No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To trigger campaign finance disclosure regulations, States rely on dollar thresholds ranging from zero to amounts in the thousands. Recognizing that setting a disclosure threshold is a policy decision entitled to deference, this Court held in *Buckley v. Valeo* that disclosure thresholds must be upheld unless they are "wholly without rationality." 424 U.S. 1, 83 (1976). The Tenth Circuit, however, has rejected this test. In two decisions, it has held that Colorado's disclosure threshold for "issue committees" is too low, although it declined to explain what number would be constitutional. Under that reasoning, even groups that spend $3,500 on campaign advocacy—a figure over ten times greater than the amount that triggers similar disclosure regulations in other States—are exempt from Colorado's disclosure laws.

The question presented is as follows:

Does *Buckley*'s "wholly without rationality" test apply to all dollar thresholds that trigger campaign finance disclosures, or are thresholds below some as-yet-undefined amount subject to heightened constitutional scrutiny?

PARTIES TO THE PROCEEDINGS

Petitioner, Appellant below, is the Colorado Secretary of State, who was sued in his official capacity.

Respondent, Appellee below, is a Colorado nonprofit corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion (App. 1–29) is reported at 815 F.3d 1267. The district court's opinion (App. 30–45), issued after a trial to the bench, is reported at 71 F. Supp. 3d 1176.

JURISDICTION

The Tenth Circuit issued its final judgment on March 2, 2016. This Petition is timely filed pursuant to Justice Sotomayor's grant of an extension of time for petitioning to June 30, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides in relevant part that government "shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

INTRODUCTION

"Ballot issue" campaigns, which advocate for or against the enactment of statutes or constitutional amendments directly by the people, are a fixture of Colorado politics. Many of these campaigns can be more consequential, as a matter of public policy, than campaigns for elected office. For example, a recent ballot issue required the State to become one of the first to legalize and regulate the commercial production and sale of recreational marijuana. Colo. Const. art. XVIII, § 16. Another, passed in the 1990s, requires popular votes on all state and local tax increases. Colo. Const. art. X, § 20. Another changed public ethics rules and altered how ethics complaints against Colorado public officials are investigated and adjudicated. Colo. Const. art. XXIX.

Given the often critical significance of ballot issue campaigns, Colorado regulates them in much the same way it regulates campaigns for public office. It has established registration, reporting, and disclosure requirements for "issue committees," defined as entities and groups that (1) have a major purpose of supporting or opposing any ballot issue and (2) have accepted contributions or made expenditures of over $200. Colo. Const. art. XXVIII, § 2(10)(a); Rule 1.9, 8 Colo. Code Regs. § 1505-6 (2015).[1]

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[1] In setting forth these two criteria, the state constitution uses the disjunctive "or" rather than the conjunctive "and." Colo. Const. art. XXVIII, § 2(10)(a). But to maintain consistency with the First Amendment, the Secretary has long interpreted this provision as requiring a group to satisfy both the "major purpose" requirement *and* the monetary threshold before being subject to regulation as an issue committee. Rule 1.9, 8 Colo. Code Regs. § 1505-6; *see also*

This $200 monetary threshold for issue committee registration—set by Colorado's Constitution—has spawned frequent litigation. Colorado is not uncommon in this regard. In recent years, groups across the country have challenged campaign finance triggering thresholds repeatedly, but almost always unsuccessfully. *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014) (rejecting a challenge to Mississippi's $200 reporting threshold), *cert. denied*, 136 S. Ct. 1514 (Apr. 4, 2016); *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013) (rejecting a challenge to Florida's $500 reporting threshold), *cert. denied sub nom. Worley v. Detzner*, 134 S. Ct. 529 (Nov. 4, 2013); *Nat'l Ass'n for Gun Rights v. Murry*, 969 F. Supp. 2d 1262, 1270–71 (D. Mont. 2013) (affirming Montana's zero-dollar threshold for ballot measure committee disclosure).

What *is* uncommon, however, is the Tenth Circuit's divergence from the constitutional standard that governs these challenges, announced decades ago in *Buckley v. Valeo*, 424 U.S. 1 (1976). According to *Buckley*, the establishment of a monetary threshold within a campaign finance framework is a "judgmental decision" that is "best left in the context of this complex legislation to [legislative] discretion." *Id*. at 83. *Buckley* instructed courts to avoid judicial line-drawing and uphold campaign finance triggering thresholds unless they are "wholly without rationality." *Id.* Some circuit courts have questioned the "wholly without rationality" test and wondered whether the higher standard of

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Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1154–55 (10th Cir. 2007). Neither party disputes that matter of state law in this litigation.

"exacting scrutiny" should apply instead. But most have either adhered to "wholly without rationality" or at least declined to explicitly reject it. These circuits have upheld disclosure thresholds identical to, higher than, and lower than Colorado's, from $0 to $500.

The Tenth Circuit is the outlier. It has rejected *Buckley*, opting instead to determine, case-by-case and plaintiff-by-plaintiff, appropriate monetary thresholds for ballot issue committees. In *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), the Tenth Circuit held that a group that spends around $2,000 on a ballot issue campaign cannot constitutionally be subject to regulation as an issue committee. Then, in this case, the court held that $3,500 is too low—while at the same time suggesting that even $5,000 or $10,000 might be insufficient. (App. 28.) The only certainty in the Tenth Circuit is that if a group spends "tens of millions of dollars on ballot issues," *Sampson*, 625 F.3d at 1261, Colorado can require the kinds of campaign finance disclosures that other States, in other circuits, impose after a group spends as little as $200 or even no money at all.

The Court should grant certiorari to decide whether the Tenth Circuit was correct to depart from *Buckley* and its sister circuits.

STATEMENT OF THE CASE

1. ***CSG's campaign advocacy***. Plaintiff Coalition for Secular Government ("CSG") is a non-profit corporation formed in response to a Colorado ballot issue concerning "personhood," which if adopted would have granted legal rights to fetuses. (App. 2–3.) CSG, whose sole aim is to broadcast its owner's political and

ideological views to as large an audience as possible, has opposed the personhood ballot issue each of the three times it has been placed on the statewide ballot. (App. 3.) CSG disseminates its views through a "policy paper" available through the Internet, as well as through blog posts, Internet advertising, and other channels. CSG uses all of these communications to urge a "no" vote on the personhood amendment. (App. 3, 41.)

A repeat player in Colorado politics, CSG raises moderate amounts of money—$3,500 was the figure cited in the complaint—from both in-state and out-of-state donors to fund its advocacy and compensate its owner. (App. 33.) Even on this modest budget, CSG has successfully disseminated its "vote no on personhood" message to an extensive audience. Readers downloaded CSG's policy paper more than 100,000 times. CSG's Internet advertising—which specifically targeted Facebook users who lived in Colorado and were of voting age—reached 18,000 people. And stories about CSG's advocacy have been featured in a national pro-choice voting guide and in the *New York Times*.

Because CSG met the definition of an "issue committee" under Colorado law, it was required to register with the Secretary of State and satisfy disclosure requirements. (App. 3–4.) Specifically, CSG was required to disclose its full organizational name, identify a registered agent to receive legal notices, provide a street address and telephone number for its principal place of operations, open a bank account, and explain which ballot issue or issues it supports or opposes. Colo. Rev. Stat. §§ 1-45-107.5(7), 108(3.3). CSG was then required to periodically report information about its donors and expenditures and

satisfy various other requirements. Colo. Const. art. XXVIII, § 7; Colo. Rev. Stat. §§ 1-45-108, 109.

2. ***District court proceedings.*** CSG sued the Secretary of State in federal district court under 42 U.S.C. § 1983, claiming that Colorado cannot, consistent with the First Amendment, compel registration and periodic disclosure from campaign groups with modest budgets. (App. 31.)[2] After years of litigation, CSG prevailed, but the route to final judgment made one significant procedural detour.

Soon after CSG's complaint was filed, the district court certified several questions of state law to the Colorado Supreme Court. (App. 34–35.) One of those questions sought to clarify whether Colorado's $200 triggering threshold was still facially valid after *Sampson* declared it unconstitutional for a local group spending around $2,000. (App. 35 n.4.) The Colorado Supreme Court never answered that question.

Instead, it decided another case involving the $200 trigger—*Gessler v. Colorado Common Cause*, 327 P.3d 232 (Colo. 2014). In *Gessler*, the Secretary had attempted to address the *Sampson* problem through a rule increasing the triggering threshold for issue committees to $5,000. *Id*. at 233. The Colorado Supreme Court invalidated the Secretary's rule, holding that he had no authority to alter the state constitution's $200 limit. *Id.* at 238. The *Gessler* decision thus did not resolve whether CSG was exempt from the $200 threshold; it invited the federal courts to answer the question.

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[2] Federal jurisdiction was based on 28 U.S.C. § 1331.

Back in federal court, CSG raised a variety of facial and as-applied challenges to Colorado's issue committee law. After a bench trial at which the parties introduced testimony and other evidence regarding the government's interest in disclosure and the burdens imposed by Colorado's issue committee laws, the district court ruled in CSG's favor on a single issue. Applying *Sampson*, the district court concluded that the government interest in public disclosure of CSG's advocacy is "so minimal as to be nonexistent," and that this "nonexistent" interest could not justify the burdens of complying with Colorado's campaign finance reporting requirements. (App. 31.) It therefore excused CSG from regulation as an issue committee. (App. 44.)

At the same time, the district court lamented the Tenth Circuit's failure in *Sampson* to announce a "bright line" monetary threshold for ballot issue committee regulation. (App. 43.) *Sampson*'s case-by-case approach, the court observed, has spawned repeat litigation, meaning that the "stability" of Colorado's monetary threshold "will have to await another day or days and even more lawsuits." (App. 43.) The district court even suggested that this "post hoc, case-by-case review" is "itself unconstitutional" because it "chills, if not freezes entirely, prospective speakers' resolve to exercise their First Amendment rights." (App. 43 n.9 (quotation marks omitted).) The court also explained the conundrum the Secretary now faces: despite trying unsuccessfully to raise the dollar threshold through rulemaking, he will be "on the hook for [attorney] 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." (App. 32.)

Although the Secretary urged the district court to apply *Buckley*'s "wholly without rationality" test, the district court's opinion did not even mention it.

3. ***The Tenth Circuit's opinion.*** The Tenth Circuit affirmed. Echoing its analysis in *Sampson*, the court concluded that "[t]he informational interest in [CSG's] disclosures is far outweighed by the substantial and serious burdens of the required disclosures." (App. 18.) The court emphasized that "there is an informational interest in [CSG's] financial disclosures" but that the interest is "minimal where an issue committee raises or spends $3,500." (App. 22–23.)

Unlike the district court, the Tenth Circuit directly addressed the *Buckley* "wholly without rationality" test. (App. 16–18.) The court held that *Sampson* compelled it to eschew that test and apply exacting scrutiny, a more stringent standard of review: "We face the exact as-applied question the *Sampson* court faced, though with a putative issue committee that has, at times, raised slightly more money …. Thus, as in *Sampson*, we will apply exacting scrutiny …." (App. 17.)

Like the district court, however, the Tenth Circuit declined to explain what reporting threshold might withstand *Sampson*'s exacting scrutiny test. The court acknowledged that its opinion again invited future challenges by groups that intended to spend more than CSG's $3,500, but less than the huge $10 million number that *Sampson* recognized would support issue committee registration. (App. 28.) "We understand the Secretary's frustration with the present state of the law," the court remarked. (App. 28.) "[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. What about $5,000? $10,000?" (App. 28.)

In addition to analyzing the reporting itself, the court also analyzed the burdens of Colorado's reporting framework, finding them "less substantial than the burdens in *Sampson*" but still "substantial." (App. 24, 26.) But the court made clear that no matter the burden of disclosure, Colorado is categorically barred from imposing disclosure regulations on groups that collect or spend below some as-yet-unspecified amount of money: "We reiterate that there is an informational interest in … disclosures. … But at a $3,500 contribution level, we cannot under *Sampson*'s reasoning characterize the disclosure interest as substantial." (App. 23.) Under the Tenth Circuit's exacting scrutiny test, a "substantial" interest is a prerequisite to government regulation. (App. 39.) Thus, the constitutionality of Colorado's issue committee regulations has become a game of numbers. Until a group with a large enough campaign budget decides to sue, and loses, the Secretary cannot know where the line might be drawn.

The "wholly without rationality" test might have avoided this problem, as it has in other circuits. But the Tenth Circuit did not explain, beyond its rote invocation of *Sampson*'s as-applied ruling, why it rejected that test in favor of a doctrine of "piecemeal litigation." (App. 28.)[3]

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[3] The panel below, perhaps misunderstanding the gravity of the Secretary's dilemma, instructed him to "seek[ ] help from … the Colorado legislature." (App. 28.) The Secretary has done his best

REASONS FOR GRANTING THE WRIT

Certiorari is appropriate where a federal court of appeals has issued opinions that conflict with its sister circuits or with relevant precedent of this Court. Sup. Ct. R. 10(a) & (c). Here we have both: the circuits are divided regarding the legal standard to apply to campaign finance triggering thresholds, and the divide stems from whether or not the circuits choose to apply this Court's guidance in *Buckley* or depart from it.

The legal question at stake is also exceptionally important. "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (plurality opinion). Given the potency of ballot

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to follow the panel's instructions. This past legislative session, the Colorado General Assembly enacted Senate Bill 16-186, codified at Colo. Rev. Stat. § 1-45-108(1.5). That statute reduces the frequency of reporting for issue committees that raise or spend between $200 and $5,000. But for three reasons, the statute will not solve the problems created by the Tenth Circuit's rulings.

First and most importantly, the statute does not alter the $200 reporting threshold itself, nor could it. As the panel itself recognized, only "the people of Colorado themselves" may set a new reporting threshold under the state constitution. (App. 29.) Thus, although the new law reduces the frequency of disclosures, it still regulates groups with aggregate spending and contributions below $3,500, a level the Tenth Circuit held does not support a "substantial interest" under exacting scrutiny. (App. 23.) Second, section 1-45-108(1.5) does not affect groups that spend between $5,000 and $10,000, a range the panel below suggested might also be entirely exempt from reporting requirements. (App. 28.) Finally, the law sunsets in three years, meaning that even if it is a partial solution, it is not a permanent one.

initiatives in shaping public policy, arming the public with information about ballot issue campaigns is of vital interest to many States. And how much information voters receive will depend on whether disclosure thresholds are subject to "exacting scrutiny" or a "wholly without rationality" test.

Finally, this case is an excellent vehicle for addressing the question presented. Campaign finance challenges are frequently decided on dispositive pre-trial motions, leaving little more than legal argument in the record. Here, in contrast, the district court held a bench trial during which the parties presented evidence about both the important government interests supporting disclosure and the burdens associated with the challenged disclosure framework. This Court can look to that record for evidence and findings on key issues to assist it in understanding how, as a legal matter, cases like this one should be decided.

I. This Court's review is necessary to resolve the circuit split over the standard of review for campaign finance triggering thresholds.

The Tenth Circuit's rulings in this case and in *Sampson* are outliers, because of both their legal reasoning and their ultimate outcomes. This Court should grant certiorari to clarify *Buckley* and address the confusion among the circuits regarding the standard of review for campaign finance disclosure thresholds.

A. The Circuits are split three ways over *Buckley*'s "wholly without rationality" test.

Perhaps because challenges to disclosure thresholds were rare in the years after *Buckley*, courts seldom cited the "wholly without rationality" test. Recently, however, litigants have increasingly challenged not only disclosure schemes in general but also the monetary thresholds that trigger them. Yet despite numerous published decisions—and no apparent ambiguity in *Buckley*'s discussion of the subject—the circuits have failed to form a consensus regarding the standard of review for disclosure thresholds.

Three circuits embrace the "wholly without rationality" test. Three circuits—the First, Third, and Ninth—have expressly adopted *Buckley*'s "wholly without rationality" test.

In *National Organization for Marriage v. McKee*, 649 F.3d 34, 59–60 (1st Cir. 2011) ("*McKee I*"), the First Circuit reviewed 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." Citing *Buckley*, the court examined whether the $100 threshold was "wholly without rationality," rejecting the argument that it must "review reporting thresholds under the 'exacting scrutiny' framework." *Id*. at 60.

The Third Circuit follows the same legal approach. In upholding a $500 threshold, it explained that "even though election disclosure laws are analyzed under exacting scrutiny, we apply less searching review to monetary thresholds—asking whether they are

'rationally related' to the State's interest." *Del. Strong Families v. Attorney General*, 793 F.3d 304, 310 (3d Cir. 2015) (quoting *McKee I*, 649 F. 3d at 60), *cert. denied*, 579 U.S. ___, No. 15-1234 (June 28, 2016). The court noted that a similar federal threshold was $10,000—twenty times Delaware's. But it declined to second-guess the State's policy decision, explaining that "it is unsurprising that Delaware's thresholds are lower than those for national elections" because "Delaware is a small state" and its thresholds "are rationally related to Delaware's unique election landscape." *Id.*

The Ninth Circuit also hews to the "wholly without rationality" test. In a case involving in-kind contributions to a ballot issue campaign, the court explained that "[t]he question … [is] whether Montana's 'zero dollar' threshold for disclosure is 'wholly without rationality." *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (quoting *Buckley*). Under the unusual facts of the case—involving non-monetary, "*de minimis*" contributions like "us[ing] [a] copy machine on a single occasion to make a few dozen copies"—the court held that the zero-dollar threshold was irrational. *Id*. at 1034.[4]

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[4] Some federal district courts and state courts have also explicitly adopted the "wholly without rationality" test. *Joint Heirs Fellowship Church v. Ashley*, 45 F. Supp. 3d 597, 627–29 (S.D. Tex. 2014) (applying the "wholly without rationality" test to uphold a $500 disclosure threshold for a recall committee that estimated the value of its activities would total around $1,200); *Corsi v. Ohio Elections Comm'n*, 981 N.E.2d 919, 928–29 (Ohio App. 2012) (affirming the constitutionality of a zero-dollar threshold and

Three circuits have avoided the question. Three other Circuits—the Second, Fifth, and Eleventh—have declined to explicitly adopt the "wholly without rationality" test while also declining to explicitly reject it.

In *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 133 (2d. Cir. 2014), the Second Circuit appeared to endorse *Buckley*'s test, explaining that while the general standard of review in the campaign finance context is "exacting scrutiny," "[r]eview of the monetary threshold for requiring disclosure of a contribution or expenditure is highly deferential." The court implied that "wholly without rationality" was the appropriate deferential test, noting that States are not "require[d] … 'to establish that [they have] chosen the highest reasonable threshold.'" *Id*. (quoting *Buckley*, 424 U.S. at 83). But in analyzing a $100 reporting threshold, the court waffled, upholding it without adopting any particular standard of review: "regardless of the applicable standard, the [$100] threshold is not so low as to prompt any real constitutional doubt." *Id*. at 139.

Case law in the Fifth Circuit is likewise ambiguous. In *Justice v. Hosemann*, the court upheld a $200 threshold without saying which legal standard should apply. It simply held that it "need not consider whether the $200 threshold is subject to exacting scrutiny or the much lighter 'wholly without merit' standard of review." 771 F.3d at 300 n.13.

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holding, "we cannot say that the absence of a monetary trigger for PAC designation is wholly without rationally in this context").

The Eleventh Circuit followed the same approach in reviewing a $500 trigger combined with a "first-dollar disclosure threshold" (that is, a system in which groups that plan to accept or spend $500 must track and report "any and all donations"). *Worley*, 717 F.3d at 1250–51. It held that these thresholds "survive[d] exacting scrutiny," but noted that it found "instructive" the portion of *McKee I* that explicitly adopted the "wholly without rationality" test. *Id*. (quoting *McKee I*, 649 F.3d at 60).

The Tenth Circuit has explicitly rejected "wholly without rationality." The Tenth Circuit has staked out the most aggressive position, explicitly rejecting *Buckley*'s "wholly without rationality" test. In its place, the court applies a stringent form of exacting scrutiny, holding that disclosure thresholds below some amount in the thousands or tens of thousands of dollars are categorically unsupported by a substantial government interest in educating voters. (App. 23, 28 (citing *Sampson*, 625 F.3d at 1259).)

B. The outcome below conflicts with cases from the Fifth, Ninth, and Eleventh Circuits, which uphold disclosure thresholds for issue committees ranging from $0 to $500.

The circuit split at issue exists not just at the abstract level of legal phraseology; it has led to irreconcilable outcomes across jurisdictions. Specifically, the outcome in this case cannot be squared with similar cases from the Fifth, Ninth, and Eleventh Circuits, all of which have upheld monetary thresholds for ballot issue committees far lower than $3,500. While specific reporting requirements vary by State,

including the frequency of reporting and the amount of detail that must be reported, the disclosure frameworks upheld in these circuits impose burdens similar to those at issue here.

Fifth Circuit. In *Justice*, the Fifth Circuit rejected a facial challenge to a Mississippi law requiring registration and reporting once an issue committee raised or spent $200. 771 F.3d at 287–88 (citing Miss. Code Ann. § 23-17-1(1)). Similar to the Colorado law challenged here, the Mississippi law required the group to file a "Statement of Organization," disclose information about its affiliations and purpose, and submit detailed periodic contribution and spending reports to the Secretary of State. *Id*. at 287–89.

The *Justice* plaintiffs "urge[d the Fifth Circuit] to follow the Tenth Circuit's lead in *Sampson*" and strike down Mississippi's disclosure law for groups that spend only a few hundred dollars on ballot initiative advocacy. *Id*. at 297. But the Fifth Circuit rejected the invitation to join *Sampson*'s outlier position, holding that "[e]ven at lower levels of fundraising and expenditure, the disclosure regulations further Mississippi's interest in providing information to voters." *Id*. at 300.

Ninth Circuit. Although the Ninth Circuit has held that a zero-dollar threshold for issue committees can violate the "wholly without rationality" test in unique circumstances, subsequent cases within that jurisdiction have upheld zero-dollar thresholds on facts similar to those here.

In *Canyon Ferry*, the Ninth Circuit held that Montana's zero-dollar disclosure threshold could not be

applied to a church whose pastor encouraged parishioners to sign a petition, and which had allowed a parishioner to make a "few dozen copies" of the petition using her own paper but the church's copy machine. 556 F.3d at 1034. But the court "express[ed] no view about … the constitutionality of Montana's disclosure requirements … as applied to monetary contributions of any size." *Id.* Nor did it consider whether the Montana law would have passed muster if applied to an organization whose major purpose was engaging in express advocacy on a particular ballot issue. *Id.*

Here, the facts are different. This case involves a group that spent thousands of dollars on election advocacy, reached hundreds of thousands of people, and devoted its entire budget to urging a "no" vote on a ballot issue. *Canyon Ferry* held that *de minimis* in-kind contributions by a church are qualitatively different from monetary contributions and spending by campaign groups. It did not say that a nonprofit corporation like CSG, formed specifically to advocate, would be exempt from disclosure.

Subsequent opinions demonstrate that cases in the Ninth Circuit turn out differently from cases in the Tenth. In *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2012), the Ninth Circuit again distinguished in-kind from monetary contributions, noting that "[i]t is far from clear … that even a zero dollar disclosure threshold" would be ruled unconstitutional. *Id.* at 809 n.7. And in *Nat'l Ass'n for Gun Rights v. Murry*, 969 F. Supp. 2d 1262, 1266–67 (D. Mont. 2013), a district court within the Ninth Circuit upheld just such a threshold. The court rejected the argument that

Montana's disclosure statute was "substantially overbroad because it applies to groups whose expenditures are less than $500 or are *de minimis*." *Id.* To the contrary, the court held, "[s]mall contributions made by special interest groups still hold informational value in the aggregate, whether they contribute $10 or $25." *Id.* at 1271. The Montana law thus passed constitutional muster under the "wholly without rationality" test. *Id*.

Eleventh Circuit. The Eleventh Circuit has upheld a threshold similar to Colorado's—a $500 monetary trigger combined with a "first-dollar threshold." In *Worley*, the plaintiffs challenged a Florida law requiring registration and disclosure by groups who raise or spend "more than $500 in a year to expressly advocate … the passage or defeat of a ballot issue." 717 F.3d at 1240 (citing Fla. Stat. § 106.011(1)(a)). As in Colorado, once a group met that disclosure threshold, it had to register with the Secretary of State, create and maintain detailed accounts of receipts and expenditures, and "file regular reports with the Division of Elections." *Id.* at 1241. By authorizing random audits and requiring itemization of "every contribution and expenditure, small or large," *id.*, the Florida law challenged in *Worley* went even further than the Colorado law challenged here. Colorado's law requires itemization only of contributions that exceed twenty dollars and does not authorize the Secretary to conduct audits of any kind. Colo. Rev. Stat. § 1-45-108(1).

The *Worley* plaintiffs, like the challengers in *Justice*, looked to Tenth Circuit precedent for support. They asked the Fifth Circuit to depart from "sister

Circuits [that] have offered thoughtful explanations for why disclosure advances government interests in the ballot issue context" and instead "adopt the Tenth Circuit's contrary reasoning in *Sampson*." *Worley*, 717 F.3d at 1248. The Eleventh Circuit, however, sided with the majority of circuits, rejecting *Sampson*'s conclusion that "knowing who the messenger is distorts the message." *Id*. Based on this analysis, the court denied the plaintiffs' challenge.

* * *

The Fifth, Ninth, and Eleventh Circuit cases discussed above were decided before the Tenth Circuit's opinion was issued in this case, and those that discussed *Sampson* generally distinguished it on its facts. *See, e.g., Worley*, 717 F.3d at 1252. But the opinion below clarifies that in the Tenth Circuit, it is Colorado's monetary threshold itself, and not any particular facts, that drive the outcome. (App. 22 ("[T]he governmental interest in issue-committee disclosures remains minimal where an issue committee raises or spends $3,500.").) This means that if Colorado were within another circuit, it could constitutionally apply its issue committee registration laws to CSG. The split of authority is real and widening, and it is causing similar cases to come out differently in different federal jurisdictions.

II. The constitutional standards that govern campaign finance disclosure laws, particularly laws that apply in the ballot issue context, are exceptionally important in dozens of States.

The scope of speech that can be subject to disclosure rules is exceptionally important. Providing the voting public with information about groups that spend money to advocate for or against candidates or ballot issues furthers vital democratic objectives. *E.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("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."); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369 (2010) (holding that an "informational interest alone" justifies disclosure and disclaimer regulations).[5] And, as this

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[5] Echoing the reasoning of *Belotti* and *Citizens United*, most Circuits have concluded that voters' informational interest in ballot issue campaigns is strong and in fact may be "compelling." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1107 (9th Cir. 2003); *see also Ctr. 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."); *Nat'l Org. for Marriage v. McKee*, 669 F.3d 34, 40 (1st Cir. 2012) ("*McKee II*") ("[T]ransparency is a compelling objective in a climate where the number of ballot questions Maine voters face is steadily increasing.") (internal quotation marks omitted). On this subject, the Tenth Circuit is once again the outlier. *Sampson*, 625 F.3d at 1256 (stating that "it is not obvious that there is … a public interest" in "knowing who is spending and receiving money to support or oppose a ballot issue"); *cf. Del. Strong Families v. Denn*, No. 15-1234, slip op. at 6 (U.S. June 28, 2016) (Thomas, J., dissenting from denial of certiorari) ("In my

case demonstrates, whether disclosure thresholds in the hundreds of dollars are subject to "exacting scrutiny" or a "wholly without rationality" test may determine their fate—and consequently determine how much information about campaign groups a State's voting population will receive.

The importance of this question is not limited to just a few States. Colorado's $200 threshold is far from an anomaly. In *Justice*, the Fifth Circuit catalogued many state laws that require disclosure in the context of ballot issue campaigns, noting that some use $0 as the trigger and even "states with large populations," like Texas, use modest numbers like $500. 771 F.3d at 288; *see also Worley*, 717 F.3d at 1241 n.1 ("Twenty-four states have ballot issue elections. … Four, including Florida, have no minimum threshold for reporting contributions to, or expenditures by, PACs."). The federal threshold for political action committees is not much higher—the regulations use $1,000. *Justice*, 771 F.3d at 288.

Under this Court's modern First Amendment jurisprudence, disclosure is now the preferred and sometimes only method States may use to regulate campaign advocacy by corporations like CSG. *E.g., Citizens United*, 558 U.S. at 319 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not

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view, the purported government interest in an informed electorate cannot justify the First Amendment burdens that disclosure requirements impose."). This disagreement provides another reason to grant certiorari—particularly in a case arising in the ballot initiative context.

suppress that speech altogether."). The increased prominence of campaign finance disclosure frameworks has prompted constitutional challenges to many disclosure thresholds. Ballot initiative disclosure requirements alone—on the books in dozens of States—have been the target of endless lawsuits across the country. As explained above, these cases have seen mixed results based largely on the deep disagreement as to the appropriate analytical framework and the amount of deference courts should accord to States' regulatory decisions.

This question of deference is of central importance to the States' campaign finance systems. As Justice 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)). When it comes to the amount of information the voting public receives, should the decision be for the policymakers or the courts?

III. Because it comes from the outlier circuit after a bench trial, this case is an excellent vehicle for resolving the confusion among the lower courts.

This case is an ideal vehicle for addressing the question presented for two reasons.

First, this case comes from the outlier circuit, which has now issued two published opinions detailing its disagreement with *Buckley* and its sister circuits.

Granting certiorari in this case will allow the Court to grapple directly with the factual and legal arguments that led the Tenth Circuit to strike out on its divergent jurisprudential path.

Second, because this case arises from a bench trial, it comes with a detailed record that will help put the abstract legal question of the proper standard of review in a concrete setting. Campaign finance cases are often decided in the context of facial challenges and on summary dispositions. This can lead to disagreements among the Justices about the salient facts and the proper scope of the Court's ultimate ruling. *McCutcheon*, 134 S. Ct. at 1479–80 (Breyer, J., dissenting) ("The District Court in this case … granted the Government's motion to dismiss the complaint prior to a full evidentiary hearing. … In the past, when evaluating the constitutionality of campaign finance restrictions, we have typically relied upon an evidentiary record amassed below …. [A]n evidentiary record can help us determine whether or the extent to which we should defer to Congress' own judgments, particularly those reflecting a balance of the countervailing First Amendment interests …."); *Citizens United*, 558 U.S. at 400 (Stevens, J., dissenting) ("In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent.").

Here, however, the parties presented lay and expert testimony about Colorado's justifications for disclosure, the burdens imposed by compliance with the challenged campaign finance laws, and the demonstrated public interest in the information that registered groups submit to the Secretary. Witnesses for the defense, for example, demonstrated the extent

to which members of the public and the press search for information about small, medium, and large issue committees. The Secretary also offered evidence demonstrating that CSG has raised money from contributors both inside and outside of Colorado, and that it has been able to disseminate its political speech to a significant audience notwithstanding its relatively modest budget. CSG countered with its own testimony on these topics and presented evidence and argument about the burdens of complying with Colorado's disclosure scheme.

This case offers the opportunity to provide much-needed guidance to lower courts, political speakers, state legislative bodies, and campaign finance regulators as to the constitutionally acceptable scope of campaign finance disclosure requirements. It arises in a concrete factual setting and will allow this Court to directly confront—and correct—the outlier circuit's reasoning and conclusions.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-1469

[Filed March 2, 2016]

COALITION FOR SECULAR GOVERNMENT, a Colorado nonprofit corporation, Plaintiff - Appellee,	)
v.	)
WAYNE WILLIAMS, in his official capacity as Colorado Secretary of State, Defendant - Appellant.	)
COLORADO ETHICS WATCH; COLORADO COMMON CAUSE, Amici Curiae.	)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:12-CV-01708-JLK)

Matthew D. Grove, Assistant Solicitor General (Cynthia H. Coffman, Attorney General, Frederick R. Yarger, Assistant Solicitor General, Sueanna P. Johnson, Assistant Attorney General, with him on the

briefs) Office of the Attorney General for the State of Colorado, Denver, Colorado, for Defendant-Appellant.

Allen Dickerson, Center for Competitive Politics, Alexandria, Virginia (Tyler Martinez, Center for Competitive Politics, Alexandria, Virginia, with him on the briefs), for Plaintiff-Appellee.

Benjamin J. Larson, Ireland Stapleton Pryor & Pascoe, Denver, Colorado, for Colorado Common Cause, Amicus Curiae.

Luis A. Toro and Margaret G. Perl, Colorado Ethics Watch, Denver, Colorado, for Colorado Ethics Watch, Amicus Curiae.

Before **PHILLIPS**, **McHUGH**, and **MORITZ**, Circuit Judges.

PHILLIPS, Circuit Judge.

Colorado Secretary of State Wayne Williams (Secretary) appeals a district court order enjoining him from enforcing Colorado's issue-committee registration and disclosure requirements against the Coalition for Secular Government (Coalition), a nonprofit corporation that was planning to advocate against a statewide ballot initiative in the 2014 general election. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

The Coalition is a Colorado nonprofit corporation whose mission is "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." J.A. vol. 5 at 933. In

2008, Dr. Diana Hsieh, who holds a doctorate degree in philosophy, founded the Coalition and is solely responsible for its operations.

In accordance with its mission, the Coalition publishes a policy paper each year in which a proposed "personhood" amendment appears on Colorado ballots.[1] The policy paper advocates against the personhood amendment, explains the Coalition's view of the deleterious effects of passing such an amendment, and urges "no" votes on the ballot initiative. In 2008, 2010, and 2014, the Coalition used contributed funds to publish its personhood policy paper. Dr. Hsieh and a colleague co-authored each paper and distributed the papers publicly, first by printing and mailing copies and later by making the paper available online.

Under Colorado law, the Coalition's activities triggered various issue-committee registration and disclosure requirements, which we detail below.

A. Colorado's Issue-Committee Regulatory Framework

The Colorado Constitution defines "issue committee" as follows:

> [A]ny person, other than a natural person, or any group of two or more persons, including natural persons: (I) That has a major purpose of

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[1] For instance, in 2010, Colorado citizens voted on "[a]n amendment to the Colorado Constitution applying the term 'person' as used in those provisions of the Colorado Constitution relating to inalienable rights, equality of justice and due process of law, to every human being from the beginning of the biological development of that human being." J.A. vol. 4 at 769.

> supporting or opposing any ballot issue or ballot question; or[2] (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).[3] Once a person or group of persons qualifies as an issue committee under

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[2] The Secretary has promulgated a rule defining "issue committee" to mean "a person or a group of people that meets *both* of the conditions in [Colo. Const. art. XXVIII, § 2(10)(a)(I) and 2(10)(a)(II)]." Colo. Code Regs. § 1505-6:1.9 (2015) (emphasis added). In effect, this rule changes the "or" that exists in the Colorado Constitution's definition of issue committee to "and." Notwithstanding the Secretary's interpretation of the Colorado Constitution, and especially in light of *Gessler v. Colo. Common Cause*, 327 P.3d 232, 236–38 (Colo. 2014) (declaring a regulation unlawful because it conflicted with a constitutional provision), we enforce the "or" in the issue-committee definition just as it is written in the Colorado Constitution. Thus, we disagree with amici curiae Colorado Ethics Watch and Colorado Common Cause, who argue that Article XXVIII "explicitly" defines "issue committee" as a group (or group of persons) that spends or receives $200 *and* has as its major purpose supporting or opposing a ballot initiative. *See* Amici Curiae Brief at 8.

On appeal, the Coalition does not challenge its putative status as an issue committee or the Secretary's interpretation of the Colorado Constitution. Therefore, we assume for this case that the Coalition—in its activities opposing the personhood-amendment ballot initiative—is indeed an issue committee under the Colorado Constitution.

[3] Article XXVIII of the Colorado Constitution "was proposed by citizen's initiative as Amendment 27 and adopted by popular vote in 2002." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012).

this definition, a substantial set of registration and disclosure requirements apply.

Initially, we note that the regulatory framework governing issue committees in Colorado derives from multiple sources: the state's constitution, Colo. Const. art. XXVIII, §§ 2–3, 7, 9–10; its statutes, Colo. Rev. Stat. §§ 1-45-101 to -118 (2015); and its regulations, Colo. Code Regs. § 1505-6 (2015). As we evaluate the claims now raised, we take care to note the source of each relevant registration or disclosure requirement. Knowing where any unconstitutional burdens lie is the key to Colorado's addressing them.

1. Constitutional Requirements

Although Article XXVIII of the Colorado Constitution defines "issue committee," it imposes few registration or disclosure requirements, leaving it to the legislative and executive branches to fill in the details. Even so, we still see six constitutional provisions that bear on our case.

First, section 3(9) requires that issue committees deposit all contributions in "a financial institution in a separate account whose title shall include the name of the committee . . . ." Colo. Const. art. XXVIII, § 3(9). This subsection also imposes some recordkeeping responsibilities: "All records pertaining to such accounts shall be maintained by the committee . . . for one-hundred eighty days following any general election in which the committee . . . received contributions unless a complaint is filed, in which case they shall be maintained until final disposition of the complaint and any consequent litigation." *Id.*

Second, section 3(10) forbids issue committees from "accept[ing] a contribution, or mak[ing] an expenditure, in currency or coin exceeding one hundred dollars." *Id.* § 3(10).

Third, section 3(11) provides that "[n]o person shall be reimbursed for a contribution made to any . . . issue committee, . . . nor shall any person make such reimbursement . . . ." *Id.* § 3(11).

Fourth, section 9(2)(a) permits any person to file a complaint against anyone violating the issue-committee regulatory framework. Any such person "may file a written complaint with the secretary of state no later than one hundred eighty days after the date of the alleged violation." *Id.* § 9(2)(a). In response to any filed complaint, the Colorado Constitution requires the Secretary to "refer the complaint to an administrative law judge [(ALJ)] within three days . . . ." *Id.* The ALJ then must "hold a hearing within fifteen days of the referral of the complaint" and "render a decision within fifteen days of the hearing." *Id.* The Colorado Court of Appeals may review the ALJ's final decision, and if the Secretary fails to enforce the ALJ's decision within 30 days, the complainant may bring a private action in Colorado district court. *Id.*

Fifth, section 10(2)(a) provides that an "appropriate officer" must impose a $50 penalty "per day for each day" that any violation of the issue-committee disclosure requirements in Colo. Const. art. XXVIII, § 7, or Colo. Rev. Stat. § 1-45-108, remains uncured. Colo. Const. art. XXVIII, § 10(2)(a).

Sixth and finally, section 7 provides that "[t]he disclosure requirements of section 1-45-108, C.R.S., or

any successor section, shall be extended to require disclosure of the occupation and employer of each person who has made a contribution of one hundred dollars or more to a[n] . . . issue committee . . . .” *Id.* § 7. For issue committees, then, the Colorado Constitution itself simply requires the state legislature to extend one existing statute to include one limited disclosure.

2. Statutory Requirements

Colorado statutes—specifically, Colorado’s Fair Campaign Practices Act, Colo. Rev. Stat. §§ 1-45-101 to -118 (2015)—contain the majority of the issue-committee registration and disclosure requirements.

First, under the Act, a person or group of persons must register as an issue committee with the “appropriate officer” within ten days of accepting contributions or making expenditures in excess of $200 to support or oppose a ballot issue. Colo. Rev. Stat. § 1-45-108(3.3). Registration requires a statement listing certain categories of information: the committee’s full name; “[a] natural person authorized to act as a registered agent”; “[a] street address and telephone number for the principal place of operations”; “[a]ll affiliated candidates and committees”; and “[t]he purpose or nature of interest of the committee or party.” *Id.* § 1-45-108(3)(a)–(e), (3.3).

Once registered, an issue committee must “report to the appropriate officer [its] 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 . . . .” *Id.* § 1-45-108(1)(a)(I). In accordance with the Colorado Constitution’s mandate, the Act also requires that an

issue committee's disclosure reports "include the occupation and employer of each person who has made a contribution of one hundred dollars or more to such committee . . . ." *Id.* § 1-45-108(1)(a)(II); *see* Colo. Const. art. XXVIII, § 7.

The Act also requires an issue committee to

> file a report with the secretary of state of any contribution of one thousand dollars or more at any time within thirty days preceding the date of the primary election or general election. This report shall be filed with the secretary of state no later than twenty-four hours after receipt of said contribution.

Colo. Rev. Stat. § 1-45-108(2.5).

Under section 1-45-108(2), every issue committee must file disclosure reports that include the information identified above. Subsection (2) requires multiple filings during election years and less frequent filings during off-election years. *See id.* § 1-45-108(2)(a). In 2014, for example, an issue committee that supported or opposed a ballot initiative in Colorado's general election would have had to file disclosure reports on May 5, May 19, June 2, June 16, July 1, August 1, September 2, September 15, September 29, October 14, October 27, and December 4. In addition, issue committees would have had to file reports within 24 hours of receiving any contribution of $1,000 or more. *See id.* § 1-45-108(2.5). If a 2014 issue committee's registered agent did not file a report terminating the issue committee, the issue committee would have had to continue filing quarterly reports even in off-election years. *Id.* § 1-45-108(2)(a)(I)(A).

Finally, the Act provides additional reporting requirements for certain media-related activity:

> An issue committee making an expenditure in excess of one thousand dollars on a communication that supports or opposes a statewide ballot issue or ballot question and that is broadcast by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences, or otherwise distributed shall disclose, in the communication produced by the expenditure, the name of the issue committee making the expenditure.

Id. § 1-45-108.3(1).

3. Regulatory Requirements

At the legislature's direction, the Secretary has adopted several campaign-finance rules, many of which clarify or supplement constitutional or statutory requirements. For example, one rule clarifies that "[i]f a contributor gives $20 or more in the aggregate during the reporting period, the committee must individually list the contributor on the report, regardless of the amount of each contribution." Colo. Code Regs. § 1505-6:10.2.1. Another rule ensures each issue committee's filed registration statement is up-to-date by requiring the issue committee to "report any change to its committee registration statement to the appropriate filing officer within ten days." *Id.* § 1505-6:12.1. Yet another rule requires issue committees to report any expenditure of $20 or more to the same payee within a single reporting period, including the payee's name and address. *Id.* § 1505-6:10.3.

Neither the Colorado Constitution nor the Act provides for issue-committee termination. But the Secretary's rules do. An issue committee can file a termination report if (1) "[t]he committee no longer has a major purpose of supporting or opposing a ballot measure and no longer intends to accept or make contributions or expenditures" and (2) the committee's reporting account "reflects no cash on hand and no outstanding debts, obligations, or penalties." *Id.* § 1505-6:4.4.

Thus, the Colorado Constitution, the Act, and the Secretary together regulate issue-committee activity.

B. The Coalition's Activities

Since 2008, the Coalition has either registered or considered registering as an issue committee in four general elections: 2008, 2010, 2012, and 2014.[4] As a result, the Coalition has previously disclosed certain information about its contributors and expenditures. We detail the Coalition's experience as an issue committee below.

1. 2008 Election

In 2008, after publicly announcing her intention to publish the first policy paper opposing Colorado's proposed personhood amendment, Dr. Hsieh registered the Coalition as an issue committee with the Secretary's office on the advice of a friend who was familiar with Colorado's issue-committee laws. In

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[4] Again, the Coalition does not challenge its status as an issue committee under the Colorado Constitution, Colorado statutes, or the Secretary's rules.

attempting to register the Coalition as an issue committee, Dr. Hsieh accessed the Secretary's website but found it "completely impossible to figure out what . . . to do." J.A. vol. 3 at 597. Eventually, though, Dr. Hsieh concluded that the Coalition would probably spend at least $200 printing and mailing copies of the 2008 policy paper, thus requiring her to register the Coalition as an issue committee under Colorado law.

Accordingly, in 2008, Dr. Hsieh completed a form registering the Coalition as an issue committee opposing the proposed personhood amendment. Dr. Hsieh also completed and filed bi-weekly reports with the Secretary's office detailing any contributions received and expenditures made, each report taking about an hour to complete. In meeting the reporting requirements, Dr. Hsieh found it "difficult" to track down the required business addresses where she had purchased items such as mailing envelopes, labels, and postage stamps. *Id.* at 600. Even when the Coalition did not spend any funds or receive contributions during a reporting period, Dr. Hsieh needed to spend about ten minutes filling out nearly blank reports.

In November 2008, after the election, Dr. Hsieh terminated the Coalition's issue-committee status, meaning the Coalition would no longer need to comply with Colorado's disclosure requirements.

2. 2010 Election

In 2010, in response to another personhood ballot initiative, Dr. Hsieh solicited financial contributions to enable her and her co-author to update and expand the personhood policy paper. Using what Dr. Hsieh called a pledge model, she publicized that she and her co-

author would publish an updated policy paper if they received a total of at least $2,000 in contributions. Putative contributors could then register their names, e-mail addresses, and pledge amounts with the Coalition. Dr. Hsieh told the putative contributors that she would not collect their pledged money if the Coalition did not receive at least $2,000 in pledges. Later in 2010, the Coalition raised and collected about $2,800 in pledges, so the Coalition completed and published its updated policy paper.

Remembering her 2008 experience, Dr. Hsieh again accessed the Secretary's website and registered the Coalition as an issue committee. In registering the Coalition again, Dr. Hsieh learned that Colorado law required issue committees to have separate, standalone bank accounts. In 2008, she had failed to realize (and comply) with this requirement, but now aware of the requirement in 2010, she opened a new bank account "solely to comply with the State's campaign finance requirements." J.A. vol. 3 at 608. After registering the Coalition, Dr. Hsieh once again began filing disclosure reports.

In meeting the reporting requirements, Dr. Hsieh had to list the addresses of all $20-plus contributors. For $100-plus contributors, Dr. Hsieh also had to list their occupations and employer information. She felt it "intrusive" to request that personal information from the Coalition's contributors. *Id.* at 609. In fact, after Dr. Hsieh wrote a blog post describing the reporting requirements, putative contributors reacted, at least one increasing his pledge because he was "angry about the reporting requirements" and five reducing their

contributions to avoid the reporting requirements. *Id.* at 631.

By 2010, the Secretary had found ways to ease the reporting burden by implementing its online-reporting system, TRACER. Using TRACER, Dr. Hsieh was better able to transfer disclosure information from her software to the Secretary's website. But even with this improvement, Dr. Hsieh still needed to maintain a spreadsheet, separate from her financial records that she maintained on accounting software, to organize her data so it would sync with the TRACER system. Dr. Hsieh spent about an hour or two completing each TRACER report.

In 2010, Dr. Hsieh failed to file her first disclosure report on time because her house had flooded. Soon afterward, she received an e-mail from the Secretary's office notifying her of the missed deadline and telling her that the Coalition's issue committee could be fined $50 per day for uncured violations of the issue-committee disclosure laws. To stop the fine from increasing, Dr. Hsieh immediately filed an incomplete report that she would later update. Even so, she soon received a notice that the Secretary had assessed the Coalition's issue committee a $50 fine. In response, Dr. Hsieh filed a waiver request, which the Secretary's office granted two weeks later.

Despite the difficulties recounted above, Dr. Hsieh found her 2010 experience with Colorado's issue-committee regulatory framework "significantly easier" than her experience in 2008 because of improved documentation and online resources that streamlined disclosure. *Id.* at 607. In April 2011, after the election,

Dr. Hsieh filed the necessary papers to terminate the Coalition's issue-committee status.

3. 2012 Activities

As the 2012 election neared, the Coalition filed in federal district court a declaratory-judgment suit against Scott Gessler, the then-Colorado Secretary of State. Among other relief, the Coalition requested the court to declare that the Coalition's "expected activity of $3,500 does not require registration as an issue committee." J.A. vol. 1 at 25. On August 13, 2012, the Coalition moved the court for a preliminary injunction. On October 2, 2012, after full briefing on the motion, the federal court certified four questions to the Colorado Supreme Court, including this one: "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?" J.A. vol. 2 at 428.

On July 2, 2014, the Colorado Supreme Court declined to answer the certified questions "in light of the [Colorado Supreme] Court's decision in 12SC783, *Gessler v. Colorado Common Cause*, which was issued June 16, 2014." *Id.* at 439 (emphasis altered). By then, the 2012 election had come and gone. Because the personhood amendment failed to qualify for the general-election ballot, the Coalition had neither registered as an issue committee nor published an updated policy paper.

4. 2014 Election

After the Colorado Supreme Court's decision in *Gessler v. Colorado Common Cause*, 327 P.3d 232 (Colo. 2014), the Coalition renewed its preliminary-injunction

motion in federal district court. By then, the personhood amendment had qualified for the 2014 general-election ballot, and Dr. Hsieh and her co-author again wanted to update and expand the policy paper urging readers to vote "no" on the latest iteration of the personhood ballot initiative.

The district court consolidated the hearing on the preliminary-injunction motion with a hearing on the merits of the case. As Dr. Hsieh testified at the hearing, the Coalition planned to raise about $1,500 in 2014 to fund the policy paper but still opposed registering as an issue committee. By October 3, 2014, the day of the preliminary-injunction hearing, the Coalition had already received pledges totaling about $2,000.

On October 10, 2014, the district court "ORDERED and DECLARED that [the Coalition]'s expected activity of $3,500 does not require registration or disclosure as an 'issue committee' and the Secretary is ENJOINED from enforcing" Colorado's disclosure requirements against the Coalition.[5] J.A. vol. 2 at 579. Specifically, the district court concluded that the Coalition had "established clearly and convincingly that it will suffer irreparable injury to its First Amendment right of free association." *Id.*

The Secretary appeals the district court's order granting the Coalition declaratory and injunctive relief.

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[5] For the 2012 and 2014 general elections, Dr. Hsieh expected to raise between $1,500 and $3,500 in contributions. The parties agree that the amount involved in this appeal is $3,500.

II. DISCUSSION

The Secretary presents two issues on appeal. First, does Colorado's $200 threshold for issue-committee registration and reporting violate the First Amendment? And second, can Colorado require issue-committee registration and disclosure for a group that raises and spends $3,500 to influence an election on a statewide ballot initiative? Thus, the Secretary's first issue asks us whether the Colorado Constitution's monetary threshold for defining "issue committee" is facially valid under the First Amendment. The Secretary's second issue asks us whether Colorado's issue-committee regulatory framework is constitutional as applied to the Coalition. We conclude that Colorado's issue-committee regulatory framework is unconstitutional as applied to the Coalition. We therefore do not address the facial validity of the $200 threshold.

A. Legal Standard

We review de novo the district court's "findings of constitutional fact . . . and conclusions of law." *Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1195–96 (10th Cir. 2005). "Because this decision implicates First Amendment freedoms, we perform an independent examination of the whole record in order to ensure that the judgment protects the rights of free expression." *Id.* at 1196.

The parties dispute what legal standard governs our review of the constitutional question. The Secretary advocates for exacting scrutiny, which this court has applied in a similar, controlling case. *See Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010)

(discussing the exacting-scrutiny standard). Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), however, the Secretary argues that we should apply a "wholly without rationality" standard in determining whether Colorado's $200 disclosure threshold may stand. *Buckley*, 424 U.S. at 83. To support his view, the Secretary argues that the *Sampson* court applied exacting scrutiny only because "the focus of those plaintiffs was on the impact of the entire disclosure scheme." Appellant's Opening Br. at 31. The Secretary argues that the Coalition's case merits a less-stringent standard since it focuses "specifically on the constitutionality of Colorado's disclosure threshold [of $200]." *Id.* We conclude that exacting scrutiny is the standard that controls this case, at least in deciding the as-applied challenge.

The plaintiffs in *Sampson* sought a declaration that Colorado's "registration and disclosure requirements are unconstitutional, facially, and as applied." *Sampson*, 625 F.3d at 1253. We concluded that, as applied, Colorado's issue-committee regulatory framework failed exacting scrutiny. *Id.* at 1261. Thus, *Sampson* forecloses the Secretary's argument for a less-stringent standard.

We face the exact as-applied question the *Sampson* court faced, though with a putative issue committee that has, at times, raised slightly more money than did the issue committee in *Sampson*. Thus, as in *Sampson*, we will apply exacting scrutiny to the as-applied challenge. *See Doe v. Reed*, 561 U.S. 186, 196 (2010) ("We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed

such challenges under what has been termed 'exacting scrutiny.'" (citing, among other cases, *Buckley*, 424 U.S. at 64)).

Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010) (quoting *Buckley*, 424 U.S. at 64, 66). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Reed*, 561 U.S. at 196 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008)).

B. Whether the Coalition Must Register and Disclose

We conclude that the Secretary may not constitutionally require the Coalition to register and disclose as an issue committee under Colorado's regulatory framework. The informational interest in the Coalition's disclosures is far outweighed by the substantial and serious burdens of the required disclosures.

In assessing the Secretary's arguments, we often draw comparisons to the facts in *Sampson*. We therefore begin by reviewing *Sampson* before proceeding to our exacting-scrutiny analysis of the facts in this case.

1. Sampson *Revisited*

In *Sampson*, we concluded that Colorado's issue-committee regulatory framework was unconstitutional as applied to a group of residents opposing annexation

of their unincorporated neighborhood (Parker North) into a larger, incorporated town (Parker). *See Sampson*, 625 F.3d at 1249, 1254. After a Parker North resident submitted a petition to the Parker Town Council seeking annexation of Parker North into Parker, a group of residents joined in opposing the petition and annexation. *Id.* at 1251. To convince other Parker North residents to oppose the petition, the anti-annexation residents "purchased and distributed No Annexation signs, mailed to all residents of Parker North a postcard summarizing the reasons to oppose annexation, continued to discuss and debate the issue on the Internet, and . . . submitted to the [Parker] Town Council a document opposing annexation . . . ." *Id.*

A pro-annexation resident, who had earlier formed an issue committee to support annexation, filed a complaint with the Colorado Secretary of State (then Bernie Buescher) alleging that the anti-annexation residents had violated the Act by failing (1) to register as an issue committee, (2) to comply with issue-committee reporting requirements, and (3) to establish a separate bank account. *Id.* By that time, the anti-annexation residents had received $782.02 in nonmonetary contributions. *Id.* at 1252. All told, the neighborhood group would ultimately receive a total of $2,239.55 in monetary and nonmonetary contributions and spend $1,992.37 opposing the annexation measure and answering the complaint. *See id.* at 1260 n.5.

After retaining an attorney and responding to the complaint, the anti-annexation residents filed suit against Secretary Buescher in federal court alleging that the Colorado issue-committee requirements

violated their First Amendment rights to free speech and association. *Id.* at 1253. The federal district court upheld the constitutionality of Colorado's issue-committee regulatory framework as applied to the anti-annexation residents, but we reversed. *Id.* at 1253–54.

In applying exacting scrutiny in *Sampson*, we discussed the public's interest in issue-committee disclosures and the Supreme Court's recognizing "three proper justifications for reporting and disclosing campaign finances." *Id.* at 1256. We concluded that the first two of these justifications—"facilitating the detection of violations of contribution limitations" and deterring quid pro quo corruption—were irrelevant or inapplicable to issue committees. *Id.* This left the third—the public's informational interest. *Id.* Issue-committee disclosures serve the public's informational interest by allowing voters to "identify those who (presumably) have a financial interest in the outcome of the election." *Id.* at 1259. In measuring the value of this informational interest in the annexation debate, we focused on a balance: "[W]hile assuming that there is a legitimate public interest in financial disclosure from campaign organizations, we also recognize that this interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight." *Id.*

In balancing the public's legitimate interest in financial disclosure with the anti-annexation residents' First Amendment right of association, we concluded that the burden "imposed by Colorado's registration and reporting requirements cannot be justified by a public interest in disclosure." *Id.* In *Sampson*, we

characterized Colorado's laws burdening issue committees as "substantial." *Id.* We noted first that "[t]he average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth" in the Colorado Constitution, the Act, and the Secretary's rules. *Id.* Second, we noted that hiring an attorney to help comply with disclosure laws and to answer any complaints would often cost more than the total amount of contributions of small-scale issue committees. *Id.* at 1260 (citing *Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.")). Finally, we noted the residents' burden of the "time, energy, and money to review the law themselves." *Id.* We concluded that "the financial burden of state regulation on [the anti-annexation residents'] freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions." *Id.* at 1261.

Having reviewed *Sampson*'s exacting-scrutiny analysis, we turn now to the facts of this case.

2. Framework As Applied to the Coalition

In our view, *Sampson*'s holding compels us to conclude that Colorado's issue-committee regulatory framework fails exacting scrutiny in this case. Simply put, Colorado's issue-committee regulatory framework remains too burdensome for small-scale issue

committees like the Coalition. We commend the Secretary for his progress in streamlining issue-committee disclosures and explaining complex laws to ordinary citizens. But the burdens remain too great in the face of the public's legitimate but minimal interest in information about the Coalition's contributors and expenditures.

a. Governmental Interest

We begin our exacting-scrutiny analysis by noting that under *Sampson*'s reasoning we must conclude that the governmental interest in issue-committee disclosures remains minimal where an issue committee raises or spends $3,500. In *Sampson*, we held that the informational interest was minimal in the financial disclosures of an issue committee that raised and spent about $2,000. *Id.* at 1260. Again, as in *Sampson*, "[t]he case before us is quite unlike ones involving the expenditure of tens of millions of dollars on ballot issues presenting 'complex policy proposals.'" *Id.* at 1261 (quoting *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003)).

The Secretary argues that the informational interest in the Coalition's disclosures is "substantial." Appellant's Opening Br. at 32. Citing other courts' discussions of *Sampson*, the Secretary argues that "courts are virtually unanimous in concluding that campaign disclosures are often more meaningful in the ballot initiative context than they are for candidate elections." *Id.* at 34 (citing, among others, *Worley v. Fla. Sec'y of State*, 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." (citation omitted))). In *Sampson* we explicitly "assume[d] that there is a legitimate public interest in financial disclosure from" issue committees. 625 F.3d at 1259. Instead of assigning that interest the same weight across all issue committees, however, we recognized that the strength of the informational interest in financial disclosure varies depending on whether an issue committee has raised and spent $10 million, for example, or instead $3,500. In other words, the strength of the public's interest in issue-committee disclosure depends, in part, on how much money the issue committee has raised or spent. We continue to agree with the Ninth Circuit's characterization of this sliding scale:

> As a matter of common sense, the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level. As the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy.

Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth, 556 F.3d 1021, 1033 (9th Cir. 2009) (emphasis in original); *Sampson*, 625 F.3d at 1260–61 (same).

We reiterate that there is an informational interest in the Coalition's financial disclosures. After all, the Colorado electorate said so in passing Article XXVIII. But at a $3,500 contribution level, we cannot under *Sampson*'s reasoning characterize the disclosure interest as substantial.

b. Burden

Obviously, informational interest is just one side of the exacting-scrutiny balance. An issue committee raising or spending a meager $200 might still be required to disclose limited information without violating the First Amendment, but any reporting burdens must be measured against the government's interest in that disclosure. *See Reed*, 561 U.S. at 196 ("To withstand [exacting] scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" (quoting *Davis*, 554 U.S. at 744)).

As a practical matter, the burdens here are less substantial than the burdens in *Sampson*. Today, the Secretary's office and website have additional resources to assist people like Dr. Hsieh. In addition, the Secretary's office has implemented the TRACER system, by which issue committees can more easily disclose contributions and expenditures. Dr. Hsieh's easier experience meeting Colorado's issue-committee registration and disclosure requirements is a testament to the Secretary's good work in improving the process. In 2008, issue committees seeking guidance were left to sort through the language of the Colorado Constitution, the Act, and the Secretary's regulations. Yet, apart from the easier entry of information, Colorado's issue-committee regulatory framework and its associated burdens remain fully in place.

In registering the Coalition as an issue committee and complying with Colorado's reporting requirements, Dr. Hsieh still faces an overly burdensome regulatory framework. Although the Secretary has created additional resources to assist issue committees in

understanding and complying with registration and disclosure laws, meeting the requirements is no small chore. Implementing TRACER alleviated some technical burdens, but even with TRACER, a person registering an issue committee still faces over 35 online training modules on how to use TRACER. And although TRACER enables Dr. Hsieh to more easily transfer the Coalition's financial information to the Secretary's disclosures database, she still must provide detailed information about the Coalition's most mundane, obvious, and unimportant expenditures (e.g., the address of the post office at which she purchased stamps).

We also note that financial disclosure imposes a unique burden on small-scale issue committees. In 2010, after reaching out to putative contributors who pledged funds in support of the Coalition's policy paper, some putative contributors altered their behavior in response to Dr. Hsieh's request for their personal information. While one contributor increased his contribution in response to the disclosure requirements, the Coalition lost contributions it otherwise would have received. We would expect some prospective contributors to balk at producing their addresses or employment information. And with small-scale issue committees, like the Coalition's, lost contributions might affect their ability to advocate. Although larger-dollar issue committees may not notice some lost donations, Dr. Hsieh vividly recalled losing even $20 contributions.

The Secretary argues that the Coalition's incremental burden in complying with Colorado's issue-committee regulatory framework is less than the

overwhelming burden borne by the anti-annexation residents in *Sampson*. Specifically, the Secretary argues that because the Coalition is a nonprofit corporation instead of a citizen group, the Coalition is better prepared to comply with Colorado's issue-committee laws. Although it is true that the Coalition may closely track finances and use software that helps in creating TRACER reports, we note that Dr. Hsieh operates the Coalition by herself. Dr. Hsieh spends a considerable amount of time tending to the Coalition's disclosure obligations. In this way, Dr. Hsieh experienced the same substantial burdens as did the citizen group in *Sampson*.

In sum, Colorado law imposes a wide range of burdens on issue committees, some of which are slight and others more substantial.

c. Balancing

In balancing the informational interest in the Coalition's disclosures and the burdens Colorado law imposes, we see a mismatch. In Colorado, at least in the Coalition's circumstances, the minimal informational interest cannot justify the associated substantial burdens.

The minimal informational interest here cannot support Colorado's filing schedule that requires twelve disclosures in seven months regardless of whether an issue committee has received or spent any money. Further, the burden of asking for personal information of $20-contributors is substantial. Gaining the necessary information from these contributors might well result in fewer contributors willing to support an issue committee's advocacy. A $20 threshold for

contributor disclosure—coupled with other registration and reporting requirements—is too burdensome when applied to a small-scale issue committee like the Coalition.

In short, Colorado law—as it stands—demands too much of the Coalition given the public's modest informational interest in the Coalition's disclosures.[6] Voters certainly have an interest in knowing who finances support or opposition to a given ballot initiative, but for small-scale issue committees like the Coalition, Colorado's onerous reporting requirements outweigh that informational interest. At the same time, we recognize that Colorado's current issue-committee regulatory framework is much more justifiable for large-scale, bigger-money issue committees.

In concluding that Colorado's issue-committee regulatory framework is unconstitutional as applied to the Coalition, we decline to address the facial validity of the Colorado Constitution's $200 threshold for issue-committee reporting. The Secretary argues that if we conclude that Colorado may not require the Coalition to register and disclose as an issue committee, we "should [also] facially invalidate the $200 threshold."

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[6] Our exacting-scrutiny analysis does not change after this court's recent decision in *Independence Institute v. Williams*, ___ F.3d ____, No. 14-1463, 2016 WL 423759 (10th Cir. Feb. 4, 2016). In *Independence Institute*, we concluded that Colorado's electioneering-communications disclosure framework was constitutional as applied to a television advertisement urging Colorado voters to support an audit of Colorado's Health Benefit Exchange. *Id.* at *1. Because *Independence Institute* involved a different disclosure framework, *Independence Institute*'s as-applied ruling does not impact our decision here.

Appellant's Opening Br. at 68. The Secretary argues that facially invalidating the $200 threshold would "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." *Id.* at 69.

We understand the Secretary's frustration with the present state of the law. Secretary Gessler tried to adjust his office's rules after *Sampson* but then lost his bid to do so in *Gessler*. We sympathize with the Secretary's suggestion that striking the $200 threshold as facially unconstitutional is better than leaving the threshold subject to piecemeal litigation on what amount of contributions and expenditures would be constitutional as applied.[7] For instance, in *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?

From no one's perspective is this a satisfactory posture. But the Secretary is better served seeking help from the institution best equipped in our governmental system to solve the problem—the Colorado legislature. As noted, statutes provide most of the onerous reporting requirements. Even the Colorado

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[7] At oral argument, the court asked the Secretary's counsel: "It sounds to me like what you're really saying is if we don't win on our first argument [as-applied constitutionality], then find the constitutional provision facially unconstitutional, is that what you're saying?" Oral Arg. at 31:10. With a proper dose of levity but a dead-serious point too, the Secretary's counsel replied, "Execute us or set us free, your honor." *Id.* at 31:22. Here we do neither, directing the Secretary to seek relief from those able to amend Colorado's statutes to meet the Secretary's concerns.

Constitution's setting a floor of $200 does not require the same full reporting as for larger-scale issue committees. Accordingly, we decline to address the facial validity of the $200 threshold, and leave it to the people of Colorado themselves.

We thus conclude that Colorado's issue-committee regulatory framework does not satisfy exacting scrutiny in this case. As applied to the Coalition, Colorado's framework is unconstitutional under the First Amendment.

III. CONCLUSION

As in *Sampson*, we conclude that Colorado's issue-committee regulatory framework is unconstitutional as applied to the Coalition. The government's modest informational interest in the Coalition's disclosures is not reflected in the burdens Colorado law imposes on the Coalition. We therefore affirm.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

[Filed October 10, 2014]

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,

[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.

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.

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

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[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.

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

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[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?

imposed could not be justified by the public's 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:

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[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.

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 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 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

[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 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.

(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 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*

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[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.

to 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]

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[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.

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 *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