IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. _____
SCOTT GESSLER, in his official capacity as Colorado Secretary of State,	)	
Defendant.	)	

VERIFIED COMPLAINT

NATURE OF ACTION

1. This case challenges certain provisions of COLO. CONST. art. XXXVIII ("Article XXVIII"), the Fair Campaign Practices Act ("FCPA") as codified in COLO. REV. STAT. ("C.R.S.") § 1-45-101 (2013) *et seq.*, and the campaign finance rules promulgated by the Colorado Secretary of State found at 8 COLO. CODE REGS. ("C.C.R.") § 1505-6.

2. Plaintiff Independence Institute is a nonprofit corporation organized under the Internal Revenue Code and under Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public); C.R.S. §§ 6-16-103(1) (defining "charitable

organization"); 7-21-101 *et seq* ("Colorado Revised Nonprofit Corporation Act").The Independence Institute conducts research and educates the public on various aspects of public policy—including taxation, education policy, health care, and environmental issues. Occasionally, its educational endeavors include advertisements that mention the officeholders who direct such policies. Sometimes, these officeholders are also candidates for office.

3. The Independence Institute plans to produce an advertisement, to be distributed on broadcast television, which will discuss the possibility of auditing the exchange created by the Colorado Heath Benefit Exchange Act, C.R.S. § 10-22-101 *et. seq.*, ("Health Benefit Exchange" or "Exchange"). The advertisement will mention the Governor of Colorado, John Hickenlooper, and ask that he call for such an audit.

4. The Independence Institute believes that, under Article XXVIII § 2(7) and C.R.S. § 1-45-103(9) ("electioneering communications" definition) and Article XXVIII § 6(1) and C.R.S. § 1-45-108(a)(III) (electioneering communication disclosure) it will be required to report and disclose its donors and their names, addresses, employers, and occupations if the organization makes communications mentioning Governor Hickenlooper.

5. The Colorado Constitution provides that "any person" may file a complaint with the Secretary of State claiming a violation of the campaign finance laws, including those regulating electioneering communications. COLO. CONST. art.

XXVIII §9(2)(a). In such circumstances, the Secretary must refer the matter to an administrative law judge who must hold a hearing within the specified period generally within thirty to forty-five days from the referral of the complaint. *Id.* If the Secretary subsequently fails to bring an action to enforce the administrative law judge's decision concluding that a violation has occurred, then the complainant may bring a private right of action in state district court. *Id.* The prevailing party in a private enforcement action "shall be entitled to reasonable attorney's fees and costs." *Id.*

6. Consequently, the Independence Institute reasonably fears that failure to disclose its donors or report to the state will result in enforcement actions, investigations, and penalties levied by the Defendant, his agents or a private complainant.

7. Colorado's campaign finance laws chill discussion of state government and public policy issues by forcing putative speakers, including the Independence Institute, to comply with unconstitutional regulatory burdens when they merely mention a candidate for office, including an incumbent official, and even in circumstances where that speech neither promotes nor disparages the candidate.

JURISDICTION

8. This Court has jurisdiction because this action arises under the First and Fourteenth Amendments to the United States Constitution. 28 U.S.C. § 1331 (federal question).

9. This Court has jurisdiction because this action arises under Section 1 of the Civil Rights Act of 1871. *See* 42 U.S.C. §§ 1983, 1988; 28 U.S.C. § 1343(a).

10. This Court has jurisdiction to grant relief under The Declaratory Judgment Act. *See* 28 U.S.C. §§ 2201 and 2202.

VENUE

11. Venue is proper under 28 U.S.C. §§ 1391(b)(1) ("a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located") and (b)(2) (the "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred").

PARTIES

12. Established in 1985, the Independence Institute is a nonprofit corporation organized under the Internal Revenue Code and under Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public); C.R.S. §§ 6-16-103(1) (defining "charitable organization"); 7-21-101 *et seq.* ("Colorado Revised Nonprofit Corporation Act").

13. Defendant Scott Gessler is the Colorado Secretary of State, sued in his official capacity as the person charged with administering and enforcing Colorado's campaign finance laws. COLO. CONST. art. XXVIII § 9; C.R.S. § 1-45-111.5.

FACTS

14. This case arises from provisions of Article XXVIII and the FCPA. Article XXVIII went into effect on December 6, 2002. The FCPA went into effect in its most recent iteration on January 15, 1997.

15. The general election in Colorado is scheduled for November 4, 2014. C.R.S. § 1-1-104(17) ("'General election' means the election held on the Tuesday succeeding the first Monday of November in each even-numbered year").

The Independence Institute and its tax status

16. Established May 31, 1985, the Independence Institute is a nonprofit corporation organized under the Internal Revenue Code and under Colorado law. 26 U.S.C. §§ 501(c)(3) (charity status); 170(b)(1)(A)(vi) (public charity-foundation status for revenue generated by donations from the general public); C.R.S. §§ 6-16-103(1) (defining "charitable organization"); 7-21-101 *et seq* ("Colorado Revised Nonprofit Corporation Act").

17. The Independence Institute's mission is "to empower individuals and to educate citizens, legislators[,] and opinion makers about public policies that enhance personal and economic freedom." *See* INDEPENDENCE INSTITUTE "Mission Statement" *available at* http://www.i2i.org/about.php.

18. The Independence Institute's Health Care Policy Center ("HCPC") focuses on healthcare and health insurance policy issues. The HCPC was founded in 2002.

19. The Independence Institute's current president is Jon Caldara.

20. Organizations exempt from taxation under §501(c)(3) may not engage in activity supporting or opposing a candidate. 26 U.S.C. §501(c)(3) (banning "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

21. In applying the Internal Revenue Code's ("IRC") prohibition of § 501(c)(3) political activity, the Internal Revenue Service ("IRS") has issued regulations and guidance on what does and does not constitute political activity. For example, voter registration drives and "get-out-the-vote" drives—if conducted in a nonpartisan manner—are not political activity. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421, 1422. Likewise, nonpartisan candidate fora are not political activity. Rev. Rul. 2007-41, 2007-25 I.R.B. at 1421; Rev. Rul. 66-256 2 C.B. 210 (1966).

22. The Independence Institute is not under the control or influence of any political candidate.

23. The Independence Institute is not under the control or influence of any political party.

24. "Public charity" § 501(c)(3) organizations may engage in only limited lobbying activity. 26 U.S.C. § 501(c)(3) ("no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation"); 26 C.F.R 1.501(c)(3)-1(c)(3).

25. An organization may elect treatment under IRC § 501(h), which permits it to spend a defined portion of its budget on lobbying. 26 U.S.C. §§ 501(h)(2)(B) and (D).

26. The Independence Institute elects treatment under § 501(h).

27. Federal law currently protects the privacy of donors to § 501(c)(3) organizations. *See*, *e.g.*, 26 U.S.C. § 6104(d)(3)(A) (prohibiting "the disclosure of the name and address of any contributor to the organization").

The advertisement

28. As part of its mission, the Independence Institute wishes to run an advertisement calling for the state government to audit Colorado's Health Benefit Exchange.

29. The advertisement will be approximately 30 seconds in length, and be distributed over local broadcast television in Colorado.

30. The Independence Institute intends to spend more than $1,000 on the advertisement.

31. The advertisement will read as follows:

Audio	Visual
Doctors recommend a regular check up to ensure good health.	*Video of doctor and mother with child.*
Yet thousands of Coloradoans lost their health insurance due to the new federal law.	*Headlines of lost insurance stories.*
Many had to use the state's government-run health exchange to find new insurance.	*Denver Post headline "Colorado health exchange staff propose $13M fee on all with insurance"*

Now there's talk of a new $13 million fee on your insurance. It's time for a check up for Colorado's health care exchange. Call Governor Hickenlooper and tell him to support legislation to audit the state's health care exchange. INDEPENDENCE INSTITUTE IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISING.	*Call Gov. Hickenlooper at (303) 866-2471.* *Tell him to support an audit of the health care exchange.* *Paid for by The Independence Institute, Jon Caldara, President. 303-279-6536. www.indepedenceinstitute.org*

32. The Independence Institute wishes to raise funds for this specific advertisement from individual donors, independent of its general fundraising efforts for other programs.

33. The Independence Institute will seek donations greater than $250 from individual donors.

34. The Independence Institute guards the privacy of its donors and therefore does not wish to disclose its donors on an electioneering communications report.

THE LAW AT ISSUE

The Colorado constitutional, statutory, and regulatory definition of "electioneering communications"

35. Article XXVIII defines an "electioneering communication" to be

> [A]ny communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that (I) Unambiguously refers to any candidate; and (II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.
>
> COLO. CONST. art. XXVIII § 2(7)(a).

36. Since the general election is on November 4, 2014, sixty days prior to this year's general election is Friday, September 5, 2014.

37. There are exemptions to the "electioneering communication" definition. The constitution features a press exemption (COLO. CONST. art. XXVIII § 2(7)(b)(I)) and a broadcast editorial endorsement exemption (COLO. CONST. art. XXVIII § 2(7)(b)(II)). Beyond the media, communications made "in the regular course and scope of… business" *or* made to an organization's members are exempted (COLO. CONST. art. XXVIII § 2(7)(b)(III)). Finally, any communication that refers to a candidate "only as part of the popular name of a bill or statute" (COLO. CONST. art. XXVIII § 2(7)(b)(IV)) is exempted.

38. The FCPA defines "electioneering communication" only by reference to Article XXVIII. C.R.S.§ 1-45-103(9).

39. Secretary Gessler attempted to promulgate regulations further defining "electioneering communication" in light of federal precedent. 8 C.C.R. 1505-6, Rule

1.7 (adding, *inter alia*, a "functional equivalent of express advocacy" standard to the test for electioneering communications).

40. Secretary Gessler's rule was overturned, however, by the Colorado Court of Appeals, as being in excess of his authority. *Colo. Ethics Watch v. Gessler*, 2013 COA 172M ¶ 60 (Colo. App. 2013) ("although the Secretary's attempt to conform Article XXVIII, section 2(7)(a), to constitutional standards is understandable, it exceeds his authority to 'administer and enforce' the law") (internal citation omitted); *id.* at ¶ 62 (affirming trial court's invalidation of Rule 1.7).

Disclosure requirements for "electioneering communications"

41. Disclosure is triggered once an organization spends $1,000 on an electioneering communication. COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(a)(III).

42. "Such [disclosure] reports shall include spending on such electioneering communications, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year to such person described in this section for an electioneering communication." COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(a)(III).

43. If a donor is a natural person, then the donor's occupation and employer must be disclosed. COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(a)(III).

44. The Secretary has interpreted the disclosure provisions to apply to only earmarked donations: "If a person spending money for electioneering

communications is a corporation or labor organization, disclosure of the names and addresses of persons contributing $ 250 or more used to make electioneering communications *shall only be required if the money is specifically earmarked* for electioneering communications." 8 C.C.R. 1505-6, Rule 11.1 (emphasis added).

45. However, the Independence Institute wishes to keep *all* donations for issue speech private, and therefore does not wish to disclose its donors on an electioneering communications report.

46. The Independence Institute reasonably fears enforcement proceedings from the Secretary or a private lawsuit, pursuant to COLO. CONST. art. XXVIII § 9(2)(a), for failure to file and disclose its donors.

SUPREME COURT DECISIONS REGARDING ISSUE ADVOCACY

Buckley v. Valeo

47. The Supreme Court's touchtone for all campaign finance law is *Buckley v. Valeo*, 424 U.S. 1 (1976), an omnibus challenge to the Federal Election Campaign Act ("FECA") (once codified at 2 U.S.C. § 431 *et seq.*, now codified at 52 U.S.C § 30101 *et seq.*).

48. One aspect of FECA limited the amount spent on independent communications made "relative to a clearly identifiable candidate." *Id.* at 7.

49. The language "relative to a clearly identifiable candidate" was found unconstitutionally vague because the "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in

practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42.

50. To avoid this vagueness, the Supreme Court said FECA "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.*

51. Specifically, the Court limited regulable speech to "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" *Id.* at 44 n. 52.

52. In this way, the Court explicitly acted to prevent the federal campaign finance regime from reaching speech discussing issues of public policy. For decades, this "express advocacy" test (or "*Buckley*'s 'magic words'"—including synonymous words or phrases) remained the hallmark for examining communications.

53. In 2012, the Colorado Supreme Court held that *Buckley*'s test for "express advocacy" was the standard adopted by the state's voters when passing Article XXVIII. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 26 (Colo. 2012) ("Because we presume that the electorate was aware of the legal significance of the term 'expressly advocated' when article XXVIII was adopted by voter initiative in 2002, we hold that the voters intended to define 'political committees' as those organizations that engage in communications that utilize either the 'magic words' or substantially similar synonyms").

54. In addition to distinguishing between issue speech and political speech, the United States Supreme Court has also recognized that disclosure implicates the First Amendment freedom of association. *Buckley*, 424 U.S. at 75.

55. To prevent the federal disclosure requirement from reaching groups that merely mentioned candidates in the context of issue speech, the *Buckley* Court construed the relevant provisions to apply *only* to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.

56. Expenditures by groups under the control of a candidate or with "the major purpose" of supporting or opposing a candidate "are, by definition, campaign related." *Id.* This language, now known as "the major purpose test," effectively narrowed the reach of FECA's disclosure provisions to protect the associational freedoms of individuals and groups speaking about issues.

57. As applied to individuals and groups that did *not* have "the major purpose" of political activity, the *Buckley* Court narrowed the definition of "expenditures" in the same way: "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. To describe the term "expressly advocate," the Court simply incorporated the "magic words" examples listed in footnote 52. *Id.* at 80 n. 108 (incorporating *id.* at 44 n. 52).

58. Under *Buckley*, disclosure of donors is appropriate only when an organization is under the control of a candidate or has the major purpose of supporting or

opposing clearly identified candidates. To protect issue speech, *Buckley* demanded that donor disclosure be connected to express advocacy for or against candidates. The Colorado Supreme Court reaffirmed that voters intended to adopt *Buckley*'s framework when adopting Article XXVIII. *Senate Majority Fund*, 2012 CO 12, ¶¶ 24-26.

McConnell v. FEC

59. In 2002, Congress again substantively overhauled the federal campaign finance regime, creating a new category of communications called "electioneering communications." Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155 § 201, 116 Stat. 81, 88 (2002) (once codified at 2 U.S.C. § 434(f)(3)(A)(i), now codified at 52 U.S.C. § 30104(f)(3)(A)(i)); *McConnell v. FEC*, 540 U.S. 93, 189 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010)).

60. An omnibus facial challenge was brought against BCRA. *See McConnell* 540 U.S. at 194 (discussing facial overbreadth challenge to electioneering communications provisions).

61. The new "electioneering communications" term was a response to the rise of "sham issue advocacy…candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (internal quotations omitted).

62. With this in mind and in the context of a facial challenge, the Supreme Court examined the ban on electioneering communications by corporations and unions.

McConnell, 540 U.S. at 206 (examining BCRA § 203 (once codified at 2 U.S.C. § 441b(b)(2), now codified at 52 U.S.C. § 30118(b)(2)).

63. The Court noted a study in the *McConnell* record that found "the vast majority of ads" which would be regulated as electioneering communications "clearly had" an electioneering purpose. *Id.*

64. Therefore, while pure issue speech could not be regulated as an electioneering communication, the state could regulate speech *if* ads "broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*." *Id.* (emphasis added). Consequently, the Court upheld the statute against a facial challenge. *Id.*

65. But the *McConnell* Court "assume[d] that the interests that justify the regulation of campaign speech might not apply to the regulation of *genuine issue ads*," and thus left open the possibility for future, as-applied challenges. *Id.* at 206, n. 88 (emphasis added).

FEC v. Wisconsin Right to Life

66. Four years later, the Court addressed just such an as-applied challenge involving the ban on corporation-funded electioneering communications. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"). *WRTL II* examined the distinction between issue advocacy and candidate advocacy under "the functional equivalent of express advocacy" test. *Id.* at 455-56.

67. Returning to *Buckley*, *WRTL II* noted the difficulty of distinguishing "between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other…" and therefore rejected "analyzing the question in terms 'of intent and of effect'" as it "would afford 'no security for free discussion.'" *Id.* at 467 (quoting *Buckley*, 424 U.S. at 43).

68. Consequently, "a court should find that an ad is the functional equivalent of express advocacy only if the ad *is susceptible of no reasonable interpretation other than as an appeal to vote* for or against a specific candidate." *Id.* at 469-470 (emphasis added); *see also Citizens United v. FEC*, 558 U.S. 310, 324-25 (quoting and applying this test).

69. Invoking this standard, the *WRTL II* Court found that BCRA § 203's ban did not apply to the nonprofit's three proposed advertisements:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 470 (Roberts, C.J. controlling opinion); *see also*, *id.* at 482 (announcing decision of the Court upholding the district court's ruling that the advertisements were not subject to the ban in BCRA § 203).

70. The controlling opinion specifically rejected the assertion that "any ad covered by § 203 that includes an appeal to citizens to contact their elected representative is the 'functional equivalent' of an ad saying defeat or elect that candidate." *Id.* (internal quotations and citation omitted).

71. Noting that the "Court has never recognized a compelling interest in regulating ads, like WRTL's, that are neither express advocacy nor its functional equivalent," the controlling opinion agreed that there was no compelling interest in regulating the advertisements. *Id.* at 476 (approving of *Wis. Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 208-210 (D.D.C. 2006)); *Id.* at 481.

Citizens United v. FEC

72. The Court struck down the corporate independent expenditure ban (both BCRA § 203 and other parts of 2 U.S.C. § 441b (now 52 U.S.C. § 30118)) in *Citizens United v. FEC*, 558 U.S. 310, 372 (2010). In so doing, the Court specifically upheld BCRA's disclosure and disclaimer requirements. *Id.* But "this part of the opinion is quite brief." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014).

73. Citizens United argued that "the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy…," but the Court "reject[ed] this contention." *Citizens United*, 558 U.S. at 368-69. The Court held that disclosure is "a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369 (citing *MCFL*, 479 U.S. at 262 and *Buckley*, 424 U.S. at 75-76).

74. In *Citizens United*, the organization produced a film called *Hillary: The Movie* ("*Hillary*") and several advertisements to promote the film. *Id.* at 320.

75. Central to the Court's disposition of the challenge to corporate independent expenditures was whether *Hillary* and its supporting advertisements were express advocacy or the functional equivalent, as articulated in *WRTL II*. *Citizens United*, 558 U.S. at 324-25.

76. The Court explicitly held that *Hillary* was the functional equivalent of express advocacy. *Id.* at 325.

77. Turning to the advertisements, the Court held that "[t]he ads fall within BCRA's definition of an 'electioneering communication'" because "[t]hey referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy." *Id.* at 368.

78. The Seventh Circuit has stated that the *Citizens United* Court's reasoning on electioneering communication disclosure "was dicta. The Court had already concluded that *Hillary* and the ads promoting it were the equivalent of express advocacy." *Barland*, 751 F.3d at 836 (citations omitted). Given that the Court had already found *Hillary* to be express advocacy, and the advertisements to be "pejorative," the holding does not address advertisements that are pure issue advocacy.

79. As *Buckley* observed, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 at 42.

80. Speech, under the law, lies on a spectrum. On one end sits express advocacy—speech using *Buckley*'s magic words of "support" or "reject" or their synonyms in connection with a specific candidacy. *See*, *id.* at 44 n. 52. Next to express advocacy sit communications that do not use *Buckley*'s magic words but are nonetheless the "functional equivalent of express advocacy," under the test articulated in *WRTL II* and found to apply to the communications at issue in *Citizens United*. *WRTL II*, 551 U.S. at 469-70; *Citizens United*, 558 U.S. at 325; *id.* at 368.

81. But on the other end of the spectrum is pure issue advocacy—discussion of public policy that also asks elected leaders to take action. The Independence Institute's advertisement is pure issue advocacy. It simply educates the public and asks the governor to audit Colorado's Health Benefit Exchange.

82. In rejecting the organization's claim that disclosure would harm its donors, the Court noted that the organization had already disclosed its donors in the past. *Citizens United*, 558 U.S. at 370. But Citizens United is a IRC § 501(c)(4) organization. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008). Thus, the court did not examine the dangers of disclosure in the more sensitive IRC § 501(c)(3) context.

83. The problem of disclosure attendant to "electioneering communications" has not been directly addressed by the Supreme Court in the context of pure issue advocacy by an IRC § 501(c)(3) nonprofit organization (which, by statute, cannot engage in *any* political activity). 26 U.S.C. § 501(c)(3).

CAUSES OF ACTION

Count 1:
Declaratory judgment regarding Colorado's definition of "electioneering communications" as applied to the Independence Institute's proposed advertisements

84. Plaintiff realleges and incorporates by reference paragraphs 1 through 83.

85. The Independence Institute's planned advertisements are genuine issue speech. Because of the Colorado Constitution's expansive definition of "electioneering communication," mere mention of a candidate in an advertisement 30 days before a primary or 60 days before a general election triggers reporting and disclosure requirements. *See* COLO. CONST. art. XXVIII § 2(7)(a)(I) and C.R.S. § 1-45-103(9). Genuine issue speech is not exempted or protected.

86. Although the Independence Institute advertisement will mention Governor Hickenlooper, a candidate in the upcoming general election, it is not presently an electioneering communication because it is not yet within the 60-day electioneering communication period before the general election.

87. Considering the time needed to produce the advertisement, and raise the funds necessary to air the advertisement, it will run after September 5, 2014, and consequently during the electioneering communications period.

88. There is no test in Colorado for assessing the nature of a communication, or the manner in which it mentions a candidate.

89. Colorado's electioneering communication definition lacks a "functional equivalent of express advocacy" test. *McConnell*, 540 U.S. at 206; *see* COLO. CONST. art. XXVIII § 2(7)(a); C.R.S. 1-45-103(9).

90. Colorado's electioneering communication definition lacks a "susceptible of no reasonable interpretation other than as an appeal to vote" test. *WRTL II*, 551 U.S. at 469-70; *see* COLO. CONST. art. XXVIII § 2(7)(a); C.R.S. 1-45-103(9).

91. The Secretary's attempt to promulgate rules adopting such tests were outside the scope of his authority. *Colo. Ethics Watch*, 2013 COA 172 ¶ 60.

92. While the Colorado Constitution does have a few exceptions to the "electioneering communication" definition—for example, as part of the name of a bill or statute—the exemptions do not cover genuine issue speech, where an organization seeks action by government officials who also happen to be candidates. *See* COLO. CONST. art. XXVIII § 2(7)(b)(IV) (exception for mentioning "any candidate *only* as part of the popular name of a bill or statute") (emphasis added).

93. Nor do the proposed advertisements qualify under the press exemption, since they will be paid advertisements on commercial broadcast television. COLO. CONST. art. XXVIII §§ 2(7)(b)(I) and (II).

94. Nor are the proposed advertisements "made in the regular course and scope of [the Independence Institute's] business." COLO. CONST. art. XXVIII §§ 2(7)(b)(III).

IRC §§ 501(c)(3) and 501(h) limit the amount of grassroots lobbying the Independence Institute may engage in: it cannot be "substantial," which means it cannot be "in the regular course" of business.

95. The proposed advertisements will be aired on television, and thus seen by many. The advertisements are not a "communication made by a membership organization *solely* to members." *Id.* (emphasis added).

96. Hence, Colorado's campaign finance law impermissibly blurs the line between candidate advocacy, which may be regulated, and issue advocacy, which generally cannot. *See Buckley*, 424 U.S. at 42.

97. Thus, the law chills speech, as the Independence Institute and similar speakers must not discuss public policy issues within 30 days of a primary election or 60 days of a general election, lest they be required to register and report their advertisements as "electioneering communications," and consequently violate the privacy of their donors.

98. Therefore, the Independence Institute seeks a declaration that, as applied to the Independence Institute's proposed advertisements, COLO. CONST. art. XXVIII § 2(7)(a) and C.R.S. 1-45-103(9) are overbroad.

Count 2:
Declaratory judgment on the associational burdens of Colorado's electioneering communications disclosure provision as applied to the Independence Institute

99. Plaintiff realleges and incorporates by reference paragraphs 1 through 98.

100. The Independence Institute's planned advertisements are genuine issue speech.

101. The Independence Institute wishes to raise funds for these specific advertisements, including by seeking donations greater than $250.

102. Due to the sensitive nature of § 501(c)(3) donor lists, the Independence Institute wishes to keep such donations private, and therefore does not wish to disclose its donors on an electioneering communications report, pursuant to COLO. CONST. art. XXVIII § 6(1) and C.R.S. § 1-45-108(1)(a)(III).

103. Failure to disclose and report the donors who earmarked their money for the proposed advertisements will result in substantial penalties of fifty dollars per day. COLO. CONST. art. XXVIII § 10(2)(a).

104. The Independence Institute also reasonably fears enforcement actions or private lawsuits under COLO. CONST. art. XXVIII §9(2)(a) for failure to report its donors.

105. The Supreme Court has consistently recognized the danger of requiring disclosure of donors to nonprofit organizations. *See*, *e.g.*, *Buckley*, 424 U.S. at 64 (citing *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama*, 357 U.S. 449 (1958)).

106. Under *Buckley*, disclosure is only appropriate for groups "that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.

107. Likewise, if a group does not have "the major purpose" of political activity, then only communications that "expressly advocate the election or defeat of a clearly identified candidate" are subject to disclosure. *Id.* at 80.

108. Nevertheless, Colorado demands the name, address, occupation, and employer for every person who gives to an organization that wishes to run an issue advertisement within the electioneering communications window that mentions a candidate for office. COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(a)(III).

109. While *Citizens United* upheld similar disclosure, it was in the context of an IRC § 501(c)(4) organization making a film that was the "functional equivalent of express advocacy," and advertisements that featured "pejorative" statements against a candidate. This case presents distinctly different facts.

110. The Independence Institute and similarly situated groups organized under IRC § 501(c)(3) must remain silent on *issues* 30 days before a primary and 60 days before a general election in Colorado, if it wishes to protect its donors and avoid the burdens of mandated reports.

111. The Independence Institute wishes to raise funds to run the proposed advertisements, but cannot for fear that the donors who give more than $250 for the advertisements will be disclosed. The electioneering communication disclosure law

makes the Independence Institute choose between disclosing its donors or remaining silent on issues central to its mission.

112. Therefore, the Independence Institute seeks a declaration that, as applied to the Independence Institute's proposed advertisements, COLO. CONST. art. XXVIII § 6(1) and C.R.S. § 1-45-108(a)(III)'s disclosure provisions are overbroad.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

A. Declaration that the definition of "electioneering communication" in COLO. CONST. art. XXVIII § 2(7)(a) and C.R.S.§ 1-45-103(9) is overbroad as applied to the Independence Institute's proposed advertisements.

B. Declaration that the electioneering communication disclosure regime in COLO. CONST. art. XXVIII § 6(1) and C.R.S. § 1-45-108(a)(III) is overbroad as applied to the Independence Institute's proposed advertisements.

C. Such injunctive relief as this Court may direct.

D. Costs and attorneys' fees under 42 U.S.C. § 1988 and any other applicable statute or authority.

E. Any other relief this Court may grant in its discretion.

Respectfully submitted this 2nd day of September, 2014.

/s/ Allen Dickerson
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Counsel for Plaintiff

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

I, Jon Caldara, president of the Independence Institute, being first duly sworn, state under oath that I have read the foregoing VERIFIED COMPLAINT, and that the statements contained therein are true and correct to the best of my knowledge, information, and belief.

Jon Caldara

Subscribed and sworn before me this 29 day of August, 2014.

Marylla MacFarlane
Notary Public

MARY ILA MACFARLANE
NOTARY PUBLIC, STATE OF COLORADO
My Comm. Expires July 11, 2016

My Commission Expires: 7-11-2016

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of September, 2014, the foregoing document was served on the following, via first class mail:

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/s/ Tyler Martinez
Tyler Martinez