COLORADO SUPREME COURT Ralph L. Carr Judicial Center 2 East Fourteenth Avenue Denver, Colorado 80203 Certiorari to the Court of Appeals, 2011CA2405 District Court, City and County of Denver, 2011CV4164 Petitioner: Scott Gessler, in his official capacity as Colorado Secretary of State, v. Respondents: Colorado Common Cause and Colorado Ethics Watch.	▲ COURT USE ONLY ▲ Supreme Court Case No. 2012SC783
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BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

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Dated this 6th day of August, 2013.

Tyler Martinez
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STATEMENT OF THE ISSUES

Whether the Secretary of State correctly concluded that *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), invalidated registration and reporting requirements for all issue committees that raise or spend similarly small amounts of money.

Based on *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), whether the Secretary of State, under his constitutional and statutory authority to "promulgate such rules… as may be necessary to administer and enforce" campaign finance laws, can promulgate a rule that establishes the line at which an issue committee's financial contributions or expenditures exceed the burden of state regulation.

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INTEREST OF *AMICUS CURIAE*

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, *amicus curiae* Center for Competitive Politics ("CCP") is a nonprofit 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and state and federal litigation. CCP has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010), *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12. CCP is counsel to the plaintiff in *Coalition for Secular Government v. Gessler*, 2012 SA 312, wherein questions concerning the interpretation of Article XXVIII and the Fair Campaign Practices Act were certified to this court by the U.S. District Court for the District of Colorado.

SUMMARY OF THE ARGUMENT

Colorado's executive departments are tasked with carrying out the law of the state, and must apply the decisions of both Colorado and federal courts. Here, the Secretary is caught between two fires: the Colorado Constitution has a $200 trigger for "issue committee" status, but the U.S. Court of Appeals for the Tenth Circuit has held that this threshold is too low, as a matter of constitutional law, when applied to small organizations. *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010). Fortunately, the Secretary may be able to harmonize this conflict if he is allowed to promulgate proposed Rule 4.27. The Court of Appeals's decision below prevents him from doing so.

This is not the first time the Secretary has been presented with a conflict between Article XXVIII and a federal court ruling. In 2007, *Colorado Right to Life Committee, Inc. v. Coffman* held that the $200 trigger was insufficient for creating "political committee" status under Article XXVIII § 2(12). 498 F.3d 1137, 1153 (10th Cir. 2007). The Secretary's predecessor, recognizing the implications of the ruling for the definition of "*issue* committee," promulgated a rule to change "or" to "and" in Article XXVIII § 2(10)(a). Now, "issue committee" status only attaches when an organization has *both* the major purpose of supporting or opposing a ballot measure *and* has received contributions or made expenditures of $200 or

more. Colorado courts later approved the Secretary's rulemaking, which has been in place for several election cycles.

It is true that federal and state courts have parallel jurisdiction to interpret the federal Constitution, subject to the mandates of the U.S. Supreme Court. But federal court holdings can be persuasive, and the Colorado state courts have adopted and applied federal court rulings when reviewing provisions of state law. Further, this Court has never issued a ruling that directly conflicts with the Tenth Circuit's First Amendment jurisprudence.

In fact, since the founding of the State, this Court has consistently held that the Colorado Constitution sometimes provides *greater* free speech protections than does the First Amendment—and has never reached the opposite conclusion. Given this long history of providing greater civil rights protections, this Court should find the reasoning of the Tenth Circuit in *Sampson* persuasive and agree that the $200 trigger is invalid under the First Amendment.

But if the $200 trigger still stands despite *Sampson*, then the civil rights of all Coloradoans will be restricted. Speakers everywhere, seeing the contradictory rules, will "hedge and trim" before speaking, a grave constitutional harm. *Buckley v Valeo*, 424 U.S. 1, 43 (1976). Such a situation will also create traps for the unwary and grounds for ideologically-motivated lawsuits.

Without the Secretary's rule, potential speakers will be forced to go to court seekingdeclaratory judgments as to the law's meaning. Forcing citizens to take such recourse to vindicate their First Amendment rights is, in itself, a clear constitutional harm that has been recognized by the U.S. Supreme Court. *Citizens United v. FEC*, 558 U.S. 310, 324 (2010). The litigation will tax both judiciaries and leave the state vulnerable to substantial legal costs.

Therefore, the better course is to uphold the Secretary's rulemaking authority and Rule 4.27.

ARGUMENT

I. The Secretary is caught between two fires. He must abide by the constitutional interpretations of both the state and federal courts.

This Court must abide by the federal constitution. U.S. CONST. art. VI, § 2. But in interpreting that document, it is independent of, and coequal with, the federal courts.[1]

State constitutional officers do not share this status. *See, e.g., Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984) (affirming federal district court order to the Colorado Secretary of State to recognize political organizations for ballot access); *Constitution Party of Kan. v. Kobach*, 695 F.3d 1140, 1147 (10th Cir. 2012) (discussing and approving of *Baer*); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (4th Cir. 1980) (collecting cases holding federal agencies must follow decisions of circuit courts of appeal). The state's executive departments must apply both Colorado and federal jurisprudence. When a state constitutional officer is presented with conflicting legal mandates, and has undertaken a formal rulemaking to harmonize that conflict, his expert determination should not be lightly set aside. *See* COLO. CONST. art. XXVIII § 9(1); COLO. REV. STAT. 1-45-111.5(1) (2013) .

The Secretary must apply and enforce the Colorado campaign finance laws and guide the residents of Colorado in their compliance. *See* COLO. CONST. art.

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[1] Discussed in section III, *infra*, p. 11.

XXVIII § 9. In the case of "issue committees," Article XXVIII provides a clear definition: issue committee status attaches to groups having the "major purpose" of supporting or opposing a ballot measure *or* groups that collect or expend more than $200 in support of or opposition to a ballot measure. COLO. CONST. art. XXVIII § 2(10)(a).

If Article XXVIII's definition were the whole of the matter, the Secretary's task would be easy. But campaign finance laws implicate the fundamental freedoms enumerated in the First Amendment. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 21 (applying *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Consequently, the courts—both Colorado and federal—can and do intervene to ensure that those rights are protected from infringement and burden. This process creates a number of rulings, sometimes contradictory, that the Secretary must follow in administering Colorado's campaign finance laws.

The Tenth Circuit's decisions, including those issued in as-applied cases, are precedent for all federal district court judges in the District of Colorado and guide their consideration of constitutional challenges to Article XXVIII. *See United States v. Riccardi*, 405 F.3d 852, 868 (10th Cir. 2005) (discussing the difference between facial challenges and as-applied challenges, where as-applied challenges cover the original parties and those "similarly-situated"); *see also Swanson v.*

Town of Mt. View, 577 F.3d 1196, 1200 (10th Cir. 2009) (discussing the use of similar circumstances in prior cases when presenting constitutional claims for relief).

Moreover, for a precedent to apply, the facts of a subsequent as-applied challenge need not be precisely the same as those present in the earlier case. As the United States Supreme Court has said: "[h]istory repeats itself," but there is no "[r]equir[ment of] repetition of every 'legally relevant' characteristic of an as-applied challenge—down to the last detail" for subsequent cases to be governed by a prior ruling. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) ("*WRTL II*"). Therefore, the Secretary of State must adhere to the rulings of the Tenth Circuit, even where those decisions were made on an as-applied basis.

At issue in this case is the effect of *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). *Sampson* found Article XXVII § 2(10)(a)(II) unconstitutional as applied to several homeowners who wanted to voice opposition to a ballot initiative that, if enacted, would annex their unincorporated neighborhood to a nearby town. *Id.* at 1251. The *Sampson* plaintiffs raised $2239.55 in total contributions (monetary and in-kind). *Id.* at 1260 n. 5 (detailing the contributions). The *Sampson* court concluded that Colorado's issue committee disclosure and reporting requirements could only be justified based on the "public interest in

knowing who is spending and receiving money to support or oppose a ballot issue." *Id.* at 1256. The court concluded that the informational interest in the neighbors' contributions and expenditures was "minimal, if not nonexistent, in light of the small size of the contributions." *Id* at 1261. Thus, under "exacting scrutiny," the imposition of issue committee status upon the homeowners violated the First Amendment. *Id.*

While *Sampson* did not specify the level at which the public's interest in disclosure becomes significant, it did find that Article XXVIII § (2)(10)(a)(II)'s $200 threshold is unconstitutionally low. *Id.* Spending "less than $1,000 on a campaign" falls "well below the line" at which small ballot issue committees can be subject to reporting and disclosure requirements. *Id.*

Thus, the Secretary is caught between two fires. On one side is the express language of Article XXVIII § 2(10)(a)(II), creating a $200 reporting threshold. From the other, the Tenth Circuit has found $2,200 in total contributions as too low to justify for state regulation of political speakers – and has explicitly found that amounts less than $1,000 are "well below" the constitutional line for issue committee status.

If a group spending small amounts of money brings a challenge in federal court, the *Sampson* decision will have precedential value. The Secretary cannot ignore *Sampson*.

At the same time, the Colorado Court of Appeals decision in *this* case holds that the Secretary cannot make a rule that accords with *Sampson*. The state court mandates that Article XXVIII's $200 trigger remain. It appears the Secretary is trapped between an explicit provision of Article XXVIII and the explicit decision of the Tenth Circuit.

II. The last time an explicit provision of Article XXVIII was at odds with Tenth Circuit mandates, the Secretary used his discretion to harmonize the law, and it has worked for these past six years.

Generally, Colorado courts defer to expert constitutional officers and administrative agencies. *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1005 (Colo. 2004) (citing *Aurora v. Bd. of County Comm'rs*, 919 P.2d 198, 203 (Colo. 1996)). Specifically, "[t]his court has given credence to an administrative interpretation of a statute when the statute is subject to differing reasonable interpretations, and when the issue comes within the agency's special expertise." *Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 1002 (Colo. 2003). Of course, on matters of law, this Court makes an independent inquiry and judgment. *See Coffman*, 102 P.3d at 1005. Yet the purpose of rulemaking

proceedings is to "afford interested persons an opportunity to submit written data, views, or arguments on a proposed rule" and allow the agency to form a considered policy. *Regular Route Common Carrier Conference of Colorado Motor Carriers Ass'n. v. Public Utilities Com.*, 761 P.2d 737, 743 (Colo. 1988) (internal citations omitted).

The underlying issue of this case—the Secretary's attempt to harmonize a conflict between Article XXVIII and a conflicting federal court ruling—is not unique. In 2007, the Tenth Circuit tackled a different constitutional deficiency of Article XXVIII. *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137 (10th Cir. 2007) ("*CRLC*").

Colorado Right to Life Committee ("CRLC") was a 501(c)(4) nonprofit corporation. *Id.* at 1141. CRLC had "a policy of not contributing to, accepting contributions from, or engaging in express advocacy regarding, political parties or candidates." *Id.* It instead focused on the issue of abortion and made communications referencing candidates' stances on that issue. *Id.* at 1143. CRLC sued the Secretary of State alleging that various provisions of Article XXVIII violated the First Amendment, both on their face and as-applied. *Id.* at 1146.

The Tenth Circuit was asked to examining Article XXVIII's definition of "political committee," which like the provisions at issue here, also had a $200

trigger. *Id.* at 1151 (examining Colo. Const. art. XXVIII §2(12)). The court held that *Buckley*'s "the major purpose" test was a required part of a constitutional test for political committee status. *Id.* at 1153-1154. Indeed, "the $200 trigger, standing alone, cannot serve as a proxy for the 'major purpose' test as applied to CRLC." *Id.* at 1154. The court affirmed the district court and held that "the amount of money an organization must accept or spend—$ 200—*is not substantial* and would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets." *Id.* at 1153 (internal citations omitted) (emphasis added). The Tenth Circuit noted with approval that the definition of "issue committee" included "the major purpose" test, but did not comment on the use of the disjunctive "or" in Article XXVIII § 2(10)(a). *Id.* at 1155.

As a result of *CRLC*, the Secretary was placed in the same situation he finds himself in here. Article XXVIII triggered *issue* committee status with *either* the organization's "major purpose" *or* the $200 trigger. And yet, the as-applied challenge in *CRLC* explicitly stated that the $200 trigger was not sufficient for "political committee" status under the Tenth Circuit's interpretation of the First Amendment. To resolve this paradox, the Secretary promulgated a rule to functionally change the "or" to an "and" in Article XXVIII § 2(10)(a)'s definition

of issue committee. *See* Rule 1.12.2, 8 C.C.R. 1505-6.[2] Issue committee status now attaches only when a group has collected or expended $200 in support or opposition to a ballot measure *and* where the group's "major purpose" is supporting or opposing a ballot measure. *Id.*

The significant change of "or" to "and"—and the concurrent impact on issue committee status and registration—has been approved by Colorado's courts. *See, e.g., Independence Inst. v. Coffman*, 209 P.3d 1130, 1135 (Colo. Ct. App. 2008) (applying the rule in defining "issue committee"); *Cerbo v. Protect Colorado Jobs, Inc.*, 240 P.3d 495, 498 (Colo. Ct. App. 2010) (noting that no party challenged the rule). The rule has been in place for several election cycles, and has provided guidance to the Colorado electorate. More importantly, it has harmonized Colorado law with the state's constitutional obligations.

In this case, the Secretary's predecessor began a rulemaking to implement *Sampson*. After notice and comment by a variety of experts and citizens, the Secretary continued the rulemaking and eventually adopted Rule 4.27.[3] Ultimately, Rule 4.27 provides a $5,000 trigger to replace the Article XXVIII $200 trigger

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[2] The Secretary's predecessors had a different codification of the campaign finance rules. Consequently, cases often refer to the rule's original location at Rule 1.7(b), 8 C.C.R. 1505-6.

[3] The Rule has been renumbered as Rule 4.1, 8 C.C.R. 1505-6. However, throughout the litigation parties and courts have referred to it as Rule 4.27.

found wanting in *Sampson*—and, in the "political committee" context, in *CRLC*. Rule 4.1, 8 C.C.R. 1505-6. The Secretary's rule is certainly reasonable. Generally, "a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (internal quotations and citations omitted). Likewise, there is no scalpel to probe the policy difference between a registration trigger of $2,500 or one of $5,000. In either case, both the $2,500 and $5,000 thresholds are "well below the line" of the "expenditure of tens of millions of dollars on ballot issues presenting complex policy proposals" that were clearly regulable to the *Sampson* court. *Sampson*, 625 F.3d at 1261 (internal citation and quotation omitted).

III. While this Court is not bound by the rulings of the Tenth Circuit, it has found that the Colorado Constitution provides *greater* free speech protections than the First Amendment.

Federal and state courts have parallel jurisdiction to interpret federal constitutional law, but all are subject to the direction of the United States Supreme Court. *See, e.g., People v. Barber*, 799 P.2d 936, 939-940 (Colo. 1990). Moreover, the "[l]ower federal courts do not have appellate jurisdiction over state courts and their decisions are not conclusive on state courts, even on questions of federal law." *Id.* at 940 (collecting cases). Thus, it is well established that Colorado courts are independent of the federal courts, except for the United States Supreme Court.

See American Tradition P'ship v. Bullock, 568 U.S. ___ , 132 S.Ct. 2490 (2012) (per curiam) (citing U.S. CONST. art. VI, § 2).

But lower federal courts can be persuasive as to matters of federal constitutional and statutory interpretation. As a New York appellate court noted succinctly: "the interpretation of a [f]ederal constitutional question by the lower [f]ederal courts may serve as useful and persuasive authority for our Court." *Matter of State of New York v Daniel Oo.*, 88 A.D.3d 212, 219 (N.Y. App. Div. 2011) (internal citations omitted). The Colorado Courts have readily accepted this principle in the campaign finance context. For example, the Colorado Court of Appeals adopted and applied the reasoning of *CRLC* in *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964, 972 (Colo. Ct. App. 2007). The Colorado appellate court even ordered further proceedings consistent with *CRLC*. *Id.* at 973.

This Court has never issued a ruling that direct conflicts with the Tenth Circuit's reading of First Amendment jurisprudence. Cases such as *Barber* often involve a federal district court's declaratory judgment—judgments that may be binding only on the parties to the case, but which are widely understood to apply in similar (and, again, not exact) circumstances.

Indeed, while this Court has found that the Colorado Constitution sometimes gives *greater* civil rights protections than its federal counterpart, it has never found

the opposite. For example, in the *Tattered Cover* case regarding the privacy of bookstore records, this Court explicitly held: "[T]he Colorado Constitution provides broader free speech protections than the Federal Constitution." *Tattered Cover v. City of Thornton*, 44 P.3d 1044 (Colo. 2002); *see also Lewis v. Colorado Rockies Baseball Club*, 941 P.2d 266, 271 (Colo. 1997). Almost since statehood, this Court has recognized the greater speech protections found in the Colorado Constitution. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) (collecting cases as far back as 1889). If the *Colorado* Constitution grants more protection than the *federal* Constitution, then this Court's First Amendment jurisprudence ought to reflect its values, and accord *stronger* protections for speech than that proffered by federal court holdings.

Therefore, since this Court has held that the Colorado Constitution's free speech provisions provide *greater* protection than the First Amendment, this Court ought to adopt the reasoning of the Tenth Circuit in *Sampson*, and find that the Secretary's rule is reasonable.

IV. Absent the ability of the Secretary to provide guidance, citizens suffer chill in their speech and constitutional officers, and consequently the state, will face unnecessary litigation and associated financial costs.

Without guidance from the Secretary, Coloradans may choose not to engage in otherwise-constitutionally-protected activity. This chill of free speech will

violate the civil rights of Colorado's residents. The United States Supreme Court described the issue succinctly: "Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Citizens United*, 558 U.S. 310, 324 (2010) (internal quotation and citation omitted). Indeed, the Supreme Court has determined that laws which force a "speaker to hedge and trim" are unconstitutional and must be narrowed by the courts or overturned. *Buckley*, 424 U.S. at 43 (internal quotation and citation omitted). If the Secretary cannot offer guidance, assistance, and rules as mandated by Article XXVIII § 9, then speakers are left to wonder at the express provisions of Article XXVIII § 2(10)(a) and the holdings of the Tenth Circuit. Upholding the Secretary's authority to promulgate Rule 4.27 will avoid this hedging and trimming, and the inevitable chilling of Coloradan's political speech. It will also help avoid traps for the unwary and ideologically-motivated lawsuits. *See, e.g., Colorado Ethics Watch v. Clear the Bench Colorado,* 2012 COA 42 ("*CTBC*")(organization formed, on the advice of the Secretary's staff, as an issue committee instead of a political committee was then sued by Colorado Ethics Watch; the Secretary's arguments, presented as *amicus curiae,* were dismissed as unpersuasive).

In this case, the Tenth Circuit has effectively stricken the $200 trigger for issue committee status for small organizations. However, the Colorado Constitution is clear: the $200 trigger is anything but ambiguous. If the Secretary has no power to reconcile these differing legal mandates, as indicated by the court of appeals in this case and in *CTBC*, then he has no means of complying with the Tenth Circuit's ruling.

The only resolution, in that event, will be recourse to the courts. Such litigation will be costly, resulting in greater strain on both the federal and state judiciaries. On the federal side, many of these actions may arise as 42 U.S.C. § 1983 actions. *See* 42 U.S.C. § 1983 (civil action for depravation of civil rights under the color of law). Those plaintiffs may, if successful, be awarded expert and attorneys' fees. 42 U.S.C. § 1988(b).

Litigation is no solution to these First Amendment concerns. The United States Supreme Court could not have been more clear: "[t]he First Amendment does not permit laws that force speakers *to retain a campaign finance attorney*, conduct demographic marketing research, *or seek declaratory rulings* before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324 (emphasis added). If the Secretary cannot promulgate rules to comply with the

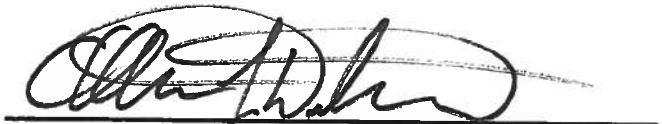
Tenth Circuit's decisions, then speakers must retain attorneys and seek declaratory rulings, a result in direct opposition to *Citizens United.*

Therefore, without the Secretary's guidance, speakers are left to wonder at the contradiction between Article XXVIII and the Tenth Circuit's decisions. Either they will remain silent lest they run afoul of the campaign finance regime, or they must engage in litigation to resolve conflicting laws. This litigation option is costly, both for the civil rights of Colorado's citizens and to the State's treasury.

CONCLUSION

This case presents the very real quandary of a constitutional officer caught between two fires, Colorado's Constitution and the First Amendment. Fortunately, the Secretary may be able to save the intent and effect of both sets of law—if he may promulgate a rule just as he did in response to *CRLC*. Therefore, *amicus curiae* Center for Competitive Politics urges this court to reverse the court of appeals and uphold the Secretary's promulgated rule.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Colorado Appellate Rule 25(e) (2013), I hereby certify that on this 6th day of August, 2013, I have caused a true and correct copy of the forgoing Brief of *Amicus Curiae* Center for Competitive Politics to be sent via electronic and first-class mail to the following:

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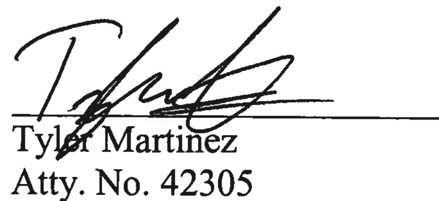

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