No. 16-28

In The
Supreme Court of the United States

WAYNE WILLIAMS, in his official capacity as Colorado Secretary of State,

Petitioner,

v.

COALITION FOR SECULAR GOVERNMENT, a Colorado nonprofit corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, applying exacting scrutiny, correctly weighed the concrete burdens imposed by Colorado upon "issue committees" against the state's minimal informational interest in a think tank raising and spending less than $3,500 to publish a lengthy policy paper.

RULE 29.6 STATEMENT

Respondent, Plaintiff-Appellee below, is the Coalition for Secular Government ("CSG"). CSG is a Colorado nonprofit corporation organized under the laws of that State. CSG is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with any ownership stake in CSG.

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INTRODUCTION

Petitioner, the Colorado Secretary of State ("Secretary"), claims that the Tenth Circuit has created a substantial circuit split by misapplying *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*). This is not so. The Tenth Circuit faithfully applied *Buckley*, which requires courts to subject state regulation of political committees, and the attendant burdens on free speech and association, to exacting scrutiny.

The Secretary's purported circuit split is also largely exaggerated and illusory. While some circuits have applied a "wholly without rationality" standard to certain monetary thresholds, the lower courts have generally followed *Buckley* and subjected political committee statutes, of which such thresholds are but a part, to exacting scrutiny.

In any event, this case presents an improper vehicle for review. The Colorado legislature has, in direct response to the Tenth Circuit's decision, amended the state's campaign finance laws to eliminate the "onerous" burdens imposed upon "small-scale issue committees" which, like Respondent, raise and expend less than $5,000. App. 28. Consequently, granting *certiorari* would force this Court to either evaluate a defunct statutory regime or else embark on a fresh analysis of new legislation that no lower court has ever reviewed.

STATEMENT

A. The Coalition for Secular Government.

Respondent Coalition for Secular Government ("Coalition" or "CSG") "is a small 'think tank'" organized as a nonprofit corporation under the laws of the state of Colorado. App. 30. The Coalition's "founder and sole principal is Diana Hsieh . . . who holds a doctorate in philosophy." App. 33. Its mission is "to educate the public about the necessary secular foundation of a free society, particularly the principles of individual rights and separation of church and state" App. 32 (quotation marks and citation omitted).

CSG's "advocacy includes opposition to laws based on religious scripture or dogma, such as abortion and discrimination against gay persons; government promotion of religion such as the teaching of 'intelligent design' in public schools; and the granting of tax exemptions or other privileges to churches that are not made available to other non-profits." App. 32. This "advocacy takes the form of blog posts and video blogs, and includes a lengthy policy paper on the consequences of enshrining the concept of 'personhood' into law." App. 33.[1]

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[1] The Secretary claims that the Coalition "is a non-profit corporation formed in response to a Colorado ballot issue concerning 'personhood,' which if adopted would have granted legal rights to fetuses." Pet. 4. This is not an accurate characterization, as the district court found below. While its distribution of that paper is the only activity implicating Colorado's campaign finance laws, it is far from Respondent's *raison d'etre.* As the district court specifically stated: "CSG clearly exists independently of and in addition

In 2008, Dr. Hsieh and a co-author, Ari Armstrong, wrote the first version of the policy paper giving rise to this litigation. On the advice of a friend familiar with Colorado's campaign finance regime, "Dr. Hsieh concluded that the Coalition would probably spend at least $200 printing and mailing copies of the 2008 policy paper, thus requiring her to register the Coalition as an issue committee under Colorado law." App. 11.

In 2010, CSG published an updated and expanded version of the policy paper. That 20,000-word work, supported by over 175 endnotes, provides an extended argument concerning the moral, legal, and scientific reasons for preserving an absolute right to abortion, and discusses efforts to enact measures in Colorado and other states that would grant legal personhood to fetuses. It concludes by stating that if the reader "believes that 'human life has value,' the only moral choice is to vote against Amendment 62," a ballot measure then pending before Colorado's voters.

It is undisputed that without its final sentence, the policy paper would not be regulated as express advocacy, and CSG could not be forced to register as an issue committee under state law.

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to its personhood paper, which is but one of its many advocacy issues." App. 38, n.7.

B. The Coalition's Experience as an Issue Committee.

In both 2008 and 2010, CSG registered as a Colorado issue committee. As the Tenth Circuit explained, "the regulatory framework governing issue committees in Colorado derives from multiple sources: the state's constitution . . . its statutes . . . and its regulations." App. 5. With a few exceptions – such as the $200 monetary trigger for committee registration, the requirement that all issue committees keep a bank account, and the penalty for late filing – the constitution "imposes few registration or disclosure requirements, leaving it to the legislative and executive branches to fill in the details." App. 5-6.[2]

Consequently, as the Tenth Circuit recognized, it is the "statutes [that] provide most of the onerous reporting requirements." App. 28. These include a duty to designate a registered agent, track the personal information of persons giving $20 or more for publication by the Secretary, and, in election years, file no fewer than "twelve disclosures in seven months regardless of whether an issue committee has received or spent any money." App. 7-8, 26. In turn, the Secretary must make public the names and addresses of donors giving $20 or more, and post the occupation and employer of donors giving at least $100.

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[2] The Secretary's regulations are few and, for the most part, ministerial, as in his providing a procedure whereby issue committees may terminate. These regulations are described at App. 10-11.

At trial, Dr. Hsieh – founder, registered agent and bookkeeper for the Coalition[3] – testified as to the burdens Colorado law imposed upon CSG. The district court noted that "Dr. Hsieh testified at length . . . and I found her intelligent and sincere – virtually incapable of dissimilation." App. 34, n.2.

In 2008, she "accessed the Secretary's website but found it 'completely impossible to figure what . . . to do.' " App. 11 (quoting testimony of Dr. Hsieh) (ellipses in original). Eventually, however, she erred on the side of caution, and registered CSG as an issue committee. The Coalition filed "bi-weekly reports with the Secretary's office detailing any contributions received and expenditures made," a requirement that forced Dr. Hsieh "to track down the required business addresses where she had purchased items such as mailing envelopes, labels, and postage stamps." App. 11. Filing each of the required reports generally took about an hour. *Id*.

In 2010, CSG "solicited financial contributions to enable" Dr. Hsieh and Mr. Armstrong "to update and expand the personhood policy paper." App. 11. CSG used a pledge model, whereby supporters could pledge funds and, if $2,000 were pledged, the paper would be updated and distributed. All told, contributors raised approximately $2,800 – although after Dr. Hsieh

[3] In Dr. Hsieh's words at trial: "I am the founder. I am the president. I am the accountant. I am the webmaster. I am the trash collector . . . you name it, I do it." Joint Appendix, vol. III at 589, *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016).

informed potential givers that Colorado required CSG to disclose its donors, five contributors balked, "reducing their contributions to avoid the reporting requirements." App. 12-13; *also* App. 25 (" . . . with small-scale issue committees, like the Coalition's, lost contributions might affect their ability to advocate . . . Dr. Hsieh vividly recalled losing even $20 contributions").

For the 2010 election cycle, the state introduced an improved online filing system for committees, called TRACER. The Tenth Circuit observed that while "[i]mplementing TRACER alleviated some technical burdens . . . a person registering an issue committee still faces over 35 online training modules on how to use TRACER." App. 25. Nor did TRACER change the fact that, as an issue committee, CSG "must provide detailed information about the Coalition's most mundane, obvious, and unimportant expenditures (e.g., the address of the post office at which she purchased stamps)." *Id*. This recordkeeping and reporting burden exists independently of the technical means by which reports are filed.

Nevertheless, Dr. Hsieh "failed to file her first disclosure report on time because her house had flooded," triggering the state's $50-per-day fine for failure to file. App. 13. "To stop the fine from increasing, Dr. Hsieh immediately filed an incomplete report that she would later update," and was only able to obviate the fine by filing a waiver request with the Secretary's office, which was "granted two weeks later." App. 13.

C. Proceedings Below.

CSG filed suit on July 2, 2012, anticipating that a personhood amendment would, once again, be presented to the voters of Colorado. Before the 2012 election, the personhood amendment failed to qualify for the ballot in Colorado, eliminating any issue committee requirements arising from the publication of an updated policy paper. As the failure of the personhood amendment to make the ballot "eliminated the immediacy of CSG's request for relief . . . it was agreed that the declarations CSG was seeking were uniquely matters of state law and appropriate for certification to the Colorado Supreme Court." App. 31, 34-35. On October 10, 2012, questions were certified relating to the application of *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), the applicability of Colorado's press exemption, whether the policy paper was a "written or broadcast communication," and whether the paper qualified as "express advocacy" within the meaning of the state constitution. App. 35, n.4, Pet. 6. On July 2, 2014, two years to the day after CSG filed its complaint, the Colorado Supreme Court declined to answer any of the district court's certified questions. App. 14.

In response, the district court consolidated CSG's request for a preliminary injunction with a trial on the merits. In 2014, a personhood proposal was on the ballot, and the Coalition "plan[ned] to spend no more than $3,500 to conduct all of the business of CSG, which include[d] publishing and distribut[ing] the 'personhood' paper and seed money to incentivize other authors and get [other] intellectual projects off the ground." App. 41

(citation omitted, punctuation altered). It was undisputed that this would trigger Colorado issue committee status.

The district court ruled for Respondent, finding that "[g]iven the nature of the ballot question and the nature of the expenditures, this is a case where the state's informational interest" was "truly not obvious" and was "outweighed by the burdens CSG has suffered and will continue to suffer in trying to comply with issue committee reporting requirements." App. 42 (quotation marks omitted). Accordingly, the court granted as-applied relief to the Coalition. App. 44-45.

The Tenth Circuit, applying exacting scrutiny pursuant to *Buckley v. Valeo*, 424 U.S. 1 (1976), affirmed, finding that "[t]he government's modest informational interest in the Coalition's disclosures is not reflected in the burdens Colorado law imposes on the Coalition." App. 29. Although the Secretary sought to have the case determined – one way or another – on facial grounds, the court of appeals demurred. App. 28, n.7. Because "statutes provide most of the onerous reporting requirements," the court determined that "the Secretary is better served seeking help from the institution best equipped in our governmental system to solve the problem – the Colorado legislature." App. 28.

Accordingly, on June 10, 2016, Governor John Hickenlooper signed into law amendments to Colorado's campaign finance regime, eliminating disclosure requirements for contributions to and expenditures by small-scale issue committees raising

and spending less than $5,000. Colo. Rev. Stat. § 1-45-108(1.5). No court has ever reviewed those provisions.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit Correctly Applied *Buckley v. Valeo.*

1. The Secretary repeatedly suggests that *Buckley* "instructed courts to avoid judicial line-drawing and uphold campaign finance triggering thresholds unless they are 'wholly without rationality.'" Pet. 3 (quoting *Buckley*, 424 U.S. at 83). He goes so far as to accuse the Tenth Circuit of having "rejected *Buckley*." Pet. 4. This view is mistaken, and relies upon a deeply flawed misreading of that decision.

The Secretary's key error is conflating *donor disclosure* thresholds with *committee registration* thresholds. Donor disclosure thresholds refer to the amount any particular donor must give a committee before being listed on a public report. In Colorado, that amount is twenty dollars. Colo. Rev. Stat. § 1-45-108(1)(a)(I) (requiring committees to report "the name and address of each person who has contributed twenty dollars or more").[4]

Committee registration thresholds, by contrast, refer to the amount of money a group of individuals

[4] If a contributor gives more than one hundred dollars, in the aggregate, her employer and occupation must be disclosed as well. Colo. Rev. Stat. § 1-45-108(1)(a)(II).

must pool before being required to take on a formal organizational structure, register with the state, and file periodic reports listing, among other things, the names and addresses of persons crossing the $20 donor-disclosure threshold.[5] In Colorado, under the state's constitution, the committee registration threshold is $200. Colo. Const. art. XXVIII § 2(10)(a) (" . . . accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.").

Donor disclosure thresholds were not challenged below. Colorado's committee registration threshold was – as a component of the overall issue committee system burdening CSG. The Secretary's conflation of these two thresholds informs his misreading of *Buckley*.

2. In *Buckley*, this Court applied a "wholly without rationality" standard to donor disclosure thresholds, but required the imposition of committee status, and the attendant burdens on speech and association, to survive exacting scrutiny.

Under the Federal Election Campaign Act ("FECA"), a committee was "defined . . . as a group of persons that receives 'contributions' or makes 'expenditures' of over $1,000 in a calendar year." *Buckley*, 424 U.S. at 62; *compare* Colo. Const. art. XXVIII § 2(10)(a).

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[5] On June 10, 2016, Governor John Hickenlooper signed into law Colo. Rev. Stat. § 1-45-108(1.5), which removed the requirement for issue committees to publicly report their donors if a group raises or spends less than $5,000. *See infra* at 28-32.

FECA further defined "contributions" and "expenditures" as funds raised or expended "'for the purpose of . . . influencing'" a federal election. *Buckley*, 424 U.S. at 77. Because that definition was potentially boundless, and in light of its significant constitutional defects, the Court limited "expenditures" to reach only the funding of communications containing "express words of advocacy." *Buckley*, 424 U.S. at 80, n.108, *id*. at 44, n.52. This dramatically shrank the universe of potential political committees, a result this Court considered appropriate since "[t]o fulfill the purposes of the Act [PACs] . . . need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id*. at 79. This narrow tailoring resulted directly from this Court's concerns with vagueness and, importantly, overbreadth. *Id*. at 78 ("Our task is to construe . . . the definitions of 'contributions' and 'expenditures' in a manner that precisely furthers [Congress's] goal" in enacting the statute).

Thus, *Buckley*, as a facial matter, dramatically cabined the overall scope of FECA. This Court then turned to as-applied challenges brought by plaintiffs seeking an exception to these political committee registration requirements for minor parties and independent candidates.[6] Here, the Court explicitly applied

[6] *Buckley* did not include an as-applied claim by a small organization analogous to CSG, although the Second Circuit and the D.C. district court interpreted FECA narrowly so as to prevent its regulation of nonpartisan civil society organizations. *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139-1142 (2d Cir. 1972); *Am. Civil Liberties Union v. Jennings*, 366 F. Supp.

heightened constitutional scrutiny because the "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64.

Relying on *NAACP v. Alabama*, 357 U.S. 449 (1958) and its progeny, the Court stated "that the subordinating interests of the State must survive exacting scrutiny." *Buckley*, 424 U.S. at 64 "[G]roup association is protected because it enhances '[e]ffective advocacy,'" and accordingly, applying a standard less than exacting scrutiny would threaten a fundamental liberty. *Id*. at 65 (quoting *NAACP*, 357 U.S. at 460) (second brackets in original). FECA's committee registration burdens risked "dilut[ion]" of "[t]he right to join together for the advancement of beliefs and ideas" because disclosure could limit Americans' "right to pool money through contributions" by scaring off donors or unduly invading a contributor's "privacy of belief." *Id*. at 65-66 (citation and quotation marks omitted); *also* at 66 ("The strict test established by *NAACP vs. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights").[7]

1041, 1055-1057 (D.D.C. 1975); *see also Buckley*, 424 U.S. at 79, n.106 ("At least two lower courts, seeking to avoid questions of unconstitutionality have construed the disclosure requirements imposed on 'political committees' . . . to be nonapplicable to nonpartisan organizations").

[7] After affirming that PAC status applied to all candidate and party committees, the Court also reviewed FECA, § 434(e), a

Applying this "strict test," the *Buckley* Court identified "three categories" wherein the government could show a sufficient interest concerning the "free functioning of our national institutions." 424 U.S. at 66-67 (citation and quotation marks omitted). First, compelled disclosure "provid[ed] the electorate with information" about the "interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.* at 66-67. Second, it provided the public "with information about a candidate's most generous supporters" which permits the electorate "to detect any post-election special favors that may be given in return." *Id*. at 67. Finally, the "disclosure requirements . . . gather[ ] the data necessary to detect violations of the contribution limitations described above." *Id.* at 67-68.[8]

After a thorough review, the Court found that the application of PAC status to minor parties and independent candidacies survived constitutional review, because the disclosure requirements, even as applied

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requirement that persons making independent expenditures file reports, and pointedly applied the same exacting scrutiny analysis it had just conducted with respect to political committees. *Id*. at 75 ("In considering this provision we must apply the same strict standard of scrutiny. . . .").

[8] As the Tenth Circuit properly acknowledged, the anti-corruption and law enforcement interests are not at issue here. App. 20. There can be no *quid pro quo* corruption between a donor and the larger electorate voting on a ballot proposition, and there are accordingly no limits on contributions to issue committees. Consequently, only the informational interest is at issue in this case.

to those specific groups, still served the identified governmental interests. *Id*. at 70, 72 ("But a minor party sometimes can play a significant role in an election . . . On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged"). But in doing so, this Court unambiguously applied exacting scrutiny.

3. The Secretary, however, reads this thorough, careful application of exacting scrutiny entirely out of the *Buckley* opinion, and instead relies on the challenge brought against FECA's thresholds for record-keeping and donor disclosure. But the Court only turned to that issue after having already scaled back the scope of political committee regulation to ensure that the law was constitutional in scope and further determining – under exacting scrutiny – that all groups triggering committee registation could be constitutionally required to register, report, and disclose. Only then did the Court confront the question of whether it would also fine-tune the level at which a committee's donors would be recorded and publicized.

FECA required political committees to keep records of contributions made "in excess of $10," and to place a contributor's name, address, occupation, and employer on the committee's quarterly public filings once a contributor crossed the $100 donor disclosure threshold. *Id*. at 63. In reviewing those provisions, and only in that context, did the Court say that on the "bare

record" provided it could not find that the donor disclosure limits were "wholly without rationality." *Id*. at 83.[9] The portion of the *Buckley* opinion on which the Secretary relies, then, was not a discussion of committee registration thresholds and the burdens imposed upon political committees.

The Court upheld these donor disclosure thresholds, in part, because it noted that "there [was] no warrant for assuming that public disclosure of contributions between $10 and $100" – contributions which, under Colorado law, and in 2016 dollars, *are* publicly disclosed – "is authorized by the Act." *Id*. at 84.[10] The $1,000 trigger for committee registration, by contrast, goes completely unmentioned in this section of the Court's opinion.

The language of the decision is sufficiently clear on this point, but additional support comes from the Court's footnote explaining its answers to the questions certified to the Court of Appeals below.[11] *Id*. at 84,

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[9] Of course, in this case, both the district court and the court of appeals had the benefit of an extensive record, given that a trial on the merits was held, and both sides presented witnesses concerning the burdens imposed by then-existing Colorado law.

[10] On the other hand, the *Buckley* Court noted that the government's interests in donor disclosure "can never be well served if the threshold is so high that disclosure becomes equivalent to admitting violation of the contribution limitations." 424 U.S. at 84. Of course, that interest is not at issue here. There are no limits on contributions to Colorado issue committees.

[11] This Court heard the *Buckley* case under a special, expedited review provision in FECA. At that time, section 437h (now codified at 52 U.S.C. § 30110) limited the jurisdiction of the Court

n.113. Those answers conclusively show that the Court approved the $10 recordkeeping threshold and the $100 donor disclosure threshold, and did not issue a ruling specifically concerning the $1,000 committee registration threshold. *Id*. ("Do 2 U.S.C. §§ 432(b), (c), and (d) and 438(a)(8) (1970 ed., Supp IV) violate such rights, in that they provide, through auditing procedures, for the Federal Election Commission to inspect lists and records required to be kept by political committees of individuals who contribute more than $ 10?"; "Does 2 U.S.C. §§ 434(b)(1)-(8) (1970 ed., Supp. IV) violate such rights, in that it requires political committees to register and disclose the names, occupations, and principal places of business (if any) of those of their contributors who contribute in excess of $ 100?").

The Secretary has plainly misread *Buckley*, which applied exacting scrutiny to political committee burdens, both facially and as-applied to independent candidates and small parties, and only then reviewed donor disclosure thresholds *for existing committees* under a "wholly without rationality" standard.

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of Appeals, and the scope of the Supreme Court's review, to specific questions certified by the district court.

II. While The Courts Of Appeals Have Appeared To Reach Differing Conclusions In Similar Cases, The Secretary's Suggested Circuit Split Is Exaggerated.

1. Nonetheless, the Secretary posits that "[t]he Circuits are split three ways over *Buckley*'s 'wholly without rationality' test." Pet. 12. This greatly overstates the sharpness and extent of this circuit split, which more closely resembles a circuit "crease."

The Secretary argues that "[t]hree circuits – the First, Third, and Ninth – have expressly adopted" the "'wholly without rationality' test." Pet. 12. This is not quite correct. The First and Ninth Circuits apply exacting scrutiny to laws imposing committee status, and the Third Circuit took special care to note that its decision did not concern political committees.

Del. Strong Families v. Attorney General, 793 F.3d 304 (3d Cir. 2015) ("*DSF*") concerned a law requiring one-time, event-driven reporting for communications mentioning a candidate close in time to an election. Moreover, the Third Circuit pointedly contrasted the burdens at issue there with those imposed upon Delaware political committees – and suggested that, had DSF been required to register as a political committee, it might have prevailed. *DSF*, 793 F.3d at 312, n.10 ("A comparison of the Act's political action committee ("PAC") disclosure requirements to the disclosure required of DSF shows that the former is much more extensive . . . Whether the Act's disclosure requirements for PACs would be overly burdensome as applied to

DSF *is not an issue that is before us* and thus is not one we reach today") (emphasis supplied).

The Secretary's First Circuit citation is similarly self-refuting. *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) explicitly applied exacting scrutiny in a challenge to Maine's "non-major-purpose PAC" law. 649 F.3d at 56-57 ("C. Application of Exacting Scrutiny to Maine's Laws"). The First Circuit only applied a "wholly without rationality" standard to the portion of the law requiring one-time, event-driven reporting – without *any* donor disclosure – for anyone spending $100 or more expressly advocating for or against a candidate or "naming or depicting a clearly identified candidate within a set period prior to any election." *Id.* at 59-60. Consequently, with the exception that Maine's law related to speech about candidates rather than ballot propositions, the Maine law reviewed in that case bears comparison not to the law reviewed by the Tenth Circuit here, but rather to the new "small scale issue committees" created by the Colorado legislature in response to the ruling below. *Infra* at 28-32.

The Secretary also misreads *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). *Canyon Ferry* concerned the "financial and organizational disclosures that" were imposed upon a church forced to register as a political committee. 556 F.3d at 1031. The Ninth Circuit considered whether *strict* or exacting scrutiny was appropriate, and applied, consistent with *Buckley*, exacting scrutiny. *Id.* (" . . . we ask whether the Montana

disclosure requirement has a 'relevant correlation' or 'substantial relation' . . . ") (quoting *Buckley*, 424 U.S. at 64).

Where the *Canyon Ferry* court assessed "the 'fit' between Montana's disclosure requirements and the State's informational interest," it did apply a "wholly without rationality" standard – but only as *part* of its exacting scrutiny of Montana's PAC registration requirements, not in place of that analysis. *Canyon Ferry*, 556 F.3d at 1033 (applying "wholly without rationality" as part of its analysis as to whether the law bore a "substantial relation" to a governmental interest); *cf. Buckley*, 424 U.S. at 84; *Nat'l Ass'n for Gun Rights, Inc. v. Murry*, 969 F. Supp. 2d 1262 (D. Mt. 2013) ("Defendants' interest in enforcing Montana's political committee disclosure and reporting laws is sufficiently important to meet the exacting scrutiny standard"). Indeed, the Tenth Circuit, in a prior challenge to Colorado's issue committee provisions, relied upon *Canyon Ferry* in its application of exacting scrutiny. *Sampson*, 625 F.3d at 1260-1261 (10th Cir. 2010); *see also* App. 23 (applying *Canyon Ferry* as part of the Tenth Circuit's exacting scrutiny analysis below).

4. The Secretary further contends that "[t]hree circuits," the Second, Fifth, and Eleventh, "have avoided the question." Pet. 14. However, each of the Secretary's cited cases applies exacting scrutiny when reviewing political committee registration requirements.

The Secretary argues that "[i]n *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 133 (2d Cir. 2014), the Second Circuit appeared to endorse" a "wholly without rationality" standard, but "waffled." Pet. 14. That is not a fair characterization of the Second Circuit's opinion. Rather, when confronted with a challenge to Vermont's campaign finance laws, the Court consistently applied exacting scrutiny. *Vt. Right to Life Comm.*, 758 F.3d at 134 (" . . . the Vermont statutes governing electioneering communications and mass media activities survive exacting scrutiny."); *id*. at 137 ("As a result, we, like the district court, apply exacting scrutiny to the 'political committee' definition as used to impose the registration and disclosure requirements here").

The exception is when the Second Circuit reviewed "the $100 threshold for reporting a contribution" to a political committee – that is, a donor disclosure threshold. *Id*. at 138. There, the court applied a "wholly without rationality" standard. *Id*. at 139. In doing so, the Second Circuit did not "waffle;" it simply read and applied *Buckley*.[12]

The Secretary's invocation of a Fifth Circuit case, *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014), fares

[12] In the course of doing so, the Second Circuit relied on the *Canyon Ferry* decision, acknowledging that "[t]he Ninth Circuit has applied a 'wholly without rationality' standard in evaluating a disclosure threshold, *although it evaluated the overall scheme using an 'exacting scrutiny' standard*." *Vt. Right to Life Comm.*, 758 F.3d at 139 (citing *Canyon Ferry*, 556 F.3d at 1031, 1033-1034) (emphasis supplied).

no better. He claims that court "upheld a $200 threshold without saying which legal standard should apply." Pet. 14. But the Fifth Circuit explicitly applied exacting scrutiny. 771 F.3d at 296 ("disclosure and organizational requirements are subject to the lesser but still meaningful standard of exacting scrutiny"); *id*. at 297 ("The first question under the exacting scrutiny standard is whether the government has identified a sufficiently important governmental interest in its disclosure scheme") (quotation marks omitted); *id*. at 299 ("Mississippi's minimal registration burdens, which are central to its disclosure scheme and proportional to its relatively small population, thus also survive exacting scrutiny review"). While the *Justice* court did, in a footnote, address an argument grounded in the same misreading of *Buckley* the Secretary advances here, it went on to state that it "need not consider" that argument. In short, there is no indication that exacting scrutiny has been dethroned in the Fifth Circuit. 771 F.3d at 300, n.13.

Lastly, the Secretary suggests that "[t]he Eleventh Circuit followed the same approach" as the Fifth Circuit. Pet. 15. This is true in that the Eleventh Circuit applied exacting scrutiny, as the Secretary admits. Pet. 15 (citing *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013). Indeed, *Worley* addressed not the lower rational-basis approach the Secretary champions, but the higher strict scrutiny standard, ultimately citing *McKee* and *Sampson* to support its declaration "that Florida's PAC regulations are subject to 'exacting

scrutiny,' so they must be substantially related to a sufficiently important government interest." *Worley*, 717 F.3d at 1244-1245.[13]

5. Finally, in an effort to consolidate his suggested circuit split, the Secretary points to case law "from the Fifth, Ninth, and Eleventh Circuits, which uph[e]ld disclosure thresholds for issue committees ranging from $0 to $500." Pet. 15. All of the Secretary's cited cases apply exacting scrutiny. *See* Pet. i ("The question presented is as follows: Does *Buckley*'s 'wholly without rationality' test apply to all dollar thresholds that trigger campaign finance disclosures . . . ?"). Moreover, with the exception of the Ninth Circuit's *Canyon Ferry* case, which the Secretary candidly concedes is against him, all of his cited cases involve facial rulings. *Family PAC v. McKenna*, 685 F.3d 800, 808 nn.5-6 (9th Cir. 2012);[14] *Murry*, 969 F. Supp. 2d at 1266; *Justice*, 771 F.3d at 295-296; *Worley*, 717 F.3d at 1249-1250. The Tenth Circuit, by contrast, issued an as-applied decision addressing the specifics of Colorado's overly-burdensome

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[13] The Eleventh Circuit's language, cited by the Secretary, finding the "wholly without rationality" standard "instructive," comes only one paragraph after the Court discussed Florida's zero-dollar donor disclosure threshold. *Id*. at 1251-1252.

[14] Moreover, the *Family PAC* court explicitly noted that "[i]n both *Canyon Ferry* and *Sampson*, the courts invalidated *reporting* requirements – i.e., when an organization is required to file contribution and expenditure reports with state election regulators – rather than *contribution* disclosure requirements – i.e., assuming an organization is subject to a reporting requirement, what contributions must be disclosed in the report." 685 F.3d at 810, n.10 (emphasis in original).

regime and limited to a group collecting and spending $3,500 or less.

III. The Tenth Circuit Applied Exacting Scrutiny To Colorado's Overall System Of Committee Burdens, Not Merely Its Choice Of Monetary Trigger.

1. The Secretary errs further in reading the Tenth Circuit's opinion to reach merely Colorado's $200 issue committee threshold, as opposed to the totality of burdens imposed upon CSG by Colorado law. Pet. 15. The court of appeals properly weighed the state's (slight) informational interest in small committees against the extensive registration, record-keeping, and disclosure requirements required by Colorado's statutes. The State's monetary trigger was only one factor among many that the court considered under exacting scrutiny. App. 5 (" . . . we take care to note the source of each relevant registration or disclosure requirement. Knowing where any unconstitutional burdens lie is the key to Colorado's addressing them").

Applying this Court's precedents, the Tenth Circuit recognized that exacting scrutiny "'requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" App. 18 (quoting *Citizens United*, 558 U.S. at 366-67; *see also Buckley*, 424 U.S. at 64, 66). It was that *relationship* that the Court of Appeals reviewed.

2. The Tenth Circuit began by recognizing that, where the government regulates political speech and association, "'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id*. (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010) and *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008)). Therefore, the court "perform[ed] an independent examination of the whole record in order to ensure that the judgment protects the rights of free expression." App. 16 (quoting *Faustin v. City & Cty. of Denver*, 423 F.3d 1192, 1196 (10th Cir. 2005)) (internal quotation marks omitted, brackets and emphasis added).

On one hand, the court of appeals held that "the governmental interest in issue-committee disclosures remains minimal where an issue committee raises or spends $3,500." App. 22. That is, a state's interest in issue committee disclosures is on a "sliding scale" because "[a]s a matter of common sense, the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level." App. 23 (quoting *Canyon Ferry*, 556 F.3d at 1033) (emphasis in original). Consequently, despite the unsupported assertion of Colorado's voters, the Tenth Circuit determined that "at a $3,500 contribution level" it could not "characterize the disclosure interest as substantial." *Id*.

In fact, despite arguing for a form of rational basis review, the Secretary made little effort to defend the rationality of Colorado's $200 issue committee threshold. *Cf. Randall v. Sorrell*, 548 U.S. 230 (2006); *see also*

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"). The Secretary failed to carry his burden below or otherwise demonstrate how the government had an adequate interest to justify imposing political committee burdens on a group raising $3,500 to produce a policy paper longer than Tom Paine's *Common Sense* – complete, unlike Paine's work, with over 175 endnotes.

Instead, the Secretary made and continues to make arguments that apply with equal force to freely-produced content. While this strategy is necessitated by the very low monetary trigger imposed by the Colorado constitution, the Tenth Circuit correctly declined to provide the state with unlimited discretion to regulate any politically-effective speech. After all, the mere fact that content garners attention – whether through citation by a *New York Times* columnist or simply through page views provided by autonomous individuals – cannot support governmental efforts to license the speaker. Pet. 5.[15] As the district court pointedly observed:

> The Secretary's point is perplexing: Is he suggesting that the effectiveness of political

[15] For instance, the Secretary places some weight on the citation of CSG's paper by a "pro-choice voting guide" distributed by a third-party group, not in Colorado, but in *New York State*. Pet. 5. The district court and the Tenth Circuit were well within their discretion in disregarding attempts to stretch Colorado's informational interest halfway across the continent.

> speech – the fact it resonates, generates interest, and is downloaded from the [I]nternet by individuals wanting to read it – somehow elevates or enervates the public's informational interest in its disclosure? Surely not. It must be remembered by those older than Ms. Hsieh that the [I]nternet is the new soapbox; it is the new town square.

App. 41.

3. Moreover, the court did not end its analysis with the scope of the governmental interest. App. 24 ("Obviously, informational interest is just one side of the exacting-scrutiny balance."). The Tenth Circuit also examined the burden of Colorado's "issue committee" status as applied to a particular small organization. App. 25. While the Tenth Circuit lauded the Secretary for doing what he could, via a new online disclosure system, to ease the pain of compliance with Colorado's issue committee reporting and disclosure rules, CSG "still faces an overly burdensome regulatory framework" and the need to absorb "over 35 online training modules on how to use" the new system. App. 24-25.

Similarly, the court noted that the Coalition was forced to report "detailed information about [its] most mundane, obvious, and unimportant expenditures (e.g., the address of the post office at which she purchased stamps)." App. 25. Additionally, Colorado's filing schedule required the gathering of this information for twelve reports in just seven months – even if the Coalition expended no additional funds. *Id*. at 26; *see also* Colo. Rev. Stat. § 1-45-108(2) (reporting schedule)

but see Colo. Rev. Stat. § 1-45-108(1.5) (eliminating these requirements for small issue committees in the wake of the opinion below).

Finally, CSG is run by a single person, rather than a large staff, and "financial disclosure imposes a unique burden on small-scale issue committees." App. 25. In part, the detailed disclosure of contributors – name, address, occupation, and employer – directly affected CSG's fundraising, which in turn, "affect[s] their ability to advocate." *Id*. Large-dollar issue committees are somewhat more insulated and able to absorb the loss of a few small donors, but Dr. Hsieh "vividly recalled losing even $20 contributions." *Id*. Thus, in examining the burdens imposed by the state, the *CSG* court went beyond the monetary threshold to find that "Colorado law imposes a wide range of burdens on issue committees, some of which are slight and others more substantial." *Id*. at 26.

As the foregoing shows, the Tenth Circuit's ruling was anything but haphazard, and reached far beyond Colorado's monetary trigger for issue committee status. Rather, it appropriately applied exacting scrutiny, addressing the totality of the burdens imposed by Colorado law and measuring those burdens against the State's informational interest to determine whether there was a substantial mismatch. On these facts, such a mismatch existed, at least under the law in effect when the Tenth Circuit made its ruling.

IV. Recent Legislation, Passed Explicitly In Response To The Ruling Below, Has Changed The Balance Of Costs Imposed Upon Small Groups Discussing Ballot Issues.

1. The Tenth Circuit's opinion concluded that "for small-scale issue committees like the Coalition, Colorado's onerous reporting requirements outweigh . . . the public's modest informational interest in the Coalition's disclosures." App. 27. While it observed that these burdens stemmed from a number of legal sources, the court of appeals noted that "statutes provide most of the onerous reporting requirements." App. 28; *also* App. 7 ("Colorado statutes . . . contain the majority of the issue-committee registration and disclosure requirements"). Accordingly, the Secretary was explicitly encouraged to seek legislative changes alleviating these burdens. App. 28; *also id*. n.7. He did so, and the legislature immediately amended the law "in light of the opinion of the United States [C]ourt of [A]ppeals for the [T]enth [C]ircuit in the case of *Coalition for Secular Government v. Williams*, No. 14-1469. . . ." Colo. Rev. Stat. § 1-45-108(1.5).[16]

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[16] The Coalition's challenge was decided on March 2, 2016, the Colorado legislature drafted a bill on May 20, 2016, and the governor signed the bill on June 10, 2016. *Available at*: http://www.leg.state.co.us/CLICS/CLICS2016A/csl.nsf/fsbillcont3/7351B1D85F6A346D87257F9400795EB8?Open&file=186_enr.pdf.

While that legislation was awaiting the Governor's signature, the Secretary sought an extension for the filing of his Petition, pursuant to Rule 13(5), until after the Governor could take action

Pursuant to that legislation, Colorado has created a new category of issue committees, called "small-scale issue committees." Pet. 9-10 n.3. This law, and any attendant regulations, comprehensively change the relationship between the government and small-scale committees such as Respondent. As the Tenth Circuit recognized, the old issue committee rules "require[d] twelve disclosures in seven months regardless of whether an issue committee has received or spent any money," and required small groups to gather and report the names and addresses of donors giving minimal amounts, a burden in and of itself for small entities. App. 26-27.

Under the new statute, small-scale issue committees are defined as any "issue committee that has accepted or made contributions or expenditures in an

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on the bill. Application to the Hon. Sonia Sotomayor for an Extension of Time to File a Petition for Writ of Certiorari to the Tenth Circuit Court of Appeals, *Coal. for Secular Gov't v. Williams*, No. 16-28 (U.S. May 12, 2016).

That statute fundamentally alters the regulatory regime that would apply to Respondent in the 2016 or 2018 elections. Likewise, the Secretary issued a Notice of Proposed Rulemaking on June 15, 2016 to specially change the Colorado Campaign Finance Rules to reflect the adoption of Colo. Rev. Stat. § 1-45-108(1.5). Colo. Secretary of State, Notice of Proposed Rulemaking, Rules Concerning Campaign and Political Finance 8 CCR 1505-6 at 1 (June 15, 2016), *available at*: http://www.sos.state.co.us/pubs/rule_making/files/2016/20160615CPFNoticeRulemaking.pdf. The Secretary held a public hearing on the matter just days ago, on July 26, 2016. *See id*., and Colo. Secretary of State, Campaign & Political Finance Rulemaking Hearing 7/26/2016, *available at*: http://www.sos.state.co.us/pubs/rule_making/hearings/2016/CPFRulesHearing20160726.html.

amount that does not exceed five thousand dollars during an applicable election cycle for the major purpose of supporting or opposing any ballot issue or ballot question." Colo. Rev. Stat. § 1-45-103(16.3)(a). Such groups are "not required to make any disclosure about any contributions or expenditures it has made or received." Colo. Rev. Stat. § 1-45-108(1.5)(b)(II). While the new amendments do not eliminate all burdens – small-scale issue committees must still maintain a separate bank account and file a registration form with the Secretary – it does eliminate those requirements the court of appeals deemed most "onerous." Colo. Rev. Stat. § 1-45-108(1.5)(b); App. 27.

2. In his footnote, the Secretary provides three reasons why this new legislation does not obviate the need for this Court's review. None is availing.

First, he notes that "the statute does not alter the $200 reporting threshold itself, nor could it." Pet. 10, n.3. This is true, so far as it goes. But the legislature has removed the disclosure requirements that went to the heart of the Tenth Circuit's tailoring analysis. *See supra* at 24 (citing *Doe*, 561 U.S. at 196). The Tenth Circuit did not invalidate the state's $200 reporting trigger *per se*, but rather evaluated the disproportionate burdens imposed on a specific group once that threshold was crossed.

Second, the Secretary notes that "section 1-45-108(1.5) does not affect groups that spend between $5,000 and $10,000, a range the panel below suggested

might also be entirely exempt from reporting requirements." Pet. 10, n.3. This passage is obvious dicta, because Respondent *does* fit within the definition of a small-scale issue committee, and has pled no intention to raise and expend $10,000 in a future election cycle. Granting *certiorari* on this basis would be tantamount to issuing an advisory opinion. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning").

Third, the Secretary notes that "the law sunsets in three years, meaning that even if it is a partial solution, it is not a permanent one." Pet. 10, n.3. But, put differently, this is simply an acknowledgement that the Secretary's case is unripe for decision at this time. After all, *no* court – including the Tenth Circuit below – has ever reviewed Colorado's new issue committee regime. Moreover, the law's sunset date does not mean that Colorado law must automatically revert back to its previous state. Colorado's legislature has the authority to renew legislation, and presumably would do so rather than face additional litigation. In any event, the Secretary's assumption to the contrary is entirely speculative.

Finally, this three years' breathing room gives the people of Colorado ample opportunity to take the Tenth Circuit's reasoning to heart and amend their constitution to raise the patently-unjustifiable $200 issue committee threshold. This Court's intervention

would unwisely preempt that process of self-government.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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