutional in *Citizens*, the Natural Person Requirement bans speech by incorporated and unincorporated associations, requiring their members to speak by proxy on their behalf. This is a more burdensome alternative because it forces associations' members unnecessarily into the public eye, when the true speaker is the association. The Supreme Court has repeatedly explained that speech-limiting laws are not cured of First Amendment defects simply because they leave available other, more burdensome avenues for speech. *See, e.g.*, *Citizens*, 130 S. Ct. at 897-98 (finding the PAC-option to be a burdensome and impermissible substitute for direct corporate speech); *Meyer*, 486 U.S. at 424 ("That [a law] leaves open more burdensome avenues of communication, does not relieve its burden on First Amendment expression."); *Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986) (plurality opinion) ("*MCFL*") (finding challenged speech regulation burdened First Amendment because "the avenue it leaves open [for speech] is more burdensome than the one it forecloses.").

The Natural Person Requirement is thus a ban on associational speech notwithstanding the fact that an associations' members may speak for it. It is impermissible under *Citizens United* and unconstitutional under the First and Fourteenth Amendments.

D. The Natural Person Requirement Creates An Unconstitutional Condition.

The First Amendment protects *both* political speech and political association. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). Included within the right to associate is the right to privacy in one's associations. *Id*. at 64; *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Chula Vista Citizens and

ABC ("Association-Plaintiffs") thus have two fundamental First Amendment rights at stake in this litigation. First, they have a First Amendment right to engage in political speech through the ballot initiative process. *See Bellotti*, 435 U.S. at 774-76 (corporations' ballot measure speech is fully protected by the First Amendment). They also have a First Amendment right to privacy of association. But the Natural Person Requirement forces the Association-Plaintiffs to choose between these two protected rights. They may *either* engage in the protected political speech inherent in initiative petitions by revealing one of their members as the proponent of their initiative, *or* they may allow their members to associate without being revealed to the government. They may not, however, exercise both their right to speak and their right to privacy in their associations.

Forcing incorporated and unincorporated associations to choose between constitutional rights is an impermissible unconstitutional condition. *Simmons v. United States*, 390 U.S. 377, 391 (1968). The basic doctrine of unconstitutional conditions "limits the government's ability to exact waivers of rights as a condition of benefits, even when those benefits are fully discretionary." *U.S. v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006). *See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) ("*FAIR*") (the unconstitutional condition doctrine prohibits government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.") (internal citations omitted). The most egregious form of unconstitutional conditions is the "intolerable" situation where persons must choose between exercising one of two constitutional rights. *Simmons*, 390 U.S. at 393. One court has called this an "especially malignant" form of the unconstitutional conditions doctrine. *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004).

The Supreme Court first recognized this especially problematic form of unconstitutional conditions in *Simmons*, 390 U.S. 377. Simmons was forced to choose between his Fifth Amendment right against self-incrimination and his right to assert a claim under the Fourth Amendment's protection against warrantless search and seizure. *Id*. at 394. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another" and struck down the "choice" as an unconstitutional condition. *Id*. The Court reached a similar conclusion in *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In that case a prominent political figure was required to

"forfeit one constitutionally protected right as the price for exercising another." *Id*. at 807–08 (*citing Simmons*, 390 U.S. at 394). Lefkowitz was deprived of a political office under a New York statute in violation of "his [First Amendment] right to participate in private, voluntary political associations" when he exercised his Fifth Amendment right and "refused to . . . give self-incriminating testimony." *Id*. This, the Court held, was an unduly coercive and unconstitutional condition. *Id*.

Simmons and *Lefkowitz* together show that the protection under the doctrine of unconstitutional conditions is at its apex when persons are forced to choose between exercising one of two or more constitutional rights. Conditions on the receipt of some generally available statutory or monetary benefit may be constitutional if the conditions pass a balancing test. *See*, *e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The constitution cannot tolerate, however, one of its protections being conditioned on the relinquishment of another. Characterizing the decision between exercising only one of two constitutional rights as a "choice . . . to give up [a] benefit" is improper because "situations in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights [pose] an ['intolerable' and] undeniable tension." *Simmons*, 390 U.S. at 394. In such cases, there is no need to perform a balancing test: the condition itself is unconstitutional. *Id*.

The City's law requires the Association-Plaintiffs to choose between two constitutional rights. They may *either* exercise their First Amendment right to speak by convincing one of their members to identify themselves to the world as a proponent-by-proxy, *or* they may exercise their First Amendment right to enjoy privacy in their associations by allowing their members to remain anonymous. They may not do both. This forced "choice" is no choice at all, but an unconstitutional condition. *Simmons*, 390 U.S. at 394. *See also U.S. v. Midgett*, 342 F.3d 321, 325 (4th Cir. 2003) (unconstitutional to force defendant to choose between constitutional rights); *U.S. v. Scott*, 909 F.2d 488, 493 (11th Cir. 1990) (same). The Natural Person Requirement is therefore unconstitutional.

E. The Natural Person Requirement Fails Strict Scrutiny.

The Natural Person Requirement completely bans the political speech of unincorporated and incorporated associations. It is therefore unconstitutional, because "an outright ban" is "not a permissible remedy," no matter the injury the government seeks to address. *Citizens*, 130 S. Ct. at 911. *See infra* at Part I.A. Even if that were not so, however, the Natural Person Requirement would

still be unconstitutional. "Laws that burden political speech are subject to strict scrutiny." *Citizens*, 130 S. Ct. at 898. Under strict scrutiny review, the Defendants must prove the Natural Person Requirement "furthers a compelling interest and is narrowly tailored to achieve that interest." *Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007) ("*WRTL-II*"); *see also Citizens*, 130 S. Ct. at 898 (same). The City has no compelling interest in the Natural Person Requirement. The law is therefore unconstitutional.

Citizens United held that the only interest that can justify limits on political speech is the interest in preventing quid-pro-quo corruption. *Citizens*, 130 S. Ct. at 901, 909. The Court explicitly rejected all other purported 'interests.' *Id*. at 903-13. There is no 'interest' in limiting corporate speech on the basis of the corporate identity of the speaker. *Id*. at 913. Nor is there an interest in limiting corporate speech because corporations possess wealth that might be used to influence or distort elections. *Id*. at 903-05. Nor is there an interest in limiting speech because it might gain the speaker access to, or influence with, candidates or elected officials. *Id*. at 910. Nor is there an interest in limiting corporate speech because dissenting shareholders might need protection. *Id*. at 911. *Only* the anti quid-pro-quo corruption interest can support limits on political speech. *Id*. at 901, 909.

The City has no constitutionally cognizable interest in limiting associational ballot measure speech because the risk of quid-pro-quo corruption is "not present" in popular votes on public issues. *Bellotti*, 435 U.S. at 790; *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 203 (1999) ("*Buckley-II*"). Because the City has no compelling interest to support its ban on political speech, the Natural Person Requirement fails strict scrutiny and is unconstitutional.

The Natural Person Requirement is an impermissible ban on speech. It also discriminates on the basis of the speakers' identity. It forces incorporated and unincorporated associations to speak by proxy. It creates an unconstitutional condition. And it fails strict scrutiny. 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.

Code Section 9207 provides that "[e]ach section of the petition" as it is circulated among the voters must "bear a copy" of the notice of intent to circulate that was filed with City Clerk. Code

Section 9202 requires that the notice of intent must be signed. These sections force proponents to disclose their identities at the point of contact with the voters (the "Reveal Yourself Requirement"). This requirement is unconstitutional for two reasons. It prohibits, without constitutional justification, anonymous petition- circulation speech as the petition circulates among the voters. *See infra* at Part II.A. And it is an impermissible, content-based proscription of political speech. *See infra* at Part II.B.

A. The Reveal Yourself Requirement Impermissibly Bans Anonymous Petition Circulation.

1. The First Amendment Protects Anonymous Petition-Circulation Speech.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983). *See also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (same). Placing a petition before the voters "involves 'interactive communication concerning political change.'" *Buckley-II*, 525 U.S. at 186 (*quoting Meyer*, 486 U.S. at 422). It is "'both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *Id*. at 199 (*quoting Meyer*, 486 U.S. at 421). Petition circulation is thus "core political speech" for which the First Amendment's protection is "at its zenith." *Id*. 525 at 186-87 (*quoting Meyer*, 486 U.S. at 422, 425).

The First Amendment's protection for petition circulation includes protection for *anonymous* circulation. *Washington Initiatives Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000) ("*WIN*"). *See also Buckley-II*, 525 U.S. at 197-200 (same). These decisions properly follow *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), which held that the First Amendment protects anonymous political speech to voters about ballot measures. 514 U.S. at 342. The 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*. at 341-42. It can even be motivated by the belief that ideas will be more persuasive if the identity of the proponent is unknown. *Id*. at 342. Regardless of the reason, the right to anonymity remains, *id*. at 343, because "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," *id*. at 342.

The Ninth Circuit embraced and extended *McIntyre*'s reasoning in *ACLU v. Heller*, 379 F.3d 979 (9th Cir. 2004), holding that the right to anonymous speech in ballot-measure contexts applies to associations. The *Heller* court applied strict scrutiny to a law banning anonymous ballot-measure related speech, *id*. at 1002, and ruled that "[t]he reasons given by *McIntyre* for protecting anonymous speech apply regardless of whether an individual, a group of individuals, or an informal 'business or social organization' is speaking," *id*. at 989. The court explained that "[r]equiring a political communication to contain information concerning the identity of the speaker is no different from requiring the inclusion of other components of the document's content that the author is free to include or exclude." *Id*. at 989 (internal citation and quotation omitted). Government is prohibited from dictating the content of a speaker's message, and laws which do so must survive strict scrutiny and utilize "the least restrictive means" to further their interest. *Id*. at 992-93.

Recent Supreme Court decisions upholding disclosure in other contexts 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 *Buckley-II* and *WIN* that those who circulate petitions may do so anonymously at the point of contact with voters. For instance, *Citizens United* upheld on-ad disclosure for expenditures in *candidate* elections. 130 S. Ct. at 913-14. But candidate elections and ballot initiative votes are very different, and rules applying to one do not always apply to the other. *See, e.g.*, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 297-300 (1981) ("*CARC*") (explaining that while contributions to candidates may be limited, contributions to ballot measure committees may not be, because the risk of corruption present in candidate elections is absent in popular votes on ballot issues). *Buckley* said that informational and anti-corruption interests may undergird disclosure requirements, but it limited the applicability of those interests to disclosure of speech concerning *candidate* elections. 424 U.S. at 66-67. *Citizens United*'s ruling upholding disclosure for speech in the candidate-election context relied on those interests. 130 S. Ct. at 914. But *Citizens* said nothing about forced identification of speakers advocating ballot measures, and the interests it relied on have no application in that context. *See infra* at Part II.A.3.a.(2).

Similarly, *Doe v. Reed*, 130 S. Ct. 2811 (2010), upheld disclosure of voters signing ballot-measure petitions. *Id*. at 2815-16. Signature-gatherers may falsify signatures, and petition-signers

may mistakenly think they are registered to vote when they are not. *Id*. at 2821. The *Doe* Court found disclosure of those signing ballot measure petitions was supported by the interest in allowing the public to verify that enough registered voters signed the petition to qualify it for the ballot. *Id*. But that interest does not support the identification of proponents at the point of contact with voters. And *Doe* did not consider anonymous petition circulation.

Neither *Citizens United* nor *Doe v. Reed* abrogated the right of proponents of ballot initiatives to engage in anonymous speech at the point of contact with the voters. *McIntyre*, *Buckley-II*, *WIN*, and *Heller* remain controlling law for this Court.

2. The Reveal Yourself Requirement Burdens And Chills Speech.

The Reveal Yourself Requirement forces initiative proponents to reveal their identity on each page of the initiative petition circulated among the electorate. *See* Code § 9207. This requirement burdens speech, because it denies proponents of initiative petitions the right to anonymity, which the First Amendment guarantees. 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.

The Supreme Court's *Buckley-II* decision is instructive. It involved a Colorado law that banned anonymous petition circulation by forcing petition-circulators to identify themselves at the point of contact with voters. 525 U.S. at 186. The Court found that such requirements "force[] circulators to reveal their identities at the same time they deliver their political message," *id*. at 198-99, "when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned[,]" *id*. at 199 (internal citation and quotation omitted). It is also "the precise moment when the circulator's interest in anonymity is greatest." *Id*. The Court found that bans on anonymous petition circulation were constitutionally problematic. Initiative petitions tend to be controversial. At the very least, they advocate for change in the status quo. Some people are unwilling to circulate petitions when they must reveal their identities at the point of contact with the voters. *Id*. at 198-99. Forcing them to do so "discourage[] participation in the petition circulation process." *Id*. 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 Supreme Court applied strict scrutiny to the ban on anonymous petition circulation, noting

that the "now-settled approach" is that "state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest." *Id*. at 192 n.12 (internal citation and quotation omitted). Colorado law required circulators to publicly identify themselves in official filings at times other than when they were circulating their petitions. *Id*. at 188-89, 192. Because these other filings were a less burdensome alternative to forcibly identifying circulators at the point of contact with the voters, the requirement failed scrutiny and was unconstitutional. *Id*. at 200.

The *WIN* case is also instructive. It involved a law banning anonymous petition-circulation at the point of contact with the voters by requiring that the names of the circulators appear on the petitions. 213 F.3d at 1134. The Ninth Circuit recognized that such bans 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." *Id*. at 1138. This "chills speech by inclining individuals toward silence." *Id*. The *WIN* Court then mistakenly evaluated the ban under "exacting scrutiny."[4] *Id*. The *Buckley-II* Court had earlier applied strict scrutiny to a ban on anonymous petition circulation, 525 U.S. at 192 n.12, and the Ninth Circuit should have followed *Buckley-II*'s controlling precedent. But even under the less rigorous scrutiny, *WIN* held the ban on anonymous petition circulation unconstitutional. *Id*. at 1140. None of the proffered interests supported it, and other disclosure requirements better served those interests. *Id*. at 1138-40.

The issue before this Court is the same as the issue in *Buckley-II* and *WIN*—whether government may ban anonymous petition circulation. The Reveal Yourself Requirement forces proponents to self-identify at the point of contact with voters. Anonymity is important to the Plaintiffs 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.) The Ninth Circuit recognized

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[4]Exacting scrutiny requires a "substantial relation" between the disclosure requirement and a "sufficiently important" interest. *Citizens United*, 130 S. Ct. at 914. It often entails a balancing of the interest in disclosure with the harm inflicted by disclosure. *See, e.g.*, *WIN*, 213 F.3d at 1138-39 (performing a balancing of interests). Strict scrutiny requires government to prove its law is "narrowly tailored" to a "compelling interest," *Citizens*, 130 S. Ct. at 898, and employs the "least restrictive means," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *MCFL*, 479 U.S. at 262. *See also Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (laws surviving strict scrutiny must "not unnecessarily circumscribe protected expression").

that "[a]nonymity 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. Bans on anonymity at the point of contact with voters "interfere[] 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.

That is true in this case. Plaintiff Brietfelder believes he is well-known as "anti-union." (Facts ¶ 61.) He has staked out well-known political positions. (*Id*.) Mr. Brietfelder 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.) Nor does he 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.

Because of the massive numbers of signatures necessary to qualify an initiative for the ballot, most proponents hire professional circulators just like the Plaintiffs did. (*Id*. ¶¶ 39-40, 43, 67-68.) But proponents cannot know how each circulator presents their message to the electorate. The Reveal Yourself Requirement may make it appear that proponents endorse the words and actions of the circulators, since the proponents' signatures are on the petitions as they circulate. (*Id*. ¶ 63.) Plaintiff Breitfelder explained the problem:

> I've . . . heard of situations where people . . . do a very good and responsive job presenting petitions and asking people for support and sign the petitions. And I have heard disturbing, you know, stories on very—probably every issue in every campaign has at least alleged, you know, horror stories about some kind of misrepresentation or something of that nature. And who is to say, you know, what is truth and what is not, but I certainly wasn't in the position to do any quality control [of the circulators' presentation of the petition].
>
> If someone 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.

(*Id*.) Mr. Waters, the Deputy Attorney General for California, conceded that he too has heard allegations of professional circulators who have "misbehaved" as they asked voters to sign the petitions. (*Id*.) The proponents cannot control what these circulators say and do, yet the proponents' identifying information must appear on the petition. This burdens proponents' speech and further discourages participation in the initiative-petition process.

Plaintiffs Breitfelder and Kneebone were hesitant, nearly-unwilling proponents because of the Reveal Yourself Requirement. (*Id*. ¶¶ 58-59.) Ms. Kneebone feared harassment from union-members after revealing her name on the petition that was circulated among the voters. (*Id*. ¶ 65.) Her fear was reasonable: recent elections demonstrate how individuals use publicly disclosed information to intimidate individuals exercising First Amendment rights. *See, e.g.*, *Citizens United*, 130 S. Ct. at 916 (threats and harassment "cause for concern"); *id*. at 981 (Thomas, J., concurring) ("[S]uccess of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights."). Ms. Kneebone wishes her name had not been revealed at the point of contact with voters. (Facts ¶ 65.) Mr. Breitfelder is adamant that he will never be a proponent again if he must reveal his identity at the point of contact with voters. (*Id*. ¶ 64.) Just as in *Buckley-II* and *WIN*, the Reveal Yourself Requirement both burdens and chills petition-circulation speech and so must be subjected to constitutional scrutiny.

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

a. The Requirement Is Subject To, And Fails, Strict Scrutiny.

1) Strict Scrutiny Applies.

Subsequent to the *WIN* decision, the Ninth Circuit ruled that ballot measure laws imposing severe burdens on speech are subject to *strict* scrutiny, while those imposing lesser burdens are subject to exacting scrutiny. *Prete*, 438 F.3d at 961. The law challenged in *Prete* 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. But petition circulators could be paid in other ways, *id*. at 952 n.1, and salaries could be adjusted on the basis of productivity so the most successful signature-gatherers could continue to earn the most money, *id*.; *see also id*. at 968. 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. Instead, they offered "unsupported speculation." *Id*. The plaintiffs thus failed to establish that their speech was burdened. *Id*. They had only established a "lesser burden" on the initiative process itself, so the regulation was subject to exacting scrutiny. *Id*.

In contrast, the Reveal Yourself Requirement burdens speech. It dictates what speakers must say by requiring proponents to identify themselves on their initiative petitions as they are circulated. Requiring proponents' signatures on the petition may also make it appear to the voters that the proponents agree with the words and actions of the petition circulators. And speech is actually 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 be willing to do so. (Facts ¶¶ 64, 66.)

The Reveal Yourself Requirement imposes a severe burden 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). *Prete*'s standard thus requires the Court to review the Reveal Yourself Requirement under strict scrutiny. *Pest Committee*'s holding, that strict scrutiny applies where regulations reduce the "quantum of speech" or "the available pool of circulators or other supporters of a[n] . . . initiative[,]" 626 F.3d at 1106, likewise requires this Court to apply strict scrutiny. *See also Citizens*, 130 S.Ct. at 898 ("Laws that burden political speech are subject to strict scrutiny"); *Heller*, 378 F.3d at 987 ("proscribing the content of an election communication is . . . subject to traditional strict scrutiny."). Strict scrutiny review therefore applies.[5]

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[5] *WIN* applied exacting scrutiny to a ban on anonymous petition circulation. 213 F.3d at 1138. *WIN* should not be followed, for three reasons. **First**, *WIN* overlooked *Buckley-II*'s binding precedent declaring that bans on anonymous petition circulation should be evaluated under strict scrutiny. *Buckley-II*, 525 U.S. at 192 n.12. **Second**, the subsequent *Prete* decision clarified that ballot measure regulations imposing severe burdens on speech are subject to strict scrutiny, while those imposing lesser burdens on the initiative process itself are subject to exacting scrutiny. *Prete*, 438 F.3d at 961. Under *Prete*'s standard, exacting scrutiny would be inappropriate on *WIN*'s facts. **Third**, the Supreme Court declared exacting scrutiny proper only for disclosure laws that do not prevent anyone from speaking. *Citizens*, 130 S. Ct. at 914. But "[l]aws that burden political speech are subject to

2) There Is No Compelling Interest.

Strict scrutiny requires government to prove a compelling interest in its law. *WRTL-II*, 551 U.S. at 464. *See also Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 653 (9th Cir. 2007) (government bears the burden of proving its interest). The City has no compelling interest in the Reveal Yourself Requirement. It therefore fails scrutiny and is unconstitutional.

The seminal case for electioneering disclosure is *Buckley*, 424 U.S. 1. That Court found three compelling interests in disclosure, *id*. at 66-68, none of which are sufficient to support the Reveal Yourself Requirement. First, *Buckley* identified an interest in informing voters about the sources of political campaign money and how candidates spend it. *Id*. at 66. Such knowledge would "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id*. But this interest cannot support disclosure of the identity of proponents of ballot measures. Unlike elected candidates, adopted ballot measures cannot "be responsive" to anyone. Voters do not need to know the identity of proponents to predict "the future performance" of ballot measures. Everything necessary to evaluate them is contained in 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. 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.[6]

Second, *Buckley* identified an anti-corruption interest in disclosure, recognizing that "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. at 67. But this interest cannot support compelled identification of proponents at the point of contact with the voters because there

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strict scrutiny." *Id*. at 898. The *WIN* Court recognized that bans on anonymous petition-circulation prevent speech. *WIN*, 213 F.3d at 1138. Strict scrutiny thus should have been applied.

[6]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.)

is no risk of corruption in ballot measures. *CARC*, 454 U.S. at 298. *See also Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010) (ruling that *Buckley*'s anti-corruption interest is irrelevant to ballot measures because "quid pro quo corruption cannot arise in a ballot-issue campaign.").[7]

Third, *Buckley* identified an enforcement interest in disclosure, noting that "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of . . . contribution limitations[.]" *Buckley*, 424 U.S. at 67-68. But this interest does not support compelled identification of proponents at the point of contact with the voters.

None of the recognized interests in disclosure support the Reveal Yourself Requirement. It fails strict scrutiny and is unconstitutional under the First and Fourteenth Amendments.

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 the interest. Rather, it is overinclusive, compelling more speech than necessary to further the government's interest in the statute. *See Citizens*, 130 S. Ct. at 911 (holding that a law restricting more speakers than necessary is not narrowly tailored); *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 121-23 (1991) (holding that a law reaching more speech than necessary is not narrowly tailored). It also is underinclusive, failing to compel all the speech necessary to further the government's interest. *See Citizens*, 130 S. Ct at 911 (holding that a law failing to reach all speakers necessary to further its goal is not narrowly tailored); *White*, 536 U.S. at 769-81 (same). It also fails to use the least restrictive means to accomplish its goal as is constitutionally required. *See Gonzales*, 546 U.S. at 429 (holding that laws must employ the least restrictive means to survive strict scrutiny); *MCFL*, 479 U.S. at 262 (same); *White*, 536 U.S. at 774-75 (same).

a) It Is Overinclusive.

The Ninth Circuit explained that "in the ballot issue context, the relevant informational goal is

[7]The anti-corruption interest supports disclosing petition *signers* because verifying signatures is necessary to verify that the petition qualified for the ballot. *Doe*, 130 S. Ct. at 2821. But that ruling has no application to compelled disclosure of proponents' identities. *WIN*, 213 F.3d at 1139 (holding that "[d]isclosure of a circulator's name and address will not establish whether signatures on a petition he submits are forged.").

to inform voters as to 'who backs or opposes a given initiative' financially . . . ." *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (*quoting Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir.2003) ("*CPLC-I*")). Yet neither plaintiff-proponent made any financial contribution to their initiative effort. (Facts ¶¶ 36, 54.) Thus, even if there is an interest in identifying financial supporters of ballot measures at the point of contact with the voters, the Reveal Yourself Requirement is not narrowly tailored. Instead, it compels the identification of those who made *no* financial contribution. It is therefore overinclusive.

b) It Is Underinclusive.

Similarly, if the City's goal is to inform voters who it is that financially backs ballot measures, the Reveal Yourself Requirement is woefully inadequate because it only requires financial supporters to identify themselves if they are proponents. The case at bar illustrates the problem. Plaintiff ABC was the principle financial sponsor of its initiative and Plaintiff Chula Vista Citizens paid for the newspaper publication required by Section 9205. (Facts ¶¶ 2, 36, 54.) Yet because neither were proponents of the initiative, the Reveal Yourself Requirement did not compel their identification. This underinclusiveness leaves the voters uninformed as to the true financial backers of ballot measures. Also, the Reveal Yourself Requirement does not compel those who financially oppose initiative petitions to identify themselves. If the goal is an informed electorate, identifying financial opponents of initiative petitions is as important as identifying financial supporters. *CPLC-I*, 328 F.3d at 1106; *Canyon Ferry*, 556 F.3d at 1032 (same). Yet the City does not require opponents of initiative petitions to identify themselves, even when they circulate literature urging the electorate to refuse to sign the initiative petition. Only proponents are forced to identify themselves. The Reveal Yourself Requirement's underinclusiveness to its purported purpose "diminish[es] the credibility of the government's rationale for restricting speech," *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994), and "render[s] belief in that purpose a challenge to the credulous[,]" *White*, 536 U.S. at 780.

c) It Does Not Use The Least Restrictive Means.

Even if the City has an interest in informing the electorate who are the proponents of ballot initiatives, the Reveal Yourself Requirement is not the least restrictive way to do so. On-publication identification is "considerably more intrusive" than reporting at other times. *Heller*, 378 F.3d at 992;

see also McIntyre, 514 U.S. at 356. The City requires proponents to identify themselves on filings made with the City Clerk, Code § 9202, and in the local newspaper, Code § 9205, prior to circulating petitions, Code § 9207. Those filings are available to the electorate and satisfy whatever interest the City might have in compelling proponents to reveal themselves. Requiring identification at the point of contact with voters is not necessary and so is not narrowly tailored. *Buckley-II*, 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).

The Reveal Yourself Requirement is not narrowly tailored. It is overinclusive and underinclusive, and fails to use the least restrictive means. It therefore fails strict scrutiny review and is unconstitutional under the First and Fourteenth Amendments.

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

Even if exacting scrutiny is the proper standard of review, the Reveal Yourself Requirement fails because there is not the requisite "substantial relation" to a "sufficiently important interest." *See Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1003 (9th Cir. 2010) (articulating the exacting scrutiny standard). The City has no constitutionally cognizable interest in the Reveal Yourself Requirement. *See supra* Part II.A.3.a.(2). Even if the City has a constitutionally cognizable interest, the Reveal Yourself Requirement is not related to the interest. *See supra* Part II.A.3.a.(3). Thus, the Reveal Yourself Requirement is unconstitutional even when evaluated under exacting scrutiny.

The Ninth Circuit held under exacting scrutiny that compelled identification of petition circulators at the point of contact with the voters was unconstitutional. *WIN*, 213 F.3d 1132. The court held that "[t]he State's interest in combating fraud weighs minimally in the balance[,]" because "ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates." *Id*. at 1139. And "[e]ven if [the] interest in fraud detection were substantial, the required disclosure of names and addresses of paid circulators does not further that interest." *WIN*, 213 F.3d at 1139. The court also found the informational interest inadequate, explaining that "there is no logical explanation of how a voter who signs an initiative petition would be educated in any meaningful way by learning the circulator's name or address." *Id*. The court noted instead that the informational interest was adequately served by "a panoply of the State's other requirements that

have not been challenged." *Id*. The proffered interests were thus insufficient, so the requirement that circulators identify themselves to voters could not pass scrutiny. *Id*. at 1140.

In the same way, the constitutionally cognizable interests in disclosure recognized by *Buckley* and its progeny do not support the Reveal Yourself Requirement. The anti-corruption interest is inapplicable to ballot measures, and even if that were not so, it is not furthered by the compelled identification of proponents. *WIN*, 213 F.3d at 1139. *See supra*, Part II.A.3.a.(2). The enforcement interest is also inapplicable. *See supra*, Part II.A.3.a.(2). And no substantial relation exists between the Reveal Yourself Requirement and the informational interest because the identity of those offering petitions tells little about ballot measures. *WIN*, 213 F.3d at 1139. Besides, any informational interest is served by "a panoply of . . . other requirements that have not been challenged." *Id*. Prior to circulating a petition, proponents must identify themselves on filings with the City Clerk, Code § 9202, and in the newspaper, Code § 9205, which adequately serves any informational interest. This renders the informational interest supporting the Reveal Yourself Requirement negligible, if it exists at all. But the burden on speech is severe. Proponents must reveal themselves at the point of contact with voters and also may wrongly appear to agree with petition circulators' words and actions. The Reveal Yourself Requirement also chills speech by discouraging would-be proponents. 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. *See infra* Part I.A.3.a.(1).[8]

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[8]The Supreme Court and the Ninth Circuit have consistently struck laws creating hesitancy and unwillingness in speakers. *See, e.g.*, *Meyer*, 486 U.S. at 423 (striking ban on paid petition circulation because it had "the inevitable effect of reducing the total quantum of speech on a public issue"); *Buckley-II*, 525 U.S. 198-200 (striking law forcing circulators to wear name badges because it "discourages participation in the petition circulation process" and "inhibits communication with voters about proposed political change"); *WIN*, 213 F.3d at 1138 (striking law requiring disclosure of paid circulators' names on initiative petitions because it "discouraged would-be petition circulators from engaging in that activity.") The Ninth Circuit explains "it is precisely the risk that people will refrain from advocating controversial positions that makes a disclosure scheme of this kind especially pernicious." *WIN*, 213 F.3d at 1138. The City's law likewise risks chilling the speech of those willing to "advocat[e] controversial positions" by being proponents of ballot initiatives, which naturally involve challenges to the status quo. *Id*. The Reveal Yourself Requirement discourages participation in the initiative process, (Facts ¶¶ 64, 66), thereby "reducing the total quantum of [initiative-related] speech" available to the public. *Meyer*, 486 U.S at 423. Courts must

The Reveal Yourself Requirement thus fails exacting scrutiny, just like the reveal-requirement in *WIN*. It is unconstitutional under the First and Fourteenth Amendments.

B. The Reveal Yourself Requirement Is An Impermissible Content-based Regulation of Political Speech.

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, which forces proponents to include their identity in their message about proposed ballot measures, is thus a content-based regulation of political speech, just like the identity requirements found unconstitutional in *McIntyre* and *Heller*. *See Buckley-II*, 525 U.S. at 199 ("Circulating a petition is akin to distributing a handbill."). It is a "serious, content-based, direct proscription of political speech" because the City dictates the content of the proponent's political message. *Heller*, 378 F.3d at 993."If certain content appears on the communication, it may be circulated; if the content is absent, the communication . . . may not be circulated." *Id*. at 992. On-publication identity requirements are "considerably more intrusive" than after-the-fact reporting. *Id*. at 992; *see also McIntyre*, 514 U.S. 356 (calling a ban on anonymous political speech "more intrusive" than *Buckley*'s after-the-fact disclosure requirements). Laws such as the City's are "regulation[s] of pure speech," *McIntyre*, 514 U.S. at 345, that must be closely scrutinized.

The harm produced by the City's ban on anonymity goes beyond even that in *Heller* and *McIntyre.* The City Clerk will not accept signatures on initiative petitions that were circulated

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be "vigilant" when reviewing laws producing such effects in order "to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley-II*, 525 U.S. at 192.

anonymously. (Facts ¶¶ 45, 47-48.). Thus, the City's law not only directly intrudes on the Plaintiffs' First Amendment right to anonymous speech, but it excludes those wishing to exercise their rights from proposing citizen-initiated legislation. "[S]tatutes that limit the power of the people to initiate legislation are to be closely scrutinized[.]" *Meyer*, 486 U.S. at 423 (quotations and citations omitted).

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 II.A.3.a.(2) and II.A.3.a.(3). It is therefore unconstitutional.

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

"A statute must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). "A statute is vague if men 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). "Statutes that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on "arbitrary and discriminatory enforcement" by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Foti*, 146 F.3d at 638.

"First Amendment freedoms need breathing space to survive," so "government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). "[W]hen First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Foti*, 146 F.3d at 638 (*citing NAACP*, 371 U.S. at 433). *See also California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) (Courts considering laws touching First Amendment freedoms "apply the vagueness analysis more strictly, requiring statutes to provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles.").

Code Section 342, incorporated by Charter Section 903, defines the "proponent or proponents of an initiative or referendum measure" to mean, for non-statewide initiatives, "the person or persons who *publish* a notice or intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body." It is vital that those wishing to effect

change through the initiative process know what action is involved in publishing a notice, so they can know who proponents of initiatives are. Under the law, proponents must provide their names and signatures on the notice of intent filed with the clerk, and published in the newspaper, and on the circulated petition itself. Code §§ 9202, 9205, 9207. And the City Clerk will not process any signatures collected in support of an initiative petition, nor forward them to the San Diego County Registrar of Voters for verification, unless the proponent has complied with these requirements.

It is not clear from the statute, however, what "publish" means. The Plaintiffs believe it is the action 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, which seems to provide one set of rules for municipalities incorporating Section 9205's newspaper publication requirement, and another for municipalities that do not require publication. If the Plaintiffs are right, the true proponent for the Plaintiffs' initiative was Chula Vista Citizens, since they paid for the publication. (*Id*. ¶¶ 36, 54; *see also id*. ¶¶ 37-38, 46.)[9] The City, however, maintains that the publisher of the notice of intention to circulate is the natural person who signs and files it with the City Clerk, as required by Code Section 9202. (*Id*. ¶¶ 45, 47.) 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.

The law is not clear as to what action makes one the 'publisher' of the notice of intent to circulate and therefore the "proponent" of the initiative. The law simply does not provide the type of clarity necessary. *See Foti*, 146 F.3d at 638 ("when First Amendment freedoms are at stake, an

[9] 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.) The following language appeared on the First Petition: "Paid for by the Chula Vista Citizens for Jobs and Fair Competition, major funding by Associated Builders & Contractors PAC and Associated General Contractors PAC to promote fair competition (#1303758) PMB 342-374 East H Street, Suite A, Chula Vista, CA 91910." (*Id*.)

even greater degree of specificity and clarity of laws is required."). Because people of "common intelligence must necessarily guess at its meaning and differ as to its application[,]" the definition of "proponent" is unconstitutionally vague. *In re Doser*, 412 F.3d at 1062.

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, incorporated by Charter Section 903, 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"). It is not clear from the statute, however, what "bear a copy" means. Perhaps it must be a certified copy of the notice of intention required to be filed with the Clerk by Section 9202 (the "Clerk's Version"). Or maybe it is a non-certified but exact copy. Or maybe it is just a substantially similar copy. Neither the Plaintiffs, nor other citizens of the City, can reasonably tell from the wording of Section 9207.

The Clerk interprets Section 9207 to require that the Circulated Version be a one hundred percent, exact copy of the Clerk's Version, including containing the name and signature of the proponent. (*See* Facts ¶¶ 45, 47.) Yet Code Section 9202 only requires that the version of the notice of intention to circulate included on the petition as it is passed among the voters shall be "substantially" in the required form. It is not clear that a one hundred percent, exact copy is necessary for the notice to be substantially in the required form. In fact, it seems that something less than a one hundred percent exact copy should suffice, since in everyday usage "substantially" refers to that which relates to something, or has the substance of it. A synonym is "materially." *See* WEBSTER'S II: NEW RIVERSIDE UNIVERSITY DICTIONARY 1155 (1988).

The 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.) The City Clerk disagrees. (*Id*. ¶¶ 45, 47.) Some might suppose that, even if the wording of the notice of intention on the petition differed slightly in non-material ways from the wording filed with the City Clerk, it might still be "substantially" in the required form. The Clerk would disagree with that, too, since she requires a one hundred percent, exact copy. (*Id*.)

The Plaintiffs believe that if the State Legislature had intended that the Circulated Version required by Section 9207 should be a one hundred percent, exact copy of the Clerk's Version required by Section 9202, they would have used a phrase clearly indicating that. And they would not have had to go outside of the vocabulary of the Elections Code to do so. For instance, the Code uses "certified copy" in Section 2100, "full and correct copy" in Section 9014, "complete copy" in Section 9084, "true duplicate copy" in Section 13266, "correct copy" in Section 9258, and "exact copy" in Section 19103. Had any of these phrases been used in Section 9207, the Clerk's interpretation that the Circulated Version must be a one hundred percent, exact copy of the Clerk's Version would be more reasonable. These phrases were not used, however. What the Legislature said was that the Circulated Version of the Notice "shall *bear a copy* of the notice of intention and the title and summary prepared by the city attorney," Code § 9207, which shall be "substantially" in the required form, Code § 9202.

The phrases "bear a copy" "in substantially" the required form does not 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."). Because people of "common intelligence must necessarily guess at its meaning and differ as to its application[,]" the requirement that the Circulated Version "bear a copy" of the Clerk's Version of the notice of intention is unconstitutionally vague. *In re Doser*, 412 F.3d at 1062.

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, incorporated by Charter Section 903, requires that the Clerk's Version of the notice of intention to circulate a petition required by Section 9202, the Circulated Version of the notice of intention required by Section 9207, 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. However, it does not explain what "in substantially the following form" means, nor clarify how closely one's notice of intention to circulate must conform with the example.

The meaning of "in substantially the following form" is vital to those wanting to engage in the

petition initiative process. The City Clerk will not process the signatures on initiative petitions which she deems have not complied with the requirements of Sections 9202, including its requirement that the various versions of the notice of intention be "in substantially the following form" as the example. (Facts ¶¶ 45, 47.) Nor will she forward those signatures to the San Diego County Registrar of Voters for verification. (*Id.* ¶ 48.) It is imperative, therefore, that the Plaintiffs and other citizens of Chula Vista as well be able to understand what, exactly, the phrase "in substantially the following form" in Section 9202 means.

One would expect the law to require an "exact copy" or something synonymous if the law required all of the information from the example to be present in the Clerk's Version, Newspaper Version, and Circulated Version. That the law rather requires only that the three versions be in a form "substantially" like the example suggests that an exact copy is not required. Still, it is not clear what (if anything) appearing in the sample notice of intention to circulate may be left out of the Clerk's Version, Newspaper Version, and Circulated Version. This does not 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."). 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.

CONCLUSION

As explained herein, the Natural Person Requirement, requiring proponents to be natural persons, and the Reveal Yourself Requirement, requiring proponents to identify themselves at the point of contact with the voters, are unconstitutional. So is Section 342's definition of "proponent," Section 9207's requirement that the Circulated Version of the notice of intention "bear a copy" of the Clerk's Version, and Section 9202's requirement that each of the various notices of intention be "in substantially the following form." With no material factual disputes, this Court should declare these provisions unconstitutional as a matter of law and permanently enjoin the Defendants from unconstitutionally enforcing them.

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Respectfully Submitted,

s/ Noel Johnson

Charles H. Bell, Jr. (SBN 060553)
Brian T. Hildreth (SBN 214131)
BELL, McANDREWS, & HILTACHK, LLP
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 445-7757
Facsimile: (916) 442-7759
Email: cbell@bmhlaw.com
Email: bhildreth@bmhlaw.com
Local Counsel for Plaintiffs

Gary D. Leasure (SBN 211160)
Workman Leasure, LLP
12626 High Bluff Drive # 150
San Diego, California 92130
Telephone: (858) 720-1992, Ext. 202
Facsimile: (858) 720-1990
Email: gleasure@workmanleasure.com
Local Counsel for Plaintiffs

James Bopp, Jr. (Ind. No. 2838-84)*
Joe La Rue (Ohio No. 80643)*
Noel Johnson (Wis. No. 1068004)**
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807-3510
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Email: jboppjr@aol.com
Email: jlarue@bopplaw.com
Email: njohnson@bopplaw.com
Lead Counsel for Plaintiffs

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PROOF OF SERVICE

I hereby certify that the foregoing document was served electronically on May 31, 2011 upon the following counsel via the Southern District of California's electronic filing system:

Bart C. Miesfeld – bmiesfeld@ci.chula-vista.ca.us

Brian T. Hildreth – bhildreth@bmhlaw.com

Charles A. Bird – cbird@luce.com

Charles H. Bell, Jr – cbell@bmhlaw.com

Edward P. Swan, Jr – pswan@luce.com, dcharles@luce.com

Gary D. Leasure – gleasure@garydleasure.com

George M. Waters – george.waters@doj.ca.gov

s/ Noel Johnson
Noel Johnson (Wis. No. 1068004)
Attorney for Plaintiffs
njohnson@bopplaw.com