IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-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.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In the 2020 election, Colorado issue committees were funded by a broad array of donors, from everyday Coloradans to multi-billion-dollar out-of-state corporations. They spent more than $60 million supporting and opposing measures seeking to rewrite Colorado's constitution and statutes, the very laws under which Coloradans live, work, raise their children, and pursue their dreams. We know this, and who gave the money to the committees for those ballot measures, because Colorado requires all issue committees that receive or spend more than $5,000 to report their contributions and expenditures. Those reports in 2020 ensured that voters had the information necessary to undertake the legislative power reserved to the People.

Colorado's $5,000 threshold for contribution and expenditure reporting — which is among the highest in the country — allows voters to learn about the largest

participants in the initiative process, while exempting many issue committees from having to report at all. Plaintiff Colorado Union of Taxpayers ("CUT") asks this Court to shield the tens of millions of dollars spent on issue elections from the public. If successful, CUT would deprive all Coloradans of information about those who seek to write the laws of Colorado. Such an extreme result is contrary to the First Amendment. Defendants' motion for summary judgment should be granted.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Colorado's issue committee laws

For almost 50 years, Colorado's voters and elected officials have consistently required individuals organized to support or oppose ballot measures to disclose certain financial information. In 1974, Colorado enacted the Campaign Reform Act, which included registration and reporting requirements for "political committee[s] supporting or opposing a . . . statewide issue." § 1-45-106(1)(a), C.R.S. (1976).

In 1996, the people of Colorado reenacted the law as the Fair Campaign Practices Act ("FCPA"), in part to ensure the "full and timely disclosure of campaign contributions." *See* § 1-45-102, C.R.S. (2020). To that end, the FCPA required entities that supported or opposed a ballot initiative, called "issue committees," to register with the "secretary of state" and to report their "contributions received, . . . expenditures made, and obligations entered into[.]" §§ 1-45-108(1)(a)(I), -108(3), C.R.S. (1997). In 2003, voters again adopted comprehensive campaign finance laws affecting issue committees, this time as a constitutional amendment. *See* Colo. Const. art. XXVIII.

Under current law, an issue committee is any person (other than a natural person) or group of two or more persons who have "a major purpose of supporting or opposing any ballot issue or ballot question" and that has accepted or made contributions or expenditures of more than $200. *See* Colo. Const. art. XXVIII, § 2(10)(a); 8 Colo. Code Regs. § 1505-6:1(1.9), *available at* https://tinyurl.com/3ftj6hh5. A statute further defines how to determine an organization's "major purpose[s]," including by looking to its organizational documents and its "demonstrated pattern of conduct" as reflected by its expenditures or communications. § 1-45-103(12)(b), C.R.S.[1]

In 2016, Colorado created a second category of issue committees called "small-scale issue committees." This change came in response to the Tenth Circuit's opinions in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) and *Coalition for Secular Government v. Williams*, 815 F.3d 1267 (10th Cir. 2016), which upheld as-applied challenges to Colorado's issue committee laws by committees that took in and spent small sums of money (up to $3,500). Under current law, small-scale issue committees are those that accept or make contributions or expenditures between $200 and $5,000 during an election cycle. § 1-45-103(16.3), C.R.S. Such small-scale issue committees have no further obligations after they register; they are not required to file any reports of their contributions or expenditures. § 1-45-108(1.5), C.R.S.

As a result, nearly all entities with "a major purpose" of supporting or opposing a ballot measure must register with the Secretary of State. This electronic registration takes "less than ten minutes," and is "not burdensome." (Defs.' Appx., p. 36, ¶ 4 –

[1] All subsequent citations to the Colorado Revised Statutes are to the 2020 version.

Breeman Dec.; *id.*, p. 88, 25:22-24 – Kennedy Dep.) Issue committees are listed on the Secretary's website alongside the initiatives they support or oppose, and the Colorado State Ballot Information Booklet (the "Blue Book") directs voters to that page to view "more information on those issue committees that support or oppose the measures on the ballot." *See* § 1-40-124.5(1.7)(b)(II), C.R.S.

II. Issue committee activity in 2018, 2019, and 2020

In each of 2018, 2019, and 2020, more than 99% of all reported contributions and expenditures were made to or by issue committees that reported more than $5,000 in contributions or expenditures. (Defs.' Appx., p. 3, ¶ 4 – Reynolds Dec.) At the same time, only 33% or less of the active issue committees (including small-scale issue committees) raised or spent more than $5,000 in any of those years. (*Id.* at 4, ¶¶ 9-10.) In 2020, issue committees reported spending more than $60 million; in 2019, $15 million; and in 2018, more than $77 million. (*Id.* at 3-4, ¶ 7.)

III. Colorado Union of Taxpayers

CUT was founded in 1976, and its activities mostly involve public education around legislative measures introduced in the Colorado General Assembly. CUT provides weekly updates of its positions on legislation and produces an annual newsletter. (*Id.* at 67-68, 9:21-10:17, 18:4-17, 19:1-15 – Neilson Dep.) CUT also sometimes takes positions on initiatives and referenda placed before Colorado's voters. Some years, CUT does not take a position on any ballot measure. (*Id.* at 69, 43:19-25.)

CUT occasionally runs advertisements on ballot issues. In 2019, CUT spent $5,001 on a radio advertisement opposing a ballot measure. (*Id.* at 83 – CUT0010.)

CUT made this advertisement as an in-kind donation to an issue committee, but the content of the ad would not have changed if CUT had used its own name in the ad. (*Id.* at 70, 72-73, 49:3-50:6; 60:21-61:9 – Neilson Dep.). In 2020, CUT spent approximately $3,500 on advertisements supporting two initiatives. (*Id.* at 74-82 – CUT0109-0117.)

CUT is not registered as an issue committee or a small-scale issue committee. (*Id.* at 6, ¶ 17 – Reynolds Dec.) Defendants have never attempted to enforce Colorado's issue committee laws against CUT, nor have they ever taken the position that CUT is an issue committee. (*Id.*, ¶ 18.) CUT has never been subject to an enforcement action by anyone alleging that it is an issue committee. (*Id.*, ¶ 19) And CUT has never asked the Secretary of State for an advisory opinion as to whether the issue committee laws apply to its activity. (*Id.* at 7, ¶ 21; *id.* at 70, 52:4-18 – Neilson Dep.)

CUT and another plaintiff, Colorado Stop the Wolf Coalition, brought this lawsuit in September 2020. CUT then requested that the Court enjoin any enforcement of the issue committee or small-scale issue committee laws on the eve of the 2020 election. (Doc. 17.) The Court denied the motion for preliminary injunction on October 27, 2020. (Doc. 34.) Following a motion to dismiss Stop the Wolf from the case, Stop the Wolf voluntarily dismissed its claims earlier this year. (Doc. 59.)

LEGAL STANDARD

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the burden to show the absence of a genuine fact issue. *See Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 36

F.3d 1513, 1517 (10th Cir. 1994). If the movant makes this showing, "the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Id.* at 1518.

ARGUMENT

I. Colorado's issue committee laws are consistent with the First Amendment.

CUT's first cause of action generally asserts that Colorado's registration and disclosure requirements for issue committees deprive individuals of their free speech rights. *See* 2d Am. Compl. (Doc. 66) ¶¶ 50-61. Although CUT positions this as both an as-applied and facial challenge, it cannot bring an as-applied challenge because it has never actually been subject to any enforcement or threatened enforcement of the statute. And it cannot meet the high burden of sustaining a facial challenge. Those laws are narrowly tailored to Colorado's significant informational interest in the large sums of money raised and spent on its ballot issues, and therefore satisfy exacting scrutiny.

A. The Court should treat CUT's claims solely as facial challenges because Defendants have never attempted or threatened to apply the issue committee laws to CUT.

CUT pled its first cause of action as both a facial and as-applied challenge. *See* 2d Am. Compl. ¶¶ 60-61. But CUT cannot bring an as-applied challenge. To have standing to bring a pre-enforcement, as-applied challenge to a law, a plaintiff must show that "the threatened enforcement [is] sufficiently imminent." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). CUT lacks such standing here because (1) CUT has never registered as an issue committee and thus never been subject to the requirements of the issue committee laws; (2) CUT has never been the subject of an

enforcement proceeding relating to any issue committee requirements (unlike the plaintiffs in *Sampson* and *Coalition*); and (3) Defendants have never threatened to enforce these laws against CUT, let alone given any indication that enforcement is imminent. CUT thus has no standing to bring an as-applied challenge.

Federal courts have jurisdiction only to decide actual cases and controversies; they cannot issue advisory opinions. *See, e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). But CUT's as-applied challenge seeks exactly that: an assurance from a federal court that a law could not apply to it even though no one has sought to apply that law to CUT. Therefore, the Court should not consider CUT's as-applied challenge.

B. CUT cannot establish that the issue committee laws are facially unconstitutional.

"Facial challenges to statutes are generally disfavored as 'facial invalidation is, manifestly, strong medicine that has been employed by the Supreme Court sparingly and only as a last resort.'" *Golan v. Holder*, 609 F.3d 1076, 1094 (10th Cir. 2010) (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)) (alterations omitted). Accordingly, "plaintiffs bear a 'heavy burden' in raising a facial constitutional challenge." *Id.* (quoting *Finley*, 524 U.S. at 580).

CUT alleges that Colorado's registration and disclosure requirements violate the First Amendment. 2d. Am. Compl. (Doc. 66) ¶¶ 60-61. The Tenth Circuit has twice applied exacting scrutiny to such challenges, requiring a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Coal. for Secular Gov't*, 815 F.3d at 1275–76 (quotations omitted); *see also Sampson*, 625 F.3d at 1255. This standard "does not require that the disclosure regimes be the least

restrictive means of achieving their ends," but "it does require that they be narrowly tailored to the government's asserted interest." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

1. Binding caselaw establishes that Colorado's informational interest in registration and disclosure is sufficiently important.

The Supreme Court and Tenth Circuit have both held that Colorado has a sufficiently important informational interest in registration and financial disclosures in the initiative process. The Supreme Court "explained in *Buckley* that disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent,' thereby aiding electors in evaluating those who seek their vote." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) ("*ACLF*") (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam)). In *ACLF*, the Court struck down certain Colorado disclosure requirements for petition circulators in part because of the robust disclosures that remained in place, which informed voters "of the source and amount of money spent by proponents to get a measure on the ballot." *Id.* at 203. The Court held that Colorado has "substantial interests in regulating the ballot-initiative process," including "inform[ing] the public 'where the money comes from.'" *Id.* at 204-05 (quoting *Valeo*, 424 U.S. at 66).

As to these very issue committee laws, the Tenth Circuit has also recognized that Colorado has an informational interest in the disclosures. *See Coal. for Secular Gov't*, 815 F.3d at 1278. The Court has held that the strength of this interest "depends, in part, on how much money the issue committee has raised or spent." *Id.* In other words, the more money involved, the greater the interest in disclosure. In response to *Sampson*

and *Coalition*, which held that contributions or spending of up to $3,500 did not warrant registration and disclosure, the General Assembly in 2016 amended the FCPA to require disclosures only once contributions or expenditures exceed $5,000.

These registration and disclosure requirements "help citizens 'make informed choices in the political marketplace.'" *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003)); *see also Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010) ("[I]n the cacophony of political communications through which California voters must pick out meaningful and accurate messages . . . being able to convey who is doing the talking is of great importance.") (quotations omitted). But Colorado's informational interest goes beyond ensuring that Colorado voters have this information. The disclosures themselves act as a powerful check on undue influence, foreign or otherwise, in our elections. *See Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) ("[A] State's historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign's obligation to preserve the basic conception of a political community.") (quotations omitted). By requiring registration and disclosure, Colorado ensures that voters have the same information about who is trying to influence their votes when passing laws as elected legislators have about lobbyists who try to influence theirs. *See, e.g.*, *United States v. Harris*, 347 U.S. 612, 625 (1954).

This informational interest is strong at the $5,000 level. The $5,000 threshold captured more than 99% of all reported spending by issue committees in each of 2018, 2019, and 2020. The $200 threshold for registration also furthers this informational

interest. Because small-scale issue committees are still required to register with the Secretary of State, both voters and the press can learn whether there is an organized effort for or against particular ballot measures. Additionally, if any of those committees cross the $5,000 threshold, the disclosure requirements ensure that Colorado's citizens will be fully informed of their contributions and spending. All of this information is readily accessible to the press and the public: all committees are searchable in the public TRACER database, *see* TRACER, https://tracer.sos.colorado.gov/PublicSite/Homepage.aspx; and issue committees involved in statewide ballot issues are also identified in the Blue Book, *see* § 1-40-124.5(1.7)(b)(II), C.R.S.

Finally, although the informational interest is sufficient to sustain these laws, the government's interest in avoiding corruption, and the appearance of it, also supports these laws, in two ways.[2] First, pro- and anti-recall efforts are organized as issue committees, creating the same risks of corruption as are present in direct candidate contributions. *See Valeo*, 424 U.S. at 27-28. Second, because candidates often align themselves with particular ballot issues, the unlimited contributions that can flow to issue committees create "the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28.[3] This creates a serious risk that

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[2] The Court need not address this argument if it concludes (as the Tenth Circuit has) that Colorado has a sufficiently strong informational interest.

[3] *See, e.g.*, D. Sirota & C. Woodruff, *Drilling Down into Oil & Gas Contributions to Pro-74, Anti-112 Campaigns*, Westword, Oct. 30, 2018, https://tinyurl.com/97ya4r4t; E. Sealover, *Polis Signs Budget Bill, Asks Colo. Business Leaders to Back Gallagher Amendment Repeal*, Denver Bus. J., June 22, 2020, https://tinyurl.com/2nj3p4ms (examples of alignment between candidates and initiatives).

candidates could circumvent the contribution limits through uncapped issue committee contributions. *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001) ("all Members of the Court agree that circumvention is a valid theory of corruption"). Thus, Colorado's interest in avoiding corruption, and the appearance of it, is also strong enough to support the issue committee laws.

2. Colorado's disclosure and registration requirements are narrowly tailored to achieve its informational interest.

The means Colorado has employed, which have been refined over the last decade through Colorado's response to the Tenth Circuit's opinions in *Sampson* and *Coalition*, are narrowly tailored. To satisfy narrow tailoring, the fit between the government interest and the means chosen to achieve it does not need to be "perfect, but reasonable"; "not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Americans for Prosperity Found.*, 141 S. Ct. at 2384 (quotations omitted).

Colorado's disclosure and registration laws are narrowly tailored because they require disclosure from only 33% of active issue committees, but still capture 99% of all issue committee spending.[4] (Defs.' Appx., p. 3-4, ¶¶ 4-5, 9-10 – Reynolds Dec.) The $5,000 threshold minimizes the burden on small-scale issue committees and ensures that more disclosure is required from the entities that raise and spend more money, as

[4] Some committees reported as issue committees despite falling below the $5,000 threshold, but nothing in Colorado law required them to operate as issue committees rather than small-scale issue committees without reporting obligations. That they did so provides further evidence that the reporting burdens on issue committees are small.

the Tenth Circuit has instructed. *See Coal. for Secular Gov't*, 815 F.3d at 1278. This satisfies narrow tailoring by employing means that are reasonable and proportional to the governmental interest.

Additionally, because small-scale issue committees have no reporting obligations, any burden on them is negligible. Small-scale issue committees only need to register with the Secretary of State to fully satisfy their obligations under Colorado law. As several registered agents of small-scale issue committees stated, registration takes less than ten minutes, is easy to follow, and is not burdensome. (Defs.' Appx., p. 36, ¶ 4 – Breeman Dec.; *id.* at 41, ¶ 5 – Garnett Dec.; *id.* at 47, ¶ 4 – Tjossem Dec.) The simple, straightforward registration process is shown in two screenshots from the Secretary of State's website. (*Id.* at 32-35, Bouey Dec.) This process presents none of the concerns expressed in *Sampson* and *Coalition* about the burden of ongoing reporting obligations for small-scale issue committees. And, because the small-scale issue committee laws provide useful information to voters without imposing meaningful burdens on the committees, the General Assembly reenacted these laws in 2019 as the 2016 legislation was set to expire. 2019 Colo. Legis. Serv. Ch. 328 (H.B. 19-1318). These laws are thus narrowly tailored, in light of *Sampson* and *Coalition*, to ensure that voters have information about organized efforts and money spent supporting and opposing ballot measures while making any burdens associated with those disclosures proportionate to the government's interest in the disclosures.

II. The $5,000 threshold for issue committees is not arbitrary.

CUT next contends that the $5,000 threshold separating small-scale issue committees from issue committees is unconstitutionally arbitrary. CUT bears the burden of demonstrating the statute's unconstitutionality. *See, e.g.*, *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 198 (2001).

"[D]isclosure thresholds . . . are inherently inexact; courts therefore owe substantial deference to legislative judgments fixing these amounts." *Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012). This deference traces back to *Buckley v. Valeo*, where the Supreme Court upheld the monetary thresholds for federal recordkeeping and disclosure laws as not "wholly without rationality." 424 U.S. at 83. The Court recognized that it "cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Id.* Thus, legislatures rather than courts should make these threshold determinations so long as they are not wholly irrational. *See id.* at 30 ("If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.") (quotations omitted).

"Following *Buckley*," other courts "have granted judicial deference to plausible legislative judgments as to the appropriate location of a reporting threshold, and have upheld such legislative determinations unless they are wholly without rationality." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 60 (1st Cir. 2011) (quotations omitted); *see also Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 310 (3d Cir. 2015) ("[E]ven

though election disclosure laws are analyzed under exacting scrutiny, we apply less searching review to monetary thresholds — asking whether they are rationally related to the State's interest.") (quotations omitted).

CUT cannot meet this high burden of proving that the $5,000 threshold established by statute is wholly irrational, for four reasons.

First, the $5,000 threshold is higher, sometimes significantly so, than is used in many other states. *See Family PAC*, 685 F.3d at 811 ("wholly without rationality" standard "is all the more appropriate when, as here, the state's thresholds are comparable to those in other states"). Only two states have imposed a reporting threshold higher than $5,000, and seven other states have also set a $5,000 threshold. The remaining states impose no lower bound or one lower than $5,000. A summary of these reporting laws is contained in Defendants' Appendix, at pp. 49-65.

Second, $5,000 is significantly higher than the amounts disapproved of in *Sampson*, 625 F.3d at 1260 ($782) and *Coalition*, 815 F.3d at 1277 ($3,500).

Third, the General Assembly imposed the $5,000 threshold after hearing testimony that about 93% of overall issue committee spending was from issue committees that spent more than $5,000, and that a large number of issue committees spent less than $5,000. (Defs.' Appx., p. 28, ¶ 6 – Bouey Dec.; *id.*, p. 85 15:7-14 – Trans. of S. Comm. on State, Veterans, & Military Affairs.)

Fourth, Colorado's experience since 2016 bears out the reasonableness of the $5,000 threshold.

- **Most issue committees receive and spend less than $5,000.** More than 75% of all issue committees that were active in 2020 (199 out of 260) either had less than $5,000 in expenditures and contributions or were small-scale issue committees. (Defs.' Appx., p. 4, ¶ 9 – Reynolds Dec.)
- **The issue committees that spend more than $5,000 tend to spend much more.** The remaining 25% consists of 61 issue committees that spent an average of $983,473 in 2020. (*Id.*, ¶ 11.)
- **Most spending is by issue committees that spend more than $5,000.** More than 99% of all reported spending by issue committees in each of 2018, 2019, and 2020 was by issue committees that spent more than $5,000. (*Id.*, p. 3, ¶ 4.) Even if every small-scale issue committee spent $5,000, the $5,000 threshold still captures 98.9% of the total spending in 2020. (*Id.*, ¶ 5.)
- **Few small-scale issue committees take in or spend more than $5,000.** Small-scale issue committees can determine ahead of time whether they will spend less than $5,000. Since 2016, only 19 small-scale issue committees have changed to a full issue committee, representing just 3.3% of all issue committees (including small-scale issue committees) that registered during that time frame. (*Id.* p. 4-5, ¶ 12); *see also* § 1-45-108(1.5)(c), C.R.S.

For these reasons, the $5,000 disclosure threshold is not irrational.

III. Colorado's major purpose test is not vague.

CUT also argues that Colorado's requirement that an issue committee have "a major purpose" of supporting or opposing a ballot measure is unconstitutionally vague.

CUT has the burden to prove its vagueness claim. *See Harmon v. City of Norman*, 981 F.3d 1141, 1151 (10th Cir. 2020). A statute will withstand a vagueness challenge so long as its prohibitions are "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Dodger's Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1443 (10th Cir. 1994) (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Additionally, courts have expressed "greater tolerance" of regulations, like this one, which impose only civil penalties. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

CUT's vagueness claim fails because "a major purpose" can be understood with ordinary common sense. In determining a law's vagueness, courts "start[] with the [law's] language," but "must also consider any narrowing construction courts have given the challenged [law]." *Harmon*, 981 F.3d at 1152. Twice, the Colorado Court of Appeals has rejected vagueness challenges identical to the one CUT makes here. In *Independence Institute v. Coffman*, the court held that "a major purpose" is not unconstitutionally vague: "Constitutional provisions need not be so exact as to eliminate any need for . . . fact-specific analysis. Thus, the fact that a multi-purpose committee would have to look to its own circumstances does not render the phrase 'a major purpose' unconstitutional." 209 P.3d 1130, 1139 (Colo. App. 2008). A different division of the same court reached an identical conclusion two years later. *See Cerbo v. Protect*

Colo. Jobs, 240 P.3d 495, 501 (Colo. App. 2010) ("We perceive no ambiguity in the phrase 'a major purpose.'").

This Court should reach the same result. Determining an entity's major purpose may require a fact-specific inquiry into the organization's formation documents and its practices, but the term is easily understood. And the statute is even clearer now — in response to the *Independence Institute* decision, the General Assembly amended the statute to define "major purpose" as including purposes identified in the organization's formation documents and based on its demonstrated pattern of expenditures or communications. *See* § 1-45-103(12)(b), (c), C.R.S.

CUT has argued that "a major purpose" is somehow vaguer than "the major purpose," a standard routinely applied in campaign finance cases, but other courts have rejected this argument. *See, e.g.*, *Human Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2009 WL 62144, at *20 (W.D. Wash. Jan. 8, 2009), *aff'd* 624 F.3d 990 (9th Cir. 2010) ("The phrase '*a* major purpose' is no more vague than '*the* major purpose.'"); *Indep. Inst.*, 209 P.3d at 1143 (Connelly, J., concurring) ("It will be easier, not harder, to determine 'a' rather than 'the' major purpose of [an] organization.").

The "a major purpose" standard, particularly as clarified by statute, provides entities with sufficient notice as to whether their activities will be regulated. Entities whose organizational documents or demonstrated pattern of conduct show that supporting or opposing a ballot initiative "constitutes a considerable or principal portion of the organization's total activities," are subject to registration. *Cerbo*, 240 P.3d at 501. The standard is not vague and Defendants are entitled to summary judgment.

IV. Because a substantial amount of spending occurs before an initiative is certified to the ballot, the issue committee laws are not overbroad.

Finally, CUT argues that the issue committee laws are overbroad because they regulate spending on ballot measures before they are certified to the ballot. Specifically, an issue committee's registration and disclosure requirements arise once a ballot title is set, which occurs before an initiative's proponents circulate a petition to obtain enough signatures to qualify for the ballot. *See* § 1-45-108(7)(a), C.R.S. But CUT has not suffered any injury from this provision, and so it does not have standing. Even if it does, Colorado's laws are reasonable and not unconstitutionally overbroad.

A. CUT does not have standing to bring this claim.

CUT has the burden of establishing its own standing. *E.g. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). And while a somewhat "more lenient" standing analysis applies to facial overbreadth challenges, plaintiffs "still must show that they themselves have suffered some cognizable injury from the statute." *D.L.S. v. Utah*, 374 F.3d 971, 975-76 (10th Cir. 2004).

CUT has not suffered any injury. In 2019, CUT spent $5,000 on a radio ad after the measure it supported was certified to the ballot. In 2020, CUT did not spend any money on issue advocacy before the ballot measures it supported were certified to the ballot. (Defs.' Appx., p. 71, 54:25-55:2 – Neilson Dep.) CUT alleges in its amended complaint that it "announced its support" for Propositions 116 and 117 "before those issues qualified for the ballot," but Colorado's issue committee laws are not triggered by an announcement of support. 2d Am. Compl. (Doc. 66) ¶ 76. CUT has made no showing that its speech was chilled or it was otherwise harmed by the requirement that

issue committees register before a measure is certified to the ballot. Therefore, it lacks standing to challenge that provision.

B. The issue committee laws are not overbroad.

CUT's claim fares no better on the merits. CUT bears the burden to demonstrate "from the text of the law and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (quotations and alterations omitted). "Overbreadth is strong medicine," that "courts employ . . . with hesitation, and then, only as a last resort." *Faustin v. City & Cnty. of Denver*, 423 F.3d 1192, 1199 (10th Cir. 2005) (quotations omitted). CUT must "show that the law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep." *United States v. Brune*, 767 F.3d 1009, 1018 (10th Cir. 2014) (quotations omitted). Even if the law reaches some protected speech, "facial invalidation is inappropriate if the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." *Id.* at 1019 (quotations and alterations omitted).

CUT's overbreadth argument fails for two reasons. First, it has not shown any chilling effect from this requirement, let alone that such an effect is real and substantial. To the contrary, Katie Kennedy, an attorney who represents issue committees, testified that issue committees often form and register with the Secretary of State before the issue is certified to the ballot. (Defs.' Appx. p. 89-90, 33:22-34:2 – Kennedy Dep.)

Second, even if CUT had any evidence of a chilling effect, it cannot justify prohibiting all enforcement of the law. Far from being chilled in their expression, many issue committees fundraise and spend money on their chosen ballot issues before a

measure is certified to the ballot. (*Id.*, 33:22-34:17.). For example, in 2020, Local Choice Colorado received more than $2.25 million in contributions before the Secretary issued a statement of sufficiency concerning its ballot measure; Colorado Families First received more than $2.8 million. (*Id.* at p. 5, ¶¶ 14-15 – Reynolds Dec.) The contributions received just by those two issue committees before ballot certification constitutes more than 8% of all contributions received by issue committees in 2020. CUT's overbreadth challenge would hide all of these contributions and expenditures from public view, undermining the public interest in information about those seeking to write Colorado's laws. And, if CUT's claim prevailed, organizations could respond by shifting more contributions and expenditures before ballot certification.

Therefore, because CUT has not shown any chilling effect or that the statute punishes a substantial amount of protected speech compared to the significant disclosures that would be lost if CUT's position prevailed, Defendants are entitled to summary judgment.

CONCLUSION

Colorado's voters have repeatedly passed laws establishing that they are entitled to know who is spending money in ballot issue elections, how much they are spending, and on what. Colorado has carefully tailored its issue committee laws in light of rulings by the Tenth Circuit to provide Colorado voters with this information in a manner consistent with the First Amendment. CUT has failed to meet its burden of proving that these laws violate the Constitution. Therefore, Defendants are entitled to summary judgment on all of CUT's claims.

RESPECTFULLY SUBMITTED this 23rd day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I served a true and complete copy of the within **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** upon all counsel of record and parties who have appeared in this matter through ECF or as otherwise indicated below:

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