IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01858-RPM-MJW

KAREN SAMPSON,
NORMAN FECK,
LOUISE SCHILLER,
TOM SORG,
WES CORNWELL, and
BECKY CORNWELL,

Plaintiffs,

v.

MIKE COFFMAN, in his official capacity as Colorado Secretary of State,

Defendant.

SECRETARY'S RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant Mike Coffman, in his official capacity as the Colorado Secretary of State, respectfully submits this Response to Plaintiffs' Motion for Summary Judgment.

INTRODUCTION

Throughout their memorandum in support of their motion for summary judgment, Plaintiffs repeatedly conflate all forms of political participation in ballot measure campaigns – including financial contributions – and characterize such activity as pure "speech" deserving of the highest protections under the First Amendment. Plaintiffs also erroneously imply that simply "speaking out" about a ballot issue subjects persons to the registration and disclosure requirements of issue committees under Colorado campaign finance law. *See* Pls.'

Mem. at 7, 25. In so doing, Plaintiffs disregard the definition of "issue committee" under Colo. Const. art. XXVIII, and ignore the fact that campaign finance law governs the disclosure of financial transactions – *i.e.*, contributions and expenditures – intended to influence election outcomes. Contrary to Plaintiffs' characterization of Colorado law, simply "speaking out" about a ballot measure – even as a group – does not make that group an issue committee. Rather, a group of individuals like the Plaintiffs is subject to campaign finance laws only where (as here) the group has both a "major purpose" of supporting or opposing a ballot issue or ballot question, and accepts contributions or makes expenditures of $200 or more toward that effort. Colo. Const. art. XXVIII, § 2(10)(a); Secretary of State Rule 1.7, 8 C.C.R. § 1505-6.

As set forth in the Secretary's motion for summary judgment and accompanying brief ("Secretary's Opening Br."), the Secretary bases his motion for summary judgment on the core undisputed facts and documents related to the underlying administrative complaint against Plaintiffs (Secretary's Opening Br. at 12-24; Exs. A-2 to A-52, A-56),[1] the campaign finance provisions themselves (including the Secretary's rules, forms, and instructions) (Secretary's Opening Br. at 4-10, 33-34; Exs. A-1, A-54), and the campaign finance information made available by the Secretary of State's office to assist the public (Secretary's Opening Br. at 24-26; Exs. A-53, A55). As set forth in the Secretary's brief, existing case

[1] References herein to Exhibits A-1 to A-56 are exhibits attached to the brief filed in support of the Secretary's motion for summary judgment. Exhibits attached to this response brief appear in boldface and resume the sequence with Exhibit A-57.

law precedent establishes as a matter of law that the Secretary is entitled to summary judgment on Plaintiffs' challenges to the disclosure requirements and private enforcement provisions in Colorado's campaign finance laws. Secretary's Opening Br. at 29-46.

Plaintiffs have taken a very different approach to their summary judgment motion. In addition to setting forth the facts related to the underlying administrative action, Plaintiffs have injected here as additional "facts" their own experts' opinions and conclusions, a litany of unrelated administrative complaints going back to 1997 (several of which have nothing to do with issue committees, and all of which predate key 2005 statutory amendments affecting the private complaint process), and Plaintiffs' subjective declarations describing their personal feelings about what happened to them, including their claims that they felt intimidated – which is refuted by their own email correspondence, cited below. Plaintiffs have also submitted as statements of "fact" their own characterizations of Colorado campaign finance law and the purported "extreme burden" it imposes.[2]

If, in considering the parties' cross-motions for summary judgment, the Court decides to consider this additional body of evidence proffered by Plaintiffs (*i.e.*, expert opinions and various assertions of "fact" beyond the core events surrounding the underlying administrative action), then as set forth below, disputes of material fact will require a trial on some or all of Plaintiffs' claims. For example, the Secretary's experts take a view of the role and value of disclosure in the ballot issue context that not only comports with the case law presented in

[2] Plaintiffs are obviously free to argue their views about Colorado law; the Secretary merely emphasizes that such arguments about the law cannot be viewed as "statements of fact."

the Secretary's motion, but also contradicts the conclusions drawn by Plaintiffs' experts. Several flaws in both the Carpenter opinion survey and the Milyo compliance cost experiment call into question the conclusions drawn in those experts' reports. In addition, deposition testimony from the Secretary's other fact witnesses undermine Plaintiffs' claims regarding the comparative utility of disclosure and the "burdens" it imposes on ordinary citizens. The Secretary's witnesses' testimony establishes that this information serves a critically valuable purpose in the real world of ballot issue campaigns. Moreover, the real-world experience of these citizens – who, like Plaintiffs, are ordinary individuals who became involved in local issues – refute the Plaintiffs' claims of the purported "extreme burden" imposed by Colorado disclosure laws.

SECRETARY'S RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

The Secretary responds as follows to Plaintiffs' Statement of Facts:

Part I ("The Annexation Dispute"): The Secretary does not dispute Plaintiffs' statements of the events that led to the filing of the administrative complaint below. However, the Statement of Undisputed Material Facts in the Secretary's motion for summary judgment sets forth in greater detail Plaintiffs' specific activities in opposition to the annexation efforts of David Hopkins and Patsy Putnam. Secretary's Opening Br. at 12-23, and Exs. A-2 to A-49. The facts set forth in the Secretary's motion are undisputed and are derived from Plaintiffs' own email correspondence and documents produced in discovery.

The Secretary disputes Plaintiffs' subjective characterization that Putnam's administrative complaint was filed purely for political or vindictive motives, or on the mere basis that Plaintiffs had "join[ed] together to speak out against the annexation." Pls.' Mem. at 5. A complainant's subjective motive for filing a complaint is irrelevant to the merits of an alleged campaign finance violation, as are Plaintiffs' subjective characterizations of that complaint. In fact, Putnam's complaint expresses no particular motive, but alleges simply that Plaintiffs had supported or opposed a ballot issue or question and had accepted contributions or made expenditures in excess of $200. Ex. 6. Moreover, Putnam and Hopkins testified at their depositions that they believed Plaintiffs met the definition of an issue committee because their Yahoo group emails and other observable activities revealed that Plaintiffs were working together to oppose annexation, and because the number of yard signs in the neighborhood indicated that Plaintiffs had spent at least $200 toward that effort. **Ex. A-57** (Putnam dep.) at 42:4-25; 87:19 to 89:22; **Ex. A-58 (**Hopkins dep.) at 48:19 to 50:20; 52:5 to 54:25; 57:22-58:21. Plaintiffs' own emails and other documents confirm this activity. Secretary's Opening Br., pp. 16-17 at ¶ 17; Exs. A-19 to A-21.

Part II ("Colorado's Campaign Finance Laws"): Plaintiffs' descriptions and characterizations of Colorado campaign finance law in Part II do not qualify as statements of "fact." Further, the Secretary disputes Plaintiffs' assertion that citizens "who wish to join with others to support or oppose ballot initiatives must organize themselves into formal committees, appoint registered agents, and comply with complex disclosure regulations as a condition of exercising their rights to free speech and association." Pls.' Mem. at 7. This

claim mischaracterizes Colorado law by suggesting that merely speaking out requires citizens to comply with disclosure regulations. This is untrue. Compliance with disclosure laws is not a precondition to merely supporting or opposing a ballot issue, or even a precondition of joining with others to do so. Rather, a "group" must have a "major purpose" of supporting or opposing that ballot issue, and must accept contributions or make expenditures in excess of $200. Colo. Const. art. XXVII, § 2(10)(a); Rule 1.7.

The Secretary likewise disputes Plaintiffs' assertion that the "[f]ailure to file required registration or disclosure forms results in mandatory fines of $50.00 per day." Pls.' Mem. at 8 (citing Colo. Const. art. XXVIII, § 10(2)(a)). In fact, both the appropriate filing officer and administrative law judges have authority to set aside or reduce penalties upon a showing of good cause. Colo. Const. art. XXVIII, § 10(2)(b)(I), (2)(c); Colo. Rev. Stat. § 1-45-109(2)(b) (2007). In practice, the Secretary has internal written policies for considering requests for waiver or reduction of fines imposed. **Ex. A-59**. The Secretary considers certain circumstances to be possible justification for good cause, including bona fide personal emergencies; practical obstacles beyond the registered agent's control; reasonable misunderstandings regarding applicable disclosure requirements and deadlines; mistakes in electronic filing for first-time filers; and unexpected or unavoidable technical or computer-related failures. **Id.**

If good cause is established, the Secretary may consider other factors in determining whether to waive or reduce a fine, such as the committee's history of timeliness, accuracy, and demonstrated commitment to fulfill the requirements and spirit of Colorado's disclosure

laws; the degree of harm to the public's interest in "full and timely disclosure" caused by the late filing (as indicated by such factors as whether the violation occurred in an off-election year or the degree of unreported activity); the timeliness of the committee's response to receiving notice of the delinquency; the committee's acceptance of responsibility for the failure to timely file; and remedial measures taken by the committee to avoid future delinquencies. **Id.**

Finally, the Secretary specifically disputes Plaintiffs' description of the private complaint provisions. Pls.' Mem. at 8. Notably, Plaintiffs omit Colo. Rev. Stat. § 1-45-111.5(2) (2007), which was amended in 2005 to provide that a party in an "any action" brought to enforce the provisions of article XXVIII (including administrative proceedings) is entitled to recover attorneys' fees for frivolous or vexatious suits or other improper conduct.[3] *See* Secretary's Opening Br. at 10.

Part III ("The Campaign Finance Complaint"): The Secretary acknowledges that Putnam issued the particular discovery requests listed by Plaintiffs. Plaintiffs fail to mention, however, that they objected to this discovery, and that the ALJ quashed or limited the scope of each of these requests. **Ex. A-61** at P0137-38.

The Secretary disputes Plaintiffs' characterizations of the Putnam complaint to the extent Plaintiffs purport to state (as an assertion of "fact") that they were sued simply for "speaking out." Pls.' Mem. at 9. As set forth above, Putnam and Hopkins' sworn deposition

[3] An ALJ granted attorneys fees under this provision in OS 2007-003, a recent campaign finance case. **Ex. A-60** at SOS1697-SOS1705.

testimony sets forth their reasons for believing that the Plaintiffs constituted an issue committee under Colorado law. **Exs. A-57; A-58**. Plaintiffs ultimately stipulated that they met the definition of an issue committee. Ex. 15; Ex. A-52. In any event, the Secretary maintains that a complainant's motive for filing a complaint is irrelevant to the merits of an alleged campaign finance violation, as are Plaintiffs' subjective reactions to that complaint.

Part IV ("The Proposed "Guilty Plea") and Part V ("The Hearing"): The Secretary does not dispute the documents and correspondence setting forth the parties' negotiations in the underlying administrative proceedings; these documents speak for themselves. The Secretary notes that his office is not in a position to supervise such negotiations. The ALJ, however, can rule on discovery disputes, and is required under Colo. Rev. Stat. § 1-45-111.5(2) to award attorneys' fees upon finding that an action or any part thereof either lacked substantial justification or was interposed for delay or harassment, or upon finding that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including discovery abuses. Here, Plaintiffs settled the case midway through the administrative hearing. As part of their stipulation, Plaintiffs waived all claims for attorney fees, thereby conceding that the complaint was not groundless. Ex. 15; Ex. A-52.

Part VI ("The Annexation Election"): The Secretary does not dispute that Hopkins and Putnam issued the statements in Exhibits 16-18. Plaintiffs' Yahoo group postings make clear, however, that Hopkins and Putnam's actions did not intimidate Plaintiffs into silence or chill their speech. The day after the administrative hearing, Tom Sorg posted:

> ParkerYES tried to shut us up, and yes, they did slow us down for a bit. They threatened us with a non-negotiable settlement to take down our signs and totally stop talking about annexation. They took up a lot of our time with the litigation, but they have not stopped us. If any thing, they have only encouraged us to fight that much harder to beat this annexation with a landslide at the election. . . . . They failed. . . . . So we are back and stronger than ever. Lets get some email flowing on this group. Lets get some discussion about the annexation and get out and vote against this annexation when the time comes. Become active in this group and speak your mind.

Ex. A-62 at P1541-42 (Msg. #410). In the days following the hearing, Plaintiffs and their counsel issued their own public statements stating their version of what happened at the hearing. **Ex. A-62** at P1889; P1905-07; P1931. And as the annexation election drew near, Plaintiffs routinely ridiculed Hopkins and his postings on the Yahoo group site. **Ex. A-63** (Msgs. #512, #527, #528, #544, #563, #569, #587, #604).

Part VII ("The Operation of Colorado's Private Enforcement Provision"): As with Part II above, Plaintiffs' characterizations Colorado campaign finance law do not qualify as statements of "fact." Moreover, in describing the "current version of the law," Plaintiffs again omit Colo. Rev. Stat. § 1-45-111.5(2) (2007), which provides for attorneys' fees in administrative actions for frivolous or vexatious suits or other improper conduct. *See* Secretary's Opening Br. at 10.

The Secretary also disputes as a factual matter Plaintiffs' claim that "over 200 private enforcement actions have been brought." Pls.' Mem. at 14. The Secretary's complaint log[4]

[4] The Secretary's campaign finance complaint log is available at: http://www.elections.colorado.gov/WWW/default/Campaign%20Finance/fcpa_log.pdf.

reflects that a number of citizen complaints are never forwarded to the Office of Administrative Courts ("OAC") because they are either incomplete or fail to state a violation of campaign finance law. **Ex. A-64**; **Ex. A-65** (Heppard aff.) *See also* Secretary of State Rule 6.3, 8 C.C.R. § 1505-6 (Ex. A-1 at p.13). Moreover, the only complaints even arguably relevant for purposes of this case would be complaints actually brought against issue committees. In fact, the log reflects that only 32 complaints have been filed against issue committees of any type over the last seven years. **Ex. A-65**. Moreover, during the most recent general election cycle in 2006, where there were 14 proposed constitutional amendments and referenda on the statewide ballot alone, **Ex. A-66**, the Secretary of State's office received filings from a total of 237 issue committees around the state. Yet, throughout 2006, only three complaints were filed against issue committees of any type – including the complaint brought against Plaintiffs. **Ex. A-65**.

As a related point, the numerous administrative proceedings cited by Plaintiffs, *see* Pls.' Mem. at 14-16 & 21, are irrelevant to Plaintiffs' constitutional challenge here to the private enforcement provisions as they apply to issue committees. Compl. ¶ 78. Many of these cases do not involve issue committees, and none of them was filed under the current statutory scheme, which, since June 1, 2005, expressly provides for attorneys fees in administrative actions for frivolous claims, defenses or discovery abuses.

One recent administrative case, OS 2007-0003, reflects how this change has affected the use of the private enforcement provisions. **Ex. A-60**. There, a respondent in an

administrative proceeding sought attorneys' fees under Colo. Rev. Stat. § 1-45-111.5(2) on grounds that the complainant's claim was frivolous and groundless.

The respondent's motion for attorneys' fees sets forth the legislative history of section 111.5(2). **Ex. A-60** at SOS1721-25. The respondent noted that, prior to the enactment of section 111.5(2), administrative courts had refused to assess attorney fees in campaign finance complaints under Colo. Rev. Stat. § 13-17-102, because that statute applied only to "courts of record," a term that did not include administrative courts. **Id.**

In 2003, the General Assembly added the attorneys' fees provision in section 111.5(2) in an attempt to rein in frivolous administrative complaints. This provision however, simply mirrored the language in Article XXVIII, referring to a "prevailing party in a private action." Accordingly, an ALJ still declined to award fees in the case brought by Mac Williams against state representative Ron Teck (*see* Pls' Mem. at 16 (citing OS 2003-022), and Ex. 23), holding that a "private action" was the action of a person seeking to enforce the decision of an administrative law judge in court, not the administrative complaint proceeding before an administrative law judge. **Ex. A-60** at SOS1724. Thus, in 2005, the General Assembly amended section 111.5(2) to expand the availability of fees to "any action." The respondent argued that this change reflected the General Assembly's efforts to expand litigants' ability to recover fees; to give administrative courts the tools by which to assess attorney fees for frivolous, groundless and vexatious complaints; and to encourage administrative courts to bring a halt to frivolous, groundless and vexatious campaign finance complaints. **Ex. A-60** at SOS1724-25. The ALJ in that case ultimately relied on section 111.5(2) to award

attorneys' fees, concluding that the complainant's second claim for relief was groundless. **Ex. A-60** at SOS1697-1705.

Thus, even accepting, for example, Mac Williams' series of administrative complaints as the rare example of harassment, the Colorado legislature has responded and expanded the availability of attorneys' fees to address frivolous and vexatious complaints. As noted above, in 2006, the first full year since the amendment to Colo. Rev. Stat. § 1-45-111.5(2), only three complaints were brought against the 237 issue committees of any type on file with the Secretary. In short, Plaintiffs have presented no evidence that the private enforcement provisions have been used in abusive ways under current law.

Part VIII ("The Regulatory Burden of Colorado's Campaign Finance Laws"):

The "complex and unclear" quotation cited repeatedly by Plaintiffs in Ex. 25 must be placed in proper context. This statement appeared in a memorandum issued to all registered agents in September 2006. The memorandum itself is representative of the Secretary's extensive efforts to communicate with and assist committees in understanding and complying with campaign finance laws. Ex. 25. Specifically, this memorandum clarifies for registered agents certain distinctions between itemized and non-itemized contributions in order to help committees avoid "inadvertently reporting contributions incorrectly." Id. The memorandum also invites anyone with questions to contact the Campaign and Political Finance staff for assistance and provides a phone number. Ex. 25.

The Secretary likewise emphasizes that the legal disclaimer in the Colorado Campaign and Political Finance Manual, Ex. 7 at 2, is entirely appropriate. The Secretary's office, like any government agency, cannot dispense formal legal advice to the public. The Secretary's office does, however, provide extensive guidance and assistance to the public. *See* Secretary's Opening Br. at 24-25 and Ex. A-53. In addition to accessing the host of materials available on the Secretary's website, *see* Ex. A-55, persons may call or email the campaign finance staff with questions and take advantage of training classes offered to the public. Individuals and committees can also request advisory opinions from the Secretary.[5] Certainly nothing in Colorado campaign finance law requires any individual or committee to "hire a lawyer," contrary to Plaintiffs' suggestion. Pls.' Mem. at 17.

Becky Cornwell's declaration is, at best, self-serving, especially when viewed in light of the reports actually filed by No Annexation. Ex. 2, Ex. A-49, Ex. A-51. These reports reflect, at most, merely a handful of contributions in any one filing period (with several reports showing no activity whatsoever), and only one itemized expenditure in the committee's entire existence.

Becky's apparent struggles with the disclosure forms stand in sharp contrast with other citizens who have become involved in local issue committees. Douglas County staffer Virginia Lewis states that not one of the approximately 35 other committees she has dealt with has come even close to having the amount of difficulty with filing that Becky claims to

[5] Advisory opinions are posted at: http://www.sos.state.co.us/pubs/Info_Center/fcpa_advisory.htm.

have had. **Ex. A-67** (Lewis Decl.) ¶ 15. David Hopkins, for example, testified that he filled out each of the manual reports for the ParkerYes committee in 15-30 minutes, and did not find it particularly difficult or burdensome. *See* Secretary's Opening Br. at 26 and Ex. A-2 at 84. Similarly, ordinary Colorado citizens such as Linda Elliott and Deborah Brinkman, both of whom have served as registered agents for local issue committees, found that although they had questions when filling out their issue committee reports the first time, the help they received from local clerks was quite valuable, and that filling out the reports grew substantially easier once they became familiar with the process. **Ex. A-68** (Elliott dep.) at 29:11 to 30:3, 31:1-13; 33:1-4; 34:20 to 35:23, 41:13-43:25, 102:21 to 103:18; 112:19 to 114:5; **Ex. A-69** (Brinkman dep.) at 21:13 to 22:5, 25: 8-15, 28:5-7. Notably, the reports filed by Elliott and Brinkman reflect a far greater number of contributions and expenditures than the No Annexation reports handled by Becky Cornwell. **Ex. A-70**; **Ex. A-71.**

Part IX ("The Compliance Cost Experiment") and Part X ("The Opinion and Knowledge Survey"): Plaintiffs' discussion of their own experts' opinions and conclusions in Parts IX and X do not represent "undisputed material facts" for purposes of summary judgment. Again, if this Court chooses to consider Plaintiffs' experts' declarations as material "facts" in this case, *see* Carpenter Decl. and Milyo Decl., then summary judgment is unwarranted. Flaws in both the Carpenter survey and the Milyo compliance cost study undermine the conclusions drawn in those reports. Moreover, the Secretary's experts'

reports[6] and deposition testimony directly contradicts many of the claims made in the Carpenter and Milyo declarations regarding the utility of disclosure in the ballot issue context. Together, these create disputed issues of material fact necessitating a trial.

For example, Milyo's compliance cost study was conducted in an artificial environment that differs dramatically from the real-world conditions experienced by Colorado registered agents. Milyo used test subjects from Missouri (university students and staff, and members of his church and neighborhood association), who were paid to complete his experiment; none of these individuals can be presumed to have the kind of personal investment or stake in the process that real Colorado citizens who get involved in issue committees have. Actual Colorado issue committees (including brand new committees) are not subject to artificial time constraints when filling out disclosure reports. **Ex. A-75** (Milyo dep.) at 171:23 to 173:14. Milyo's Missouri test subjects, however, were given roughly 90 minutes to review the entire packet of Colorado statutes and regulations provided, walk through the scenario provided, and fill out all the Colorado disclosure forms – all as a first-

[6] The Secretary's experts include Robert M. Stern, general counsel for the Center for Governmental Studies, who has studied campaign finance laws since 1971, *see* Ex. 38; Professor Daniel A. Smith of the University of Florida, who is a political scientist and scholar of the politics and processes of direct democracy, including campaign finance activities of ballot issue committees; and Floyd Ciruli, a well-known Colorado pollster and political analyst who has provided political and policy commentary concerning statewide and local ballot issues since the mid-1980s. These experts dispute the conclusions drawn in the both the Milyo compliance cost study as well as the Carpenter survey. The Secretary's experts' reports are attached at **Ex. A-72** (Stern rebuttal report); **Ex. A-73** (Smith report)**; Ex. A-74** (Ciruli report).

time process. **Ex. A-75** at 166:16 to 169:25.[7] While some subjects were given the complete Colorado Campaign and Political Finance Manual, a number of subjects were given only a subset of these materials, *id.* at ¶ 107 & n.13, Ex. 45. The abbreviated set of materials omitted, notably, Colo. Rev. Stat. § 1-45-108, a key disclosure provision referred to repeatedly on the disclosure forms and in the instructions. *See* Ex. 45; **Ex. A-75** at 159 to161. Milyo explained this omission, stating that he was concerned that if he gave test subjects everything available on the Secretary's website, "they would be led astray and more confused." **Ex. A-75** at 160:12-15. As noted in Robert Stern's report, **Ex. A-72** at 4, 7, 8, unlike real Colorado registered agents, the test subjects had no opportunity to take advantage of training classes, let alone call or consult with someone from the Secretary of State's office for assistance in filling out the forms. **Ex. A-75** at 156, 163. In addition, Milyo acknowledged that his study attempted to measure the ability to comply with the laws when confronted with them for the very first time; he did not measure whether performance improved after someone has gone through the process a time or two. **Ex. A-75** at 173:23-174:12. In short, as Robert Stern observed, the experiment was "less than real-life." **Ex. A-72** at 8.

Milyo graded his test subjects on 16 specific performance measures. Milyo Decl. ¶ 121 and Table 7.1. He draws key conclusions about the purported complexity and

[7] Indeed, Becky's statements that she has taken more than 20 hours to fill out these forms only underscores the unrealistic test environment in the Milyo cost compliance study. Becky Cornwell Decl. ¶ 8.

burdensomeness of Colorado disclosure requirements based on his Missouri test subjects' performance on these 16 criteria. *Id* at ¶¶ 121-136 & Tables 7.1 and 7.2. Plaintiffs highlight some of these findings in their brief, including the conclusion that "the average overall score for participants was 50.1% correct." Plaintiffs' Mem. p. 21. These conclusions are suspect for several reasons. First, although Milyo indicated that, in coming up with the 16 performance criteria, he believed he was testing "important transactions that would need to be recorded and disclosed" under Colorado law and which, if violated, "might lead to a fine or a suit," he acknowledged that he is unaware of the Secretary's enforcement practices. **Ex. A-75** at 131: 13 to 133:5; 176:22-23; 177:3-5. Remarkably, he developed his scoring sheet only after the test forms came in, and he deliberately tailored at least one of the 16 criteria to track a particular "mistake" he was observing. **Id.** at 199:13-19.

Milyo's report contains significant legal errors and omissions. A number of Milyo's performance criteria reflect an outright misapplication of Colorado law. In particular, two of his 16 criteria test whether subjects report "aggregate" contributions from fictional contributors Baker and Cook. Milyo Decl. ¶ 121, Table 7.1, Panel Four. Contrary to Milyo's claim that these two criteria reflect "important transactions that would need to be recorded and disclosed," nothing in Colorado law requires issue committees to report aggregate contributions. Indeed, such a requirement would serve no purpose, given that issue committees are not subject to contribution limits. Table 7.1, Panel Four reflects that only 0.7 % of "All Subjects" (or 1 person of 141) "correctly" listed aggregate contributions from Baker ($540) and Cook ($1000). Put another way, 140 of 141 test subjects "failed" to

meet two of his 16 performance criteria by not listing the aggregate contributions of Baker and Cook – and yet, neither disclosure is required by Colorado law, and no Colorado issue committee would be penalized for failing to report these aggregate contributions. Virtually every single one of Milyo's test subjects' overall scores were negatively affected by this double error.

Similarly, as the test forms came in, Milyo noticed that a significant number of subjects were filling out major donor reports for a $2000 contribution from Abel on October 21 (17 days before the general election in the test scenario). Believing this to be an error, he decided to track, as one of the 16 performance criteria, the number of test subjects who filled out this "unnecessary report." **Ex. A-75** at 199:13-21. In fact, those individuals who did fill out this report (representing a majority of test subjects) correctly complied with Colo. Rev. Stat. § 1-45-108(2.5), which requires issue committees to submit major donor reports for contributions of $1000 or more received within 30 days of a general election. Interestingly, this statutory provision was not included in the abbreviated packet of materials provided to a number test subjects, Ex. 45, calling into question whether those test subjects who failed to fill out the form were missing critical information.

To the extent Milyo's performance criteria actually examined a few common transactions (*e.g.*, ordinary itemized monetary contributions and expenditures that represent the bulk of issue committee reports), his results show that the vast majority of test subjects handled such routine transactions correctly. Milyo Decl. ¶¶ 126-27 & Table 7.1, Panels Four and Five. As observed by Robert Stern, Milyo's test focused on the less common, more

nuanced transactions, such as subjects' mishandling of a $1000 anonymous donation or a non-monetary contribution (the t-shirts), which only highlights the artificial constraints imposed by the test environment, in that subjects were unable to consult with anyone to ask questions. **Ex. A-72** at 8. In the real world, citizens like Elliott and Brinkman who become registered agents can and do call their local officials to ask for help. **Ex. A-69** (Brinkman dep.) at 74:6-7, 76:5-7, 80:1-2; **Ex. A-68** (Elliott dep.) at 31:1-13, 33:1-4, 34:20-25, 102:21-24. Indeed, in this case, Plaintiffs received answers from the Secretary's office on how to correctly record such transactions. Cornwell Decl. at ¶¶ 13, 18.

The Secretary's experts expressed numerous other criticisms of the Milyo study in their reports. Dan Smith, for example, refuted Milyo's interpretation of the rationale for disclosure laws and his interpretation of scholarly literature on the efficacy of campaign finance, **Ex. A-73** at 13-15, and questioned whether his use of Missouri students, to say nothing of the non-student participants drawn from Milyo's church and homeowners' association, are representative of Coloradoans who serve as registered agents for ballot initiatives. **Id.** at 16. As such, Smith questions whether the findings are at all relevant or applicable to the ability to select Coloradoans to comply with Colorado disclosure requirements for issue committees. **Id.** In sum, many of the conclusions drawn in Milyo's compliance cost study are questionable.

The conclusions drawn in the Carpenter survey are disputed as well. For example, he concludes that disclosure requirements have a "chilling" effect because respondents stated they would "think twice" before donating to an issue committee if doing so would result in

disclosure of personal information or employer information. Carpenter Decl. ¶ 5. First, Colorado law does not require disclosure of personal information unless the contribution is $20 or greater, *see* Colo. Rev. Stat. § 1-45-108(1)(a)(I) (2007). As expert Robert Stern observed, Carpenter's survey failed to incorporate any dollar threshold "trigger" into the question; thus, a respondent could understand the question to mean that any contribution, however small, would trigger disclosure of personal information. The survey might have had different results had the actual Colorado threshold been incorporated into the question. **Ex. A-72** at 2. Similarly, Colorado law does not require disclosure of employer information unless the particular contribution is $100 or greater, Ex. A-1, *see* Colo. Rev. Stat. § 1-45-108(1)(a)(II) (2007); Secretary of State Rule 4.9.1, 8 C.C.R. § 1505-6. Carpenter's survey, however, did not incorporate any dollar threshold into this question, either.

In addition, rather than ask respondents whether they thought having to disclose personal or employer information would actually deter them from contributing to an issue committee, Carpenter's survey questions asked merely whether respondents would "think twice" before contributing. The phrase "think twice" does not connote any particular decision; rather, it connotes careful consideration, or the cognitive process that precedes a decision. The fact that a person may "think twice" before making a decision gives no indication what that decision will be; a person could "think twice" (consider carefully) before donating to a cause, political or otherwise – and decide ultimately to contribute. However, the fact that the individual in that instance paused to think about his decision before acting does not mean that he was "chilled" from doing so. In other words, only where a person is

actually dissuaded from contributing to a campaign because of disclosure requirements can it be reasonably said that the disclosure had an actual chilling effect on that activity.

Carpenter defended the use of the phrase "think twice" by insisting that the survey did not attempt to measure actual behavior. **Ex. A-77** (Carpenter dep.) at 119:11 to 121:7. While it is certainly true that these questions do not measure behavior, Carpenter nevertheless draws conclusions about behavior by inferring that respondents who expressed concerns about privacy in response to follow up questions in fact would not contribute. However, the concerns articulated by respondents to an open-ended probe "and why did you say [you would think twice]?" could also reasonably be interpreted as merely that – those concerns one takes into consideration when making a decision about whether to contribute. The articulation of such concerns does not necessarily indicate an ultimate decision, yet Carpenter assumes from the responses that it does, and draws the conclusion that the survey indicates that people "will be less likely to contribute to an issue campaign if their contribution and personal information will be made public." Carpenter Decl. ¶ 14.

The Secretary's experts identified numerous other problems with Carpenter's survey and the conclusions he drew from it. For example, Smith observed that, contrary to the assertions in the Carpenter report, the theory of the "informed voter" has nothing to do with voters being "informed about the laws governing contributions to ballot issue campaigns in the states," their ability "to access lists of those who contribute to ballot issue campaigns" or their capacity to "check out the lists of contributors". **Ex. A-73** at ¶ 7. Rather, the justification for disclosure is that publicly disclosed records can be used not only by voters

directly, but also by "information entrepreneurs," (*i.e.*, journalists, nonprofit organizations, think tanks, scholars, political parties, interest groups, and of course supporters and opponents of ballot issues) to provide cues to citizens that help improve voter competence. That voters do not directly access this information does not mean it is not valuable to them; These information entrepreneurs, acting as intermediaries, will access, compile, and disseminate campaign finance disclosure information to voters. Citizens can use this information, either directly or in a distilled form, to help inform their voting decisions. **Id.** ¶8; *see also* **Ex. A-73, and A-74**.

In sum, should the Court decide to consider Plaintiffs' experts' research and opinions for purposes of summary judgment, then Plaintiffs' motion must be denied in light of the many disputes of material fact on these points.

ARGUMENT

I. Plaintiffs erroneously conflate all forms of participation in the political process as "pure speech" afforded the highest protections under the First Amendment.

Plaintiffs claim that their actions may be considered "campaign financing" only because the law imposed that label; they never set out to run a "campaign," but were merely "speaking out" about annexation. Pls.' Mem. at 25. As set forth in detail in the Secretary's Opening Brief at 16-23, Plaintiffs' own email correspondence and other undisputed documents directly refute that assertion. *See, e.g.*, Ex. A-33 at P0722 ("[W]e're going to

have to put together a campaign that convinces the Town that they won't get their majority in an election.").

More importantly, Plaintiffs suggest that the disclosure requirements apply to anyone who merely "speaks out" on a ballot issue. This mischaracterizes Colorado campaign finance law, which governs disclosure of contributions and expenditures made to influence ballot issue elections. Plaintiffs repeatedly conflate all manner of participation in ballot issue campaigns and erroneously claim that all such activity is pure "speech" entitled to the highest level of protection under the First Amendment.

For example, Plaintiffs equate the disclosure of contributions and expenditures with the kind of pure speech addressed by libel laws. They urge this Court to conclude that constitutional standards applied in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and successor defamation cases be applied to disclosure requirements governing issue committees. They further assert that the disclosure analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976) cannot be applied to the ballot measure context. According to Plaintiffs, the Supreme Court "made clear that the disclosure laws could not be interpreted so broadly as to 'reach groups engaged purely in issue discussion.'" Pls.' Mem. at 27 (quoting *Buckley*, 424 U.S. at 79). Accordingly, Plaintiffs claim, the Supreme Court narrowed the reach of the disclosure provisions "to cover only 'spending that is unambiguously related to the campaign of *a particular federal candidate*.'" Pls.' Mem. at 27 (quoting *Buckley*, 424 U.S. at 79-80).

Plaintiffs' argument is based on two fundamental misconceptions. First, Plaintiffs assume that all campaign finance regulation is subject to the highest level of scrutiny under

the First Amendment. It is not. The Supreme Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 758 (1985). In determining the tests to be applied, the Court will consider the factors that arise in a particular context. *See Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967).

For more than thirty years, the Court has distinguished among expenditures, contributions and disclosures in the election context. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 201 (1993). Expenditures are entitled to the greatest protection, because limitations on expenditures reduce "the quantity of speech by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v.Valeo,* 424 U.S. at 19. Restrictions on contributions are subject to an intermediate level of scrutiny; this is because contribution limits still leave candidates free to discuss issues and impose only a "marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20-21. Disclosure provisions, by contrast, are subject to standards governing associational rights. This is because, in the context of elections, disclosure requirements do not restrict a contributor's right to speak, but may infringe upon the privacy of association and belief. *Id.* at 64. Disclosures of contributions and expenditures in the context of candidate elections can be justified if there is a "substantial relation" between the government interest and the information required to be disclosed. *Id.*

In *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182 (1999) ("*ACLF*"), the Supreme Court relied on the analysis in *Buckley v. Valeo* to support certain Colorado disclosure requirements for ballot proponents. The Court noted that *Buckley v.*

Valeo provided the analytical construct by which to judge the constitutionality of Colorado's disclosure requirements. *ACLF*, 525 U.S. at 202 ("We 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.") (quoting *Buckley*, 424 U.S. at 66).

Plaintiffs cite *California Pro-Life Council v. Randolph*, 2007 WL 3356716 (9th Cir. Nov. 14, 2007) ("*Randolph*") for the proposition "that the Supreme Court's candidate campaign finance decisions did not support comprehensive disclosure laws in the ballot issue context, and held that California's laws violated the First Amendment." Pls.' Mem. at 28. To the extent that Plaintiffs argue that *Randolph* precludes all disclosures in ballot measure elections, they are wrong. The Ninth Circuit emphasized that "in the context of disclosure requirements, the government's interest in providing the electorate with information related to election and ballot issues is well established." *Randolph*, 2007 WL 3356716, at *4 n.8. The Ninth Circuit upheld certain disclosure requirements at issue, and it specifically approved the requirement that organizations file disclosures of contributions. *Id.* at *10.

The U.S. Supreme Court has sustained the constitutionality of disclosure requirements in the context of electioneering communications that did not involve express advocacy. *McConnell v. Federal Election Commission*, 540 U.S. 93, 196-97 (2003). The Court, quoting from the lower court opinion, stated the rationale supporting the disclosure requirements:

> The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal

> elections, but permits them to do so while concealing their identities from the public. BCRA's disclosure provisions require organizations to reveal their identities so that the public is able to identify the source of funding behind broadcast advertisements influencing certain elections. Plaintiffs' disdain for BCRA's disclosure pro-visions is nothing short of surprising. Plaintiffs challenge BCRA's restrictions on electioneering communications on the premise that they should be permitted to spend corporate and labor union general treasury funds in the sixty days before the federal elections on broadcast advertisements, which refer to federal candidates, because speech needs to be 'uninhibited, robust, and wide-open.'
>
> Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly). Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interest of individual citizens seeking to make informed choices in the political marketplace.

McConnell, 540 U.S. 196-97 (quoting *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 237) (D.D.C. 2003) (internal citations omitted) (emphasis added).

The second fundamental flaw in Plaintiffs' arguments is their misapprehension of the unique function and purpose of campaign disclosures in the context of ballot issue campaigns. Importantly, when a citizen casts a vote on a ballot measure, he acts as both a voter and a lawmaker. In their dual role citizen-legislators called upon to pass legislation,

voters surely have a comparable, if not greater, interest in receiving information that will allow them "to make informed choices in the political marketplace." *See id.* at 197.

At his deposition, Professor Dan Smith emphasized the special role disclosure holds in ballot issue campaigns, comparing it to the lobbyist context:

> This is public law. This is . . . in some cases changing state constitutions.
>
> To me, I think we should have a fairly low standard with respect to providing information on things as momentous as changing law.
>
> We expect the same from our lobbyists who lobby members of our state legislatures. We expect them to disclose who they're working for, who they're getting paid for, whether they have conflicts of interest. We expect that of our lawmakers.
>
> I don't honestly see why we should not expect the same from most contributors for or against ballot measures. This is citizens making laws. We should have as much information available to citizens: texts, summary titles, contributors for and against, total amounts, endorsements, opposition, to weigh our opinions.
>
> And we should, as consumers of that, as voters, be able to sift through, using cues and heuristics, to make a choice.

Ex. A-77 (Smith dep.) at 197:11 to 198:4; *see also id.* at 102:20 to 103:3; 126:18-22.

The Supreme Court has plainly recognized the right of legislators and citizens to receive information about those persons who may receive money or give money to lobbyists who seek to influence legislation. Governments are also permitted to enact reasonable lobbyist disclosure laws in order to give legislators complete information about matters that may be pending before them.

In *United States v. Harriss*, 347 U.S. 612 (1954), the Supreme Court addressed the Federal Regulation of Lobbying Act, which required professional lobbyists to register and to

file reports detailing expenditures and contributions made for the purpose of influencing the passage or defeat of legislation by the Congress. The Act covererd three classes of lobbyists: (1) persons "who do not visit the Capitol but initiate propaganda from all over the country in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts;" (2) persons who are "employed to come to the Capitol under the false impression that they exert some powerful influence over members of Congress;" and (3) "entirely honest and respectable representatives of business, professional and philanthropic organizations who come to Washington openly and frankly to express views for or against legislation." *Harriss*, 347 U.S. at 620, n.10 (quoting S. Rep. No.1400, 79th Cong., 2d Sess. P. 27; Committee Print of H. Rep. on Legislative Reorganization Act of 1946, 79th Cong., 2d Sess.).

Certain lobbyists who were charged with criminal violations of the Act argued that the disclosure requirements violated their First Amendment rights to speak, publish and petition. The Court rejected the claim, reasoning that "full realization of the American ideal of government enacted by representatives depends to no small extent on their ability to properly evaluate [] pressures. Otherwise, the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625. In short, legislators must be allowed to discern the identity of lobbyists in order to properly evaluate their message. *See also Florida League of Professional Lobbyists v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996); *Minnesota State Ethical Practices Board v. National Rifle Ass'n*, 761 F.2d 509, 512 (8th Cir.

1985). The Court emphasized that the Act did not prohibit the lobbyists from exerting pressures, but only required disclosure of "a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Harriss*, 347 U.S. at 625.

Plaintiffs make the same argument here that the Supreme Court rejected in *Harriss* and *McConnell*. Plaintiffs contend that robust speech is best served by very limited or no disclosure but they fail to acknowledge the strong competing interest of Colorado voters in "making informed choices in the political marketplace," *McConnell*, 540 U.S. at 197, by knowing the identity of persons who seek to influence their decision as citizen-lawmakers, or who collect or spend funds for that purpose.

Given that voters in candidate elections are entitled to information about contributions and expenditures, and given that legislators are entitled to have access to information regarding persons trying to influence their legislative decisions, it is only logical that voters acting in a legislative capacity should have access to the same type of information. Voters who are making legislative decisions should be allowed to look behind the euphemistically-named organizations to determine who is lobbying for or against a measure. *McConnell*, 540 U.S. at 197. Citizen-legislators, who must approve or reject legislation on the ballot, should be allowed to know, for example, whether the voices they are hearing represent narrow special interests or broad grassroots support. As Professor Smith observed at his deposition:

> Voters should have full access, in my opinion, to who is financing these measures, what are their motivations, why are they spending money from outside, . . . why are they receiving

> money from one individual or several corporations, or, conversely, why are they receiving contributions from hundreds or tens of thousands of contributors? This information provides a very valuable cue.

Ex. A-77 at 190:15-23**.** Because information about the identity of persons who support or oppose a ballot measure and the source of contributions can influence voters' evaluation of a proposal, such information should be disclosed. *See Rhode Island Civil Liberties Union, American Civil Liberties Union, Inc. v. Begin*, 441 F. Supp. 2d 227, 236 (D.R.I. 2006).

In sum, the unique context of ballot issue elections must be considered when assessing the disclosure requirements for Colorado issue committees. The political speech addressed here is analogous to lobbying, because it is speech intended to influence citizen-lawmakers' decisions on pending legislation. *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003) ("Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation.").

II. The private enforcement provisions of Article XXVIII do not violate Plaintiffs' rights to free speech and association.

Plaintiffs misapprehend the nature and purpose of the private enforcement provisions of Article XXVIII. These provisions do not create a private cause of action equivalent to a tort claim sounding in libel. Rather, as described in the Secretary's Opening Brief at 29-32, these provisions are the codification of common law *qui tam* proceedings.

Unlike a private defamation action in which a plaintiff claims that the content of a defendant's speech has caused the plaintiff direct injury, a person who brings a complaint

under Colo. Const. art. XXVIII, § 9(2)(a), acts not on his personal behalf, but as a private attorney general on behalf of the state to enforce state campaign finance regulation. In this context, the "harm" is not personal harm to the complainant tied to the content of particular speech, but rather, general harm to the public caused by the failure to disclose financial transactions made to influence an election. For this reason, Plaintiffs' reliance on case law from the defamation context is wholly misplaced.

A. Private enforcement serves the public interest.

The thrust of Plaintiffs' argument is that private enforcement is likely to lead to frivolous, bad faith litigation. Pls.' Mem. at 28-29, 34, 36-38. The Court must reject this argument.

Plaintiffs fail to understand the propriety and utility of private enforcement. Private attorneys general have long been viewed as a permissible means of pursuing the public interest. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 Mich. L. Rev. 589, 598-601 (2005) (the history of *qui tam* actions "confirms that legislative reliance on uninjured private parties to enforce public-regarding statutes is no recent innovation.").

Plaintiffs attack private enforcement in the grounds that it leaves enforcement "discretion" with ordinary citizens who may act out of political motive. This is not necessarily problematic. Indeed, private enforcement actually enhances the purposes served by disclosure by putting the incentive for enforcement in the hands of those who have the most at stake: fellow citizens and voters. That political opponents monitor each other in this

regard is a modern political reality. **Ex. A-81** (Ciruli dep) at 35:12 to 36:20. It serves a valid purpose in that it encourages compliance and leads to more vigorous enforcement. As observed by one law review commentator:

> To the extent the objection here is simply that private attorneys general act out of self-interest, there is little with which to quarrel. The theory of the private attorney general has never depended on idealistic notions of public service or altruism. Rather it has always been clear that citizen-suit provisions and comparable private attorney general arrangements would be invoked most frequently by particular plaintiffs with particular agendas. . . .
>
> The critical point here is that ideological and pecuniary motivations are not necessarily problematic. . . . That can count as a virtue: if the point of a citizen-suit provision is to ensure robust enforcement of the statute's underlying substance, the fact that the most likely citizen plaintiffs are "known quantities" with strong ideological commitments to the relevant issues simply increases the likelihood of vigorous enforcement. . . . [T]he fact that private attorneys general are motivated by their own peculiar incentives merely states the theory of their office, not a persuasive basis for categorically rejecting their use.

Id. at 611-12.

Private enforcement is also cost-effective means of supplementing resource-constrained public enforcement. *See id.* at 608; *see also Osterberg v. Peca*, 12 S.W.3d 31, 48-51 (Tex. 2000) (enforcement of campaign finance laws by citizens is designed to deter violators and encourage enforcement by those involved in the process instead of placing the entire enforcement burden on the government). The Secretary of State and other election officials have no practical way of monitoring the hundreds of candidates and committees across the state who must comply with campaign finance law. Effective enforcement

depends upon the grassroots observations of those citizens and groups that have the incentive, the resources, and the vantage point from which to uncover violations that the Secretary would never be able to detect. "Law whose effectiveness depends on constant monitoring and enforcement by government officials will, absent massive commitment of public resources, be far less effective than law that can enlist social norms or private incentives to assist enforcement. These concerns are nowhere more powerful than in the potential regulation of campaign finance." Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 Tex. L. Rev. 1803, 1831 (1999).

B. Enforcement actions by private attorneys general are consistent with First Amendment concepts.

In attacking the concept of private enforcement, Plaintiffs implicitly depict the voting public as incapable of acting in a rational and objective manner. Thus, according to Plaintiffs, higher standards of proof must be enacted to protect advocates from irrational acts by the general public. This characterization is inconsistent with the basic precepts underlying our constitutional form of government.

The power of initiative and referendum places legislative power in the hands of the people. The Colorado Constitution recognizes that political power rests with and is derived from the people. *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) ("Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government."). Colorado voters, through the initiative process, retain the power to alter their government. As this Court noted in *Mountain States Legal Foundation v. Denver*

School Dist. #1, 459 F. Supp. 357, 361 (D. Colo. 1978), the people are the source of political power. The political power residing in the people necessarily includes the power to enforce laws. If the people are entrusted with the power to create law or change their system of government, they are certainly capable of enforcing the laws they create.

Viewed from a different angle, both the Federal and Colorado Constitutions express a certain degree of distrust of elected officials. "The initiative and popular referendum value widespread, open access to the political agenda and political equality." David B. Magleby, *Let the Voter Decide? An Assessment of the Initiative and Referendum Process*, 66 U. Colo. L. Rev. 13, 43 (1995). Likewise, the First Amendment prohibits governments from establishing laws that impair the rights of free speech and association. Thus, "trusting the government to exercise restraint in its enforcement decisions involving First Amendment rights…is fundamentally at odds with core First Amendment principles." Morrison, *supra*, at 669. Indeed, "the First Amendment generally regards government discretion as a further source of legal uncertainty, not a solution to it." *Id.* at 659.

Colorado voters' passage of Article XXVIII, which shifted enforcement of campaign finance laws to private attorneys general, is reflective of the underlying distrust of government to enforce the laws. Colorado voters' choice to use private attorneys general removes the uncertainty inherent in government discretion. It also eliminates concerns about arbitrary government enforcement dictated by political considerations or selective enforcement. It reduces the circumstances in which "officials may base their enforcement decisions on assessments of political expediency and public sentiment. Such decisions cut to

the heart of the First Amendment, one of whose core purposes is to protect dissent from majoritarian oppression." Morrison, at 660.

C. The identity of the enforcer does not pose First Amendment problems.

Plaintiffs claim that private enforcement leads to meritless litigation, and argue that the risk of such litigation has a chilling effect that renders the enforcement provisions unconstitutional. However, any alleged First Amendment harm here can only emanate from the substantive constitutional and statutory provisions establishing the disclosure requirements – not from the identity of the enforcer. Logically, if a disclosure requirement poses First Amendment problems, that constitutional defect exists whether the provision is enforced by a private party or the government. The converse is likewise true: where an otherwise constitutional provision may be properly enforced by the government, that same provision is not suddenly rendered unconstitutional merely because the enforcement action was brought instead by a private attorney general. In short, any defect lies in the substance of the regulation, not the identity of the plaintiff. *See* Morrison, *supra*, at 646.

Once a law is deemed constitutional, the threat of enforcement of a constitutionally-adequate law, by itself, is not a constitutional violation. *See Alexander v. Thornburgh*, 713 F. Supp. 1278, 1290 (D. Minn. 1989) (defendant's assertion that prosecution under RICO statute unconstitutionally chilled speech unfounded because underlying statute constitutional); *United States v. Pryba,* 674 F. Supp. 1504, 1512 (E.D. Va. 1987), *appeal dismissed*, 881 F.2d 1081 (8th Cir. 1989); *Osterberg*, 12 S.W.3d at 49-50. Indeed, if the mere

prospect of litigation constituted a cognizable First Amendment harm without any regard to the likely outcome of the litigation, such "harm" would be ubiquitous; everyone faces some risk of being sued, however frivolously. Morrison, *supra*, at 652. But, as Justice Scalia has observed:

> We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is we have inquired whether the individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution.

Virginia v. Black, 538 U.S. 343, 371 (2003) (Scalia, J. concurring in part, concurring in the judgment in part and dissenting in part).

Plaintiffs contend that the risk of malicious or bad-faith litigation should be enough invalidate the entire private enforcement regime under Article XXVIII. However, frivolous litigation is better addressed by plaintiff-specific sanctions, such as those in Colo. Rev. Stat. § 1-45-111.5(2) (2007) – not facial invalidation of Article XXVIII's enforcement mechanism. *See* Morrison, *supra*, at 666. As discussed above, the Colorado legislature amended section 111.5(2) to permit litigants to recover attorneys' fees for frivolous or vexatious actions or other improper conduct. Recent experience shows that the administrative courts will use this newly expanded provision to assess attorneys' fees in appropriate cases. **Ex. A-60.** Plaintiffs' discussion of cases from 2003 and earlier is not evidence of abusive use of the private enforcement process against issue committees under

current law. As noted above, in 2006, a busy election year in which there was an unusually high level of issue committee activity, only three complaints were brought against issue committees of any type (including the one underlying this case).

Importantly, the complaint brought against Plaintiffs in this case was neither frivolous nor groundless, as evidenced by Plaintiffs' stipulation that they met the definition of an issue committee. If they believed the claim was unfounded, they could have fought the charges and sought attorneys' fees. Any claim that Plaintiffs were intimidated into silence by the administrative complaint is also without merit. As disclosed by their own public statements, Plaintiffs gave as good as they got. **Ex. A-63.**

III. Colorado's registration, reporting and disclosure requirements for issue committees do not unconstitutionally burden Plaintiffs' rights of free speech and association.

Plaintiffs contend that the Secretary must demonstrate a compelling state interest for the disclosure requirements for issue committees, and that the laws are narrowly tailored to meet that interest. Plaintiff's statement of the test is incorrect in this case.

The strict scrutiny test has been applied to registration and disclosure laws only where the entity that is subject to the law does not have as its major purpose the election or defeat of a candidate or issue. For example, in *Federal Election Comm'n v. Massachusetts Citizens for Life*, ("*MCFL*") 479 U.S. 238, 252-53 (1983), the Supreme Court applied a strict scrutiny test to registration and disclosure requirements imposed upon entities whose major purpose was not campaign activity. By contrast, for entities whose major purpose is advocacy for or against a candidate or ballot issue, the appropriate test is whether a substantial relationship or

relevant correlation exists between the government interest and the information required to be disclosed. *Getman*, 328 F.3d at 1101, n. 16. In those cases in which an entity does not have electoral advocacy as a major purpose, states may still require disclosure, albeit not to the same breadth and scope. *MCFL*, 479 U.S. at 262 (finding reasonable the requirement that that multi-purpose entity report independent expenditures); *Randolph*, 2007 WL 3356716, at *11-12 (approving reporting requirements but finding certain registration and organizational requirements burdensome).

In Colorado, an entity is not an issue committee unless it has a major purpose to support or oppose a ballot issue or ballot question, and accepts or makes contributions or expenditures of $200 or more toward that effort. Colo. Const. article XXVIII, § 2(10)(a); Secretary of State Rule 1.7, 8 C.C.R. 1505-6. Because an issue committee is not subject to reporting requirements unless it has a major purpose of supporting or opposing a ballot issue or ballot question, the strict scrutiny standard does not apply.

Even assuming the strict scrutiny standard applies, however, the State can show that registration and disclosure requirements for issue committees are narrowly tailored to serve a compelling state interest. *Randolph*, at *4.

A. Colorado has a compelling interest in disclosure in ballot issue campaigns.

In *Buckley v. Valeo*, the Supreme Court upheld, as substantially related to important governmental interests, the recordkeeping, reporting, and disclosure provisions of the Federal Election Campaign Act of 1971. *See Buckley*, 424 U.S. at 66-68, 84. Although the Court's

ruling arose in the candidate context, its observations regarding disclosure were not, as Plaintiffs' suggest, linked solely and inextricably to anti-corruption concerns in candidate elections. Pls.' Mem. at 26. The Court specifically identified the voter's informational interest in knowing "where political campaign money comes from and how it is spent" as freestanding government interest – separate from the interest in deterring corruption, and separate from the interest in detecting violations of applicable contributions. *See Buckley*, 454 U.S. at 66-68. The Court further observed that "disclosure requirements, as a general matter, serve substantial governmental interests" and that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance." *Id.* at 68 (emphasis added).

Years later, when the Court examined Colorado's disclosure requirements for ballot initiative petition circulators in *Buckley v. American Constitutional Law Foundation*, the Court turned to its earlier analysis in *Buckley*, stating: "We 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." *ACLF*, 525 U.S. at 202 (quoting *Buckley*, 424 U.S. at 66) (emphasis added). These statements, as well as dicta in other cases, indicate that the Supreme Court does not construe the informational interest in disclosure identified in *Buckley* to be limited strictly to the candidate campaign context. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978); *Citizens Against Rent Control v.City of Berkeley*, 454 U.S. 290, 299-300 (1981); Secretary's Opening Br. at 35-37.

Logically, this informational interest in disclosure does extend to the ballot issue context. *See Getman*, 328 F.3d at 1105 (the same considerations for disclosure identified in *Buckley* "apply just as forcefully, if not more so, for voter-decided measures."). Given that the Supreme Court has squarely upheld disclosure in the lobbyist context, the state surely has a similarly compelling state interest in disclosure of information by groups of persons whose major purpose in ballot measure elections is to advocate for or against the measures and who receive or make contributions or expenditures in excess of $200 for that purpose. *McConnell*, 540 U.S. at 197; *Harriss*,347 U.S. at 625; *Randolph*, at *4.

Plaintiffs argue that, to demonstrate a compelling state interest, the Secretary must offer actual evidence of a real problem that the state's laws are designed to remedy. Pls.' Mem. at 44. This statement is not quite accurate. In the context of campaign disclosure cases, "the quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). In examining the public's perception of a whether a problem exists, the Court will give weight to the vote of the people as evidence of the public's desire for campaign finance reform. *Id.* at 394. If outside academic studies have reached conflicting conclusions about the issue, and yet it does not appear that public perception has been influenced by such studies, there is no reason to question the citizens' perception that a problem exists, as evidenced by their vote. *Id.* at 394-95.

The 33-year legislative history of disclosure in Colorado supports the conclusion that voters in this state consider disclosure to be exceptionally important. In 1974, the Colorado passed the Campaign Reform Act of 1974, which included the following legislative declaration:

> The general assembly hereby finds and declares that the interests of the people of this state can better be served through a more informed public; that the trust of the people is essential to representative government; and that public disclosure and regulation of certain campaign practices will serve to increase the people's confidence in their elected officials. Therefore, it is the purpose of this article to promote public confidence in government through a more informed electorate.

1974 Colo. Sess. Laws, ch. 57, p. 261. **Ex. A-78.** This law included within the definition of political committee groups of persons who would "seek to influence the passage or defeat of any issue." *Id.* at p. 263. Thus, the law attempted "to accomplish the promotion of public confidence in government through a more informed electorate by establishing a variety of filing and reporting requirements for contributions, contributions in kind, and expenditures to or on behalf of a political candidate or issue." *Colorado Common Cause v. Meyer*, 758 P.2d 153, 162 (Colo. 1988).

In 1996, Colorado voters passed the Fair Campaign Practices Act to impose contribution limits, authorize voluntary expenditure limits, and keep the disclosure requirements. This initiated measure, which passed by a margin of 65% to 34%, included a declaration stating in part that the "interest of the public are best served . . . by full and timely disclosure of campaign contributions, and strong enforcement of campaign laws." **Ex. A-79.**

Likewise, in 2002, Colorado voters overwhelmingly passed Amendment 27 by a margin of 890,389 to 448,598. Section 1 of this citizen-initiated amendment includes a statement that "the interests are the public are best served… by providing for full and timely disclosure of campaign contributions…and strong enforcement of campaign finance requirements." Colo. Const. art. XXVIII, § 1. In sum, this legislative history confirms that Colorado voters have long considered disclosure to be of exceptional importance.

The Secretary's experts' views regarding the utility of disclosure comport with Supreme Court precedent, and are consonant with the views of Colorado voters. As Robert Stern observed at his deposition, having access to just the text of a ballot measure may not be sufficient: "These measures are often very complicated. And very rarely will the public read through the measure and make a judgment just based on the language of the measure because sometimes the language is confusing." **Ex. A-80** (Stern dep), at 107:11-15. Professor Smith likewise observed:

> The[se measures] are not intended for public consumption, generally. They are laws and constitutional amendments, which have a certain precision and esoteric language. . . . [I]t's rather fanciful to think that the average citizen, or in [Milyo's] words, the ordinary citizen, should use that to digest and make some decision on whether or not it comports with his or her preferences.

Ex. A-77 at 188:15-24.

In light of the difficulty that the "plain language" of a ballot issue may often present, the information gleaned from disclosure of contributions and expenditures in ballot issue campaigns provides additional insight on the merits and ramifications of a ballot issue by

revealing who stands to benefit (or suffer) from the passage of a particular piece of legislation. As Professor Smith observed, "[F]ollowing the money and having a sense of who is financing ballot measures is extremely important to let voters have some idea of who is behind these measures. I don't think you can just have a debate on the substance of an issue without knowing the context. **Ex. A-77** at 102:24-103:3. (emphasis added); see also ***id.*** at 114:2-8; 122:5-7; 128:2 to 129:11.

Disclosure information ultimately helps a voter discern whether that measure comports with the voter's own interests. As political commentator Floyd Ciruli described it:

> I think [disclosure] goes to, fundamentally, helping the voter decide whether that ballot initiative is in his or her interest.
>
> They do that, at least partially, by examining the people that are for and against it. . . . The campaign contribution . . . helps them decide that fundamental question of whether or not this ballot initiative is something that the kind of people that are behind this, the interests that are behind this, are my kind of people, I identify with them, they have my interests at heart in this or if they don't.

Ex. A-81 (Ciruli dep) at 78:1-20**.**

The Secretary's experts' observations are grounded in decades of experience studying ballot issue campaigns from the perspectives of academia (Smith), policymaking (Stern) and on-the-ground political consulting, polling, and commentary (Ciruli).

Real-world examples from Colorado illustrate that disclosure of money intended to influence elections can play a significant role, even in local campaigns. Secretary of State witness Deborah Brinkman's experience is compelling. Ms. Brinkman became involved in a local zoning issue in Littleton when a group of citizens joined together to overturn a zoning

change passed by city council that would have permitted Wal-Mart to build a store in their neighborhood. Ms. Brinkman worked with a group of neighbors called Littleton Against Walmart. This group worked to petition city council to hold an election on the matter. Once the issue was set for an election, Ms. Brinkman became the became the registered agent for their issue committee, Littleton Pride, You Decide. **Ex. A-69** at 7:16-18, 9:9 to 12:22.

Ms. Brinkman testified that there was a lot of confusion and misunderstanding in the community when another committee, called "Littleton Neighbors Voting No," was formed to support bringing Wal-mart the area. People thought that "Littleton Neighbors" was actually a competing grassroots group, like "Littleton Pride." When "Littleton Neighbors" filed its disclosure report in May 2007, however, the contributions revealed that it was not a grassroots neighborhood group: other than a $25 contribution from the registered agent to open a bank account, the report reflected a single contribution, of $91,100 – from Wal-Mart. **Id.** at 90:21 to 91:13, 94:11 to 95:8, and May 8, 2007 report of Littleton Neighbors. A subsequent report revealed the issue committee's only other contribution, a sizeable $78,800, again from Wal-Mart. **Id. (**July 19 report of Littleton Neighbor). By comparison, Littleton Pride raised approximately $35,000 through its grassroots efforts. **Id.** at 92:13-25.

Without access to these reports, Ms. Brinkman and her fellow neighbors would not have known that Wal-Mart had poured nearly $170,000 into this local zoning election campaign; while they were generally aware that Wal-Mart was behind the effort, the contribution reports actually confirmed it. **Id.** at 59:16 to 60:12, 91:10 to 92:12. These disclosures were very valuable to the "Littleton Pride" campaign because they allowed the

committee to accurately convey to the rest of community that "Littleton Neighbors" were not, in fact, their neighbors, but Wal-Mart. **Id.** at 95:6-25.

B. The disclosure requirements are narrowly tailored and not unduly burdensome.

The specific disclosure requirements of which the Plaintiffs complain have remained essentially the same since campaign finance disclosure was initiated in Colorado in 1974. At that time, every political committee was required to register. The registration statement included the name, the address and the issue, and the name and address of the campaign treasurer. 1974 Colo. Sess. Laws. at 264. **Ex. 78.** Political committees were required to identify the name and address of each person who made aggregate contributions in excess of twenty-five dollars. **Ex. 78** at 265. The reports required the name and address of each person to whom expenditures were made, along with the amount date and purpose of each expenditure and the total sum of expenditures. **Id.** The disclosures are narrowly tailored to provide voters the necessary information to identify "where political campaign money comes from and how it is spent." *Buckley,* 424 U.S. at 66.

During this 33-year period, not one lawsuit has ever been filed challenging the constitutionality of the disclosure requirements on the ground that they were burdensome and oppressive. As noted in the Secretary's Opening Brief at 40-42, other courts have concluded that similar disclosure requirements are constitutionally sufficient. In light of this long-standing history, the Court must conclude that the disclosure requirements are constitutional.

IV. Colorado's disclosure requirements for issue committees do not violate Plaintiffs' rights to anonymous speech and association.

Plaintiffs contend that the disclosure requirements invade their right to privacy and the secrecy of the ballot. Plaintiffs theorize that their position on a ballot issue will be disclosed when the fact of their contribution is disclosed. Courts have uniformly rejected this argument. The right to ballot secrecy does not extend beyond the content of the ballot itself. As noted by the D.C. Circuit decision in *Buckley v. Valeo*:

> In this country a person's right to vote secretly is inviolate. A person also has a right of personal privacy in political association, including a right to contribute to the candidate of his choice. But the right to contribute to the candidate secretly is certainly of a lesser order of priority than the secret ballot. The extent that a person goes past voting to contributing, his right of privacy in political association weighs less when balanced against other societal values.

Buckley v. Valeo, 519 F.2d 821, 867, n.117 (D.C. Cir. 1975) (emphasis added); *cf. also Katz v. Fitzgerald*, 93 P. 112, 113 (1907) ("It is the secrecy of the ballot which [the California constitution] protects and not secrecy as to the political party with which the voter desires to act.").

In the context of ballot measure campaigns, disclosures that are not directly related to the ballot are already permitted under Colorado law. Thus, signers of ballot measure petitions must disclose their names and addresses when signing the petition. Colo. Const. art. V, § 1(6). Likewise, each petition must include an affidavit of the petition circulator, along with the circulator's name and address. Colo. Rev. Stat. § 1-40-111 (2) (2007). It can be fairly assumed that the persons who sign and circulate the petition support the measure.

These disclosures are within constitutional boundaries, even though they may disclose the signer's preference.

Finally, the Supreme Court implicitly upheld the disclosure of contributors' names to ballot issues in *American Constitutional Law Foundation*: "Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by the proponents to get a measure on the ballot; in other words, voters will be told 'who has proposed [a measure]," and who has provided funds for circulation.'" *ACLF*, 525 U.S. at 203.

For the reasons stated above and those set forth in the Secretary's Opening Brief at 42-46, the court must reject the argument that the disclosures violate Plaintiffs' rights to anonymous speech and association.

CONCLUSION

For all the foregoing reasons and authorities, should the Court decide to consider the additional body of evidence proffered by Plaintiffs (*i.e.*, expert opinions and various assertions of "fact" beyond the core events surrounding the underlying administrative action), then disputes of material fact will require a trial on some or all of Plaintiffs' claims, and Plaintiffs' motion for summary judgment must be denied.

Submitted this 21st day of December, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2007, I electronically filed the within **RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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