No. 10-3101

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: MOTOR FUEL TEMPERATURE
SALES PRACTICES LITIGATION

On Petition for Writ of Mandamus to the
United States District Court for the District of Kansas
MDL No. 1840, Case No. 07-1840-KHV
(Honorable Kathryn H. Vratil)

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES IN SUPPORT OF PETITIONERS AND ISSUANCE OF A WRIT OF MANDAMUS

The Chamber of Commerce of the United States of America (the "Chamber") and the American Society of Association Executives ("ASAE") respectfully request leave of this Court to file the attached amicus curiae brief in support of Petitioners in Case No. 10-3101.

Petitioners seek review of an order entered by the United States District Court for the District of Kansas compelling several trade associations and their members to produce in civil discovery nonpublic communications about political beliefs and activities. The district court rejected the Petitioners claims that such information is privileged from disclosure under the First Amendment.

The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber's core purpose is to advocate for free enterprise before Congress, the White House, regulatory agencies, the courts, the court of public opinion, and governments around the world. As part of this mission, the Chamber engages in a significant amount of core political activity, including legislative lobbying.

The American Society of Association Executives ("ASAE") is a membership organization of more than 22,000 association professionals and industry partners representing more than 11,000 organizations. Its members manage leading trade associations, individual membership societies, and voluntary organizations across the United States and in 50 countries around the world. ASAE's mission is to provide resources, education, ideas, and advocacy to enhance the power and performance of the association community. ASAE's is a leading voice for legislative and regulatory policies that enable associations to carry out their vital missions, and also works to educate legislators, members of the Administration, and other key audiences about the true value of associations and the resources they bring to bear on our nation's most pressing problems.

When associations like the Chamber and the ASAE engage in political activity, confidentiality is often a necessary precondition for successful action. In order to craft effective and fully-considered public messages and political strate-

gies, an association's members often engage in a vigorous, internal give-and-take and a free exchange of ideas that is possible only because the individual participants know that their confidential communications will go no further than the ears and eyes of like-minded associates. This holds true even when two individual associations come together to pursue a common political goal—something that occurs with frequency at both the Chamber and ASAE.

Accordingly, Amici have a significant interest in this case and the proper application of the First Amendment to the internal political communications of trade, industry, and business associations. In particular, Amici believe that the district court erred in holding categorically (i) that associations and their members may claim First Amendment privilege only upon a showing that compelled disclosure will likely lead to harassment, threats, or reprisal against members, and (ii) that confidential political communications that are made between and among members of distinct associations are not privileged by the First Amendment from compelled disclosure. If these holdings stand as law, then participation in the political process through associational activity will be vastly diminished, and Amici and their members will be unable to effectively associate for common political goals or to formulate common political strategy and messaging. The accompanying brief addresses these points and, Amici respectfully submit, will be helpful to this Court's disposition of the case.

Conclusion

For the foregoing reasons, Amici respectfully submit that this Court should grant leave to file the accompanying brief amicus curiae.

Dated: May 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Tenth Circuit General Order dated March 18, 2009, I hereby certify that service of the foregoing was effectuated via the ECF system this 4th day of May, 2010.

CERTIFICATE OF DIGITAL SUBMISSIONS

Pursuant to Tenth Circuit General Order dated March 18, 2009, I further certify that: (1) no privacy redactions were necessary for this filing; (2) no hard copies of this filing are required; and (3) the digital submission has been scanned for viruses with the most recent version of AVG AntiVirus, updated through May 4, 2010, and according to the program is free of viruses.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae hereby state that The Chamber of Commerce of the United States of America has no parent corporation and has issued no stock and that the American Society of Association Executives has no parent corporation and has issued no stock.

INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber's core purpose is to advocate for free enterprise before Congress, the White House, regulatory agencies, the courts, the court of public opinion, and governments around the world. As part of this mission, the Chamber engages in a significant amount of core political activity, including legislative lobbying.

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[1] Pursuant to Fed. R. App. P. 29(b) and (c)(3), this brief is accompanied by a motion for leave to file.

When associations like the Chamber and the ASAE engage in political activity, confidentiality is often a necessary precondition for successful action. In order to craft effective and fully-considered public messages and political strategies, an association's members often engage in a vigorous, internal give-and-take and a free exchange of ideas that is possible only because the individual participants know that their confidential communications will go no further than the ears and eyes of like-minded associates. This holds true even when two individual associations come together to pursue a common political goal—something that occurs with frequency at both the Chamber and ASAE.

ARGUMENT

Petitioners seek this Court's review of discovery orders requiring disclosure by trade associations and their members of nonpublic, confidential political speech and associational activity. Petitioners argue that these orders violate the First Amendment and that this Court should review them pursuant to its mandamus jurisdiction. One of the factors this Court considers in determining whether to grant a writ of mandamus is whether the court below erred as a matter of law. *See In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1184 (10th Cir. 2006). Amici respectfully submit that on this question there can be no serious doubt: the district court's orders ran afoul of the First Amendment's protection against compelled disclosure of nonpublic political speech and association.

I. THE FIRST AMENDMENT PROTECTS THE RIGHT TO ENGAGE IN ANONYMOUS AND/OR CONFIDENTIAL POLITICAL SPEECH AND ASSOCIATION.

"The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91

(1982). This fundamental right of anonymous and/or confidential political speech and association was well understood and deeply cherished by the Framers. After all, they maintained the confidentiality of the proceedings of the Constitutional Convention for a generation, *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974), and, by joining issue through nom de plumes such as Publius and the Federal Farmer, conducted in anonymity the most momentous political debate this country—indeed, the world—has ever known, *see, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995).[2] In light of this history, the Supreme Court has repeatedly recognized, in many different contexts, that the First Amendment prohibits compelled disclosure of a speaker's identity or a citizen's political beliefs, activities, and associations. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) ("the vital relationship between freedom to associate and privacy in one's associations" bars compelled disclosure of group's membership list); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *Talley v. California*, 362 U.S. 60 (1960) (invalidating city ordinance requiring disclosure of handbill author's identity); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963) ("the guarantee [of free association] encompasses protection of privacy of association in organiza-

[2] *See also id.* at 360-69 (Thomas, J., concurring in judgment); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 n.17 (D.C. Cir. 1981) ("It bears remembering that Elbridge Gerry, Oliver Ellsworth, Roger Sherman, Spencer Roane, Noah Webster, James Iredell, and others all sought anonymity while they conducted the most important political campaign of their lives, the campaign to ratify the federal constitution."); *Talley v. California*, 362 U.S. 60, 64-65 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind…. It is plain that anonymity has sometimes been assumed for the most constructive purposes."); *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010) ("At the founding, speech was open … [and] there were no limits on the sources of speech and knowledge.").

tions"); *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 828 (1966) (First Amendment bars compelled disclosure of "information relating to [a person's] political associations of an earlier day, the meetings he attended, and the views expressed and ideas advocated at any such gatherings"); *Socialist Workers*, 459 U.S. at 100-01 (contribution and expenditure disclosure requirements were unconstitutional as applied to minor political party); *Dawson v. Delaware*, 503 U.S. 159 (1992) (introduction of criminal defendant's political association at penalty phase of trial violated First Amendment associational rights); *McIntyre*, 514 U.S. at 343 (embracing a "respected tradition of anonymity in the advocacy of political causes" in striking down law requiring identification of author of political handbills); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199 (1999) ("*Buckley II*") (striking down state law requiring petition circulator to disclose identity by wearing name badge); *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002) (striking down "requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection").[3]

[3] Likewise, the long line of cases affirming the First Amendment right *not to speak* are animated by the principle that it is not for the government to tell its citizens what to say, when to say it, or when and how to publicly embrace political speech, activities, or association. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.' ") (citation omitted); *PG&E Co. v. Public Utils. Comm'n of California*, 475 U.S. 1, 9 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Likewise, in applying these fundamental First Amendment principles, both this and other courts of appeals have repeatedly recognized that when discovery in civil litigation threatens compelled disclosure of confidential political speech and association, the First Amendment requires the requesting party to show both that it has a compelling need for the information and that compelled disclosure is the least restrictive means of obtaining it. *See, e.g.*, *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987); *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010); *Dole v. Service Employees Union, AFL-CIO*, 950 F.2d 1456, 1461 (9th Cir. 1991); *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), *cert. granted and vacated as moot sub nom. Moore v. Black Panther Party*, 458 U.S. 1118 (1982)[4]; *Hastings v. North East Indep. Sch. Dist.*, 615 F.2d 628, 632 (5th Cir. 1980); *United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980).[5]

In short, when a discovery request seeks to compel disclosure of nonpublic *political* communications—e.g., private communications about political beliefs and activities, lobbying activities, campaigns, elections, and formulation of public policy—constitutional interests of the highest order are implicated. The Supreme Court has re-

[4] "Even though the *Black Panther* decision was later vacated as moot, there is no suggestion in later case law … that its reasoning or analysis has been rejected or abandoned by [the D.C. Circuit]." *International Action Ctr. v. United States*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002).

[5] *See also Wyoming v. USDA*, 208 F.R.D. 449, 454-55 (D.D.C. 2002); *International Action Ctr. v. United States*, 207 F.R.D. 1, 4 (D.D.C. 2002); *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 812 (D.D.C. 1982); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, No. 75-5388, 1985 U.S. Dist. LEXIS 22188, at *56 (S.D.N.Y. Feb. 28, 1985); *Christ Covenant Church v. Town of Sw. Ranches*, No. 07-60516, 2008 U.S. Dist. LEXIS 49483, at *20-26 (S.D. Fla. June 29, 2008).

peatedly held that such political speech is "the essence of First Amendment expression," *McIntyre*, 514 U.S. at 346-47, "serves significant societal interests," and "is at the heart of the First Amendment's protection," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). As the D.C. Circuit aptly explained in applying "extra-careful scrutiny" to FEC subpoenas:

> The subject matter which the FEC oversees … relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes…. Thus the highly deferential attitude which courts usually apply to business related subpoena enforcement … has no place where political activity and association … form the matter being investigated…. This information is of a fundamentally different character from … financial or commercial data.

Machinists, 655 F.2d at 387-88.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE FIRST AMENDMENT PRIVILEGE AGAINST COMPELLED DISCLOSURE OF NONPUBLIC POLITICAL SPEECH AND ASSOCIATION MAY BE CLAIMED ONLY BY PARTIES WHO CAN SHOW THAT DISCLOSURE WILL LIKELY RESULT IN THREATS, HARASSMENT, OR REPRISAL.

The court below held that in order to claim the First Amendment privilege in civil discovery, a party "must demonstrate an objectively reasonable probability that compelled disclosure will chill associational rights, i.e. that disclosure will deter membership due to fears of threats, harassment or reprisal from either government officials or private parties which may affect members' physical well-being, political activities or economic interests." Doc. 1583 at 11. The First Amendment does not erect so high a hurdle for individuals and associations to qualify for heightened judicial scrutiny of discovery requests seeking disclosure of private political communications and associational activity.

To be sure, compelled disclosure of unpopular or controversial speech and political activity will often lead to harassment and reprisal, which in turn deeply chills and diminishes such speech and activity. Accordingly, some cases have focused upon these realities in balancing potential First Amendment harm against the need for disclosure. *See, e.g.*, *NAACP*, 357 U.S. at 462-63; *Socialist Workers*, 459 U.S. at 100-01.

But protection from harassment and reprisal is by no means the only reason for the First Amendment's solicitude for anonymity and privacy in political speech and association. Instead, the exercise of First Amendment rights is chilled whenever government requires disclosure of private political speech or associations, and heightened scrutiny accounts for the myriad legitimate reasons a person or association may have for withholding particular information—including identity, associational bonds, or beliefs—from public political expression. *See* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. OF CONST. L. 1, 16-20 (2003). For example, "quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity." *McIntyre*, 514 U.S. at 342. *See also McConnell v. FEC*, 540 U.S. 93, 286 (2003) (Kennedy, J., concurring in judgment and dissenting in part) ("The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views…."). Or a citizen might seek to avoid "decontextualized judgments" derived from disclosure of only "fragmentary information" regarding that person's political views. McGeveran, *supra*, at 19. Or citizens involved in an election campaign or a lobbying effort may prefer not to share their political strategy, or their candid and unrestrained inter-

nal exchanges, with their opponents. *See McConnell*, 540 U.S. at 363 (Rehnquist, C.J., dissenting) (recognizing interest in keeping "political strategy" private); *id.* at 321 (Kennedy, J., concurring in judgment and dissenting in part) (same). Or citizens may object to the notion that their private political speech or associations should be examined or "licensed" by the government or anyone else. *See Watchtower*, 536 U.S. at 167 ("There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate … that they would prefer silence to speech licensed by a petty official."); *Buckley II*, 525 U.S. at 198 n.19 (crediting evidence of petition circulator who simply did not "think it's right" to have to wear an identification badge). Or a citizen may simply—and quite understandably in an age of ever-increasing incursions on the privacy of personal information—"be motivated by … a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. In sum, individuals and associations may choose to keep their political voices anonymous, and their political associations and communications private, for any number of reasons, and that is a choice that the First Amendment protects absent a compelling government interest in disclosure.[6]

The Supreme Court has thus never *required* a showing of a reasonable fear of threats, harassment, or reprisal by parties seeking to invoke the First Amendment's protection. Although some cases, like *NAACP*, take such showings into account, other cases,

[6] Accordingly, a protective order that limited disclosure to attorneys' eyes only, or the use of documents solely for a particular case, would not sufficiently protect the First Amendment rights at issue. As the Ninth Circuit recently explained, "[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms." *Perry*, 591 F.3d at 1164. *See also id.* at 1160 n.6.

like *DeGregory*, demonstrate that a prima facie case of privilege may be made simply by presenting the court with the discovery requests at issue.[7] *DeGregory*, 383 U.S. at 828 ("The substantiality of appellant's *First Amendment* claim can best be seen by considering what he was asked to do."). *See also, e.g.*, *Gibson*, 372 U.S. at 545-46, 556-57 (holding that First Amendment privilege barred disclosure without requiring specific showing of threats or reprisal, and stating that "all legitimate organizations" have a "strong associational interest in maintaining the privacy of membership lists").[8] As the Ninth Circuit recently reaffirmed, some discovery requests on their face lead to the "self-evident con-

[7] To be sure, *Citizens United* rejected a challenge to federal disclaimer and disclosure provisions for political advertising in federal elections, and noted that Citizens United had not offered "evidence that its members may face … threats or reprisals." 130 S. Ct. at 916. But *Citizens United* did *not* hold that heightened scrutiny is triggered only upon such a showing. Quite to the contrary, the Court held that such provisions—on their face and with no further showing—*are* subject to "exacting scrutiny." *Id.* at 914. Evidence of threats and harassment may tip the balance of such scrutiny (rendering an interest insufficient that might otherwise be compelling), but such evidence is simply not necessary to trigger exacting scrutiny. *Id.* at 915-16.

[8] *See also AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003) (holding that evidence (or lack thereof) of retaliation and threats "speaks to the strength of the First Amendment interests asserted, not to their existence," and noting that "[i]n *Buckley v. Valeo*, for example, the Supreme Court concluded—without considering either the popularity of the parties or any specific evidence of retaliation—that disclosure of campaign contributions would chill political activity and therefore place 'not insignificant burdens' on First Amendment rights.") (quoting *Buckley v. Valeo*, 424 U.S. 1, 65-66, 68 (1976)); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-88 (D.C. Cir. 1981) (holding as a matter of law that where "subject matter" of subpoena goes to "the very heart of the organism which the first amendment was intended to nurture and protect"—"political expression and association"—"extra-careful scrutiny" is required because "release of such information carries with it a real potential for chilling the free exercise of political speech and association"); *Australia/Eastern U.S.A. Shipping Conference v. United States*, 537 F. Supp. 807, 810-11 (D.D.C. 1982) ("A factual showing of actual chilling effect is not a necessity for a decision forbidding disclosure … [Supreme Court] cases reveal that such showings are not essential to a decision that forced disclosure is unconstitutional.").

clusion that important First Amendment interests are implicated." *Perry*, 591 F.3d at 1163-64.[9]

It is little wonder, then, that this Court's principal case on First Amendment privilege, *Grandbouche*, makes *no* mention of a required showing of threats, harassment, or reprisal—a fact that the district court acknowledged, but dismissed as inconsequential, in a footnote. Doc. 1583 at 10 n.10. *See Grandbouche*, 825 F.2d at 1466. Given the significance of such a requirement, and the difficulty most speakers and associations would have in meeting it, this silence, like that of the dog that did not bark, speaks volumes.[10]

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[9] The district court stated that the Ninth Circuit in *Perry* "required the [petitioners] to demonstrate that disclosure would create an objectively reasonable probability of chill on First Amendment rights" and that petitioners "did so by presenting declarations" attesting to such a chill. Doc. 1583 at 19. While it is true that the *Perry* petitioners had submitted such evidence to the district court, and that the Ninth Circuit credited this evidence, it simply cannot be said that *Perry* stands for the proposition that such declarations are *required* to trigger heightened scrutiny. For, as noted, the Ninth Circuit found that the declarations merely confirmed a "self-evident" proposition. Moreover, the specific portion of the declaration that the Ninth Circuit quoted and relied on did not speak to threats, harassment, or reprisal.

[10] The district court stated that "*Grandbouche* appears to be the only case in which the Tenth Circuit has addressed the First Amendment associational privilege with regard to discovery disputes between private parties." Doc. 1583 at 10 n.10. But *Grandbouche* explicitly relies on this Court's earlier decision in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977). *Silkwood* dealt with the First Amendment reporters' privilege and held that in civil discovery a reporter "may … claim his privilege [against compelled disclosure] in relationship to particular questions which probe his sources." *Silkwood*, 563 F.2d at 437. *Silkwood*, like *Grandbouche*, did not require a showing that disclosure would likely result in threats, reprisal, or harassment against reporter or source. *Id.*

The district court stated that the decision in *NCBA v. United States*, 951 F.2d 1172 (10th Cir. 1991), "applied a burden-shifting analysis to claims of associational privilege with respect to grand jury subpoenas." Doc.1583 at 11 n.10. True. But this was perfectly consistent with *Grandbouche*, which requires "[t]he trial court [to] determine the validity of the claimed First Amendment privilege." 825 F.2d at 1466. While the parties in *NCBA* had submitted evidence of harassment, this Court did not state that such evidence was in any way *required* to make out a prima facie case of privilege.

Accordingly, there is simply no basis in law or logic for the district court's requirement that a party must show specific evidence of likely harassment, threats, or reprisal in order to claim the benefit of private speech and association afforded to all persons under the First Amendment.[11]

III. THE DISTRICT COURT ERRED IN HOLDING THAT "INTER-ASSOCIATIONAL" COMMUNICATIONS CANNOT BE PRIVILEGED.

The district court upheld the magistrate judge's finding that inter-associational political speech and activity—that is, political speech conducted between and among members of different trade associations—is not privileged under the First Amendment. *See* Doc. 1583 at 28-30; Doc. 1080 at 12-13 & n.27. This, too, was error.

Political associations come in all shapes and sizes, both formal and informal, and the First Amendment's protections apply no less to one than the other. *See Perry*, 591 F.3d at 1158 (risks from compelled disclosure of nonpublic political speech and activity apply to "the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures"); *Citizens Against Rent Control/Coalition for Fair*

[11] The district court also appears to have held that a party must show that disclosure would chill *membership*. *See* Doc. No. 1583 at 11, 19. But the threat from disclosure, and thus the scope of the privilege's protection, is not confined to thinning the ranks of membership rolls, but rather extends to chilling the political speech and activity of members within the association. Thus, in *Perry* (and contrary to the district court's characterization), the Ninth Circuit recognized not just a concern over chilling "participation in campaigns," but also over chilling "the free flow of information within campaigns." 591 F.3d at 1162. *See also id.* ("Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private."); *Dole*, 950 F.2d at 1460 (prima facie case of First Amendment privilege where union members to "no longer feel free to express their views on controversial issues at union meetings"); *McIntyre*, 514 U.S. at 348 ("the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude").

Hous. v. City of Berkeley, 454 U.S. 290, 293-94, 298 (1981). Effective politics involves coalition building, and thus individuals often form political associations for the purpose of advancing a shared political goal. As the old saying goes, politics sometimes makes for strange bedfellows. So just as individuals will sometimes associate across formal or ideological lines and engage in confidential discussions to advance a shared political goal (think of the discussions between Senators McCain and Feingold leading up to BCRA's enactment), so too will existing associations sometimes form alliances to advance a shared political goal (such as when the ACLU and NRA allied together in challenging BCRA's constitutionality). The result is simply a new political association, albeit larger than the two preexisting associations and perhaps without a formal title or legally registered corporate form. The new association is still made up of the same building blocks—individuals with shared political interests who have come together to advance their cause. There is no principled basis for denying the First Amendment's protections to these individuals simply because they had previously formed smaller associations. Indeed, under the district court's rule, a group of individuals who, in the first instance, come together to form one large association enjoy the First Amendment's protections. But if those same persons first form two associations, and then later merge into one association for certain purposes, they would not enjoy the same First Amendment protections.

To put it in the more concrete (though anachronistic) terms of Supreme Court precedent, imagine that Mr. DeGregory and his associates, *see DeGregory*, 383 U.S. 825, had supported Mrs. McIntyre's position on the local referendum question at issue in her case, *McIntyre*, 514 U.S. 334. Suppose further that his association reached out to Mrs.

McIntyre and her small band of associates (*McIntyre* notes she was assisted "by her son and a friend," *id.* at 337), to help her settle on a message and create her handbills. Under the district court's rules, the joinder of these two associations for this shared political enterprise strips all of the individuals within that new, larger association of the protections they would otherwise enjoy. Whereas disclosure of Mr. DeGregory's "political associations" and the "views [he] expressed … at … [association] gatherings" was off limits, 383 U.S. at 828, and whereas the political speech that Mrs. McIntyre was "free to include or exclude" from her handbills was her choice alone, 514 U.S. at 348, now all of this confidential political communication and activity would be subject to unrestrained compelled disclosure. Again, there is little in law or logic to support such a regime.

In practice, the district court's rule is not one about inter-associational communications, but rather is a rule that certain associations (formal) are entitled to First Amendment privilege while others (informal) are not. But the scope of the privilege is not status-based: it does not matter if the association is formal or informal, made up of persons in other associations or only of persons who have a singular associational allegiance. Indeed, as the Supreme Court has recently explained, "[p]rohibited … are restrictions distinguishing among different speakers, allowing speech by some but not others." *Citizens United*, 130 S. Ct. at 898. "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id.* at 899. Instead, the scope of the privilege is determined by the type of speech and activity at issue. Thus, in *DeGregory*, the First Amendment protection flowed not from Mr. DeGreg-

ory's particular role in political associations (indeed, he refused to disclose that information) but from the political nature of the speech and associations at issue. *See* 383 U.S. at 827-28. And in *McIntyre*, the law at issue was subject to "exacting scrutiny" not because of Mrs. McIntyre's status, but because it targeted "only those publications containing speech designed to influence the voters in an election," a "category of speech … [that] occupies the core of the protection afforded by the First Amendment." 514 U.S. 345-46.

The courts of appeals have thus never followed the rule endorsed by the district court here. Indeed, following the remand in *Perry I*, the district court in that case adopted the same rule as the district court here, holding that as a matter of law communications between individual entities allied in the same overarching political campaign are not entitled to First Amendment protection. *See Perry v. Schwarzenegger*, No. 09-2292, 2010 U.S. Dist. LEXIS 32499, at *27 (N.D. Cal. Mar. 22, 2010). In a subsequent appeal, however, the Ninth Circuit explained that this was error and that *Perry I* "did not hold that the privilege cannot apply to a core group of associated persons spanning more than one entity." *Perry v. Schwarzenegger*, No. 10-15649, 2010 U.S. App. LEXIS 7492, at *11, __ F.3d __, __ (9th Cir. Apr. 12, 2010). The privilege applies "whether or not they are members of a single organization or entity. The *operative inquiry* is whether they are part of an *association* subject to First Amendment protection." *Id.* *See also Machinists*, 655 F.2d at 387-88 (applying "extra-careful scrutiny" to FEC subpoenas for nonpublic communications "internal" to a single group *and* "communications among various groups

whose alleged purpose was to defeat the President"); *Wymoing*, 208 F.R.D. at 455 (protecting against disclosure of communications among environmental advocacy groups).[12]

CONCLUSION

For the foregoing reasons, this Court should issue the writ of mandamus.

Respectfully submitted,

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[12] The magistrate judge's reason for rejecting a privilege claim over "information … shared among trade associations" was that "the further information gets from the heart of the association the less it is connected to the association's core associational activities"—i.e., it is less confidential. Doc. 1080 at 12-13 n.27. But again, this just assumes that associations must be formally defined and, once formed, cannot merge informally for limited purposes or times. The actual confidentiality of political communications certainly is relevant to determining privilege, but that question cannot be answered by labeling a communication "inter-associational" simply because the correspondents have official titles from different organizations.

CERTIFICATE OF SERVICE

Pursuant to Tenth Circuit General Order dated March 18, 2009, I hereby certify that service of the foregoing was effectuated via the ECF system this 4th day of May, 2010.

CERTIFICATE OF DIGITAL SUBMISSIONS

Pursuant to Tenth Circuit General Order dated March 18, 2009, I further certify that: (1) no privacy redactions were necessary for this filing; (2) the ECF submission is an exact copy of the hard copies filed with the Clerk of the Court; and (3) the digital submission has been scanned for viruses with the most recent version of AVG AntiVirus, updated through May 4, 2010, and according to the program is free of viruses.

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