IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

INDEPENDENCE INSTITUTE, a Colorado nonprofit corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:14-cv-02426-RBJ-MJW
SCOTT GESSLER, in his official capacity as Colorado Secretary of State,	)	
Defendant.	)	

MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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Introduction

This is a case about speech unrelated to elections that is nevertheless captured by Colorado's campaign finance regulations. The Independence Institute—a well-established Colorado think tank—will be required to publicly disclose its donors if it wishes to mention Governor John Hickenlooper in a public communication asking him to take official action concerning Colorado's Health Benefit Exchange. Colorado would subject this issue speech to the full force of its electioneering communications regime, even though the advertisement takes no position whatsoever on Mr. Hickenlooper as a political candidate. Consequently, Colorado's law is unconstitutionally overbroad and a preliminary injunction is appropriate.

Facts

Founded in 1985, the Independence Institute is one of the oldest state-based think tanks in the country. Focusing on Colorado, the Independence Institute conducts research and educates the public on issues of public policy—including taxation, education policy, health care, and environmental issues. Since 2002, the Independence Institute's Health Care Policy Center has focused on healthcare and health insurance policy.

The Independence Institute is a nonprofit corporation organized under Internal Revenue Code ("IRC") § 501(c)(3), and is a charitable foundation. 26 U.S.C. §§ 501(c)(3) (charity status) and 170(b)(1)(A)(vi) (foundation status for revenue generated by donations from the general public). 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"). Additionally, the privacy of §

501(c)(3) organizations' donors is protected by federal law. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A) (prohibiting "the disclosure of the name and address of any contributor to the [§ 501(c)(3)] organization").

But public charity §501(c)(3) organizations *may* engage in limited lobbying activity—including "grassroots lobbying" where an organization encourages citizens to call their leaders and request official action. 26 U.S.C. § 501(c)(3) (decreeing that "no substantial part of [a § 501(c)(3) organization's] activities" shall consist of "carrying on propaganda, or otherwise attempting, to influence legislation"); 26 C.F.R. § 1.501(c)(3)-1(3). Since "substantial" is undefined and difficult to discern, Congress provided a safe harbor under IRC § 501(h), which permits a § 501(c)(3) organization to spend a defined portion of its budget on lobbying and grassroots lobbying. 26 U.S.C. §§ 501(h)(2)(B) and (D). The Independence Institute elects treatment under § 501(h).

Consistent with its § 501(h) designation, the Independence Institute wishes to run an advertisement calling for the state government to audit Colorado's Health Benefit Exchange. The advertisement will encourage Coloradoans to call Governor Hickenlooper and request that he undertake such an audit. It will be approximately 30 seconds in length, and be distributed over local broadcast television in Colorado. Since this is an election year, but advertisements take time to produce, the advertisement will run after the start of Colorado's electioneering communications window for the general election.[1] The advertisement will be as follows:

Audio	Visual
Doctors recommend a regular check up to ensure good health.	*Video of doctor and mother with child.*

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

Yet thousands of Coloradoans lost their health insurance due to the new federal law. Many had to use the state's government-run health exchange to find new 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.	*Headlines of lost insurance stories.* *Denver Post headline "Colorado health exchange staff propose $13M fee on all with insurance"* *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.independenceinstitute.org*

Television advertisements are expensive. Running this advertisement will cost well in excess of $1,000—the trigger for Colorado's electioneering communication definition. *See* COLO. CONST. art. XXVIII § 6(1). In order to fund this communication, the Independence Institute wishes to solicit donations. The organization will seek donations greater than $250 from individual donors to pay for the advertisement. If it does so, Colorado law requires that such donors be disclosed on an electioneering communications report. *Id.*

The Institute does not wish to disclose and report its donors and, as it is not engaging in electioneering, does not believe it may be constitutionally required to do so. Consequently, the Independence Institute faces a dilemma: it may remain silent on issues important to its mission,

or it may speak on the issue of Colorado's Health Benefit Exchange, but disclose its donors and destroy their associational privacy.

Facing this choice, the Independence Institute filed a Verified Complaint seeking declarations that Colorado's electioneering communications definition and accompanying disclosure system are overbroad as applied to the Independence Institute's planned activity. Because the general election—and consequently, the electioneering communications window—is rapidly approaching, the Independence Institute seeks a preliminary injunction from this Court allowing it to speak without disclosing its donors or facing hefty fines for failing to do so.

Summary of the Argument

Speech about public issues lies at the core of the First Amendment. But Colorado law does not exclude issue speech from its regulation of "electioneering communications." That term captures advertisements that merely mention a candidate within two months of the general election, regardless of the communication's content.

The Independence Institute's challenge presents two issues for this Court. First, whether Colorado's electioneering communications definition is overly expansive, reaching and chilling issue speech that does not, under any reasonable interpretation, advocate for or against a candidate for office. Second, whether the disclosure demanded by Colorado in connection with electioneering communications is insufficiently tailored to the State's legitimate interests, and consequently constitutes an unconstitutional violation of donors' privacy.

The Supreme Court in the civil rights era championed a fundamental principle: compelled disclosure threatens the freedom of association. The foundational campaign finance case—*Buckley v. Valeo*—explicitly applied this principle to campaign finance disclosure. Recognizing

the harm to associational liberties inherent in the forced disclosure of donors, the Court differentiated between candidate advocacy—which may be regulated—and issue advocacy, which generally may not. Under that decision, donors may be disclosed *only* when a group makes expenditures that expressly advocate a particular election result, or where the organization's major purpose is electoral advocacy.

After passage of the Bipartisan Campaign Reform Act of 2002, the Supreme Court reviewed a new form of regulated speech: the (federal) electioneering communication. *McConnell v. FEC* upheld the new regime facially, at least insofar as the regulated advertisements contain express advocacy or its functional equivalent. In *FEC v. Wis. Right To Life, Inc.*, the Court applied the "functional equivalent of express advocacy test" in the context of a ban on corporate electioneering communications. The Court, in an as-applied challenge, narrowed the law to reach only those advertisements that were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

In *Citizens United v. FEC*, the Court briefly considered BCRA's disclosure regime and rejected Citizens United's request that disclosure be limited to communications containing the functional equivalent of express advocacy. But *Citizens United*'s terse language was dicta—the communications in question had already been found to be the functional equivalent of express advocacy. Likewise, the advertisements were run by a § 501(c)(4)—not (c)(3)—organization known for its political advocacy.

Like BCRA, Colorado Constitution Article XXVIII contains a category of speech called an "electioneering communication." Colorado law does not distinguish between "electioneering communications" that in some way "electioneer" and those which merely mention a sitting

officeholder who also happens to be a candidate for office. Therefore, the Institute's proposed advertisement exposes its donors to public disclosure of their names, addresses, occupations, and employers. This fear is not conjectural—ideological opponents have in the past used Colorado's campaign finance disclosure system as a weapon. Consequently, the Institute seeks this Court's protection before speaking.

The advertisement presented here is pure issue advocacy. It does not support or oppose Governor Hickenlooper's reelection, and in fact make no reference to his candidacy. Therefore, Colorado's electioneering communications definition and accompanying disclosure requirements are unconstitutional as applied to the Independence Institute and its specific advertisement. Plaintiff consequently has a substantial likelihood of success on the merits.

Satisfying the merits factor for a preliminary injunction eases the Institute's burden on the non-merits factors. Restrictions on First Amendment rights, even for a minimal time, do irreparable harm. Because an injunction would be protecting First Amendment freedoms *as applied* to the Independence Institute, the balance of interests favors granting the injunction. Enforcing the First Amendment always serves the public interest.

Argument

I. The standard for granting a motion for preliminary injunction.

In the Tenth Circuit, entry of a preliminary injunction is appropriate "where the moving party shows: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) the threatened harm outweighs injury which the injunction may cause the opposing party; and (4) the injunction will not be adverse to the public interest."

United States v. Power Eng'g Co., 191 F.3d 1224, 1230 (10th Cir. 1999). As established in the Verified Complaint, the Independence Institute's claims satisfy all four prongs.

II. The Independence Institute has a substantial likelihood of success on the merits in this as-applied challenge.

a. Because compelled disclosure infringes upon the freedom of association, disclosure laws must survive exacting scrutiny.

As a first principle, the disclosure of an organization's contributors is disfavored. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective… restraint on freedom of association…."). That is because there is a "vital relationship between freedom to associate and privacy in one's associations." *Id*.

The freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference" such as, here, disclosure and its attendant sanctions for failing to disclose. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). The freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

In the campaign finance context, it has "long [been]…recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). It is not enough that the government have some interest—its interest must be substantial enough to withstand "exacting scrutiny." *Id*. The Supreme Court has permitted the

government to mandate disclosure only when a group makes expenditures that expressly advocate a particular election result. *Id.* at 80.

Exacting scrutiny is "not a loose form of judicial review." *Wis. Right to Life v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). In order for *any* disclosure law to survive this strong review, "the subordinating interests of the State must… [possess] a 'substantial relation' between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64 (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 463). This tailoring requirement is a "strict test." *Id*. at 66.

b. In the foundational case of *Buckley v. Valeo*, the Supreme Court specifically shielded organizations engaging in issue speech from the burdens of campaign finance disclosure.

Buckley v. Valeo serves as the starting point for all campaign finance jurisprudence in the modern era. *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. ___, ___, 134 S.Ct. 1434, 1444 (2014) (applying *Buckley* to aggregate contribution limits). *Buckley* specifically incorporated the civil rights cases' reasoning when dealing with campaign finance generally and disclosure specifically. *See, e.g.*, *Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460); *id.* at 64-66 (applying to associational privacy principles from cases such as *NAACP v. Alabama*, 357 U.S. at 460-61; *Bates*, 361 U.S. at 522-523; and *NAACP v. Button*, 371 U.S. at 438).

In *Buckley*, the Supreme Court examined the interplay between the government's desire for disclosure and the First Amendment's robust protection of the freedoms of speech and association. The *Buckley* Court determined that "[t]he constitutional right of association…stem[s] from the…recognition that '[e]ffective advocacy of both public and private points of view…is undeniably enhanced by group association.'" *Buckley*, 424 U.S. at 15 (quoting

NAACP v. Alabama, 357 U.S. at 460). Acting to safeguard this associational liberty, the Court noted explicitly that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Id*. at 66. The Court was further concerned with "the invasion of privacy of belief" generated by disclosure, given that "'[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id*. (*quoting California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)).

Consequently, the Court placed the burden of defending a disclosure regime's constitutionality on the government. *Id.* at 65. And *Buckley* was no outlier: the Court incorporated the long-mandated rule that disclosure survive "exacting scrutiny." *Id*. at 64-65 (citing *NAACP v. Alabama*, 357 U.S. at 463). Therefore, Colorado must show a "relevant correlation" or "substantial relation" between the disclosure required and a sufficiently-important governmental interest. *Id*. at 64 (internal citation omitted).

The Federal Election Campaign Act ("FECA"), the law challenged by the *Buckley* plaintiffs, required disclosure from "political committees"—a term defined only as organizations making "contributions" or "expenditures" over a certain threshold amount. *Id*. at 79. Both "contributions" and "expenditures" were defined as "the use of money or other objects of value 'for the purpose of… influencing' the nomination or election of any person to federal office." *Id.* at 63. Since such a vague definition "could be interpreted to reach groups engaged purely in issue discussion" the Court, performing its duty to save, if possible, legislative intent, promulgated the "major purpose" test. *Id*. The test is straightforward: the government may compel contributor information from "organizations that are under the control of a candidate or

the major purpose of which is the nomination or election of a candidate." *Id*. In this context, such an organization's expenditures "are, by definition, campaign related." *Id*.

However, in the context of organizations, such as the Independence Institute, *without* "the major purpose" of supporting or opposing a candidate, the Court deemed disclosure constitutionally appropriate *only:*

> (1) when [organizations] make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when [organizations] make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 80. The Court narrowly defined the term "expressly advocate" to encompass only "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 80 n. 108, incorporating by reference *id*. at 44 n. 52. Such communications have a "substantial connection with the governmental interests" in disclosure, because they involve "spending that is unambiguously related" to electoral outcomes. *Id*. at 80, 81.

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 … 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"). But *Senate Majority Fund* discussed Article XXVIII in the context of "political committee" status triggered by "expenditures"—and distinguished its

holding from the electioneering communication definition and disclosure system. *Id*. at ¶¶ 31 and 35.

Consequently, to summarize, the *Buckley* Court held that compelled disclosure of contributors is constitutionally disfavored. Disclosure can only be required of groups that exist to actively advocate for a particular electoral result. And such disclosure regimes must withstand "exacting scrutiny"—under which the burden of persuasion falls upon the state. *Buckley*, 424 U.S. at 25 (burden is on "the State [to] demonstrate[]a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms").

c. The Supreme Court's decisions in *McConnell* and *Citizens United* do not predicate disclosure upon neutral, nonpartisan issue speech and do not overturn *Buckley*.

In 2002, Congress overhauled the federal campaign finance laws, creating a new category of speech called "electioneering communications." Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155 § 201, 116 Stat. 81, 88 (2002) (definition 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, 366 (2010). In the federal system, electioneering communications are

> [A]ny broadcast, cable, or satellite communication which--(I) refers to a clearly identified candidate for Federal office; (II) is made within—(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

52 U.S.C. § 30104(f)(3)(A)(i). "Targeted to the relevant electorate" was defined to mean that "the communication can be received by 50,000 or more persons" in the relevant jurisdiction. 52

U.S.C. § 30104(f)(3)(C). These provisions, along with others from BCRA, became the background to several constitutional challenges to regulation of electioneering communications, often in the context of bans on speech rather than forced disclosure. The cases are instructive, however, in that they show the Supreme Court's continued commitment to protecting issue speech from undue capture by overbroad state regulation.

i. *McConnell* and its progeny limited state regulation to the "functional equivalent" of *Buckley's* "express advocacy," both facially and as applied.

McConnell was an omnibus facial challenge to BCRA. 540 U.S. at 194. There, the Supreme Court reviewed the new federal regulation of "electioneering communications," and upheld a ban on electioneering communications by corporations and unions. *Id.* at 206 (examining BCRA § 203 (codified at 52 U.S.C. § 30118(b)(2)).

In its analysis, the Court noted that BCRA was a response to the rise of "sham issue advocacy… candidate advertisements masquerading as issue ads." *McConnell*, 540 U.S. at 132 (internal quotations and citations omitted). It singled out 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.* Therefore, because many ads "broadcast during the 30- and 60-day periods preceding federal primary and general elections *are the functional equivalent of express advocacy*," the electioneering communication definition had some constitutionally sound applications and withstood a facial challenge. *Id*. (emphasis added); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456 (2007) ("*WRTL II*") ("The [*McConnell*]Court concluded that there was no overbreadth concern to the extent the speech in question was the 'functional equivalent' of express campaign speech") (applying *McConnell*, 540 U.S. at 206).

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 of future, as-applied challenges. *Id.* at 206, n. 88 (emphasis added). The Court would hear just such an as-applied challenge when a nonprofit corporation, Wisconsin Right to Life wished to run advertisements discussing the Senate's filibuster of federal judicial nominees. *WRTL II*, 551 U.S. at 455-56.[2] The proposed advertisements in *WRTL II*, like the Independence Institute's proposed advertisement, simply referenced a (then) current issue—the filibustering of judicial nominees—and encouraged viewers to contact their senators. *Id*. at 458-459.

Chief Justice Roberts's controlling opinion in *WRTL II* expounded upon *McConnell*'s holding, and demarcated the different between the functional equivalent of express advocacy—the "sham issue" advertisements that *McConnell* addressed—and genuine issue speech. *Id*. at 470. The *WRTL II* Court held that the government could only regulate the former. In particular, the Court found that the relevant governmental "interest [could] not justify regulating" the nonprofit's advertisements. *Id*. at 479. They were "*not* the functional equivalent of express advocacy." *Id.* at 478. Consequently, the statute flunked the required tailoring analysis.

The controlling opinion defined the functional equivalence of express advocacy as a communication which is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70. Furthermore, the Chief Justice noted the difficulty in divining the line "between discussion of issues on the one hand and advocacy of election or defeat of candidates on the other…" and therefore declined to "analyz[e] the question

[2] *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006)("*WRTL I*") focused on whether *McConnell* had foreclosed as-applied challenges to the corporate electioneering communications ban. A unanimous Supreme Court determined "[i]n upholding [BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges." *Id*. at 411-12.

in terms 'of intent and of effect'" as doing so "would afford 'no security for free discussion.'" *Id*. at 467 (quoting *Buckley*, 424 U.S. at 43). Accordingly, to determine whether speech is the functional equivalent of express advocacy, courts must look no further than the "four corners" of a proposed advertisement. *Id*. at 461 (internal quotation marks and citation omitted).

WRTL II arose in the context of a ban on speech, not a forced disclosure regime. But it nonetheless serves as strong authority for the continued vitality of *Buckley*'s separation of issue speech from express advocacy and, while acknowledging that some issue speech may indeed be a "sham," provides an authoritative roadmap for courts seeking to make that determination. A communication is the "functional equivalent of express advocacy" only if—within the four corners of the communication—no reasonable person can read it as anything other than as an appeal to vote in a particular way.

ii. The disclosure upheld in *Citizens United* was for donors who explicitly contributed for a communication found to be the functional equivalent of express advocacy—not genuine issue speech.

In time, the Supreme Court struck down the corporate and union independent expenditure ban (both BCRA § 203 and other parts of 52 U.S.C. § 30118) in *Citizens United v. FEC*, 558 U.S. 310, 372 (2010). As the Seventh Circuit recently noted, *Citizens United* discussed electioneering communication disclosure, but "this part of the opinion is quite brief." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 824 (7th Cir. 2014).

In its truncated discussion, the Court noted Citizens United's claim "that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy." It then "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 *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) and *Buckley*, 424 U.S. at 75-76). But as *Citizens United*, like this case, was an as-applied challenge, the specific facts of the case are dispositive.

Citizens United produced a film called *Hillary: The Movie* ("*Hillary*") and several advertisements to promote the film. *Id*. at 319-20. Because of the decision in *WRTL II*, a key question was whether *Hillary* and its supporting advertisements were express advocacy or its functional equivalent. *Id*. at 324-25. The Court explicitly held that *Hillary* was express advocacy. *Id*. at 325.

When the Court turned to the advertisements for *Hillary*, it found that "[t]he ads f[e]ll 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 (emphasis added). Given that the Court already found *Hillary* to be the functional express advocacy and the advertisements for that express-advocacy communication to be "pejorative," this holding does not address advertisements that are pure issue advocacy.

As the Seventh Circuit reasoned, "the Court declined to apply the express-advocacy limitation to the federal disclosure…requirements for electioneering communications…. This 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). Indeed,

> [l]ifting the express-advocacy limitation more broadly would have been a major departure from *Buckley* and is not likely to have been left implicit. *Citizens United* approved event-driven disclosure for federal electioneering communications—large broadcast ad buys close to an election. In that specific and narrow context, the Court declined to enforce *Buckley*'s express-advocacy limitation, but it went no further than that."

Id.

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. Speech exists on a spectrum, and—importantly for this litigation—the *Citizen United* communications and the Independence Institute's proposed advertisement sit on different parts of that spectrum.

On one end sits express advocacy—candidate speech using *Buckley*'s magic words of "support" or "reject" or their synonyms. *See*, *id*. at 44 n. 52. Next to express advocacy sit communications that do not use *Buckley*'s magic words but nevertheless clearly advocate on behalf of or against a candidate—communications that are the "functional equivalent of express advocacy," as applied by *WRTL II*. 551 U.S. at 469-70. This category includes *Citizens United*'s "pejorative" communications. *Citizens United*, 558 U.S. at 325, 368; *Barland*, 751 F.3d at 823 ("The [*Citizens United*] Court began by holding that Hillary and the ads promoting it were the functional equivalent of express advocacy under *Wisconsin Right to Life II*").

But on the other end of the spectrum is genuine issue advocacy—discussions of public policy that ask elected leaders to take action. The Independence Institute's advertisement is issue advocacy; it educates the public about a question of public policy and asks Coloradoans to seek action from their governor. It does not support or oppose Governor Hickenlooper, or even allude to his candidacy.

The contrast with Citizens United's communications is marked. One advertisement began with "a kind word about Hillary Clinton," and after complimenting Mrs. Clinton's fashion sense, announced that *Hillary: The Movie* was "a movie about the [*sic*] everything else." *Citizens*

United v. FEC, 530 F. Supp. 2d 274, 276, n. 3 (D.D.C. 2008). Another advertisement claimed then-Senator Clinton was "the closest thing we have in America to a European socialist." *Id.* n. 4.

Electioneering communications considered by other courts have generally been in a similar vein. For instance, in one case, the Fourth Circuit was confronted with an advertisement called "Change." *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012). The advertisement asked, "[j]ust what is the real truth about Democrat Barack Obama's position on abortion?" *Id*. After detailing alleged policy positions taken by then-candidate Obama, the advertisement ended, "Now you know the real truth about Obama's position on abortion. Is this the change you can believe in?" *Id*. Another advertisement ended: "Obama's callousness in denying lifesaving treatment to tiny babies who survive abortions reveals a lack of character and compassion that should give everyone pause." *Id*. at 547.

Advertisements like these were the sort of "sham issue advocacy" described in *McConnell*. These communications encourage a specific electoral outcome—namely, the defeat of Hillary Clinton or Barack Obama. The *Citizens United* Court recognized this. It described the organization's advertisements for *Hillary* as "pejorative," and held that *Hillary* itself functioned as a "feature length negative advertisement." *Citizens United*, 558 U.S. at 368; *id*. at 325. By contrast, the Independence Institute's proposed advertisement is genuine issue speech. It does not mention the candidacy of Governor Hickenlooper or his fitness for office. From within the "four corners" of the proposed advertisement, one would not know that Governor Hickenlooper is seeking office. Instead, the advertisement is focused on Colorado's Health Benefit Exchange, the Independence Institute's belief that there should be an audit, and encourages the viewer to

contact the governor—who is the State's chief executive, and who has the ability to veto or sign legislation authorizing an audit.

iii. *Citizens United* did not discuss the particular burden of disclosing donors to a § 501(c)(3) organization.

Citizens United is, and at the time of its case, was an IRC § 501(c)(4) organization. *Citizens United*, 530 F. Supp. 2d at 275. The Independence Institute is organized under Section 501(c)(3). These two sections of the tax code, while differing by only one digit, describe markedly different types of organizations. These differences exacerbate the burdens of forced donor disclosure.

Organizations exempt from taxation under § 501(c)(3) may not engage in activity supporting or opposing a candidate; they are forbidden from electioneering. 26 U.S.C. § 501(c)(3). Furthermore, § 501(c)(3) organizations are limited in the amount of lobbying activity they can perform, unlike § 501(c)(4) organizations.[3] *Id*.; 26 C.F.R. § 1.501(c)(3)-1(3). Thus, unlike an IRC §501(c)(4) organization like Citizens United, the Independence Institute cannot engage in any political activity and may only engage in limited lobbying or grassroots lobbying activity. Put differently: while Citizens United could, without violating its tax status, sponsor communications opposing then-Senator Clinton's candidacy, the Independence Institute cannot.

Consistent with this difference in permitted activity, donors to § 501(c)(4) organizations are generally offered less protection than those to § 501(c)(3) groups. *See*, *e.g.*, 26 U.S.C. §

[3] Unlike a §501(c)(3) organization, the §501(c)(4) is specifically conceptualized as a group advocating for certain public policies as a means to promote "social welfare." INTERNAL REVENUE SERVICE, *Social Welfare Organizations*, http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations (last accessed June 25, 2014) ("Seeking legislation germane to the organization's programs is a permissible means of attaining social welfare purposes").

6104(c)(3) (differentiating between disclosure to state officials of donors to § 501(c)(3) organizations and other § 501(c) organization types). The tax code specifically protects § 501(c)(3) donor lists from public disclosure. 26 U.S.C. § 6104(d)(3). Indeed, the *Citizens United* Court specifically noted that that organization had disclosed its donors in the past, something the Independence Institute has not done, and will not do. *Citizens United*, 558 U.S. at 370 ("Citizens United has been disclosing its donors *for years*") (emphasis added).

d. Colorado's electioneering communications definition and disclosure regulations unconstitutionally burden the rights of the Independence Institute and its donors to freedom of speech and association.

The Independence Institute's planned advertisements are genuine issue speech. Because of Colorado'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); *see also* COLO. CONST. art. XXVIII § 6(1) *and* C.R.S. § 1-45-108(1)(a)(III). Issue speech is not exempted or otherwise protected.[4] 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 42-44.

Once triggered, the electioneering communications disclosure law impermissibly burdens the freedom of association of the Independence Institute's donors. Their privacy is destroyed by the public disclosure of their names, addresses, occupations, and employers. COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(1)(a)(III).

[4] Other states have tailored their electioneering communications statutes so as to protect issue speakers. Some states, such as Illinois, actually exempt § 501(c)(3) groups from their electioneering communications regime.10 ILL. LEG. STAT. 5/9-1.14(b)(4).

i. Colorado failed to tailor its disclosure demand to a substantial governmental interest.

The Independence Institute concedes that speech advocating for an electoral result may constitutionally trigger disclosure. *Buckley*, 424 U.S. at 80 ("as construed [the statute] bears a sufficient relationship to a substantial governmental interest… for it only requires disclosure of those expenditures that expressly advocate a particular election result"). In such instances, there is a "strong" governmental interest in "disclosure [which] helps voters to define more of the candidates' constituencies." *Id*. at 81. But Colorado's statute captures too much speech for too little purpose, and accordingly, is not "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. The Institute is not a "constituency" of any candidate. Issue speech, such as the Independence Institute's proposed advertisement, does not encourage an electoral outcome.

Without a valid informational interest in the Institute's donors, the electioneering communication regime fails exacting scrutiny, which "demand[s] a close fit between ends and means…[to] prevent[] the government from too readily sacrificing speech for efficiency." *McCullen v. Coakley*, 573 U.S. ___, ___, 134 S. Ct. 2518, 2534-2535 (2014) (internal citation and punctuation omitted). Colorado's citizens may have an interest in knowing who is supporting and opposing candidates—a valid "end"—but that interest is not implicated here. And the chosen "means"—disclosure of donors to an educational nonprofit that merely mentions the sitting governor—has no connection, in this case, to that ephemeral interest.

ii. Colorado's electioneering communication definition is overly broad and makes no exception for genuine issue speech.

Colorado's electioneering communication definition is broader than its federal counterpart, which is limited to "broadcast, cable, or satellite" communications. 52 U.S.C. § 30104(f)(3)(A)(i). Instead, Colorado defines electioneering communications to include "any 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." COLO. CONST. art. XXVIII § 2(7)(a). Likewise, there is no "targeted" requirement for the communication: if the audience merely "*includes* members of the electorate" then Colorado labels it an electioneering communication. COLO. CONST. art. XXVIII § 2(7)(a)(III) (emphasis added). While there are exemptions to Colorado's electioneering communications definition, there is none for issue speech. *See* COLO. CONST. art. XXVIII § 2(7)(b). The Fair Campaign Practices Act (FCPA) is unhelpful. It merely defines electioneering communications by reference to Article XXVIII. C.R.S. § 1-45-103(9).

Secretary of State Scott Gessler attempted to promulgate regulations further defining "electioneering communication" in light of federal judicial 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). However, Secretary Gessler's rule was overturned by the Colorado Court of Appeals on the grounds that it exceeded his authority. *Colo. Ethics Watch v. Gessler*, 2013 COA 172M ¶ 60 (Colo. App. 2013) ("Again, 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).[5]

Without any further clarification or test to delineate between candidate speech and issue speech, Colorado's electioneering communication definition appears to include the Independence Institute's advertisement. Therefore, because it would regulate the Independence Institute's unambiguous issue speech, the law is overbroad as applied in this instance.

iii. Colorado's electioneering communication disclosure system is overly broad and unconstitutionally burdens the Independence Institute and its donors.

Once triggered, Colorado's electioneering communication disclosure system is burdensome. An organization must file an electioneering communications report once it spends more than $1,000 on a qualifying communication. COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(1)(a)(III). The report requires the name and address of anyone who gives more than $250 "for an electioneering communication." COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(1)(a)(III).[6] If the donor is a natural person, then the donor's employer and occupation are required. COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(1)(a)(III).

These requirements are particularly pernicious when applied to § 501c(3) organizations who traditionally keep their donors private—and are explicitly permitted to do so under federal

[5] The Colorado Supreme Court followed similar reasoning in the Secretary's promulgation of a rule purported to conform with a Tenth Circuit decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), regarding the definition of "issue committee" in Article XXVIII § 2(10). In *Gessler v. Colorado Common Cause*, 2014 CO 44 (Colo. 2014), the court held that the Secretary lacked the power to promulgate rules contrary to the clear language of Article XXVIII and the FCPA. *Id*. at ¶ 15.

[6] The Secretary has interpreted the law to only require donations earmarked for the communication. 8 C.C.R. 1505-6, Rule 11.1.

law. 26 U.S.C. § 6104(d)(3)(A). The Independence Institute is left with the unconstitutional choice between staying silent on issues important to its mission or disclosure of its donors.

These reporting requirements are substantively similar to "political committee" status for contributors to candidate campaigns. *Compare* C.R.S. §§ 1-45-108(1)(a)(I) and (II) (detailing political committee reporting to include name, address, occupation, and employer for those who contribute more than $100) *with* COLO. CONST. art. XXVIII § 6(1); C.R.S. § 1-45-108(1)(a)(III) (detailing the same, with a threshold of $250). They go much further than the federal electioneering communications disclosure report, which has a threshold four times larger than Colorado's. *See* 52 U.S.C. § 30104(f)(2)(F) (requiring "the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more").

All of this might make sense in the context of actual "electioneering." But the Independence Institute is prohibited by the tax laws from advocating for or against candidates; its advertisement does not do so. Put differently, the constitutional objection to donor disclosure can be put aside for "political committees" or "election" advertisements. But as the Institute is not a political committee, and its advertisement does not even allude to an election, the governmental interests undergirding these burdensome requirements simply do not apply.

iv. The Independence Institute reasonably fears enforcement of Colorado's campaign finance regulation because it has happened before.

The fears of the Independence Institute are not conjectural. The organization has previously faced a complaint brought by an ideological opponent for an alleged failure to comply with Colorado's campaign finance rules. The facts are succinctly laid out in *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. Ct. App. 2008).

In 2005, the Colorado legislature referred two changes to Colorado's Taxpayer Bill of Rights ("TABOR")[7] to the Colorado electorate. *Id*. at 1134. Referenda C and D would have suspended certain provisions of TABOR and allowed Colorado to take on additional debt. *Id*. The Independence Institute, through its Fiscal Policy Center, launched an educational campaign on the impact of Referenda C and D—including radio commercials with directions to the think tank's website for further information. *Id*. The advertisements contained no express advocacy. *Id*.

Nevertheless, an agent for the "Vote Yes on C and D" campaign filed an administrative complaint[8] against the Independence Institute regarding the advertisements. *Id*. The agent for the "Vote Yes" campaign claimed that the Independence Institute was an "issue committee" under Colorado's campaign finance laws and required to report and disclose its donors. *Id*. A few days *after* the election, the administrative law judge ruled that the Independence Institute was not an "issue committee." *Id*.[9] Now, when the Independence Institute again wishes to discuss public policy, it reasonably fears ideological opponents filing another administrative complaint or civil action.

Likewise, the penalties levied by the Secretary for failure to file electioneering communications disclosure reports can quickly add up. The Colorado Constitution provides fines

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[7] COLO. CONST. art. X § 20.

[8] Colorado law provides for enforcement of Colorado Constitution article XXVIII—including the electioneering communications definition and disclosure provisions—by administrative complaints from private parties referred to a state administrative law judge. COLO. CONST. art. XXVIII § 9(2)(a). If the Secretary fails to enforce the decision of the administrative law judge, then the complainant has a private right of action in state court against the alleged violating organization or person. *Id*.

[9] In the interim, the Independence Institute brought a facial challenge to the "issue committee" definition in Colorado state court, but ultimately lost when the Colorado Court of Appeals facially upheld the state constitution's definition of "issue committee." *Independence Institute*, 209 P.3d at 1134 and 1136.

of $50 per day per report due. COLO. CONST. art. XXVIII § 10(2)(a). Even if an advertisement were run only once at the very beginning of the electioneering communication window before the general election, the fine would be $3,000 by election day (and continue thereafter until waived or paid). The fines increase dramatically if the same advertisement is run multiple times.

These harms are concrete. If the Independence Institute wishes to run its advertisement, it must choose between disclosing its donors on one hand, and accepting the costs to its rights and those of its donors, or risk thousands of dollars in fines and the costly defense of an ideologically-driven enforcement action.

III. First Amendment violations, even if they persist for only a brief time, impose irreparable harm.

The Supreme Court has directly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal citation and quotation marks omitted).

Here, Colorado's electioneering communication disclosure laws impose an unconstitutional restriction on the activity of the Independence Institute by regulating as "electioneering" what is, in fact, a discussion of public policy with no connection to a political campaign. During the electioneering communications window, Colorado effectively silences the Independence Institute by forcing it to otherwise waive its First Amendment rights. This is no small constitutional curtailment. As the Supreme Court expressed in *Thomas v. Collins*:

> The restraint is not small when it is considered what was restrained. The right is a national right, federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede.

323 U.S. 516, 543 (1945). The rights of the Independence Institute and its members are restrained by Colorado's expansive electioneering communication regulation. Such injury is irreparable.

IV. The balance of interests favors granting the Independence Institute's motion.

Absent intervention by this Court, the Independence Institute fears its proposed advertisement will trigger regulation and disclosure as an electioneering communication. Without this Court's protection, it will have to remain silent. And while this case involves the very real and important rights the First Amendment guarantees, it examines only a small portion of Colorado's campaign finance laws: a challenge to the electioneering communication rules as applied to a particular issue advertisement. The injunction would reach no further than the specific activity of the Independence Institute.

Therefore, while the public interest in upholding the Independence Institute's rights is great, the relative impact on the administration of Colorado's campaign finance laws is slight. The balance of harms favors the Independence Institute.

V. The public interest is served by protecting the First Amendment rights to speech and association.

Since no party has an interest in the enforcement of an unconstitutional law, the public interest is best protected by issuing a preliminary injunction. *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) ("[a state] does not have an interest in enforcing a law that is likely constitutionally infirm. Moreover, the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law") (citations and quotation marks omitted). As the Tenth Circuit has held in a previous case dealing with the

requirements for a preliminary injunction, "[v]indicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005).

Conclusion

For the foregoing reasons, a preliminary injunction should be issued preventing Defendant from enforcing Colorado's electioneering communications definitions and disclosure laws—COLO. CONST. art. XXVIII § 2(7); COLO. CONST. art. XXVIII § 6; C.R.S. § 1-45-103; and C.R.S. § 1-45-108(1)(a)(III)—as applied to the specified activity of the Independence Institute.

Respectfully submitted this 4th day of September, 2014.

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