# Rebuttal to Steve Simpson's Response to *A Cold Breeze in California: ProtectMarriage Reveals the Chilling Effect of Campaign Finance Disclosure on Ballot Issue Advocacy*

*By Stephen R. Klein*

I have had the opportunity to consider First Amendment associational privacy and anonymity in greater detail since writing the article appearing above in this edition of *Engage*.[1] Steve Simpson's observation that my argument takes for granted a governmental interest in ballot measure disclosure where there is plainly none is aptly put. Despite my best intentions, I treated the First Amendment in light of judicial precedent, and, using such a backwards paradigm, called for a visit to the proverbial free speech woodshed.

Nevertheless, while I agree that there is no governmental interest in ballot measure campaign disclosure, this maxim has had little effect in practice. Although the Ninth Circuit is the only Court that has described the so-called "informational interest" in detail,[2] First Amendment challenges against similar concoctions have also failed in Alabama,[3] Maine,[4] Utah,[5] and Colorado.[6] Free speech finally scored a win recently in Wisconsin,[7] and this will hopefully amount to more than but a moment of clarity. But it is up against a large body of careless precedent.

Furthermore, Simpson's assertion that "neither is the law exactly bad for those asserting their First Amendment rights in this context" seems overly optimistic. Though Simpson acknowledges that "lower courts... have navigated around [Supreme Court] precedents," he does not acknowledge that the Supreme Court itself has provided part of the map, and not merely in the *Bellotti/Citizens Against Rent Control/ ACLF* line of dicta.[8] *McConnell v. FEC* also contains ample expansions of *Buckley*, complete with implicit assertions that the government has an interest in restricting political groups from "misleading" names.[9] Even *McIntyre v. Ohio Elections Comm'n*, the quintessential case affirming the First Amendment right to anonymous speech, contains dictum that squelches anonymity in the face of campaign finance law:

> Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.[10]

So, despite recent progress in First Amendment campaign finance actions, working to narrow the informational interest may be more effective (albeit far slower and more frustrating) than a root-and-branch attack.

Though Simpson correctly argues that differentiating between economic issues and social issues is unworkable in other contexts,[11] in the *ProtectMarriage* case the distinction would work. I did not argue that a group may have more or less interest in hiding their agenda if their interest is guided by economic or social principles, but rather that government only has an interest in disclosing donors who may appear to be "buying" a law that will enrich them. Again I acknowledge that this argument draws from case law rather than the First Amendment, but the argument would force the Ninth Circuit and/or the Supreme Court to confront the spurious reasoning that superimposes *Buckley* onto ballot measure disclosure and offers a solution that works in the context of *ProtectMarriage*: although there is a powerful gun lobby, tobacco lobby, and other lobbies in the United States looking to protect their industries, the "marriage lobby" is not out to protect marriage parlors or religious service fees. The Proposition 8 campaign was unquestionably driven by morality and morality alone, a social issue distinguishable from any hint of money used as quid pro quo. Simpson argues that this solution would do more harm than good in the long run, but it would vindicate the rights of those who contributed to Proposition 8 and would force courts to at least consider disclosure in future cases rather than sweep aside all arguments with faithful recitations of *Getman*.[12]

Simpson illustrates numerous other social issues, such as gun control, that have economic components, and correctly argues that groups advocating positions in related ballot measures should have no less First Amendment protection than the Proposition 8 donors. But by narrowing the "informational interest" for disclosure with the distinction of social and economic issues, the interest will become a far easier target in future challenges by such organizations. In other hotly contested areas of campaign finance law, such as the "functional equivalent of express advocacy," it is only through a series of as-applied challenges that judges have come to recognize the burdens the law places on political speech, and to finally "err on the side of protecting political speech rather than suppressing it."[13]

The First Amendment's victory over ballot measure disclosure in Wisconsin will, I hope, become a pattern, but, in the meantime, advocates of free speech should—in addition to root-and-branch arguments—work to clarify shoddy precedent to the greatest extent possible. This can lead to exposing the oppressive nature of campaign finance laws. Either way, Simpson and I share the ultimate end of freeing citizenry to engage in constitutionally guaranteed political speech.

**Endnotes**

1 The author recently co-authored, with attorney Benjamin Barr, an *amicus curiae* brief for certiorari by the United States Supreme Court in the case *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. Ct. App. 2009). The brief is available at http://www.campaignfreedom.org/news_center/detail/ccp-files-friend-of-the-court-brief-in-colorado-free-speech-case. Institute for Justice is lead counsel on the case.

2 California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1100–04

(9th Cir. 2003).

3 Richey v. Tyson, 120 F. Supp. 2d 1298, 1310 (S.D. Ala. 2000).

4 Volle v. Webster, 69 F. Supp. 2d 171, 173–74 (D. Maine 1999).

5 Nat'l Right to Work Legal Defense Fund and Educ. Found., Inc. v. Herbert, 581 F. Supp. 2d 1132, 1145 (D. Utah 2008).

6 *Coffman*, 209 P.3d at 1142–43.

7 Swaffer v. Cane, 610 F. Supp. 2d 962, 968 (E.D. Wis. 2009) ("The government's interest in keeping the public informed of where and how the teetotalers of Whitewater are spending their money to rally support against a liquor referendum is not commensurate with the government's interest in knowing which candidates for public office those same teetotalers financially support.").

8 *See* Simpson Response, *supra*, 74 n.5 and accompanying text.

9 McConnell v. FEC, 540 U.S. 93, 128 (2003) (citations omitted) ("Because FECA's disclosure requirements did not apply to so-called issue ads, sponsors of such ads often used misleading names to conceal their identity. 'Citizens for Better Medicare,' for instance, was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And 'Republicans for Clean Air,' which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals- brothers who together spent $25 million on ads supporting their favored candidate."); *id.* at 196 ("'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.'") (citing McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (internal citations omitted)).

10 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 355 (1995).

11 *See* Simpson Response, *supra*, at 74.

12 It is still mind-boggling that after the argument was conceded by counsel, Judge England would go to the trouble of reciting *Getman* and, despite his effort, not realize that not one alleged governmental interest was implicated in the case at hand. *See* ProtectMarriage.com v. Bowen, 599 F.Supp.2d 1197, 1207–11 (E.D. Cal. 2009).

13 FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 457 (2007).