IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02766-CMA-SKC

COLORADO UNION OF TAXPAYERS, INC.,

Plaintiff,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, and JUDD CHOATE, Director of Elections, Colorado Department of State, in his official capacity,

Defendants.

MOTION FOR SUMMARY JUDGMENT

Plaintiff Colorado Union of Taxpayers, Inc. (CUT), hereby moves the Court to grant CUT summary judgment on its claims and, in support thereof, states as follows:

I. Undisputed Facts

1. There are no material disputed facts in this matter. The material undisputed facts are as follows.

2. Colorado law requires most groups who want to advocate for or against a ballot issue—the law calls these groups "issue committees"—to register with the Secretary of State and follow certain rules. The genesis of this requirement is in article XXVIII of the Colorado Constitution. However, because of numerous cases finding that portions of article XXVIII violate the U.S. constitution, the precise rules that the Secretary of State enforces vary somewhat from the text of the article itself.

3. For example, article XXVIII defines an issue committee as any group that either spends more than $200 on ballot issue advocacy or has "a major purpose" of

supporting or opposing any ballot issue. Any group that meets *either* of these requirements must register with the Secretary of State. The Secretary's regulations, however, only require registration if an organization meets *both* of those criteria. Colo. Code Regs. § 1505-6, Rule 1.9 (2020).

4. Also, article XXVIII requires all issue committees to disclose their donors and report their expenditures to the Secretary of State. However, the legislature has divided issue committees into two types: those that spend or accept aggregate donations of $5000 or less (which the statute calls "small-scale issue committees") and those that spend or accept aggregate donations of more than $5000 (i.e., standard issue committees). Small-scale committees must still register and obtain a separate bank account in the committee's name, Colo. Rev. Stat. §§ 1-45-108(1.5), (3.3) (2020), but they need not report donations and expenditures unless and until they cross the $5000 threshold. Ordinary issue committees remain subject to all of article XXVIII's requirements from inception.

5. CUT is a non-profit organization. It was founded in 1976. Its mission is to educate the public about and advocate for fiscally conservative government." Scheduling Order 4, ECF No. 50.

6. Each legislative session, CUT reviews numerous pieces of proposed legislation and issues a "support" or "oppose" rating for each bill so reviewed. Based on these ratings, CUT calculates a score for each Colorado legislator. These scores and bill ratings are published in a newsletter and posted on the organization's website. CUT has been rating bills and scoring legislators since 1977. *Id.* at 4–5.

7. CUT also encourages legislators and candidates to sign a pledge regarding fiscal discipline and CUT's view of the proper role of government. The organization publicizes which legislators and candidates have signed the pledge. *Id.* at 5.

8. CUT also occasionally advocates for or against certain ballot issues. However, support or opposition to ballot issues or ballot questions has never been a specifically identified objective in CUT's organizational documents. *Id.* at 5; Defs.' Resp. to Reqs. for Admission, Pl's MSJ Appx. at 002.

9. In 2019, CUT spent $5001 advocating against Proposition CC. Such spending was embodied in an in-kind donation of radio ads to No on CC, a registered issue committee. Scheduling Order 5.

10. Four issue committees registered reported expenditures on Proposition CC:

- Great Education Colorado spent $146,774.47 in favor of the measure,
- Coloradans for Prosperity spent $4,378,000.05 in favor of the measure,
- Americans for Prosperity spent $1,651,361.16 against the measure, and
- No on CC spent $182,388.47 against the measure.

Committee Financial Summaries, Pl's MSJ Appx. at 004–08.

11. In 2020, CUT spent $3495 on radio advertisements advocating in favor of Propositions 116 and 117. CUT 2020 Profit & Loss Statement, *id.* at 017–18. These ads were issued in CUT's own name. Radio Advertisement Scripts, *id.* at 019–20.

12. A total of six issue committees registered on these two initiatives:

- Americans for Prosperity Colorado Issue Committee supported both and reported spending $761,919.27,
- Energize Our Economy supported 116 and reported spending $11.10,
- Voter Approval of Fees supported 117 and reported spending $427,627.99,
- Protect Colorado's Recovery opposed both and reported spending $2,075,391.95,
- Fair Tax Colorado opposed both and reported spending $762,942.25, and
- Earthworks Action Fund opposed 117 and reported spending $61,625.71.

Committee Financial Summaries, *id.* at 009–14.

13. CUT did not register as an issue committee in 2019 or 2020. Scheduling Order 5.

14. CUT's expenditures on ballot issue advocacy were about 38% of its total expenditures in 2019 and about 49% in 2020. *See* CUT 2019 & 2020 Profit & Loss Statements, Pl's MSJ Appx. at 015–18. However, its ballot issue advocacy was relatively minor in comparison to the time and effort that CUT put into its other activities throughout the year. *See* Neilson Tr. Excerpts, *id.* at 033–38; Neilson Aff., *id.* at 47–48.

II. Claims, Elements, and the Burden of Proof

15. CUT challenges four parts of the state's regulation of issue committees: (1) the "a major purpose" standard that Colorado uses to determine who qualifies as an issue committee, (2) the regulation of "small-scale issue committees," (3) the $5000 trigger for expanded disclosure obligations, and (4) regulation of speech regarding citizen initiatives that may never appear on any ballot. CUT also argues that, regardless of the resolution of its other challenges, Colorado's issue committee regime is unconstitutional as applied to CUT itself.

16. Where, as here, "a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." *Ass'n of Cmty. Organizations for Reform Now v. Mun. of Golden*, 744 F.2d 739, 746 (10th Cir. 1984). Thus, the burden of proof for all of the claims in this case is on Defendants.[1]

17. For most of CUT's claims, Defendants must satisfy "exacting scrutiny." In a case such as this, dealing with compelled disclosure in the election context, exacting

[1] While some of the arguments that CUT makes—vagueness, arbitrariness—are generally due process concepts, the applicable caselaw has blurred the line between First and Fourteenth Amendment claims. Nonetheless, registration and disclosure requirements imposed on political groups plainly burden First Amendment rights. Thus, the First Amendment burden allocation should apply.

scrutiny requires Defendants to show both (1) "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010) (internal quotes omitted), and (2) that the "disclosure regime[] . . . [is] narrowly tailored to the government's asserted interest." *Ams. for Prosperity Found. v. Bonta*, No. 19-251, slip op. at 9 (U.S. July 1, 2021) (attached). The first element focuses on the severity of the burden imposed by the law: "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. 186, 196 (2010). The second element focuses on "the scope of the challenged restrictions—their breadth—rather than the severity of any demonstrated burden." *Ams. for Prosperity*, slip op. at 11.

18. One of Plaintiff's claims is analyzed under a different standard, however. The vagueness argument (discussed in Part III.B, below) requires Defendants to prove that the challenged definition of "major purpose" neither "fails to provide people of intelligence a reasonable opportunity to understand" to whom the statute applies nor "authorizes or . . . encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). When a statute impinges on First Amendment freedoms (as the challenged provision here does), "the doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *accord Hoffman Estates*, 455 U.S. at 499 (citation omitted).

III. Plaintiff Is Entitled to Summary Judgment on Its Claim that Colorado's "a Major Purpose" Standard Is Facially Unconstitutional.

A. *Defendants Cannot Prove that Colorado's Regulation of Groups with Multiple Major Purposes Is Narrowly Tailored.*

19. Tenth Circuit caselaw compels this Court to hold that Colorado's "a major purpose" standard is facially overbroad and, therefore, fails exacting scrutiny. The Court should grant CUT summary judgment on that claim.

20. A test that recognizes only one major purpose for an organization "sets the lower bounds for when a regulation as a political committee is constitutionally permissible." *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677–78 (10th Cir. 2010). To regulate more than that does not meet exacting scrutiny's narrow tailoring requirement. *Accord N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288–89 (4th Cir. 2008), *cited with approval in N.M. Youth Organized*, 611 F.3d at 678. "A single organization can have multiple 'major purposes,' and imposing political committee burdens on a multi-faceted organization may mean . . . regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a relatively small amount of election-related speech." *Id.* at 289. This is, quite simply, unconstitutional.

21. Colorado law, however, flies in the face of this precedent. Article XXVIII plainly reaches "organizations for which promoting a ballot issue is but one" of several major purposes. *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 501 (Colo. App. 2010). Although the Secretary has previously argued that limiting her reach to a single major purpose is merely optional, the Tenth Circuit rejected that argument fourteen years ago. *See Colo. Right to Life*, 498 F.3d 1137, 1153–54 (10th Cir. 2007). This Court is bound to reject that argument again and give CUT judgment on its claim that Colorado's regulatory regime is overbroad. Unless express advocacy on ballot issues is a group's "central organizational purpose," *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262 (1986), Colorado may not regulate the group's political speech.

B. *Defendants Cannot Prove that Colorado's Definition of "Major Purpose" Is Reasonably Understandable and Does Not Allow for Arbitrary Enforcement.*

22. Even if the law were narrowed down to organizations with a single major purpose, however, it would still be unconstitutional because it does not define what a

"major purpose" is in any objectively determinable way. "[L]aws must be crafted with sufficient clarity to 'give the person of ordinary intelligence reasonable opportunity to know what is prohibited' and to 'provide explicit standards for those who apply them.'" *Betancourt v. Bloomberg*, 448 F.3d 547, 552 (2d Cir. 2006) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

23. Definitions in laws that infringe on political speech should generally be "both easily understood and objectively determinable." *McConnell v. FEC*, 540 U.S. 93, 194 (2003) (citation omitted); *accord Common Sense All. v. Davidson*, 995 P.2d 748, 756 (Colo. 2000). And while a vague statute can sometimes be saved by a clarifying construction that narrows the law's potential applications, *Maynard v. Cartwright*, 486 U.S. 356, 364–65 (1988), the official constructions given to the statute thus far have reinforced its ambiguity rather than mitigating it.

24. Article XXVIII does not define "major purpose." The legislature, however, has attempted to give some tangibility to the phrase. By statute, a major purpose can be demonstrated by:

> [S]upport or opposition to a ballot issue or ballot question that is reflected by:
>
> > (I) An organization's specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or
> >
> > (II) An organization's demonstrated pattern of conduct based upon its:
> >
> > > (A) Annual expenditures in support of or opposition to a ballot issue or ballot question; or
> > >
> > > (B) Production or funding, or both, of written or broadcast communication, or both, in support of or opposition to a ballot issue or ballot question.

Colo Rev. Stat. § 1-45-103(12) (2020). But while the statute provides a few things that might go into determining whether ballot issue advocacy is an organization's major purpose, it draws no clear lines that give a person of ordinary intelligence fair warning of precisely what activities will subject him to Defendants' oversight. There is nothing objectively determinable at all. Annual expenditures are relevant, but what does that mean? How often? Is it the number of expenditures? Or is it solely a question of dollar amount? And if it's the dollar amount, does regulation hinge on the raw number of dollars? Or is it about advocacy expenditures in proportion to the organization's total expenditures? Similar questions exist with regard to written or broadcast communications: Is it solely the number of such communications? Or is it how broadly they're disseminated? Or how long they are? Or how much is spent on them?

25. It is as if one asked the legislature how to make a cake and they simply produced a list of ingredients (eggs, flour, butter, sugar, etc.) without noting the required quantities or what to do with them. All of the unanswered questions would make it impossible for a person of ordinary intelligence to know whether he is making cake, cookies, or cobbler (or, perhaps, just a mess). Likewise, by merely throwing out a few things that Defendants might think about in their search for major purposes, Colorado has failed to appraise its citizens of when they've become an issue committee and when they have not. *Accord N.C. Right to Life*, 525 F.3d at 290.

26. Nor do the Secretary of State's official policies provide any clarity. During discovery, Plaintiff sought guidance as to how many annual expenditures were necessary to establish a major purpose. Defendants could only respond that:

> [They] do[] not apply either a minimum number of annual expenditures or a predetermined ratio to determine whether an entity has [the necessary major purpose]. The major purpose determination is a fact-intensive, common-sense inquiry into an entity's organizational documents and its

> demonstrated pattern of conduct . . . and is not reducible to a formulaic application of either a minimum amount of expenditures or a predetermined ratio.

Defs.' Resp. to 1st Set of Interrs., Pl's MSJ Appx. at 026. Defendants gave nearly identical answers regarding the amount of annual expenditures and how many communications were necessary to give an organization the necessary major purpose. *Id.* at 027–29. These are not the answers of a government that can provide a reasonably predicable definition of "major purpose." Rather, they are admissions that the applicable rules are open to ad hoc enforcement based on Defendants' whims.

27. Admittedly, the Colorado Court of Appeals has previously ruled, in *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. App. 2008), that "a major purpose" is not unconstitutionally vague. *Id.* at 1136–39. However, that decision is not only not binding on this Court, it is problematic in several ways.

28. First, the state court's attempt to differentiate Colorado's standard from federal cases holding other states' nearly identical tests unconstitutionally vague is unconvincing. The panel discusses the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, where a federal appeals court found North Carolina's definition of a political committee, which used the same "a major purpose" language, unconstitutionally vague. But the supposed differences between the Colorado and North Carolina cases that the court then trots out amount to little more than hand waving: the Court of Appeals says that the *North Carolina Right to Life* case has "to be placed in context" and then discusses a different case, *National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008), that allegedly provides the necessary context. 209 P.3d at 1138. But the court in *Right to Work* came to a conclusion exactly opposite of what the *Independence Institute* court did, and it did so by citing directly to *North Carolina Right to Life*. 581 F. Supp. 2d at 33

(citing 525 F.3d at 288). How this satisfactorily differentiates Colorado's issue committee regime is anyone's guess.

29. Second, the *Independence Institute* decision suggests that an unpredictable, multi-factor, fact-specific inquiry at the trial court level is sufficient to sort out whether an organization has the necessary major purpose. 240 P.3d at 1139. But due process demands *forewarning* of what is expected, not just an opportunity to argue one's case after the fact. *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting); *United States v. Anzalone*, 766 F.2d 676, 678 (1st Cir. 1985).

30. Third, developments since 2007 have cast doubt on the validity of *Independence Institute*. For one thing, the Tenth Circuit has approvingly cited *North Carolina Right to Life*—the case that invalidated North Carolina's "a major purpose" standard—twice in the intervening years. *See Republican Party of N.M. v. King*, 741 F.3d 1089, 1096 (10th Cir. 2013); *N.M. Youth*, 611 F.3d at 677–78. Also, it has become clear, as discussed above, that it is constitutionally impermissible for a state to regulate groups for whom express advocacy in elections is not the organization's main function. *N.M. Youth*, 611 F.3d at 677–78.

31. Even the definition of "major purpose" has changed. In *Independence Institute*, the state court applied a narrowing construction to the previously unadorned phrase. 209 P.3d at 1143 (Connolly, J., concurring). The supposed narrowing construction laid out a grab-bag of facts that had been mentioned at earlier stages of the case and others thought up by the court. *See* 209 P.3d at 1139. But the court's list of factors is not consistent with what the legislature eventually settled on; despite the legislature's stated intent to codify *Independence Institute*, several of the theoretically pertinent facts the court listed in that case are not mentioned in the later-enacted statute. *Compare* 240 P.3d at 1139, *with* § 1-45-103(12).

32. At any rate, neither the statue nor the judicial decision provide the necessary clear lines—they're just more ingredients in the recipe, with Defendants left to play chef and determine, based on their own tastes, when everything is just right. This arrangement violates fundamental due process. As the *North Carolina Right to Life* court pointed out:

> [I]f . . . regulators [are] to decide when a purpose becomes "a major purpose," . . . this leaves the application of [the statute] open to the risk of partisan or ideological abuse. This is nowhere so dangerous as when protected political speech is involved. [The statue]'s "we'll know it when we see it approach" simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject.

525 F.3d at 290; *accord Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Given the infirmities in the *Independence Institute* opinion, then, and the changing legal landscape since that decision was issued, this Court should not be persuaded by that opinion.

33. In the end, Defendants cannot point to any reasonably predictable definition of "major purpose" and, therefore, the statute is constitutionally infirm. Plaintiff should have summary judgment on this point.

IV. Plaintiff Is Entitled to Summary Judgment on Its Claim that Regulation of Small-Scale Issue Committees Is Facially Unconstitutional.

34. Even if Colorado has adequately defined who is an issue committee, the state's small-scale committee regime nonetheless fails to pass constitutional muster because Defendants cannot prove that regime's requirements are substantially related to a sufficiently important governmental interest. Groups that spend as little as $200 on ballot issue advocacy must not only register with the Secretary, but also comply with other regulatory requirements. Before an organization can even register, it must obtain a separate bank account in its name. § 1-45-108(1.5)(b). This, of course, requires the

organization to get a taxpayer number from the federal government. *See* 31 C.F.R. § 1020.220(a)(2)(i)(A) (2020). Which in turn requires the committee to organize under the laws of the state in some way. Certainly, a professional could navigate this with relative ease. But hiring a professional costs money. Ten years ago, the Secretary of State's Office suggested that professional assistance would cost about $300. Memorandum from Paris Nelson to Scott Gessler, Pl's MSJ Appx. at 022. Katie Kennedy, a local professional in this field, would charge $500 for these services today, and there would be a few additional fees for filing with the Secretary of State and IRS. Kennedy Tr. Excerpts, *id.* at 039–41. Even at the highest possible amount a committee can spend and still remain within the small-scale category ($5000), that's 10% of the committee's entire budget spent just to comply with the regulatory scheme (more if the Secretary and the IRS' fees are counted). That burden is not justified by the minor interest at stake.

35. Admittedly, the burden is light compared to those that fall on ordinary issue committees. But the Court still must balance the burdens against the state's legitimate interests. And here, the interest is nearly nonexistent. It cannot justify even the relatively minimal burdens that the small-scale regime imposes.

36. The only significant interest in an issue committee disclosure regime is "the public's informational interest." *Coal. for Secular Gov't*, 815 F.3d at 1277. Disclosure serves that interest "by allowing voters to identify those who (presumably) have a financial interest in the outcome of the election." *Id.* (internal quotes omitted). But while "such disclosure has some value, [it's] not that much." *Sampson*, 625 F.3d at 1257. And this already weak interest becomes even weaker when relatively small expenditure amounts are involved. *Coal. for Secular Gov't*, 815 F.3d at 1278.

37. Applied to any conceivable small-scale issue committee, then, the

government's interest is attenuated almost to the point of nonexistence. CUT's 2020 circumstances are illustrative. Registered issue committees spent a total of $4,089,518.27 on Propositions 116 and 117 during that election cycle: $1,189,558.36 in favor and $2,899,959.91 opposed. *See* Committee Financial Summaries, Pl's MSJ Appx. at 009–14. CUT's $3495 is not even one one-thousandth of the total amount. Even if judged solely compared to other expenditures in favor of the initiatives, CUT's spending was about a quarter of a percent of the total.

38. The 2019 figures are similar. Registered committees reported spending $6,358,524.15 on Proposition CC: $4,524,774.52 in favor and $1,833,749.63 opposed. Committee Financial Summaries, *id.* at 005–08. Even the largest possible small-scale committee—a $5000 spender—would've been less than a thousandth of the total spending and wouldn't have amounted to even half a percent of the spending on either side.

39. What we are talking about with small-scale committees, then, are *miniscule* amounts. The size of the public's interest in knowing such information is microscopic. The state's registration regime cannot be justified by this information, regardless of the minimal burdens the system imposes because it is hard to see how such tiny amounts could be a relevant consideration for any rational voter.

40. Furthermore, the small-scale registration requirement is not substantially related to a sufficiently important interest because the information collected from small-scale committees is not the sort of thing that the government has a legitimate interest in publicizing. The cases that have discussed the public's informational interest have focused on *financial* disclosure as a way for the public to analyze the *financial* interests in an election. *See Coal. for Secular Gov't*, 815 F.3d at 1277–78; *Sampson*, 625 F.3d at 1257, 1259. But small-scale committees report no financial information at all. What the

small-scale issue committee registration becomes, then, is simply a list of the supporters and opponents of particular ballot issues, which the state has no legitimate interest in keeping or publicizing. *See Doe v. Reed*, 561 U.S. 186, 207–08 (2010) (Alito, J., concurring), *quoted in Sampson*, 625 F.3d at 1259.

41. Therefore, because small-scale issue committees are such minor players in ballot issue spending, and because the information collected from them does not support any important government interest, Plaintiff is entitled to summary judgment on its claim that the small-scale committee regime is facially unconstitutional.

V. Plaintiff Is Entitled to Summary Judgment on Its Claim that the $5000 Threshold for Regulation as an Ordinary Issue Committee Is Unconstitutional.

42. Colorado's regulation of ordinary issue committees is also unconstitutional. That is because Defendants cannot prove that the $5000 threshold (which is where the more stringent regulations kick in) is narrowly tailored. Nor can they show that it is substantially related to an important governmental interest.

43. While lawmakers may draw distinctions between different conduct, they may not do so arbitrarily. This is especially true where, as here, a law burdens First Amendment rights. In this context, legislators must be careful that they are not sweeping too broadly or drawing lines where the differences between conduct are slight or nonexistent. *See Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1100 (10th Cir. 1997). In the context of campaign finance distinctions, this means that the chosen threshold must still meet the exacting scrutiny standard discussed above. *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1275 (10th Cir. 2016). Furthermore, while lawmakers need not choose "the highest reasonable threshold," *Buckley*, 424 U.S. at 84, they still must make a plausible legislative judgment based on a sober consideration of the facts, *accord Ams. for Prosperity*, slip op. at 10; *see also Nixon v. Shrink Mo.*

Gov't PAC, 524 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . .").

44. The legislature has twice enacted the $5000 threshold: first, in 2016, with a sunset provision, 2016 Colo. Sess. Laws 1113–16, and then in 2019 without a sunset, 2019 Colo. Sess. Laws 3040–47. In the entire legislative history for both bills, the only justification for the $5000 threshold came in testimony from then-Deputy Secretary of State Suzanne Staiert before a Senate committee in 2016. The Secretary of State's Office was involved in the drafting of the bill, and one of the senators asked her "How did you decide on the $5,000 figure?" Cmte. Hrng. Tr. Extract, Pl's MSJ Appx. at 044. Ms. Staiert replies:

> During the testimony at the [*Coalition for Secular Government*] case, I'm trying to remember the exact figure, but about 90—about 93 percent of the money in issue committees is in issue committees that are making—that are bringing in more than $5,000. But about—I'm going to—I'm potentially going to get the number wrong, but a great number of these committees are under $5,000, but they're not—they're not accounting for very much money in politics. So there was a lot of money [*sic*] about, you know, how many hits do certain committees get on the website. Does anybody even go and look at these disclosure amounts of committees that are making, you know, a thousand dollars? Is that disclosure really helping anybody in formulating a decision?
>
> So there was quite a bit of testimony about that. But we found that once a committee hits 5,000, it's really likely to hit—sorry—100,000. And so that's when we settled on the 5,000 number.
>
> Now, the two court cases we had, they didn't draw a line for us. The first one said 1,000 is too low, and the second one said 3500 is too low. And so we took the 5,000 based on the evidence that was present.

Id. at 044–45.

45. This testimony—the only thing on which the legislature could have based the

necessary reasoned legislative judgment—is problematic in several ways. First, the supposed evidence Ms. Staiert cites does not exist. In more than 180 pages of transcript from the *Coalition for Secular Government* hearing, there is not a single mention of the alleged accelerating affect beyond $5000.[2] It seems that Ms. Staiert actually confused and conflated three different things:

- testimony from *Coalition for Secular Government* that more than 96% of the expenditures on ballot issues came from committees spending more than $50,000 (not $5000), CSG Hrng. Tr. Excerpt, Pl's MSJ Appx. at 058–61;
- internal analysis from the Secretary of State's office that showed the vast majority of individual contributions to issue committees were for less than $5000, Memorandum from Christi Heppard to Scott Gessler, *id.* at 064; and
- other internal analysis "[that] showed . . . the $5,000 threshold was an accurate predicter for whether a committee would remain small or whether its spending would expand greatly," Bouey Aff., *id.* at 052.[3]

This sort of confusion is perfectly understandable when trying to recall years-old memories. But inaccurate, patched-together-after-the-fact testimony cannot support any sort of reasoned legislative judgment.

46. Nor does the actual evidence—which became garbled in Ms. Staiert's

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[2] Based on conversations with opposing counsel, the undersigned does not believe Defendants will contest this point. Therefore, in the interest of avoiding voluminous exhibits, Plaintiffs have refrained from attaching the entire transcript.

[3] Plaintiff questions whether this analysis ever occurred. No record of it was disclosed in a request for production of documents that identified the basis for the $5000 threshold. Nonetheless, even if this analysis occurred and supported Ms. Staiert's testimony, it would not support the statute. Therefore, it is not a "material" disputed fact for purposes of this motion.

testimony—support the $5000 threshold. The testimony from the *Coalition for Secular Government* hearing supports a threshold *ten times higher* than what the legislature chose—at $50,000, not $5000. And the internal analysis regarding donation size has little if anything to say about what a proper threshold might be. The size of individual donations is not the same thing as the size of an organization's expenditures and total fundraising, yet expenditures and total fundraising are what trigger the expanded disclosure regime.

47. Even if we take Ms. Staiert's testimony at face value, however, it would not show that the $5000 threshold was narrowly tailored. What she claimed is that there was some accelerating effect beyond $5000 and most committees spent either less than $5000 or more than $100,000. But if that's truly the case, that fact supports a $100,000 threshold, not a $5000 one. That is because the lower threshold vastly increases the burdens while only providing a minimal additional information (because, presumably, the lower threshold only captures a handful of additional committees). Thus, even if we assume that there were some legitimate facts to support Ms. Staiert's testimony that remain undisclosed or have been lost to time, it would not adequately support the legislature's decision. Rather, it would show that the $5000 threshold is not narrowly tailored.

48. Nor is the expanded reporting threshold substantially related to an important governmental interest. The lack of narrow tailoring can also be seen from the spending on Propositions CC, 116, and 117 discussed above. Even a committee that raised and spent $50,000—ten times the reporting threshold—would have accounted for barely 1% of the money spent on 116 and 117 and not even 1% of the money spent on CC. The burdens of Colorado's reporting regime are not justified by the inclusion of such minor players' information.

VI. Plaintiff Is Entitled to Summary Judgment on Its Claim that the Regulation of Speech on Proposed Initiatives that Have Not Qualified for the Ballot Is Unconstitutional as Applied to Organizations that Are Not Sponsoring the Initiative Itself.

49. Colorado's decision to regulate third-party speech on issues that may never make it to the ballot is also unconstitutional insofar as it applies to groups that are not themselves seeking to qualify a measure for the ballot.[4] Defendants cannot show that bringing such organizations under the Secretary's authority is substantially related to an important interest. Nor can they show that such broad disclosure requirements reflect narrow tailoring.

50. Colorado begins regulating groups as issue committees the moment the Title Board approves a measure's title. Colo. Rev. Stat. 1-45-108(7)(a) (2020).[5] If a group publishes anything about a proposed initiative from that point forward, it risks issue committee regulation. There is no reasonable justification for such a far-reaching regime. The only interest the Tenth Circuit has for regulating issue committees is "the public interest in knowing who is spending and receiving money to support or oppose a ballot issue." *Sampson*, 625 F.3d at 1256. But in order for this interest to be legitimate, it must be grounded in the fact that the ballot issue will actually appear on the ballot. *See Sampson*, 625 F.3d at 1259. (To hold otherwise would be to approve the regulation and licensing of political speech in its entirety.) Insofar as Colorado includes groups that

[4] CUT concedes that the state has interests in regulating groups that are circulating petitions or otherwise seeking to qualify an issue for the ballot that are not present when a third party shares its opinions about such proposals.

[5] This is the triggering point for citizen-initiated statutes and constitutional amendments. § 1-45-108(7)(a). CUT has also advocated on referred measures from the legislature (such as Proposition CC), but such measures automatically appear on the ballot and the state does not begin regulating issue committees on such measures until after the matter is referred, *id.* Therefore, the argument here focuses on citizen initiatives alone.

spend money discussing initiatives which have not and may never qualify for any ballot, its has untethered the disclosure requirement from any legitimate interest.

51. Nor does it reflect narrow tailoring for the state to impose disclosure requirements on groups discussing unqualified initiatives. "First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). "[E]ven a legitimate and substantial governmental interest cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Ams. for Prosperity*, slip op. at 9 (internal quotes omitted).

52. The vast majority of proposed ballot issues never appear on any ballot. Just by way of illustration, in 2019 and 2020, seven citizen initiatives qualified for the ballot. But more than one hundred proposed initiatives received a title yet never made it to the ballot.[6] That is more than one hundred proposals, just in a two-year period, that triggered issue committee regulation but which no Coloradan ever voted on. In other words, Colorado imposed disclosure requirements on groups discussing more than 100 different proposals on the chance that some of them (less than 7% as it turned out) might appear on the ballot one day. That is not a narrowly tailored regulatory scheme, it is a dragnet. Plaintiffs are therefore entitled to summary judgment on this claim.

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[6] The Secretary keeps a compilation of initiative filings, Title Board agendas, and results on her website. The 2019–20 filings are available at https://www.sos.state.co.us/pubs/elections/initiatives/titleBoard/2019-2020index.html. The ballot-qualified initiatives are under thel heading "On ballot (2020)," but unqualified initiatives that received a title are scattered under the headings "Signatures submitted – Petition found insufficient," "Expired," and "Withdrawn." All of the initiatives in the first two categories (sixty-one in all) received a title, but determining which "Withdrawn" initiatives received a title requires clicking on each one individually. Counsel counted forty-three initiatives that were withdrawn after receiving an approved title.

VII. Plaintiff Is Entitled to Summary Judgment on Its Claim that Colorado's Issue Committee Regime Is Unconstitutional as Applied to CUT.

53. Even if CUT's facial claims are unavailing, however, Defendants still cannot show that applying the issue committee regime to CUT itself is substantially related to an important governmental interest. All of the points above about the miniscule value of expenditures below even $50,000 apply with equal force to CUT, which has spent $5001 and $3495 in the last two elections. Nor does CUT hide behind an ambiguous name or mission. It is plainly a taxpayer advocacy organization pushing a fiscally conservative philosophy. Also, the space in which CUT finds itself—debates over fiscal policy involving billions of dollars in tax policy changes and organizations willing to spend millions advocating for or against such changes—makes it unlikely that knowing about the minor expenditures of a small membership organization like CUT provide any marginal value to Colorado's disclosure regime. Furthermore, CUT's long history in Colorado politics and substantial efforts unrelated to ballot issues show that it cannot fairly be said to have a primary purpose of ballot issue advocacy, despite the fact that expenditures on such advocacy constitute a fairly large chunk of the group's total outlays. Therefore, even if CUT's facial arguments fail, the Court should still grant it summary judgment on the claim that the issue committee regime is unconstitutional as applied.

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