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. 12-cv-1708 (Kane, J.)

APPELLANT'S REPLY BRIEF

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April 30, 2015

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CSG suggests that this appeal represents little more than an attempt by the Secretary to relitigate *Sampson v. Buescher,* 625 F.3d 1247 (10th Cir. 2010). To the contrary, the Secretary freely acknowledges that *Sampson* is binding precedent. But because it was an explicitly narrow, as-applied ruling, *Sampson*'s outcome controls future cases only to the extent that they arise in a "similar context." *See Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011 (1992) (Scalia, J. dissenting from denial of certiorari). And because a unique, and uniquely problematic, set of circumstances animated this Court's opinion in *Sampson*, its binding precedential effect is not nearly so broad as CSG suggests. Indeed, the factual circumstances of CSG's political activity do not arise in a "similar context" to the *Sampson* plaintiffs at all.

ARGUMENT

I. *Sampson*'s narrow, as-applied ruling does not control the outcome here.

The district court believed that the relevant context in *Sampson* was money, and money alone. Echoing that interpretation, CSG asserts that because its budget can be measured on the same scale as that of the *Sampson* plaintiffs, the district court was correct to look no further

than *Sampson*'s discussion of small-group financing. *Ans. Br.* at 29 ("Here, CSG's minor financial resources—a maximum of $3,500—placed CSG in the same shoes as the *Sampson* plaintiffs."). As a result, CSG makes little effort to compare the context in which its claims arose to the context of *Sampson*. Instead, CSG addresses at length the burdens associated with its own reporting, attempts to minimize the record-keeping requirements associated with its corporate status, and suggests that the Secretary's efforts to ensure clarity for political speakers demonstrate that Colorado's campaign finance reporting scheme is overly complex. *Ans. Br.* at 29-42.

The first two of these arguments have little comparative value. CSG faces the same burdens as any other small for-profit corporation; the *Sampson* plaintiffs, meanwhile, did not incorporate, nor did they seek to derive income from their advocacy. CSG's last point is a straightforward Catch-22. To wit: in *Sampson*, this Court sharply criticized the lack of quality guidance that the Secretary provided to "the average citizen." 625 F.3d at 1260-61. That the Secretary responded by substantially improving and expanding upon informational materials and upgrading TRACER should not now be the

basis for questioning the constitutionality of the underlying reporting and disclosure system.

But to CSG, saddling the Secretary with just one paradox is insufficient. Attempting to downplay the importance of its status as a corporation, CSG emphasizes the ease of the required paperwork, arguing that the "annual, 10 minute interaction with Colorado's nonprofit registration website" pales in comparison to the burdens of campaign finance reporting. *Ans. Br.* at 33. CSG's position is puzzling—indeed, it implies that if Colorado simply made its corporate registration process *more* demanding, then CSG's First Amendment argument would be substantially weakened as a result. But that is not only obviously wrong, it also misses the point. CSG's nonprofit corporate status matters because it demonstrates a higher level of organization than the *Sampson* plaintiffs ever demonstrated. CSG does not need to start from scratch to keep books for its political fundraising and expenditures. Responsible corporate citizenship dictates that it should already do so, and Dr. Hsieh's testimony at trial confirmed that this was the case. In this sense, CSG's claims do not arise in a similar context to *Sampson*.

Finances aside, CSG's other attempts to draw at least some parallels between itself and the *Sampson* plaintiffs fare little better. CSG suggests, for example, that the electorate's informational interest is attenuated by the fact that the policy paper is signed by "sources whose credibility is a mere Google search away." *Ans. Br.* at 52 (quotations omitted). In other words, CSG emphasizes that its speech, like that of the *Sampson* plaintiffs, is not anonymous. While this may be technically accurate, it is incomplete. Because the *Sampson* neighbors collected no money—instead relying entirely on in-kind contributions pooled by members of the group—there is no possibility that their views were influenced by the financial contributions of others. The authors of CSG's policy paper, by contrast, actively solicit outside contributions to underwrite their advocacy. And although CSG's policy paper identifies its authors, it does not disclose either the fact that they are paid advocates or the sources of their funding, both of which are relevant to a reader's evaluation of the arguments presented.[1] One

[1] CSG suggests that its paper should be viewed as more of an "academic work" than political advocacy. Ans. Br. at 49-50. But academic journals typically require disclosure of funding sources as a condition of publication. *See, e.g.,* *Disclosure Policy, The Journal of Law and*

(*continued on next page*)

small corporation's voluntary disclosure of some information associated with its advocacy does not make disclosure unnecessary for all.

CSG also relies heavily on Dr. Hsieh's difficulties in familiarizing herself with the campaign finance system and reporting requirements in 2008. *Ans. Br.* at 34. The *Sampson* plaintiffs had many of the same problems. 671 F.3d at 1260-61. But this case concerns prospective relief in *2014*; the substantial improvements in the TRACER system and the guidance available to political speakers during the intervening six years—facts which were undisputed at trial—render Dr. Hsieh's earlier experiences irrelevant.

Tacitly acknowledging this difficulty, CSG hastens to add that it is concerned not only with the mechanics of reporting itself, but also with "the administrative burden of collecting and regularly disclosing detailed information in the first place," as well as the prospect that it could face the "loaded weapon" of an ideologically motivated

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Economics (University of Chicago Press) http://tinyurl.com/mmmz4j3 (visited April 29, 2015) ("(1) Every submitted article should state the sources of financial support for the particular research it describes. If none, that fact should be stated. Failure to disclose relevant information at the submission stage may result in reversal of acceptance decisions.")

administrative complaint should it fail to comply with the applicable reporting and disclosure requirements. *Ans. Br.* at 40. As noted above, however, CSG's corporate form already requires it to collect much of the information that must be disclosed, thereby lessening its incremental burden to a substantial degree. And no matter how colorfully CSG describes the private enforcement system, its as-applied challenge is not based on circumstances that were anything like those created by the litigious campaign finance complainants in *Sampson*.

CSG's concentration on the balance between the public interest in disclosure and the administrative burdens of compliance only reinforces the fact that this case is not about the similarities to *Sampson*. Instead, because CSG neither demonstrated any substantial similarity to the *Sampson* plaintiffs nor proved any burdens unique to its own situation, this case is simply about whether the First Amendment will tolerate Colorado's $200 reporting threshold for *any group* in *Sampson*'s wake. The Secretary maintains that Colorado's reporting threshold passes constitutional muster, particularly for groups like CSG that engage in sophisticated nationwide fundraising efforts in order to widely disseminate their opposition to statewide ballot measures.

II. Colorado's reporting threshold is not "wholly without rationality," either facially or as-applied to CSG.

CSG argues that exacting scrutiny (and not *Buckley*'s "wholly without rationality" standard) must apply because this case is about "whether or not political committee status—with its attendant 'significant encroachments on First Amendment rights'—may be demanded of an organization [like CSG]." *Ans. Br.* at 44 (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). Nonetheless, CSG concedes that while a challenge to the state's overall scheme should be evaluated under exacting scrutiny, the "wholly without rationality" standard applies to narrower challenges that are focused on disclosure thresholds. *Ans. Br.* at 44 (citing *Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 139 (2d Cir. 2014); *Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1031, 1033-34 (9th Cir. 2009)). CSG thus claims that its challenge should be construed as one to the overall disclosure scheme, rather than as one that concentrates on the disclosure threshold.

CSG's attempt to recast and broaden its position, however, is inconsistent with its own argument that it should prevail solely because

Colorado's disclosure threshold is too low. *Ans. Br.* at 29. ("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."). While CSG may have originally challenged several different aspects of Colorado's campaign finance system, the evidence presented at trial, along with the district court's opinion, leaves no doubt that both CSG and the lower court were concerned almost exclusively about the constitutionality of the $200 threshold. J.A. 578. Yet despite this narrow focus, the district court refused to apply *Buckley*'s deferential standard to that question. This runs counter not only to *Buckley* itself, but also to similar analyses conducted by the First, Second, and Ninth Circuits, as well as several other state and federal courts. Each of these cases has applied the "wholly without rationality" standard to a disclosure threshold independent of any broader analysis of the registration requirement at issue. *See, e.g., Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2011); *Vt. Right to Life Comm.*, 758 F.3d. at 133; *Nat'l Org. for Marriage v. McKee*, 649

F.3d 34, 60 (1st Cir. 2011); *Joint Heirs Fellowship Church v. Ashley*, 45 F.Supp.3d 597, 628 (S.D. Tex. 2014). [2]

III. Colorado's $200 threshold is constitutional, both facially and as-applied to CSG's circumstances.

"In for a calf is not always in for a cow." *McIntyre v. Ohio Election's Comm'n*, 514 U.S. 334, 358 (1995) (Ginsburg, J., concurring). In *McIntyre*, the Supreme Court found "inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name." *Id.* As a loosely organized community group that did not solicit outside cash donations, and whose members instead pooled their resources and talents to advocate largely face-to-face on an issue of

[2] Other circuits have acknowledged the potential applicability of the "wholly without rationality" standard, but have deemed it unnecessary to reach the question, instead affirming the constitutionality of disclosure thresholds similar to Colorado's after applying exacting scrutiny. *Justice v. Hosemann*, 771 F.3d 285, 300 n.13 (5th Cir. 2014) (declining to "consider whether the $200 threshold is subject to exacting scrutiny or the much lighter 'wholly without merit' standard of review" because "Mississippi's calibrated reporting and itemization requirements for committees engaged in campaigns related to constitutional amendments survive First Amendment scrutiny at most levels"); *Worley v. Fla. Sec'y of. State*, 717 F.3d 1238, 1251 (11th Cir. 2013) (finding "wholly without rationality" standard "instructive," but nonetheless upholding $500 disclosure threshold under exacting scrutiny).

purely local concern, the *Sampson* plaintiffs shared many of Mrs. McIntyre's attributes.

For CSG, however, any purported similarities between itself and the *Sampson* plaintiffs end with the relatively modest financial wherewithal of each group. In contrast to the circumstances in *Sampson*, CSG's advocacy has not focused on a single initiative of local concern; rather, it is a repeat player on statewide issues that attract millions of votes. It does not rely on face-to-face communications for the bulk of its political efforts, but instead distributes its express advocacy in writing to tens of thousands of voters statewide. And perhaps most importantly, CSG does not rely on in-kind donations from a few members of an easily identifiable group; instead, it solicits monetary donations as part of a nationwide fundraising campaign and pays its authors with the money raised. Those contributions and expenditures amount to several multiples of the amount that this Court determined was "well below the line" for the *Sampson* plaintiffs. 625 F.3d at 1261.

CSG insists that the relevant figure from *Sampson* was $2,239.55, which was the amount spent by the plaintiffs on both their advocacy *and* their defense to the campaign finance complaint. *Ans. Br.* at 28.

But the campaign finance complaint underlying *Sampson*'s First Amendment challenge was based on their in-kind expenditures of $782.02. The *Sampson* plaintiffs hired an attorney to defend themselves—and contributed their own money to do so—only after a campaign finance complaint was filed. As *Sampson* itself held, the Court was concerned with the fact that the challenged law required disclosure despite the fact that the plaintiffs "spent less than $1,000 on a campaign (*not including $1,179 for attorney fees*)." 625 F.3d at 1261 (emphasis added). Thus, the Court found it significant that "the financial burden of state regulation" on the *Sampson* plaintiffs "approach[ed] or exceed[ed] the value of their financial contributions to their political effort." *Id.* CSG made no similar showing of the costs of its compliance. Notwithstanding CSG's attempt to sweep in all of the *Sampson* plaintiffs' spending, the *Sampson* opinion itself shows that the relevant figure was only the amount that was spent before the campaign finance complaint was filed. For CSG, that number is significantly higher—$3,500, according to the district court's ruling.

While agreeing with the Court's holding in *McIntyre*, Justice Ginsburg's concurrence expressly acknowledged that "larger

circumstances" may justify the state's interest in disclosure. 514 U.S. at 358. This case squarely presents such larger circumstances. To borrow a metaphor, in for the *Sampson* calf is not in for the cow; that case does not stand for the notion that a $200 reporting threshold for issue committees is wholly without rationality as applied to every political speaker. Unlike the *Sampson* neighbors, CSG is marketing to the entire herd (each and every year personhood appears on the ballot) and using a level of financial resources that every other circuit considering the question has deemed reportable. *Buckley* acknowledged that states should be accorded substantial deference when it comes to drawing the disclosure line, and lower courts have consistently recognized that while that deference is not unlimited, it is "appropriate when, as here, the state's thresholds are comparable to those in other states." *Family PAC*, 685 F.3d at 811.

As the opening brief demonstrated, Colorado's $200 threshold for issue committee registration falls somewhere in the middle of the many states that have disclosure requirements for spending on ballot issue advocacy. Some states have certainly chosen, as a policy matter, to set their thresholds higher. But many others—including some with very

large populations—have drawn the line at levels equivalent to, or even lower than, Colorado's. The first group includes, for example, Maine and Illinois, which both require disclosure once expenditures reach $5,000.[3] In addition to those cited in footnote 4 of the opening brief, states with equivalent disclosure thresholds include Arkansas ($500),[4] Florida ($500),[5] Idaho ($500),[6] Mississippi ($200),[7] Missouri ($500),[8] Montana ($500),[9] North Dakota ($100),[10] Oklahoma ($500),[11] South Dakota ($100),[12] Utah (receipt of $750 or expenditure of $50),[13] and Wyoming ($0).[14]

Three of these states are within the Tenth Circuit; affirming the district court's opinion, and thereby affirming its expansion of *Sampson*'s reasoning, would effectively invalidate those other state

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[3] 21-A Me. Rev. Stat. § 1056-B; 10 ILCS 5/9-10; 10 ILCS 5/9-1.8(e).
[4] Ark.Code Ann. § 7-9-406.
[5] Fla. Stat. § 106.011(16)(a).
[6] Idaho Code §§ 67-6602(p)(2); 67-6607(a)(1) .
[7] Miss. Code Ann. §§ 23-15-801(c); 23-15-807(d)(i) .
[8] R.S.Mo §§ 130.046(3.),130.046(5.)(2).
[9] Mont. Code Ann. §§ 13-37-225(1),13-37-226(4).
[10] N.D. Cent. Code, § 16.1-08.1-03.1(1).
[11] 74 Okl. St. Chap. 62, Appx., 257:10-1-11(a); 257:10-1-13(a)(1).
[12] S.D. Codified Laws §§ 12-27-3; 12-27-16; .
[13] Utah Code Ann. § 20A-11-802.
[14] Wyo. Stat. § 22-25-106(b).

laws. Equally troubling is the fact that expanding *Sampson* in the manner that CSG suggests would set the Tenth Circuit apart from the several other circuits that have already rejected challenges very similar to this one. Although CSG attempts to distinguish this case from *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1240 (11th Cir. 2013), and *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010), among others, the reasoning in those cases did not turn on the type of communications or the ultimate fundraising goals of those groups.

Moreover, CSG simply ignores several other cases that it is apparently unable to distinguish, including the Fifth Circuit's opinion in *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014). *See also ProtectMarriage.com v. Bowen*, 830 F.Supp.2d 914, 933-34 (E.D. Cal. 2011), *aff'd* 752 F.3d 827 (9th Cir. 2014). And CSG overlooks the fact that notwithstanding their particular circumstances, many of the cases that it identified either distinguished *Sampson* or expressly declined to follow it. *See Worley*, 717 F.3d at 1248-49; *Center for Ind. Freedom v. Madigan*, 697 F.3d 464, 482 (7th Cir. 2012).

IV. This Court should at minimum clarify whether the Secretary and prospective issue committees must continue to litigate Colorado's $200 threshold.

CSG claims that this case was resolved "on the narrowest possible grounds[.]" *Ans. Br.* at 60. The district court's opinion, however, makes clear that its holding was anything but narrow. Far from tailoring an as-applied exception for CSG's particular circumstances, the district court based its holding solely on CSG's income. It plainly indicated that its reasoning was applicable across the board, warning that "the Secretary will be on the hook for fees every time a group, like CSG, falls under the $200 trigger for issue committee status and has to sue to vindicate its First Amendment rights." J.A. 570.

The district court erred by rendering judgment in favor of CSG when Colorado's threshold amount for ballot issue committees is not "wholly without rationality" and CSG demonstrated no material similarities to the *Sampson* plaintiffs. The district court compounded its error by failing to recognize the broad impact that its purportedly "as-applied" analysis would have.

Certainly the district court's ruling does not provide clarity for future political speakers, who will continue to have to file as-applied

suits in order to discern whether or not they must disclose. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 329 (2010). Case-by-case adjudications are unworkable for the Secretary as well. The Colorado Supreme Court has forbidden the Secretary from adjusting Colorado's reporting requirements in response to an as-applied ruling. *See Gessler v. Colo. Common Cause,* 327 P.3d 232 (Colo. 2014). Thus, by declaring that the Secretary will be "on the hook for fees" for enforcing a provision that he cannot ignore and cannot amend, the district court's order threatens to leave substantial portions of Colorado campaign finance law both unclear for political speakers and impossible for the state government to administer.

If this Court agrees with the district court that CSG cannot be constitutionally required to comply with Colorado's campaign finance laws, then it should also make clear that "the breadth of the remedy employed" bars Colorado from requiring disclosures for any major purpose group of CSG's size. *Citizens United*, 558 U.S. at 331. Given that the district court's ruling turned only on the amount of money raised and spent, it is plain that anyone spending less than $3,500—regardless of the type of election or the nature of the group's express

advocacy—would be able to rely on this case to demand an exemption similar to CSG's. Thus, the "claim and the relief that would follow" from affirming the district court's opinion would "reach beyond [CSG's] particular circumstances." *Doe v. Reed*, 561 U.S. 186, 194 (2010). If CSG indeed "satisf[ied] [the] standards for a facial challenge to the extent of that reach," *id.*, then this Court should make that point clear in its opinion, not only to provide the clarity that the First Amendment requires, but also to ensure that the Secretary is able to exercise his authority in a manner that is consistent with constitutional requirements.

CONCLUSION

The Secretary respectfully requests that this Court reverse the ruling of the district court.

Respectfully submitted this 30th day of April, 2015.

* * *

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **APPELLANT'S REPLY BRIEF** upon all parties through ECF or as indicated below at Denver, Colorado, this 30th day of April, 2015 .

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s/ *Matthew D. Grove*
Dated April 30, 2015

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Dated: April 30, 2015