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.)

APPELLANT'S OPENING BRIEF

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Oral argument is requested

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CORPORATE DISCLOSURE STATEMENT

Because Defendant-Appellant is a state government officer, no corporate disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

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STATEMENT OF RELATED CASES

In compliance with 10th Cir. R. 28.2(C)(1), Defendant-Appellant states that there are no prior related appeals in this Court.

JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear federal questions arising under the First and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871 (42 U.S.C. §§ 1983 and 1988). 28 U.S.C. § 1331. On October 10, 2014, the district court issued its Memorandum Opinion and Order permanently enjoining the Colorado Secretary of State from enforcing the disclosure provisions of Colorado's Fair Campaign Practices Act against the Plaintiff. J.A. 568-581. Final judgment was entered on October 27, 2014. J.A. 582-83. The Secretary filed his timely notice of appeal to this Court on November 10, 2014. This court has jurisdiction to hear the appeal from the district court's order and final judgment. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether Colorado's $200 threshold for issue committee registration and reporting violates the First Amendment.

2) Whether Colorado may require issue committee registration and reporting for a group that raises and spends $3,500 to influence an election on a statewide ballot initiative.

INTRODUCTION

In 2006, a small group of neighbors in south metro Denver learned of a local petition seeking the annexation of their neighborhood by an adjacent town. Meeting around a kitchen table, they discussed how to persuade their neighbors to oppose annexation, settling on a strategy that included walking the neighborhood, writing letters, distributing flyers, and posting yard signs. They sought no monetary donations and spent only a few hundred dollars in in-kind contributions. For their trouble, they were met with a campaign finance complaint filed by the annexation proponent, followed by an attempt to force the neighbors into a "guilty plea" for failing to register with the Colorado Secretary of State (the "Secretary") as an issue committee. In those unique circumstances, this Court held that the neighbors should be exempt from Colorado's reporting and disclosure requirements: "Colorado law, *as applied to Plaintiffs*, has violated their constitutional freedom of association." *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) (emphasis added).

Though the claims here attempt to echo *Sampson*, this case is not the story of a group of neighbors knocking on doors to oppose an issue affecting a few hundred homes. Plaintiff Coalition for Secular Government ("CSG") is a corporation formed with the specific aim of broadcasting its owner's political and ideological views to as large an audience as possible. A repeat player in Colorado politics, CSG raises money from both in-state and out-of-state donors specifically to engage in political advocacy on statewide ballot issues, and it has successfully disseminated its message to hundreds of thousands of people. CSG has never faced a campaign finance complaint, but it does assert that registration and disclosure requirements are overly burdensome for a group of its size. To be sure, CSG does not spend "tens of millions of dollars on ballot issues presenting complex policy proposals." *Id.* at 1261 (internal quotation omitted). But it also is not a purely local group of neighborhood volunteers.

This case instead presents a much more straightforward question appropriate for a facial determination: at what point does the

electorate's interest in who is funding political advocacy on a matter of statewide concern outweigh the burden that campaign finance disclosure imposes on the speaker? Here, the answer falls in favor of the electorate's interest in disclosure.

More fundamentally, however, this case asks how Colorado campaign finance law may be constitutionally administered. The district court believed that this Court's precedent requires those who wish to advocate on ballot questions to engage in repeat litigation on the same basic issue year after year, merely to determine whether the First Amendment will tolerate application of the state's campaign finance rules to individual groups. The Colorado Supreme Court, meanwhile, has denied the Secretary the authority to reset the dollar threshold that triggers disclosure—unless and until a court issues a facial ruling invalidating the current $200 reporting threshold for issue committees.

The Court should hold that Colorado's constitutionally fixed reporting threshold is facially constitutional, except for groups that face

the rare circumstances at issue in *Sampson*. If, however, the Court finds in favor of CSG, it should invalidate the $200 limit facially, thereby granting the State authority to reset the dollar threshold and avoid the type of burdensome repeat litigation the First Amendment forbids.

STATEMENT OF THE CASE AND FACTS

I. CSG and its history of advocating against the Personhood Amendment.

CSG is a small nonprofit corporation that has, in prior elections, published and distributed materials urging a "no" vote on the "Personhood Amendment," a pro-life citizen initiative that qualified for Colorado's general election ballot in 2008, 2010, and 2014. J.A. 570-71. Opposition to the Personhood Amendment is not CSG's sole reason for existence, but its publication and distribution of anti-Personhood materials did account for the vast majority of its activities during the 2008, 2010, and 2014 election cycles. J.A. 546, ¶¶ A.2-A.4, A.6.

The keystone of these efforts is a "public policy paper," which CSG publishes and begins distributing several weeks before any election that

features some version of the Personhood Amendment. In years where no version of the Personhood Amendment has appeared on the ballot, CSG has not published its paper. J.A. 625:8-11 (trial transcript). The paper is a long-form exposition of the "personhood movement" that is targeted at, and presented in the context of, the version of the Personhood Amendment appearing on that year's Colorado general election ballot. J.A. 43-86. It is focused on the movement's alleged philosophical shortcomings and closes by urging the reader to vote against the ballot measure in the upcoming election. J.A 76; 546, ¶ A.1.

CSG promotes the paper and its anti-Personhood message in a number of ways: by passing out fliers at events, by writing op-eds for publication in newspapers, on its own website, and through social media. J.A. 662:6-8; 617:15-621:12. These efforts have grown more and more successful with each passing election. In 2008, for example, the full paper was downloaded more than 3,700 times and a summary appeared in a national pro-choice voting guide with a circulation of 70,000. J.A. 655:24-25; 645:14-645:8; 917. That same year, CSG's anti-

personhood efforts were featured in a *New York Times* column. J.A. 924. CSG's paper was distributed even more widely during the 2010 election cycle. CSG serialized the new version of the paper on its blog, which was visited nearly 90,000 times, and readers downloaded the full version of the paper approximately 12,000 times in the three-month period leading up to and including the general election. [1] J.A. 619:24-620:1; 664:20-22. CSG also purchased three separate advertisements to promote the paper on Facebook. Each ad, urging viewers to vote "No on Amendment 62," targeted over 18,000 Facebook users who lived in Colorado and were of voting age. J.A. 662:23–664:8; 956-959.

CSG has followed the same business model in each election cycle, funding its opposition to the Personhood Amendment by raising monetary donations from individual contributors. J.A., 12, ¶ 32; 13, ¶ 38. In 2010, CSG began soliciting those contributions as pledges made specifically for the purpose of funding the paper. J.A. 624:6-14.

[1] Statistics for 2012 and 2014 are not available. The Personhood Amendment did not qualify for the ballot in 2012 and CSG consequently did not publish the paper. CSG did publish the paper in 2014, but only after the trial in this case had already taken place.

Work begins once supporters have pledged a sufficient amount. *Id.* In 2010, CSG raised about $2,800. J.A. 625:6-7. In 2012, its goal was $3,500 (although, again, the Personhood Amendment did not make the ballot that year, and CSG consequently declined to publish its paper). J.A. 625:11-13. And in 2014, although it had lowered its goal to $1,500, CSG had already raised about $2,000 at the time of trial. J.A. 625:14-21.

The money that CSG raises via its pledge system is primarily used to compensate the paper's authors (CSG's principals), for the paper's layout and design, and for costs associated with advertising and distributing it.[2] J.A. 13-14, ¶¶ 39-45.

II. Colorado's registration and reporting requirements for issue committees.

Colorado's voters adopted a comprehensive regulatory framework for campaign finance in 2002. The ballot measure approved in that year's election, which is commonly called Amendment 27, is codified as

[2] The software developer who designed the pledge feature also receives 5 percent of the gross amount paid. Tr. 43:12-14.

Article XXVIII of the Colorado Constitution. Implementing statutes and regulations appear in the Fair Campaign Practices Act, § 1-45-101, C.R.S. (Colo. 2014) *et seq*., and in the Secretary's Rules Concerning Campaign and Political Finance, 8 Colo. Code Regs. § 1505-6.

Amendment 27 defines an "issue committee" as "any person, other than a natural person, or any group of two or more persons, including natural persons: (I) That has a major purpose of supporting or opposing a ballot issue or ballot question; or (II) That has 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)(I). In order to maintain consistency with First Amendment standards, the Secretary has interpreted this provision as requiring a group to satisfy both the contribution/expenditure threshold *and* the "major purpose" requirement before qualifying for issue committee status. Rule 1.12.2, 8 Colo. Code Regs. § 1505-6; *see also Colorado Right to Life Committee v. Coffman,* 498 F.3d 1137, 1154-55 (10th Cir. 2007).

"Major purpose" is defined as "support 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 in opposition to a ballot question." § 1-45-103(12)(b), C.R.S. (Colo. 2014).

Colorado law requires each issue committee to register with the Secretary within ten calendar days of accepting or making contributions or expenditures in excess of two hundred dollars to support or oppose a ballot measure or ballot issue. § 1-45-108(3.3) C.R.S. (Colo. 2014). The registration statement—which can be completed entirely online, via the state's TRACER campaign finance reporting system—must include the organization's full name; the name of the registered agent; a street address and telephone number for the principal place of operations; and

the purpose of the committee. *Id;* § 1-45-108(3). An issue committee must identify the ballot measures to be supported or opposed, if known, and must create a separate bank account in the committee's name. § 1-45-107.5(7), C.R.S. (Colo. 2014).

Like registration, reporting can be done entirely online. TRACER is compatible with standard bookkeeping software, and permits users to import information directly and efficiently. Tr. 145:23-146:21. Once a committee is registered, the Secretary's office sends regular reminders of upcoming filing deadlines. Tr. 141:9-14. During the first five months of an election calendar year, a committee—assuming it exists at all—must file a single report, due in early May. J.A. 1283. Reports are due biweekly around the time of statewide primary elections, and then monthly during the summer. *Id.* Beginning on September 1, issue committees must file a total of five biweekly reports before election day, and then a final report a month after the election. *Id.* Based on when it commenced activity in 2014, CSG would have had to file a total of three reports once it registered as an issue committee. J.A. 713:17-25. Two of

those would have been due before the election and the last would have been due on December 4, 2014. J.A. 713:17-25; 1283.

III. CSG's historic compliance with Colorado campaign finance disclosure requirements.

Dr. Diana Hsieh, who holds a Ph.D. in philosophy, is CSG's founder. Described at one point as "presiding over a mini empire of on-line activism," J.A. 617:3-8, she incorporated CSG in 2008 because she "was looking just to have the Coalition for Secular Government have kind of a legally recognized status[.]" J.A. 595:2-4. Dr. Hsieh worked with a coauthor to publish the first version of the policy paper ahead of that year's general election. J.A. 594:22-28. CSG had not developed its pledge model at that time, but Dr. Hsieh was aware of Colorado's campaign finance requirements, and she decided to register CSG as an issue committee when she realized she would be spending more than $200 on the project. J.A. 597:3-7.

A. CSG registers as an issue committee in 2008.

Compliance with Colorado's campaign finance requirements in 2008 looked much different than it does today. The online TRACER platform had not been developed yet, the Campaign Finance Manual was less detailed, and little guidance was available on the Secretary's website. According to Dr. Hsieh, the information she was able to locate was "completely impossible to figure out." J.A. 597:19-598:2. Despite this, Dr. Hsieh "[e]ventually … did kind of figure out … [that] we were right at that $200 threshold," but she was "angry about it and … distressed." J.A. 598:3-5,19. As she put it, in 2008 CSG was just "two people who were writing a paper for free. We were not getting paid for this at all. I was going to spend some of my own money to promote it; and as a result of that … I had to go and do all the paperwork filing." J.A. 599:10-16.

Once Dr. Hsieh had completed registration, she learned that she "had to file periodic reports," which she found to be a burden even when CSG had no activity, but particularly when the committee had made

expenditures. J.A. 599:20-600:19. Depending on CSG's level of activity in the previous reporting period, this process took somewhere between 10 minutes and "a very unhappy hour[.]" J.A. 601:2.

B. CSG registers as an issue committee in 2010.

With the release of TRACER and improvements made to the Campaign Finance Manual and other materials, Dr. Hsieh's experience in 2010 "was so much better, the website was so much better…there [were] big improvements… in the information that was available to people in 2010, so…that made things easier when I went back to do it[.]" J.A. 598:10-14. Nonetheless, CSG's adoption of the pledge model and Dr. Hsieh's decision to "get paid for all of our hard work" increased the amount of information that had to be included in the entity's periodic campaign finance reports. J.A. 604:4. Although Dr. Hsieh instituted the pledge model, she had "blanked out" the fact that she would have to report information about who contributed more than $20 to support the policy paper. J.A. 606:20. She had "60-some contributors, quite a number of whom had donated over these relevant

amounts[.]" J.A. 609:11-13. Because Dr. Hsieh had not asked for information necessary for reporting on the pledge form, she "had to email them, ask for this data." J.A. 609:13-24. She testified that asking for this information "felt intrusive," J.A. 609:14, although it did not result in a net loss in the amount of pledges received, J.A. 631:9-19, and CSG substantially exceeded its 2010 fundraising goal. J.A. 631:21-22.

Dr. Hsieh tracked those who pledged financial support for the 2010 policy paper in order to collect on those pledges once the work was complete. J.A. 609:16-17. Apparently unaware that she could import these data directly into TRACER, she manually copied them over in a process that took "about one to two hours for every report." J.A. 609:20-21. Dr. Hsieh found filling out the reports to be "unpleasant and time consuming," J.A. 610:3, and because errors in reporting can lead to penalties, she "really didn't want to make a mistake[.]" J.A. 610:11.

Dr. Hsieh missed a reporting deadline in 2010. When she received a notice from the Secretary's office she filed a blank report and amended it when she had an opportunity. J.A. 610:17-612:2. Although

the Secretary issued a notice of a $50 penalty, Dr. Hsieh applied for a waiver due to extenuating circumstances, and the Secretary granted it. Tr. 614:15-16.

C. CSG files suit in 2012 and is granted relief in 2014.

With the proponents for a similar Personhood Amendment gathering signatures to qualify for the 2012 election, CSG was once again preparing to publish and distribute a revised version of its paper. J.A. 14, ¶ 46. Unhappy with the requirement that it register as an issue committee, CSG filed suit, arguing that Colorado's campaign finance registration and reporting requirements violate the First Amendment, both facially and as-applied. J.A. 8-27. Just before the scheduled preliminary injunction hearing, however, the count of the Personhood Amendment's signatures fell short. J.A. 417-419. CSG elected not to publish its policy paper that year. J.A. 625:8-10. Without the time pressure of a pending election, the district court certified several questions to the Colorado Supreme Court regarding whether, as

a matter of Colorado law, CSG was in fact required to register as an issue committee. J.A. 417-419.

After briefing and argument, however, the Colorado Supreme Court ultimately declined to answer the certified questions. J.A. 439. But as the 2014 election approached, supporters of the Personhood Amendment gathered enough signatures to qualify for that year's general election ballot. J.A. 542. CSG renewed its preliminary injunction motion and the district court expedited the proceedings and combined the preliminary injunction hearing with the trial pursuant to Fed. R. Civ. P. 65(a)(2). J.A. 469-70.

After an abbreviated discovery period and a one-day bench trial, the district court issued a written order finding that "[e]ven if there is any informational interest in the $3,500 CSG has raised, that interest is outweighed by the burdens CSG has suffered and will continue to suffer in trying to comply with issue committee reporting requirements." J.A. 578. Finding that "CSG falls outside the scope of ballot issue-committees to which Colorado's campaign finance disclosure laws may

constitutionally apply," J.A. 569, the district court ordered "that CSG's expected activity of $3,500 does not require registration or disclosure as an 'issue committee' and the Secretary is ENJOINED from enforcing FCPA disclosure requirements against it." J.A. 579. While the court stated that "wholesale invalidation of Colorado's $200 threshold for ballot issue committees" would be "warranted," it declined to facially invalidate Colorado's registration and reporting requirements because it determined that "*Sampson* provides an adequate and binding legal standard under which CSG's specific constitutional claims may be decided." J.A. 569. At the same time, refusing to acknowledge the significance of the fact that the $200 threshold is embedded in Colorado's Constitution (and is thus beyond the legislature's power to amend absent a judicially-created gap), the district court "advise[d] state lawmakers that the Secretary will be on the hook for fees every time a group, like CSG, falls under the $200 trigger for issue committee status and has to sue to vindicate its First Amendment rights." J.A. 570.

IV. The current legal predicament in the aftermath of *Sampson* and the Colorado Supreme Court's decision in *Gessler v. Colorado Common Cause*.

A. The Secretary promulgates a rule in order to address the perceived impact of *Sampson*, and the Colorado Supreme Court invalidates it.

The district court's invitation to prospective plaintiffs to file suit in order to "vindicate [their] First Amendment rights," J.A. 570, is particularly problematic due to the Colorado Supreme Court's recent ruling in *Gessler v. Colorado Common Cause*, 327 P.3d 232 (Colo. 2014). *Gessler* was the culmination of a challenge to the promulgation of Campaign Finance Rule 4.1, which the Secretary adopted several months after the opinion in *Sampson* was issued. As the Colorado Supreme Court put it: "Recognizing that *Sampson* invalidated the registration and reporting requirements for at least some issue committees in Colorado, [the Secretary] promulgated Rule 4.1 to clarify which issue committees were subject to the requirements." *Id.* at 234. The Rule "increase[d] the contribution and expenditure threshold that triggers issue committee status from $200 to $5000 and exempt[ed]

retrospective reporting of contributions and expenditures once issue committee status is achieved." *Id.*

Interpreting *Sampson* as a matter of first impression, however, the Colorado Supreme Court invalidated Rule 4.1. While the Colorado Constitution vests the Secretary with the authority to promulgate rules that are necessary to administer and enforce campaign finance laws, Colo. Const. art. XXVIII, § 9(1)(b), that authority does not permit the adoption of "rules that conflict with other provisions of law." *Gessler*, 327 P.3d at 235. And because, the Colorado Supreme Court held, the opinion in *Sampson* "was carefully tailored to the facts before the court," Colorado's $200 threshold "can be enforced in future circumstances where such enforcement is constitutional (i.e., in circumstances that are different from those at issue in *Sampson*)." *Id.* at 237. The fact that *Sampson* had not foreclosed enforcement of the $200 threshold in circumstances distinguishable from that case meant that the threshold still survived. From there, the outcome was straightforward. The constitutional provision trumped the rule.

B. The dilemma created by the conflicting holdings of the district court and the Colorado Supreme Court.

Neither a federal district court nor a state supreme court is bound by the other's interpretation of the United States Constitution. The Secretary, however, is bound by both, and these inconsistent interpretations of *Sampson*—by the district court in this case, and by the Colorado Supreme Court in *Gessler*—have created an intractable problem that can be resolved only by this Court or the United States Supreme Court. In this case, although the district court stated that its ruling was "as-applied," it also made its views about the breadth of *Sampson* and the overall constitutionality of the $200 threshold quite clear. Indeed, the district court stated in no uncertain terms that it would not countenance application of campaign finance requirements to a group that spends $3,500 (or less) to support or oppose a statewide ballot initiative. In *Gessler*, however, the Colorado Supreme Court held that the $200 threshold stands except in cases that involve circumstances similar to those in *Sampson*.

In short, while the Colorado Supreme Court commanded in *Gessler* that the Secretary must enforce the Colorado Constitution as written, the district court in this case made it clear that if the Secretary does so, at least with respect to committees that spend $3,500 or less, the State will be subjected to repeated attorney fee awards under 42 U.S.C. §§ 1983 and 1988. Whatever the outcome of this case—whether this Court limits *Sampson* to its facts and facially upholds the $200 disclosure threshold, or facially invalidates it—the need to provide clarity for political speakers in Colorado is paramount.

SUMMARY OF THE ARGUMENT

In *Sampson,* this Court held that Colorado's $200 threshold for issue committees could not be constitutionally applied to a loosely affiliated group of neighbors who collectively made several hundred dollars of in-kind contributions to advocate against a purely local ballot measure, and who were subjected to a politically motivated campaign finance complaint for their efforts. 625 F.3d at 1254. The Tenth Circuit rejected the facial challenge brought by those same plaintiffs, however,

refusing to "draw a bright line below which an issue committee cannot be required to report contributions and expenditures." *Id.* at 1261.

The district court here found that *Sampson*, despite its unique facts, compelled the conclusion that Colorado's voters have a vanishingly small informational interest in the disclosure of campaign finance information from a group the size of CSG. That minimal informational interest, the district court held, was outweighed by the burdens that would be imposed upon CSG if it were required to comply with Colorado's registration and reporting requirements.

At the outset, this Court should depart from the district court's decision to conduct only an as-applied analysis. Notwithstanding the district court's reading of *Sampson*, nothing in that opinion constrained it from engaging in a broader review of Colorado's disclosure threshold, particularly given that CSG neither alleged nor proved the existence of any circumstances not specifically contemplated by Colorado law. And as other federal circuits have acknowledged in similar cases, rendering *ad hoc* decisions concerning the constitutionality of campaign finance

regulations imposes intolerable burdens on potential political speakers. Because clarity and predictability are vital in this area of constitutional law, this Court should decline to rule purely on an as-applied basis irrespective of the outcome. Rather, it should simply declare as a facial matter that Colorado may constitutionally require registration and disclosure from an issue committee that, as CSG's complaint alleged it intended to do, raises and spends $3,500 to advocate for or against passage of a statewide ballot issue.

While *Sampson* will certainly factor into that analysis, this Court should clarify that its approach in that case was driven by its unusual facts. In so doing, this Court should reject the district court's finding of constitutional fact that CSG is indistinguishable from the *Sampson* plaintiffs. And with the benefit of information that was not available in 2008, this Court should also, if necessary, revisit *Sampson*'s *dicta* about the importance of disclosure for political speakers of all types. In the end, this Court should—in line with every other federal circuit to have addressed this question—accord "judicial deference to plausible

legislative judgments as to the appropriate location" of Colorado's reporting threshold. *National Organization for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (*McKee I*). Because Colorado's selection of its $200 threshold for issue committee disclosure is not "wholly without rationality," its facial constitutionality should be affirmed. *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

ARGUMENT

I. Standard of review

In a First Amendment case, a district court's "findings of constitutional fact and conclusions of law" are reviewed *de novo,* and a reviewing court "perform[s] an independent examination of the record to ensure protection of free speech rights." *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1285 (10th Cir. 1999) (applying standard following trial that was consolidated with preliminary injunction proceedings); *see also Colorado Right to Life Committee v. Coffman*, 498 F.3d 1137, 1145 (10th Cir. 2007) (*CRLC*) (applying standard in campaign finance case decided on summary judgment).

II. The district court incorrectly held that requiring CSG to register and disclose its expenditures was inconsistent with the First Amendment.

A. The district court erred by declining to apply *Buckley*'s "wholly without rationality" standard to Colorado's $200 threshold.

As a general matter, laws that govern the disclosure of information associated with ballot initiatives are subject to exacting scrutiny. *See, e.g. Buckley v. Am. Constitutional Law Found.*, 525 U.S 182 (1999) (*"ACLF"*) (applying exacting scrutiny to various provisions governing disclosures by petition circulators); *Doe v. Reed*, 561 U.S. 186 (2010) (applying exacting scrutiny to law permitting public disclosure of signed ballot petitions). The same standard typically applies to recordkeeping, reporting, and disclosure provisions in the campaign finance context. *See Buckley*, 424 U.S. at 66-68. To survive exacting scrutiny, the government must show that there is "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67. "That is, the strength of the governmental interest must reflect the

seriousness of the actual burden on First Amendment rights." *Davis v. Federal Election Commission*, 554 U.S. 724, 744 (2008).

Although exacting scrutiny is the general rule associated with disclosure laws, when it comes to the point at which disclosure is required—*i.e.*, the monetary threshold that triggers application of reporting obligations—the Supreme Court has articulated a much more deferential standard. In *Buckley*, examining the disclosure thresholds of FECA (which it pointed out were "indeed low"), the Supreme Court commented that Congress had apparently not "focused carefully on the appropriate level at which to require recording and disclosure." 424 U.S. at 83. "Rather," the Court noted, Congress "seems merely to have adopted the thresholds existing in similar disclosure laws since 1910." *Id.* Nonetheless, implicitly acknowledging that courts are poorly equipped for the type of line-drawing that selecting a disclosure threshold entails, the Court in *Buckley* recognized that it could not "require Congress to establish that it has chosen the highest reasonable threshold." *Id.* Because the location of that threshold is a "judgmental

decision," *Buckley* held that it was "best left in the context of this complex legislation to congressional discretion," and will pass muster unless it is "wholly without rationality." *Id.* Or, as Justice Oliver Wendell Holmes put it nearly ninety years ago: "[W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." *Buckley*, 424 U.S. at 83, n.111, *quoting Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

Perhaps because challenges to disclosure thresholds were rare in the years after *Buckley*, its "wholly without rationality" language was rarely cited in the decades after the opinion was issued. In recent years, however, courts have begun to apply it more frequently, as plaintiffs bring more and more challenges not only to disclosure schemes in general but also to the monetary threshold that triggers disclosure. In *McKee I*, for example, the plaintiffs challenged a Maine law "requir[ing] a report of any expenditure over $100 for

communications naming or depicting a clearly identified candidate within a set period prior to any election." 649 F.3d at 59-60. Citing *Buckley*, the First Circuit examined whether the disclosure threshold was "wholly without rationality," and explicitly rejected the plaintiffs' argument that it must "review reporting thresholds under the 'exacting scrutiny' framework." 649 F.3d at 60.

A number of other courts have taken the same approach, according substantial deference to a legislatively-drawn reporting threshold in both the ballot initiative and candidate contexts. *See Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031-34 (9th Cir. 2009) (applying "wholly without rationality" standard to Montana's 'zero dollar' threshold for ballot initiative disclosure, but holding that requiring disclosure of *de minimis* in-kind expenditures failed the test); *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 133 (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"); *Joint Heirs Fellowship Church v. Ashley*, Dist. Ct. Case No. H-14-0125, 2014 U.S. Dist. LEXIS 126232, at *70-71 (S.D. Tex., Sept. 9, 2014) (applying "wholly without rationality" standard to disclosure threshold for a recall committee); *Corsi v. Ohio Elections Commission*, 981 N.E.2d 919, 928-29 (Ohio App. 2012) (affirming constitutionality of zero-dollar threshold for PAC designation, holding that "we cannot say that the absence of a monetary trigger for PAC designation is wholly without rationally in this context").

In this case, the Secretary urged the district court to apply the deference required by the "wholly without rationality" standard when considering the constitutionality of Colorado's reporting threshold. J.A. 760:3-10. The district court's order did not explicitly address that argument; instead, it simply cited *Sampson* for the proposition that exacting scrutiny controls, despite the fact that the *Sampson* opinion never explicitly rejected the controlling "wholly without rationality" standard. While this may have been understandable in *Sampson*, given

that the focus of those plaintiffs was on the impact of the entire disclosure scheme, it was error for the district court to overlook this accepted standard when focusing specifically on the constitutionality of Colorado's disclosure threshold.

B. Even if the exacting scrutiny standard applies, the district court erred when it held that CSG could not be constitutionally required to comply with Colorado's disclosure requirements.

Irrespective of its methodology, the district court reached the wrong result in this case. Colorado's $200 disclosure threshold passes constitutional muster as a general matter. And even if there are some circumstances similar to *Sampson*'s unique context in which the $200 threshold is constitutionally problematic, the district court erred by forbidding the Secretary from requiring disclosure by a group that over the course of 3 electoral cycles has repeatedly raised and spent more than 10 times that amount. Neither the record nor the district court's findings in this case support its decision to grant relief to CSG

based on Colorado's reporting threshold, either facially or on an as-applied basis.

1. Voters have a substantial informational interest in disclosure in the ballot initiative context, even at comparatively low levels of contributions and expenditures.

Campaign finance law has gone through drastic changes in the decades that have passed since *Buckley v. Valeo*. While various cases have chipped away at contribution limits and speech bans, the Supreme Court's view of the value of disclosure has remained unchanged since its pronouncement that "[t]he people in our democracy are entrusted with responsibility for judging the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978). This message resonates as strongly today as it did nearly forty years ago. *See McCutcheon v. Federal Election Comm'n*, 134 S.Ct. 1434, 1460 (2013) ("With modern technology,

disclosure now offers a particularly effective means of arming the voting public with information.").

In *dicta*, the *Sampson* court mulled over the possibility that public disclosure in the context of ballot initiatives may actually carry with it *less* informational value than it does in candidate elections, and suggested that nondisclosure might be preferable because it would "require the debate to actually be about the merits of the proposition on the ballot," rather than highlighting who is paying for that debate. 625 F.3d at 1257. Although this statement has been popular among plaintiffs challenging disclosure thresholds, it has yet to find any purchase among the federal Circuits. *See, e.g.*, *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1248 (11th Cir. 2013) ("In the same way the Supreme Court in *Citizens United* rejected the idea that the messenger distorts the message, we reject the notion that knowing who the messenger is distorts the message."); *McKee I,* 649 F.3d at 57 (in the modern communication age, "[c]itizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin"); *see also*

Protectmarriage.com v. Bowen, 830 F. Supp. 2d 914, 943-44 (E.D. Cal. 2011) ("The Tenth Circuit's analysis regarding a state's informational interest in ballot initiative campaigns is unpersuasive," in part because *Sampson* "rejected the reasoning in several critical Supreme Court cases by categorizing those discussions as dicta").

Indeed, *Sampson*'s discussion notwithstanding, courts are virtually unanimous in concluding that campaign disclosures are often more meaningful in the ballot initiative context than they are for candidate elections. *See, e.g., Center for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012) ("Educating voters is at least as important, if not more so, in the context of initiatives and referenda as in candidate elections"); *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010) ("[T]he high stakes of the ballot [initiative] context only amplify the crucial need to inform the electorate that is well recognized in the context of candidate elections . . . .").

The reasons for this are straightforward. When it comes to ballot initiatives, "[v]oters act as legislators," and "interest groups and individuals advocating a measure's defeat or passage act as lobbyists." *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1106 (9th Cir. 2003). When acting as lawmakers, citizens "have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists' services and how much." *Id.* This interest is only enhanced by the fact that in Colorado, most ballot initiatives result in constitutional amendments. As the Secretary's expert witness testified: "A ballot issue tends to have a much longer life and perhaps more of an impact than any elected official." J.A. 692:1-3.

This reasoning extends to small contributions as well as large ones. As the Secretary's expert witness explained, campaign finance reports "can reveal a lot about a campaign, its origins, its motivation, whether [it has] a huge deep pockets organization backing it or whether it is, in fact, pro[b]ably a very small grass roots effort." J.A. 692:16-19.

This is consistent with analysis by many other federal Circuits. *See, e.g., Worley*, 717 F.3d at 1251 ("[D]isclosure of a plethora of small contributions could certainly inform voters about the breadth of support for a group or cause . . . ."); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012) ("*McKee II*") ("The issue is … not whether voters clamor for information about each 'Hank Jones' who gave $100 to support an initiative. Rather, the issue is whether the cumulative effect of disclosure ensures that the electorate will have access to information regarding the driving forces backing and opposing each bill . . . ."); *Justice v. Hosemann*, 771 F.3d 285, 298 (5th Cir. 2014) (holding that the benefits of disclosure "accrue even when small-dollar donors are disclosed"); *cf. Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S 290, 299-300 (1981) ("The integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed … [and] if it is thought wise, legislation *can outlaw anonymous contributions* . . . .") (emphasis added).

The electorate's interest in groups of all sizes was also demonstrated by empirical evidence presented at trial. As the Secretary's campaign finance manager, Stephen Bouey, testified, the TRACER system not only accepts campaign finance filings, but also permits the public to view that information via a web interface. J.A. 730:6-15. The Secretary tracks website traffic in order to ensure that it has "the band width and the server capacity to handle the loads that the system might experience . . . during peak periods." J.A. 730:2-4. In preparation for trial, Mr. Bouey compiled data concerning "the number of public site views related to issue committees." J.A. 731:11-12. Mr. Bouey presented those data in several demonstrative exhibits showing dramatic increases in public site views during the period leading up to various elections. J.A. 733:5-734:15; (Ex. 71-72).

And these public site views were not focused solely on very large issue committees. To the contrary, issue committees on the low end of the spectrum in terms of spending received a disproportionately high level of interest, as expressed in terms of public page views, compared

to their spending activity. For example, as shown in Exhibit 73, there were a total of 38 issue committees registered in Colorado during the 2011-2012 election cycle. J.A. 1286. 14 of these committees spent between $0-3500, 14 more spent between $3,500-50,000, and the 10 largest committees spent more than $50,000 each during that period. While the aggregate spending of the smallest group comprised only 0.2% of all issue committee spending in Colorado during this period, that same group's TRACER data comprised 15.7% of total page views for issue committees. This trend was even more dramatic during the 2013-2014 election cycle. Based on data that were current to the week before trial, the smallest 20 issue committees combined to spend only 0.03% of all money spent by issue committees in Colorado. Yet, measured by public page views this group garnered an outsized amount of interest, comprising 18.1% of all public page views. J.A. 1287 (Exh. 74). These data run counter to the district court's outright dismissal of the informational interest in small issue committees. Indeed, the uncontroverted evidence at trial established that the public's interest in

small issue committees is far higher than one might expect when compared to their levels of spending.

These data—as well as testimony from the Secretary's expert witness and case law upholding disclosure thresholds as low as zero dollars—contradict the district court's dismissal of the informational interest in small issue committees. The public's interest in disclosure is substantial even when advocacy groups spend comparatively small amounts of money. And this is especially true in the modern day. As the evidence at trial demonstrated, relatively small amounts of money can be used to spread political messages to hundreds of thousands of potential voters.

2. Colorado's disclosure threshold is similar to those upheld by other circuits, and compliance with Colorado's disclosure requirements is not onerous.

If *Sampson* was unusual in creating an as-applied exemption for a small group opposing a neighborhood annexation, then the district court's suggestion that *facial* invalidation of Colorado's disclosure

threshold would be "warranted" is a true outlier. No court has *ever* facially invalidated a disclosure law based on a conclusion that the threshold is too low. Rather, applying the substantial deference to legislative judgment demanded by the "wholly without rationality" standard, courts have consistently rejected facial challenges to disclosure thresholds within the same range as the $200 mark set for issue committees under Colorado law.

For example, in *Justice* the Fifth Circuit rejected a facial challenge to a Mississippi statute that, like Colorado, sets a disclosure threshold of $200 for issue committees.[3] 771 F.3d at 296-301. In *Worley*, the Eleventh Circuit found facially constitutional a Florida law setting a $500 threshold in a state with a population nearly four times the size of Colorado's. 717 F.3d at 1252-53. And the Ninth Circuit has repeatedly suggested that Montana's *zero*-dollar reporting threshold is

[3] Finding that as-applied relief was inappropriate based on the record, the Fifth Circuit also reversed the district court's ruling "enjoin[ing] Mississippi from enforcing the requirements against small groups and individuals expending 'just in excess of' Mississippi's $200 disclosure threshold." *Justice*, 771 F.3d at 287.

constitutional, at least with respect to monetary contributions. *Family PAC v. McKenna*, 685 F.3d 800, 809, n.7 (9th Cir. 2012); *see also National Ass'n for Gun Rights, Inc. v. Murry*, 969 F.Supp.2d 1262, 1270-71 (D. Mt. 2013) (upholding Montana's zero-dollar disclosure threshold for monetary contributions).[4]

[4] Many states whose disclosure thresholds appear to have never been judicially challenged are also in Colorado's range, particularly relative to their populations. A few examples follow:

- Ohio Rev. Code Ann. §§ 3517.10(D) and 3517.105(C)(2)(b) set a zero-dollar threshold for independent expenditures by corporations and other groups, and a $100 reporting threshold for individuals making independent expenditures to support or oppose ballot issue.
- Mass. Gen. Laws Ann. ch. 55, § 22 sets a zero-dollar threshold for committee registration for statewide ballot initiatives, and requires reporting by individuals spending more than $250 on express advocacy on the same.
- Mich. Comp. Laws 169.203(4) sets a $500 threshold for issue committee registration.
- Alaska Stat. Ann. § 15.13.040(b)(2) sets a zero-dollar threshold for ballot groups, with detailed reporting "for all contributions in excess of $100 in aggregate a year;"
- Cal. Code § 82013 defines a "committee" as any person or combination of persons who receives contributions or makes independent expenditures totaling $1,000 or more in a calendar year.

The district court's *as-applied* ruling that Colorado cannot require disclosure from a group spending approximately $3,500 to oppose a statewide ballot initiative is also unprecedented. In the wake of *Sampson*, federal district and circuit courts have repeatedly rejected similar challenges involving far smaller amounts spent on express advocacy. *See, e.g., SpeechNow.org v. Federal Election Commission*, 599 F.3d 686, 698 (D.C. Cir. 2010) (rejecting as-applied challenge to federal $1000 threshold for PAC registration); *see also Joint Heirs Fellowship Church*, *supra*, 2014 U.S. Dist. LEXIS 126232, *59-77. Even those few cases that have granted as-applied relief in circumstances somewhat similar to *Sampson* have considered far lower levels of spending. *See Hatchett v. Barland*, 816 F.Supp.2d 583 (E.D. Wis. 2011) (finding that $25 reporting threshold under Wisconsin law could not be constitutionally applied to individual who spent $300 to oppose local referendum); *Swaffer v. Cane*, 610 F.Supp.2d 962 (E.D. Wis. 2009) (finding that same $25 threshold could not be constitutionally applied to individual who wished to spend $500 to oppose local referendum); *cf.*

Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804, 840-42 (7th Cir. 2014) (invalidating Wisconsin rule requiring registration and detailed reporting from "independent disbursement organizations" that spent $300 on express advocacy because the reporting threshold was not coupled with a "major purpose" limitation). Nothing in the record supports diverging from these cases, particularly to the significant degree that the district court did so here.

3. CSG is not sufficiently similar to the *Sampson* plaintiffs.

The most significant flaw in the district court's ruling is that it awarded as-applied relief despite declining to engage in a substantive as-applied analysis. Although the Secretary addresses the broader problems created by that approach in more detail below, the more immediate question is whether, in fact, CSG shares enough relevant characteristics with the *Sampson* plaintiffs for the ruling in *Sampson* to control the outcome here.

As the evidence at trial showed, CSG and the *Sampson* plaintiffs are dramatically different. The differences are not only structural and

strategic, but also circumstantial and contextual. In short, the disclosure calculus for CSG—a Colorado corporation that invests substantial time and energy raising money for and engaging in express advocacy on statewide ballot issues (at least in the years in which the Personhood Amendment qualifies for the ballot)—is very different from the *Sampson* plaintiffs, who pooled in-kind contributions among themselves in order to oppose a ballot question of purely local interest.

a. There are structural differences between CSG and the *Sampson* plaintiffs.

CSG first registered as a Colorado nonprofit corporation in 2008, more than six years before trial in this case. J.A. 621:13-17. It is one of two corporations—one for-profit, one nonprofit, both web-based—that Dr. Hsieh manages. J.A. 617:22-618:6. Registering a nonprofit in Colorado requires the completion of forms and the payment of a fee, and in order to remain in good standing the corporation must file annual reports. J.A. 595:12-596:3. As required of all nonprofit corporations

under Colorado law, CSG has articles of incorporation on file with the Secretary of State, and has appointed a registered agent. J.A. 937-55.

Dr. Hsieh treats CSG as a pass-through corporation for tax purposes. J.A. 622:1-2. It is not a registered § 501(c)(3) corporation under the Internal Revenue Code, but CSG does have income and expenses, almost all of which are associated with the various iterations of the policy paper that it has published over the last several years. Dr. Hsieh maintains CSG's financial records with commercial bookkeeping software. J.A. 636:2-7. She must keep records of any income she derives from CSG and file taxes for that income. J.A. 622:1–15.

In sharp contrast to CSG's formal and long-standing organizational structure, the *Sampson* plaintiffs had no discernible structure at all. They were just a group of neighbors who assembled to resist the proposed annexation of their neighborhood. 625 F.3d at 1251. Realizing that they could be more effective if they pooled their resources and talent, the *Sampson* neighbors supported the effort in various ways—all of them (at least prior to the campaign finance complaint) in-

kind. *Id.* at 1261, n.5. One group member owned a printing shop and chipped in by providing yard signs at cost. *Id.* at 1251. Others knocked on doors to introduce the issue and to encourage residents to withdraw their signatures from the original petition; still others created flyers for distribution throughout the neighborhood. *Id.*

For the purposes of an as-applied analysis, the structural differences between CSG and the *Sampson* plaintiffs matter because they affect not only the expectations of the speaker but also the incremental amount of additional effort that compliance with Colorado's campaign finance regulations requires. In *Sampson*, this Court suggested that enforcement of Colorado's campaign finance regulations had infringed on the plaintiffs' right of association by imposing administrative costs that were out of proportion to the electorate's interest in disclosure of the small, in-kind amounts that were at stake in that case. *Id.* at 1259-60. Quoting Justice Brennan's plurality opinion in *MCFL*, the court noted that "[d]etailed record keeping and disclosure obligations, along with the duty to appoint a treasurer and

custodian of records, impose administrative costs that many small entities may be unable to bear." *Sampson*, 625 F.3d at 1255, *quoting Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 254 (1986).[5]

Evaluating whether CSG's claims arise in a "similar context" to those advanced by the *Sampson* plaintiffs should turn on the relative weight of the burdens faced by the two groups. With no formal structure, no preexisting recordkeeping requirements or practice, and no reason (outside of the campaign finance laws themselves) to establish either, the *Sampson* plaintiffs would have had to start from

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[5] This quote is drawn from Part III-A of the *MCFL* opinion, which garnered only a four-vote plurality. Justice O'Connor's concurrence in the judgment on this point is accordingly of particular note: "In my view, the significant burden on *MCFL* in this case comes not from the disclosure requirements that it must satisfy, but from the additional organizational restraints imposed upon it by the [Federal Election Campaign] Act." *MCFL*, 479 U.S. at 266 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor was not concerned by the burdens that disclosure placed on an entity of *MCFL*'s size and form; rather, she concurred in the judgment because "engaging in campaign speech requires *MCFL* to assume a more formalized organizational form and significantly reduces or eliminates the sources of funding for groups such as *MCFL* with few or no 'members.'" *Id.*

scratch in order to comply with Colorado's requirements. In addition to registering, they would have needed to appoint a treasurer and a custodian of records, and then have those individuals begin to track the group's fundraising and expenses and submit related reports. *MCFL*, 479 U.S. at 254. CSG, by contrast, already does this work as a matter of course. Most importantly, it tracks income and expenses, and due to its corporate status and tax filing requirements, CSG has an independent reason for doing so. With the bulk of the work already a part of its everyday existence, Colorado's campaign finance laws impose much less of a burden on CSG's freedom of association than those same laws did on the *Sampson* plaintiffs.

b. There are strategic differences between CSG and the *Sampson* plaintiffs.

Perhaps the most important entity-level distinction between CSG and the *Sampson* plaintiffs derives from the way that CSG does business. In fact, while it a vast overstatement to suggest that the *Sampson* plaintiffs were "doing business" at all, CSG has a very specific

business model that has proven successful in election cycle after election cycle.

i. CSG disseminates its message much more broadly than the *Sampson* plaintiffs.

Unlike the *Sampson* plaintiffs, who simply pooled in-kind contributions and utilized those assets to engage in purely local advocacy on a volunteer basis, CSG conducts a biannual, multi-platform, national campaign to raise monetary donations and urge the statewide electorate to reject the Personhood Amendment. In the months leading up to the 2010 election, for example, CSG posted a page on its website titled "Vote No on Amendment 67." J.A. 618:21-22. That page solicited monetary pledges to support CSG's efforts to draft and publish the policy paper, and garnered support from both in-state and out-of-state sources. J.A. 639:6-8; 1014 (noting donors from Michigan and Georgia). Most of the money collected goes to pay CSG's principals for writing the paper; smaller amounts are used for advertising and to compensate the individuals who wrote the software for the pledge

collection page and completed the pre-publication layout and artwork. J.A. 13-14, ¶¶ 38-45.

In contrast to the purely local campaign at issue in *Sampson*, CSG's anti-Personhood efforts have a statewide and even national reach. As discussed above, CSG works tirelessly to promote and disseminate the message that its donors have funded and that its principals have been paid to create. It has run targeted advertisements on Facebook, issued media releases, and coordinated with local and national pro-choice groups. J.A. 13, ¶¶ 40-42; 640:14-16; 642:2-647:12. Various versions of the policy paper have been downloaded tens of thousands of times, J.A. 664:20-22, the paper has been featured in a national pro-choice voting guide, J.A. 906-917, and CSG as an entity has been featured in local and national media outlets, including the *New York Times*. J.A. 651:12-15.

The district court was dismissive of the idea that the groups in *Sampson* and in this case could be distinguished "based on the breadth of their respective messages and the relative interest in their issue."

J.A. 577. But the Supreme Court has recognized and relied upon precisely this distinction in several cases over the course of several decades. In *Bellotti*, for example, the Court explained that "[c]orporate advertising, unlike some methods of participation in political campaigns, *is likely to be highly visible*. Identification of the source of advertising may be required as a means of disclosure so that people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n. 32. (emphasis added). But in *McIntyre v. Ohio Elections Comm'n*, which involved much more personal and limited dissemination of the speaker's message, the Court held that a leaflet distributor's interest in anonymous speech outweighed the limited public interest in banning the distribution of anonymous campaign literature.[6] 514 U.S. 334, 355 (1995). In other words, the district court

[6] Despite the fact that *McIntyre* invalidated the disclaimer requirement as applied to certain anonymous handbills, the same opinion spoke favorably of campaign finance disclosures, making it clear that "[t]hough such mandatory reporting [of the amount and use of money spent] undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings." 514 U.S. at 355.

was simply wrong to flatly reject the idea that "the effectiveness of political speech … somehow elevates or enervates the public's informational interest in its disclosure." J.A. 577. The Supreme Court has held that the degree of interest in a political message has at least some dependence on the breadth of its distribution.

ii. CSG's incremental administrative burden is less substantial than the burden in *Sampson*.

The nature and scale of CSG's activities distinguish it from the *Sampson* plaintiffs on both sides of the First Amendment equation. With respect to the administrative burden, CSG's pledge page automatically tracks donor identity for the purpose of collecting when the paper is complete. That function could be expanded to request additional information from pledgers, such as an address, that must be reported for donations that exceed twenty dollars. J.A. 628:5-7. Dr. Hsieh testified that assembling information for reporting took "one to two hours for every report," plus an additional "unpleasant and time consuming" period of copying and pasting donor information into the

TRACER system, J.A. 609:21, 610:3, but she also failed to take advantage of TRACER functionality that would have virtually eliminated the data entry portion of that task. J.A. 728:12-729:11.

An evaluation of CSG's business model also suggests several reasons why the electorate has a far stronger informational interest in disclosure of its contributions and expenditures than those that were involved in *Sampson*.

First is the nature of the ballot initiative that is CSG's focus, together with the means that it has chosen to disseminate its advocacy. As opponents of an issue of purely local interest who engaged in advocacy largely by face-to-face communication, the *Sampson* plaintiffs made no secret of who they were. In this sense, their activities bore similarities to Mrs. McIntyre's leafleting. *See McIntyre,* 514 U.S. 334. In contrast, while CSG's principals certainly do not attempt to hide their identities, their advocacy is relevant to voters in every part of the state. And the type of information about the proponent — and its donors — that would be easily discoverable for a resident considering a

local petition in Parker would be far less obvious to the voter considering a statewide initiative who came across a piece of electoral advocacy whose author he or she did not personally know.

Second, the informational interest in CSG's activities is enhanced by its reliance on cash donations and its practice of compensating the authors of the policy paper. A number of courts, including this Circuit in *Sampson*, have agreed that the value of disclosure "declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Sampson,* 625 F.3d at 1260, *quoting Canyon Ferry*, 556 F.3d at 1033. However, most courts that have considered this question have also drawn a bright line between in-kind contributions—which can often be difficult to quantify at very low levels—and direct financial support.

In *Canyon Ferry*, for example, the Ninth Circuit considered whether a church that had made a few copies of a petition, placed them in its foyer, and had the pastor endorse the petition during her sermon could be subject to Montana's "zero-disclosure" law. Noting that

Montana's disclosure law was focused on "the identity of persons *financially* supporting or opposing a candidate or ballot proposition," rather than just general support of or opposition to the same, the Ninth Circuit expressed skepticism that Montana's informational interest was substantially implicated by *de minimis* in-kind expenditures. 556 F.3d at 1033 (emphasis in original). The court found that applying the disclosure requirement to the church under these circumstances was wholly irrational because, as the court put it, "the value of public knowledge that the Church permitted a single like-minded person to use its copy machine on a single occasion to make a few dozen copies on her own paper—as the Church did in this case—does not justify the burden imposed by Montana's disclosure requirements." *Id.* at 1034 (emphasis in original).

At the same time, *Canyon Ferry* suggested that there is a bright line between the informational value associated with *de minimis* in-kind contributions and monetary contributions of any size. 556 F.3d at 1034 ("[i]t may very well be that … *all* monetary contributions convey

sufficiently valuable information about the supporters of an initiative to justify the burden of disclosure") (emphasis added). And in *Murry*, *supra,* 969 F.Supp.2d at 1270-71, a federal district court confirmed this by upholding the constitutionality of Montana's zero-dollar disclosure law to monetary contributions. Noting that "because disclosure thresholds are inherently inexact," the court held that it "must defer to the legislative branch in setting proper amounts." *Id.* at 1271, *citing Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012).

Similar to *Murry*, and in contrast to *Canyon Ferry* and *Sampson*, this case exclusively involves monetary contributions. They are not only straightforward to quantify, but also as a general rule implicate the electorate's informational interest in who provided the contributions and how they were spent. That some of these contributions come from out-of-state sources further enhances the public's interest in them. *See Getman,* 328 F.3d at 1106, n.25 (9th Cir. 2003) (noting that "after a sample of California voters was informed that more than 60 percent of the funds used to place Proposition 226 on the 1998 ballot came from

out-of-state interests, support for the ballot measure waned significantly"). The same goes for the fact that CSG's principals are compensated by the donations that they solicit.

c. There are circumstantial differences between CSG and the *Sampson* plaintiffs.

Finally, the circumstances surrounding CSG's challenge in this case are starkly different from those presented in *Sampson*. While the *Sampson* plaintiffs were able to point to concrete events as violating their First Amendment rights, CSG was unable to make an even remotely similar showing.

For example, like Dr. Hsieh, the plaintiffs in *Sampson* presented evidence about the difficulties that they experienced with the pre-TRACER legacy system. In 2006, for example, "the forms were hard to follow; the website was often slow and had technical glitches; and getting questions answered often took several days and sometimes did not yield correct answers or even any answer at all." *Sampson*, 625 F.3d at 1260. Dr. Hsieh had many similar complaints about first

registering CSG in 2008. But that old system was retired prior to the 2010 election cycle, and as Dr. Hsieh acknowledged, her more recent experience with TRACER was substantially better. J.A. 598:10-15. CSG cannot qualify for prospective relief based on its frustrations over an online system that ceased to exist more than four years before the trial in this case.

Nor, in contrast to the *Sampson* plaintiffs, was CSG able to establish that it or its supporters had been subject to threats, harassment, or reprisals as a consequence of complying with disclosure laws, which is the only way that the Supreme Court has ever exempted a party from disclosure requirements on an as-applied basis. *See, e.g. Doe v. Reed*, 561 U.S. at 200. To be sure, CSG was notified of a $50 administrative penalty when it missed a filing deadline in 2010, but Colorado is certainly permitted to adopt even-handed regulations that are designed to ensure compliance with campaign finance reporting requirements. And, in any event, the Secretary waived the fine after Dr. Hsieh appealed.

While *Sampson* and *Canyon Ferry* both suggest that there is a constitutional need for some measure of proportionality between the burden of reporting and the value that the electorate will derive from it, Dr. Hsieh's philosophical objections to campaign finance disclosure requirements — and, specifically, her belief that all of Colorado's campaign finance rules should ultimately be "abolished," J.A. 669:24 — are insufficient to demonstrate that an imbalance exists in Colorado. To the contrary, Dr. Hsieh has been able to reach her fundraising goals in every election even while warning potential donors of the fact that their contributions may be subject to disclosure. J.A. 631:21-23. And while Dr. Hsieh testified that she found compliance objectionable and time-consuming, there is no evidence in the record to support a claim that complying with disclosure requirements harmed CSG's ability to distribute its advocacy. Indeed, Dr. Hsieh testified that she would have published her 2014 paper whether or not she was required to comply with Colorado's campaign finance laws. J.A. 671:7–10

C. Because the First Amendment demands certainty for political speakers and regulators, the district court erred by granting CSG an entity-specific carve-out to Colorado's disclosure regime.

There is significant tension between the Supreme Court's general disfavor for facial challenges, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), and its efforts to safeguard a political speaker's "liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Bellotti*, 435 U.S. at 776. While facial challenges "run contrary to the fundamental principle of judicial restraint," *Wash. State Grange*, 552 U.S. at 450, as-applied rulings foster the development of standards that result in uncertainty for future speakers and regulators, who struggle to interpret and apply those standards to varying situations.

Narrow, as-applied rulings can be particularly problematic in the area of political speech, where a lack of certainty—and the possibility that speakers will suffer penalties if they misunderstand the pertinent

requirements—can chill participation in the political process. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 493 (2007) (Scalia, J. concurring) ("In this critical area of political discourse, the speaker cannot be compelled to risk felony prosecution with no more assurance of impunity than his prediction that what he says will be found susceptible of some 'reasonable interpretation other than as an appeal to vote for or against a specific candidate.'"). Nor does the possibility of a judicially created carve-out offer a viable solution. *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to … seek declaratory rulings before discussing the most salient political issues of our day . . . .").

In the First Amendment context, the distinction between as-applied and facial challenges depends not on what has been "pleaded in a complaint," but rather "goes to the breadth of the remedy employed by the Court." *Citizens United* 558 U.S. at 331. When "particularized facts" are developed in the record, a court may "issue a narrowly tailored and circumscribed" opinion, one with the "hallmarks of a

traditional as-applied remedy—dependability and a limited scope[.]" *Justice*, 771 F.3d at 292, 294. But it is impossible to create such a narrowly tailored remedy when a party's challenge to a law does not rely on any facts that are unique to its particular circumstances. And where the "claim and the relief that would follow … reach beyond the particular circumstances" of the plaintiff asserting an as-applied claim, that plaintiff "must … satisfy [the] standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. at 194.

Contrasting this case with *Sampson* illustrates this distinction. *Sampson* involved a challenge filed by a group whose expenditures (prior to the filing of the campaign finance complaint) totaled $782.02. 625 F.3d at 1251-52. All of these expenditures were in-kind. *Id.* at 1260 n.5. The group was made up of a loose affiliation of local volunteers who were engaged in advocacy in a single election on a question of purely local concern, and who were subjected to a politically motivated campaign finance complaint. Although this Court's opinion focused in part on whether the electorate had any discernible

informational interest in a group of this size, it specifically circumscribed its remedy to the facts at hand. As the Court stated more recently, "in *Sampson*, 625 F.3d 1247, we held that Colorado disclosure requirements could not be imposed on a neighborhood organization opposing annexation to an adjacent town." *Citizens United v. Gessler*, __F.3d__, No. 14-1387 (10th Cir., Oct. 27, 2014), at *55.

The facts of this case—particularly with respect to the disclosure threshold—do not lend themselves to the same narrow outcome that *Sampson* reached. CSG did not plead or prove that compliance with Colorado's disclosure laws would burden it any differently than they would any other group of a similar size or configuration. It did not establish that Colorado's disclosure requirements had been or likely would be employed in a manner designed to chill its speech. Nor did the district court accurately identify any factors that distinguish CSG's circumstances from those of any other issue committee. To be sure, the district court did state that CSG "is similarly situated to the plaintiffs in *Sampson* in that it is interested in a single ballot issue." J.A. 578. In

contrast to the *Sampson* plaintiffs, however, CSG has raised and spent money to oppose at least three different versions of the Personhood Amendment over the course of 6 years. In any event, even if the district court's finding had record support, it would do nothing to distinguish CSG from the majority of issue committees that are formed to support or oppose a single statewide ballot initiative.

CSG could have made such an argument had the proof been available. The *Sampson* plaintiffs, for example, relied on facts that led to a narrow, as-applied remedy. And other courts have relied on concrete factual showings to issue similarly narrow rulings in the disclosure context. *See, e.g., Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) (recognizing right to exemption from otherwise valid disclosure requirements based upon showing that compliance would lead to threats, harassment, or reprisals); *see also Canyon Ferry, supra,* 556 F.3d 1021 (finding that Montana's zero-dollar disclosure threshold could not be constitutionally applied to a church's one-time, *de minimis,* in-kind expenditure).

CSG offered no proof of this type, however. The district court's ruling can thus only have been based on a conclusion that Colorado's disclosure threshold is too low not only for groups opposing neighborhood annexation, but across the board. As-applied rulings are binding in similar circumstances. *Ada v. Guam Society of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011 (Scalia, J. dissenting from denial of certiorari) ("The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative."). But the district court's opinion—in particular its focus on the amount spent and raised and the corresponding lack of informational interest associated with that amount—can only be taken as suggesting that Colorado cannot constitutionally require disclosure from *any* group that raises and spends $3,500 or less to support or oppose a ballot initiative. Indeed, by holding that a group like CSG that raises $3,500 need not register as a Colorado issue committee and submit disclosure reports, the district court's opinion appears to be a facial invalidation of the Colorado's $200

disclosure threshold without the benefit and clarity that such a ruling would actually provide.

Despite the effective reach of its opinion, the district court maintained that *Sampson*'s fact-bound analysis constrained the scope of the remedy it could impose. Thus, rather than simply declaring Colorado's $200 threshold to be facially unconstitutional—that is, incapable of being applied consistent with First Amendment standards—or holding that Colorado could not require registration and disclosure from any group that raises or spends $3,500 or less to support or oppose a statewide ballot initiative, the district court carved out an as-applied exemption from Colorado's disclosure requirements for CSG, and CSG alone. But the fact that it did so without relying on any particularized facts runs counter to the very nature of an as-applied ruling.

Affirming the district court's grant of as-applied relief will provide no useful guidance either to future political speakers who attempt to comply with Colorado law, or to regulators who are responsible for

interpreting that law in a manner consistent with the First Amendment. This case leaves the parties in the same untenable situation, where "[t]he speech of plaintiffs, or of others hoping to engage in fundraising for constitutional amendments, has not been 'unchilled' in any meaningful sense … because they do know the dollar amounts at which the ruling provides protection." *Hosemann*, 771 F.3d at 294. Requiring speakers and regulators to guess as to the permissible scope of regulation harms both. It harms speakers by requiring them "to either risk violating the law or go back to federal court in a separate pre-enforcement suit." *Id.* A lack of guidance harms the State because it "does not know where the constitutional line is, and thus has no reliable method of enforcing its own laws while ensuring compliance with a federal court order." *Id.*

To be clear, and as discussed in detail above, the Secretary believes that the district court was wrong on the merits. Absent the unique circumstances that animated the narrow ruling in *Sampson*, Colorado's $200 limit passes constitutional muster as a general matter,

and facially invalidating it would be a step that no other court has taken. *Justice,* 771 F.3d at 285, *quoting Madigan,* 697 F.3d at 470 ("[o]f the federal courts of appeals that have decided these cases, every one has upheld the disclosure regulations against the facial attacks"); *see also SpeechNow.org,* 599 F.3d at 698 ("The Supreme Court has consistently upheld organizational and reporting requirements against facial challenges."). This Court should thus reiterate that *Sampson* was a narrow, as-applied decision that was limited to its unique facts, and uphold Colorado's $200 disclosure threshold generally and as applied to CSG.

In the unlikely event that this Court *disagrees* that Colorado may as a general matter require disclosure from major-purpose issue committee groups that spend $200 or more on express advocacy—thus putting it at odds with every other circuit to have addressed the question—then it should also reject the district court's entity-based, "carve-out" approach. Instead, it should facially invalidate the $200 threshold and find that the state *may not* require CSG to disclose. This

is the only solution that could offer certainty to political speakers and regulators in Colorado by permitting the Colorado General Assembly to exercise its political judgment to set constitutionally acceptable reporting requirements. J.A. 579, n.5; *Gessler*, 327 P.3d at 238.

CONCLUSION

Based on the foregoing reasoning and authorities, the Secretary respectfully requests that this Court reverse the district court's ruling and confirm that CSG must comply with Colorado's registration and reporting requirements for issue committees.

STATEMENT ON ORAL ARGUMENT

The Secretary requests oral argument. This case involves important issues arising under the First Amendment that have the potential to create a split in authority among the federal circuits. The importance of the issues and complexity of the pertinent case law suggest that oral argument will be helpful to the Court.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **APPELLANT SECRETARY OF STATE'S OPENING BRIEF** upon all parties through ECF-file and serve or as indicated below at Denver, Colorado, this 23rd day of February 2015.

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

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 12,024 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7)(B)(111).

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Dated February 23, 2015

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/s/*Matthew D. Grove*
Dated: February 23, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-1708-JLK-KLM

COALITION FOR SECULAR GOVERNMENT, a Colorado nonprofit corporation,

Plaintiff,

v.

SCOTT GESSLER, in his official capacity as Colorado Secretary of State,

Defendant.

MEMORANDUM OPINION AND ORDER

KANE, J.

> Speech advocating approval or disapproval of a ballot issue is "'at the core of our electoral process and of the First Amendment freedoms,' . . . an area of public policy where protection of robust discussion is at its zenith."

Grant v. Meyer, 828 F.2d 1446, 1456-57 (10th Cir. 1987)(Moore, J.)(en banc).

Plaintiff Coalition for Secular Government (CSG) is a small "think tank" that advocates for the separation of church and state. One of its advocacy pieces is a policy paper on "personhood" and, in years where a "personhood" initiative has qualified for Colorado's general election ballot, the paper addresses that initiative and urges a "no" vote. CSG's "electioneering" activities have been limited to "personhood" ballot measures in 2008, 2010, and again in 2014. CSG does not advocate for candidates or political parties.

In 2012, faced with ongoing uncertainty that its "personhood" paper made it an "issue committee" under article XXVIII of the Colorado Constitution and related Fair

Campaign Practice Act (FCPA), CSG filed suit, seeking declaratory judgment and injunctive relief exempting it from the law's registration and expenditure disclosure requirements. Personhood's failure to qualify for the 2012 ballot eliminated the immediacy of CSG's request for relief, but the case is newly revived with the qualification of Colorado Amendment 67 on the 2014 ballot and CSG's desire to market and distribute its updated paper before the election.

Applying the standards articulated in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), as interpreted by the Colorado Supreme Court in *Gessler v. Colorado Common Cause*, 327 P.3d 232 (Colo. 2014), I find CSG falls outside the scope of ballot issue-committees to which Colorado's campaign finance disclosure laws may constitutionally apply. The nature of CSG and its advocacy render any "informational interest" the government has in mandating contribution and expenditure disclosures so minimal as to be nonexistent, and certainly insufficient to justify the burdens compliance imposes on members' constitutional free speech and association rights.

This conclusion is so obvious, moreover, that having to adjudicate it in every instance as the Colorado Supreme Court implies is necessary *itself* offends the First Amendment. By setting in stone the uncertainty that precipitated this litigation in the first place, the Court's interpretation chills robust discussion at the very core of our electoral process. I am without authority, however, to undo the damage done because *Sampson* provides an adequate and binding legal standard under which CSG's specific constitutional claims may be decided. The wholesale invalidation of Colorado's $200 contribution threshold for ballot issue committees, though warranted, would go beyond

my charge and be improvident. What I can do, however, is award CSG its attorney fees under 42 U.S.C. § 1988 and advise state lawmakers that the Secretary will be on the hook for fees every time a group, like CSG, falls under the $200 trigger for issue committee status and has to sue to vindicate its First Amendment rights.

I.

Background and Procedural History.

Plaintiff Coalition for Secular Government ("CSG") is a nonprofit corporation that "seeks to educate the public about the necessary secular foundation of a free society, particularly the principles of individual rights and separation of church and state." CSG Mission Stm. (Tr. Ex. 40). Its advocacy includes opposition to laws based on religious scripture or dogma, such as abortion and discrimination against gay persons; government promotion of religion such as the teaching of "intelligent design" in public schools; and the granting of tax exemptions or other privileges to churches that are not made available to other non-profits. *Id.* Its founder and sole principal is Diana Hsieh (pronounced "Shay"), who holds a doctorate in philosophy. CSG's advocacy takes the form of blog posts and video blogs, and includes a lengthy policy paper on the consequences of enshrining the concept of "personhood" into law.

CSG was originally entirely self-financed by Dr. Hsieh, but now solicits pledges online to defray marketing and operating expenses and to pay Dr. Hsieh and the co-author of the "personhood" paper a small ($1,000 in 2010) honorarium. Combined monetary and nonmonetary contributions to CSG have ranged from $200 in 2008 to approximately $3,500 expected in 2014. Given its small size and the nature of its

activities, it has never been clear that CSG is required to register as an "issue committee" under article XXVIII of the Colorado Constitution, or to meet the reporting requirements imposed under § 1-45-108 of the state's Fair Campaign Practice Act (FCPA).[1] Not wanting to run afoul of the law, Dr. Hsieh elected to register CSG as an "issue committee" in 2008 and 2010, and did her best to comply with the FCPA reporting requirements.[2]

In October 2010, Dr. Hsieh's house flooded and in the confusion she was a day late in filing a committee report. She was fined $50,[3] and her fine was only waived after she sought an administrative remedy. When movement began on qualifying a Personhood Amendment for the 2012 election cycle, CSG filed suit, seeking a declaration that certain elements of article XXVIII § (2) and FCPS reporting requirements were unconstitutionally vague and overbroad and seeking preliminary injunctive relief from having to register in 2012.

[1] "Issue committee" under art. XXVIII § 2(10)(a) is defined as "any person, other than a natural person, or any group of two or more persons, including natural persons . . . [t]hat has a major purpose of supporting or opposing any ballot issue or ballot question; or . . . [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Dr. Hsieh denies CSG's "major purpose" is to oppose or support any ballot issue, but concedes the CSG meets the $200 contribution threshold for such status.

[2] Dr. Hsieh testified at length at the trial held on October 3, 2014, and I found her intelligent and sincere -- virtually incapable of dissimilation. According to Dr. Hsieh, she incorporated CSG in 2008 because she wanted to it to have "some kind of legally recognized status," but never imagined "in a million years" that she had to "register with the state to speak about a ballot measure." Tr. at 10-12. Her initial research suggested CSG was "in the clear," but when a friend familiar with Colorado's campaign finance regime second-guessed that conclusion, she investigated further. Reviewing the relevant statutes and constitutional provisions, Dr. Hsieh found it "impossible" to figure out what she was supposed to do. Concerned CSG was "right at that $200 threshold," she decided to register. *Id.*

[3] Article XXVIII § 10(2) imposes a penalty of $50 per day for each day that a statement or other information required to be filed is not filed.

When it became clear "personhood" would not make the 2012 ballot, it was agreed that the declarations CSG was seeking were uniquely matters of state law and appropriate for certification to the Colorado Supreme Court. By Order dated October 10, 2012, I certified four questions[4] to the Court under Colorado Appellate Rule 21.1. (Doc. 34).

By Order dated July 2, 2014, the State Supreme Court summarily dismissed the certified questions "in light of the Court's decision in case 12SC783*Gessler v, Colorado Common Cause,* which was issued June 16, 2014." (Doc. 40-1.) I will discuss *Gessler* in more detail below, but its gist was to invalidate a rulemaking in which the Secretary sought to raise the contribution threshold for article XXVIII "issue committee" status from $200 to $5,000 in response to the Tenth Circuit's decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). In *Sampson*, the Tenth Circuit held unconstitutional Colorado's campaign finance disclosure requirements as applied to a single ballot-issue committee of neighbors that had spent $1,000 to challenge an annexation initiative. The Court applied "exacting scrutiny" to the case, invalidating Colorado's disclosure requirements on grounds the burdens imposed could not be justified by the public's

[4] The questions were as follows:

> 1. Is the policy paper published by the Coalition for Secular Government (CSG) in 2010 "express advocacy" under Art. XXVIII, § 2(8)(a) of the Colorado Constitution?
> 2. If the policy paper is express advocacy, does it qualify for the press exemption found at Art. XXVIII, § 2(8)(b)?
> 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?
> 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?

informational interest in how the group made and spent its money. *Id.* at 1261 (holding government's informational interest was "minimal, if not nonexistent, in light of the small size of the contributions"). The Court specifically declined, however, to draw a "bright line below which a ballot-issue committee cannot be required to report contributions and expenditures," stating only that the case before it was "quite unlike ones involving the expenditure of tens of millions of dollars," (where, presumably, disclosure would be constitutionally justified). *Id.* (citing *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003). [5]

Given the limited holding in *Sampson*, *Geller*'s rejection of efforts to raise the issue committee contribution threshold to $5,000, and the Supreme Court's refusal answer the certified questions in this case -- I am left to assess CSG's issue committee status only after a formal adjudication on an evidentiary record.[6] I have done so, and rule as follows:

II.

Findings of Fact and Conclusions of Law.

Art. XXVIII of the Colorado Constitution declares the Legislature's intent in enacting campaign disclosure regulations:

> The people of the state of Colorado hereby find and declare ... that large campaign contributions made to influence election outcomes allow wealthy

[5] Because *Sampson* was not a facial invalidation of article XXVIII's $200 contribution threshold, the Court in *Gessler* concluded the Secretary's attempt to raise the threshold to $5,000 on his own exceeded his authority and set it aside.

[6] Justice Eid recognized as much in her dissenting opinion in *Gessler:* "In the end . . . the Secretary [is left] with only one option: post-hoc, case-by-case adjudications to determine whether the particular small-scale issue committee in question is 'sufficiently similar' to the one at issue in *Sampson* to warrant being excused from certain reporting requirements." 327 P.3d at 238.

> individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process ... that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas and can unfairly influence the outcome of Colorado elections; and that the interests of the public are best served by ... providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

Art. XXVIII § 1, Colo. Const. Colorado's Fair Campaign Practice Act (FCPA) provides that "issue committees… shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made, and obligations entered into by the committee or party." Colo. Rev. Stat. Ann. § 1-45-108 (1)(a)(I) (West 2013).

Art. XXVIII §2 (10)(a) of the Colorado Constitution defines "issue committee" as "any person, other than a natural person, or any group of two or more persons, including natural persons: (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or (II) that has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Under a technical reading of the law and after *Sampson*, CSG meets the "issue committee" test by virtue of its $200 - $3,500 in annual contributions that it then uses to support the distribution of its policy paper.[7] The next question, then, is whether CSG may constitutionally be

[7] CSG argues it should not be considered an "issue committee" because its "major purpose" is not to oppose Colorado's Personhood Amendment. It also argues that the moneys it uses to create and distribute its personhood paper cannot be considered "expenditures" for purposes of issue committee

required to submit to the FCPA's reporting requirements under *Sampson.* Clearly it cannot.

Reporting and disclosure requirements by their nature "infringe on the right of association." *Sampson* at 1255. "'Detailed record-keeping and disclosure obligations impose administrative costs that many small entities may be unable to bear.'" *Id.* (quoting Justice Brennan in *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 254 (1986)). Not all such burdens are unconstitutional, however, and may be upheld upon a showing of a substantial relation between the disclosure requirement and a "sufficiently important governmental interest." *Id.* (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010)). The standard is one of "'exacting scrutiny,'" *id.*, and to withstand such scrutiny, the strength of the governmental interest "must reflect the seriousness of the actual burden on First Amendment rights" and exceed it. *See id.* This is the case-by-case determination with which we are concerned.

Here, it is important to distinguish the government's interest in regulating groups that advocate for particular candidates from those supporting or opposing ballot initiatives:

> When analyzing the governmental interest in disclosure requirements, it is essential to keep in mind that our concern is with ballot issues, not candidates. The legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to ballot-issue campaigns. For example, the Supreme Court has upheld limits on

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status because they are not spent "to oppose" the Amendment. CSG's points are well taken, in that CSG clearly exists independently of and in addition to its personhood paper, which is but one of its many advocacy issues. Nevertheless, given that most of CSG's modest financial dealings go to the support of the personhood paper and because the paper explicitly urges a "no" vote on Amendment 67, I assume, for the sake of the *Sampson* inquiry before me, that CSG has accepted or made contributions or expenditures in excess of two hundred dollars to oppose Amendment 67 in the 2014 election cycle.

> contributions to candidates on the ground that the limits are necessary to avoid the risk or appearance of *quid pro quo* corruption – the exchange of a contribution for political favor. [Citations omitted.] Limits on contributions to ballot-issue committees, in contrast, are unconstitutional because of the absence of any risk of *quid pro quo* corruption. [Citations omitted.]

Sampson, 625 F.3d at 1255. "The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Id.* (quoting *First Nat'l Bk of Boston v. Bellotti*, 435 U.S. 765, 790 (1978)).

Accordingly, of the three "proper" justifications for reporting and disclosing campaign finances articulated by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 68 (1976), only the third – the public's "informational interest" – applies to ballot issue committees. *Sampson*, 625 F.3d at 1256.[8] Even this interest, the court continued, is "not obvious" in ballot cases:

> Candidate elections are, by definition, ad hominem affairs. . . . In contrast, when a ballot issue is before the voter, the choice is whether to approve or disapprove of discrete governmental action, such as annexing territory, floating a bond, or amending [the state constitution]. No human being is being evaluated.

Id. Even allowing for the "not obvious," then, CSG may be subjected to Colorado's reporting and disclosure requirements on grounds of the public's informational interest only. *Id.*

After *Sampson*, the standard for this determination is "whether the small-scale issue committee in question is 'sufficiently similar' to the one at issue in *Sampson* to

[8] The first -- that reporting and disclosure requirements can be used to detect violations of contribution limitations, *Valeo* at 68, "is mooted by the prohibition on contribution limitations in the ballot-issue context." *Sampson,* 625 F.3d at 1256. The second – that disclosure can deter actual corruption, avoid the appearance of corruption, and facilitate the detection of post-election favoritism, *ibid.*, "is irrelevant because . . . *quid pro quo* corruption cannot arise in a ballot-isue campaign." *Sampson* at 1256.

warrant being excused from certain reporting requirements." *Gessler*, 237 P.3d at 238 (Eid, J.). The Secretary contends it is not, distinguishing the groups based on the breadth of their respective messages and relative interest in their issue. *See e.g.* Hg. Tr. at 174 (pointing out that CSG "coordinat[es] with national groups to get their message out" while the *Sampson* plaintiffs were "restricted to a very small, very narrow issue"); Tr. at 78 (noting CSG's paper was downloaded "approximately 12,000 or more" in 2010, a number that "doesn't include the page views of the paper" that was posted "chapter by chapter on CSG's blog."). The Secretary's point is perplexing: Is he suggesting that the effectiveness of political speech -- the fact it resonates, generates interest, and is downloaded from the internet by individuals wanting to read it – somehow elevates or enervates the public's informational interest in its disclosure? The more vibrant the public discourse the more justified the burdening of the speech is? Surely not. It must be remembered by those older than Ms. Hsieh that the internet is the new soapbox; it is the new town square. CSG's "personhood" paper is Tom Paine's pamphlet. It is the quintessence of political speech.

In the present case, CSG plans to spend no more than $3,500 to conduct all of the business of CSG, which includes publishing and distribute the "personhood" paper and seed money to incentivize other authors and "get[] intellectual projects off the ground." Tr. at 40. While this is more than the $1,000 contemplated by the Tenth Circuit in *Sampson*, it is magnitudes less than the opposite pole the court used for contrast (tens of millions of dollars for "complex policy issues"). As the court stated, the state interest in ballot issue campaign finance is significantly attenuated when compared to candidate

campaign finance; even less so when the "issue committee" here is similarly situated to the plaintiffs in *Sampson* in that it is interested in a single ballot issue.

Given the nature of the ballot question and the nature of the expenditures, this is a a case where the state's informational interest is truly "not obvious." What financial interest or other untoward benefit could CSG's principals or pledge contributors realize in a defeat of the Personhood Amendment? Even so, the amount of the expenditures -- no more than $3,500 – limits the informational value of the public's "right to know." Colorado's issue committee disclosure laws are concerned with "large campaign contributions" that allow "wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process." Colo. Const. art. XXVIII § 1. The terms "large," "wealthy," or wielding "disproportionate influence" are simply not germane to the activity in which CSG is engaged. Voters' interest in the $3,500 CSG might spend this year on all of its ballot and non-ballot related activities combined is so minimal as to be non-existent.

Even if there is any informational interest in the $3,500 CSG has raised, that interest is outweighed by the burdens CSG has suffered and will continue to suffer in trying to comply with issue committee reporting requirements. The Secretary disagrees, noting there are only a few reporting periods left in the 2014 election cycle, and because CSG has reported as an issue committee in the past, complying with those rules in the few weeks leading up to election day will not be burdensome. The Secretary misses the point: the burdens at issue are not merely clerical or administrative, they are restrictions on speech and association. *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 254.

CSG's ballot-issue advocacy, to the extent it renders it an "issue committee" at all, is sufficiently like that of the *Sampson* neighbors that its obligation to comply with FCPA reporting requirements must be excused.

Unfortunately, given the Tenth Circuit's refusal "to establish a bright line below which a ballot issue committee cannot be required to report contributions and expenditures" and the Supreme Court's election not to answer the certified questions, I must make a ruling on the specific facts of this case based on what I determine, *sui generis*, to be reasonable. I say "unfortunately" because this state of affairs means that no precedent has been established and the stability this matter of considerable public importance so needfully requires will have to await another day or days and even more lawsuits.[9]

III.

Conclusion.

Based on the foregoing, it is formally ORDERED and DECLARED that CSG's expected activity of $3,500 does not require registration or disclosure as an "issue committee" and the Secretary is ENJOINED from enforcing FCPA disclosure requirements against it.

1. The Plaintiff has established clearly and convincingly that it will suffer irreparable injury to its First Amendment right of free association. As stated in

[9] Though I need not rule on this issue definitively – and it was not raised by the parties – I suggest the "post hoc, case-by-case review" mandated by the Colorado Supreme Court majority is itself unconstitutional and respectfully disagree that *Sampson* compels it. The sheer expense and delay of unnecessary litigation chills, if not freezes entirely, prospective speakers' resolve to exercise their First Amendment rights and should be mitigated with due haste.

Sampson, "We agree with [plaintiff's] as-applied First Amendment argument, holding that Colorado registration and reporting requirements have unconstitutionally hindered their First Amendment right of free association." The same is true in the case at bar because the distinctions between it and *Sampson* are insignificant. If anything, it must be stated that the "personhood" policy paper at issue is quintessential political speech, worthy of the highest constitutional protections, whereas the protected activity in *Sampson* was of a different magnitude entirely. A violation of a First Amendment right *ipso facto* constitutes irreparable injury.

2. The denial of a First Amendment right far outweighs the claimed harms asserted by the opposing party, which amounts to nothing more than a bureaucratic inconvenience in not taking action in discrete cases.
3. The injunction is in the public interest because it supports and vivifies the fundamental constitutional rights of the citizenry.
4. The plaintiff has succeeded in demonstrating an imminent threat of irreparable injury. Any harm the injunction would cause is illusory because all it does is prohibit the Secretary from enforcing Colorado law against a limited number of persons in a way that would violate their constitutional rights.
5. Given the nature of the case, no bond is required.

In light of the foregoing, preliminary injunctive relief is unnecessary and Plaintiff's original and renewed Motions for Injunctive Relief (Docs. 13, 41) are DENIED as MOOT.

In addition, Plaintiff's request for attorney fees under 42 U.S.C. § 1988 is also GRANTED. Section 1988 is designed to enable individuals to act as private attorneys general to vindicate their constitutional and other civil rights and Plaintiff has done so in this case. Plaintiff shall have to and including October 28, 2014, to submit an affidavit delineating its fees with an expert endorsement of their reasonableness. If the parties reach an informal resolution of the fee matter before then, so much the better.

Dated October 10, 2014.

s/John L. Kane
SENIOR U.S. DISTRICT JUDGE