COLORADO SUPREME COURT 101 West Colfax Avenue Suite 800 Denver, Colorado 80202	
Certification of Questions of Law United States District Court District of Colorado, 12-cv-1708-JLK	▲ COURT USE ONLY ▲
Plaintiff: Coalition for Secular Government, a Colorado nonprofit corporation, v. Defendant: Scott Gessler, in his official capacity as Colorado Secretary of State.	Supreme Court Case No. 2012SA312
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OPENING BRIEF

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On November 2, 2012, this Court accepted four questions certified to it by the United States District Court for the District of Colorado in connection with *Coalition for Secular Government v. Gessler,* No. 12-cv-1708. Coalition for Secular Government ("CSG"), the plaintiff in that case, urges this Court to answer those questions as follows.

1. **Is the policy paper published by the Coalition for Secular Government in 2010 "express advocacy" under Art. XXVIII, § 2(8)(a) of the Colorado Constitution?**

No. Because Art. XXVIII gives no indication that the People of Colorado intended to regulate lengthy policy papers as express advocacy, because doing so was unconstitutional in 2002 and remains so today, and because the People are presumed to know this, the policy paper is not "express advocacy."

2. **If the policy paper is express advocacy, does it qualify for the press exemption found at Art. XXVIII § 2(8)(a)?**

The policy paper is not express advocacy. But if it were, the People intended that it qualify for the press exemption, just as it would qualify under the similar federal provision.

3. **Is the policy paper a "written or broadcast communication" under § 1-45-103(12)(b)(II)(B) C.R.S.? If not, did it become a "written or broadcast communication" when it was posted to CSG's blog or Facebook page?**

Because the phrase "written or broadcast communication" is undefined, and because this Court must read § 1-45-103(12)(b)(II)(B) C.R.S. so as not to merely duplicate subsection (A), CSG's policy paper and other publications are not "written or broadcast communications" as that term is used in Section 1-45-103.

4. **In light of *Sampson v. Buescher,* 625 F.3d 1247 (10th Cir. 2010), what is the monetary trigger for Issue Committee status under Art. XXVIII § 2(10)(a)(II) of the Colorado Constitution?**

This Court should announce a monetary trigger that, in keeping with *Sampson's* rationale and concerns, shields CSG's publication costs for its policy paper.

ARGUMENT

I. Issue Committees under Colorado law.

Article XXVIII § 2(10)(a) defines an issue committee as any person or any group of two or more persons that either has "(I)…a major purpose of supporting or opposing any ballot issue or ballot question" *or* "(II)… accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." COLO. CONST. art. XXVIII §2(10)(a). By regulation, the Secretary of State "has interpreted the emphasized word "or" to mean "and." *Independence Institute v. Coffman,* 209 P.3d 1130, 1135 (Colo. App. 2008) (citing then Sec'y of State Campaign & Political Finance Rules 1.7, 8 Code Colo. Regs. 1505-6, now Rule 1.12.2, 8 Code Colo. Regs. 1505-6).

The question, then, is whether a group has *both* (1) the major purpose of "supporting or opposing" a ballot question, and (2) has accepted or made at least $200 in "contributions or expenditures" to carry out that purpose.

The answer comes from the definition of "major purpose." This term is undefined in Article XXVIII itself. But the Fair Campaign Practices Act ("FCPA") adopts the definition of Article XXVIII for "issue committee." C.R.S. § 1-45-103(12)(a) (2012). And, in the very next subsection, the FCPA refines the definition of "major purpose":

> [S]upport of or opposition to a ballot issue or ballot question that is reflected by:
>
> (I) An organization's specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or
>
> (II) An organization's demonstrated pattern of conduct based upon its: (A) Annual expenditures in support of or opposition to a ballot issue or ballot question; or (B) Production or funding, or both, of written or broadcast communications, or both, in support of or opposition to a ballot issue or ballot question.

C.R.S. § 1-45-103(12)(b) (2012).

Further, the FCPA defines "expenditure" as having the same meaning as defined in Article XXVIII § 2(8). C.R.S. § 1-45-103(10) (2012). Thus, all of the definitions and exemptions of Article XXVIII are read into the FCPA's definition of "major purpose."

Consequently, there are two ways that an organization may have the major purpose of supporting or opposing a ballot measure and, consequently, become an issue committee under Colorado law. Either (1) it may make sufficient "expenditures" supporting or opposing a ballot measure, or (2) it may make sufficient "written or broadcast communications" that do so.

Beginning with "expenditures," Article XXVIII provides the following definition:

> [A]ny purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot

> question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.
>
> COLO. CONST. art. XXVIII § (2)(8)(a).

But an expenditure is *not*

> (I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;
> (II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party
> (III) …
> (IV) ….
>
> COLO. CONST. art. XXVIII § (2)(8)(b).

Colorado law provides no similar definition or guidance concerning "written or broadcast communications."

Taking these various provisions together, an organization is an "issue committee" if it:

(1) is formed with the purpose of supporting or opposing a ballot measure, *or*

(2) it spends or receives more than $200 to support or oppose a ballot measure *and* either (a) makes sufficient "expenditures" to have the major purpose of supporting or opposing a ballot measure, *or* (b) "produc[es] or fund[s]" sufficient "written or broadcast communication" that do so.

C.R.S. § 1-45-103(12)(b); *see also* C.R.S. § 1-45-103(10).

The first two certified questions turn on the *constitutional* definitions of "expenditure" and the press exemption to that definition. The third certified question involves the *statutory* definition of "written or broadcast communication" in the FCPA. Finally, the fourth certified question addresses the clear tension between the holding of *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) and the $200 threshold outlined in Article XXVIII § 2(10)(a)(II). With this roadmap in place, we turn to the standard of interpretation for Article XXVIII.

II. Standard of interpretation.

In *Colorado Ethics Watch v. Senate Majority Fund*, this Court explained the process for interpreting a constitutional provision created by a citizen initiative—in particular Article XXVIII §2(8)(a). *Colorado Ethics Watch v. Senate Majority Fund*, 269 P.3d 1248, 1253 (2012) ("*Senate Majority Fund*"). Colorado uses a similar method for interpreting a statute. *See, e.g., In re Miranda*, 2012 CO 69 ¶9 (Colo. Nov. 27, 2012) *Romanoff v. State Comm'n on Judicial Performance*, 126 P.3d 182, 188 (Colo. 2006). Courts look to the plain meaning of the text, look to the General Assembly's intent, and construe each provision in harmony with overall statutory design; if the language is ambiguous, courts use other tools of statutory construction. *Id.*

To give effect to the intent of the electorate, "the words are first read in their ordinary and popular meaning." *Id.* at 1253-54 (quoting *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004)). If the language is susceptible to multiple interpretations, then the amendment must be read "in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Senate Majority Fund at 1253.* (internal quotation marks omitted) (quoting *Zanver v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). Furthermore, the electorate is "presumed to know the existing law at the time" of the amendment. *Senate Majority Fund at 1254.* (internal quotation marks omitted) (quoting *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)).

The "ordinary and popular meaning" of various terms will be discussed below, in the context of each particular question. But the overall background and purpose of Article XXVIII may be taken as a whole.

A. Article XXVIII Preamble

An amendment's preamble may shed light on the intent of the electorate in adopting it. *See, e.g., Senate Majority Fund*, 269 P.3d at 1253; *Colorado Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, 1215-1216 (Colo. App. 2008). Article XXVIII was passed as Amendment 27 in 2002. *Senate Majority Fund, id.* According to the preamble, Article XXVIII was passed to

combat, among other things, "large campaign contributions to political candidates [that] create the potential for corruption and the appearance of corruption," "the rising costs of campaigning," and non-issue-focused "televised electioneering communications." COLO. CONST. art. XXVIII, § 1.

Nowhere in the preamble does the text discuss small organizations discussing public policy, or even mention issue committees. *See*, *id.* Therefore, the preamble indicates that the primary concern of the voters was the influence of large amounts of money and major campaign spending on the level of television advertisements. It evidences no concern over the activities that gave rise to this case. Consequently, to the extent that the Preamble guides this Court's inquiry, it suggests that CSG's activities fall outside the scope of Colorado's campaign finance laws. *See Senate Majority Fund*, 269 P.3d at1253 (examining the preamble of Article XXVIII).

B. The 2002 Bluebook

When reading a citizen-adopted amendment "in light of the objective sought to be achieved and the mischief to be avoided," *Senate Majority Fund*, 269 P.3d at 1253-54, a court may "consider[] other relevant materials such as ...the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature."

In re Interrogatories on House Bill 99-1325, 979 P.2d 549, 554 (Colo. 1999); *see also Zanver*, 917 P.2d at 283.

The 2002 Ballot Information Booklet provides analysis and arguments for and against ballot issues in the 2002 election, including Amendment 27. Legislative Council of the Colorado General Assembly, Res. Pub. No. 502-1, 2002 Ballot Information Booklet: Analysis of Statewide Ballot Issues i, 1 (2002) (hereinafter, "Bluebook").

In a bulleted list, the 2002 Bluebook details various proposals to change candidate contributions and spending—the "regulat[ion of] ballot issue committees" comes last. *Id.* The Bluebook then provides a table detailing the then-current campaign finance limits alongside the proposed new caps under Amendment 27. *See* Table 1, *id.* at 2. This table does not provide any information about issue committees. *Id.* The Bluebook details contributions to political parties, political committees, and small donor committees, voluntary spending limits, unexpended campaign contributions, regulation of political advertisements for candidates, reporting, and penalties. *Id.* at 3-4. The only place "issue committee" appears is under "Reporting," as part of a long list of possible contribution recipients in which a person "who contributes over $100" must "disclose his or her occupation or employer." *Id.* at 5.

The "Arguments For" and "Arguments Against" are significant in that they do not mention issue committees or extensive public policy papers. *Id.* at 5-7. Each side's five paragraphs are devoted to the amount raised and spent on *candidate* campaigns and the roles of corporations and unions in campaign finance for "state races." *Id.* at 6. They spoke about "big money" in politics and disclosure for *candidate* contributions. *Id.* at 6-7. Issue committees or issue advocacy are not substantively addressed, nor is any consideration whatsoever given to the process by which an organization becomes an issue committee, how such organizations are defined, or what advocacy activities (other than contributions) the Amendment sought to regulate.

C. The relevant case law in 2002 was *Buckley*.

Finally, "[t]he electorate, as well as the legislature, must be presumed to know the existing law at the time [it] amend[s] or clarif[ies] that law." *Senate Majority Fund*, 269 P.3d at 1254 (brackets in original) (quoting *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000). Under this cannon of interpretation, the case law in 2002 resolves the meaning of ambiguous terms. *Senate Majority Fund at 1254*.

III. The Coalition for Secular Government's policy paper is not "express advocacy."

The first certified question asks whether CSG's entire policy paper is "express advocacy" due to a single sentence encouraging a vote against a ballot measure. If so, then the funds used to create and distribute the paper become "expenditures," potentially making CSG an "issue committee" subject to the weight of Colorado's campaign finance laws.

The term "express advocacy" is not defined to clearly capture lengthy public policy papers. *See* COLO. CONST. art. XXVIII §2(8)(a); *see also Senate Majority Fund*, 269 P.3d at 1256. But this ambiguity does not foreclose analysis, as this Court may interpret citizen-adopted constitutional provisions "in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Zanver v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996).

In undertaking this analysis, the preambulatory text of Amendment 27 is particularly helpful, as it reflects precisely what Coloradans intended Amendment 27 to do. Section 1 of Article XXVIII declares the "purpose and findings" of "the people of the state of Colorado." COLO. CONST. art. XXVIII, § 1. It states that the people of Colorado were concerned with, among other things, "large campaign contributions," the influence of large aggregations of money, "significant spending

on electioneering communications," and television advertisements. COLO. CONST. art. XXVIII § 1. But the paper implicates none of these concerns.

Nor does the Blueblook's analysis bear on this question. Indeed, as discussed *supra*, the "issue committee" question is generally absent from the 2002 Bluebook, let alone how the State plans to treat policy papers.

This Court has previously addressed the definition of "express advocacy," finding that it is limited to the "magic words" of *Buckley v. Valeo* and their equivalents. *Senate Majority Fund*, 269 P.3d at 1255 (approving *League of Women Voters v. Davidson*, 23 P.3d 1266 at 1277). What this Court has not determined is whether a single sentence of express advocacy is a 'magic trigger' polluting a whole 20,000 word document in the context of issue speech.

Nevertheless, *Senate Majority Fund* notes that this Court presumes that the voters understood the law as it existed at the time they voted. *Senate Majority Fund*, 260 P.3d at 1254. Thus, it uses that law to interpret the meaning of Article XXVIII. *Id.* In the context of "express advocacy," *Buckley v. Valeo*, 424 U.S. 1 (1976) controls.

Since the 1976 *Buckley* decision, the U.S. Supreme Court has repeatedly noted that public discussions of issues and candidates may blur with advocacy, as they "tend naturally and inexorably to exert some influence on voting at elections."

424 U.S. at 43, n. 50 (internal citations omitted). *Buckley* took specific pains to ensure that issue speech was protected from government regulation. Such defense is all the more important when dealing with issue speech analyzing a ballot measure. Ballot measures pose no threat of corruption, and accordingly any significant government interest in regulation withers. *First Nat'l Bank of Bellotti v. Boston*, 435 U.S. 765, 790 (1977).

CSG's 37-page policy paper is a wide-ranging discussion of the personhood movement, abortion, and the separation of church and state. The paper closes by noting that those who find its arguments persuasive should vote against the personhood amendment. This Court is asked whether this single sentence renders the paper's whole 37 pages express advocacy. In short, the question for this Court is whether the people of Colorado intended that one sentence to overshadow the previous pages of analysis, converting the whole into the mere equivalent of a campaign flyer or 30-second radio advertisement.

A. *Buckley* and other cases predating the 2002 vote on Amendment 27 explicitly protected issue speech.

At the time of the adoption of Article XXVIII, *Buckley* informed the Colorado electorate on what is "express advocacy" in the campaign finance context. *Senate Majority Fund*, 269 P.3d 1254; *see also League of Women Voters*, 23 P.3d at 1277. Indeed, post-2002, the *Buckley* distinction between issue speech

(which may not be regulated) and express advocacy (which may) remains the law of the land. *See Citizens United v. FEC*, 130 S. Ct. 876 (2010).

The *Buckley* Court framed its holding around its "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Buckley,* 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). *Buckley* examined several aspects of the Federal Election Campaign Act ("FECA"), including a monetary ceiling placed on independent expenditures. *Id.* at 6, 75.

The Court addressed the relevant provision by establishing the distinction between issue speech, which may not be regulated, and express advocacy, which may. *Id.* at 43. But the Court noted that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions…campaigns themselves generate issues of public interest." *Id.* at 42. The Court explained that "[p]ublic discussion of public issues which also are campaign issues readily and often unavoidably draw[] in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well

more positive efforts to influence public opinion on them, tend naturally and inexorably to some influence on voting at elections." *Id.* at 43, n. 50.

But this does not convert this larger discussion of politics into something other than issue speech. No government is permitted to regulate pure issue speech merely because it discusses a candidate or, by extension, a ballot measure. *Id* at 43, n. 50.

It was this constitutional concern that led to *Buckley's* use of the "express advocacy" standard. "[T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* at 43. Since "[s]uch a distinction offers no security for free discussion", the Court decided that such "constitutional deficiencies...[could] be avoided only by reading [the FECA section] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43, 44 (quoting *Thomas v. Collins*, 323 U.S. at 535 (1945)). Thus was born the famous footnote 52 'magic words' test of "express words of advocacy for election or defeat, such as 'vote for,' 'elect,' 'support.'" *Id.* at 44, n. 52. The very purpose of the "magic words" approach to express advocacy was to prevent the government

from regulating discussions of issues that might implicate candidates, or are otherwise subjectively "relative to" a political campaign. *Id.* at 42, n. 50; *see also id* at 43-44, *Senate Majority Fund* at 1258.

Four years after *Buckley*, the Court reiterated the issue speech/candidate speech distinction. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1977), turned on whether a corporation could be banned from engaging in issue speech explicitly endorsing a ballot measure. In *Bellotti*, the Court recognized that First Amendment's "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)). After all "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections...simply is not present in a popular vote on a public issue." *Id.* at 790 (internal citation omitted).

The Supreme Court's ruling in *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238 (1986) (Brennan, J., for the majority) ("*MCFL*") provides another example of the interaction between issue and campaign speech. There, the Court was asked whether a "special edition" newsletter published by MCFL constituted express advocacy. In determining that it did, the Court noted the

"special edition" was not "a mere discussion of public issues that by their nature raise the names of certain politicians." *MCFL*, 479 U.S. at 249. Rather, it was a flyer with the title "EVERYTHING YOU NEED TO VOTE PRO-LIFE", the back page of which carried the "large bold-faced" admonition "VOTE PRO-LIFE." *MCFL,* 479 U.S. at 243. Its contents:

> listed the candidates for each state and federal office in every voting district in Massachusetts, and identified each one as either supporting or opposing what MCFL regarded as the correct position on three issues. A "y" indicated that a candidate supported the MCFL view on a particular issue and an "n" indicated that the candidate opposed it.... While some 400 candidates were running for office in the primary, the "Special Edition" featured the photographs of only 13. These 13... were identified as having a 100% favorable voting record... No candidate whose photograph was featured had received even one "n" rating.
>
> *Id.* at 243-244.

The differences between this "flyer" and an extended, heavily researched philosophical treatise are obvious. Indeed, the special edition included no true "discussion of public issues," but rather functioned as a voting guide – complete with a cover bearing explicit exhortations to vote.

Whereas CSG's policy paper reaches a conclusion on how to vote only as the result of an extended "discussion of public issues that by their nature raise" the identity of a particular ballot measure, the MCFL flyer was found to have no content counterbalancing its express advocacy. Therefore, under the analysis of

MCFL, while the "special edition" was, on the whole, express advocacy, CSG's paper is not.

B. Since 2002, the U.S. Supreme Court has continued to emphasize the protection of issue speech.

The *Buckley* Court's fear that the State may swallow core issue speech remains the backbone of the Court's post-2002 campaign finance decisions. The Court has "recognized that the interests held to justify the regulation of campaign speech and its 'functional equivalent' 'might not apply' to the regulation of issue advocacy." *FEC v. Wisc. Right to Life*, 551 U.S. 449, 457 (2007) ("*WRTL II*") (quoting *McConnell v. FEC*, 540 U.S. 93, 206 (2003)). *WRTL II* ultimately held that BCRA's regulation of electioneering communications could only apply to publications that have "no reasonable interpretation other than an appeal to vote for or against a specific candidate." *Id.* at 470. And, as the Chief Justice pointedly observed, on a close question "[w]here the First Amendment is implicated, the tie goes to the speaker." *Id.* at 474.

Taken together, the law, both in 2002 and today, clearly and strongly protects issue speech. Moreover, it recognized that discussions of issues will often involve some mention or analysis of candidates and ballot measures, because discussing the pressing issues of the day will often necessitate discussions of

electoral politics. But the U.S. Supreme Court clearly noted that this fact did not turn issue speech into express advocacy subject to state regulation, and that "the tie goes to the speaker." *WRTL II*, 551 U.S. at 474.[1]

C. Article XXVIII's definition of "express advocacy" was not intended to cover CSG's public policy paper and substantively similar speech.

Therefore, following the lead of *Senate Majority Fund*, in the absence of clear constitutional definitions, or any guidance from Amendment 27's preamble or Bluebook discussions, this Court must look to *Buckley* and its progeny when deciding whether the voters of Colorado would have regulated the paper as "express advocacy." *See Senate Majority Fund*, 269 P.3d at 1254. That analysis conclusively demonstrates that issue speech is not to be regulated, and that issue speech that happens to include some elements of express advocacy is not thereby converted, overall, into express advocacy.

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[1] The specific issue at the core of CSG's case—whether one sentence of express advocacy may pollute 37 pages of double-columned text—also came up in the procedural history of *Citizens United.* At the original oral argument, a hypothetical came up which asked whether one line of express advocacy in a book could trigger regulation and possible censorship as an electioneering communication. Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1, 10 (2012). When the answer from the United States came back as "yes," the concerned justices ordered new briefing and argument. *Id.*

The paper presents a moral case for abortion. It critiques the rhetorical styles of its ostensible pro-choice allies. It discusses the personhood campaigns in Colorado and elsewhere. It discusses what would happen to birth control, criminal investigations of miscarriages, and embryonic stem cell research if personhood principles became law. It comments on the effects of personhood to the disestablishmentarian nature of the Republic. And it concludes that, if the reader accepts the authors' lengthy philosophical arguments, "the only moral choice" is to oppose a personhood amendment on the ballot in Colorado. The State's attempt to regulate this type of speech is precisely the fear that the U.S. Supreme Court has attempted to prevent in *Buckley* and subsequent decisions.

Because the People are presumed to know the law at the time they voted, the 17 words of the paper's final sentence do not control the status of the remaining 20,000 words of clear issue speech. The paper is not "express advocacy" under the Colorado Constitution.

IV. If the policy paper is express advocacy, it falls under Article XXVIII's press exemption to the definition of "expenditure."

A. The paper is an "opinion or commentary writing" and therefore exempted.

Even if this Court determined that the paper is an "expenditure," CSG is still not an issue committee. This is because Article XXVIII contains an exemption

from the definition of "expenditure" covering opinion or commentary writings like CSG's policy paper.

The plain text of the Press Exemption states that "[a]ny news Articles, editorial endorsements, opinion or commentary writings" are exempted. COLO. CONST. art. XXVIIII, § 2(8)(b)(I). Furthermore, "letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party" are also protected. *Id.*

Given the previously discussed contents of the paper, it is plainly an "opinion or commentary writing" under the Exemption. *Senate Majority Fund*, 269 P.3d at 1254 ("we give words their ordinary and popular meaning") (internal citations omitted). It is a policy paper, outside of the scope of Amendment 27's regulatory scope. Indeed, the entire constitutional amendment makes no mention of public policy papers at all. *See Harwood v. Senate Majority Fund*, 141 P.3d at 965, Colo. App. 2006) ("We find it significant that the Amendment makes no mention whatsoever of opinion polls.")

Once again, Amendment 27's lack of concern for policy papers is reinforced by the preambulatory text of the law and the text of the Bluebook, which is mainly concered with concentrations of wealth and corporate power, and which makes little mention of issue committees, and none of policy papers or similar long-form

writing. COLO. CONST. art. XXVIII, § 1. None of this provides a mandate to regulate publications such as the policy paper.[2]

To state otherwise is to presume, without any evidence whatsoever, that Coloradans also wished to regulate the think tank policy analyst and the college professor. Such a reading would create a state where think tanks must comb every policy brief for an inadvertent magic word, lest political committee status follow, and where every co-written academic article containing scathing analysis of a local political movement can lead to registration with the Secretary of State. If there were ever "mischief" to be avoided, this is it. *Senate Majority Fund* 269 P.3d at 1254.

B. While it need not be to receive the exemption's protection, the paper is also a "periodical."

If this Court, contrary to CSG's view, determines that the wording of the Press Exemption requires "opinion or commentary writings" to be in a "newspaper, magazine, or other periodical," then the statute becomes ambiguous. The amendment does not define "periodical." A resort to the dictionary is no further help: Merriam-Webster defines the noun 'periodical' as a "periodical publication" and the adjective 'periodical' as either "periodic" (that is: "occurring

[2] Nor does the Bluebook shed any light on the voters' intent of applying the Press Exemption to policy papers.

or recurring at regular intervals" or "occurring repeatedly from time to time") or "published with a fixed interval between the issues or numbers" *or* "published in, characteristic of, or connected with a periodical." Merriam-Webster Online, "Periodical"; "Periodic", Encyclopedia Britannica, http://www.merriam-webster.com/dictionary/periodical; http://www.merriam-webster.com/ dictionary/ periodic.[3] While "[m]athematical precision in legislative draftsmanship is not necessary," such ambiguity cannot be condoned. *People v. Gross*, 830 P.2d 933, 937 (Colo. 1992). The law "must be sufficiently specific to give fair warning of proscribed conduct." *Gross*, 830 P.2d at 937.

First, the 2010 paper is a periodical because it is being revised and updated for 2012 to further discuss the personhood movement's efforts outside of Colorado. Dr. Hsieh and Mr. Armstrong are doing so independent of any election or upcoming vote on personhood. A publication re-written, updated and disseminated regularly (in this case, every two years) ought to qualify as a "periodic" one.

Second, the presumption that the people knew the present state of the law when they cast their ballots provides insight. *Senate Majority Fund*, 269 P.3d at

[3] Indeed, the phrase "other periodical" implies that a "periodical" is a category that includes newspapers and magazines. Yet, not every magazine or newspaper makes it past its first run. The voters could hardly have been suggesting that a $250 run of editorial magazine that fails to amass enough profit for a second edition must register as a political committee.

1256. It is "well established [Colorado law] that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and 'in its historic connotation comprehends *every sort of publication which affords a vehicle of information and opinion.*" *Joe Dickerson & Associates v. Dittmar*, 34 P.3d 995, 1004 (Colo. 2001) (internal quotations and cites omitted) (emphasis added). The people must be presumed to have intended to protect all such publications that serve as vehicles of information and opinion, including the policy paper written by Dr. Hsieh and Mr. Armstrong for CSG. It would be absurd to assume that the voters of Colorado instead intended to shrink the freedom of the press to such an extent that a public policy paper's authors must risk becoming a political committee or cease publication.

C. The federal government's similar press exemption would comfortably cover CSG's paper.

The federal press exemption is similar to Colorado's and may serve as persuasive guidance to this Court.[4] Specifically, the federal exemption has been interpreted expansively over the years to keep pace with an understanding of the press akin to one that this Court emphasized in *Dittmar*.

[4] The federal press exemption reads: "The term "expenditure" does not include—
(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. 4319(B)(i) (2012).

"While an earlier Commission advisory opinion narrowly concluded that a news story, commentary, or editorial distributed through facilities other than the enumerated media (*i.e.* a book) is generally not covered by the press exemption, later Commission actions have read the press exemption more broadly, consistent with the Act's legislative history, to cover cable television, the Internet, satellite broadcasts, and rallies staged and broadcast by a radio talk show." Federal Election Commission, AO 2010-08 ("Citizens United") at 4. "The legislative history of the press exemption indicates that Congress did not 'intend to limit or burden in any way the First Amendment freedoms of the press…[it] assures the unfettered right of the newspapers, TV networks, and *other media* to cover and comment on political campaigns.'" Federal Election Commission, AO 2011-11 ("Colbert") at 6 (citing FECA legislative history). Now, "the Commission has not limited the press exemption to traditional news outlets, but rather has applied to 'news stories, commentaries, and editorials *no matter in what medium they are published.*'" AO 2010-08 at 4(quoting AO 2008-14 ("Melothé, Inc." at 3) (emphasis in original)). Just like the state of Colorado, the Federal Election Commission has not forced a text always to be "frozen in time as of its enactment date" and instead "assess[es] the…statute on its face, as it applies to current conditions. *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 36 (Colo. 2000).

Dr. Hsieh and Mr. Armstrong's regularly revised opinion and commentary piece on the personhood movement has been published and disseminated through the federal mails, posted on CSG's website as its own page, posted as a PDF and made available for download as an e-book. It would likely be protected at the Federal level and ought to be protected in Colorado as well.

V. The meaning of "written or broadcast communication" can only be discerned by comprehensively reading Article XXVIII, the FCPA, and *Independence Institute* together. Doing so reveals that this phrase does not cover CSG's public policy paper.

The third certified question asks this Court to interpret the FCPA's phrase "written or broadcast communication." Unfortunately, the statute provides no definition, nor has any court explained the meaning of this clause.

When interpreting a constitutional provision, a court must look at the context of the provision and "harmonize all its parts." *Bruce v. City of Colo. Springs* 129 P.3d 988, 992 (Colo. 2006). The same holistic approach applies to statutes. *Romanoff v. State Comm'n on Judicial Performance*, 126 P.3d 182, 188 (Colo. 2006). When the constitution and a statute apply to the same subject, they are read to harmonize with each other. *Colorado Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 932 (Colo. App. 2012) (citing *Colorado Project-Common Cause v. Anderson*, 178 Colo. 1, 7, 495 P.2d 220, 222 (1972)). But statutory provisions

should not be read to make a section "redundant and superfluous." *Colorado Compensation Ins. Auth. v. Jorgensen*, 992 P.2d 1156, 1163 (Colo. 2000). Therefore everything must be read together, but each subsection of the statute should add something to the law and have independent effect.

Starting with the constitution, Article XXVIII § 2(10)(a) defines an issue committee as any person or any group of two or more persons that either has "(I)…a major purpose of supporting or opposing any ballot issue or ballot question" *or* "(II)… accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." COLO. CONST. art. XXVIII §2(10)(a). By regulation, the Secretary of State "has interpreted the emphasized word "or" to mean "and." *Independence Institute v. Coffman,* 209 P.3d 1130, 1135 (Colo. App. 2008) (citing then Sec'y of State Campaign & Political Finance Rules 1.7, 8 Code Colo. Regs. 1505-6, now Rule 1.12.2, 8 Code Colo. Regs. 1505-6).

Article XXVIII provides the following definition for "expenditures":

> [A]ny purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

COLO. CONST. art. XXVIII § (2)(8)(a) *see also* C.R.S. §1-45-103(10) (2012) (adopting the same definition for the FCPA). Therefore, reading the plain language of the constitution, an "expenditure" is any payment given for the purpose of supporting or opposing a ballot measure. This would include production of publications, advertisements, or even the purchase of supplies to do any of the former. The definition is very broad.

Following the statutory interpretation canons as articulated in *Bruce*, *Romanoff*, and *Clear the Bench Colo.*, Article XXVIII §§ 2(8) and 2(10) and COLO. REV. STAT. §1-45-103(12) must be read together, but not in a way that makes these subsections redundant. The constitutional definition of "expenditure" is so broad as to encompass the creation or funding of any communication. The plain meaning "written and broadcast communication" would include nearly any form of non-verbal communication—in particular publications and advertisements. But such a reading would subsume the "written and broadcast communication" language found in C.R.S. § 1-45-103(12)(b)(II)(B) into the definition of "expenditure" in Article XXVIII § (2)(8)(a). There would be no purpose in the separate provisions.

Consequently, "written or broadcast communications" cannot simply mean "expenditures," that is, anything supporting or opposing a ballot measure that has

an economic element. Fortunately, the legislature provided a purpose for this provision in the very next subsection:

> The provisions of paragraph (b) of this subsection (12) are intended to clarify, based on the decision of the Colorado court of appeals in *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. App. 2008), *cert. denied*, --- U.S. ---, 130 S. Ct. 165 [*sic*], 175 L. Ed. 479 (2009), section 2 (10) (a) (I) of article XXVIII of the state constitution and not to make a substantive change to said section 2 (10) (a) (I).

COLO. REV. STAT. § 1-45-103(12)(c) (2012). Therefore, *Independence Institute v. Coffman* is key to understanding "written or broadcast communication."

Independence Institute v. Coffman involved the then-Golden-based think tank and the ballot issues of Referenda C and D in 2005. *Independence Institute*, 209 P.3d at 1134. Prior to the case, the Independence Institute had a long history of nonprofit policy research and education. *See id.* An agent of the pro-Referenda C and D group filed an administrative complaint against the Independence Institute with the Secretary of State. *Id.* While that matter was pending, the Independence Institute filed a facial challenge to Article XXVIII and the FCPA. *Id.* The think tank asserted that the definitions of "issue committee" and "multi-purpose committee" were vague and overbroad. *Id.* at 1137. The Colorado Court of Appeals held that Article XXVIII § 2(10)(a) was neither unconstitutionally vague nor unconstitutionally overbroad. *Id.* at1136. The court then stated:

> To determine whether it has, as "a major purpose," engaging in ballot advocacy, a multi-issue committee, for example, could look to and compare the purposes stated in its charter, articles of incorporation, and by-laws; the purposes of its activities and annual expenditures; and the scope of issues addressed in its print and electronic publications.

Id. at 1139. It appears that it is this section of the case that C.R.S. § 1-45-103(12)(b) was designed to incorporate.

Looking at C.R.S. § 1-45-103(12)(b) and *Independence Institute* together, there are few ways that "a major purpose" may be determined. Of course, it could be that the organization was created to support or oppose a ballot measure. C.R.S. § 1-45-103(12)(b)(I), *Independence Institute*, 209 P.3d at 1139 ("purposes stated in its charter, articles of incorporation, and by-laws"). Another way to determine a major purpose would be to look at how the organization spends its money—i.e. what part of its annual budget are "expenditures." C.R.S. § 1-45-103(12)(b)(II)(A), *Independence Institute*, 209 P.3d at 1139 ("the purposes of its activities and annual expenditures"). Of course, "expenditures" are defined carefully in Article XXVIII §2(8)(a) and there is a clear $200 threshold of expenditures when becoming an "issue committee" in Article XXVIII §2(10)(a).

Finally, an organization may have "a major purpose" based upon the *publications or communications its makes to the public over time*. C.R.S. § 1-45-103(12)(b)(II)(B), *Independence Institute*, 209 P.3d at 1139 ("and the scope of

issues addressed in its print and electronic publications"). That is, when reading the FCPA and *Independence Institute* together, it appears that "written or broadcast communications" is meant to mean the scope of issues discussed by the organization, without reference to the funds spent toward that end.

This reading not only harmonizes subsections (A) and (B), it also prevents the term "funding" in subsection (B) from merely being duplicative of "expenditure." This is because the scope of issues discussed by an organization may be done by the organization directly, or by hiring outside expertise (academics, advertisers, publishers, etc.). The words "production" and "funding" merely show that the statute reaches all topics discussed by an organization, whether done directly with its imprimatur, or indirectly through others.

Furthermore, by looking at the topics discussed by an organization over its lifetime, this reading of subsection (B) explains why the term "annual" is used to limit analysis of "expenditures," but not of "written and broadcast communications." The provisions work together: a major purpose is either (1) noted from an organization's budget on an annual basis, or (2) from evaluating the overall number and range of topics discussed by that organization, without reference to the budget (which will generally be created and audited on an annual basis).

Applying this analysis to CSG, the public policy paper may be a "written or broadcast communication" in the strict sense of being a publication, but it must be viewed within the overall context and history of C.R.S. § 1-45-103(12)(b)(II)(B). CSG discusses a wide range of issues on its blog, its posts are filed under disparate categories such as "Creationism", "Antitrust", "Christianity", "Marriage" and "Black Liberation Theology." Politics without God, Coalition for Secular Government, http://blog.seculargovernment.us. Even the public policy paper itself covers a variety of topics besides any particular ballot measure. *Id.* at 5-6 (discussing other personhood campaigns), 24-26 (discussing a woman's rights in pregnancy), 30-33 (expressing concern that personhood is motivated by theocrats). Consequently, it is not a "written or broadcast communication… opposing" a ballot measure within the meaning of the statute and *Independence Institute*. Therefore, the public policy paper does not tend to show that CSG has such a major purpose.

VI. In light of *Sampson v. Buescher*, the monetary trigger for issue committee status must be higher than the $200 Article XXVIII § 2(10)(a)(II) imposes.

If the public policy paper is considered express advocacy (rendering its production and distribution an expenditure), and it does not fall under the press

exemption, and CSG is otherwise found to have the "major purpose" of supporting or opposing a ballot measure, then CSG will be subject to reporting and disclosure requirements that are unconstitutionally burdensome under *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). There, the court held that a group spending less than $1,000 opposing a ballot issue cannot—as a matter of federal First Amendment law—be regulated as a Colorado issue committee.

Sampson found Article XXVII § 2(10)(a)(II) unconstitutional as applied to several homeowners who wanted to voice opposition to a ballot initiative that would annex their unincorporated neighborhood to a nearby town. These individuals "had raised less than $1,000 in monetary and in-kind contributions for their cause when supporters of annexation challenged the failure of the opponents to register as an issue committee." *Id.* at 1249.[5]

In assessing the homeowners' challenge, the Tenth Circuit considered the three permissible justifications for disclosure laws: detecting violations of campaign contribution limits, deterring corruption and its appearance, and the public's informational interest. Noting at the outset that "[t]he legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to

[5]*Sampson* at 1260 n. 5 ("The record contains the No Annexation disclosure reports from November 27, 2005, through October 27, 2007. In addition to the $782.02 in in-kind contributions reported on July 13, 2006, the committee received an additional in-kind contribution of $31.53 in October 2006. The cash contributions (made between September 2006 and April 2007) totaled $1,426, of which $1,178.82 went for attorney fees and $247.18 remained in the committee bank account.")

ballot-issue campaigns," *Id.* at 1255, it dismissed the first justification as "mooted by the prohibition on contribution limits in the ballot-issue context." *Id.* at 1256. It also dismissed the second, recalling that, "[l]imits on contributions to ballot-issue committees…are unconstitutional because of the absence of any risk of quid pro quo corruption." *Sampson* at 1255 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.15 (1995); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296-300 (1981); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)).

Thus, the court concluded that Colorado's issue committee disclosure and reporting requirements could only be justified based on the "public interest in knowing who is spending and receiving money to support or oppose a ballot issue." *Sampson* at 1256. The court looked to Article XXVIII's preamble, reasoning that, "[i]t would take a mighty effort to characterize the No Annexation committee's expenditure of $782.02 for signs, a banner, postcards, and postage as an exercise of a 'disproportionate level of influence over the political process' by a wealthy group that could 'unfairly influence the outcome' of an election." *Id.* at 1254 (quoting COLO. CONST. art. XXVIII § 1).

In holding that Colorado's requirements "substantial[ly]" burdened the homeowners' First Amendment rights, the court relied on *Citizens United*, 130 S.

Ct. at 889: "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Sampson* at 1260. The court balanced the "substantial" burden of reporting and disclosure against the informational interest at stake, which it considered "minimal." *Id.* It noted that, "[a]s a matter of common sense, the value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Id.* (quoting *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009)).

The court concluded that the informational interest in the No Annexation committee's contributions and expenditures was "minimal, if not nonexistent, in light of the small size of the contributions." *Sampson* at 1261. Thus, the imposition of issue committee status upon the homeowners could not satisfy "exacting scrutiny." *Id.*

Sampson did not specify the level at which the public's interest in disclosure becomes significant: "[w]e do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures." *Id.* The Tenth Circuit was clear, however, that Article XXVIII § (2)(10)(a)(II)'s $200 threshold is unconstitutionally low: spending "less than

$1,000 on a campaign" falls "well below the line" at which ballot issue committees can be subject to reporting and disclosure requirements. *Id.* Colorado law, however, does not reflect this clarification by the appellate court, and continues to classify any group spending $200 or more to express views on a ballot initiative as an issue committee. In addressing the fourth certified question, this Court has an opportunity to update the state's campaign finance regime to comport with the Tenth Circuit's ruling in *Sampson* by raising the threshold for triggering issue committee status.

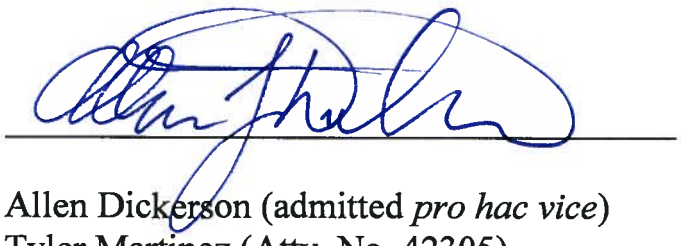
The No Annexation committee collected a total of $2239.55 in contributions.[6] Moreover, the *Sampson* court made clear that spending "less than $1,000 on a campaign (not including $1,179 for attorney fees)," does not come close to what is required for disclosure. *Id.* In this case, CSG's wishes to spend roughly $3,500 sharing its views on personhood. All of these amounts are insufficient to trigger issue committee registration and reporting requirements. After all, "[i]t is unlikely that the Colorado voters who approved the disclosure requirements of Article XXVIII... were thinking of" either the "No Annexation committee" or CSG. *Id.* at 1254.

[6] This total was determined by adding all of the contributions reflected in *Sampson* at 1260 n. 5: $782.02 in-kind reported on July 13, 2006; $31.53 in-kind in October 2006; and $1,426 cash between September 2006 and April 2007.

Conclusion

For the foregoing reasons, this Court should answer the First and Third question in the negative, the Second in the affirmative, and announce a new trigger for Colorado issue committee state that is consistent with Tenth Circuit law and the First Amendment.

Respectfully submitted,



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Certification of Questions of Law United States District Court District of Colorado, 12-cv-1708-JLK	▲ COURT USE ONLY ▲
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

The brief complies with C.A.R. 28(g). It complies with the word limits of an opening brief under C.A.R. 28(g) because it contains 8,010 words, excluding the parts exempted by C.A.R. 28(g).

The brief complies with C.A.R. 28(k), where applicable to certified questions from the United States District Court for the District of Colorado.

The brief complies with the typeface requirements of C.A.R. 32(a) because it is in Times New Roman, 14 point font, as created in Microsoft Office Home and Business 2010. This Opening Brief further complies with the printing requirements of C.A.R. 32(b) in paper size, margins, and printing.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements.

Dated this 3rd day of December, 2012.

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CERTIFICATE OF SERVICE

Pursuant to Colorado Appellate Rules 25(e) (2012), I hereby certify that on this 3rd day of December, 2012, I have caused a true and correct copy of the forgoing Opening Brief to be sent via electronic and first-class mail to the following:

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