COLORADO SUPREME COURT Ralph L. Carr Judicial Center 2 East Fourteenth Avenue Denver, Colorado 80203 Certification of Questions of Law United States District Court District of Colorado, 12-cv-1708-JLK	▲ COURT USE ONLY ▲
Plaintiff, Coalition for Secular Government, a Colorado nonprofit corporation, v. Defendant, Scott Gessler, in his official capacity as Colorado Secretary of State.	Supreme Court Case No. 2012SA312
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COALITION FOR SECULAR GOVERNMENT REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in the rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:
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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements.

Dated this 31st day of January, 2013.

Tyler Martinez
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ARGUMENT

I. When Colorado's voters adopted Article XXVIII in 2002, they could not have been informed by subsequent events.

Pursuant to C.A.R. 21.1(a), this Court has been asked to answer certified questions from the federal district court for the District of Colorado. In doing so, this Court must determine the intention of Colorado's voters when they passed Article XXVIII in 2002. While subsequent legal developments may be relevant to CSG's federal constitutional claims in the federal district court, only cases occurring prior to the 2002 election could have contemporaneously informed Colorado's electorate. *See Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1254 (Colo. 2012) ("*Senate Majority Fund*") ("The electorate, as well as the legislature, must be presumed to know the *existing* law at the time [it] amend[s] or clarif[ies] that law") (emphasis added) (citing *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)).

The Secretary's brief relies heavily on legal developments and authority occurring subsequent to the adoption of Article XXVIII. *See, e.g. Sec. Br.* at 22-25. For instance, much is made of *Citizens United v. FEC*, 130 S.Ct. 876 (2010),[1] a case which CSG does not rely upon in this forum, and whose reasoning could not

[1] The Secretary's Brief cites *Citizens United* eleven times on six different pages. *Sec. Br.* 21-24, 26, and 46.

have been known more than seven years before it was composed.[2] Such authorities do not provide guidance as to the probable intentions of Colorado's voters, and provide little assistance in answering the District Court's certified questions. *Senate Majority Fund*, 269 P.3d at 1258 (declining to adopt post-2002 case law to contradict "the well-settled definition of 'express advocacy'...at the time Amendment 27 was adopted.").

II. The Secretary provides no compelling argument supporting a construction of "express advocacy" that reaches lengthy scholarly work containing a single sentence of express advocacy.

> If that sentence were simply excised, and assuming the reasoning in *Senate Majority Fund* applies in the ballot initiative context in the same manner as it applies to candidate speech, CSG's paper would amount to nothing more than issue advocacy, and consequently would be exempt from Colorado's disclosure requirements. *Sec. Br.* at 25.

The Secretary argues that, uniquely in the modern history of the United States, the people of Colorado intended to regulate lengthy public policy papers, books, and the like as political ads if such communications contain a single

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[2] The Secretary incorrectly states that the Supreme Court "found that *Hillary* qualified as express advocacy" despite a lack of "magic words." *Sec. Br.* at 24. In fact, the Court held that "[u]nder the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifie[d] as the functional equivalent of express advocacy." *Citizens United v. FEC*, 130 S.Ct. 876, 890 (2010). The notion of a "functional equivalent of express advocacy" *does not exist in Colorado law. Senate Majority Fund*, 269 P.3d at 1257. Thus, the Secretary's references to *Hillary* are doubly irrelevant: they do not inform this Court's analysis of the voters' intentions, and they do not correctly characterize the case.

sentence of express advocacy. For the reasons given in the Opening Brief, this cannot be the case. But the Secretary's arguments also suffer from a number of specific infirmities.

A. The flyer at issue in *MCFL* is easily distinguished from CSG's Paper.

The Secretary argues that "whether a document qualifies [as express advocacy] depends on far more than its length." *Sec. Br.* at 22. He is correct. But three facts were true in 2002 when Article XXVIII was adopted. First, the longest document ever held to qualify as express advocacy was eight pages long. Second, that document differed markedly from CSG's paper in tone, content, and format. Third, although that eight-page document was indeed held to be express advocacy, the same court held that regulating its author as a political committee was unconstitutional.

The *MCFL* flyer[3] advertised itself as "EVERYTHING YOU NEED TO VOTE PRO-LIFE," contained thirteen photographs of candidates with a 100 percent favorable rating from MCFL, and listed the voting records of a remaining "some 400 candidates" running for state and federal office in Massachusetts. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 243-244 (1986) ("*MCFL*"). The flyer

[3] It is noteworthy that the Court's opinion consistently refers to the MCFL document as a flyer.

even placed an "asterisk...next to the names of those incumbents who had made a special contribution...by actively supporting MCFL legislation." *Id.* This presentation dramatically changed the MCFL flyer from a simple voting guide to an exhortation to specifically vote for the thirteen photographed candidates. On the back was a coupon listing the names of pro-life candidates that pro-life voters could clip out and bring to the polls. *Id.* at 243. The Court's interpretation of the *MCFL* flyer was not that the phrase "vote pro-life" qualified the flyer as express advocacy, but rather that the flyer as a whole was eight full pages of express advocacy.

CSG, meanwhile, has published a 33 page paper that is approximately five times the length of this reply brief. It contains 176 endnotes, an indication of academic aspiration and rigor obviously lacking in MCFL's flyer. And, again, by the Secretary's own admission, only one sentence of the paper can be identified as express advocacy. *Sec. Br.* at 25. The voters of Colorado could not have intended to place the MCFL flyer and CSG's paper in the same category. Certainly *MCFL* does not suggest that they should be treated similarly.

B. The burdens of issue committee status are comparable to those incurred by federal PAC status, and Colorado's 2002 electorate would be aware that imposing those burdens in this context would have been unconstitutional.

In *MCFL*, both the plurality opinion and the concurrence were troubled by the burdens experienced by political committees. The plurality was concerned with the requirements to appoint a treasurer; ensure that contributions were forwarded to the treasurer; keep detailed books documenting expenditures; record the name, address, and employer of contributors; and the need to comply with burdensome reporting schedules. *MCFL*, 479 U.S. at 253 (Brennan, J.).

Similarly, although approving of *Buckley*'s transparency rationale for disclosure by political committees, Justice O'Connor was concerned with the "organizational restraints" imposed by committee status, including "a more formalized organizational form," and a significant loss of funding availability. *Id.* at 266 (O'Connor, J. concurring) (citing *Buckley v. Valeo*, 424 U.S. 1, 81-82 (1976)).

These burdens were substantially greater than those imposed on unincorporated entities, which needed only to disclose the recipients of independent expenditures and donors who gave for that purpose.[4] *MCFL* 479 U.S.

[4] Assuming they did not have the major purpose of supporting candidates. It is clear from context that the Court is referring to the *single* major purpose. And the

at 252. Consequently, because the mechanism for speech permitted by the statute was "more burdensome than the one if foreclose[d]," and because its "practical effect may [have been] to discourage protected speech," forcing MCFL to register as a political committee was unconstitutional. *Id.* at 255 (plurality opinion). Justice O'Connor agreed, noting that "the Government ha[d] failed to show that groups such as MCFL pose any danger that would justify infringement of its core political expression." *Id.* at 266. Consequently, MCFL – whose flyer contained "express advocacy" – could nevertheless not be forced to form a political committee. *MCFL*, 479 U.S. at 264-65.

The Colorado scheme is similarly burdensome. Colo. Const. art. XXVIII § 7 (incorporating the disclosure requirements of Colo. Rev. Stat. § 1-45-108). Issue committees have to report on a frequent basis until terminated. Colo. Rev. Stat. § 1-45-108(2)(a)(I). They must keep separate financial records, and designate a registered agent. Colo. Rev. Stat. §§ 1-45-108(2)(b) and 108(3)(b). They must track and report the names and addresses of all contributors who give more than $20, and give the employer of those who give more than $100, regardless of the purpose for which such funds are given. Colo. Rev. Stat. § 1-45-108(1)(a). Committees are compelled to note expenditures in great detail, including *which*

Secretary appears to concede that CSG's "regular activities" do not include express advocacy. *See infra* at 11.

post office and *which office supply store* the organization uses. Colo. Rev. Stat. § 1-45-108(2)(b), § 1-45-109(5)(d)(I) (requiring reporting of vendor information on Secretary's website); Campaign Finance Rules 4.4.1 and 10.2, 8 C.C.R. 1505-6.

The "disclosure" CSG must endure is similar to that specifically found too burdensome in *MCFL*. That case involved a publication only 8 pages long, functioning as a voter guide complete with coupons for the voting booth, multiple exhortations to vote, and thirteen lionized candidates. By contrast, the CSG public policy paper is 33 pages long, with almost 200 endnotes, is philosophical, and has only one sentence of express advocacy – dealing with *an issue perennially in controversy.* Certainly, the voters of Colorado knew that if an eight page document exhorting votes for candidates could not, without more, constitutionally trigger the burdens of political committee reporting, then neither could a lengthy public policy paper.

C. This Court should not be swayed by the Secretary's suggestion that CSG's standard is unworkable.

Should the Court adopt CSG's position, the Secretary has expressed concern that such an electoral portion analysis "would be entirely unworkable in practice" and may create hard cases. *Sec. Br.* at 21. This seems improbable given that nearly all campaign finance cases turn on true political ads, and not academic

publications. Indeed, the unusual nature of CSG's activities is why these issues are before this Court.

But, more fundamentally, as-applied challenges often pose difficult questions that require weighing certain facts or interests against others. Courts ought to shy away from creating a "standard that would be difficult to apply" when "as a result, [it might] potentially serve to unconstitutionally chill protected political speech." *Senate Majority Fund*, 269 P.3d at 1258. But this does not imply the inverse: careful balancing is obviously permissible when the result is to *protect* constitutional liberties. Indeed, as the Supreme Court expressly stated in the campaign finance context itself, the mere "desire for a bright-line rule...hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in original).

Fact-intensive, as-applied constitutional cases are hardly a novel challenge for the judiciary. *Compare, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding that Pawtucket, RI nativity scene involving a crèche did not violate the Establishment Clause because of surrounding "figures and decorations traditionally associated with Christmas") *with County of Allegheny v. ACLU*, 492 U.S. 573, 581 (1989) (holding that a crèche placed on a courthouse's staircase, where "distinct and not connected with any" other exhibit or Christmas decorations, violated the Establishment Clause). Handling such questions, regardless of their difficulty, is

the responsibility of judges, as this Court has amply demonstrated. *See, e.g., Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007) (rejecting as-applied challenge to Colo. Rev. Stat. § 16-3-309(5) under *People v. Mojica-Simental*, 73 P.3d 15 (Colo. 2003)).

The Secretary's suggestion that this Court ought to enshrine a restrictive, prophylactic "magic trigger" understanding of "express advocacy" because follow-on as-applied cases may be too difficult for the judiciary is precisely what Justice Brennan inveighed against in *MCFL*.[5]

A single sentence of express advocacy ought not to be permitted to pollute 20,000 words of philosophical and policy analysis. Under Colorado law, we presume voters knew the constitutional law in 2002, and at that time, *MCFL* made clear that an organization engaged primarily in issue speech could not constitutionally be forced to register as a political committee.[6] For this reason, and

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[5] The point is neither new nor novel. It is "emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each...This is the very essence of judicial duty." *Marbury v. Madison*, 1 Cranch 137, 177-178, 5 U.S. 137, 177-178 (1803).

[6] The Secretary suggests that the burden issue committee registration imposes on CSG is slight by stating that the "regulations imposed on Colorado issue committees...do not 'censor' speech. They simply require disclosure, an outcome that the *Citizens United* Court endorsed by a vote of 8-1." *Sec. Br.* at 21, n. 8. But the disclosure upheld in *Citizens United* (the filing of a single independent

for those given in the Opening Brief, the people of Colorado did not intend for the policy paper to be considered an expenditure under Article XXVIII.

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expenditure report by "any person who spends more than $10,000" on independent expenditures "within a calendar year") bears no resemblance to the burdens of full issue committee status. *Citizens United*, 130 S. Ct. at 914.

The *Citizens United* Court explicitly recognized that the disclosure requirements it upheld for independent expenditures were "a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 915. As an example of "more comprehensive regulations of speech," the Court cites *MCFL*, 479 U.S. at 262. In that portion of the case, the Court both notes that "[t]he state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee" and that MCFL may only be regulated as a political committee if "MCFL's independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity." *Id.* This is actually CSG's point.

The burdens in *MCFL* required, *inter alia*, political committees to obtain the name and address of every contributor over $50, the name and address of any person to whom a disbursement was made, and mandatory monthly or quarterly filing with the FEC. *MCFL*, 238 U.S. at 253-254. Similarly, Colorado requires issue committees to report the names and addresses of contributors giving over $20, quarterly filing in off-election years (and accelerated filings closer to the day of the election), as well as special filings within 24 hours after receipt of a $1,000 contribution within thirty days of an election, and the tracking of all disbursements. Colo. Rev. Stat. 1-45-108(2)(a)(I).

Moreover, these burdens are exacerbated by the Section 9(2) private party enforcement system. Because political opponents may bring opportunistic lawsuits, the threat of substantial (indeed, organization-ruining) fines is ever-present. An error, whether in reporting or choosing whether to report, can bankrupt a small organization. *Amicus's* attempt to separate Colorado's enforcement mechanism from its underlying law clearly fails. This is precisely because one must invest "the time, energy and money involved in reviewing the law" regardless of whether one is being sued by an ideological opponent, and run the risk that – without sophisticated counsel – one will "review the law" incorrectly. *See* Amicus *Br.* at 24-25. That a federal judge saw sufficient legal ambiguity to certify four questions to this Court is adequate evidence of this risk.

III. CSG primarily engages in press activity and commentary, and therefore the publication of the public policy paper falls under Article XXVIII's press exemption.

The application of a press exemption to lengthy scholarly papers or books is an issue of first impression. This is doubtless because no American government, to CSG's knowledge, has ever attempted to regulate such a publication as a political "expenditure." Because the law has not previously reached such publications in the first instance, exceptions – including the press exemption – have seldom been invoked.

For the reasons given previously and in the Opening Brief, there is no reason to believe the people of Colorado anticipated or intended that CSG's paper would be treated as express advocacy and, consequently, as an expenditure.

But should this Court decide otherwise, three points bear noting. First, the Secretary appears to concede that CSG's primary activities would be covered by Colorado's press exemption. *Sec. Br.* at 34 (noting CSG's "regular organizational activities"). Second, if CSG's blog qualifies CSG as a press entity, posting the paper on the blog makes the paper press. Third, what little guidance exists strongly suggests that the public policy paper is itself press, regardless of CSG's press status.

A. The Secretary and CSG appear to agree that CSG's primary activities would qualify under the press exemption.

The Secretary describes "CSG's regular organizational activities…[as] consist[ing] primarily of a frequently updated blog containing a variety of news, commentary, and opinion, a Facebook page, and publication of various op-eds and letters to the editor in newspapers around the state." *Sec. Br.* 34. This description squares neatly with the State's press exemption, which covers:

> Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine, or other periodical not owned or controlled by a candidate or political party…Colo. Const. art. XXVIII § 2(8)(b)(I).

Moreover, the Secretary admits that "the manner of distribution" of press is "relatively unimportant." *Sec. Br.* at 33. This is CSG's position, and accords with the Federal Election Commission's interpretation of the federal press exemption.[7] Such exemptions are defined to protect press *activity*, not merely certain press *channels*. Thus, the CSG blog itself is an "other periodical."

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[7] The Secretary concedes that the "press exemption contained in Amendment 27 varies only slightly from the federal statute, which excludes from the definition of 'expenditure' 'any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.' 2 U.S.C. § 431(9)(B)(i)." *Sec. Br.* at 32-33.

This position also keeps pace with the longstanding, "well established [Colorado law] that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Joe Dickerson & Assoc's. v. Dittmar*, 34 P.3d 995, 1004 (Colo. 2001) (internal quotations and citations omitted).

B. If CSG's primary activities are press-related, then the posting of the paper online – as a central and prominent element of CSG's Web presence and general activities – makes the paper press as well.

While there are few cases interpreting press exemptions, those cases that do exist suggest that press exemptions ought to encompass the paper. CSG's press status is derived from its "frequently updated blog containing a variety of news, commentary, and opinion." *Sec. Br.* at 34. CSG's status as a press entity permits it to engage in express advocacy, so long as it does so through a "legitimate press function." *See, e.g. Reader's Digest v. FEC*, 509 F.Supp. 1210 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F.Supp. 1308 (D.D.C. 1981); *San Juan Cnty. v. No New Gas Tax*, 160 Wn.2d 141 (Wash. 2006).[8] An accepted press function is the

[8] This is the test used today by the FEC to determine if an entity qualifies for the federal press exemption. Federal Election Commission, AO 2010-08 ("Citizens United") at 4.

"media's traditional function of public commentary." *San Juan Cnty.*, 160 Wn.2d at 158.

Ever since the 2010 version of the paper was initially issued, CSG's "Politics without God" blog has prominently displayed the paper in the upper-right hand corner of the blog, directly above the blog's masthead.[9] In fact, the paper is the most unchanging feature of the blog. Putting such public commentary in the main body of a news source obviously ought to be protected, given that newspapers publish endorsements of candidates and ballot measures every election. Only if CSG manifestly went outside of its press function would the exemption not apply. *Cf. FEC v. Multimedia TV, Inc.*, 1995 U.S. Dist. LEXIS 22404 *28 (D. Kan. Aug. 15, 1995) (campaign fliers attached to monthly cable billing statements not protected as press since entity's core press function was cablecasting, not disseminating fliers).

Bailey v. Maine Comm'n on Gov't Ethics and Elec. Practices and *MCFL* are not to the contrary.[10] *Bailey* did not hold that the press exemption did not apply because the entity in question published a blog – but rather because the blog existed solely for the purpose of opposing a political candidate and *shut down after two months*. *Bailey*, 2012 U.S. Dist. LEXIS 141310 at 44. The *Bailey* court

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[9] Accessible at http://blog.seculargovernment.us.

[10] In any event, *Bailey*, being from 2012, could not have been known to the voters of Colorado in 2002.

specifically noted that "[t]his case could well have come out differently if the [blog]...had *any* sort of track record before it appeared on August 30, 2010, or if it had extended beyond its two month run." *Id.* at 45 (emphasis added).

Meanwhile, in *MCFL*, the Court determined that the press exemption did not apply to the flyer because "*[n]o* characteristic of the [flyer]...associated it in any way with the normal MCFL publication." *MCFL*, 479 U.S. at 250 (emphasis added) In part, the Court explained, this was because "[i]t was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters." *Id.* But the CSG paper has been published on the blog (although paper copies were also disseminated), and the paper's authors, Dr. Hsieh and Mr. Armstrong, have been listed on the blog's masthead since before the 2010 paper was issued.[11]

C. What guidance exists suggests that the paper alone should also be protected as press.

There is little judicial guidance as to whether or not the paper itself should be considered a periodical. But such guidance as exists suggests the phrase "other periodical" ought to be read liberally. Underscoring the lack of authoritative precedent, the Secretary relies upon *Bailey*, a 2012 case which in turn deals with a

[11] Accessible at http://web.archive.org/web/20100424232834/http://blog.seculargovernment.us/.

regulation promulgated in 2006. *Sec. Br.* at 33-34 (citing *Bailey*, 2012 U.S. Dist. LEXIS 141310 at 41 and 71 Fed. Reg. at 18610). Again, these provisions postdate the adoption of Article XXVIII and are distinguishable as discussed above.

What *was* established in 2002 was that the freedom of the press was closely guarded and read expansively. *See, e.g. Lovell v. Griffin*, 303 U.S. 444, 450 (1938); *Dickerson*, 34 P.3d at 1004-1005; *Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002). Looking at "the mischief to be avoided by Article XXVIII," *Senate Majority Fund*, 269 P.3d at 1254, the electorate was plainly concerned about *MCFL*-esque flyers and other short, one-time publications of express advocacy. This explains the requirement that such publications be published in some sort of "newspaper, magazine or other periodical." Colo. Const. art. XXVIII § 2(8)(b)(I).

Applying this bias for protection known to the Colorado electorate in 2002, the definition of "periodical" does not necessitate the restrictive definition posited by the Secretary. Instead, "periodical" should be read to mean what it plainly says: something published and updated repeatedly. Books, investigative journalism, and public policy papers can – and often are – updated and revised as new information becomes available. CSG's public policy paper *itself* is a "periodical" because it is updated regularly every two years to take into account new developments regarding issues of personhood, both in Colorado and nationally.

IV. *Sampson v. Buescher* casts doubt on the validity of the $200 threshold for issue committees.

CSG agrees with the Secretary that *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), is "categorical in effect" and therefore casts doubt on the $200 threshold of Article XXVIII §2(10)(a)(II). *Sec. Br.* at 47; *see also Open. Br.* at 35. But it disagrees with the Secretary's assertion that this case is "not postured in a manner that would permit this Court to simply declare an expenditure threshold." *Sec. Br.* at 46. In fact, the record of this as-applied challenge clearly indicates facts sufficient for this Court to declare such a threshold.[12]

Unlike the Secretary and *Amicus,* CSG is not a party to *Colorado Common Cause v. Gessler*, 2012 COA 147 (Colo. App. 2012). Consequently, CSG does not take a position on its merits.[13]

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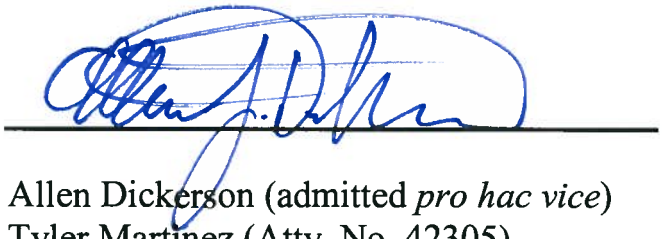
[12] $3,500. R. V.Compl., 16 ¶ 97. Colorado Common Cause, as *amicus curiae,* also commits this error stating that "CSG asks this Court to declare a [*sic*] just such a bright-line higher threshold (although it declines to offer a number), that would apply to all issue committees, not just where the financial burden of compliance meets or exceeds the value of financial contributions." *Amicus Br.* at 24. To the contrary, this fact was plainly pled in the Verified Complaint. *Id.*

[13] To the extent *Common Cause v. Gessler* properly reaches the issue, CSG's interpretation of *Sampson* is clear. R. Mem. in Supp. of Motion for Preliminary Injunction at 29-30.

Conclusion

For the foregoing reasons, and for the reasons stated in the Opening Brief, this Court should find that: 1) the public policy paper is not express advocacy, 2) the public policy paper qualifies for the press exemption, 3) the public policy paper is not a "written or broadcast communication," and 4) announce a new trigger for Colorado issue committee status that is consistent with Tenth Circuit law and the First Amendment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Pursuant to Colorado Appellate Rules 25(e) (2012), I hereby certify that on this 31st day of January, 2013, I have caused a true and correct copy of the forgoing Coalition for Secular Government Reply Brief to be sent via electronic and first-class mail to the following:

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