No. 14-1469

In the

United States Court of Appeals for the Tenth Circuit

COALITION FOR SECULAR GOVERNMENT,
a Colorado nonprofit corporation,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

On appeal from the United States District Court
for the District of Colorado, No. 1:12-cv-1708 (Kane, J.)

Plaintiff-Appellee's Answer Brief

Allen Dickerson
Tyler Martinez
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org

Counsel for Plaintiff-Appellee

Oral Argument Requested

March 30, 2015

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Coalition for Secular Government makes the following corporate disclosure. The Coalition for Secular Government is a nonprofit corporation organized under Colorado law. The Coalition for Secular Government does not have any outstanding securities in the hands of the public. There are no parent companies, subsidiaries, or affiliates of the Coalition for Secular Government with securities in the hands of the public.

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

Statement of Related Cases

Pursuant to 10th Circuit Rule 28.2(C)(1), Plaintiff-Appellee Coalition for Secular Government states that there are no prior or related appeals in this Court.

Glossary

Bluebook – Legislative Council of the Colorado General Assembly, Res. Pub. No. 502-1, 2002 Ballot Information Booklet: Analysis of Statewide Ballot Issues (2002).

FCPA – Colorado's Fair Campaign Practices Act, codified at COLO. REV. STAT. § 1-45-101 *et seq*.

FEC – Federal Election Commission.

PAC – Political committee or political action committee.

TRACER – Transparency in Contribution and Expenditure Reporting, Colorado's online campaign finance reporting portal and database.

Introduction

Less than five years ago, this Court expressly held that a group raising $2,239.55 could not be regulated as a Colorado issue committee because the state's interest was "minimal, if not nonexistent, in light of the small size of [its] contributions." *Sampson v. Buescher*, 625 F.3d 1247, 1260 n.5, 1261 (10th Cir. 2010). Today, Colorado's Secretary of State asks this Court to nonetheless permit him to regulate another small group, with contributions of between $2,000 and $3,500, under the exact same provision denied him in *Sampson*.

The Secretary argues that a number of minor differences between the Coalition for Secular Government ("CSG") and the *Sampson* plaintiffs makes that case inapplicable. None of those arguments has the slightest basis in *Sampson*'s reasoning, which relied solely upon the group's limited financial resources.

One can sympathize with the Secretary. Recognizing that he is bound by the *Sampson* ruling, he promulgated a regulation raising the monetary trigger for Colorado issue committees from $200 to $5,000. But that rule was invalidated by the Colorado courts. Now, if Colorado is to fix a problem of its own making, he must defend this suit while simultaneously using it to request facial invalidation of the state's existing threshold.

CSG is a small philosophical organization subject to state regulation because of a single sentence in a 30,000-word policy paper. It is unlikely that the Colorado

electorate gave any thought to such organizations or such speech, and there are many independent reasons why CSG's regulation as an issue committee is unconstitutional. But the District Court, bound like the Secretary by *Sampson*, properly relied upon the most obvious. Whether this Court chooses to provide facial or as-applied relief, *Sampson* is clear and binding precedent that governs the outcome of this case.

Counter-Statement of the Facts and Case

I. Colorado's regulation of issue committees

Pursuant to an amendment adopted by the Colorado electorate in 2002, Colorado's Constitution directly regulates the financing of political campaigns. *See* COLO. CONST. art. XXVIII ("Article XXVIII"). Supplemental authority may be found in the Fair Campaign Practices Act, COLO. REV. STAT. ("C.R.S.") § 1-45-101 *et seq*. ("FCPA"), which implements Article XXVIII. The Secretary of State's regulations and guidance are found at 8 COLO. CODE REGS. 1505-6.

Article XXVIII was enacted because voters were "concerned with 'large campaign contributions' that allow 'wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process.'" J.A. 578 (quoting COLO. CONST. art. XXVIII § 1).

a. Defining "issue committee"

Article XXVIII § 2(10)(a) defines an issue committee as any person or any group of two or more persons that either has "(I)…a major purpose of supporting or opposing any ballot issue or ballot question; *or* (II)… accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." COLO. CONST. art. XXVIII §2(10)(a) (emphasis supplied). By regulation, the Secretary has interpreted the emphasized word "or" to mean "and." 8 COLO. CODE REGS. 1505-6 Rule 1.12.2.

Despite its importance to the overall statutory scheme, the term "major purpose" is not defined in Article XXVIII. The FCPA has filled this gap, declaring that a group's major purpose can be found either by looking to a group's "annual expenditures" or its "production or funding…of written or broadcast communications" to support or oppose a ballot question. C.R.S. § 1-45-103(12)(b)(II)(B).[1]

Article XXVIII defines an "expenditure" as:

> [A]ny purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question.

[1] The FCPA also permits a major purpose finding based upon "an organization's specifically identified objectives in its organizational documents," a provision that is not at issue here. C.R.S. § 1-45-103(12)(b)(I). It is undisputed that CSG exists for purposes other than ballot issue advocacy.

COLO. CONST. art. XXVIII § 2(8)(a).

> But an expenditure is *not*:
>
> (I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;
> (II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party….

COLO. CONST. art. XXVIII § 2(8)(b).

By contrast, Colorado law provides no definition of "written or broadcast communications" whatsoever.

The interactions between and among these definitions are unclear and convoluted. Consequently, the District Court certified four questions of law to the Colorado Supreme Court. J.A. 427 (Order certifying questions). Those questions reflected the several constitutional claims CSG raised. But, for purposes of this appeal, only one is relevant:

> In light of *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), what is the monetary trigger for Issue Committee status under Art. XXVIII § 2(10)(a)(II) of the Colorado Constitution?

J.A. 428.

More than a year after full briefing and oral argument, the Colorado Supreme Court declined to answer any of the District Court's certified questions. *See* J.A. 436 and accompanying exhibits.

b. Issue committee reporting

Once a group or entity qualifies as an "issue committee" it has ten days to register with the Secretary of State. C.R.S. § 1-45-108(3.3). The registration report must contain the organization's name, a natural person as registered agent, a street address and telephone number, all affiliated candidates and committees, and the purpose or "nature of interest" of the committee. *Id*. (incorporating by reference C.R.S. § 1-45-108(3)).

An organization's responsibilities do not end with the filing of this initial registration. Regular reports must be filed thereafter. C.R.S. § 1-45-108(1). The frequency of these reports varies depending upon the time of year, but in the lead-up to an election, reports must be filed every two weeks. C.R.S. § 1-45-108(2)(a)(I) (detailing reporting frequency).

These periodic reports list detailed information concerning contributions to, and expenditures by, the organization. C.R.S. § 1-45-108(1)(a). An issue committee must report "the name and address of each person who has contributed twenty dollars or more." C.R.S. § 1-45-108(1)(a)(I). If a contributor gives more than one hundred dollars, in the aggregate, then her employer and occupation must be disclosed as well. C.R.S. § 1-45-108(1)(a)(II). All expenditures by the committee must be reported, regardless of amount. C.R.S. § 1-45-108(1)(a)(I).

c. The burdens and confusion imposed by Colorado's reporting regime is reflected in the Secretary's extensive guidance: three dozen webinars, a compliance manual, and phone hotlines.

Issue committee reporting is accomplished via the Secretary's TRACER[2] online database system, which was developed in 2008 but released to the public in 2010. J.A. 727 *ll* 19-21 (testimony of Stephen Bouey). The Secretary has regularly modified the system: TRACER is in its "third major iteration" since 2010. J.A. 728 *ll* 9-10. While the Secretary has attempted to simplify the process of filing committee reports, the inherent burdens imposed by Colorado's legal regime are reflected in the sheer volume of guidance the Secretary has issued to assist ordinary Coloradoans in complying with state law.

That guidance includes 38 webinars on how to use TRACER. *See* J.A. 1070 (index of webinars); J.A. 746 *ll* 10-13. The webinars are videos with slides and voice narration instructions. J.A. 746 *ll* 22-24. For example, the webinar on adding contributions is 27 slides long. J.A. 747 *l* 12; J.A. 1072 (Trial Exhibit 61) (webinar for adding contributions). Likewise, the webinar explaining how one reports an expenditure contains 32 slides. J.A. 748 *l* 23; J.A. 1099 (Trial Exhibit 63). Each has a run time of approximately 17 minutes. *See* J.A. 1070 (list of webinar trainings with time codes). Even then, "[s]ome people don't know the webinar[s]

[2] TRACER stands for **Tr**ansparency in **C**ontribution and **E**xpenditure **R**eporting. *See* Colorado Secretary of State, TRACER: About this website http://tracer.sos.colorado.gov/PublicSite/homepage.aspx#.

exist" and must be pointed to the relevant section of the Secretary's website. J.A. 749 *ll* 9-10.

The Secretary's office also produces a campaign finance manual. *See* J.A. 1131 (2014 Colorado Campaign Finance Manual). According to the testimony of Melissa Polk, legal analyst in the Elections Division, the "manual is meant to assist political activists who believe that they may need to register and file with [the Secretary's] office." J.A. 717 *l* 25 – 718 *ll* 1-2. The manual is 37 pages long, and includes an additional 114 pages reproducing relevant portions of the state constitution, statutes, and regulations. J.A. 1131. Taken together, the manual is 152 pages long. J.A. 1284.

Both the webinars and the manual explain how to contact the Secretary's office. People call in daily with questions, including inquiries not covered by the webinars or manual. J.A. 749 *ll* 5, 8, and 18 (Stephen Bouey testimony). While the hotline is sometimes staffed by an attorney, it does not offer legal advice. J.A. 724 *ll* 20-25 (testimony of Melissa Polk). Moreover, if a committee—or an individual uncertain as to whether they must register with the state—calls into the office, the Secretary's guidance provides no safe harbor from complaints, penalties, or litigation. J.A. 725 *ll* 12-15 (Melissa Polk testimony); J.A. 750 *l* 4 (Stephen Bouey testimony); *Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 936 (Colo. Ct. App. 2012) ("*CTBC*") ("CTBC argues that we must defer to the position

expressed by personnel from the Secretary of State's office that CTBC is an issue committee. We disagree"). Nor do Colorado courts necessarily consider such advice persuasive. *Id*. at 937.

In short, even those who exercise care and act in good faith cannot receive any guarantee that they have properly complied with Colorado's extensive reporting regime.

As the trial court recognized, these "reporting and disclosure requirements by their nature 'infringe on the right of association.'" J.A. 575 (quoting *Sampson*, 625 F.3d at 1255). In some applications, "[d]etailed record-keeping and disclosure obligations impose administrative costs that many small entities may be unable to bear." J.A. 576 (internal citation and quotation marks omitted).

d. Reporting penalties, complaints, and private rights of action

The stakes are high. Failing to register, or improperly reporting any information, no matter how minor, may trigger Article XXVIII's enforcement mechanisms: penalties assessed by the Secretary, complaints initiated by the public, and private lawsuits brought by ideological opponents.

i. Penalties assessed by the Secretary

Article XXVIII requires the Secretary to assess a $50 per day, per violation penalty for failing to file a report. COLO. CONST. art. XXVIII § 10(2)(a). The penalties run "until that report is filed." J.A. 719 *l* 10 (testimony of Melissa Polk).

An issue committee may apply for a waiver of this penalty, but it must do so in writing. COLO. CONST. art. XXVIII § 10(2)(b)(I). Furthermore, it must "provide an explanation that includes all relevant factors relating to the delinquency and any mitigating circumstances, including measures taken to avoid future delinquencies." 8 COLO. CODE REGS. 1505-6 Rule 18.1.1. The Secretary may also consider additional factors that "establish good cause or may otherwise be relevant to the request for waiver…." 8 COLO. CODE REGS. 1505-6 Rule 18.1.3. "Good cause" is not defined in Article XXVIII, FCPA, or the Secretary's rules. J.A. 721 *ll* 6, 10, 13.

A committee consisting of a legal analyst, "two other campaign finance staff members, [the] director of elections[,] and the Deputy Secretary" then decides, in its discretion, whether to grant the waiver, partially grant the waiver, or enforce the full penalty. J.A. 720 *ll* 5-7; 11-12.

ii. Complaints from private parties

Article XXVIII provides that, "[a]ny person who believes that a violation… has occurred may file a written complaint with the secretary of state." COLO. CONST. art. XXVIII § 9(2)(a). Upon receipt of a complaint, "[t]he secretary of state *shall* refer the complaint to an administrative law judge," who "*shall* hold a hearing." *Id*. (emphasis supplied). If an investigated organization failed to properly register as an issue committee, the organization's complete donor list is subject to subpoena. COLO. CONST. art. XXVIII § 9(2)(c). The administrative law judge has

the power to issue orders, sanctions, and penalties pursuant to Article XXVIII § 10. COLO. CONST. art. XXVIII § 9(2)(a); *cf* COLO. CONST. art. XXVIII § 10. The Secretary may enforce the administrative law judge's order. COLO. CONST. art. XXVIII § 9(2)(a).

iii. Private right of action

If the Secretary chooses not to enforce the administrative law judge's order, then the complainant has a private right of action in state district court. COLO. CONST. art. XXVIII § 9(2)(a). Article XXVII provides that "[t]he prevailing party in a private enforcement action shall be entitled to reasonable attorneys[']fees and costs." *Id*.

II. The Coalition for Secular Government is a small organization that runs a website and occasionally publishes a policy paper.

a. A philosopher starts a small nonprofit to examine philosophy, religion, and public policy.

The Coalition for Secular Government ("CSG") is a Colorado nonprofit corporation founded in 2008. J.A. 29, 937. In the words of the *Secretary's* expert, CSG is "a small group…[with] financing…certainly not of a level that suggests that any big money interests are involved." J.A. 699 *ll* 4-7 (Fred Brown direct examination). CSG is a side project of its principal officer, philosopher Dr. Diana

Hsieh.[3] J.A. 582 *ll* 16-18; J.A. 934. In her words: "I am the founder. I am the president. I am the accountant. I am the webmaster. I am the trash collector…. you name it, I do it." J.A. 589 *ll* 11-13.

Apart from the public policy paper at issue in this case, CSG's activities are generally financed by Dr. Hsieh. J.A. 570. CSG is not Dr. Hsieh's primary occupation: she is "a philosopher and…a radio host." J.A. 588 *l* 23. Dr. Hsieh describes her program as "a once or twice weekly radio show that broadcasts over the [I]nternet…the topics really range from – anything from whether moral responsibility requires free will or arguments for the existence of [G]od to things like what I do if my neighbor's dog attacked my husband and my kids play over there…a pretty broad range of topics." J.A. 588 *l* 24 – 589 *l* 8.

When founding CSG, Dr. Hsieh wanted to ensure that the organization had "some kind of legally recognized status." J.A. 595 *ll* 3-4. Finding registration as a nonprofit corporation significantly easier—and cheaper—than registering a "doing business as" addendum to her other work, Dr. Hsieh went online to register CSG as a nonprofit corporation under Colorado law. J.A. 595 *ll* 2-8. Registration was simple, requiring "a really minimal set of bylaws or something like that, if I recall correctly, and then I paid some small amount of money and boom, we existed." J.A. 595 *ll* 16-18. Yearly reporting for the nonprofit corporation takes her about 10

[3] The District Court described Dr. Hsieh as "intelligent and sincere – virtually incapable of dissimilation." J.A. 571 n.2.

minutes. J.A. 595 *l* 24. The online system "basically pre-populates the form with a bunch of the old data," which Dr. Hsieh verifies is still correct before paying the reporting fee by credit card. J.A. 595 *l* 24 – 596 *l* 3. CSG maintains a presence on the Web, at www.seculargovernment.us.

CSG's mission is "to educate the public about the necessary secular foundation of a free society, particularly the principles of individual rights and separation of church and state." J.A. 933 (mission statement of CSG). As a philosopher, Dr. Hsieh uses CSG to examine the difficult issues arising from a strong barrier between church and state. J.A. 592 *ll* 23-25. As the District Court determined, "CSG clearly exists independently of and in addition to its personhood paper, which is but one of its many advocacy issues." J.A. 575 n.7.

Much of this work is done on CSG's blog, which contains about 500 posts. J.A. 591 *l* 6. The blog features original content (written and video) and cross-posts content from other blogs and videos. J.A. 591 *ll* 10-14. Topics vary widely, from atheism to small government to the nature of luck. *See, e.g.,* J.A. 872 ("Atheist as a Negative Term"); J.A. 877 (Interview with Eric Daniels on Small Government); and J.A. 892 ("Responsibility and Luck"). In 2012, CSG contributor Ari Armstrong wrote an article on Pope Benedict XVI's writings and the literary world of Harry Potter. J.A. 782 ("The Pope and Harry Potter"). Within the larger topic of the philosophy of life, death, and personal autonomy, CSG has published blog

posts on "the right to die," whether consensual sex is "a tacit consent to pregnancy," and other questions regarding human life and personal autonomy. J.A. 848 ("Right to Die" blog post); J.A. 860 ("Tacit Consent to Pregnancy" blog post); J.A. 592 *l* 23 (Dr. Hsieh testimony). CSG also maintains a Facebook page and Twitter account, J.A. 620 *ll* 15, 24

b. The public policy paper produces campaign finance reporting woes.

As part of its larger intellectual pursuits, CSG discusses hot button issues such as abortion. J.A. 607 *ll* 10-11. In that vein, Dr. Hsieh enlisted the help of a friend, Ari Armstrong, to write a policy paper for CSG discussing philosophical implications of the Personhood Movement[4] in Colorado and nationally. The paper's production, including the authors' desires for a small honorarium, ensnared CSG within the regulatory web of Colorado's campaign finance law. As the District Court determined, "[u]nder a technical reading of the law and after *Sampson*, CSG met the 'issue committee' test by virtue of its $200-$3,500 in annual contributions that it then uses to support the distribution of its policy paper." J.A. 574.

[4] The "Personhood Movement" seeks to amend state law to legally define the term "person" to begin at conception.

i. 2008

In 2008, CSG published its first policy paper discussing the legal and practical effects of Colorado's Amendment 48, the 2008 personhood ballot measure. J.A. 597 *ll* 7-8. Dr. Hsieh "never ever would have imagined in a million years that [she] had to register with the State to speak about a ballot measure," but—out of caution—decided to check the Secretary of State's webpage anyway. J.A. 597 *ll* 6-8 (testimony of Dr. Hsieh); *cf.* J.A. 571 n.2. (District Court opinion). Finding nothing, she initially thought she was "in the clear"—until "a friend familiar with Colorado's campaign finance regime second-guessed that conclusion" and she investigated further. J.A. 597 *ll* 12, 15-16; J.A. 572 n. 2.

"Eventually [she] did kind of figure out... [that CSG was] right at that $200 threshold" for Colorado's definition of "issue committee." J.A. 598 *ll* 3-4. Without the aid of counsel, Dr. Hsieh decided to register CSG as an issue committee. J.A. 598 *l* 7 (testimony of Dr. Hsieh); J.A. 12 ¶ 30 (V. Compl.); J.A. 88 (CSG 2008 Issue Committee filings). The need for filing distressed Dr. Hsieh—because printing and mailing a lengthy policy paper would cost $200, she had "to do all this paperwork." J.A. 598 *l* 24 – 599 *l* 1. In 2008, Dr. Hsieh did not seek an honorarium for her work, but by the mere act of *expending* $200 to promote and distribute it, she was forced to comply with Colorado's campaign finance regulations. Accordingly, she needed to register and file multiple periodic reports—every two

weeks—even though CSG had no further contributions or expenditures before the 2008 election. J.A. 599 *ll* 11-12, 22-23.

Reporting expenditures proved to be problematic: before the District Court, Dr. Hsieh described the difficulties she experienced in finding a post office's street address so that she could disclose where CSG bought its stamps. J.A. 600 *ll* 14-19. CSG knew the stakes for strict compliance with reporting. The same year, Dr. Hsieh had heard that the "Yes on 48" leader, on the basis of a complaint brought by ideological opponents, was brought before the Colorado administrative courts for failing to provide the addresses of contributors who gave $25 to the campaign. J.A. 601 *l* 23 – 602 *l* 3. Dr. Hsieh testified that, as a result, she feared she could be subject to similar complaints. J.A. 602 *ll* 20-22.

ii. 2010

Despite the difficulties she experienced in 2008, CSG substantively expanded its paper in 2010. The new effort was 33 pages long with 176 endnotes. *See* J.A. 77-78 (2010 Policy Paper). While the paper discussed general moral objections to personhood laws, Dr. Hsieh also included direct references to Amendment 62, a personhood ballot measure before Colorado voters in 2010, to "serv[e] as a stand-in for all personhood measures." J.A. 676 *ll* 23-24. The last section of the policy paper contains the sentence: "If you believe that 'human life has value,' the only moral choice is to vote against Amendment 62." J.A. 76. It is

uncontested that absent this one sentence, the state would not require CSG to register as an issue committee. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1258 (Colo. 2012); *see also Coalition for Secular Gov't v. Gessler*, No. 2012 SA 312, Sec. Ans. Br. at 25 (Colo. Jan. 16, 2013)[5] ("If that sentence were simply excised…CSG's paper would amount to nothing more than issue advocacy, and consequently would be exempt from Colorado's disclosure requirements").

In addition to expanding and updating the policy paper, this time Dr. Hsieh and Mr. Armstrong "had the novel idea that [they] really wanted to get paid for all of [their] hard work. What [Dr. Hsieh] decided to do was use what [she] had developed in other contexts for non-CSG projects[—]a pledge model." J.A. 604 *ll* 3-6. Each author was to be paid $1,000 from pledges gathered from the general public.

CSG registered and reported as an issue committee. J.A. 128 (CSG 2010 Issue Committee filings). This registration highlighted the need for CSG to open a separate bank account. J.A. 608 *ll* 12-15. Setting up a separate bank account and PayPal account to handle pledges took "quite a number of hours…solely to comply with the State's campaign finance requirements." J.A. 608 *ll* 18-24.

Because CSG gathered donations to update the paper for 2010, it was required by law to collect personal information from its contributors and report that

[5] *Available at* http://www.campaignfreedom.org/wp-content/uploads/2015/03/Answer-Brief-CSG-FINAL.pdf.

information to the Secretary. But Colorado's disclosure of the name and address—and often employer—of CSG's donors concerned Dr. Hsieh. As she said at trial, "the abortion issue, this is a highly politically charged issue. And some anti-abortion activists have engaged in violence… and harassment." J.A. 607 *ll* 10-11, 14. Further, she had to email "60-some contributors" to seek out the required address, occupation, and employer data. J.A. 609 *ll* 11-12.

In 2010, unlike 2008, CSG decided to run ads on Facebook to promote the paper. The ads featured the headline "No on Amendment 62" and appeared on the social media site. J.A. 204-206 (reproduction of the Facebook ads). At trial, however, Dr. Hsieh noted that she was unsure if CSG will run similar ads in the future because "[t]he paper is…of a size at this point that if somebody wants reasons to vote yes or no on this amendment, our paper is not going to be the quickest read for them." J.A. 672 *ll* 12-16. Thus, CSG is unlikely to replicate the 2010 advertisements in the future because they do not reflect the paper's intellectual breadth.

Dr. Hsieh found Colorado's filing system to be burdensome. The required level of detailed record keeping was difficult to maintain. For tax compliance purposes, Dr. Hsieh was permitted to keep CSG's financial information "clumped" without itemization. J.A. 673 *l* 5. That option is not available to an issue committee.

The punitive nature of Colorado's system came into focus in October 2010. Dr. Hsieh's house flooded and, in attending to that critical situation, she was one day late in filing CSG's issue committee report. J.A. 194; 611 *l* 8. Moreover, she was forced to make two further amendments in order to properly gather all the required personal data concerning CSG's donors. J.A. 611 *ll* 16-18. Dr. Hsieh was particularly worried because she knew Colorado imposes a $50 per day fine, per violation, "[a]nd so every line, every contribution, every expenditure that I didn't report I thought could be reasonably interpreted as a failure and could be a $50 fine." J.A. 612 *ll* 8-10; J.A. 192 (Notice of Imposition of Penalty).

Dr. Hsieh asked the Secretary for a waiver, saying the process "felt like begging. I felt like I had to reveal details of my personal life to make sure I wasn't dinged." J.A. 613 *ll* 16-18. Despite the otherwise voluminous information posted by the Secretary, she still "had no idea what constituted a reason for a waiver" and feared that, because CSG had no assets, she would be personally liable for a large fine. J.A. 613 *ll* 23-25; J.A. 614 *ll* 4-14. Dr. Hsieh described the time spent waiting for a waiver as "an anxious couple weeks." J.A. 614 *l* 15.

The Secretary's office ultimately granted the waiver. J.A. 199 (Letter of Waiver); J.A. 200 (Waiver Invoice).

III. CSG's First Amendment challenge to registration and reporting.

In 2012, CSG wanted to update and expand the policy paper, publish it to the general public, and purchase advertising to promote it. J.A. 14 ¶ 46. CSG planned to spend $3,500 or less on the paper: to pay the authors and fund design work, copy editing, flyer production, and online advertising. J.A. 14 ¶ 47; J.A. 577 ("CSG plans to spend no more than $3,500 to conduct all of the business of CSG, which includes publishing and distribut[ing] the 'personhood' paper and seed money to incentivize other authors and get intellectual projects off the ground") (quotation marks, citation omitted, punctuation altered). This time, however, it sought the protection of the U.S. District Court for the District of Colorado on First Amendment grounds, facially and as-applied. J.A. 9 ¶ 6. CSG also sought injunctive relief and attorneys' fees. J.A. 25 ¶¶ H-I.

Following the Colorado Supreme Court's dismissal of the District Court's Certified Questions of Law, the Personhood Movement was successful in gaining ballot access for a 2014 measure: Amendment 67. J.A. 542. CSG still wished to publish a new policy paper. J.A. 614 *ll* 19-20. The 2014 paper is longer—30,000 words compared to 23,000 in 2010—and has 200 citations. J.A. 614 *ll* 23-25. While the 2014 policy paper discussed Amendment 67 in Colorado, the paper also discusses the failed attempt to get Amendment 62 on the ballot, along with actions

in Mississippi and North Dakota. J.A. 615 *ll* 1-9. To write the paper, CSG again raised "right around $2,000" from donors. J.A. 615 *l* 21.

CSG therefore renewed its motion for injunctive relief, which was consolidated into a motion for a permanent injunction. J.A. 542.

A one-day trial was held October 3, 2014, and featured testimony from four witnesses. Dr. Hsieh was called by CSG. Fred Brown (a former *Denver Post* reporter), Secretary of State Election Division Legal Analyst Melissa Polk, and Secretary of State Campaign Finance Manager Stephen Bouey were called by the Secretary.

In its opinion, the District Court found that "under a technical reading of the law and after *Sampson*, CSG met the 'issue committee' test by virtue of its $200-$3,500 in annual contributions that it then uses to support the distribution of its policy paper." J.A. 574. While "CSG clearly exists independently of and in addition to its personhood paper, which is but one of its many advocacy issues," the District Court found that policy paper takes "most of CSG's modest financial dealings" and is above $200—triggering issue committee status. J.A. 575 n.7 (continued from 574).

Applying *Sampson*, the District Court found that CSG's activities "fall outside the scope of ballot issue committees to which Colorado's campaign finance disclosure laws may constitutionally apply." J.A. 569. Therefore the Secretary was

enjoined from enforcing Article XXVIII against CSG's planned activities. J.A. 579.

The Secretary subsequently and timely appealed.

Summary of the Argument

Sampson v. Buescher binds this Court "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015) (citations and emphasis omitted). Because *Sampson* was never reconsidered *en banc*, and the Secretary cites no superseding authority of the Supreme Court whatsoever, it remains good law.

Sampson applied exacting scrutiny, which required it to weigh Colorado's informational interest in the funders of political speech against the burdens imposed by compelled registration and disclosure. The first step was to interpret the scope of the informational interest as applied to speech concerning ballot measures. Noting that "[i]t is not obvious that there is such a public interest," this Court found that the Supreme Court's guidance on the matter suggested that "such disclosure has some value, but not that much." *Sampson*, 625 F.3d at 1256-57. That was particularly true in the case of Article XXVIII of the Colorado Constitution, which explicitly spoke only of "large" campaign contributions.

Comparing this minor governmental interest against the burdens placed on the *Sampson* plaintiffs, this Court found that Colorado's issue committee law failed

exacting scrutiny. Importantly, it did so not on the basis of organizational form, type of message, procedural posture, or any other highly-malleable construction. Rather, and sensibly, it focused only on the very slight "value of [the plaintiffs'] financial contributions." *Id*. at 1261.

The Secretary attempts to avoid the clear meaning of *Sampson* on a number of creative, but ultimately futile, grounds. While CSG is incorporated, that fact avails little where Colorado makes registration as a nonprofit corporation exceedingly easy and registration as an issue committee both risky and difficult. Similarly, while Colorado has improved its online filing system since *Sampson* was decided, those administrative changes do nothing to eliminate the absurd record-keeping obligations imposed by the Colorado Constitution, nor do they protect organizations from Colorado's affirmative decision to allow ideologically-motivated enforcement actions to be brought for the slightest violation of Colorado's complex election laws. The burdens experienced by the *Sampson* plaintiffs, and those experienced by CSG, stem from precisely the same, unchanged legal regime.

Consequently, the Secretary turns to a newly-minted standard: because CSG's policy paper has been widely read, and sometimes cited, the state has an interest in regulating it as "effective" political speech. No authority exists for this

vague and unbounded theory, which directly violates the dictates of the Supreme Court and was properly discounted by the District Court below.

But even if this Court wished to overturn *Sampson* or limit it to its facts, Colorado's effort to regulate CSG cannot withstand exacting scrutiny. Article XXVIII evidences no interest in lengthy scholarly work, nor are the funders of a white paper relevant where its authors are prominently featured on its cover and its intellectual bona fides proven by the extensive references contained in its 200 endnotes. Requiring such a group to register with the state, report the address of every vendor at which it buys postage stamps, track every contribution received along with contributors' addresses and employers, and run the risk of enforcement proceedings for the smallest hiccup, bears no resemblance to the state's minimal interest.

The District Court correctly applied *Sampson* and granted CSG narrow, as-applied relief. That decision should be affirmed.

Argument

I. Standard of Review

The Secretary correctly states the standard of review.

II. As the District Court properly recognized, this Court's decision in *Sampson v. Buescher* controls this case.

While CSG raised a number of constitutional objections to Colorado's compelled registration regime, the District Court granted relief only on CSG's

sixth and most narrow claim: that "under *Sampson*'s reasoning, [CSG's] expenditures are too small to trigger a public interest in CSG's registration or the disclosure of CSG's activities." J.A. 23 ¶ 97; J.A. 574-75 n.7 (noting that other claims "are well taken"). This case is consequently a straightforward application of *Sampson*'s holding that compelled registration is unconstitutional where "the financial burden of state regulation on [a plaintiff's] freedom of association approaches or exceeds the value of their financial contributions to their political effort…" *Sampson*, 625 F.3d at 1261.

On appeal, then, the Secretary has argued that *Sampson* should be set aside, or that CSG falls outside that case's protection. Both arguments are unavailing.

a. The Secretary provides no authority for overruling *Sampson*, which this Court has recently reaffirmed.

This panel, like the Secretary, is "bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *Barnes*, 776 F.3d at 1147 (citations and emphasis omitted).

In his argument for setting aside *Sampson*, the Secretary cites only Supreme Court cases that came *prior* to that decision. *See, e.g.* Op. Br. at 60 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)); *id*. at 61 (citing *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)); *id*. at 62 (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)). Notably, the *Sampson* Court recognized and applied both *Citizens United* and *Doe v. Reed*. *See Sampson*, 625 F.3d at 1255 (citing *Citizens United* and

applying *Doe v. Reed*'s mandate that "disclosure requirements in the electoral context" be subjected to exacting scrutiny).

The only post-*Sampson* ruling the Secretary supplies from this Circuit is *Citizens United v. Gessler*, which approvingly cited *Sampson* in its discussion of as-applied challenges. 773 F.3d 200, 219 (10th Cir. 2014) ("in *Sampson*…we held that Colorado disclosure requirements could not be imposed on a neighborhood organization opposing annexation to an adjacent town").

Moreover, *Citizens United v. Gessler* involved a completely different legal question.[6] Citizens United asked this Court to define the scope of the media exemption in Colorado as applied to new media outlets. *Gessler*, 773 F.3d at 209 ("[o]n the record before us, we hold that the First Amendment requires the Secretary to treat Citizens United the same as the exempted media"). *Sampson* never discussed the media exemption because the neighbors never claimed to be press entities. *See Sampson*, 625 F.3d at 1251 (describing plaintiffs' activities). Nor did *Citizens United* turn upon the burdens of issue committee status on small groups. The case is simply inapplicable.

Consequently, in the absence of superseding authority, *Sampson* is binding precedent.

[6] *Citizens United v. Gessler* is irrelevant to the Secretary's current appeal of the District Court's application of *Sampson*. But CSG also claimed the protections of Colorado's press exemption, and *Citizens United* would be highly relevant to that claim. J.A. 28-29.

b. *Sampson* weighed the minimal state interest in the activities of thinly-funded organizations against the substantial burdens imposed by Colorado upon issue committees.

Sampson centered on a small group of neighbors—six named plaintiffs—who organized a campaign against the annexation of their neighborhood by a neighboring town. *Sampson*, 625 F.3d at 1251. They engaged in two rounds of activity. The first consisted of email discussions, flyers, letters, and "No Annexation" signs charged at cost. *Id*. The second consisted of "signs… mail[ings] to all residents of Parker North…continued… discuss[ion] and debate [concerning] the issue on the Internet, and…a document opposing annexation [submitted to the town council]." *Id*. In total, their out-of-pocket costs were $782.02. *Id*. at 1252.

Sampson applied exacting scrutiny and weighed the State's informational interest against the burdens of compelled registration and reporting. *Sampson*, 625 F.3d at 1255. It began by noting that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010)); *compare Sampson*, 625 F.3d at 1255 *with* J.A. 575-76.

As part of that analysis, there as well as here, "it is essential to keep in mind that our concern is with ballot issues, not candidates. The legitimate reasons for regulating candidate campaigns apply only partially (or perhaps not at all) to ballot-issue campaigns." *Id*. *Sampson* recognized that the Supreme Court has

upheld, under exacting scrutiny, only one relevant state interest sufficient to justify mandatory disclosure: the informational interest "in knowing who is spending and receiving money to support or oppose a ballot issue." *Id*. at 1256.

But the *Sampson* Court noted that this interest is minimal because

> [i]t is not obvious that there is such a public interest. Candidate elections are, by definition, *ad hominem* affairs. The voter must evaluate a human being…In contrast, when a ballot issue is before the voter, the choice is whether to approve or disapprove of discrete governmental action…No human being is being evaluated.

Id. at1256-57. Consistent with this insight, "[t]he Supreme Court has sent a mixed message regarding the value of financial disclosure in a ballot-issue campaign. Perhaps its view can be summarized as 'such disclosure has some value, but not that much.'" *Id*. at 1257.

Having decided the theoretical weight of the informational interest, the Court then considered the actual interest asserted by Colorado's voters. Looking to Article XXVIII's preamble, this Court held that "[t]he people of the state of Colorado" were concerned with "*large campaign contributions* made to influence election outcomes." *Id*. at 1261 (quoting COLO. CONST. art. XXVIII § 1) (emphasis in *Sampson*).

Because the Colorado electorate declared—in the text of Article XXVIII itself—that *large* campaign contributions were the problem, the law's capture of

small organizations was not tailored to the state's interest. As the *Sampson* Court summarized:

> Here, the *financial burden* of state regulation on [the *Sampson* neighbors'] freedom of association approaches or exceeds the value of their *financial contributions* to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions.

Sampson, 625 F.3d at 1261 (emphasis supplied). *See also* Mem. Op. and Or. J.A. 572-73 (quoting and applying *Sampson*).

Exacting scrutiny asks about the fit between ends—the state interest—and means—the burdens state law imposes. In *Sampson*, this Court recognized that Colorado's informational interest has "little to do with a group of individuals who have together spent less than $1,000 on a campaign….", and specifically noted the $2,239.55 budget available to those plaintiffs. *Id.* at 1261 n. 5. Conversely, this Court specifically held that Colorado's reporting "burdens are substantial." *Id*. at 1259. Thus, the *Sampson* Court found that Article XXVIII fails exacting scrutiny, as applied, when an organization raises and spends "well below the line" of "tens of millions of dollars on ballot issues." *Id*. at 1261.

The Secretary is now in the awkward position of explaining why $2,239.55 (in 2006 dollars) is "well below th[at] line," but $2,000, or even $3,500 (in 2014 dollars) is not.

c. CSG is substantively similar to the *Sampson* neighbors.

Despite arguing that *Sampson*'s reasoning is flawed, the Secretary recognizes that, if *Sampson* is good law, then "the immediate question is whether, in fact, CSG shares enough relevant characteristics with the *Sampson* plaintiffs for the ruling in *Sampson* to control the outcome here." Op. Br. at 43.

Of course, as the District Court correctly held, *Sampson* concerned not an amorphous basket of "relevant characteristics," but rather whether the state's informational interest applied to organizations with meager financial resources. Here, CSG's minor financial resources—a maximum of $3,500—placed CSG in the same shoes as the *Sampson* plaintiffs. J.A. 578-79 ("CSG's ballot-issue advocacy, to the extent it renders it an 'issue committee' at all, is sufficiently like that of the *Sampson* neighbors that its obligation to comply with FCPA reporting requirements must be excused").

While the Secretary exaggerates the distinctions between CSG and the *Sampson* plaintiffs in an attempt to make *Sampson* a dead letter applicable only to its facts, *Sampson* cannot be read so narrowly.

i. CSG's corporate form is irrelevant to the applicability of *Sampson*.

The Secretary first attempts to distinguish CSG and the *Sampson* neighbors based upon CSG's corporate form. Op. Br. at 44. But the form of organization, or

lack thereof, was not a factor in *Sampson*'s analysis. Instead, what mattered was the size of the organization's "*financial contributions*," balanced against the burdens of registering and reporting as an issue committee. *Sampson*, 625 F.3d at 1261 (emphasis supplied).

To support his claim that CSG's incorporation is relevant, the Secretary quotes from *First Nat'l Bank v. Bellotti*: "[c]orporate advertising, unlike some methods of participation in political campaigns, *is likely to be highly visible*…" Op. Br. 51 (quoting 435 U.S. at 792 n. 32) (brackets and emphasis in the brief). This use of *Bellotti* is belied by that footnote's context, wherein the Court rejected a theory that "corporations are wealthy and powerful and their views may drown out other points of view" absent specific evidence, and explicitly noted that "the Constitution protects expression which is eloquent no less than that which is unconvincing." 435 U.S. at 789-90 (citation and quotations marks omitted). The "visibility" of the corporate advertising hypothesized in *Bellotti* was a function not of the corporate form, but of the resources the Court presumed were placed at the disposal of corporate directors. CSG has no such resources, which is in fact the point.

In fact, there are fewer people involved with CSG than participated in the *Sampson* struggle against annexation. *Sampson* involved six named plaintiffs, and the overall effort included eleven people. *Sampson*, 625 F.3d at 1251; J.A. 761 *ll* 4-

12. At the end of the day, CSG has only one principal—Dr. Hsieh—and she teamed up with one coauthor to write the policy paper giving rise to this suit. J.A. 589 *ll* 11-13; J.A. 594 *l* 18 (discussing coauthor).

Moreover, in 2010—just before *Sampson* was decided—the Supreme Court, in the context of a ban on corporate independent expenditures, specifically rejected distinctions based upon a speaker's corporate form. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech"). While a speech ban is stronger medicine than compelled disclosure, the Court roundly rejected the government's attempt to use the mere fact of incorporation as a basis for regulating speech. *See id*. at 347-56; *see also* Section II(c)(iii), *infra* (discussing Secretary's "effectiveness" standard).

CSG's corporate status is immaterial. It is just as small—or smaller—than the neighbors fighting annexation in *Sampson*. Even the Secretary's own expert noted that CSG is "a small group… [with] financing… certainly not of a level that suggests that any big money interests are involved." J.A. 699 ll 4-7 (Fred Brown direct examination). The Secretary's use of CSG's incorporation, especially in light of Colorado's choice to regulate nonprofit corporations far more lightly than it does issue committees, is unpersuasive.

ii. Filing one yearly corporate registration document is materially easier than filing multiple detailed campaign finance disclosure reports.

The time, energy, and financial investment required to maintain a Colorado nonprofit corporation is trivial compared to the registration and reporting required of issue committees. So while it may be literally true that, as the Secretary says, the "administrative burden" of campaign finance filing is "incremental" and "less substantial" because CSG is a corporation, that "incremental" burden is significant. Op. Br. at 52.

Dr. Hsieh's annual, 10 minute interaction with Colorado's nonprofit registration website is the only burden Colorado imposes upon CSG as a nonprofit corporation. J.A. 595 *l* 23 – J.A. 596 *l* 3. That visit merely requires verifying that the contact information of the registered agent—Dr. Hsieh—is unchanged, and paying a small registration fee. *Id*. This is all CSG's incorporation, as a practical matter, signifies.

Importantly, CSG's corporate status does not require Dr. Hsieh to keep specific records in specific formats. The Secretary glosses over the difference between corporate reporting and campaign finance reporting, noting only that Dr. Hsieh keeps records "with commercial bookkeeping software" in order to file taxes for income earned through CSG. Op. Br. at 45. But the Secretary ignores Dr. Hsieh's testimony that the records contained in her accounting software, Quicken,

do not include "enough information…for me to transfer over to the State [campaign finance] reporting" system. J.A. 674 *ll* 4-7.

Conversely, the burdens of Article XXVIII's mandated disclosure are significant. Once an organization has determined that it must register, and has navigated the TRACER system (with or without the help of the Secretary's library of webinars, 152 page campaign finance manual, and non-binding advisory hotline), the reporting itself is onerous.

As discussed *supra* at 5, Colorado requires CSG to document all incoming and outgoing funds, no matter how little is spent or contributed. C.R.S. § 1-45-108(1)(a). Dr. Hsieh testified that assembling the information to properly file a report with the Secretary took "one to two hours for every report." J.A. 609 *ll* 20-21; *cf* Op. Br. at 52-53. Dr. Hsieh then needed to laboriously copy and paste this information from her accounting software into TRACER. J.A. 610 *ll* 3-5; *cf* Op. Br. at 52-53. This is not simply a one-time affair; CSG must file *every two weeks* in the lead up to the election. C.R.S. § 1-45-108(2) (detailing issue committee reporting requirements); J.A. 1285 (2014 State Frequent Filing Calendar).

Furthermore, the record below establishes that Dr. Hsieh had trouble complying with Colorado's detailed mandates. For example, Dr. Hsieh described the difficulties she experienced in 2008 finding a post office's street address—all so she could disclose where CSG bought its stamps. J.A. 599 *ll* 14-19. In 2010, she

had to track down her donors' addresses, occupations, and employer data. J.A. 609 *ll* 8-15. Such record keeping was difficult to maintain. Moreover, Dr. Hsieh was required to spend additional time administering a separate bank account and a special PayPal account for CSG solely in order to comply with Colorado's campaign finance laws. J.A. 673 *ll* 13-15.

In response, the Secretary chides Dr. Hsieh for not using a special data importation feature of his proprietary TRACER software. Op. Br. at 53. But the Secretary, whose office works in and through TRACER every day, cannot expect the laity to have detailed knowledge of all shortcuts available. Nor did he prove that CSG's specific records were kept in a format allowing use of that function.

On the basis of this record, the District Court correctly found that Colorado's "reporting and disclosure requirements by their nature 'infringe on the right of association.'" J.A. 575 (quoting *Sampson*, 625 F.3d at 1255). In this application, "[d]etailed record-keeping and disclosure obligations impose administrative costs that many small entities may be unable to bear." J.A. 575 (internal citation and quotation marks omitted). These burdens are substantial, and entirely separate from the extremely minimal requirements Colorado imposes upon nonprofit corporations.

iii. The effectiveness or popularity of an organization's message is not a basis for compelling its registration.

The Secretary believes that the effectiveness or persuasiveness of a philosophical paper is a proper yardstick against which to measure the State's regulatory interest. Op. Br. at 50. The District Court was unpersuaded by this argument:

> The Secretary's point is perplexing: Is he suggesting that the effectiveness of political speech – the fact it resonates, generates interest, and is downloaded from the internet by individuals wanting to read it – somehow elevates or enervates the public's informational interest in its disclosure? The more vibrant the public discourse the more justified the burdening of the speech is? Surely not.

Mem. Op. and Or. J.A. 577. Nevertheless, on appeal, the Secretary claims that "the District Court was simply wrong to flatly reject the idea that 'the effectiveness of political speech'" is a constitutional standard. Op. Br. at 51-52.

There is no support for the "effectiveness of political speech" standard in Article XXVIII. The preamble declares Colorado's interest to be in "large *campaign contributions* to political candidates." COLO. CONST. art. XXVIII § 1 (emphasis supplied). Indeed, the preamble encourages citizen activity, and seeks to limit corporate expenditures because they are "not an indication of popular support." *Id*. If anything, an organization with popular support, as opposed to substantial financial resources, is precisely the sort of group Article XXVIII seeks to protect. Furthermore, Article XXVIII's definition of "issue committee" is not

delineated by some test of the effectiveness of the speech, but only that the group has *contributions or expenditures* of at least $200. COLO. CONST. art. XXVIII § 2(10)(a)(II).

Federal case law likewise does not support the Secretary's newly-created "effectiveness" standard. The Secretary's citation to *Bellotti* is, as explained *supra*, highly misleading. *See supra* at 30. And the Secretary's reliance upon *McIntyre v. Ohio Elections Comm'n*, as a case where the Supreme Court "spoke favorably of campaign finance disclosure," is curious. Op. Br. at 51 n.6 (citing 514 U.S. 334, 355 (1995)). That case ruled in *favor* of anonymous speech. It is also quite beside the point since the identities of the paper's producer—CSG—and authors—Dr. Hsieh and Ari Armstrong—appear on its cover. J.A. 43. The better authority is *FEC v. Wisconsin Right to Life*, which flatly stated that the proper standard for as-applied challenges must eschew "amorphous considerations of intent and effect." 551 U.S. 449, 469 (2007) (Roberts, C.J., controlling opinion).

As importantly, the Secretary's "effectiveness standard" has no limiting principle, as demonstrated by his many examples of "distribution" over which CSG had no control. Op. Br. at 50 (noting that policy paper was "featured in a national pro-choice voting guide" and "in local and national media outlets"). Under the Secretary's theory, if a *Colorado Law Review* article becomes influential, and discusses an issue that appears on the ballot, then Colorado may assert an

"informational interest" in any grants supporting the author's work.[7] The fact that CSG's thorough analysis of issues surrounding abortion and definitions of personhood are read and appreciated does not convert the organization into a campaign powerhouse that the State may regulate. It merely means that Dr. Hsieh and Ari Armstrong have done good and persuasive academic work.

The Secretary makes much of the number of times the policy paper has been downloaded and viewed, believing that this strengthens the state's informational interest. Op. Br. at 6-7; 50. But the District Court responded eloquently:

> It must be remembered by those older than Ms. Hsieh that the internet is the new soapbox; it is the new town square. CSG's "personhood" paper is Tom Paine's pamphlet. It is the quintessence of political speech.

Mem. Op. and Or. J.A. 577. The Internet has made viewing documents easier and allows small organizations to affordably disseminate their speech. Internet communications do not, however, become regulable just because they have been viewed by a wide audience. The Secretary has advanced no authority for this

[7] The *Colorado Law Review* routinely publishes articles dealing with issues before the Colorado electorate. For example, when several municipalities were considering bans on hydraulic fracturing (a.k.a. "fracking"), the journal published an article on fracking—complete with policy proposals. *Compare* Hannah J. Wiseman, *Risk and Response in Fracturing Policy*, 84 COLO. L. R. 729 (2013) *with* BOULDER DAILY CAMERA, *Boulder Ballot Question 2H: Oil and gas exploration moratorium extension*, Oct. 13, 2013, http://www.dailycamera.com/ boulder-election-news/ci_24301178/boulder-ballot-question-2h-oil-and-gas-exploration

breathtakingly broad proposition, nor any indication of when a communication becomes sufficiently "effective" to trigger this new standard.

Instead of regulating by popularity, this Circuit applies exacting scrutiny to see if the state's interest in a financially-small organization is sufficient to outweigh the burdens of campaign finance disclosure and reporting. *Sampson,* 625 F.3d at 1261. The Secretary attempts to avoid this controlling standard by creating a new paradigm, unmoored from the financial concerns present in Article XXVIII and *Sampson,* out of whole cloth.

iv. The form in which CSG received its contributions is not significant.

The Secretary believes that the use of "cash donations" to pay the authors of CSG's paper distinguishes *Sampson*. Op. Br. at 54. As a preliminary matter, this argument was never raised below, and is consequently waived. *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) (declining to entertain new arguments not raised at trial).

In any event, the Secretary is mistaken. The *Sampson* Court detailed the types of contributions at issue—including cash contributions: "[t]he cash contributions (made between September 2006 and April 2007) totaled $1,426…." *Sampson,* 625 F.3d at 1260 n.5. In briefing below, the Secretary recognized that *Sampson* dealt with cash contributions. *See, e.g.*, Sec. Br. in Opp. to Pl. Mot for Prelim. Inj. J.A. 280 ("the [*Sampson*] Plaintiffs' contributions and expenditures

were $2,239.55 and $1,992.37. (Namely $813.53 in in-kind contributions, plus $1,426 in cash contributions….")) (quoting Sec. Exhibit E, which is reproduced at J.A. 358.

Sampson never relied on any distinction between *types* of contributions. Instead, the *Sampson* Court looked to the total financial picture of the neighbors' effort. *Sampson*, 625 F.3d at 1261 (discussing amounts expended); *id.* at 1260 n. 5 (describing *Sampson* group's finances). This approach made sense: Colorado campaign finance laws draw no such distinction, regulating a wide variety of financial instruments, gifts, and loans. COLO. CONST. art. XXVIII § 2(5)(a). The State's out-of-circuit cases are not to the contrary; while each discussed the form contributions took, it was the low level—not the specific form—that was dispositive. The *Sampson* Court found that the state's informational interest did not justify the regulation of small organizations, full stop. *Id*. The Secretary's attempt to import an irrelevant distinction is not supported by the language of *Sampson* and is, in any event, not properly before this Court.

v. CSG is subject to substantially similar burdens to those placed upon the *Sampson* plaintiffs.

The Secretary notes that *Sampson* was based on the pre-TRACER reporting system and claims that "CSG cannot qualify for prospective relief based on the frustrations over an online system that [has] ceased to exist." Op. Br. at 58. But as already discussed, *supra*, Dr. Hsieh testified at length concerning the burdens of

reporting under both the old and new online reporting systems. *See, e.g.*, J.A. 599-601 (discussing 2008) and J.A. 609-14 (discussing 2010). CSG's claims are based both on the difficulty in using that system *and* the administrative burden of collecting and regularly disclosing detailed information in the first place.

The *Sampson* neighbors faced a difficult-to-use reporting system. Op. Br. at 57. While TRACER may be a better system than the *Sampson* plaintiffs encountered, "better" does not mean "easy," as demonstrated by Dr. Hsieh's experience in 2010. Nor does better software eliminate the need to thoroughly review hundreds of pages of guidance to ensure that a filer does not incorrectly report, and face punitive punishments of $50 a day. Likewise, an improved reporting system does not negate the organizational form, record keeping, and biweekly reporting required by Article XXVIII.

The Secretary notes that CSG, unlike the *Sampson* plaintiffs, was not subject to a complaint and administrative hearing, and appears to believe that only organizations that are actively attacked may assert as-applied First Amendment claims. Op. Br. at 58. Of course, if CSG has not had a complaint filed against it, that is largely a matter of chance: as established at trial, Dr. Hsieh specifically feared an ideological opponent's use of Colorado's complaint system. This was not an empty or speculative fear: she had heard of it happening to others. J.A. 601 – 602. Colorado's complaint process is a loaded weapon ready to be used by

ideological opponents at the slightest provocation. It was used in *Sampson*. 625 F.3d at 1251. It has been used against other organizations. *See, e.g.*, *Independence Inst. v. Coffman*, 209 P.3d 1130, 1134 (Colo. Ct. App. 2008). CSG need not wait for an enforcement proceeding, and the possibility that a federal forum will not be available, before asserting its First Amendment rights.[8]

Likewise, the penalties are substantial if an organization should have registered and does not do so. Fifty dollars per day per report compounds quickly. COLO. CONST. art. XXVIII § 10(2)(a). Given the need for multiple reports, CSG's financial resources would be exhausted in a matter of weeks, while obtaining counsel would bankrupt CSG in a few days. The secretary may grant a waiver of penalties, if he finds "good cause" to do so. COLO. CONST. art. XXVIII § 10(2)(c)(I); 8 COLO. CODE REGS. 1505-6 Rules 18.1.1. & 18.1.3. Unfortunately for CSG and other groups, "good cause" is not defined in Article XXVIII, the FCPA, or the Secretary's rules. J.A. 721 *ll* 4-20. CSG and similar groups are left at the Secretary's mercy.

Dr. Hsieh already faced such a penalty when her house flooded. J.A. 194; J.A. 611 *l* 8. She sought a waiver, but did not know if a flooded house constituted "good cause." J.A. 613 *ll* 23-25. This lack of clarity caused Dr. Hsieh to fear that,

[8] Moreover, since the Secretary strenuously argues that CSG must be forced to register with the State, it is reasonable to assume that the Secretary will himself bring an enforcement action in the event CSG fails to register and publishes a future paper that mentions a future ballot measure.

because CSG had no assets, she would be personally liable for a large fine. J.A. 614 *ll* 4-14. Indeed, Dr. Hsieh described the time of waiting for a waiver as "an anxious couple weeks." J.A. 614 *l* 15.

Finally, the Secretary suggests that it is significant that "Dr. Hsieh has been able to reach her fundraising goals" and "there is no evidence in the record to support a claim that complying with disclosure requirements harmed CSG's ability to distribute its advocacy." Op. Br. at 59. But Dr. Hsieh's perseverance does not negate the "imbalance…in Colorado['s]" campaign finance rules." Op. Br. at 59. An organization need not be cowed into silence in order to state a First Amendment objection to overly burdensome governmental regulation. *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) ("it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity") (quotation marks and citation omitted).

The Secretary attempts to avoid the binding effect of *Sampson*, which stated that a committee raising $2,239.55 could not be regulated. 625 F.3d at 1260 n. 5. He does this by inventing meaningless distinctions not contemplated by *Sampson* or supported by other authority. But even if *Sampson* did not control, he correctly concedes that "there is a constitutional need for some measure of proportionality

between the burden of reporting and the value that the electorate will derive from it." Op. Br. at 59. There is no such proportionality here.

III. Even without *Sampson*, Colorado's compelled registration and disclosure regime is unconstitutional as applied to CSG.

a. This Court must apply exacting scrutiny.

The Secretary argues that "[t]he District Court erred by declining to apply *Buckley*'s 'wholly without rationality' standard to Colorado's $200 threshold." Op. Br. at 26. This is incorrect, and stems from the Secretary's misreading of the relevant case law, including *Buckley*. Op. Br. at 27 (suggesting proper review is "much more deferential").

This case concerns the burdens issue committee status imposes upon CSG—including forcing the disclosure and publication of its supporters—as a result merely of raising and spending in excess of $200 on a policy paper. But the "wholly without rationality" language the Secretary invokes does not come from the *Buckley* Court's analysis of the burdens of PAC status. Nor does that phrase concern the monetary trigger for PAC status itself. It comes, instead, from the portion of the opinion addressing the monetary threshold at which a particular *contributor* would be disclosed. *Buckley*, 424 U.S. at 82-83. CSG's challenge concerns the need to register as an issue committee in the first place, not solely Colorado's $20 threshold for donor disclosure.

In such circumstances, *Buckley* is clear. In determining whether or not political committee status—with its attendant "significant encroachments on First Amendment rights"—may be demanded of an organization, the Court "required that the subordinating interests of the State *must* survive exacting scrutiny." *Buckley*, 424 U.S. at 64 (emphasis supplied). Once a state has successfully demonstrated that its reporting and disclosure regime properly applies to a speaker, then—and only then—does the government enjoy the privilege of defending the narrow particulars of recordkeeping under rational basis review. *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 139 (2d. Cir. 2014) (noting that "[t]he Ninth Circuit has applied a 'wholly without rationality' standard in evaluating a disclosure threshold, although it evaluated the overall scheme using an 'exacting scrutiny' standard") (citing *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031,1033-34 (9th Cir. 2009)). In arguing for rational basis here, the Secretary has placed the cart well ahead of the horse.[9]

[9] Furthermore, the *Buckley* Court, in a facial challenge, determined that it could "[]not say, *on this bare record*, that the limits designated are wholly without rationality." *Buckley*, 424 U.S. at 83 (emphasis supplied). Here there is a record, and it demonstrates that in these circumstances Colorado's disclosure limits are indeed "without rationality."

b. The Secretary has failed to demonstrate how a sufficiently important governmental interest justifies its reporting and disclosure regime as applied to CSG.

As discussed *supra*, this case presents a straightforward application of *Sampson*. J.A. 569 ("[a]pplying the standards articulated in *Sampson v. Buescher*…I find CSG falls outside the scope of ballot issue-committees…"). But even if this Court believes that CSG is not similarly situated to the *Sampson* plaintiffs, the Secretary must nonetheless demonstrate "a substantial relation between [Colorado's] disclosure requirement and a sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-67 (citing *Buckley*, 424 U.S. at 64, quotation marks omitted)). *See also Free Speech v. FEC*, 720 F.3d 788, 792-93 (10th Cir. 2013) (noting necessity of exacting scrutiny and collecting cases).

i. This Court's *Sampson* decision held that the State's informational interest, to the extent it exists at all, is minimal.

"The reporting and disclosure requirements for Colorado issue committees (at least those committees addressing ballot issues) must be justified [only] on…the informational interest." *Sampson*, 625 F.3d at 1256 (parentheses in original); J.A. 576 (same). The Secretary has failed to demonstrate that the informational interest applies to CSG.

The Secretary argues that "the District Court erred by forbidding the Secretary from requiring" regulation of CSG as an issue committee because "voters have a substantial informational interest in disclosure in the ballot initiative context, even at comparatively low levels of contributions and expenditures." Op. Br. at 31-32. But the Secretary has no authority from this Court or the Supreme Court for that proposition. *Sampson*, 625 F.3d at 1258 (the Supreme "Court has never upheld a disclosure provision for ballot-issue campaigns that has been presented to it for review"). Indeed, this Court has stated that "[i]t is not obvious" that there is *any* constitutionally appropriate "public interest in knowing who is spending and receiving money to support or oppose a ballot issue." *Id*. at 1256, J.A. 576 (same). At best, "financial disclosure in a ballot-issue campaign…'has some value, but not that much.'" *Sampson*, 625 F.3d at 1257.

In response, the Secretary insists that this Court's discussion of the State's informational interest is *dicta*. Op. Br. at 33. He is mistaken. Exacting scrutiny requires courts to balance the state's interest against the First Amendment burdens it imposes in pursuit of that interest. An articulation of the interest involved is a logical necessity. Consequently, that "the governmental interest in imposing th[e]se regulations is minimal, if not nonexistent," particularly "in light of the small size of the contributions," is central to *Sampson*'s holding. 625 F.3d at 1261. This binds both the Secretary and this Court. *Barnes*, 776 F.3d at 1147.

ii. As *Sampson* recognized, Article XXVIII itself articulates Colorado's informational interest, which does not extend to small committees or lengthy policy papers.

In examining the State's informational interest, the *Sampson* Court twice looked to the preambulatory language of Article XXVIII. *Sampson*, 625 F.3d at 1254, 1261. Colorado courts have similarly relied upon preambulatory language to determine the voters' intent in amending the state constitution. *See, e.g.*, *Senate Majority Fund*, 269 P.3d at 1253; *Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream*, 187 P.3d 1207, 1215-16 (Colo. Ct. App. 2008).[10]

The preamble to Article XXVIII provides a clear window into the intentions of the Colorado electorate. In passing Amendment 27 in 2002, Colorado's citizens wished to combat "large campaign contributions to political candidates [that] create the potential for corruption and the appearance of corruption," "the rising costs of campaigning," and certain "televised electioneering communications." COLO. CONST. art. XXVIII § 1. The preamble is devoid of any discussion of think tanks, policy papers, or groups spending small amounts on philosophical pursuits. *Id*. In fact, the preamble fails to even mention issue committees. Rather, it—perhaps not unexpectedly—indicates that voters intended to regulate TV ads funded by multi-million dollar organizations supporting or opposing candidates for

[10] This Court's practice, when interpreting a provision of the Colorado Constitution, is to look to the methods used by the state Supreme Court. *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 899 (10th Cir. 2006).

office. *See Sampson*, 625 F.3d at 1261 ("These expressed purposes have little to do with a group of individuals who have together spent less than $1,000 on a campaign [and]…$1,179 for attorney fees").

Nor does the preamble stand alone. When reading a citizen-adopted constitutional amendment "in light of the objective sought to be achieved and the mischief to be avoided," *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996), Colorado courts—and therefore this Court—may "consider[] other relevant materials such as…the biennial [Ballot Information Booklet, commonly known as the] 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature." *Senate Majority Fund*, 269 P.3d at 1256 (citation omitted).

The relevant "Bluebook" for 2002 contains an analysis of Amendment 27 (the ballot measure that became Article XXVIII), as well as arguments for and against its adoption. Legislative Council of the Colorado General Assembly, Res. Pub. No. 502-1, 2002 Ballot Information Booklet: Analysis of Statewide Ballot Issues at i, 1 (2002) ("Bluebook").[11] It details various proposals for reforming candidate contributions and candidate campaign spending, but only mentions the "regulat[ion] of ballot issue committees" last. *Id*. Despite thorough discussions of Amendment 27's expected effect on parties, PACs, and candidate-centric advertising, the Bluebook only mentions "issue committees" once—as part of a

[11] *Available at* http://www.law.du.edu/images/uploads/library/CLC/502-1.pdf.

long list of possible entities that must "disclose [the] occupation or employer" of persons "who contributes over $100." *Id*. at 1-5.

Moreover, the Bluebook's arguments for and against adoption of Amendment 27 lack any discussion of issue committees. Both sides discussed the regulation of candidate campaigns, the intervention of corporations and unions in "state races", and the need to tackle "big money" in politics. *Id*. at 5-7. Nowhere were voters warned of the need to regulate groups distributing policy papers or spending relatively small sums.

The Secretary provides a mostly speculative theory of the state's informational interest. But that interest was expressly articulated in Article XXVIII and in the accompanying Bluebook entries that guided citizens' votes. At no point was there any indication that voters intended to regulate groups like CSG. Consequently, and given that the Secretary has failed to provide any contemporaneous evidence to the contrary, this Court should limit the state's informational interest to the "large campaign contributions" that the people of Colorado "found and declared" to be relevant. COLO. CONST. art. XXVIII § 1.

iii. Colorado's informational interest is especially attenuated where, as here, the communication in question is a lengthy, signed academic work and not a brief, pseudonymous broadcast advertisement.

CSG's policy paper is a lengthy, scholarly work. At over 30,000 words, the 2014 version of the paper is substantially longer than the Constitution of the United

States, and nearly a third longer than Tom Paine's *Common Sense*. No court has ever extended the informational interest to such speech. Nor would the Secretary, but for a single sentence. *Supra* at 15-16.

The Secretary insists that public curiosity concerning campaign finance reports buttresses the informational interest. Op. Br. at 37-38 (discussing evidence that some people review issue committee filings). Specifically, the Secretary relies largely on the fact that 14 of the smallest issue committees during the 2011-2012 election cycle "compris[ing] only 0.2% of all issue committee spending…comprised 15.7% of total page views for issue committees." Op. Br. at 38. But very few individuals actually bother to look at this data—the page for Citizens for Colorado's Water, a 2012 cycle issue committee which raised over $2,100 in contributions, was viewed a mere 67 times. J.A. 1290. The Kutaka Rock Political Action Committee, a committee which raised and expended $5,000 during that cycle, received a mere *five* page views. *Id*. Moreover, the Secretary never provided any evidence that these page views were by Colorado residents, natural persons (as opposed to automated web crawlers), voters (as opposed to fundraising consultants and opposition researchers), or unique individuals (as opposed to a single person visiting the site multiple times). This is an extraordinarily thin evidentiary reed, and one properly discounted by the District Court.

The "informational interest" does not cover all "information" that may "interest" a few dozen members of the public. Such reasoning would permit the government "to require [organizations]…to disclose all kinds of demographic information [on their donors]…including the [contributor]'s race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships." *Sampson*, 625 F.3d at 1259 (quoting *Doe v. Reed*, 561 U.S. 186, 207 (2010) (Alito, J., concurring)). Rather, the informational interest extends to "the sources of [a] candidate's financial support" so as to "alert the voter to the interests to which a candidate is most likely to be responsive…in office." *Buckley*, 424 U.S. at 67. This interest cannot be said to exist in the same way for ballot measures, as this Court has recognized. *Sampson*, 625 F.3d at 1256 (citing *Buckley*, 424 U.S. at 67).

The Secretary contends, however, that disclosure of the policy paper's backers is necessary to ensure that voters "'consider…the source and credibility of the advocate.'" Op. Br. at 32 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978)). There may be a significant governmental interest in revealing that "'Republicans for Clean Air'…[which] spent $25 million" on broadcast advertisements "in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals [who were] brothers." *McConnell v. FEC*, 540 U.S. 93, 128 (2003). But that same interest cannot apply to the paper,

which is not misleadingly attributed. It is a work authored by Dr. Hsieh and Mr. Armstrong, "source[s]" whose "credibility" is a mere Google search away. Op. Br. at 53 (admitting that "CSG's principals certainly do not attempt to hide their identities"). Moreover, while a credibility determination may be necessary when evaluating a 30-second broadcast ad, a 30,000 word paper may be judged on the merits of its arguments. To the extent credibility is even at issue, it is conveyed not by a disclosure form buried on the Secretary's website, but by the extensive endnotes found in the paper itself.

Regardless, the State must do more than simply wave the flag of public curiosity, for "compelled disclosure…cannot be justified by a mere showing of…[the informational] interest." *Buckley*, 424 U.S. at 64. "In the First Amendment context, fit matters." *McCutcheon v. FEC*, 572 U.S. ____, ____, 134 S. Ct. 1434, 1456 (2014).

c. Article XXVIII is not properly tailored to Colorado's informational interest.

i. The substantial record in this case contains ample evidence that Colorado's issue committee registration and reporting regime is burdensome, but no evidence that that burden is proportional to a proper state interest.

Colorado's issue committee regulations are burdensome for CSG and small issue organizations like it. As this Court has determined, "campaign-disclosure statutes must survive exacting scrutiny. There must be a 'substantial relation'

between the requirement and a governmental interest that is sufficiently important to justify the burden on freedom of association." *Sampson*, 625 F.3d at 1261 (citations omitted). Here, the District Court had ample evidence upon which to conclude that CSG's particular activities were not of a scope or character sufficient to trigger Colorado's interest in compelled registration and disclosure.

As discussed at length *supra* at 6-8, cooperation with Colorado's registration and reporting system requires a filer to digest hundreds of pages of guidance and hours of webinars simply to establish a basic familiarity with the State's software. Reporting requires revealing to the Secretary the most minute details of a committee's activities, and Colorado's practice of imposing fines for even inadvertent omissions only raises the stakes for small groups. Worse yet, filers cannot rely on advice from the Secretary's own staff if they have a question about reporting or registration. The Secretary's protestations to the contrary, Colorado's system imposes significant costs on those who wish to exercise their First Amendment rights, and he has failed to "justify th[at] burden on freedom of association." *Sampson*, 625 F.3d at 1261.

Lawyers, especially those who practice election law, may not find Colorado's issue committee regime intimidating. Nevertheless, this case shows that normal people—the people who are actually *engaging* in issue speech, especially small, novice organizations like CSG—do. Non-lawyers are not trained to comply

with a complex legal regime comprised of multiple (sometimes far-flung) constitutional provisions, state statutes, and administrative regulations. This remains true even when they are aided by a manual 152 pages long, hours of webinars, and hotline advice that binds no one. *CTBC*, 277 P.3d at 936-937. Under such circumstances, the state's regime is plainly not tailored to any informational interest it might have in detailed information concerning the funding of CSG's modest, issue-focused activities.

ii. Colorado's enforcement mechanism chills speech by allowing for punitive, ideologically motivated administrative proceedings.

The Secretary attempts to distinguish *Sampson* based upon the absence of administrative enforcement in CSG's case. Op. Br. 58 (contrasting *Sampson* administrative complaint with CSG's procedural posture). Of course, given the provisions for private complaints and rights of action, an organization cannot know before speaking if it or its donors will face threats, harassment, or reprisals. But it is also relevant that Colorado's system is abused with sufficient regularity to chill speech.

As discussed *supra* at 8-10, Colorado's system divests the Secretary of traditional powers of prosecutorial discretion, instead implementing a complaint-driven system that provides a private right of action to any person who believes a violation has occurred.

Sampson, of course, is a perfect example of how this system is abused in practice. There, the pro-annexation committee used Article XXVIII § 9(2)(a) to initiate an investigation of the *Sampson* plaintiffs. *Sampson*, 625 F.3d at 1251. This compelled the Secretary to refer the matter to a state administrative law judge. *Id*. Once in the administrative courts, the pro-annexation committee subpoenaed their opponents' private financial data, and demanded that they cease all activity. *Id*. at 1252. After a one-day trial, the parties entered a stipulation ending the administrative process. *Id.* at 1253.

This is one lesson of *Sampson*—if that small group of neighbors could be dragged into court, so could anyone else. CSG's $3,500 budget is no less sufficient to defend against a complaint. And *amici*, who have followed this case closely, are precisely the groups that often bring such complaints. *See*, *e.g.*, *Senate Majority Fund*, 269 P.3d at 1252; *CTBC*, 277 P.3d at 933; *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1000 (Colo. 2004).

Unfortunately, the experiences of CSG and the neighbors in *Sampson* are hardly unique. For example, in 2005, the Independence Institute, a Colorado-based nonprofit think tank, published educational material on the fiscal impact of two budget referenda before the state electorate. *Independence Inst.*, 209 P.3d at 1134. "[A]n agent of…[the] issue committee promoting the adoption of statewide referenda… filed an administrative complaint with the Secretary of State." *Id*. The

administrative law judge eventually ruled in the Institute's favor, but only after holding a hearing and requiring the Institute to expend the resources necessary to defend itself. *Id*.

Dr. Hsieh faced the same concerns about retaliatory complaints when trying to report CSG's activity in 2008. At trial, Dr. Hsieh testified that she had heard that the "Yes on 48" leader was brought before the Colorado administrative courts—supposedly by opponents of that ballot measure—for failing to provide the addresses of contributors who gave $25. J.A. 601 *l* 23 – 602 *l* 14. She noted that this story caused her to fear similar treatment. J.A. 602 *ll* 20-22.

iii. The Secretary's out-of-circuit authorities are inapplicable to the District Court's as-applied ruling, which is based upon Colorado law, a controlling decision of this Circuit, and a voluminous record.

The Secretary claims that *Sampson* is out of step with "virtually unanimous" holdings of sister courts. Op. Br. at 34. Of course, *Sampson* is good law in *this* Court, and for good reason. *Sampson* was an as-applied ruling concerning the precise provision of Colorado law at issue here. *See Sampson*, 625 F.3d at 1249; J.A. at 569; *id*. at 579-80.

By contrast, the foreign cases the Secretary relies upon to, essentially, seek *Sampson*'s overruling, present starkly different facts than those faced by either the *Sampson* plaintiffs or CSG. Specifically, those cases contemplate distinct campaign finance regimes from other states, and do so primarily on facial

challenges involving large-budget broadcast advertisements—quite a departure from the policy paper at issue here. Thus, their persuasiveness pales in comparison to this Circuit's on-point *Sampson* decision.

For example, *Center for Individual Freedom v. Madigan* was a facial challenge to a complex Illinois law brought by an organization wishing to run television advertisements about candidates—a fixture of conventional politics. 697 F.3d 464, 471, 475 (7th Cir. 2012) ("This is not a case where a group has actually engaged in a particular form of speech that is subject to regulation and seeks to challenge the applicability of the law to itself…"). For that reason alone, *Madigan* is of limited use in this as-applied case. Moreover, to the extent that the *Madigan* plaintiff provided evidence of its proposed activity to the court, it planned to make "advertisements referring to incumbent officeholders *who were candidates*." *Madigan*, 697 F.3d at 471. Accordingly, this Court's cogent, on-point discussion of the government's informational interest in speech about ballot measures ought to control.

Worley v. Cruz-Bustillo is similarly inapposite. 717 F.3d 1238, 1240 (11th Cir. 2013). *Worley* centered on proposed radio ads (not lengthy, published white papers) and was a facial challenge to disclosure and disclaimer laws. *Worley*, 717 F.3d at 1249-1250 ("[b]ased on the record we do have, we consider this challenge

to Florida PAC regulations to be a facial challenge"). Here, six volumes of a Joint Appendix clearly support an as-applied remedy.

The Secretary's citation to *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010) is unhelpful. Human Life sought to run four different 30-second radio communications. Moreover, the Ninth Circuit stated, in *dicta*, that if Human Life's message had been about a candidate, as opposed to a ballot measure, it would have been *more* deserving of constitutional protection. *Human Life*, 624 F.3d at 1018. That is not the law in this Circuit.

The Secretary also relies upon yet another Ninth Circuit case, *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). *Canyon Ferry* was a challenge brought by a church that, *inter alia*, allowed its copier to be used to produce flyers in support of a state constitutional amendment. As a result, Montana declared the church an "incidental" PAC. The Secretary suggests that *Canyon Ferry* stands for the principle that "that there is a bright line between the informational value associated with *de minimis* in-kind contributions and monetary contributions of any size." Op. Br. at 55.

To the contrary, *Sampson* itself quoted *Canyon Ferry* to emphasize that "[a]s a matter of common sense, the value of [] *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." *Sampson*, 625 F.3d at 1260 (quoting *Canyon Ferry*, 556 F.3d at

1033) (emphasis in *Sampson*). The *Canyon Ferry* court also specifically stated that it "[could] not say that the informational value derived by the citizenry is the same across expenditures of all sizes." *Canyon Ferry*, 556 F.3d at 1033; *id*. ("[a]s the monetary value of an expenditure in support of a ballot issue approaches zero, financial sponsorship fades into support and then into mere sympathy").[12] The case simply cannot bear the weight the Secretary places upon it.

Finally, the Secretary's First Circuit authorities are also distinguishable. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 49 (1st Cir. 2011) ("*McKee I*") is an opinion principally about the regulation of speech about *candidates*. *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 39 (1st Cir. 2012) ("*McKee II*") is also, inapposite. While *McKee II is* a case about committees organized to speak about ballot measures, Maine's regulation of ballot measure committees differs substantially from Colorado's. In Maine, regulation is tied to the expenditure or receipt of $5,000—the exact figure that Secretary Gessler sought to apply to issue committees following this Court's ruling in *Sampson*. *McKee II*, 669 F.3d at 37.

[12] The Secretary also points to a follow-on district court case, *Nat'l Ass'n for Gun Rights, Inc. v. Murry*, 969 F. Supp. 2d 1262 (D. Mt. 2013), which found a zero-dollar disclosure threshold for PACs to be constitutional. But *Murry* was a *facial* constitutional challenge brought by a § 501(c)(4) organization with "1.8 million members in the United States" and an "anticipated budget for 2012 [of] $5 to 6 *million*." 969 F. Supp. 2d at 1264 (emphasis supplied). Moreover, the *Murry* plaintiff sought to conduct $20,000 worth of direct mail activities criticizing a candidate for governor's record on the Second Amendment. *Id*. at 1264-1265.

The District Court granted relief to CSG on the narrowest possible grounds: an as-applied exception based upon an extensive record detailing the burdens Colorado placed upon a small, poorly-financed philosophical group for including a single sentence in a 30,000 word paper. With that record in mind, attempting to use CSG's case as an avenue to overrule *Sampson*—based upon other courts' analyses of other states' laws—should be denied.

iv. Facial relief is unnecessary, but not inappropriate.

This Court need not invalidate the Colorado Constitution to uphold the ruling below. Indeed, in *Sampson*, this Court concluded that "[w]e do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures." 625 F.3d at 1261. It is enough that "[t]he case before us is quite unlike ones involving the expenditure of tens of millions of dollars on ballot issues presenting 'complex policy proposals.'" *Id.* (citing *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003)). In both CSG's case and *Sampson*, the relevant "contributions and expenditures are well below the line." *Id.*

However, to the extent the Secretary requests facial invalidation of the $200 trigger for Colorado issue committees, CSG pled a facial challenge to that provision, and does not object. J.A. 9 ¶ 6; *cf id.* at 23 ¶¶ 96-97.

Conclusion

A clear, recent decision of this Court compels the conclusion that Colorado may not require CSG to register and report as an issue committee based upon the publication of its policy paper.

Request for Oral Argument

Pursuant to Federal Rule of Appellate Procedure 34 and Tenth Circuit Rule 28.2(C)(4), Appellee Coalition for Secular Government concurs in the Secretary's reasoned request for oral argument.

Respectfully submitted this 30th day of March, 2015.

/s/ Allen Dickerson
Allen Dickerson
Tyler Martinez
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org

Counsel for Plaintiff-Appellee

Certificate of Length and Typeface Compliance

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 13,819 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: March 30, 2015

/s/ Allen Dickerson
Allen Dickerson

Certificate on Privacy Redaction

I certify that there is no information required to be redacted pursuant to Federal Rule of Appellate Procedure 25(a)(5) and 10th Circuit Rule 25.5.

Dated: March 30, 2015

/s/ Allen Dickerson
Allen Dickerson

Certificate of Digital Submission

Pursuant to the 10th Circuit *ECF User Manual* § II(I)(b) (5th ed.), I hereby certify that the printed copies delivered to the Clerk are exact copies of the PDF version of the document filed in CM/ECF.

Dated: March 30, 2015

/s/ Allen Dickerson
Allen Dickerson

Certificate of Anti-Virus Scan

Pursuant to the 10th Circuit *ECF User Manual* § II(I)(c) (5th ed.), I hereby certify that I have scanned for viruses in the filed PDF version of the foregoing document, using AVG Anti-Virus, Version 2014.0.4800, updated March 30th, 2015. According to that program, the document was free of viruses.

Dated: March 30, 2015

/s/ Allen Dickerson
Allen Dickerson

Certificate of Service

I hereby certify that on March 30, 2015, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Frederick R. Yarger	fred.yarger@state.co.us
Matthew D. Grove	matt.grove@state.co.us
Sueanna P. Johnson	sueanna.johnson@state.co.us
Kathleen Spalding	kit.spalding@state.co.us
LeeAnn Morrill	leeann.morrill@state.co.us
Melody Mirbaba	melody.mirbaba@state.co.us
Jonathan P. Fero	jon.fero@state.co.us
Margaret G. Perl	pperl@coloradoforethics.org
Luis Angel Toro	ltoro@coloradoforethics.org
Benjamin J. Larson	blarson@irelandstapleton.com

/s/ Allen Dickerson
Allen Dickerson