No. 16-28

In the Supreme Court of the United States

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

v.

COALITION FOR SECULAR GOVERNMENT,
a Colorado nonprofit corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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CSG opposes the Petition on two main grounds. First, it argues that there is no circuit split regarding the wholly-without-rationality test and, instead, there is only a circuit "crease." Br. Opp. 17. Second, CSG claims that recent legislation governing issue committees creates a vehicle problem. Br. Opp. 28. Neither argument has merit.

I. The Circuits are split both as to the analytical framework and the outcome of cases involving challenges to disclosure thresholds.

CSG dismisses the possibility that the circuits are split, implying that there is broad *agreement* as to the framework for analyzing disclosure thresholds. Yet CSG acknowledges, as it must, that the circuits have employed a variety of different analytical approaches and that some of them have explicitly applied "a 'wholly without rationality' standard … as *part* of [the] exacting scrutiny" analysis. Br. Opp. 17–22.[1] Despite this concession, CSG attempts to attribute differences in the *legal standards* the circuits have applied to variations in the *facts* of particular cases: specifically,

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[1] This concession refutes CSG's argument that the Tenth Circuit "appropriately applied exacting scrutiny." Br. Opp. 23–27. The Tenth Circuit *rejected* the wholly-without-rationality test as part of the exacting scrutiny analysis, Pet. 8–9, in conflict with courts that have done precisely the opposite. Br. Opp. 17–19 (conceding that the First, Third, and Ninth Circuits have all applied the wholly-without-rationality test as part of an exacting scrutiny framework). Either the wholly-without-rationality test has a place in evaluating campaign finance disclosure thresholds, as the First, Third, and Ninth Circuits hold, or it does not, as the Tenth Circuit has decided. This Court should answer that question.

CSG emphasizes the type of reporting scheme evaluated, the scope of the regulations challenged, or some combination of these factors. *Id*. This merely acknowledges the obvious—that no two States' campaign finance laws are identical. It does not change what is plain in the opinions themselves. The circuits, in evaluating the constitutionality of various campaign finance laws, cannot agree on the legal standards to apply.

CSG's attempt to explain away the disagreement among the circuits only muddies these already murky waters. CSG asserts that *Buckley*'s wholly-without-rationality test is limited to "donor disclosure thresholds" and does not apply to "committee registration thresholds." Br. Opp. 9. This is an artificial distinction. CSG fails to identify a single court that has interpreted *Buckley* in this manner. In fact, although the lower courts cannot agree upon the appropriate legal test, they all routinely apply *Buckley* not just to donation thresholds, but to registration thresholds as well. *See, e.g.*, *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1250–52 (11th Cir. 2013) (citing *Buckley* and First Circuit precedent to hold that deference is due to monetary *registration* thresholds); *Protectmarriage.com v. Bowen*, 830 F. Supp. 2d 914, 949 (E.D. Cal. 2011) ("Looking to *Buckley*, the Ninth Circuit … asked 'whether Montana's 'zero dollar' threshold for [donor] disclosure is 'wholly without rationality'"); *Joint Heirs Fellowship Church v. Ashley*, 45 F. Supp. 3d 597, 627–28 (S.D. Tex. 2014) (citing *Buckley* in support of applying the "wholly without rationality" standard to a $500 threshold for committee *registration*).

CSG's attempt to distinguish donor and registration thresholds also obscures a more fundamental aspect of *Buckley*. With the notable exception of this case and the Tenth Circuit's earlier ruling in *Sampson v. Buescher,* 625 F.3d 1247 (10th Cir. 2010), the circuits—regardless of the legal standard they ultimately apply—have consistently acknowledged that under *Buckley* and related precedent, the voting public's informational interest in disclosure extends even to modest levels of fundraising and expenditures. Some have affirmed the strength of that interest while applying *Buckley*'s "wholly without rationality" test. *Del. Strong Families v. Attorney Gen.,* 793 F.3d 304, 310 (3d Cir. 2015) ("[E]ven though election disclosure laws are analyzed under exacting scrutiny, we apply less searching review to monetary thresholds—asking whether they are 'rationally related' to the State's interest."); *Canyon Ferry Rd. Baptist Church of E. Helena v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) ("The question … [is] whether Montana's 'zero dollar' threshold for disclosure is 'wholly without rationality.'"). Others have even more strongly endorsed the governmental interest in disclosure by concluding that low monetary thresholds survive under *any* potentially applicable standard. *See, e.g., Justice v. Hosemann*, 771 F.3d 285, 300 & n.13 (5th Cir. 2014) (holding that challenged reporting requirements "survive First Amendment scrutiny at most levels," and that "we … need not consider whether the $200 threshold is subject to exacting scrutiny or the much lighter 'wholly without merit' standard of review"); *Worley*, 717 F.3d at 1251 (finding a case that applied the "wholly without rationality" standard to be "instructive," but concluding that $500 registration threshold survived exacting scrutiny).

The Tenth Circuit has diverged from these approaches in two significant ways, neither of which CSG disputes. First, in contrast to the First, Third, Fifth, and Ninth Circuits, the Tenth Circuit refuses to pay deference to Colorado's policy judgment about the point at which the electorate's informational interests justify the burdens of disclosure. *Compare Vt. Right to Life Comm. 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*." (emphasis added)), *with Sampson*, 625 F.3d at 1257 (concluding that putative issue committee's expenditures were "sufficiently small that they say little about the contributors' views of their financial interest in the annexation issue"), and Pet. App. 23 ("[A]t a $3,500 contribution level, we cannot under *Sampson*'s reasoning characterize the disclosure interest as substantial."). Second, even putting this question of deference aside, the Tenth Circuit has categorically rejected the notion that there is any informational interest substantial enough to justify disclosure from small campaign groups. *Compare* Pet. App. 23, 28, *with Del. Strong Families*, 793 F.3d at 311 (noting that even a $150 threshold would serve substantial informational interests), *Justice*, 771 F.3d at 298 (noting that the benefits of disclosure "accrue to the voters even when small-dollar donors are disclosed").[2]

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[2] This Court's opinions have twice "endorsed broad disclosure rules in the context of a ballot issue election." *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1247 (11th Cir. 2013). In *Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 299-300 (1981), the Court explained that "[t]he integrity of the political system will be adequately protected if contributors are

The Tenth Circuit's divergence from its sister circuits on these two points has led to irreconcilable outcomes in cases similar to this one. While the Tenth Circuit has made clear that Colorado cannot require registration and disclosure by a group that raises $3,500 and expends that amount on express advocacy about a statewide ballot initiative,[3] other courts have rejected challenges to disclosure thresholds that are a small fraction of this figure. *Justice*, 771 F.3d at 300 (rejecting challenge to Mississippi's $200 threshold); *Worley*, 717 F.3d at 1250 (rejecting challenge to Florida's $500 threshold); *Family PAC v. McKenna*, 685 F.3d 800, 809 n.7 (9th Cir. 2012) (stating that "[i]t is far from clear … that even a zero dollar disclosure threshold would succumb to exacting scrutiny"); *Corsi v. Ohio Elections Comm'n*, 981 N.E.2d 919, 928–29 (Ohio App. 2012) (rejecting challenge to zero-dollar

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identified in a public filing revealing the amounts contributed." And in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.32 (1978), the Court said, "Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."

[3] In its Brief in Opposition, CSG disputes that its "*raison d'etre*" is opposing personhood ballot measures. Br. Opp. 2 n.1. But while the district court did find that CSG engages in some activities other than ballot initiative advocacy, there is no dispute that "most of CSG's modest financial dealings go to the support of" its advocacy efforts. App. 38 n.7. Those "financial dealings" involve fundraising for the publication of a paper expressly advocating against the Personhood Amendment, which is released for distribution in the months leading up to elections in which a personhood initiative appears on the ballot, and is advertised over the Internet and at campaign events *only* during the election season.

disclosure threshold). And the Tenth Circuit has made clear that its understanding of the constitutional line is orders of magnitude greater than that which prevails in other jurisdictions: "We understand the Secretary's frustration with the present state of the law. … [I]n Sampson we declared Colorado's regulatory scheme unconstitutional for an issue committee that raised $2,239.55. Here we do so again for $3,500. So what about $5,000? $10,000?" Pet. App. 28.

CSG's attempt to reconcile the competing approaches across circuits serves only to demonstrate how confused the case law is. There is only one explanation for a state of affairs in which some circuits uphold thresholds of $500, $200, or even zero dollars, while the Tenth Circuit rejects any threshold under $3,500 (and perhaps any threshold under $5,000 or $10,000). Pet. 9, 16–19; Pet. App. 28. The circuits are not applying the same law.

II. Colorado's recent legislation has no effect on the underlying split of authority and does not prevent the Court from reaching the question presented.

CSG argues that Colorado created a vehicle problem by passing legislation covering issue committees that raise and spend more than $200 but less than $5,000. But the recent legislation does not alter the question presented in the Petition, nor does it prevent the Court from reaching that question. Colorado's $200 disclosure threshold for issue committees is prescribed by the state constitution and cannot be altered by statute. The Tenth Circuit acknowledged as much. Pet. App. 28–29. Whatever legislation the Colorado General Assembly employs to implement that $200 threshold, the fact

remains that, according to the Tenth Circuit, States have *no* substantial government interest in disclosure of campaign advocacy that falls below some as-yet unspecified monetary amount in the thousands or tens of thousands of dollars. *Id*. While States in other circuits may adopt even zero-dollar thresholds for ballot issue committees, Colorado and other states in the Tenth Circuit are categorically prohibited from doing so. This Court should grant certiorari to reconcile the stark disparity in outcomes across circuits.

Respectfully submitted,

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