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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

ILLINOIS OPPORTUNITY PROJECT, Plaintiff, v. **STEVE BULLOCK**, in his official capacity as governor of Montana, and **MEGHAN HOLMLUND**, in her official capacity as chief of the State Procurement Bureau, Defendants.	Case No. 6:19-cv-00056-CCL MEMORANDUM OF LAW IN SUPPORT OF THIRD MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER SOURCES

INTRODUCTION

In recent months, three federal judges have struck down regulations mandating that issue-advocacy organizations disclose their donors. Considering a municipal ordinance requiring contractors to disclose their sponsorship of the National Rifle Association (NRA), Judge Wilson found the NRA's concerns that it will lose donors are "well-founded," and similarly that the contracting company's fears that it will lose "fair consideration of his bids" by the city are also "well-founded." *Nat'l Rifle Ass'n (NRA) v. City of Los Angeles*, 2:19-cv-03212-SVW-GJS, at *19 (C.D. Cal. Dec. 19, 2019).

Judge Martinotti noted that donors to advocacy organizations operate in "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others." *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM, 2019 U.S. Dist. LEXIS 170793, *61 (D.N.J. Oct. 2, 2019).

Ruling for another non-profit, Judge Cole said, "There is no question that public disclosure of donor identities burdens the First Amendment rights to free speech and free association." *Citizens Union of N.Y. v. AG of N.Y.*, No. 16-cv-9592, 2019 U.S. Dist. LEXIS 169438, *30 (S.D.N.Y. Sep. 30, 2019).

And in a fourth case, though she upheld disclosure requirements for express advocacy, Judge Herrera said, "This evidence of threats, harassment, and retaliation against other persons affiliated with nonprofit free enterprise groups and media accounts of public persons encouraging reprisals for speech by those with opposing views is alarming." *Rio Grande Found. v. City of Santa Fe*, No. Civ. 1:17-cv-00768-JCH-CG, 2020 U.S. Dist. LEXIS 15710, at *46-47 (D.N.M. Jan. 29, 2020).

This Court should similarly recognize that all Americans, regardless of their political affiliation, are entitled to speech and association rights under the First Amendment. All Americans, no matter the causes they support, benefit from privacy in their financial affairs and political views. Disclosure burdens those rights, chilling the speech of Plaintiff Illinois Opportunity Project ("IOP") and its members because of the "cancel or call-out culture" which characterizes our times.

Defendants have adopted a policy (hereinafter, "the Order") which invades the anonymity and privacy of IOP and its supporters by forcing disclosure of their association as a condition of bidding on government contracts. This imposes substantial burdens on IOP and its members while barely serving the government's proffered interests. Summary judgment is an appropriate tool for this Court to resolve the questions of law before it.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

This case presents only a question of law. No evidence is needed beyond the Order, IOP's intended speech, and publicly available sources. Interpretation of the First Amendment given these facts is solely a question of law. Challenges that apply a constitutional doctrine to a government policy are well-suited to summary judgment. *Lair v. Murry*, 871 F. Supp. 2d 1058, 1062 (D. Mont. 2012). Because there are no material facts to dispute (see the Statement of Undisputed Facts for a concise description of material facts), this Court should proceed to resolve the questions of law presented by this case.

ARGUMENT

I. The Order must survive exacting scrutiny.

Because IOP seeks an order protecting all groups and donors subject to the rule, this lawsuit is a "facial" challenge. *Doe v. Reed*, 561 U.S. 186, 194 (2010). The Order is unconstitutional every time it is applied to a donor to an organization engaged solely in issue advocacy in Montana, so IOP seeks injunctive relief that protects all such organizations. (*See* First Amended Compl., Doc. 37, at 14.)

For a facial challenge, exacting scrutiny applies.[1] The Order must "serve[] an important governmental interest ... without imposing a substantial burden on the exercise of First Amendment rights." *Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1189 (9th Cir. 2019) (Fisher, Paez, and Nguyen, JJ., concurring). "Put differently, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Yamada v. Snipes*, 786 F.3d 1182, 1194 (9th Cir. 2015) (internal quotations omitted). Defendants cannot meet that standard in this case. The Order imposes a substantial burden on IOP's rights with only slight offsetting governmental interests.

II. The Defendants lack a sufficiently important interest in this policy.

A. Defendants can only compel disclosure of membership lists if doing so would further a purpose of fighting crime.

The Supreme Court's previous cases set a very high expectation for the governmental interest necessary to invade a private organization's membership list: only the suppression of a criminal enterprise will do. The seminal *NAACP* case

[1] IOP believes strict scrutiny is the appropriate standard, *see Ams. for Prosperity Found*, 919 F.3d 1177, 1179 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing en banc); *Calzone v. Summers*, 942 F.3d 415, *18-21 (8th Cir. 2019) (Grasz, J., concurring), but the Ninth Circuit has held that exacting scrutiny is the standard. *See Ams. for Prosperity Found.*, 919 F.3d at 1189, *cert. pet. filed* 19-251. IOP also contends that no difference between strict and exacting scrutiny exists, *see, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015) (using the terms interchangeably), but again the Ninth Circuit has held otherwise. *Ams. for Prosperity Found.*, 919 F.3d at 1190. IOP may argue these points on appeal.

distinguished its holding protecting the NAACP's membership list from a previous decision permitting compelled disclosure of Ku Klux Klan membership lists by finding the latter was justified only because of "the particular character of the Klan's activities, involving acts of unlawful intimidation and violence." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 465 (1958) (discussing *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928)).

The Court also confronted the challenge of distinguishing the Jim Crow cases, protecting the NAACP's contributor lists, from the Red Scare cases, where a majority of the Court felt compelled disclosure of membership lists was appropriate for the Communist Party and Communist front groups. Again, the line drawn to justify the government's interest was criminality. *See Uphaus v. Wyman*, 360 U.S. 72, 80 (1959); *Barenblatt v. United States*, 360 U.S. 109, 128 (1959). Later circuit court decisions follow this same pattern, *see Dole v. Service Employees Union*, 950 F.2d 1456, 1461 (9th Cir. 1991) *and Trade Waste Mgmt. Asso. v. Hughey*, 780 F.2d 221, 238 (3d Cir. 1985), or recognize it explicitly, *see Familias Unidas v. Briscoe*, 619 F.2d 391, 401 (5th Cir. 1980).

The Defendants have no such interest in combating criminality here. There is no suggestion in any of the materials pertaining to the Order that there is rampant bid-rigging or bribery among state contractors, or that organized crime has taken over state construction contracting. (*See* Statement of Facts ¶7.) The Order itself cites a

general interest in corruption, but gives no particulars as to a specific concern about illegal behavior amongst contractors. A generalized fear of illegal behavior without something specific is not a sufficient interest. *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 572 (1963) (Douglas, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring). In short, the government cannot reach the standard set by the Court's membership-disclosure cases to justify the Order.

The Order instead relies on rationales used to justify disclosure of political contributors: "to prevent corruption, promote confidence in government, and inform the public of the operations of government." (First Amended Compl., Doc. 37, Ex. 1 at 2.) None of them is sufficient to justify an invasion of IOP's privacy.

B. Defendants' corruption rationale is insufficient.

The Order's first proffered interest is corruption. The Supreme Court has put strict limits on the corruption rationale: it may only be used to prevent the actuality or appearance of quid-pro-quo corruption—merely gaining or appearing to gain influence or access is not enough. *McCutcheon v. FEC*, 572 U.S. 185, 207-08 (2014).

The Supreme Court has held that independent-expenditure groups pose no threat of quid-pro-quo corruption. *Lair*, 871 F. Supp. 2d at 1067-68 (discussing *Citizens United v. FEC*, 558 U.S. 310, 357 (2010)). A group engaged solely in issue-advocacy is even less of a threat of corruption than an independent-expenditure

group, because by definition issue advocacy cannot expressly advocate a candidate's election. By its very nature, then, issue advocacy poses no threat of quid-pro-quo corruption. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999) (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978)); *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 478-79 (2007) (Roberts, C.J.).

Additionally, a quid-pro-quo corruption interest is implicated only in the context of large, direct contributions to candidate committees. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Neither independent expenditures nor issue advocacy pose the same possibility of corruption, and so the rationale is inapplicable to those types of efforts.

Finally, though Montana may have suffered from corrupt politicians in its past, its politics today are generally free from such misbehavior. *Mont. Chamber of Commerce v. Argenbright*, 28 F. Supp. 2d 593, 597-99 (D. Mont. 1998).

C. Defendants' public-confidence rationale is insufficient.

Buckley did not recognize a public-confidence interest independent of the anti-corruption rationale. 424 U.S. at 27. *Buckley's* majority has one sentence about public confidence, woven into a four-paragraph discussion of corruption, saying simply that the appearance of corruption undermines public confidence in our democratic institutions. *Id*. *Buckley* discussed three governmental interests, and public confidence was not one of them.

Moreover, the Order does not even serve such a purpose. "Where a privacy interest is established and disclosure would not significantly serve the principal purpose of disclosure, i.e. ensuring public confidence in government by increasing the access of the public to government and to its decision-making processes, disclosure is inappropriate." *Okla. Pub. Emples. Ass'n v. State ex rel. Okla. Office of Pers. Mgmt.*, 267 P.3d 838, 848 (Ok. 2011). Ending the privacy of IOP's membership list does nothing to increase public access to government. It does not provide the public with information about senior officials' financial interests. *Bertoldi v. Wachtler*, 952 F.2d 656, 660 (2d Cir. 1991). It does not provide information about who is lobbying legislative decision-makers. *United States v. Harriss*, 347 U.S. 612 (1954); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1007 (9th Cir. 2010). Nor does it provide information about the on-the-job conduct of public employees, *Special February 1971 Grand Jury v. Conlisk*, 490 F.2d 894, 898 (7th Cir. 1973), or the use of taxpayer dollars. *Judicial Watch, Inc. v. GSA*, 98-2223, 2000 U.S. Dist. LEXIS 22872, *37 (D.D.C. Sept. 25, 2000). It provides information about private corporations, many of whom may not even win the bid and actually become government contractors (since the Order requires disclosure at the bidding stage rather than the award stage. (*See* Statement of Facts ¶4.)) And it provides information about civil-society organizations engaged in issue speech, not express advocacy.

In other words, the Order is a fishing expedition, not a rule targeting an actual problem. "General assertions that public disclosure will foster public confidence in public institutions and maintain accountability for public officers are not sufficient to establish a strong public interest." *Moe v. Butte-Silver Bow Cty.*, 371 P.3d 415, 422 (Mont. 2016). Concern about "public image" cannot be a catch-all justification for any invasion of privacy. *See Am. Fed'n of Gov't Emps., Council 33 v. Meese*, 688 F. Supp. 547, 554 (N.D. Cal. 1988). The government must show more, or any compelled disclosure of any information could be rationalized as promoting "public confidence" in any institution.

D. Defendants' informational interest is insufficient.

Buckley recognizes an informational interest in the context of campaign finance because "disclosure helps voters to define more of the candidates' constituencies." 424 U.S. at 81. But *Buckley* limited this interest to "spending that is unambiguously campaign related," *id*., in order to distinguish its decision from the Court's prior decision in *Talley v. California*, 362 U.S. 60 (1960), which protected the right to anonymous issue advocacy. This case is closer to *Talley* than *Buckley*, since it concerns issue advocacy rather than spending that is unambiguously campaign-related.

Other courts recognize that the informational interest is less applicable in the issue-advocacy context than in the candidate context. *Sampson v. Buescher*, 625

F.3d 1247, 1256-57 (10th Cir. 2010); *McCauley v. Howard Jarvis Taxpayers Ass'n*, 68 Cal. App. 4th 1255, 1257 n.1 (1998). As the Supreme Court said in *McIntyre*, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer [of issue advocacy] make statements or disclosures she would otherwise omit." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995). In fact, the Order here adds far less information than the statute before the Supreme Court in *McIntyre* because it discloses a donor rather than the speaker. It adds less value than the disclosure in *American Constitutional Law Foundation* and in *Sampson* because IOP is engaged in general issue advocacy rather than express advocacy on a referendum or ballot question.

The Order here does nothing to "inform the public of the operations of government" as it claims. (Statement of Facts ¶3.) It provides no new information about bureaucrats' procurement decisions. It provides information about private entities' associational decisions. This does not give the public relevant information about "the operations of government."

Moreover, the Order does not limit its application only to contributors whose funds were used to pay for issue advocacy in Montana. The Order requires disclosure if a bidder gave to an organization that made an electioneering communication in Montana. (Statement of Facts ¶5.) If a donor was motivated to give to support issue advocacy in another state, or because of IOP's work on another issue, or to support

general office operations rather than issue-oriented advertisements, all this would be disclosed, yet none of it would provide Montanans with particularly interesting or relevant information. *See* Allison Hayward, "Junk Disclosure," Institute for Free Speech (Feb. 11, 2011).[2]

Indeed, the Order looks more like a generalized "curiosity" interest—the governor does not like "dark money," and he wants to know who is giving it where. (*See* Statement of Facts ¶¶9-11.) But "curiosity" is not a sufficient informational interest to justify an invasive regulatory scheme. *Calzone*, 942 F.3d at *14.

Crucially, there is no limiting principle for invasions of privacy based on a generalized informational interest. If the informational interest is so unconstrained, then the government could require disclosure of any private information that it believed interesting to the citizenry at large. *Doe*, 561 U.S. at 206 (Alito, J., concurring). This is a bridge too far.

Last, the Order adds little when viewed in the context of the existing disclosure regime. Montana and federal laws already prohibit corporate contributions directly to candidate committees. MCA § 13-35-227; 52 U.S.C. 30118(a). They further require that any corporation that makes a contribution to support an independent expenditure must disclose that donation. MCA § 13-37-229; "FEC provides

[2] Available at https://www.ifs.org/blog/junk-disclosure-a-series-on-stupid-disclaimers/.

guidance following U.S. District Court decision in *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018)," Fed. Election Comm'n (Oct. 4, 2018).[3] In fact, all of the contributions disclosed thus far on the state's transparency website were already disclosed under other laws as contributions to candidates, PACs, parties, or ballot committees. *See* transparency.mt.gov (click on "Dark Money Spending"). Thus, the Order is overinclusive, with the only donations that will newly come to light are donations to groups like IOP. Moreover, Montana already requires that groups like IOP file a "two-page registration form with the State containing basic identification information" in order to engage in issue advocacy proximate to an election. *Nat'l Ass'n for Gun Rights (NAGR), Inc. v. Mangan*, 933 F.3d 1102, 1118-19 (9th Cir. 2019). This court must weigh "the marginal value of the small amount of *new* information compelled under the [Order]" against "the weighty First Amendment burdens imposed." *Wash. Post v. McManus*, 944 F.3d 506, 523 n.5 (4th Cir. 2019).

This order reaches much farther than *NAGR*, mandating that not only the speaker itself, but the donors behind the speaker be disclosed. *NAGR* does not control the outcome in this case. *NAGR* reinforces the holding of *Yamada*, 786 F.3d at 1197, that "disclosure obligations provide information to the electorate about who is speaking." This is the information that is important; "[t]hat a certain, unknown

[3] Available at https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

individual supplied the paper, computer, and time involved in producing a given communication adds little, if anything, to the reader's ability to evaluate the document" when it already contains a disclosure as to the responsible speaker. *ACLU of Nev. v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004). *Accord Vote Choice v. DiStefano*, 4 F.3d 26, 35 (1st Cir. 1993) (identity of ad sponsor "will signify more about the candidate's loyalties than the disclosed identity of an individual contributor will ordinarily convey.").

This Order goes beyond who is speaking to who is generally contributing to a speaker. This is a substantial step that implicates *NAACP* and its progeny. It is to these cases, protecting the associational privacy of individuals and civil-society organizations, that we now turn.

III. The Order imposes substantial burdens on civil-society organizations such as IOP and their members and contributors.

IOP and other issue-advocacy organizations and their members and contributors will suffer substantial burdens due to the Order (to survive exacting scrutiny, government must show sufficient interests without "impos[ing] substantial burdens on the exercise of First Amendment rights." *Ams. for Prosperity Found.*, 919 F.3d at 1189). Because of these burdens, "fear of disclosure in and of itself chills their speech." *Doe v. Harris*, 772 F.3d 563, 581 (9th Cir. 2014). The First Amendment

stands as a bulwark to protect IOP and others who wish to discuss controversial issues in the public square. As this Court has said previously:

> In order to promote open and informed discussion of public affairs, the First Amendment seeks to 'protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society.' *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, … (1995). . . . Freedom of speech regarding public affairs is one of the cornerstones of self-government. 'And self-government suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources."' *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 … (1964) . . .

Mont. Chamber of Commerce, 28 F. Supp. 2d at 600. IOP is here today because it discusses public affairs. It fears that those in power may seek to suppress its views by retaliating against its corporate members. It fears that intolerant elements in society may harass its corporate supporters. So it asks this Court to vindicate the privacy protections afforded it and its members by the First Amendment.

The Order unconstitutionally conditions corporate donors' right to contract with the government on the bearing of these unconstitutional burdens. Disclosure of their contributions to a group like IOP engaging in Montana issue advocacy is required "as a condition of submitting a bid or offer," (First Amended Compl., Ex. 1 at 4, III.1), and must continue in order for any awarded contract to be maintained, (id. at 5, ¶5). This is an unconstitutional condition placed on First Amendment speech and privacy rights. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected

interests—especially, his interest in freedom of speech.") (internal citations omitted). This unconstitutional condition irreparably injures donors (who must choose between their right of association and their business) and IOP (who wants to pursue its mission through constitutionally protected speech but will deter or lose donors in doing so because of the Order's unconstitutional condition). *See id*. at 373.

A. IOP and its members have a substantial interest in maintaining their privacy.

The first burden that IOP will suffer from the Order is the loss of privacy. A desire for anonymity when engaging on issues may be motivated "by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 342. A business or association as well as an individual might wish to maintain that privacy. *ACLU of Nev.*, 378 F.3d at 990. "[D]epriving individuals of this anonymity is a broad intrusion" into their private affairs. *Id*. at 988. The protections of the *NAACP* cases apply to popular and unpopular groups alike because they all have an interest in privacy. *Gibson*, 372 U.S. at 556-57. *Accord id*. at 569-70 (Douglas, J., concurring).

Privacy is no less important for being ephemeral. It "has always been a fundamental tenet of the American value structure." *California v. Byers*, 402 U.S. 424, 450 (1971) (Harlan, J., concurring) (quoting Robert McKay, *Self-Incrimination and the New Privacy*, 1967 Sup. Ct. Rev. 193, 210). Privacy is an end in itself that courts must respect and protect. *United States v. Connolly*, 321 F.3d 174, 188 (1st

Cir. 2003). Privacy interests are especially pronounced when private financial information is involved. *See Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 695 n.8 (9th Cir. 1995). "[O]ur nation values individual autonomy and privacy," *United States v. Valdes-Vega*, 738 F.3d 1074, 1076 (9th Cir. 2013), and the loss of that privacy is in itself a substantial burden.

B. IOP and its members have a reasonable fear of official retaliation.

The second burden that IOP's members and contributors will suffer as a result of the Order is the fear of official retaliation. (Statement of Facts ¶20.) *Buckley* recognized that compelled disclosure may lead to "threats, harassment, or reprisals from … Government officials." 424 U.S. at 293. Similarly, *McIntyre* said, "[t]he decision in favor of anonymity may be motivated by fear of … official retaliation." 514 U.S. at 341. Given the virulence of the governor's attitude towards so-called "dark money," (*see* Statement of Facts ¶¶9-11), companies could reasonably worry that their contributions to issue-advocacy groups could harm their standing with Montana's decision-makers. *Nat'l Rifle Ass'n*, 2:19-cv-03212-SVW-GJS, at *13 ("Plaintiff Doe maintains he and other potential contractors are chilled from engaging in the bidding process because they are reluctant to reveal business ties with the NRA for fear of the stigma the City may attach to their bids and future business ventures. The legislative record establishes Doe's fear of hostility is well-

founded."). Though it may be improper for the procurement staff to downgrade any bid for the company's contributions, there are a variety of other, more informal ways that officials could retaliate. Officials could look unfavorably on requests for meetings with the governor or other senior decision-makers, discount the company's lobbying position on legislation or regulations, and otherwise close the door to the governor's administration. That is a high price to pay for any entity that also wishes to financially support issue advocacy. Privacy and protection from disclosure is the best way to avoid the possibility of an official "enemies list." *See Lake v. Rubin*, 162 F.3d 113, 115 (D.C. Cir. 1998).

C. IOP and its members have a reasonable fear of harassment from activists outside government.

Though official retaliation is likely more informal and *sub rosa*, the reality of public retaliation is very visible and very real for companies and executives.

Harassment by those outside government was the fear at the heart of *NAACP v. Alabama*, where members who were exposed would face "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462-63. Thankfully we no longer see a segregated south with church bombings and burning crosses, but public hostility is still a characteristic of our polarized politics. *Grewal*, No. 3:19-cv-14228-BRM, 2019 U.S. Dist. LEXIS 170793, at *61. Unfortunately, "disclosure [here] becomes a means of facilitating

harassment that impermissibly chills the exercise of First Amendment rights." *Doe*, 561 U.S. at 207-08 (Alito, J., concurring).

Members and contributors have a real fear that all these repercussions may follow from a decision to support issue advocacy. Newspapers are filled with examples from the past decade where publicly disclosed activities have led to substantial harassment.

1. Disclosed donors suffer from economic retaliation.

Corporations that support issue-advocacy groups like IOP may find that disclosure forces them into unanticipated hot water. Target and Best Buy were subject to boycotts and brand damage when they gave money to a Chamber of Commerce affiliate that praised a candidate for governor in Minnesota who supported business-friendly policies. That candidate also supported traditional marriage. When their donations became public, they faced substantial backlash from customers and shareholders and were forced to apologize. *See* Taren Kingser & Patrick Schmidt, *Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure*, 11 ELECTION L.J. 21, 29-32 (2012). "The Target episode and other instances of attempted consumer boycotts aimed at companies that donate to controversial causes suggest the potential for reputational risk and resulting harm to investors when a company's political donations become known."

Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U.L. REV. 397, 427-428 (2015).

In another instance, retailers were protested for stocking carrots from a company whose owner donated to the Proposition 8 campaign in California. Maria Ganga, "Carrot firm's olive branch," L.A. Times (Oct. 9, 2008).[4] A Hyatt hotel and a self-storage company were also targeted for boycotts based on their owners' donations supporting Proposition 8. *Id*. Prominent executives lost their jobs after their donations became public. Joel Gehrke, "Mozilla CEO Brendan Eich forced to resign for supporting traditional marriage laws," Wash. Examiner (April 3, 2014)[5]; Jesse McKinley, "Theater Director Resigns Amid Gay-Rights Ire," N.Y. Times (Nov. 12, 2008).[6]

Though those examples all related to fights over the definition of marriage, many companies may reasonably fear precipitating the wrath of organized labor thru such disclosure. A union-backed group in Washington State has targeted the businesses of board members for the free-market Freedom Foundation. *See, e.g., Will your next home purchase support the extremist right-wing movement in the Northwest? A*

[4] Available at https://www.latimes.com/archives/la-xpm-2008-oct-09-me-juice9-story.html.
[5] Available at https://www.washingtonexaminer.com/mozilla-ceo-brendan-eich-forced-to-resign-for-supporting-traditional-marriage-laws.
[6] Available at https://www.nytimes.com/2008/11/13/theater/13thea.html.

shocking look at the dark side of Conner Homes, Northwest Accountability Project (May 24, 2018)[7] .

During the massive fight over the collective-bargaining reforms in Wisconsin, campaign donors to Governor Scott Walker were subject to union retaliation. Lindsay Beyerstein, "Massive Protest in Wisconsin Shows Walker's Overreach," Huffington Post (May 25, 2011)[8] (union encourages members to withdraw funds from a local bank, many of whose executives were campaign donors to the governor). *Accord* Don Walker, "WSEU circulating boycott letters," Milwaukee J. Sentinel (March 30, 2011).[9]

In another situation, a coalition of gun-control and climate-change groups targeted corporations that supported the American Legislative Exchange Council (ALEC), a 501(c)(3) organization, after internal documents listing donors were leaked to the media. Ciara Torres-Spelliscy, *Shooting Your Brand in the Foot: What* Citizens United *Invites*, 68 RUTGERS L. REV. 1297, 1360-1363 (2016). Over 80 companies have ended their financial support due to activist and shareholder pressure. *See id. at* n.382.

[7] Available at https://nwaccountabilityproject.com.
[8] Available at https://www.huffpost.com/entry/weekly-audit-massive-prot_b_835966.
[9] Available at http://archive.jsonline.com/newswatch/118910229.html.

We live in polarized times, and taking sides on difficult topics in the public square often prompts a harassing response from activists of the opposite view. *See* Katie Rogers and Annie Karni, "Trump's Opponents Want to Name His Big Donors. His Supporters Say It's Harassment," N.Y. Times (Aug. 8, 2019).[10]

2. Disclosed donors may be subject to physical retaliation.

When Mayor Mitch Landrieu of New Orleans decided to remove the city's four Confederate monuments, he found himself blacklisted among construction companies. When he finally did secure a crane, opponents poured sand in the gas tank and interfered with its operation. According to the Mayor, "We were successful, but only because we took extraordinary security measures to safeguard equipment and workers, and we agreed to conceal their identities." Mitch Landrieu, *In the Shadow of Statutes: A White Southerner Confronts History* 2-3 (Penguin Pub. 2018). The owner of a contracting company that agreed to remove monuments and his wife received death threats, and his car was set ablaze in the parking lot of his office. *Id*. at 187. The City had to keep secret the identities of the companies that bid on the work and promised law enforcement protection to the winners. *Id*. at 192.

Sometimes, public hostility against people associated with controversial views is manifested as property crimes such as graffiti. *See, e.g.,* Savannah Pointer, *Man*

[10] Available at https://www.nytimes.com/2019/08/08/us/politics/trump-donors-joaquin-castro.html.

Arrested After Allegedly Vandalizing Chick-fil-A with Political Messages, Western J. (Oct. 3, 2018)[11]. Other times, property crime is more destructive, such as arson or bombing. Kimberly Hutcherson, *A brief history of anti-abortion violence*, CNN (Dec. 1, 2015)[12]; Derek Hawkins, *"We wanted them to live in fear": Animal rights activist admits to university bombing 25 years later*, Wash. Post (Feb. 27, 2017).[13]

3. Disclosed donors are subject to other forms of hostility.

In many instances, intimidation tactics stop short of physical violence but still cross legal and social lines from legitimate protest into illegitimate harassment. *See, e.g.*, *520 S. Mich. Ave. Assocs. v. Unite Here Local 1*, 760 F.3d 708, 720-21 (7th Cir. 2014) ("Many of the Union's other activities are disturbingly similar to trespass and harassment."); *Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union*, 248 Cal. App. 4th 908, 923 (2016) (employees report "union activity made them feel intimidated, embarrassed, upset, or fearful there would be violence").

The Internet adds a whole new level of possibilities for harassment. Posting donor information online opens the door to harassment on a heretofore unimaginable scale, where an activist in one state can target a corporate donor's executives in minute

[11] Available at https://www.westernjournal.com/man-arrested-vandalizing-chick-fil/.
[12] Available at https://www.cnn.com/2015/11/30/us/anti-abortion-violence/index.html.
[13] Available at https://www.washingtonpost.com/news/morning-mix/wp/2017/02/27/we-wanted-them-to-live-in-fear-animal-rights-activist-admits-to-university-bombing-25-years-later/.

detail. *Doe*, 561 U.S. at 207-08 (Alito, J., concurring). Any executive responsible for a company's public-affairs portfolio may reasonably fear that activists who care passionately about the environment, labor rights, or any other issue may target them over the Internet.

D. IOP faces a burden from the increased difficulty of its charitable solicitation.

Charitable solicitation is a form of free speech protected by the First Amendment. *Ill. ex rel. Madigan v. Telemarketing Assocs*., 538 U.S. 600, 611-12 (2003). The Order makes it harder for IOP and any other issue-advocacy group to raise the funds they need to undertake their missions. *United States Servicemen's Fund v. Eastland,* 488 F.2d 1252, 1265-67 (D.C. Cir. 1973), *vacated on other grounds,* 421 U.S. 491 (1975) (donor disclosure makes fundraising more difficult); *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 379 (Tex. 1998) (same); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1312 n.13 (S.D. Ala. 2002) (same); *Vote Choice, Inc. v. Di Stefano*, 814 F. Supp. 195, 200 (D.R.I. 1993) (same); *Nat'l Rifle Ass'n*, 2:19-cv-03212-SVW-GJS, at *18-19 (same).[14] See *Buckley*, 424 U.S. at 68 ("It is undoubtedly true that public disclosure of

[14] *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1014 (9th Cir. 2018), does not control here. There, plaintiffs had to show that donors objected to confidential disclosure to the California Attorney General when disclosure was already occurring to the Internal Revenue Service. Here, no donor disclosure is occurring but for the Order's requirements.

contributions to candidates and political parties will deter some individuals who otherwise might contribute."); *id*. at 83 ("[S]trict [disclosure] requirements may well discourage participation by some citizens in the political process."). *See also Wash. Post*, 944 F.3d at 515 (companies are rational for-profit actors, and when disclosure mandates create inconveniences and increased costs, companies will simply forgo participating in politically connected speech). Compelled disclosure makes people less likely to donate, and that increases IOP's difficulty in fundraising to support its mission. (Statement of Facts ¶22.)

E. The Order will decrease the effectiveness of IOP's messages.

Finally, IOP fears the disclosure of its donors will decrease the effectiveness of its message. (Statement of Facts ¶23.) And its members and supporters may fear that disclosure will make the messages their donations support less effective. "Nondisclosure could require the debate to actually be about the merits of the proposition on the ballot. Indeed, the Supreme Court has recognized that '[a]nonymity … provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.'" *Sampson*, 625 F.3d at 1256-57 (quoting *McIntyre*, 514 U.S. at 342). *Accord Wash. Post*, 944 F.3d at 515 ("many political advocates today also opt for anonymity in hopes their arguments will be debated on their merits rather than their makers.").

IOP reasonably believes disclosure of its donors may distract from the effectiveness of its message. If people do not like corporations generally, or certain corporations in particular, they may fixate on the donors behind the speaker rather than the content of the message. IOP believes the content of the message itself, the power of the idea it conveys, should command our attention.

F. In the alternative, IOP should receive an exemption from disclosure on an as-applied basis.

IOP believes the Order is unconstitutional every time its requirements are applied to a donor to an issue-advocacy group. As laid out above, Defendants' interests in this case are nonexistent or extremely weak when applied to any issue-advocacy group. The Order imposes substantial burdens on any issue-advocacy group; all of the reasons given above apply to any organization that engages on any remotely controversial issue. Thus, the Order should be enjoined as to any contract bidder that supports any issue-advocacy organization.

However, in the alternative, IOP has established a reasonable probability of reprisal against its donors.[15] IOP should receive an as-applied exemption for its donors for showing "a reasonable probability that the compelled disclosure of [its]

[15] Again, *Ams. for Prosperity Found.*, 903 F.3d at 1017, does not control. The Court declined to decide this issue because it concluded that there was a very low likelihood the California Attorney General's office would leak the confidential filing. That is not the case here, where everything disclosed is posted on the Internet.

contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley,* 424 U.S. at 74.

In order to succeed on this alternative as-applied claim, IOP must show a *reasonable* probability of retaliation specific to its donors. "[S]peakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. … '[U]nduly strict requirements of proof could impose a heavy burden' on speech. ... [T]he as-applied exemption has not imposed onerous burdens of proof on speakers who fear that disclosure might lead to harassment or intimidation." *Doe*, 561 U.S. at 204 (Alito, J., concurring) (quoting *Buckley*, 424 U.S. at 74). *Accord Black Panther Party v. Smith*, 661 F.2d 1243, 1267-68 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982) (movant "need only show that there is some probability that disclosure will lead to reprisal or harassment."). IOP cannot offer evidence of retaliation against its donors because all of its donors are currently private. (Statement of Facts ¶19.) But it can show some probability based on "evidence of reprisals and threats directed against individuals or organizations holding similar views." *Buckley*, 424 U.S. at 74.

Plaintiff engages in issue advocacy on a number of highly controversial issues, including several that directly impact public-employee unions (union reform, pension reform, and school choice). *See* www.illinoisopportunity.org. IOP fears that if its donors are disclosed, they will be subject to the kind of retaliation faced by the

Freedom Foundation or donors who supported Governor Walker in his battle with Wisconsin unions. (Statement of Facts ¶26.) IOP also fears that corporations that support its issues may encounter the same treatment as Target and Best Buy or ALEC because its free-market messages may be associated with office-holders who also support traditional marriage or the Second Amendment. (Statement of Facts ¶27.) These experiences of organizations with "similar views" render reasonable IOP's fears. *See Buckley*, 424 U.S. at 74.

CONCLUSION

The Ninth Circuit's exacting scrutiny calls for this Court to weigh the evidence and arguments before it, as though on a scale: How strong is the government's interest? How great is the burden on the plaintiff? How do the interests and the burdens balance against one another?[16]

[16] IOP reserves the right to argue on appeal the Ninth Circuit's weighing-of-interests framework. The courts should employ a test that places the burden squarely where it belongs whenever the government seeks to insert itself into the private affairs of its citizens: on the government. *Baird v. State Bar of Ariz.,* 401 U.S. 1*,* 6-7 (1971); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974). In a free society, citizens' privacy is the presumption, and the burden is on the government to show its need, not on the citizens to show likely victimization if their names are exposed. *See Shelton v. Tucker,* 364 U.S. 479*,* 487-88 (1960); *Buckley*, 424 U.S. at 238 (Burger, C.J., concurring/dissenting). Statements about retaliation and harassment in *NAACP* illustrate the need for and importance of privacy. *NAACP* did not create a required showing in order to be granted privacy. Rather, the government must bear the burden to show its need to access private information.

Here the government's interests are few, slight, and based on generalities. The government's interest is not in combating actual criminality, which is the interest the Supreme Court has identified as sufficiently weighty to overcome an organization's interest in its privacy. The government's interest is not in combatting corruption because issue advocacy poses no possibility of quid-pro-quo corruption. So Defendants are left with their public-confidence and informational interests. Both are generalized in nature, unlimited in logical scope, and add little value in practice. Generic assertions and a curiosity about who supports issue-advocacy organizations holds "some value, but not that much." *Sampson*, 625 F.3d at 1257.

By contrast, IOP and other issue-advocacy organizations and their members face burdens that are numerous, specific, and substantial: loss of privacy, fear of official retaliation, fear of activist harassment, greater difficulty at charitable solicitation, and an undermining of their messages' effectiveness. Such burdens are very compelling and outweigh any government interests.

A decade ago, this Court struck down a ban on corporate contributions to ballot issues to protect "tens of thousands of … individual Montanans who have banded together to enhance their political speech through organizations…" *Mont. Chamber of Commerce*, 28 F. Supp. 2d at 599. In another case, this Court remarked that "the typical corporation in Montana today is more likely to be a small closely held family company than a large industrial corporation." *Lair*, 871 F. Supp. 2d at 1069. Both

these decisions ring true in today's case: the Governor's Executive Order has cast a wide net, such that ranchers and small business owners who band together to enhance their speech through organizations find their First Amendment rights at risk.

For these reasons, the Court should grant summary judgment to IOP.

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Respectfully Submitted,

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*Motion pro hac vice granted

Certificate of Compliance

Pursuant to Rule 7.1(d)(2)(E), I hereby certify that this Memorandum Supporting the Third Motion for Summary Judgment has a table of contents, a table of authorities, and contains 6,483 words in the body of the brief.

/s/ Anita Y. Milanovich
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was served on Defendants via CM/ECF electronic notice.

/s/ Anita Y. Milanovich
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