Nos. 08-1389 & 08-1415

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KAREN SAMPSON, NORMAN FECK, LOUISE SCHILLER, TOM SORG, WES CORNWELL, and BECKY CORNWELL,
Plaintiffs-Appellants/Cross-Appellees,

v.

BERNIE BUESCHER, in his official capacity as Colorado Secretary of State,
Defendant-Appellee/Cross-Appellant

On Appeal from the United States District Court for the District of Colorado
The Honorable District Judge Richard P. Matsch
D.C. No. 06-cv-01858-RPM-MJW

BRIEF OF *AMICUS CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF APPELLEE BUESCHER URGING AFFIRMANCE

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ORAL ARGUMENT REQUESTED

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INTEREST OF AMICUS

The Brennan Center for Justice at NYU School of Law ("Brennan Center"), respectfully submits the following Amicus Brief, with the consent of Appellant The Institute for Justice and Appellee Bernie Buescher, in Support of Appellee/Cross-Appellant's Principal and Response Brief, dated April 24, 2009. The Brennan Center is a non-partisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Project promotes reforms that ensure that our elections embody the fundamental principles of political equality underlying the Constitution. Through legislative efforts and litigation, the Brennan Center actively supports strong federal campaign finance laws that promote transparency and deter corruption in the political process.

INTRODUCTION

In addition to providing the public with information that can enable the electorate to make informed choices regarding ballot issues, Colorado's registration and reporting requirements for ballot issue committees also serve a compelling anti-corruption interest. As an integral part of Colorado's overall regime of campaign finance regulation, these provisions aid the state in deterring and detecting the use of ballot issue committees to circumvent candidate contribution limits.

Effective campaign finance regulation is not comprised of piecemeal laws but is a system of interwoven regulations that take into consideration the high level of interaction between various political entities in an election cycle and the liquidity with which money can flow in and out of these entities. Therefore, any assessment of a state's interest in a particular disclosure provision requires an understanding of that provision within the regulatory framework as a whole. The Court's review of disclosure provisions in the instant case is no exception.

Ballot issue committees do not function in isolation from the political system and, as demonstrated below, candidates for elected office are deeply involved with the success or defeat of particular ballot issues. Therefore, in order to give adequate weight to the governmental interests served by Colorado's registration and reporting requirements for ballot issue committees, this Court must not limit its review to the narrow application of these regulations to ballot issue committees, but instead should view the impact of the challenged regulation on the efficacy of other campaign finance reforms.

Plaintiffs and their supporting *amici* ask this Court to do the exact opposite—they seek review of the challenged provisions in a vacuum without regard to the regulation's role in the larger context of Colorado's campaign finance regime. They argue that the state's anti-corruption interest justifies only those laws that regulate contributions made directly to candidates or committees that

expressly support or oppose a candidate. Since any money flowing to or from ballot issue committees directly involves the support or opposition of ballot questions, not candidates, "mandatory disclosure of the funding of ballot questions…does not deter corruption or its appearance." Br. of Amici Curiae in Supp. of Appellant, dated February 27, 2009 at 9. This deeply flawed argument rests upon both factual misunderstandings regarding the relationship between candidates and ballot issues as well as a fundamental mischaracterization of law regarding the Supreme Court's definition of corruption.

Both common sense and the record below refute Plaintiffs' factual assumption that ballot issue committees function in isolation from candidates. During each Colorado election cycle, candidates and ballot questions appear concurrently on the same ballot. In the months leading up to an election individuals, corporations, and organizations engage in the political process by making contributions in support of or in opposition to candidates, ballot questions or both. In Colorado and elsewhere, candidates often link their names to ballot questions to further their own candidacies. By controlling an issue committee or simply by serving as its spokesperson, a candidate can use an issue committee to improve the candidate's name recognition or highlight an issue central to his or her campaign platform. Other issue committees, such as those that oppose the recall of an incumbent or support the retention of a sitting judge, actually function as quasi-

candidate committees, raising contributions to keep a candidate in office. In short, there is a high level of interaction between candidates and issue committees that oppose or support ballot questions.

Unlike contributions to candidate committees, contributions to ballot issue committees are not subject to any limits. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298-299 (1981) (invalidating contribution limits for ballot issue committees). The absence of contribution limits for ballot issue committees creates an asymmetry that opens the door for candidates and large private donors to use issue committees as conduits for the circumvention of candidate contribution limits. For example, a contributor wishing to support a candidate for Secretary of State in the general election could only give $500 as a direct contribution to that candidate, but could write a seven-figure check to an issue committee, even if that issue committee is merely a pass-through to the candidate. As set forth below, the historical record in Colorado as well as in other states demonstrates that candidates and contributors have exploited this asymmetry in order to circumvent limits on direct contributions to candidates.

Not only have Plaintiffs disregarded the interaction between candidates and issue committees, they also commit an error of law by mischaracterizing the scope of the state's anti-corruption interest. Implicit in Plaintiffs' argument is that the definition of corruption is limited to the *quid pro quo* arrangements that result from

contributions made directly to a candidate's campaign. The Supreme Court has expressly rejected this narrow interpretation and has held that the definition of corruption also includes more indirect forms of corruption which encompass, the undue influence exerted by large private donors over a candidate's judgment when candidate contributions are circumvented. *McConnell v. FEC*, 540 U.S. 93, 154 (2003) (upholding ban on soft money contributions under circumvention rationale). By including circumvention in the definition of corruption, the Supreme Court has illuminated the importance of reviewing individual campaign finance regulations in the context of an overall system, for only then will the Court be able to determine whether a particular regulation, though not directly linked to a candidate's campaign, may nonetheless play a crucial anti-corruption role in preventing the circumvention of candidate contribution limits. Indeed, when placed in the overall context of Colorado's political landscape and campaign finance regulatory regime, it is clear that the registration and reporting requirements for issue committees are justified by an anti-corruption rationale because they aid the state in deterring and detecting the use of issue committees as a conduit to circumvent candidate contribution limits.

ARGUMENT

I. Factual Background[1]

A. Colorado's Registration and Reporting Requirements For Ballot Issue Committees

Colorado's comprehensive campaign finance regulatory regime consists of an interrelated network of contribution limits, voluntary campaign spending limits and disclosure requirements. *See* Colo. Const. art. XXVIII and Colo. Rev. State. §§1-45-101 to 1-45-118 (2008). In enacting this system, the state was motivated by an interest in reducing corruption and the appearance thereof and in enhancing the transparency of the political process:

> The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates allow wealthy contributors and special interest groups to exercise a disproportionate level of influence over the political process; that large campaign contributions create the potential for corruption and the appearance of corruption;… and that the interests of the public are best served by… full and timely disclosure of campaign contributions….

Colo. Rev. Stat. §1-45-102; *see also* Colo. Const. Art. XXVIII §1. In furtherance of the state's anti-corruption and transparency interests, Article XXVIII of the state Constitution and Colorado's Fair Campaign Practices Act (FCPA) set forth

[1] This Court may take judicial notice of the facts presented in this section pursuant to Rule 201 of the Federal Rules of Evidence. *See* FED. R. EVID. 201. All facts presented in this section can be found either in statutory language or in public filings with the Secretary of State.

registration and reporting requirements for ballot issue committees. *See* Colo. Rev. Stat. §1-45-108 & Colo. Const. art. XXVIII §7.

These requirements apply to organizations that have "a major purpose of supporting or opposing any ballot issue or ballot question" *and* "ha[ve] accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Colo. Const. art. XXVIII §2(10)(a); *see also* 8 Colo. Code Regs. §1505-6 (Rule 1.7). All ballot issue committees must file a statement of registration with the appropriate officer including the name of the organization, the name of a registered agent, the committee's address, all affiliated committees and the purpose or nature of the committee. Colo. Rev. Stat. §1-45-108(3). Additionally, each committee must file periodic reports with the appropriate officer disclosing contributions received, expenditures made and obligations entered into by the committee. *Id.* at (1)-(2). The reports must include the name and address for any contributor who gives $20 or more and the contributor's occupation and employer for contributions of $100 or more. *Id.* Due to the prohibition on contribution limits, these minimal registration and reporting requirements constitute the main thrust of Colorado's regulation of ballot issue committees.

B. Colorado's Contribution Limits and Anti-Circumvention Provisions

In 2002, in response to findings that "large campaign contributions to political candidates create the potential for corruption and the appearance of corruption," the citizens of Colorado, through the ballot initiative process, amended the state Constitution to reduce contribution limits for various political entities. *See* Colo. Const. Art. XXVIII §3. They also passed a series of rules preventing the circumvention of such limits. *Id.* This regime applies different contribution limits to candidate committees, political committees, political parties and ballot issue committees. Limits on contributions from individuals to candidate committees range from $200 to $1,000, depending on the office sought. *Id.* Contributions to political committees are capped at $500 and contributions to political parties are limited to $3,000. *Id.* As noted earlier, there is no limit on contributions to ballot issue committees.

The differential between the limits for contributions made directly to a candidate versus those made to issue committees creates an opportunity for large donors to exercise undue influence over elected officials. For example, a donor could write a $1 million check to a ballot issue committee that is closely affiliated with a candidate, an amount far in excess of any contribution that could be given to a candidate directly. Such arrangements are sometimes coordinated between the donor, the candidate and the conduit issue committee. However, even if such an

arrangement were unspoken, such large contributions have the ability to create undue influence over a candidate — the same type of undue influence that contribution limits are aimed at preventing. Therefore, this asymmetry could, in the absence of well-crafted regulations, greatly undermine the efficacy of candidate contribution limits.

To prevent this type of gaming, Colorado has enacted several provisions prohibiting the use of committees as conduits to circumvent candidate contribution limits. Political parties are prohibited from "accept[ing] contributions that are intended…to be passed through the party to a specific candidate's candidate committee." *Id.* at §3(3)(c). Candidate committees are prohibited from serving as pass-throughs for contributions to other candidate committees. *Id.* at §3(6) ("no candidate's committee shall accept contributions from, or make contributions to, another candidate committee…"). Under its rulemaking authority pursuant to Article XXVIII of the Constitution and the FCPA, the Secretary of State also promulgated a rule prohibiting issue committees from making contributions to candidate and political committees.[2] *See* 8 Colo. Code Regs. §1505-6 (Rule 2.6).

Although the Secretary's regulation of issue committees does help to ameliorate the most blatant use of issue committees as a pass-through for large

[2] "Issue committees shall not contribute to political parties, political committees or candidate committees…" 8 Colo. Code Regs. §1505-6 (Rule 2.6).

contributions intended for candidates, it can do nothing to prevent an unspoken arrangement, wherein enormous contributions are made with winks and nods to issue committees that are closely affiliated with candidates. Without requiring that issue committees identify themselves to the state and report the identity of their contributors, the state would have no means to detect, much less prevent, both express and the more subtle uses of issue committees as conduits for circumvention of candidate contribution limits.

C. Issue Committees and Candidates: The Opportunity to Circumvent Candidate Contribution Limits

In Colorado, there is little regulation over the interaction between candidates and issue committees. As a result of the absence of such regulation, candidates can and have developed close relationships with at least three types of issue committees: candidate-controlled ballot issue committees, issue committees opposing the retention of an incumbent, and issue committees supporting the retention of a sitting judge. Although candidate involvement with these issue committees does not necessarily lead to corruption, as explained above, the asymmetry between the contribution limits for a candidate committee and those for an issue committee creates the opportunity for candidates and large donors to use issue committees to circumvent more restrictive candidate contribution limits. Examples from Colorado's political history demonstrate that circumvention is not just a hypothetical threat, but a political reality.

1. The Candidate-Controlled Issue Committee: The Holtzman and Tourney Examples

Candidate-controlled issue committees are ballot issue committees whose affairs are directed, managed and/or influenced by a candidate or a candidate's agent. Under current Colorado law, a candidate can control an issue committee and control his own candidate committee concurrently in the same election cycle. A candidate will often establish a ballot issue committee supporting or opposing an issue that is closely aligned with his or her platform in order to boost his or her candidacy. The challenged registration and reporting requirements serve a very important function in this context. By requiring that every ballot issue committee publicly identify itself and report the inflow and outflow of money, Colorado's registration and reporting requirements: (1) deter contributors and candidates from treating large contributions made to issue committees as de facto contributions to the candidate's campaign and (2) aid the state in detecting any influence peddling that may result from large contributions to issue committees.

Large donations made to the candidate-controlled issue committee "If C Wins You Lose" in the 2006 election cycle demonstrates the important role that registration and reporting requirements play in detecting misuse of contributions to ballot issue committees. In 2006, the Secretary of State fined Marc Holtzman, a gubernatorial primary candidate, for failing to report expenditures made by "If C

Wins You Lose" as contributions to his candidate committee.[3] After reviewing "If C Wins You Lose" campaign finance disclosure reports, reports filed pursuant to the reporting requirements challenged in the instant case, an administrative law judge (ALJ) held that some of the advertising expenditures made by the issue committee were so coordinated with Holtzman's candidacy that they constituted contributions to his candidate committee. Holtzman Case at 5 n.3, 22. According to the ALJ's findings, Holtzman, a longtime fiscal conservative, sought to oppose a pro-spending referendum as part of his campaign strategy—opposition to the ballot would improve Holtzman's name recognition among Republican primary voters. *Id.* at 3, 8. To that end, Holtzman's campaign manager formed the "If C Wins You Lose" Issue Committee, and Holtzman's candidate committee was intimately involved in the day-to-day operations of the issue committee.[4] *Id.* at 5-6. Holtzman himself personally fundraised for the committee and served as the committee's spokesperson. *Id.* at 3-4, 7-8. During the course of the primary

[3] *See* Alleged Campaign And Political Finance Violations By "Holtzman For Governor" And "If C Wins You Lose," Case No. OS 2006-0004 (Secretary of State, Colorado May 31, 2006) at 22 (hereinafter "Holtzman Decision") *available at* http://www.elections.colorado.gov/WWW/default/Campaign%20Finance/2006%20Admin%20Decisions/os2006-0004.pdf (last visited on May 4, 2009).

[4] Holtzman's candidate committee arranged for the issue committee's office space, utilities and phone service. A member of the candidate's campaign media team served as the issue committee's president. Phone records indicated that the issue committee conferred with the candidate committee on a daily basis. Holtzman Decision at 5-6.

season, Holtzman made 50 to 100 fundraising calls to potential contributors and arranged donations from a number of individuals, including a $100,000 donation from his father's company and another, $50,000 donation, from his father's company that was funneled through a non-profit organization before reaching the issue committee. *Id.* at 7-8.

Due, in part, to Holtzman's fundraising efforts, the issue committee was successful in raising a significant amount of money. According to the periodic reports filed by the issue committee pursuant to the very provisions that are challenged here, the ALJ found that the issue committee spent in excess of $600,000 in advertisements opposing the ballot. *Id.* at 5 n.3. For almost 11 months during the primary season, Holtzman was prominently featured and identified by name in many of these TV, radio and print advertisements. *Id.* at 3-4.

The relationship between Holtzman and the issue committee demonstrates the potential for large contributors to garner favor with candidates in a way that they are prohibited from doing directly through contributions to candidates. In 2006, the contribution limit to a gubernatorial primary candidate was $500. Colo. Const. art. XXVIII § 3(1)(a)(I). As previously explained, there are no contribution limits for ballot issue committees. If a donor wanted to give a donation in excess of the $500 contribution limit, it would be possible to circumvent this limit by

contributing, without limit, to an issue committee controlled by Holtzman's campaign.

Indeed, the campaign reports of "If C Wins You Lose" indicate that this type of circumvention did, in fact, occur. The combined donations from Holtzman's father's company totaled $150,000, or 300 times the applicable limit to a candidate. Other contributions received by Holtzman's ballot issue committee vastly exceeded the $500 contribution limit, including a $100,000 donation from an individual and a $25,000 donation from a corporation.[5] If Plaintiffs' challenge to Colorado's registration and reporting requirements is successful, Holtzman and other candidates will be able to establish ballot issue committees without detection and then may use the limitless contributions therein as de facto contributions to a candidate. Such a scenario would create the opportunity for influence peddling to flourish in secrecy and without fear of detection or reprisal.

Holtzman is by no means the only candidate to use an issue committee in this way. In 2008, Kathy Tourney, a candidate for the local metropolitan district board formed an issue committee called Not Another Tax Increase (NATI).[6]

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[5] *See* "If C Wins You Lose" (Secretary of State ID #20055617778) Reports for periods ending on 8/31/05, 9/14/05 & 10/12/05. These reports are publicly available via the Secretary of State's website *at* http://www.sos.state.co.us/cpf/CommitteeCriteriaPage.do (last visited on April 27, 2009).

[6] *See* In The Matter Of The Complaint Filed By Bradley Richards Regarding Alleged Campaign And Political Finance Violations By Not Another Tax Increase,

Although Tourney, as a municipal candidate, was not subject to the state's contribution limits, her use of NATI further demonstrates that some candidates in Colorado have used issue committees to further their candidacy. Under Tourney's direction, NATI printed postcards and paid for automated phone calls urging voters to vote "no" on Ballot Issues A and B, and to vote for Kathy Tourney and two other candidates. Tourney Decision at 4-5. Tourney was ultimately fined by an ALJ for violating Secretary of State Rule 2.6, which prohibits issue committees from making contributions to candidate committees. *Id.* at 6.

Indeed, although, the Holtzman and Tourney examples display the most blatant misuse of issue committees, more subtle forms of candidate involvement with issue committees are sure to exist and are virtually undetectable during an election. In these cases, the only available means to detect the circumvention of contribution limits is to look for post-election special treatment that may be exchanged for a donor's contribution to a candidate-controlled issue committee. Without reporting and registration requirements, the favors dealt to large contributors (the "*quo*") would remain isolated and disconnected from the campaign contributions that triggered such favors (the "*quid pro*"). Colorado's

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Case No. OS 2008-0008 (Secretary of State, Colorado June 16, 2008) (hereinafter "Tourney Decision") at 4-5 *available at* http://www.elections.colorado.gov/WWW/default/Campaign%20Finance/2008%20Admin%20Decisions/OS2008-0008.pdf (last visited on May 4, 2009).

registration and reporting provisions provide the least burdensome method of detecting post-election favors or the circumvention of contribution limits.

2. Recall Elections, Issue Committees and Candidates

In addition to candidate-controlled committees, elected officials are also deeply invested in issue committees opposing their recall from office. In Colorado, recall elections for elected state officials are administered through the ballot issue process. Colo. Const. art. XXI §1. During these unique elections, issue committees opposing the recall of a state candidate closely resemble traditional candidate committees. In both a traditional election and a recall election, candidates' political aspirations are on the line: *i.e.* if they lose they are out of office. Therefore, like traditional candidate committees, issue committees that oppose the recall of a candidate raise and spend money to convince voters to support the candidate. Similarly, candidates in both traditional elections and recall elections can control the committees advocating for them. *See* 8 Colo. Code Regs. §1505-6 (Rule 10.3) ("the incumbent may open an issue committee to oppose the recall."). Based on these similarities, a candidate facing recall is just as susceptible to the undue influence of large contributions as is a candidate who receives direct contributions. Yet, regardless of this potential for corruption, contributions to recall committees are unlimited. This asymmetry provides a situation ripe for the circumvention of candidate contribution limits. Without the challenged

registration and reporting requirements for issue committees, large contributors would be able to exercise undue influence over candidates, without detection, by generously contributing to efforts in opposition to a candidate's recall.

Although Colorado has not historically experienced a high number of state recall elections, the recall of District Attorney Colleen Truden demonstrates the potential for such circumvention of contribution limits. In 2006, the "Integrity in Prosecution" issue committee was formed to oppose the recall of District Attorney Truden. At that time, the contribution limit for a candidate for district attorney was $200. Colo. Const. art. XXVIII §3(1)(b). The issue committee's finance reports indicate that it received several contributions in excess of that contribution limit, including a single contribution of $5,000, an amount 25 times greater than the applicable contribution limit.[7] In the recall context, as in the candidate-controlled issue committee context, the exploitation of the asymmetry between candidate contribution limits and issue committee contribution limits provides an opportunity for large private donors to influence the election of a District Attorney through the recall process in a way that could not be done during the election season. Even if such a large donation is not solicited by the recall candidate or expressly directed to the candidate, such influence is enough to behold a candidate to the wishes of

[7] *See* "Integrity in Prosecution" (Secretary of State ID #20055619511) Report from period ending on 10/12/05. These reports are publicly available via the Secretary of State's website *at* http://www.sos.state.co.us/cpf/CommitteeCriteriaPage.do (last visited on April 27, 2009).

his most generous supporters. Without disclosure, it would be virtually impossible to detect any post-recall election favor that may result from this exchange.

California's experience with the 2003 recall election of former Governor Davis further demonstrates the enormous amounts of money involved in a high-stakes recall election. In 2003, the contribution limit for a gubernatorial candidate was $21,200.[8] The campaign finance reports of one of several issue committees opposing Governor Davis' recall revealed that the committee raised $2.9 million from 172 contributors. Thirty-seven of these contributors donated amounts well in excess of the contribution limit for governor, including a $150,000 contribution from a California labor organization, a $100,000 contribution from a private corporation and a $100,000 contribution from a private individual.[9] The size of these contributions far exceeds the levels which the people of California deemed an appropriate level for campaign contributions. As a result, the registration and reporting requirements at issue here are necessary to detect large contributions and any post election special treatment.

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[8] *See* California Fair Political Practices Commission, Historical State Contribution Limits *available at* http://www.fppc.ca.gov/bulletin/statelimhistory.pdf (last visited May 5, 2009).

[9] *See* Taxpayers Against The Governor's Recall, Environmental, Labor And Religious Organizations Who Oppose The Waste Of Taxpayer Dollars (Committee ID # 1255059). Campaign finance data for this committee is publicly available via the Secretary of State's Cal-Access Website at http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1255059&session=2003 (last visited on April 27, 2009).

3. Judicial Retention Elections and Issue Committees

As in the recall election context, issue committees supporting the retention of a sitting judge function like traditional candidate committees, only without contribution limits. Although Colorado has seen very few contested retention elections, issue committees supporting the retention of a judge present the possibility that candidate contributions for judges could be circumvented. At the end of an elected judge's term, a retention election is held through the ballot issue process to determine whether the judge can retain his or her position. Colo. Const. art.VI §25. Issue committees that support the retention of a sitting judge are established to serve the political aspirations of elected officials. However, the fact that retention issue committees are not subject to contribution limits creates the opportunity for large private donors to unduly influence a judge by generously supporting an issue committee in support of the judge's retention. Disclosure's deterrent effect on corruption and the assistance disclosure provides in detecting any post-election favors is particularly compelling in light of the well-acknowledged state interest in protecting the integrity of the judicial branch and judicial elections. *See Republican Party v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J. concurring) (maintaining judicial integrity is of "vital importance").

II. Legal Argument

In its review of Colorado's ballot issue process, the Supreme Court has recognized that, "[s]tates allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process." *Buckley v. Am. Constitutional Law Found. ("ACLF")*, 525 U.S. 182, 223 (1999). Striking down issue committee disclosure provisions would put the integrity of both the ballot issue process and candidate elections at risk by enabling both candidates and large donors to use unregulated issue committees as conduits to circumvent candidate contribution limits.

The Supreme Court has made clear that the state has an acute interest in preventing circumvention of its campaign finance laws. *McConnell*, 540 U.S. at 144. ("the First Amendment does not require the government to ignore the fact that candidates, donors, and parties test the limits of the current law"). As a result the Supreme Court has repeatedly upheld campaign finance regulations that prevent the circumvention of contribution limits. *See McConnell*, 540 U.S. at 161 (upholding ban on soft money contributions); *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (upholding federal ban on direct contributions from nonprofit advocacy organizations); *FEC v. Colo. Republican Fed. Campaign Comm.* ("Colorado II"), 533 U.S. 431, 465 (2001) (upholding limits on coordinated expenditures between political parties and candidates); *Cal. Medical Ass'n v. Fed. Election Comm'n*, 453

U.S. 182, 201 (1981) (upholding FECA's limit on amount unincorporated association may contribute to multicandidate political committee). In light of this clear Supreme Court precedent, the state of Colorado has a compelling anti-corruption interest in preventing the circumvention of candidate contribution limits.

A. Exacting Scrutiny Is The Appropriate Standard of Review for Colorado's Registration and Reporting Requirements

Since 1976, the Supreme Court has consistently held that exacting scrutiny is the proper standard when reviewing registration and reporting requirements for political committees.[10] For such disclosure provisions to survive exacting scrutiny the state must show only a "a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. 64 (internal quotations and footnotes omitted).

In applying a lesser standard than strict scrutiny to such provisions, the Court has recognized that, unlike bans or limits, registration and reporting requirements place only *de minimus* burdens on protected First Amendment activity. *See Davis v. FEC*, 128 S.Ct. 2759, 2775 (2008) (reaffirming that exacting scrutiny is applicable to disclosure provisions); *ACLF*, 525 U.S. at 202-203

[10] *cf. Federal Election Comm'n v. Massachusetts Citizens for Life*, ("*MCFL*") 479 U.S. 238, 252-53 (1983) (applying strict scrutiny to disclosure requirements for organizations with a major purpose other than to support or oppose a candidate or issue).

(applying exacting scrutiny to Colorado disclosure provision regarding the ballot issue petitioning stage); *Buckley*, 424 U.S. at 64 (applying exacting scrutiny to FECA's registration and reporting requirements). In its seminal decision on campaign finance regulation, the Supreme Court in *Buckley* upheld the registration and reporting provisions of the Fair Elections Campaign Act (FECA). *Buckley*, 424 U.S. at 62-63. When deciding on which standard of review to apply, the Court compared the burdens imposed by the registration and reporting requirements with those caused by expenditure limits and contributions limits. The Court explained that, unlike limitations on contributions and expenditures, "disclosure requirements impose no ceiling on campaign-related activity" and are therefore, "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id.* at 64 & 68. Applying exacting scrutiny, the Court held that the interests in: (1) providing the electorate with information regarding the source of campaign money and how it is spent; (2) deterring actual corruption and avoiding the appearance thereof; and (3) detecting violations of contribution limits were "governmental interests sufficiently important to outweigh" any burden caused by FECA's registration and reporting requirements. *Id.* at 66-68.

Colorado's provisions here mirror the provisions upheld in *Buckley* and, therefore, are subject to the same standard of review applied in *Buckley*. Both FECA's and Colorado's provisions require that committees register with the state

and make periodic reports detailing contributions received and expenditures made. *Id.* at 63. FECA requires that the committee disclose the name and address of any contributor giving more than $10, Colorado requires the name and address of any contributor giving $20 or more. *Id.* Lastly, both FECA and Colorado require that committees disclose the occupation and employer of contributors giving more than $100. *Id.* Given these similarities, Colorado's provisions pose no more of a burden than FECA's provisions and therefore, are subject to the same standard of review.

The Tenth Circuit has indicated that *Buckley's* analysis is applicable to the review of state regulations modeled after FECA. *See Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000). In *Davidson*, the Tenth Circuit reviewed the constitutionality of disclosure provisions for independent expenditures exceeding $1,000. *Id.* at 1196. The regulation at issue in *Davidson* required that the entity making the independent expenditure provide written notice to all candidates in the race and to the Secretary of State detailing the amount of the expenditure, a description of the expenditure, and the name of the candidate whom the expenditure supported or opposed within 24 hours of the expenditure. *Id.* The Court held that the content requirements of the notice were nearly identical to those at issue in *Buckley;* therefore, the Court saw "no constitutional problems" with the disclosure provisions. *Id.* at 1197. In an

unrelated conclusion, however, the Court invalidated the provision because the 24-hour deadline and the requirement that notice be given to each candidate was not justified by a state interest. *Id.* at 1198.

More than twenty years after *Buckley*, the Supreme Court again applied exacting scrutiny to Colorado's regulation of the ballot issue process. In *ACLF*, the Supreme Court reviewed Colorado's reporting requirement in the petitioning stage of the *ballot issue process. ACLF*, 525 U.S. at 202-203. Citing *Buckley*, the Court reaffirmed that exacting scrutiny was the applicable standard. *Id.* (stating that, in *Buckley*, "we nevertheless upheld, as substantially related to important government interests, the recordkeeping, reporting and disclosure provisions"). In its review of several disclosure provisions, the Court held that the provisions requiring the disclosure of the name of ballot initiative sponsors and the amount of money spent to collect signatures for the ballot petition process bore a relation to the "substantial state interest" of controlling the "domination of the initiate process by affluent special interests groups." *Id.* Based on the Court's reliance on *Buckley* and its holding with regards to the provisions it upheld in *ACLF*, this Court should not hesitate to apply exacting scrutiny to the provisions before the Court.

B. The State of Colorado Has a Compelling Anti-Corruption Interest That is Well-Served by the Registration and Reporting Requirements for Ballot Issue Committees

The factual record demonstrates that unregulated ballot issue committees threaten the efficacy of candidate contributions, and therefore undermine the integrity of candidate elections generally. The Supreme Court and the Tenth Circuit has repeatedly emphasized that protecting the integrity of the electoral process is a compelling state interest of the highest order. *McConnell,* 540 U.S. at 137 (upholding anti-circumvention provision because it protected the integrity of the political process.); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 789 (1978) ("preserving the integrity of the electoral process, [and] preventing corruption…are interests of the highest importance"). Moreover this Court has recognized a "strong, often compelling" interest in preserving the integrity of the ballot issue process. *Am. Constitutional Law Found. v. Meyer*, 120 F.3d 1092, 1099 (10th Cir. 1997). Without Colorado's disclosure requirements for ballot issue committees, the state is helpless to detect and deter the circumvention of candidate contribution limits via issue committees. Detecting and preventing this corruption is a compelling state interest that justifies the minimal burden that may result from the disclosure provisions at issue here.

In holding that disclosure served the government's interest in preventing corruption, the *Buckley* Court reasoned that the exposure that is created by

disclosure "discourage[s] those who would use money for improper purposes either before or after the election" and enables the detection of "any post-election special favors that may be given in return" for large contributions during the election. *Buckley*, 424 U.S. at 67. In contrast, Plaintiffs claim that the corruption described in *Buckley* only occurs when contributions are made directly to candidates, at the express behest of candidates or in coordination with candidate. Accordingly, since contributions to ballot issue committees do not go directly to a candidate, Plaintiffs contend that there is no threat of *quid pro quo* arrangements and therefore, that disclosure is not justified by an anti-corruption interest. Appellant Corrected Opening Br., dated February 18, 2009, at 7; Br. of Amici Curiae in Supp. of Appellant at 4.

This "crabbed" view of corruption, has been squarely rejected by the Supreme Court. *See McConnell*, 540 U.S. at 665. Indeed, the Court in *McConnell v. FEC* affirmed that "all members of the Court agree that circumvention is a valid theory of corruption." *Id.* at 144 (citing Colorado II, 533 U.S. at 456). At issue in *McConnell* was the constitutionality of the federal ban on soft money. The soft money ban prohibited national parties from soliciting, receiving, directing or spending any contributions that were not subject to FECA's source and amount limitations. *Id.* at 133. The Court held that the ban was justified by Congress's interest in preventing the circumvention of FECA's contribution limits for federal

candidates. *Id.* at 153-154. The record amply demonstrated that large donors used soft money contributions to political parties to continue to financially support a candidate even after that donor had reached the limit for direct contributions to the candidate's committees. *Id.* at 146-148.

The Court found that, as a result of the differences in the limits between contributions to political parties and candidate committees, candidates, political parties and large private donors had devised a system whereby a candidate could expressly or implicitly direct large contributors to contribute to a political party. The donor would ask that the soft money contribution to the party be "credited" to the candidate. The party would then keep a tally and spend a related amount of party money supporting the candidate's campaign. The Court held that this arrangement made it "not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *Id.*

The use of ballot issue committees to circumvent candidate contribution limits mirrors the very type of corruption sought to be eliminated in *McConnell*. Like the different limits that applied to contributions to candidates and contributions to parties under FECA, the differences in the limits between ballot issue committees and candidate committees create an opportunity to circumvent candidate contribution limits. *McConnell* provides clear guidance that regulations

seeking to prevent this circumvention are justified by the state's anti-corruption interest.

Given *McConnell*, the state's interest in preventing circumvention can surely justify mere registration and reporting requirements. Indeed, the Court in *McConnell* held that the anti-circumvention objective was so compelling that it justified a *ban* on the use of soft money by national parties in federal elections. By contrast, here, Colorado is simply requiring basic registration and disclosure information.

Lastly, the state need not prove that circumvention occurs frequently. In *McConnell*, the Court stated that unlike "straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize." *Id.* Therefore, it was sufficient to demonstrate that circumvention occurred "only occasionally." *Id.* at 153. The record in the present case demonstrates that at least two candidate have already improperly used the unlimited contributions of issue committees to benefit their candidacies. *See supra* I(C)(1). Moreover, similar circumvention of candidate contributions is demonstrably possible in the context of retention and recall elections. Such evidence is sufficient to justify Colorado's interest in requiring registration and reporting in order to detect and prevent this corruption.

C. *Berkeley* and *Bellotti* Did Not Consider The Interest In Preventing Circumvention of Candidate Contribution Limits

Despite the Supreme Court's broad view of the state's anti-corruption interest, Plaintiffs attempt to rely on *Berkeley* and *Bellotti* to advance the proposition that the state has no anti-corruption interest in *any* regulation of the ballot issue process. Appellant's Corrected Opening Br. at 43. Such reliance is misplaced. First, although these cases did invalidate contribution limits and a ban on corporate participation in the ballot issue process, neither *Berkeley* nor *Bellotti* stand for the proposition that regulation of the ballot issue process can never be justified by an anti-corruption interest, especially where, as here, only reporting and disclosure requirements are at issue. Indeed, both opinions pointed out that the state could require disclosure to protect the integrity of the ballot issue process. *Berkeley*, 454 U.S. at 299-300 ("The integrity of the political system will be adequately protected if contributors [to ballot issue committees] are identified in a public filing revealing the amounts contributed..."); *Bellotti*, 435 U.S. at 791-791 (voters "may consider, in making their judgment, the source and credibility of the advocate."). Furthermore, to the extent that Plaintiffs attempt to draw analogies between *Berkeley* and *Bellotti* and the instant case, *Berkeley* and *Bellotti* are not controlling because neither opinion addressed the important state interest in preventing the circumvention of contributions limits at issue in the instant case.

The Court could not have considered circumvention because circumvention only arose after the decisions in *Berkeley* and *Bellotti* created the asymmetry in contribution limits which gave rise to use of issue committees as conduits for circumvention.

In *Berkeley*, the Court struck down contribution limits on ballot issue committees. The Court explained that contribution limits had only previously been upheld when the goal of such limits was to reduce the "undue influence of large contributors to a *candidate*." *Berkeley*, 454 U.S. at 297. Since ballot issue committees involved ballot questions and not candidates, the Court held that the contribution limits could not be justified by an anti-corruption interest. *Id.*

However, Plaintiffs' reliance on *Berkeley* is misguided because, it was only after the holding in *Berkeley* disallowed ballot issue contribution limits that the asymmetry between contribution limits on candidate contribution and unlimited ballot issue contributions created the potential for circumvention. Thus, the *Berkeley* Court had no occasion to consider whether ballot issue committees could be regulated to prevent the circumvention of an existing campaign finance regulation.

The Court's holding in *McConnell* clearly permits the states wide latitude in preventing the circumvention of candidate contribution limits. Colorado's minimally burdensome registration and reporting requirements serve such an anti-

circumvention goal, and therefore, unlike the contribution limits in *Berkeley*, are justified by an anti-corruption interest aimed at reducing the "undue influence of large contributors to a candidate."

Similarly, evidence of circumvention was not before the Court in *Bellotti* because it was the *Bellotti* Court's decision striking down the ban on corporate contributions or expenditures on ballot issues that created an asymmetry allowing for the use of issue committees to circumvent other campaign finance regulations. In *Bellotti*, the Court struck down a criminal statute banning corporations from making contributions or expenditures in support or opposition of a ballot issue. Although the state argued that the regulation was necessary to preserve the integrity of the ballot issue process, the state presented no evidence that corporate participation would threaten the integrity of either the ballot issue process or candidate elections. *Bellotti*, 435 U.S. at 790. In light of the absence of such evidence the Court noted that "the risk of corruption perceived in cases involving candidate elections is not present in a popular vote on a public issue." *Id.* By contrast, here, as a result of the lack of limits on ballot issue committees, the record demonstrates the potential for issue committees to be used as conduits to corrupt candidates. Accordingly, neither *Berkeley* nor *Bellotti* support Plaintiffs' contention that there is no anti-corruption interest that is served in regulating the ballot issue process.

Plaintiffs' narrow focus on *Berkeley* and *Bellotti* fails to recognize the extent to which those two cases changed the legal and political landscape. As an unintended consequence, in striking down contribution bans and limits on ballot issue committees, these two cases created an asymmetry that candidates and contributors have exploited as an end run around candidate contribution limits. Since contribution limits for ballot issue committees were eliminated by these decisions, it has become clear from experience that the risk of circumvention survives as a legitimate state concern. Continuing disclosure through registration and recordkeeping requirements is therefore the most effective and least burdensome means by which to assure the integrity of both ballot issue and candidate committees.

CONCLUSION

For the foregoing reasons, *amicus* Brennan Center respectfully submits that this Court should uphold Colorado's registration and reporting requirements for ballot issue committees because they serve *both* informational and anti-corruption interests.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 28.1(E)(2) AND 32(a)(7)(C)

I hereby certify that this brief conforms to the type and volume limitations required by Fed. R. App. P. 28.1(e)(2) and 32(a)(7)(C) for a brief produced with a proportional font. This brief has been prepared using Microsoft Word 2003, is in 14-point Times New Roman font, and contains 6,996 words, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B(iii).

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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Brief of Amicus Curiae Brennan Center for Justice at NYU School of Law: (1) was submitted in digital format to esubmission@ca10.uscourts.gov, (2) is an exact copy of the written document filed with the Clerk, (3) all required privacy redactions have been made; and (4) the digital submission has been scanned with McAfee Edition 8.5I version 5584.0000 and according to the program, this document is free of viruses.

I also certify that on the 5th day of May, 2009, I sent a true and complete copy of the foregoing Brief of Amicus Curiae Brennan Center for Justice at NYU School of Law by first class mail to each of the following:

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