No. 05-15507

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA PRO-LIFE COUNCIL, INC.,

Plaintiff-Appellant,

v.

LIANE RANDOLPH, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District Of California No. CV-00-1698-FCD

BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING APPELLEES AND URGING AFFIRMANCE

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STATEMENT OF INTEREST

The Campaign Legal Center, Inc. is a nonpartisan, nonprofit organization which works in the area of campaign finance law, participating in legal and policy debates about public campaign financing, disclosure, political advertising, contribution limits, enforcement issues, and related matters.

The present case concerns allegations that certain reporting and disclosure provisions in California's Political Reform Act violate the First and Fourteenth Amendment rights of groups that expressly advocate for and against the passage of ballot measure initiatives. This case directly implicates the campaign finance interests and activities of the *amicus.* The Campaign Legal Center believes this brief may help the Court better understand the constitutional law governing reporting and disclosure requirements as applied to ballot-measure advocacy. This *amicus* brief is desirable because it specifically offers legal authorities and arguments not advanced in either Party's filings.

The Campaign Legal Center has provided legal counsel to parties and *amici* in numerous other campaign finance cases at both the federal and state court level across the United States. *See*, *e.g*., *McConnell v. FEC*, 540 U.S. 93 (2003); *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005); *KEEP IT CLEAN – NO TO C-04-2004 v. Flake*, No. CV-04-0253-SA (Arizona Supreme Court 2004).

SUMMARY OF THE ARGUMENT

The Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), upholding the central provisions of the Bipartisan Campaign Reform Act of 2002, places beyond constitutional doubt any reasonable regime of campaign finance reporting and disclosure. In particular, *McConnell* approved federal reporting and disclosure requirements that were more encompassing, more intrusive, and less flexibly tailored than those California applies to ballot-measure advocacy. *McConnell* simply forecloses any facial challenge to California's disclosure laws.

California has clearly established that its interest in providing voters information about who is funding advocacy for or against particular ballot measures is compelling. It has also proved that there is no less restrictive means available to provide such information. California Pro-Life Council's proposals, particularly that California limit disclosure only to those amounts specifically earmarked by donors for ballot-measure advocacy, would permit donors to easily opt-out of disclosure and hide their support from the voting public.

Finally, California Pro-Life Council cannot challenge California's regulations as applied to it. It has provided none of the evidence the law requires that disclosure will subject its members to a reasonable probability of harm.

For these reasons, The Campaign Legal Center respectfully believes this Court should affirm the district court's judgment.

ARGUMENT

I. THIS COURT HAS ALREADY RECOGNIZED THE PRESUMPTIVE STRENGTH OF CALIFORNIA'S INTEREST IN PROVIDING VOTERS INFORMATION ABOUT WHO FUNDS ADVOCACY CONCERNING PARTICULAR BALLOT MEASURES.

In *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003), this Court rejected California Pro-Life Council, Inc.'s (CPLC) broad claim that "all ballot-measure advocacy is … beyond the purview of any state regulation." *Id*. at 1102. "Supreme Court precedent on this point," this Court understood, "is clear: express ballot-measure advocacy is not constitutionally sacrosanct speech. There is no per se constitutional prohibition on its regulation." *Id*. This Court then remanded the case back to the district court for determination "whether California has a compelling interest in requiring CPLC to report its express ballot-measure advocacy contributions and expenditures and whether such regulations are narrowly tailored." *Id*. at 1104 (footnote omitted). This Court indicated, moreover, that the "relevant interest [would be] informational," *id*., *i.e.*, providing the voters information about who supports and opposes particular ballot measures.

This Court also made clear that California's informational interest was presumptively significant. Even without "a more fully developed factual record," *id*. at 1107, before it, this Court found it clear that:

(1) "Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures …, being able to evaluate who is doing the talking is of great importance…." *Id*. at 1105;

(2) "Knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation." *Id*. at 1106;

(3) "Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists' services and how much." *Id*. (internal citation omitted);

(4) "While we would hope that California voters will independently consider the policy ramifications of their vote, and not render a decision based upon a thirty-second sound bite they hear the day before the election, we are not that idealistic nor that naive. By requiring disclosure of the source and amount of funds spent for express ballot-measure advocacy, California—at a minimum—provides its voters with a useful shorthand for evaluating the speaker behind the sound bite." *Id*. (footnote omitted); and

(5) The value of disclosure, recognized in *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976), as a "substantial interest" for candidate elections, "appl[ies] just as forcefully, *if not more so*, for voter-decided ballot measures," *id*. at 1105 (emphasis added).

This Court then remanded for "the capable district judge" to more fully develop the factual record to see whether California could "establish this compelling interest" and, if so, whether "the means chosen by California comport with the First

Amendment." *Id*. at 1107. After the district court judge carefully developed the record, he correctly found that California had established a compelling informational interest and that its disclosure requirements were the least restrictive means available to achieve it.

II. *MCCONNELL V. FEC* CLEARLY ESTABLISHES THAT REASONABLE CAMPAIGN FINANCE DISCLOSURE REQUIREMENTS ARE, AS A FACIAL MATTER, BEYOND FIRST AMENDMENT QUESTION.

In *McConnell v. Federal Election Commission ("FEC")*, 540 U.S. 93 (2003), decided after this Court remanded this case, the Supreme Court upheld, among other provisions, the reporting and disclosure requirements of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81. Chief among these provisions was § 201, which requires any person who disburses more than $10,000 during any calendar year for the direct costs of producing and airing "electioneering communications"[1] to file a statement with the FEC identifying the

[1] The Supreme Court described these communications as follows:

> [BCRA's term] "electioneering communication" is … defined to encompass any broadcast, cable, or satellite communication that
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has

pertinent elections and all persons sharing the costs of the disbursements. 2 U.S.C. §§ 434(f)(2)(A), (B), and (D). If the disbursements were made from a segregated bank account to which only United States citizens, nationals, or lawfully admitted foreign permanent residents have contributed, the statement must identify all persons who contributed $1,000 or more to the account during the current and prior last two calendar years. *Id*. at § 434(f)(2)(E). If the disbursements were not made from such an account, the statement must identify all persons who contributed $1,000 or more to the organization during the current and prior calendar years. *Id*. at § 434(f)(2)(F).

Although some parts of BCRA proved controversial, this provision did not. Only Justice Thomas, who takes the view that the First Amendment guarantees the anonymity of political speech, *McConnell*, 540 U.S. at 275-77 (Thomas, J., concurring in the opinion in part, concurring in the judgment in part, and dissenting

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> authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.

McConnell, 540 U.S. at 189-90 (internal quotation marks omitted) (quoting 2 U.S.C. § 434(f)(3)(A)(i)). The *McConnell* Court continued: "New FECA § 304(f)(3)(C) further provides that a communication is 'targeted to the relevant electorate' if it 'can be received by 50,000 or more persons' in the district or State the candidate seeks to represent." *McConnell*, 540 U.S. at 190 (quoting 2 U.S.C. § 434(f)(3)(C)).

in part), would have found these provisions unconstitutional. All the other Justices, including the Chief Justice, Justice Scalia, and Justice Kennedy, who would have struck down many of BCRA's other provisions, upheld § 201's broad disclosure and reporting requirements. *McConnell*, 540 U.S. at 194-99 (opinion of the Court); *id*. at 321-22 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Indeed, all the members of the Court except for Justice Thomas found § 201's disclosure requirements justified solely on the basis that they informed voters of the identity of those making electioneering communications. The Chief Justice and Justices Scalia and Kennedy, who believed that the disclosure requirements "d[id] not substantially relate to a valid interest in gathering data about compliance with contribution limits or in deterring corruption," *id* at 321, nevertheless upheld them because they "substantially relate[d]," *id*., to this informational interest. The majority, although it found that the interests *Buckley* had identified as supporting earlier disclosure requirements—"providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions"—all applied in full to BCRA, *id*. at 196, ultimately upheld § 201 under only the informational interest. Quoting the district court, the Court held:

> The factual record demonstrates that the abuse of the present law … permits [entities] to [influence elections] while concealing their identities from the public. *BCRA's disclosure provisions require these [entities] to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections.* Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they should be permitted to spend [money] in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be 'uninhibited, robust, and wide-open.' Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

Id. at 196-97 (internal citations omitted and emphasis added). § 201's disclosure requirements, the Court found, vindicated rather than violated the truly relevant First Amendment interest: that of "individual citizens seeking to make informed choices in the political marketplace." *Id*. at 197.

III. CALIFORNIA HAS ESTABLISHED BEYOND QUESTION THAT ITS BALLOT-ADVOCACY DISCLOSURE REQUIREMENTS FURTHER A COMPELLING INTEREST AND COMPORT WITH THE FIRST AMENDMENT.

A. In light of *McConnell,* California has clearly established that providing information to its voters about who is funding ballot-measure advocacy is a compelling interest.

1. *McConnell* does not require California to produce a great "quantum of empirical evidence" to support its justification.

In *McConnell*, the Supreme Court reaffirmed its traditional approach for determining whether sufficient empirical evidence supports a campaign finance regulation. Although the government bears the burden of proof on whether a particular regulation furthers a compelling interest and is sufficiently narrowly tailored, the size of that burden varies from case to case. As the Supreme Court described it, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or the plausibility of the justification raised." *Id*. at 144 (quoting *Shrink Missouri Government PAC v. Nixon*, 528 U.S. 377, 391 (2000)).

This Court, of course, in remanding the case back to the district court for fuller development of the record emphasized that California's interest in informing its voters was not merely "plausible," but "of great importance …." 328 F.3d at 1105. It also recognized that the "substantial interest" in disclosure *Buckley* found in candidate elections "appl[ies] just as forcefully, if not more so, [in] voter-

decided ballot measures." *Id*. Since California's informational justification for its disclosure requirements is long-recognized and intuitively plausible, *McConnell* requires no great "quantum of empirical evidence" to support it. Nevertheless, California produced detailed and comprehensive record evidence to support it and CPLC produced absolutely none to the contrary.

2. The record clearly indicates that California has far surpassed the evidentiary burden required to support its informational justification.

Since much of California's empirical evidence is discussed in the district court's opinion, *see* APPELLANT'S EXCERPTS OF RECORD 094-116, and in the State's brief, Amicus will not repeat it. Rather, Amicus makes two points. First, the record evidence clearly establishes not just that voters generally find the identity of supporters and opponents of political positions very important in deciding how to vote, which would by itself provide the "quantum of empirical evidence" *McConnell* requires, but also, as the district court found, (i) that "[s]uch cues play a[n even] larger role in the ballot measure context, where traditional cues, such as party affiliation and voting record are absent," *id*. at 17; (ii) that, as in *McConnell*, "groups supporting and opposing ballot measures frequently give themselves ambiguous or misleading names, [creating] a trap for unwary voters," *id*. at 18; (iii) that since "[i]nterest groups … seek to conceal their political involvement by availing themselves of complicated arrangements consisting of

nonprofit corporations, unregulated entities, and unincorporated entities … citizens are likely to be uninformed and unaware that tens of millions of dollars are spent on ballot measure campaigns by such veiled political actors," *id*.; and (iv) that experts and voters agree that "this information is of critical importance, in light of the nature and complexity of the direct democracy process in California," *id*. In short, California provided much evidence not just that allowing voters to see who was supporting and opposing various electoral alternatives was generally important, but more specifically that voters' informational interest was particularly strong in ballot measure contests in California. CPLC provided no evidence to the contrary.

Second, the evidence clearly establishes that CPLC could easily have hidden from the public the source of funds its associated PACs use in ballot-measure advocacy. As the district court found,

> In February 2002, CPLC established the California Pro-Life Council Inc. Independent Expenditure Committee ("IE PAC"). Twelve days later, IE PAC received its only contribution to date, $10,000.00 from the Bay Area Free Enterprise PAC. Less than a week earlier, the Bay Area Free Enterprise PAC had received its only contributions, $25,000.00 from PG & E and $1,000.00 from the Smokeless Tobacco Council, Inc.

APPELLANT'S EXCERPTS OF RECORD 099-100. California's ballot-measure advocacy disclosure requirements were all, the district court found, that exposed the true source of IE PAC's funds. *Id*. at 20.

B. California's ballot-measure advocacy disclosure requirements represent the least restrictive means of vindicating the First Amendment interest *McConnell* identified in "individual citizens seeking to make informed choices in the political marketplace."

In *McConnell*, the Supreme Court found that disclosure of who was ultimately funding electioneering communications promotes the central First Amendment interest of promoting informed individual political decision making. Allowing contributors to remain anonymous and thereby hide themselves from the scrutiny of the voting public, on the other hand, makes "uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), discussion of public issues impossible. As BCRA and the *McConnell* Court recognized, there is simply no way to provide voters this information other than disclosing the identities of those who provide an organization the money it could use for advocacy.

1. California's ballot-measure advocacy disclosure requirements are the only way to provide California voters the critical information they need to make informed decisions on ballot measures.

As the district court noted, any regime that requires disclosure of only those who directly engage in ballot-measure advocacy and not those who indirectly fund their activities will promote circumvention and fail to provide voters the information they find most helpful in making ballot-measure decisions. APPELLANT'S EXCERPTS OF RECORD 099-100. A person wishing to fund

such advocacy, but afraid that visibly sponsoring it will alert voters to its underlying interests, merely has to support the efforts of another organization running such ads. In many cases, the donor would not even need to formally earmark any such funds because it would already understand how the receiving organization would be likely to use them.

Indeed, a visitor to the CPLC's Web site would surely conclude that donations made to the organization would be used for ballot measure advocacy—without any need to formally earmark the funds. The home page of CPLC's Web site prominently features a ballot measure advocacy billboard reading "California's Parents' Rights—Yes on 73." *See* http://www.californiaprolife.org (visited Sept. 13, 2005). Directly above this ballot measure advocacy billboard is a link labeled "Donation," which, if clicked, takes CPLC Web site visitors directly to a credit card donation form. *See* https://secure.entango.com/donate/L5kbuNf2yjc (visited Sept. 13, 2005). Furthermore, the "Yes on 73" billboard itself is a link to a series of Web pages containing information about Proposition 73—clearly identified at the bottom of each Web page as "A Project of the California Prolife Council." *See* http://www.caparentsrights.org (visited Sept. 13, 2005).[2]

[2] The Court may take judicial notice of this Web site content pursuant to Fed. R. Evid. 201. For the Court's convenience, we have provided a copy of this Web site content as an attachment to this brief, pp. 25-28.

Requiring disclosure of only those who directly engage in ballot-measure advocacy or expressly restrict gifts to others for that purpose would thus make it child's play for any organization to circumvent California's compelling disclosure requirements. And, as the Supreme Court has long recognized, the state has as strong an interest in preventing circumvention of a valid campaign finance law as it has in the law itself. *See McConnell*, 540 U.S. at 144; *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456 (2001)(*Colorado II*).

CPLC's preferred means, to require disclosure of only those donors who specifically "earmark" their funds for another's ballot-measure advocacy, would clearly not suffice for this very reason. It would allow the ultimate donors themselves to decide whether the voters should detect their support. A donor who wanted to engage in ballot-measure advocacy but hide that fact could simply opt out of disclosure by giving funds to another engaged in such advocacy while carefully avoiding any designation of those funds for that particular use. The absence of an explicit earmark, in other words, would allow the donor to completely hide its identity from the public.

2. California's ballot-measure advocacy disclosure requirements do not burden any First Amendment interests.

CPLC offers no evidence that California's disclosure requirements burden any of its First Amendment interests. It simply cannot. The disclosure

requirements do not limit how much the CPLC may spend on ballot-measure advocacy, how the CPLC may spend it, when the CPLC may spend it, or on which measures the CPLC can spend it. *Cf. First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978)(striking down ban on corporations making contributions or expenditures to influence the outcome of state referenda). Likewise, California's disclosure requirements do not burden any associational interest. They do not in any way discourage people from banding together to support a common interest. Individuals can form umbrella organizations to engage in ballot-measure advocacy, they can fund them as they wish, and they can solicit others to join and support the umbrella organization. *Cf. FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197 (1982)(holding that organization's associational interests not violated by requirement that its associated PAC solicit only from the organization's members). California law only requires that under certain circumstances they disclose their financial participation. That clearly poses no facial difficulty. *See McConnell*, 540 U.S. at 197-98 ("The District Court was also correct that *Buckley* forecloses a facial attack on the new provision … that requires disclosure of the names of persons contributing $1,000 or more to segregated funds or individuals that spend more than $10,000 in a calendar year on electioneering communications."). Under some narrow circumstances, reporting and disclosure requirements can, of course, impose unconstitutional burdens on particular groups and organizations, *see FEC*

v. Massachusetts Citizens For Life, 479 U.S. 238 (1986) (upholding as-applied challenge to reporting and disclosure requirements), but CPLC can make no such "as-applied" challenge here.

C. California protects the First Amendment interests of those who give money which others use to fund ballot-measure advocacy by carefully tailoring its disclosure requirements.

CPLC argues that several different features of California's disclosure regime, particularly its "one bite of the apple rule," its "reachback" provision, and its pro-rating of the amount that must be disclosed, each independently violate the First Amendment. Brief of Appellant at 19-24 (arguing that "one bite of the apple rule" is unconstitutional); 32-33 (arguing that "reachback" provision is not narrowly tailored); 25-26 (arguing that triggering disclosure requirements by pro-rating funds given according to percent of funds recipient entity actually spends on ballot-measure advocacy is underinclusive). The truth is just the opposite. These three provisions operate together to ensure that California's disclosure requirements provide helpful information to voters while burdening organizations that engage in ballot-measure advocacy as little as possible.

1. California's "one bite of the apple rule" protects from unexpected disclosure those who have no reason to know that others are using their money for ballot-measure advocacy.

As the district court described it, California's "one bite of the apple rule," Cal. Code Regs. tit. 2, § 18215, functions as

> a presumption that donors or members do not know that their payments will be used for political purposes when the organization has no recent history of expenditures for political activity. The "one bite of the apple rule" is designed to assist organizations like CPLC in determining whether their members "had reason to know" that some or all of their funds would be used for political purposes. However, once an organization has established a "history of making contributions from the fund, its members are deemed to be on notice in subsequent years that a portion of their payments may be used for political purposes.

APPELLANT'S EXCERPTS OF RECORD 085-086. This rule relieves an organization that has only started to engage in ballot-measure advocacy from having to disclose the identity of those who donate money to it. It simply presumes that until the organization has a history of making such expenditures its members have no reason to know that their donations can be used for this purpose.[3] It thus respects their anonymity when there is little reason to suspect that they intended or knew that their donations would be used for ballot-measure advocacy.

[3] BCRA makes no similar exception. It applies a "first nibble of the apple" approach. Regardless of whether a speaker has engaged in political activity in the past, it requires such disclosure. A speaker who spends at least $10,000 in a calendar year on electioneering communications simply must report all those who contributed more than $1,000 to it within the last two calendar years. *See* 2 U.S.C. § 434(f)(2)(E) & (F). No exceptions.

Far from imposing an unconstitutional presumption, as CPLC claims, Brief of Appellant at 19-23, California's "one bite of the apple rule" frees donors from any risk of disclosure in exactly those cases that warrant it—when there is little reason to believe they expected that their monies would be used to fund political activities.

2. California's "reachback" provision limits disclosure more narrowly than does BCRA's "reachback" provision, which the Supreme Court upheld in *McConnell*.

CPLC objects strenuously to California's so-called "reachback" provision. In its view, California considers as contributions not only those amounts given to an organization after it has taken "one bite of the apple" but all those amounts given earlier in the same calendar year. *Id*. at 32-33. BCRA's "electioneering communications" provisions, however, have a much longer "reachback" period. Under BCRA, a speaker who spends more than $10,000 within a single calendar year on "electioneering communications" must disclose the identities of all who contributed at least $1,000 to it "during the period beginning on the first day of the preceding calendar year and ending on the disclosure date" unless the speaker spends solely from a qualified separate "electioneering communications" account. 2 U.S.C. § 434(f)(2)(F). In other words, if on December 31 of a particular year an entity or individual exceeds the $10,000 threshold for that year, he must disclose the identities of all people and entities who have contributed more than $1,000 in

total within the preceding two years. This period is *twice* as long as California's maximum "reachback" period. Since California's "reachback" period is always shorter—and generally only half as long as—BCRA's, which the Supreme Court upheld in *McConnell*, California's can hardly be unconstitutionally overbroad. That California has taken more care to protect speakers' interests does not make its regulations more suspect.[4]

3. California's practice of pro-rating monies given to multi-purpose organizations engaged in ballot-measure advocacy makes its disclosure requirements friendlier, not more hostile, to the First Amendment.

California law requires multi-purpose organizations to rely on a "reasonable basis" to calculate what donations have to be disclosed. *See* Cal. Code Regs. tit. 2, § 18215(b)(1).[5] The most common "reasonable basis" used is the "*pro-rata*" approach. Using this approach, although donations of $100.00 or more to multi-purpose organizations substantially engaged in ballot-measure advocacy have to be reported, Cal. Gov't Code § 84211(f), they are first "pro-rated," based on the percentage of the receiving organization's receipts expended for political purposes.

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[4] Moreover, California's "reachback" provision is directly linked to its definition of "committee," which is based upon calendar year activity. *See* Cal. Gov't Code § 82013.

[5] Regulation 18215(b)(1) reads, in operative part: "If the donor knows or has reason to know that only part of the payment will be used to make contributions or expenditures, the payment shall be apportioned on a reasonable basis in order to determine the amount of the contribution."

See APPELLANT'S EXCERPTS OF RECORD 086-087. In other words, if someone donated $1,000 to a multi-purpose organization which spent only $10,000 out of a total $1,000,000 calendar-year general budget on political activity, the donation would be pro-rated by one percent ($10,000/$1,000,000) to $10, which falls far below the disclosure threshold. In fact, under this pro-rating scheme, a donor could give any amount up to $10,000 to the organization without requiring disclosure of the donor's identity.[6] Only if the donor gave more than this amount would his identify be disclosed and even then the disclosed amount of his contribution would itself be pro-rated. Thus, if he gave $20,000, the organization would report his contribution as just one percent of that: $200. *See also* affidavit of Eichman, DEFENDANT-APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD, SER000594-602 (explaining applications of the *pro rata* approach).

This system is much more flexible and user-friendly than BCRA's. Under BCRA's § 201, those disbursing more than $10,000 on "electioneering communications" in a calendar year must disclose the identity of all those who contributed more than $1,000 regardless of what proportion of the speaker's overall funds were spent on electioneering communications, 2 U.S.C. § 434(f)(2)(F), unless they carefully segregate all their spending for "electioneering

[6] $100,000 pro-rated by one percent equals exactly $100, the threshold of disclosure.

communications" into a separate account, *id*. § 434(f)(2)(E). The speaker, moreover, must disclose the whole, un-pro-rated amount of the contribution. *Id*. 434(f)(2)(F). In other words, if a person donates $10,000 to an organization that disburses $10,000 on electioneering communications in a particular calendar year while spending $1,000,000 on all its activities combined, BCRA still requires the organization to disclose the identity of the contributor and list his contribution in the full amount—and, in fact, "reachback" to include any other amounts given by the same person during the present and immediately preceding calendar years. *See id*. California's pro-rating scheme, by contrast, would fully protect the identity of the donor, let alone the full amount of the donation, from disclosure. That California's scheme is more dynamic than BCRA's and adjusts the level of disclosure according to the size of the contribution and the proportion of the recipient organization's overall budget spent on ballot-measure advocacy can hardly make it more objectionable than BCRA's, which the Supreme Court upheld in *McConnell*. 540 U.S. at 194-96.

IV. *MCCONNELL* MAKES CLEAR THAT CALIFORNIA'S REASONABLE DISCLOSURE REGIME IS NOT ONLY CONSTITUTIONAL ON ITS FACE BUT ALSO AS APPLIED TO CPLC.

At times CPLC attempts to portray its broad attack on California's ballot-measure advocacy disclosure requirements as a narrowly limited "as-applied"

challenge. Several times, for example, it notes that it is not appealing the district court's upholding of California's ballot-measure advocacy requirements insofar as they apply to (1) all donations to political action committees and (2) to so-called "true contributions," *i.e.*, donations "earmarked" for ballot-measure advocacy, to all others. In the end, however, CPLC's overbreadth arguments betray it. In its current appeal, CPLC is attempting a facial challenge to a law that easily withstands facial attack. *McConnell*, however, also forecloses any attempt by CPLC to challenge California's disclosure requirements on a more narrow "as applied" basis.

In *McConnell*, the Supreme Court acknowledged that individuals and groups might be able to challenge disclosure requirements as they specifically apply to them. With respect to minor parties, for example, it stated,

> We recognize that unduly strict requirements of proof could impose a heavy burden, but it does not follow that a blanket exemption for minor parties is necessary. Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.

Id. at 198 (quoting *Buckley v. Valeo*, 424 U.S. at 74); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982).

CPLC cannot meet this standard. It offered no evidence of any probability that the compelled disclosure of the names of those who give money to it but do not expressly earmark their money for uses other than ballot-measure advocacy will subject them "to threats, harassment, or reprisals." It is clear, of course, that some of CPLC's donors would prefer to hide their identities from the public. But they would do so for a different and less respectable reason. They fear that their visible financial support will turn many voters against their political positions. The First Amendment does not protect against this kind of "reprisal." Indeed, the First Amendment seeks to promote exactly this kind of informed political response. *McConnell*, 540 U.S. at 197 (recognizing "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace")(quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)(3-judge court)). The "injury" CPLC would assert in any as-applied challenge simply reflects the decisions of a better informed electorate.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be **AFFIRMED**.

RESPECTFULLY SUBMITTED this 16th day of September, 2005.

THE CAMPAIGN LEGAL CENTER

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ATTACHMENT

Ohio Parental Involvement Law Already Reducing Abortion Rate... Despite Lack O

ProLife Council

California Affiliate of National Right to Life

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PRESS RELEASE: Planned Parenthood- Tax-Supported Hate Speech

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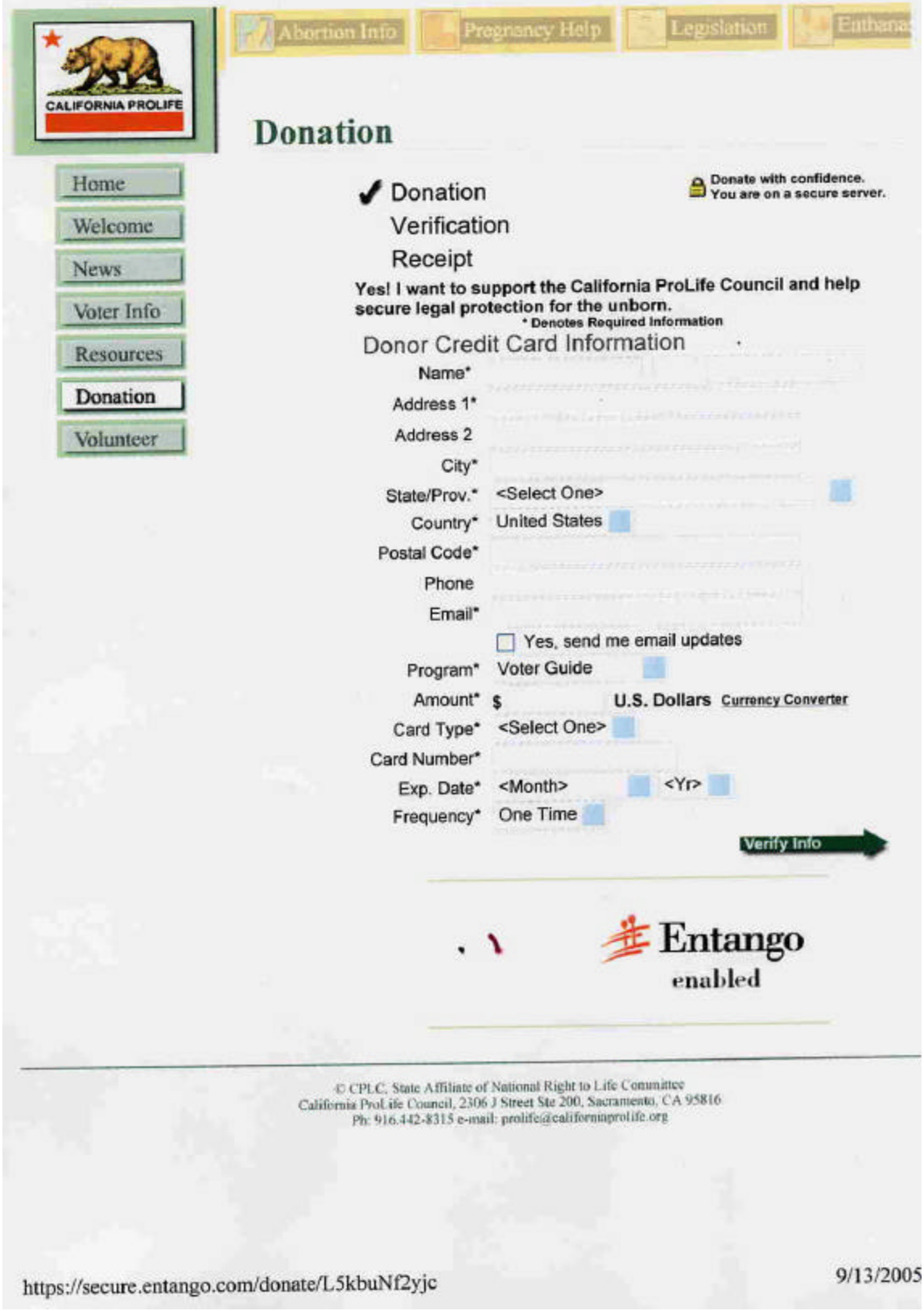

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Yes! I want to support the California ProLife Council and help secure legal protection for the unborn.

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California ProLife Council, 2306 J Street Ste 200, Sacramento, CA 95816
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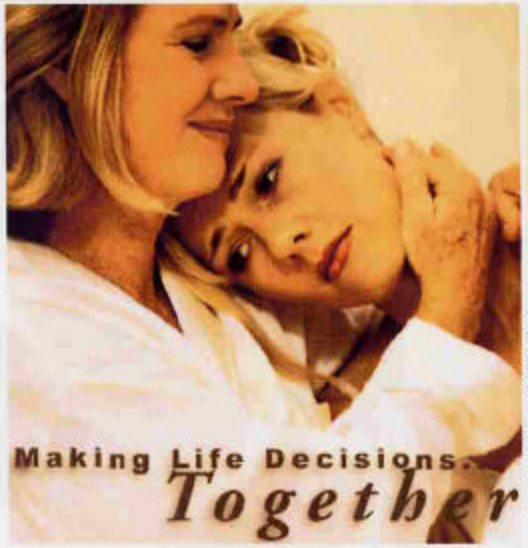

YES ON 73
NOV.08.05

Did you know that in California a 12 year old girl can obtain an abortion without her parent's knowledge?

Prop 73 requires parents to be notified before an abortion can be performed on their minor daughter.*

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A Project of the **California ProLife Council**

*Provisions allow for a judicial bypass in cases of abuse or incest and exemptions in emergency medical situations.

CERTIFICATES OF COMPLIANCE,

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CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus* brief complies with the type-volume limitation, typeface requirements and type style requirements set forth in Rules 29(d) and 32(a)(5)-(7) of the Federal Rules of Appellate Procedure. This brief uses a proportionally spaced Times New Roman 14 point typeface and contains 5,359 words, as determined by the "word count" feature of Microsoft Word software.

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CERTIFICATE OF FILING AND PROOF OF SERVICE

This is to certify that on September 16th, 2005, I sent for filing the original and four copies of the foregoing brief and attached motion by overnight delivery via a third party commercial carrier to:

Office of the Clerk
U.S. Court of Appeals, Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526
(415)556-9800

This is to further certify that on September 16th, 2005, I served one copy of the foregoing brief and attached motion on each of the following counsel by overnight delivery via a third party commercial carrier:

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