No. 14-1469

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COALITION FOR SECULAR GOVERNMENT, a Colorado nonprofit corporation

Plaintiff-Appellee,

v.

WAYNE WILLIAMS, in his official capacity as Colorado Secretary of State,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado, No. 12-cv-1708 (Kane, J.)

Secretary's Unopposed Motion for Stay of Mandate Pending the Filing and Disposition of a Petition for Writ of Certiorari

Pursuant to Rule 41(d)(2) of the Federal Rules of Appellate Procedure, Appellant Wayne Williams, in his official capacity as Colorado Secretary of State, respectfully moves this Court to stay issuance of its mandate pending the filing and disposition of a timely petition for a writ of certiorari with the Supreme Court of the United States. The mandate is scheduled to issue on March 23, 2016. The Secretary expects that a petition for a writ of certiorari will be filed with the Supreme Court within the standard time permitted, 90 days from

the issuance of this Court's opinion. *See* Sup. Ct. R. 13(1). The Secretary requests a stay that does not extend past the date on which his petition is filed, with a continuance of the stay to follow after the Secretary officially notifies the Circuit Clerk that the petition has been filed. Fed. R. App. P. 41(d)(2)(B). The filing of this motion automatically stays the mandate until this motion is ruled upon. Fed. R. App. P. 41(d)(1).

The Secretary acknowledges that he remains bound by the declaratory judgment and permanent injunction issued below and affirmed by this Court. The reason for the stay is not to avoid these rulings; instead, the stay is intended to permit the parties to fully resolve Plaintiff's request for attorney fees under 42 U.S.C. § 1988 in a single proceeding on remand to the district court, following the disposition of the case by the United States Supreme Court. Issuing the mandate now will result in duplicative fee recovery proceedings, because fees will continue to accrue for work related to the petition for certiorari. In addition, if the Supreme Court accepts jurisdiction and rules in the Secretary's favor, Plaintiff may not be entitled to attorney

fees on remand. Staying the mandate until the Supreme Court acts on the Secretary's petition will avoid these unnecessary complications.

After conferral, counsel for Plaintiff has confirmed that this motion is unopposed.

REASONS FOR GRANTING THE STAY

This Court may stay the issuance of its mandate pending the filing of a petition for certiorari where "the certiorari petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); *see also* 10th Cir. R. 41.1(B) (providing that a stay is appropriate where "there is a substantial possibility that a petition for writ of certiorari would be granted"). The Governor meets both prongs of this test.

I. There is a substantial possibility that a petition for writ of certiorari would be granted.

The panel opinion addresses two questions that have been the subject of conflicting approaches and outcomes among the federal circuit courts in recent years. First is the extent to which courts should defer to legislative judgments about the propriety of disclosure thresholds in campaign finance cases. Second is whether Colorado may

constitutionally require campaign finance registration and disclosure from a group that intends to spend $3,500 on express advocacy concerning a ballot initiative that appears on the statewide ballot. There is substantial divergence among the federal circuits on both points.

First, with respect to the propriety of Colorado's campaign finance disclosure threshold for issue committees, the panel opinion relied on *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), to hold that exacting scrutiny applied and that "*Sampson* forecloses the Secretary's argument for a less-stringent standard." Slip op. at 17.

While *Sampson* may have settled the applicable test for reviewing disclosure thresholds under the First Amendment in the Tenth Circuit, the proper standard of review remains an open question on a nationwide basis. Some courts have explicitly rejected exacting scrutiny. *See, e.g., Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) ("NOM's argument operates from a mistaken premise; we do not review reporting thresholds under the 'exacting scrutiny' framework"); *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014) ("review of the monetary threshold for requiring

disclosure of a contribution or expenditure is highly deferential. In *Buckley*, the Supreme Court suggested that a disclosure threshold will be upheld unless it is 'wholly without rationality'"); *Delaware Strong Families v. AG of Del.*, 793 F.3d 304, 310 (3d Cir. 2015) ("even though election disclosure laws are analyzed under exacting scrutiny, we apply less searching review to monetary thresholds — asking whether they are 'rationally related' to the State's interest").

Other circuits have left the question open, often concluding that the challenged disclosure law would withstand scrutiny under either exacting scrutiny or the more lenient "wholly without rationality" test. *See, e.g., Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1251-52 (11th Cir. 2013) (applying exacting scrutiny in rejecting facial challenge to Florida law setting $500 threshold, but noting that discussions in other cases of the "wholly without rationality" standard were "instructive"); *Justice v. Hosemann*, 771 F.3d 285, 300 n.13 (5th Cir. 2014) (declining to "consider whether the $200 threshold is subject to exacting scrutiny or the much lighter 'wholly without merit' standard of review" because "Mississippi's calibrated reporting and itemization requirements for

committees engaged in campaigns related to constitutional amendments survive First Amendment scrutiny at most levels").

Still other courts, including the Tenth Circuit, have applied exacting scrutiny in cases involving challenges similar to this one. *See, e.g., Center for Ind. Freedom v. Madigan,* 697 F.3d 464 (7th Cir. 2012); *Iowa Right to Life Comm. v. Tooker*, 717 F.3d 576 (8th Cir. 2013).

The "wholly without rationality" standard that the Secretary urged this Court to apply originates from *Buckley v. Valeo*, 424 U.S. 1, 83 (1976). When considered together with the substantial circuit split on the applicable legal standard over the past several years, there is a substantial possibility that the Supreme Court will grant certiorari to consider the question.

Second, there is a substantial possibility that the Supreme Court would grant certiorari to consider whether Colorado may constitutionally require disclosure from an issue committee that raises and spends $3,500 on express advocacy on statewide ballot initiative. Although the panel declined to issue a facial ruling, its as-applied analysis likely forecloses Colorado's ability to require compliance with its disclosure laws for any committee of that size or smaller. And the

ruling places this Court at odds with numerous other courts, which have repeatedly rejected challenges to disclosure thresholds that are much lower than the $3,500 at issue here. *See, e.g., Justice*, 771 F.3d at 299-300 (holding Mississippi's $200 threshold facially constitutional); *Worley*, 717 F.3d at 1252-1253 (affirming constitutionality of Florida's $500 threshold); *Center for Ind. Freedom*, 697 F.3d at 483-84 (upholding Illinois' threshold of $3,000 for ballot initiative committees); *Nat'l Ass'n for Gun Rights, Inc. v. Murry*, 969 F.Supp.2d 1262 (D. Mont. 2013) (rejecting challenge to Montana's zero-dollar threshold for ballot initiative committee disclosure).

As with the question of the appropriate legal framework, this split of authority creates a substantial possibility that the Supreme Court will grant a petition for writ of certiorari. *See* Sup. Ct. R. 10(a) (noting that a case may be appropriate for certiorari if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

II. There is good cause for a stay.

In addition, there is good cause for a stay, particularly where the primary effect of issuing the mandate would be to trigger remand

proceedings to resolve an award of attorney fees under 42 U.S.C. § 1988. Submitting briefing on a certiorari petition and, if the petition is granted, on the merits, will change the amount of any award (or eliminate it, if this Court's ruling is reversed). Thus, a stay of the mandate pending a final determination by the Supreme Court would best serve considerations of judicial economy and fairness to the litigants.

CONCLUSION

The Court should stay issuance of its mandate pending the filing and disposition of a timely petition for a writ of certiorari.

Respectfully submitted this 22nd day of March, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **MOTION TO STAY THE MANDATE** upon all parties through ECF-file and serve or as indicated below at Denver, Colorado, this 22rd day of March 2016.

/s/ *Matthew D. Grove*
Matthew D. Grove

CERTIFICATE OF DIGITAL SUBMISSION

No privacy redactions were necessary. Any additional hard copies required to be submitted are exact duplicates of this digital submission. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection, Antivirus definition 1.215.2540.0, Engine Version 1.1.12505.0, dated March 22, 2016, and according to the program is free of viruses.

/s/*Matthew D. Grove*
Dated: March 22, 2016