No. 12-55726

United States Court of Appeals for the Ninth Circuit

Chula Vista Citizens for Jobs and Fair Competition, **Lori Kneebone**, **Larry Breitfelder**, and **Associated Builders and Contractors of San Diego, Inc.**, *Plaintiffs-Appellants*,

v.

Donna Norris, in her official capacity as City Clerk of Chula Vista, **Mayor Cheryl Cox**, in her official capacity as Mayor and Member of the Chula Vista City Council, and **Pamela Bensoussan**, **Steve Castaneda**, **John McCann**, and **Rudy Ramirez**, in their official capacities as Members of the Chula Vista City Council, *Appellees*, *and* **State of California**, *Intervenor-Appellee*.

Appeal from the United States District Court for the Southern District of California, No. 3:09-cv-00897-BEN-JMA

Reply Brief of Appellants

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I. The Natural-Person Requirement Is Unconstitutional.

The issue is "[w]hether the . . . requirement . . . that a 'proponent' . . . be an individual elector ("Natural-Person Requirement"), i.e., not an association (incorporated or not), is unconstitutional . . . ." Plaintiffs' Br. ("**Br.**") 2 (underscoring added). California erroneously re-frames this issue as turning on corporate status: "Does this requirement 'suppress political speech on the basis of the speaker's corporate identity' in violation of the First Amendment? . . . ." State's Br. ("**State-Br.**") 1 (underscoring added). But Plaintiffs challenge the Requirement as applied to all associations (incorporated or not)—including associations of, or including, electors, such as Chula Vista Citizens, of whom electors Kneebone and Breitfelder are members. The State and City (collectively "**government**") ignore the fact that Chula Vista Citizens includes electors, which vitiates arguments about "foreigners" being proponents of initiatives, even were such arguments constitutionally cognizable (they are not, *see* Br.26-27).[1]

The *government* bears the burden of constitutionally justifying the Requirement as applied to such associations and all associations.[2] It fails.

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[1] Government may restrict political expression and association of *non-American*, foreign nationals, *Bluman v. FEC*, 800 F.Supp.2d 281, 286-89 (D.D.C. 2011), *aff'd without op.*, 132 S.Ct. 1087 (2012), but not of other Americans.

[2] *See, e.g.*, *Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010) (strict-scrutiny

A. The City's Requirement Is Not Mandated by Any Provision, and *Cities in Similar Situations Do Not Require It, Undercutting Any Interest.*

In Part I.A (Br.7-12), Plaintiffs responded to the district court's description of Plaintiffs' position by pointing to its position set out in court-ordered briefing—to which the court responded in part. ER–10 n.9.[3] Plaintiffs noted that, as to the City, the Natural-Person Requirement may be challenged as an enforcement policy, but no provision mandates the Requirement and, as a consequence, other cities *allow* associations to be initiative proponents without evidence of ill effect. This goes to the government's *lack of any evidence supporting an interest* in banning association-proponents. Br.7-12.

The *presence* of this evidence contrary to the government claim of an interest, coupled with the government's *lack* of evidence supporting the Requirement, is important because, where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

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burden on *government*); *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (exacting-scrutiny burden on *government*).

[3] The court does not dispute that "associations and corporations acted as ballot initiative proponents," only that "[n]one of these cases address the question of whether an association or corporation may be an official proponent . . . ." *Id.* But Plaintiffs cited these cases as indicating the *fact* that associations serve as proponents—*without evidence of problems*—not that the courts addressed whether they could be proponents.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (internal quotation marks and citation omitted); *see also Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.").

Plaintiffs demonstrated that a requirement that electors *propose* and *adopt or reject* statutes simply means that electors must "propose" initiatives by *signing* petitions in sufficient numbers to qualify them and "adopt or reject" statutes by *voting* to adopt or reject statutes, not that proponents must be electors. Br.9-10. The government never answers this argument, rendering meaningless the government's repetition that the initiative power is reserved to electors.[4]

California amended Code § 342 to require that state-wide initiatives have individual "electors" as proponents but that non-state-wide initiatives may have "persons" as proponents. Br.9. So California does not require that City initiative pro-

[4] Thus, the assertion that "Hiram Johnson . . . would . . . [not] allow[a corporation] . . . to propose initiatives," City-Br.21, is also meaningless (for multiple reasons). Electors "propose" initiatives by signing petitions in sufficient numbers. Corporations cannot be electors, so corporations cannot propose initiatives. But that says nothing about whether corporations may be proponents, which is entirely consistent with reservation of the initiative power to the people. The City's failure to distinguish between *elector* and *proponent* is evident from its declaration that "[n]o corporation, partnership, LLC, or unincorporated association has ever been an *elector*," City-Br.18 (emphasis added), which is irrelevant because they have been *proponents*, which is what is at issue.

ponents be individual electors.[5] Because cities may allow association-proponents, there is evidence that they have done so without evidence of harm.[6]

California asserts—without pointing to a single example in Plaintiffs' cited cases showing association-proponents—that "[t]hese cases use the term 'proponent' in a non-technical sense." State-Br.20 n.14. California is wrong. For example, California's argument necessarily asserts that this Court was using "proponent" in a non-technical sense when stating, in *U.S. v. Oakland*, 598 F.2d 300 (9th Cir. 1922), that " Nuclear Free Oakland, Inc. and Steven Bloom (the 'proponents'), sought to intervene as of right in this case before the district court as 'the drafters, sponsors, and proponents of the ordinance,'" *id.* at 301, and that "[t]here was no opposition to the proponents' attempted intervention and appellee United States concedes on appeal that they were entitled to intervene as of right in the district court," *id.* (citing two 9th Circuit cases where official initiative "sponsors"

[5] California argues that "Plaintiffs point to nothing in the legislative history" to show an intent to treat "elector" differently from "person." State-Br.20 n.14. Here as elsewhere, the burden of justifying the requirements at issue is on the *government*, not Plaintiffs, and the continued effort to shift the burden must be rejected. *See* footnote 2. But legislative history is only relevant where a statute is vague, and there is no vagueness in the differing requirements in Code § 342 for proponents in state-wide and non-state-wide initiatives. Since both "elector" and "person" are used, "person" cannot mean just "elector."

[6] The City inconsistently claims that "no interpretation of section 342 can be found to [allow association-proponents] as to any California city," City-Br.24, and that "other cities' activities [allowing association-proponents] is also immaterial," City-Br.25. Thus these "other cities" *do* interpret § 342 as allowing association-proponents.

or "proponents" had right to intervene). "Proponents" in the non-technical sense would lack standing to intervene because, as the district court said, "only the official proponents . . . have standing to defend the initiative in court." *See* ER–8. So this Court could not have used "proponents" in the non-technical sense.

Though it is the *government*'s burden to put forth real evidence of harm, not speculation, the government fails both to do so and to show how association-proponents elsewhere cause problems.

California tries to dodge its failure by arguing that Plaintiffs try to inject an issue not raised below and that they conceded that the City's Charter requires proponents as electors. State-Br.17-18.[7] But as noted above, the issue was raised in court-ordered briefing, the district court did address Plaintiffs' argument, ER–10 n.9, and Plaintiffs have from the beginning asserted that the City *interprets* its Charter and incorporated state statutes as requiring that proponents be individual electors.[8] But Plaintiffs raise no separate *issue* here, *see* Br.2-3 (two issues), because the City and State *require* that proponents be individual electors.[9]

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[7] *See also* City-Br.16-21.

[8] This is evident from a citation in the State's own brief: "[P]laintiffs' verified complaint alleges that 'At issue in this lawsuit is the constitutionality of . . . [state statutes] as incorporated into the [City] Charter . . . *and enforced by agents of the City*.'" State-Br.18 n.13 (emphasis added). This has been clear from the beginning of this case. *See, e.g.*, ER–38 (VC–¶ 10) ("The Plaintiffs also challenge the City's *interpretation* of the . . . Code and their Charter that a 'proponent' must be a natural person." (emphasis added)).

[9] The City's suggestion that this Court might abstain or refer an issue to the

California cannot dodge the core issue, which is that the government fails to prove a cognizable harm justifying the Natural-Person Requirement because—as the heading of Part I.A. here and in Plaintiffs' opening brief states—*"Cities in Similar Situations Do Not Require It, Undercutting Any Interest*."

B. Associations' Right to Be Proponents Is Fully Protected by First Amendment Rights to Speech, Association, and Petition Under Strict Scrutiny.

In Part I.B (Br.12-21), Plaintiffs established that being an initiative proponent is fully protected by First Amendment rights. Included was the fact that "the reservation of initiative power to the people does not address *who may ask* electors to propose (by signing petitions) that an initiative be on the ballot and to vote for the initiative, thereby turning a proponent's idea into law," Br.13, which the government never answers. Plaintiffs also showed that "*Meyer-I* made it clear that initiative *proponents* 'advance . . . [their] own political expression' in their activities to qualify and enact an initiative." Br.18 (quoting *Meyer v. Grant*, 828 F.2d 1446, 1452 (10th Cir. 1987) (en banc) ("*Meyer-I*"), *aff'd*, 486 U.S. 414 (1988) ("*Meyer-II*"). And *Meyer-II* established that "the First Amendment rights of *both* propo-

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California Supreme Court, City-Br.26-29, should be ignored because the foregoing discussion shows that there is no doubt that the State and City *enforce* a Natural-Person Requirement, which is unconstitutional on federal-law grounds, so no *Pullman*-abstention criterion applies. *See* City-Br.27-28. The City concedes that abstention would be improper if the Requirement restricts advocacy, City-Br.29 n.12, and *Meyer-II* makes it clear that being an initiative proponent is about core First Amendment advocacy. *See infra* Part I.B.

nents (appellees) *and* their paid circulators (not before the Court) are at issue in the initiative process and both . . . [are] protected by strict scrutiny." Br.18 (summarizing argument based on 486 U.S. at 417, 420, 424). The government did not refute this controlling authority and argument. Instead, California[10] made ten flawed arguments.

First, California reiterates that "[t]he [i]nitiative [p]ower is [r]eserved to the [p]eople . . . ," State-Br.14, but reservation is unaffected by associations asking the electors to propose (by signing petitions) and enact (by voting) laws by initiative. *See supra* at 3.

Second, California argues that Plaintiffs insert a new issue by showing that some California cities allow association-electors without evidence of harm, but this is no new issue but is evidence of no harm from California cities allowing association-proponents. *See supra* Part I.A.

Third, California argues that "[t]he [a]ct of [p]roposing an [i]nitiative [i]s a [l]egislative [a]ct [p]roperly [l]imited to [m]embers of the [l]egislative [b]ody—the [e]lectorate," State-Br.21, but fails because *Meyer-II* held that initiative *proponents* have First Amendment, strict-scrutiny protection. *See supra* at 6-7.[11]

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[10] In a 57-page brief, the City makes similar arguments (here and elsewhere) yet fails to refute Plaintiffs' essential arguments, so City arguments are addressed specifically only as they differ.

[11] The City says this is a ballot-access case, City-Br.12, ignoring *Meyer-II*. It argues that "persuasion is not the function of a Proponent in election law," City-

Fourth, California attempts an argument about whether the issue is properly framed as limiting "proponents" to *natural persons* versus *electors*, State-Br.23, but ignores Plaintiffs' Issue 1, which defines the "*Natural-Person* Requirement" as the "requirement . . . that a 'proponent' . . . be an *individual elector* . . . , i.e., not an association (incorporated or not) . . . ," Br.2 (emphasis added), so that argument dissolves. Nonetheless, "natural person" captures well the government's position that associations (incorporated or not) may not be proponents, even if they are comprised of, or include, electors.

Fifth, California argues that "there is a geographical component to being an elector." State-Br.23. Because that is about whether an *interest* supports the Requirement, it is addressed in Part I.C.

Sixth, California argues that the Natural-Person Requirement imposes "no

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Br.33, again ignoring *Meyer-II* and trying to convert a proponent's effort to convert an idea and implementing language into law to just certain ministerial aspects of that overall First Amendment effort—like saying that running a newspaper political ad is not speech because it's merely about filling out and signing a newspaper ad agreement and paying the newspaper. The City complains that Plaintiffs "relegate[] . . . *Doe v. Reed*, 130 S.Ct. 2811 [(2010),] to a sideline and a footnote." City-Br.33. Plaintiffs discussed *Reed* in the disclosure context relating to Issue 2, but the City's effort to use it to show that being an initiative proponent lacks First Amendment protection ignores *Meyer-II*, which controls, and ignores the fact that being a proponent is about trying to get an idea and implementing language enacted as law (i.e., expression). For similar reasons, the City's reliance on *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009), is erroneous because it is not only nonbinding here but is irrelevant because it is not about being an initiative proponent—and *Meyer-II* controls in any event.

meaningful limit on speech" because "associational plaintiffs" can be 'proponents' in the non-technical sense of the word, i.e., "[i]n normal usage, the organizational plaintiffs were proponents of Proposition G." State-Br.24. Since Plaintiffs already demonstrated that the availability of alternative forms of speech, expression, and petition cannot eliminate a First Amendment burden, Br.18-20, and that the Requirement is a speech-association-petition ban, Br.20-22, the government was required to show why its "alternatives" argument *survives*, rather than simply *reasserting* it. To reiterate, *Meyer-II* expressly rejected—in the *initiative* context, where the *proponents* were the appellees—the idea that alternatives relieved First Amendment burdens. 486 U.S. at 424.[12]

Seventh, California tries to downgrade the free-speech, -association, and -petition dimension of what an initiative proponent does by saying that being a proponent is just about "formally proposing an initiative to the electorate," State-Br.24, i.e., it's just signing and filing things. This is the district court's "qualitatively different" argument, which argument was already refuted. Br.14-16. The government needed to counter Plaintiffs' refutation, not just reiterate a flawed argument.

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[12] As *Meyer-II* put it, in part, *id.*:

> Appellants argue that even if the statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open to appellees and because the State has the authority to impose limitations on the scope of the state-created right to legislate by initiative. Neither of these arguments persuades us that the burden imposed on appellees' First Amendment rights is acceptable.

Meyer-I and *Meyer-II* rejected this sort of argument. Br.14-16 (citing 828 F.2d at 1453 n.10 and 486 U.S. at 421). As Plaintiffs previously argued,

> [A] proponent starts by expressing an *idea about an issue* that the proponent believes should be law, then the proponent *crafts specific language* to make it so, satisfies the notice and publication rules for that language, circulates petitions (or hires it done) to get electors signatures to propose that language on the ballot, *advocates* for that idea and language, and (hopefully) persuades sufficient electors to vote for that idea and language to become law. That activity is as much about ideas, expression, a desire for change, and discussing the proposed change's merits as is the work of a petition circulator, and more so.

Br.16. The government needed to prove this untrue. It fails.

Eighth, California attempts to distinguish cases, but to no effect.[13] California says *Citizens United* is "inapposite" because the electioneering-communications ban was "a near-total ban on corporate political speech during the critical period immediately before an election" based "'on the basis of the speaker's corporate identity.'" State-Br.24 (citing 130 S.Ct. at 907 and quoting *id.* at 913). The purported distinction is that "the elector requirement has a negligible effect on corporate speech and is the inevitable consequence of limiting legislative acts to mem-

[13] The City attempts an extended series of such case distinctions, City-Br.38-46, but the cases Plaintiffs cited stand for the analytical points for which they are cited, so this Court should ignore the City's distinctions. For example, *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), holds that, where government chooses to have judicial elections, it must afford First Amendment protection, just as it must where it chooses to have initiatives. *See* Br.16. The City's attempted distinction that *White* was about judicial elections is meaningless to the analysis.

bers of the legislative body." State-Br.25. Both of these assertions are erroneous. Regarding "negligible effect," Plaintiffs have already shown that the Natural-Person Requirement is a *ban* on an association's *own speech*, Br.20-21, and its effect is not constitutionally negligible, *see supra* Parts I.A and B; *see* Br.14-21. Regarding "limiting legislative acts," Plaintiffs have already shown that being an initiative proponent has First Amendment protection under *Meyer-II*. *See supra* at 9. The government needed to refute these arguments, not merely reiterate them in an erroneous distinction.

California says *Meyer-II* is "inapposite" because "Plaintiffs do not allege that the elector requirement puts any burden at all on the ability to qualify measures for the ballot." State-Br.26. *Meyer-II* did note that not being able to hire circulation petitioners would limit how many persons proponents could reach with their idea and speech and thereby decrease their likelihood of qualifying an initiative, 486 U.S. at 422-23, but that was because the case was about whether proponents could exercise their First Amendment rights *by hiring petition circulators*, which is not at issue here. So California's argument is irrelevant. The associational Plaintiffs here are banned from being proponents, which is an onerous, forbidden burden on their First Amendment rights. The fact that California has an *active* initiative system is a red herring. Plaintiffs are not required to prove that California's initiative quantity is hampered by their inability to be association-proponents. Rather, the

government has the burden to justify its Natural-Person California's argument, which burden cannot be shifted and which cannot be met by such erroneous arguments. *Meyer-II* applied ordinary First Amendment, strict-scrutiny analysis to the initiative process, which controls here, leaving the burden of proof on the government. Br.17-18, 20-21.

Ninth, California reverts to its flawed statement of the issue (as being about corporate status, *see supra* at 1), with its conclusion regarding First Amendment protection: "The fact that corporations enjoy First Amendment rights does not ipso facto grant them all the constitutional rights of electors. Corporations have no constitutional right to be the formal proponents of an initiative." State-Br.27. California must constitutionally justify its Natural-Person Requirement as applied to all associations, including those comprised of, or including, individual electors, not just corporations. It fails as to all.[14]

In sum, *Meyer-I* and *Meyer-II* established that both initiative *proponents*' and their *petition-circulators*' First Amendment rights in the initiative process are protected by strict scrutiny. Br.13-18, 21.[15] Proponents start with an *idea* for a law,

[14] Notably, the government completely abandons the district court's greater-includes-the-lesser argument, *see* City-Br.35 (conceding point), which Plaintiffs refuted. Br.15-16.

[15] These cases refute the City's colorful argument that Plaintiffs' fail to "clothe [their] naked assumption with any fabric of reasoning or precedent." City-Br.45-46.

craft specific language for it, satisfy notice and publication rules, and advocate for their idea in petitions (perhaps through hired circulators, though they do not lose their own speech rights by doing so) and on the ballot. Trying to convert your idea and language into law is core political speech, not mere paper shuffling. The governments' inability to refute these controlling holdings, means that First Amendment rights are involved and strict scrutiny applies.

C. The Natural-Person Requirement Is Unconstitutional.

What interests do the State and City advance for strict scrutiny?

California's asserted interest in preventing association-proponents is simply that "if the electors requirement is removed, the geographical requirement also is removed," State-Br.23, so "non-residents and corporations with no long-term interest in the welfare of Chula Vista and no roots in Chula Vista could propose legislation for . . . Chula Vista," State-Br.23. But Plaintiffs' already refuted this argument. Br.26-27. So California needed to prove that refutation inadequate, not just reassert the "foreigner" argument. And the government ignores the fact that Chula Vista Citizens includes electors, which vitiates arguments about "foreigners" proposing City initiatives, even were such arguments constitutionally cognizable. "A court applying strict scrutiny must ensure that a compelling interest supports *each* application of a statute restricting speech." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 478 (2007) (controlling opinion) (emphasis added) ("*WRTL-II*"). More-

over, the government not only fails to provide evidence, instead of forbidden speculation, but it ignores the contrary evidence that other California cities allow association-proponents without evidence of harm. *See supra* Part I.A.

The City's arguments similarly fail. It recycles the argument that only the people should govern themselves, City-Br.54-56, without responding to Plaintiffs' refutation that only the people can sign petitions and vote on initiatives, so they do govern themselves. *See supra* at 3.

The City argues that "[e]lectors have a stake in the future of the City; general corporations have interests only in their profits, and nonprofits have interests only in their mission, which may be antithetical to the interests of the City's electors." City-Br.55-56. This argument is asserted without citation or evidentiary support, making it pure speculation, which fails the government's burden of proving its asserted interests. It ignores application of the Natural-Person Requirement to Chula Vista Citizens—including *Chula Vista* electors and formed to pass a *Chula Vista* Initiative—which clearly has a "stake" (were that a constitutionally permissible interest; it is not). It relies on a corporate anti-distortion interest expressly rejected (as to for-profit and non-profit corporations) in *Citizens United*, 130 S. Ct. at 912.[16] Corporations and other associations long have had recognized First

[16] The City's anti-distortion argument is so weak that it was *abandoned* by the federal government in *Citizens United*, 130 S.Ct. at 912, and *rejected* by the Court:

We return to the principle established in *Buckley* and *Bellotti* that the Govern-

Amendment rights in the initiative context. *See, e.g.*, *Bellotti*, 435 U.S. at 789-95. Restricting nonprofits' issue-advocacy speech is forbidden. *See, e.g.*,*WRTL-II*, 551 U.S. at 449. And in any event, only *electors* can propose initiatives (by signing petitions in sufficient numbers) and *enact or defeat* initiatives (by voting on them), so even if the electors-have-a-stake argument were constitutionally cognizable, the argument is meaningless because electors control any initiative's outcome.

The City argues "corollary pragmatic interests." City-Br.56-57. These are refuted-but-recycled arguments, speculation, and a concession. *Recycled* is the argument that the people should propose initiatives, with the twist that cities shouldn't have to spend money on initiative qualification and election otherwise. But no initiative is proposed and enacted unless enough *electors* sign petitions and vote for the measure, *see supra* at 3, in which case the cost is required because the people choose to reserve the initiative power. And the City again ignores the application of the Natural-Person Requirement to associations, such as Chula Vista Citizens, which includes electors.

The City's *speculative* argument is the notion that "cynicism" might flow from

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> ment may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

Id. at 914 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)), *overruling Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (which had recognized the anti-distortion interest).

conflicting initiatives concerning a strip-club. City-Br.57. Supposedly, there would be cynicism if a strip-club were the proponent of an initiative, but not if it "importune[d] its employees to do the same," which would supposedly be unlikely because those strip-club employees would have such "respect . . . for . . . democracy" that they would be "pragmatic[ally] deterr[ed]" from being proponents. *Id.* This is not only rank speculation, a failure to produce real evidence of harm, and an overt effort to portray corporate proponents in an unflattering light (though strip-club employees are portrayed as paragons of respect for democracy), but it makes no sense and is paternalistic. It makes no sense by suggesting that a strip-club might try to launch multiple initiatives to create confusion to protect its interests but that its democracy-loving, strip-club employees—whose jobs depend on the club thriving—would not. It is paternalistic because it says that electors are too stupid to sort out what those wily strip-clubs might do, though the U.S. Supreme Court has rejected such a "'highly paternalistic' approach," i.e., "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." *Bellotti*, 435 U.S. at 791 n.31 (citation omitted). And the city's suggestion of outside control of a strip-club revives the "foreigners" argument already refuted. *See supra* at 12-13. To borrow the City's colorful language, the City "does nothing to clothe [its] naked [strip-club argument] with any fabric of reasoning or precedent." City-Br.45-46.

The City's *concession* is that an association (even if comprised of, or including, electors) must "find an elector to sponsor an initiative," City-Br. at 57, which concedes that an association may not exercise its *own* First Amendment free-speech, -association, and -petition rights. This brings us full cycle to the fact that First Amendment rights apply here, people who chose to associate to amplify their voices are barred from doing so, the Natural-Person Requirement mandates speech by proxy. and it requires people to forgo association rights to speak and petition. These First Amendment burdens are forbidden unless the government bears its burden of showing by non-speculative evidence that it has a compelling interest to justify the Requirement, which it must prove is narrowly tailored to that interest. The government has failed to meet its burden.

Crucially absent from the government's extensive briefing is any reliance on the one governmental interest on which the district court relies, ER–9, that might actually be attributable to *proponents*—an anti-drown-out interest. Plaintiffs refuted that interest. Br.25-26. The failure of the government to even attempt to rehabilitate it amounts to an abandonment of the argument and a concession that it is indefensible.[17] Again, the government fails to meet its burden.

[17] This abandonment is like the federal government's abandonment of the unconstitutional anti-distortion interest in *Citizens United*. *See supra* at footnote 16. The drown-out and anti-distortion theories are somewhat similar analytically and identical in their unconstitutionality as cognizable interests here.

In sum, the Requirement is unconstitutional as applied to associations, such as Chula Vista, that are comprised of, or include, electors. To the extent that the government has a cognizable interest in requiring electors to be proponents (which interest the government has failed to prove), a less restrictive means of asserting that interest would be to require that associational proponents be comprised of, or include, electors, rather than banning such associations from being proponents.

The Requirement is also unconstitutional as applied to other associations (excluding foreign nationals, *see supra* at footnote 1) because the government has failed to provide a constitutionally cognizable interest in requiring that proponents be individual electors.

And because the government has failed to constitutionally justify any application of the Natural-Person Requirement, it is facially unconstitutional for being substantially overbroad. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

II. The Requirement that Proponents Disclose Their Identity on the Circulated Version of the Initiative Petition Is Unconstitutional.

The issue is "[w]hether the requirement that the identity of an initiative proponent be disclosed at the point of actual petition circulation[18] among the voters for requisite signatures ("**Reveal-Yourself Requirement**") is unconstitutional under

[18] Plaintiffs only challenge the third of three disclosures, i.e., the Circulated-Version disclosure. Br.34 n.15. They do not challenge the Clerk's-Version disclosure or the Newspaper-Version disclosure. *Id.* Thus, any government arguments not narrowly focused on this Circulated-Version disclosure are irrelevant.

the First Amendment, both as applied to Plaintiffs and facially." Br.3. This requirement is unconstitutional for barring anonymous petition circulation at the point of circulation, Br.34-55, and for being a content-based speech proscription, Br.55-57.[19]

Key legal analytical points control. First, the activity at issue is actually placing a petition before voters, which involves "core political speech" for which the First Amendment's protection is "at its zenith," protecting both proponents and the circulators who act on the proponents' behalf. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-87 (1999) ("*ACLF*") (quoting *Meyer-II*, 486 U.S. at 422, 425). Br.34-35. Second, the First Amendment's protection for petition circulation includes protection for *anonymous* circulation under strict scrutiny. Br.35 (collecting cases).[20] Third, the Ninth Circuit has also recognized the right to anonymous speech in the initiative context. Br.35-36. Fourth, disclosure in one context does not waive or diminish one's right to anonymity in another context.

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[19] The government does not directly respond to the content-based argument, though California acknowledges that "the challenged statutes . . . regulate the contents of the initiative petition itself." State-Br.30.

[20] The right to anonymity in the initiative context protects anonymity for a *range* of reasons, from letting the language of an initiative speak for itself, to avoiding retaliation, to simply protecting privacy. Br.53 (citing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995)). That Plaintiffs asserted multiple reasons for desiring anonymity is completely consistent with this. Br.55. And the "blanket exemption" analysis for *groups* subject to harassment is not a claim that Plaintiffs make, nor is it applicable here, Br.53-54 (citing *Buckley*, 424 U.S. at 74), making the State's argument on this point, State-Br.43-45, irrelevant.

Br.54. These decisions remain controlling law, Br.37, and are the applicable federal constitutional analysis requiring strict scrutiny, Br.37-44. Under strict (or even exacting) scrutiny, the government has failed to prove any cognizable interest to justify the Requirement, making it unconstitutional. Br.42-55. And the Requirement is an impermissible content-based regulation of political speech. Br.55-57.

So how does the government attempt to counter these arguments? The City defers to the State. City-Br.3. California makes four erroneous arguments (with flawed sub-arguments), which fail to meet and overcome the arguments that Plaintiffs have already made.

First, California declares the Requirement generally "minimal." State-Br.29. It argues that by the time a proponent faces Circulated-Version disclosure he or she has already made the two disclosures described above in footnote 18. State-Br.29. But that argument fails on three grounds, which Plaintiffs have already established and which the government fails to refute before reasserting its already-answered arguments.

(a) There is a right to anonymous speech on initiatives that requires strict scrutiny, so *as a matter of law* the inability to speak anonymously in this context constitutes a severe burden. Br.34-42.

(b) Disclosure in one context does not waive (or diminish) the right to ano-

nymity in other contexts, Br.54,[21] but the State fails to even attempt to refute the cited cases that establish this.

(c) The prior Clerks's-Version and Newspaper-Version disclosures actually *reduce the government's interest* in disclosure because any informational interest has already been met by two disclosures, which are less burdensome and which make any government interest so minimal as to be non-cognizable and the Requirement inadequately tailored. Br.50.[22]

Thus, the proper analysis asks whether—given that strict scrutiny applies—the government meets its burden of constitutionally justifying the Circulated-Version disclosure. The government's attempt to evade the proper analysis fails its burden of proof.

As part of its minimal-burden argument, California next adds that (a) there is "no burden on any particular individual" because someone else can be the proponent and (b) "[n]o one has ever suggested that an initiative proposal has failed for want of a proponent." State-Br.29-30, 43. Both arguments are profoundly constitutionally flawed.

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[21] For example, Mrs. McIntyre disclosed herself on some flyers and not others but yet had an undiminished right to anonymity that prevailed, *McIntyre*, 514 U.S. at 337. *See* Br.54.

[22] Mrs. McIntyre's right to anonymous speech was sustained against a compelled-disclosure provision because there were less-restrictive means of meeting any governmental interest than the more intrusive on-communication disclosure. *McIntyre*, 514 U.S. at 356. *See* Br.48.

(a) The idea that there can be no speech burden on a *particular* would-be speaker (proponent) because *someone else* could speak (be a proponent) is contrary to all First Amendment analysis. The First Amendment protects the right of *specific* persons to speak. It does not guarantee merely that someone, somewhere can speak (assuming they don't mind these unconstitutional burdens on their speech).[23] California's flawed argument would eliminate *any* First Amendment burden on *any* speaker in *any* context—because speakers can always just remain silent and hope another will say what they want said, which of course does not protect the would-be speaker's speech right. California's argument is a variation on the there-are-alternatives argument already addressed and rejected, i.e., that there is no burden on speech because would-be speakers can do other things (here the alternative would be not speaking or trying to get someone else to try to convert their ideas and implementing language into law). *See supra* at 9 & n.12. California's argument is equivalent to telling Mrs. McIntyre that she has no burden on her First Amendment right to anonymous speech on the initiative she opposed because someone else can hand out flyers against the initiative if she wants to remain anonymous. She has no burden other than finding a surrogate (who doesn't seek

[23] California's argument that "[t]here are approximately 100,000 registered voters in Chula Vista," State-Br.30 n.18, does nothing to protect the First Amendment rights of *particular* elector-proponents who want to remain anonymous at the point of petition circulation.

anonymity) to speak by proxy. That did not work in *McIntyre*, and it cannot work here. California's flawed argument utterly fails its burden of proof to show that the Requirement is constitutional as applied to a proponent who *wants* to be a proponent and *wants* to do so anonymously at the point of circulation.[24]

(b) The government's notion that there is no burden on a particular would-be proponent *because there are lots of initiatives* is an irrelevant red herring, *see supra* at 11, that does nothing to meet the government's burden. It is equivalent to telling Mrs. McIntyre that there is no burden on her right to anonymous speech because there are lots of initiatives. Such an assertion is a profound misunderstanding of First Amendment analysis.

Second, California declared any burden from the Requirement "nonexistent" as applied to the individual plaintiffs because they had disclosed themselves in other contexts. State-Br.31.[25] But that argument has already been addressed in the opening brief, Br.54, and above, *supra* at 20, which argument the government needed to refute rather than just reasserting this flawed argument. In short, disclosure in one context does not waive a right to anonymity in another or in any way

[24] California's argument that there is no First Amendment burden because it burdens "a maximum of three people," State-Br.42, is similarly flawed because the First Amendment protects those three people, just as it protects any *particular* speaker without regard to whether there is a burden on other people.

[25] California tries to distinguish the cases on factual grounds, State-Br.30, but as before, the government fails to show that these cases do not stand for the controlling analytical points for which they are cited.

decrease the burden of the on-document, at-the-point-of-circulation disclosure Requirement on a proponent's speech.

Third, California attempts to change the analysis to a "forum" analysis. State-Br.33. But at issue is the right to anonymity at the point of petition circulation, as to which context the U.S. Supreme Court has already applied standard First Amendment strict scrutiny, precluding the application of mere forum analysis now. *See* Br.12-21. The State's reliance on non-binding state-court decisions instead of the on-point U.S. Supreme Court decisions does not meet its burden. As *Meyer-I* and *Meyer-II* indicated, the initiative *proponents*, who were the parties, had First Amendment rights, and the non-party circulators, who had a right to anonymity at the point of petition circulation did their circulation on behalf of the proponents, *see supra* at 19, so the fact that forum analysis was not applied to the circulators' free-speech rights indicates that it ought not to be applied to the proponents' rights either.[26] In any event, the government overreaches with its analysis. It

[26] Though California's cited state-court cases do not control here, they also are not on point with the issue here, which is whether initiative proponents have a right to anonymity at the point of petition circulation. For example, in *Clarke v. Burleigh*, 4 Cal.4th 474 (1992), the California Supreme Court decided a case having to do with a judicial candidate's biographical statement in a ballot pamphlet. State-Br.35. That judicial candidates could not mention other candidates there has nothing to do with whether initiative proponents have a right to anonymity in the circulation context, similar to the right of petition-circulators to do so anonymously. The State's cited case is about what a candidate may say; this case is about whether an initiative petitioner may be compelled to speak (by identifying oneself).

says a right to anonymous speech can be brushed aside where there is some form of required government speech on a document. This would deprive Mrs. McIntyre of her right to anonymous speech because there was supposed to be government-required speech on her flyers, i.e., a disclosure statement. *McIntyre*, 514 U.S. at 338. Under California's theory, that required disclosure statement would be a non-public forum in which Mrs. McIntyre could be banned from omitting her name under complaisant scrutiny. That is not what happened. Forum analysis is not the controlling analysis.[27]

Fourth, California argues that the Requirement passes the test applied in *Reed*, 130 S.Ct. 2811. State-Br.38. But Plaintiffs already showed why *Reed* is inapplicable. Br.37, 46 n.18. The State again fails to meet its burden because it fails to refute these previously responses and instead merely reasserts answered arguments.

Finally, turning to the required strict-scrutiny analysis (or even exacting scrutiny), does the government meets its burden of demonstrating by real evidence that the Reveal-Yourself Requirement is appropriately tailored to a sufficient interest? Or put another way, given that Plaintiffs have already shown that the Requirement

[27] California does acknowledge that the "most important element" of a petition, "the proposal itself," is left to the discretion of the proponent, which is a tacit concession regarding the argument in Part I, *supra*, i.e., being a proponent is really about "the proposal itself," not just signing and filing things. So it really is about particular speech (the idea in implementing language) and is protected by the First Amendment.

is not so justified, Br.42-55, has the government refuted Plaintiffs' arguments already made? No. Plaintiffs showed that no cognizable interest applies to the Requirement at issue, but that, even if it did, the tailoring is unconstitutional. Br.44-55. California asserts informational and electoral-integrity interests, State-Br.41, 45, that have already been addressed. And though the tailoring flaws of such arguments have already been addressed, it is instructive here to focus on what California argues on tailoring here in its brief. California says that "[a]ssuming that California can require initiatives to have proponents (and it can), there is no conceivable objection to a law that requires petition-signers to be informed who the proponents are." State-Br.42. But this tailoring argument fails because it tries to evade the tailoring issue, i.e., whether the Clerk's-Version and Newspaper-Version disclosure are the less restrictive, less burdensome, means of meeting any such informational interest the government may have. Since the government fails to address and refute that analysis, it fails to prove the necessary tailoring and the Requirement is unconstitutional.

Moreover, California compounds its tailoring failure by arguing that tailoring is especially "easy to meet here" because "the *actual burden* of the required disclosure is minute." State-Br.42 (emphasis in original). First, it argues that only three people (proponents) are affected. But the First Amendment protects *particular* would-be speakers. *See supra* at 21-23 & n.24. Second, it argues that propo-

nents have already disclosed their identities. State-Br.42. But that reduces the governmental interest, without reducing proponents' right to anonymity. *See, e.g.*, Br.54. Third, California argues that "there is no evidence that the disclosure requirement has chilled use of the initiative process." State-Br.43. But the fact that there are lots of initiatives does nothing to repair the government's flawed tailoring. *See supra* at 11, 23. So the government fails to meet its tailoring burden.

In sum, under the controlling analysis set out in controlling decisions such as *Meyer-II*, *ACLF*, and *McIntyre*, *see* Br.34-57, the government has failed to establish that the requirement that initiative proponents reveal themselves at the point of circulation is appropriately tailored to a cognizable interest. It is therefore unconstitutional as applied and facially.

Conclusion

For the foregoing reasons the district court's order granting summary judgment to Appellees should be reversed and the case remanded with an order to enter summary judgment for Appellants.

Respectfully submitted,

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