IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-00138-RM-CBS

TAMMY HOLLAND,

Plaintiff,

v.

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

Defendant.

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CENTER FOR COMPETITIVE POLITICS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Center for Competitive Politics files this motion for leave to file a brief *Amicus Curiae* in opposition to Defendant's motion to dismiss.

The Center for Competitive Politics is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. The Center was counsel to the plaintiff in *Coal. for Secular Gov't v. Williams*, __ F.3d __, 2016 WL 814814 (10th Cir. Mar. 2, 2016), and co-counsel in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

Amicus believes that this brief will assist this court by highlighting that the Supreme Court has repeatedly recognized that overly burdensome enforcement procedures can make an otherwise permissible speech restriction unconstitutional. This brief will also aid this court by discussing how the private enforcement procedure in Colorado's campaign finance laws burdens protected speech.

Counsel for the Center has conferred with both parties about their consent to the filing of the attached brief; both parties have no objection.

DATED: April 10, 2016

Respectfully Submitted,

By: s/ Eugene Volokh
Counsel for *Amicus Curiae*

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* Counsel would like to thank Artin Afkhami, Ian Daily, and Eric Sefton, UCLA School of Law students who worked on this brief.

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INTEREST OF *AMICUS CURIAE*

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. The Center was counsel to the plaintiff in *Coal. for Secular Gov't v. Williams*, __ F.3d __, 2016 WL 814814 (10th Cir. Mar. 2, 2016), and co-counsel in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

SUMMARY OF ARGUMENT

Colorado law authorizes private citizens to bring campaign finance enforcement actions. Anyone—including a speaker's political opponents—can allege a violation and trigger the adjudicative process; Colorado's Secretary of State is legally obligated to forward these private complaints for legal proceedings. Thus, anyone can force a speaker into an administrative proceeding, with all the accompanying time, effort, worry, and expense, simply by filing a complaint.

The Supreme Court has recognized that even substantively constitutional speech restrictions are unconstitutional when their enforcement procedures unnecessarily burden protected speech. Federal judges have specifically applied this general rule to private enforcement provisions burdening speech. And the logic of those arguments

equally applies to Colorado's private enforcement scheme for campaign finance violations.

Consider, for instance, the experience of plaintiff Tammy Holland. Holland bought ads in a local newspaper urging members of her community to educate themselves about all the candidates running in an upcoming school-board election. Compl. ¶¶ 14-17. In retaliation, the superintendent of the school district filed a complaint alleging that Holland violated campaign finance law by failing to register as a political committee or include disclaimers on her ads. *Id.* ¶¶ 37, 39. Holland was forced to hire an attorney and prepare her defense, but at the last minute, the superintendent withdrew his complaint. *Id.* ¶¶ 43, 45.

But that did not end her ordeal. After Holland requested attorneys' fees from the school district, another sitting school official retaliated a second time by refiling the initial complaint. *Id.* ¶¶ 47-50. Colorado's private enforcement system thus allowed two public officials, who disliked Holland's speech, to generate an enforcement proceeding against Holland and force her to spend time, money, and effort defending her speech.

The Tenth Circuit has already held that Colorado's reporting and disclosure requirements are unconstitutional as applied to certain small-scale political speakers because the requirements were so complex and thus unduly burdensome. *Coal. for Secular Gov't*, 2016 WL 814814, at *9-12; *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010). Private enforcement exacerbates the chilling effect caused by this

substantive complexity, because any modest or unintentional "violation" of those byzantine rules creates an independent opportunity for legally-sanctioned harassment.

The Colorado system lets a speaker's ideological opponents wage political battles in the courts rather than in the political arena. It thus tends to chill political speech, potentially frightening individual speakers and small-scale grass roots campaigns away from the political process. And it does so unnecessarily: other states, which use the traditional model of leaving prosecutors (criminal or administrative) with the decision whether to initiate a proceeding, have shown themselves able to enforce their election laws without such a speech-deterring enforcement system.

ARGUMENT

I. Speech restrictions can be unconstitutional when their enforcement procedures unduly chill speech

The Supreme Court has repeatedly recognized that even restrictions aimed at constitutionally unprotected speech may still violate the First Amendment if they use procedures that unduly chill protected speech. Thus, for instance, in *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 793-94 (1988), the Court invalidated a ban on "unreasonable" fundraising fees in part because the process of enforcing that ban excessively burdened protected speech. The statute left the definition of "reasonable fee" to case-by-case development, and, once the state showed that the fee was at least 35% of gross receipts (or in some circumstances at least 20%), the fundraiser had to prove the fee was reasonable. *Id.* at 784-86, 793.

The Court concluded that this procedure "must necessarily chill speech in direct contravention of the First Amendment" by denying speakers "a measure of security" about whether their speech was lawful. *Id.* at 794. Moreover, during each enforcement proceeding, "the fundraiser [had to] bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe[d] that the fee was in fact fair." *Id.*

As in *Riley*, the Colorado private enforcement system chills speech by exposing speakers to lengthy, expensive enforcement proceedings when they are accused of violating a statute. The fundraisers in *Riley* lacked security when they spoke because the only way to determine the reasonableness of their speech was to complete a costly enforcement proceeding. Similarly, Coloradans who spend money to speak about elections lack security when they speak, because anyone can initiate legal action by filing a complaint, forcing speakers to divert time and money from their political speech to defend themselves in court. Indeed, even when an organization seeks guidance from the Colorado Secretary of State, and complies with that advice, it may still be held liable in a private enforcement action. *See Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 937 (Colo. App. 2012) (involving this very scenario).

And this extra burden is unnecessary, because Colorado could do what many other jurisdictions do in campaign finance cases (and what prosecutors and civil enforcement officials routinely do as to other kinds of legal regimes): accept citizen complaints, but have the Secretary of State decide which complaints are valid before

starting legal proceedings. *See, e.g.*, 52 U.S.C. § 30109; Kan. Stat. §§ 25-4160 to -4166; Me. Rev. Stat. tit. 21-A, §§ 1003 to 1004-B; N.M. Stat. §§ 1-19-34.4 to -36; Utah Code §§ 20A-1-802 to -807, 20A-11-206, -305, -603. That would be an effective alternative that imposes a lesser burden on political speech. Just as in *Riley*, where the Court concluded that the state had to rely on traditional enforcement of antifraud laws instead of following the unduly burdensome procedure that North Carolina created, 487 U.S. at 795, so here Colorado should rely on traditional campaign finance law enforcement mechanisms instead of on its especially speech-deterring procedures.

Likewise, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 347-50 (1974), the Court concluded that negligently false statements defaming a private figure lack constitutional value, and may lead to libel liability using a proper procedure—the imposition of compensatory damages. Nevertheless, the Court held, the very same statements may not lead to liability under two kinds of unduly burdensome procedures: (1) the presumption that damages flow from the statement, even without proof of actual damages, and (2) the imposition of punitive damages. *Id.* at 348-49.

The threat of presumed or punitive damages even for constitutionally unprotected (negligently false) speech, the Court concluded, tended to excessively chill *protected* speech, even though proven compensatory damages could constitutionally be awarded based on the unprotected speech. *Id.* at 348-50. And this excessive chill was unnecessary because, in the Court's judgment, compensatory damages adequately served the government interest. *Id.* at 349-50.

This case is similar to *Gertz*. In both, the government is trying to regulate constitutionally-regulable First Amendment activity—in *Gertz*, negligently false statements of fact that defame private figures; in this case, the failure to file reports pursuant to properly-crafted campaign regulations. In both, the restriction risks chilling constitutionally protected speech: true statements in *Gertz*, and lawful campaign-related activity in this case. In both, the restriction is unnecessary to serve the government interest, given the alternative, less chilling means that the government could use instead: the threat of compensatory damages in *Gertz*, and traditional government-initiated prosecution in this case.

And such unnecessary and excessive burdens on speech are unconstitutional whether or not strict scrutiny is applied. In *Gertz*, for instance, the Court did not discuss strict scrutiny (which has never been viewed as applicable to defamation cases), but instead considered broader First Amendment principles.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015), concludes that restrictions that distinguish among speech based on the content of the speech being regulated are generally subject to strict scrutiny. Likewise, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), states that a law "would be content based"—and thus subject to "strict scrutiny," *id.* at 2530—"if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* at 2531 (citations omitted). These principles may require strict scrutiny of campaign finance reporting schemes, which single out speech about candidates and ballot

measures for special restriction, and require a review of the content of a message to determine whether the reporting requirements apply; courts have not yet examined this question after *Reed* and *McCullen*. But in any event, the excessive burden imposed by the Colorado system is unconstitutional whether under strict scrutiny, exacting scrutiny, or any other First Amendment standard of review.

II. Federal judges have recognized that allowing anyone to initiate legal proceedings against speakers may unduly chill constitutionally protected speech

Under Colorado's campaign finance laws, all citizen complaints automatically trigger legal proceedings against the speaker. *Coal. for Secular Gov't v. Williams*, 2016 WL 814814, at *2. The state cannot investigate complaints for factual accuracy or legal validity before having to initiate an enforcement proceeding. Thus, when speakers are choosing whether to speak, they must consider the time, money, and effort they would have to spend on litigation if any complaints are filed against them.

Federal judges have recognized the danger of such enforcement schemes. In *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2344-46 (2014), the Supreme Court held that a speaker had standing to raise a facial challenge to an election law when the law's private enforcement provisions created a substantial risk that the speaker would face criminal prosecution. The Court explained that, "[b]ecause the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Id.* at 2345. By expanding the number of people who could

bring a claim, the law created serious "burdens . . . on electoral speech," for instance by forcing "the target of a false statement complaint . . . to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election." *Id.* at 2346.

Having settled the standing issue, the Court remanded for the Sixth Circuit to evaluate the facial challenge. And on remand, the Sixth Circuit held that the law was unconstitutional partly because the private enforcement process prevented the government from screening out frivolous complaints, and thus unfairly burdened speakers by forcing them to respond to unfounded allegations. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 474-75 (6th Cir. 2016). The court noted that "Ohio fails to screen out frivolous complaints prior to a probable cause hearing," which "provides frivolous complainants an audience and requires purported violators to respond to a potentially frivolous complaint." *Id.* at 474. As a result, "some complainants use the law's process 'to gain a campaign advantage without ever having to prove the falsity of a statement . . . tim[ing] their submissions to achieve maximum disruption . . . [and thus forcing political opponents] to divert significant time and resources . . . in the crucial days leading up to an election.'" *Id.* at 475 (quoting *Driehaus*, 134 S. Ct. at 2346). The court also explained that "[t]he potential for attorney's fees and the costs for frivolous complaints does not save the law because this finding of frivolity does not occur until *after* a probable cause finding or a full adjudicatory hearing." *Id.* Whatever the merits of a "private attorney general" model may be for law enforcement in

other cases, using such a model for enforcing speech restrictions risks unduly chilling constitutionally protected speech.

The *Driehaus* opinions echo Justice Breyer's dissent in *Nike, Inc., v. Kasky*, which reasoned that "a private . . . action brought on behalf of the State, by one who has suffered no injury, threatens to impose a serious burden upon speech." 539 U.S. 654, 679 (2003) (Breyer, J., dissenting, joined by O'Connor, J.). The statute in *Nike*, like the Colorado statute, allowed private plaintiffs to initiate proceedings based on defendants' speech (there, business speech that supposedly misled consumers) without any showing of personalized injury to the plaintiffs.

Private enforcers, Justice Breyer reasoned, are not subject to the same practical and legal checks that public enforcement agencies must overcome, and are therefore more likely to file complaints (including groundless ones). *Id.* at 679-80. As a result, the statute's "delegation of enforcement authority to private attorneys general disproportionately burdens speech," and thus helps pressure speakers to self-censor. *Id.* at 681-83. The other Justices did not disagree with this part of Justice Breyer's reasoning; the disagreement among the Justices' opinions focused on whether the case should have been dismissed on the grounds that there was not yet any final judgment rendered by California courts. *Id.* at 657-58, 667.

Justice Breyer was especially concerned that private enforcement "authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums." *Id.*

at 679. Private enforcement heightens the risk of these ideologically motivated suits because "plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm." *Id.* at 679-80. And this is especially so, Justice Breyer concluded, given that such "delegation of the government's enforcement authority to private individuals is not traditional, and may be unique" to the challenged statute. *Id.* at 680.

This reasoning equally applies to the Colorado statute. As in *Driehaus* and *Nike*, private enforcement of Colorado campaign finance law chills speech by making it more likely that ideological opponents will pull speakers into litigation. When choosing whether to speak about local community issues, Holland and other speakers like her will worry that opponents might not just speak out in response, but will initiate expensive and time-consuming enforcement proceedings that will require the speakers to hire lawyers and appear in court.

And, as *Driehaus* explains, the prospect of possible recovery of attorney fees after the proceeding is concluded cannot compensate for the lost time, effort, and up-front expenditure that a speaker would have to invest during the election season. *Driehaus*, 814 F.3d at 475. Everyday speakers who want to participate in community politics, but are unable or unwilling to fight costly legal battles, may thus be pressured to refrain from speaking.

Private enforcement is also especially concerning when it exacerbates the chilling effect already caused by the statute's substantive complexity. In *Citizens United v. FEC*, 558 U.S. 310, 335-36, 365 (2010), the Court struck down a campaign finance law in part because the legal scheme was so complicated that speakers were pressured to avoid speaking by the risk of "litigation and the possibility of civil and criminal penalties." The Court explained that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney," and observed that complex "laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application." *Id.* at 324 (internal citations and quotation marks omitted).

Even though the statute in *Citizens United* was not privately enforced, the Court held that a proposed interpretation of the statute would be sufficiently complex to violate the First Amendment. And, as the Tenth Circuit recently noted, the Colorado campaign finance law is similarly complex. *Coal. for Secular Gov't*, 2016 WL 814814, at *9-12 (affirming decision to enjoin the government from enforcing disclosure requirements against low-level spenders, because the burden of detailed record-keeping and disclosure obligations was so onerous on such small spenders); *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010) (holding likewise, partly because "[t]he average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado's constitution, the Cam-

paign Act, and the Secretary of State's Rules Concerning Campaign and Political Finance"). And the combination of this complexity and the possibility of private enforcement actions launched by the speaker's political enemies, whether in good faith or for partisan advantage, makes for a doubly-damaging chilling effect. Not only must the speaker worry that the slightest technical error may lead to the enormous costs of defending an enforcement action; the very complexity of the law increases the chance that even a well-meaning opponent will simply read the law differently, substantially raising the chances that an enforcement action will be filed.

CONCLUSION

For these reasons, the Colorado provision allowing any person to initiate campaign finance enforcement proceedings unnecessarily chills speech, and thus violates the First Amendment.

DATED: April 10, 2016

Respectfully Submitted,

By: s/ Eugene Volokh
Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2016, I electronically filed the foregoing Motion with supporting Brief *Amicus Curiae* with the Clerk of the U.S. District Court of the District of Colorado by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

By: s/ Eugene Volokh
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