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| SUPREME COURT<br>STATE OF COLORADO<br><br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202 | |
| Certification of Questions of Law<br><br>United States District Court for the District of Colorado, Case No. 12-cv-1708-JLK | |
| COALITION FOR SECULAR GOVERNMENT, a Colorado nonprofit corporation,<br><br>Plaintiff,<br><br>v.<br><br>SCOTT GESSLER, in his official capacity as Colorado Secretary of State,<br><br>Defendant. | ▲ **COURT USE ONLY** ▲<br>Case No. 2012SA312 |
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| **SECRETARY'S ANSWER 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 these rules. Specifically, the undersigned certifies that:

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

**Choose one:**

☑ It contains **8,612** words.

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☐For the party raising the issue:
It contains under a separate heading (1) a concise statement of the applicable standard of review with citation to authority; and (2) a precise location in the record (R.__, p.___), not to an entire document, where the issue was raised on ruled on.

☑For the party responding to the issue:
It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

_/s/ *Matthew D. Grove*_____

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## INTRODUCTION

Several months prior to the November 2012 general election, Plaintiff Coalition for Secular Government ("CSG") sued Colorado Secretary of State Scott Gessler ("the Secretary") in the United States District Court for the District of Colorado, asserting that several provisions of Colorado's campaign finance laws violate the First Amendment. CSG is a small organization that, among other things, regularly analyzes and critiques the personhood movement, which seeks to enact state and federal laws declaring that life begins at conception. Proponents of the personhood amendment placed proposed constitutional amendments on the Colorado ballot in 2008 and 2010.

A few months prior to both of those elections, CSG published and distributed a "policy paper" that was critical of both the personhood movement in general and of the specific initiatives on Colorado's general election ballot – Amendment 48 in 2008 and Amendment 62 in 2010. *CD,* pp. 36-79 (2010 paper). CSG raised and spent small to moderate amounts of money on both publications, and in both years

also registered as an issue committee under Colorado law, making the disclosures that status as an issue committee requires. *See* Colo. Const. art. XXVIII § 2(10)(a); § 1-45-103(12)(a), C.R.S. (2012); *CD,* pp. 5-7 (¶¶ 35-46).

In advance of the 2012 election, with proponents gathering signatures for a new version of the personhood amendment, CSG determined that it would revise and update the policy paper to reflect new developments, with publication and distribution of the updated product to occur several weeks prior to the election.[1] *CD,* p.7 (¶¶ 46 - 48). Rather than registering as an issue committee, however, CSG decided to challenge the constitutionality of Colorado's registration and disclosure requirements both on their face and as they apply to small organizations such as CSG.

CSG filed for a preliminary injunction in United States District Court, but when the personhood amendment failed to timely submit

[1] The personhood amendment failed to qualify for the ballot. To the best of the Secretary's knowledge, CSG did not update, publish, or distribute the policy paper either before or after the November 2012 general election.

enough signatures qualify for the 2012 ballot, the federal court vacated the preliminary injunction hearing and certified the following questions to this Court.

## CERTIFIED QUESTIONS

1. Is the policy paper published by the Coalition for Secular Government in 2010 "express advocacy" under Art. XXVIII § 2(8)(a) of the Colorado Constitution?

2. If the policy paper is express advocacy, does it qualify for the press exemption found at Art. XXVIII § 2(8)(a)?

3. Is the policy paper a "written or broadcast communication" under § 1-45-103(12)(b)(II)(B), C.R.S.? If not, did it become a "written or broadcast communication" when it was posted to CSG's blog or Facebook page?

4. In light of *Sampson v. Buescher,* 625 F.3d 1247 (10th Cir. 2010), what is the monetary trigger for Issue Committee status under Art. XXVIII § 2(10)(a)(II) of the Colorado Constitution?

## SUMMARY OF THE ARGUMENT

1. Because it opposed a ballot question – Amendment 48 in 2008 and Amendment 62 in 2010 – and used the language of express advocacy to do so, money spent to write, publish, and distribute the policy paper in those years amounted to an "expenditure" under Art. XXVIII § 2(8)(a). While the length and complexity of the policy paper made for an uncommonly thorough form of express advocacy, those factors do nothing to change the paper's fundamental conclusion: that the reader's only moral choice is to vote against personhood. Urging the reader to vote in one way or another is, by definition, express advocacy. CSG's decision to expressly advocate against the personhood amendment within the policy paper prevents this Court from classifying that document as mere issue advocacy.

2. "Policy papers" such as those published by CSG do not qualify for the press exemption because they are not contained "in a newspaper, magazine or other periodical[.]" Art. XXVIII, § 2(8)(b)(I). The policy paper itself does not qualify as a periodical because it is published too infrequently and only when some version of the

personhood amendment appears on the ballot. Moreover, the policy paper is not an "opinion or commentary writing...*printed in* a...periodical." The policy paper comprises the entire publication. Permitting writings such as the policy paper to qualify for the press exemption would permit the press exemption to swallow Colorado's much broader disclosure requirements.

3. The term "written or broadcast communication" in § 1-45-103(12)(b) is only intended to provide guidance for evaluating whether an organization has "a major purpose" of supporting or opposing a ballot initiative. CSG's policy paper qualifies as a "written or broadcast communication" under any reasonable reading of the statute.

4. The breadth and meaning of the holding in *Sampson* is the ongoing subject of litigation in Colorado. While the Secretary does not believe that this Court is in a position – at least in this case – to simply announce an acceptable monetary threshold for the disclosure requirements under the First Amendment, this case does provide an opportunity to explore the scope of the *Sampson* holding and the impact

that it has on Colorado's existing requirements for issue committee registration.

## ARGUMENT

### I. History and structure of issue committee campaign finance reporting under Colorado law.

Colorado's campaign finance law is governed by a blend of constitution and statute. The constitutional provisions were adopted by ballot initiative in 2002, and are codified as Colo. Const. Article XXVIII. Various statutory provisions implementing the constitutional requirements appear throughout Title 1 of the Colorado Revised Statutes; the Fair Campaign Practices Act is codified at § 1-45-101 *et seq.*, C.R.S. (2012).

Article XXVIII establishes several different types of election-related committees, including candidate committees, political committees, and issue committees. Consistent with constitutional mandates declared by the United States Supreme Court, candidate and political committees are regulated most closely. To curb *quid pro quo* corruption and its appearance, the law imposes both contribution limits

and disclosure requirements on both candidate committees and political committee. *See Colo. Education Ass'n v. Rutt,* 184 P.3d 65, 79 (Colo. 2008); *see also Fed. Election Comm'n v. Massachusetts Citizens for Life,* 479 U.S. 23, 259-60 (1986) ("*MCFL*").

Issue committees – which collect contributions and expend money in support of or in opposition to ballot initiatives – face substantially less regulation than committees that make expenditures on candidate elections. Consistent with Supreme Court precedent that has dismissed the possibility of *quid pro quo* corruption in the ballot initiative context, *see First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978), and has consequently invalidated attempts to limit campaign spending on ballot measures, *see Coalition for Fair Housing v. Berkeley,* 454 U.S. 290 (1981), article XXVIII does not impose contribution limits on issue committees. Instead, Colorado law regulates ballot initiative speech only by requiring registration, reporting, and disclosure from groups that qualify for issue committee status.

An issue committee under Colorado law includes "any person, other than a natural person, or any group of two or more persons,[2] including natural persons: (I) That has *a major purpose*[3] of supporting or opposing a ballot issue or ballot question; [and][4] (II) That has accepted or made contributions or expenditures in excess of two

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[2] The Opening Brief states that an issue committee can be made up of "any person or any group of two or more persons." *Open. Br.* at 3. This is incorrect. A *natural person* making expenditures alone does not qualify for issue committee status. A body corporate acting alone would be an issue committee assuming that its expenditures were sufficient and it had a major purpose of supporting or opposing a ballot question.

[3] The Opening Brief quotes this provision inconsistently in several places. The constitutional requirement is "*a* major purpose," not "*the* major purpose." Art. XXVIII § 2(10)(a); *see also Independence Institute v. Coffman,* 209. P.3d 1130 (Colo. App. 2008); *Cerbo v. Protect Colorado Jobs, Inc.,* 240 P.3d 495 (Colo. App. 2010).

[4] Article XXVIII § 2(10)(a)(I) uses the disjunctive "or." By administrative rule, and in an effort to ensure compliance with the First Amendment as interpreted by the Tenth Circuit Court of Appeals, the Secretary has interpreted this provision in the conjunctive. Rule 1.12.2, 8 C.C.R. 1505-6; *see Colorado Right to Life Committee, Inc. v. Coffman,* 498 F.3d 1137, 1154 (10th Cir. 2007) (holding that "the $200 trigger, standing alone, cannot serve as a proxy for the 'major purpose' test[.]"). Thus, issue committee status attaches only when a group has made or expended in excess of $200 to support or oppose a ballot question ***and*** has "a major purpose" of supporting or opposing a ballot measure or a ballot issue.

hundred dollars to support or oppose any ballot issue or ballot question." Colo. Const. art. XXVIII, § 2(10)(a)(I) (emphasis added).

### A. The constitutional validity of existing contribution and expenditure thresholds.

As relevant to CSG's activities and issue committee status under Colorado law, an "expenditure" as contemplated by § 2(8) and (10) means any "purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question." § 2(8)(a). There are exceptions to this definition, of course. The most prominent is the press exemption, which excludes from the definition of expenditure "news articles, editorial endorsements, opinion or other commentary writings, or letters to the editor printed in a newspaper or other periodical not owned or controlled by a candidate or political party." § 2(8)(b)(1). Under the constitutional definition, a group generally will satisfy the spending threshold for issue committee status if it spends more than $200 expressly advocating in support of or opposition to a ballot measure

(although to qualify as an issue committee, the group must also have a major purpose of engaging in such express advocacy).

In *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), the Tenth Circuit cast doubt on the constitutional validity of this $200 threshold. As explained in greater detail below, *Sampson* involved a small issue committee's challenge to the state's disclosure requirements. Although its scope is still the subject of some uncertainty, at a minimum *Sampson* held that the value of mandatory public disclosure for certain very small issue committees is outweighed by the burden of complying with the laws that require such disclosure. The Secretary has interpreted *Sampson* as invalidating the $200 threshold across the board, and as a result enacted Election Rule 4.27, which set the minimum threshold for reporting at $5,000 per election cycle.[5] Rule 4.27 was challenged in Denver District Court, which held that the Secretary lacked authority to adopt it and also disagreed with the

[5] CSG maintains that its expenditures for each iteration of the policy paper have been less than $5,000. *CD,* p. 5 (¶ 32), 6 (¶ 38), 7 (¶ 47). Accordingly, if Rule 4.27 were upheld, CSG would not be required to register as an issue committee at all.

Secretary's interpretation of *Sampson*. *Colorado Common Cause v. Gessler,* Denver District Court Case No. 2011 CV 4164, *CD,* pp. 349-358. The Colorado Court of Appeals affirmed. *Colorado Common Cause v. Gessler,* __P.3d__, 2012 COA 147 (Colo. App. 2012). The Secretary's petition for a writ of certiorari is pending.

### B. The definition of "a major purpose."

The expenditure of $200 or more on express advocacy is insufficient, standing on its own, to require issue committee registration. A group must also have "a major purpose of supporting or opposing any ballot issue or ballot question." § 2(10)(a)(I).

The Colorado Constitution does not define "major purpose." The General Assembly, however, has enacted a statutory definition based on the holding in *Independence Institute v. Coffman,* 209. P.3d 1130 (Colo. App. 2008), *cert. denied,* 130 S.Ct. 165 (2009). "Major purpose" is defined as "support of or opposition to a ballot issue or ballot question that is reflected by:

(I) An organization's specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended;[6] or

(II) An organization's demonstrated pattern of conduct based upon its: (A) annual expenditures in support of or opposition to a ballot issue or ballot question; or (B) Production or funding, or both, of written or broadcast communications, or both, in support of or in opposition to a ballot question."

§ 1-45-103(12)(b), C.R.S. (2012). In 2011 the Secretary enacted a regulation that interpreted "major purpose" to encompass groups that have "a demonstrated pattern of conduct…established by: (A) Annual expenditures in support of or opposition to ballot issues or ballot questions that exceed 30% of the organization's total spending during

[6] The Opening Brief incorrectly suggests that issue committee status can be based on the organization's purpose alone. *Open. Br.* at 5. But organization's specifically identified objective is not determinative; rather, it is one of several factors to consider when assessing the organization's "major purpose." Moreover, irrespective of the outcome of the "major purpose" test, issue committee status does not attach unless the group also satisfies the minimum expenditure threshold.

the same period; or (B) Production or funding of written or broadcast communications in support of or opposition to a ballot issue or ballot question, where the production or funding comprises more than 30% of the organization's total spending during a calendar year." Rule 1.12.3, 8 C.C.R 1505-6. As with the *Sampson* rule (4.27), the Secretary's "major purpose" rule was challenged in, and declared invalid by, the Denver District Court. *See Colorado Ethics Watch v. Gessler,* 2012CV 2133 (*Order,* August 3, 2012), *CD,* pp. 376-386. The Secretary's appeal of that order is currently in the Colorado Court of Appeals.

## II. Standard of review and interpretive canons.

Words in constitutional provisions must be given their ordinary and plain meaning. *Washington County Bd. of Equalization v. Petron Dev. Co.,* 109 P.3d 146, 149 (Colo. 2005). Constitutional provisions will be declared and enforced as written if the language of the provision is clear and unambiguous. *People v. Rodriguez,* 112 P.3d 693, 696 (Colo. 2005). "[I]n so doing, technical rules of construction should not be applied so as to defeat the objectives sought to be accomplished by the provisions under consideration." *Id.* (quoting *Cooper Motors v. Board of*

*County Comm'rs of Jackson County*, 131 Colo. 78, 83, 279 P.2d 685, 688 (1955)).

The Court must consider every word of the provision and construe the amendment as a whole. *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004). Each sentence and clause within a constitutional provision is presumed to have meaning. *In re Great Outdoors Colorado Trust Fund,* 913 P.2d 533, 538 (Colo. 1996). The Court will give effect to each word. *City of Aurora v. Acosta*, 892 P.2d 261, 267 (Colo. 1995). However, when construing a provision in light of the requirements of the United States Constitution, if more than one interpretation exists the Court must adopt the interpretation that preserves the amendment. *C.S. v. People*, 83 P.3d 627, 635 (Colo. 2004).

As CSG points out, statements of legislative policy contained both in Amendment 27's preamble and in the Bluebook are "[o]ften the best guide to legislative intent." *People v. Cross,* 127 P.3d 71, 73 (Colo. 2006) (relying on extensive and detailed legislative declaration); *Common Sense Alliance v. Davidson,* 995 P.2d 748, 755 (Colo. 2005) (relying on legislative declarations in Fair Campaign Practices Act and Colorado

Campaign Reform Act); *Tivolini Teller House, Inc. v. Fagan,* 926 P.2d 1208, 1214 (Colo. 1996) (Bluebook provides insight into the electorate's understanding of the amendment). But legislative declarations and the Bluebook are merely an aid to interpreting constitutional language that is unclear on its face. Courts will not rely either source to supersede the plain language of a constitutional amendment. "[W]hen the language of an amendment is clear and unambiguous, the amendment must be enforced as written." *Davidson v. Sandstrom,* 83 P.3d 648, 654 (Colo. 2004).

Consequently, the fact that neither the preamble to Amendment 27 nor the Bluebook focuses on the activities of small issue committees would only be helpful if the remainder of the amendment was ambiguous on the topic. But the constitutional language is clear. Groups engaging in express advocacy about ballot issues in Colorado qualify as issue committees under Amendment 27 so long as they meet the expenditure threshold and have "a major purpose" of supporting or opposing a ballot issue or ballot question.

### III. The policy paper qualifies as express advocacy under Colo. Const. art. XXVIII, § 2(8)(a).

CSG contends that its public policy paper, which it has twice published and distributed in direct opposition to a proposed personhood amendment, does not amount to express advocacy and therefore cannot form one of the bases for its classification as an issue committee under Colorado law. In short, although CSG freely admits that its paper contains language of express advocacy – that is, a direct appeal to the reader to vote against the personhood amendment – it nonetheless maintains that Amendment 27 "is not defined to clearly capture lengthy public policy papers," and denies that "a single sentence of advocacy is a 'magic trigger' polluting a whole 20,000 word document in the context of issue speech." *Open. Br.* at 12. Rather, CSG maintains that in order to qualify as express advocacy, a communication must contain more than "a minimal quantum of advocacy" relative to its overall length. *CD,* p.262.

This is a remarkable proposal, and one that is at odds both with Amendment 27 and the federal law that it is patterned upon. As far as

Amendment 27 is concerned, although the preamble and the Bluebook concentrated more heavily on candidate elections, the plain language of the amendment plainly covers speech seeking to influence the fate of ballot initiatives. *See* Colo. Const. art. XXVIII, § 2(10)(a). Moreover, the constitutional language contains nothing to suggest that express advocacy cannot come in a variety of forms and lengths.

In *Buckley v. Valeo,* 424 U.S. 1, 43 n.52 (1976), the Supreme Court clearly defined express advocacy for the purpose of evaluating the constitutionality of certain expenditure limitations. In applying *Buckley*'s "magic words" to Amendment 27, this Court did not hold that a communication's electoral content should be compared to its policy discussion in order to assess whether the communication, as a whole, qualifies as "express advocacy." *Colorado Ethics Watch v. Senate Majority Fund, LLC,* 269 P.3d 1248 (Colo. 2012). As interpreted in *Senate Majority Fund,* the definition of "express advocacy" in Amendment 27 covers only those communications that contain the "magic words," or the functional equivalent of those words, identified in *Buckley*'s famed footnote 52.

The Secretary and CSG agree on that much. But where CSG goes wrong is in assuming that the presence of the "magic words" themselves is not enough. Under both *Buckley* and *Senate Majority Fund,* the presence of any of the "magic words" is all that is needed for a communication to qualify as express advocacy. Put another way, speech that contains the "magic words" or their functional equivalent is, by definition, "unambiguously campaign related" and therefore amounts to express advocacy irrespective of its length or depth of treatment. *See, e.g. N.C. Right to Life v. Leake,* 525 F.3d 274, 283 (4th Cir. 2008) (communications containing *Buckley*'s magic words are, by definition, unambiguously campaign related); *see also New Mexico Youth Organized v. Herrera,* 611 F.3d 669, 676 (10th Cir. 2010).[7]

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[7] In the context of mandatory disclosure, the use of *Buckley*'s "magic words" is always *sufficient* to establish that a communication is express advocacy. However, the Tenth Circuit stands alone in holding that the "magic words" are also *necessary* predicate to compelled disclosure. *See Ctr. for Individual Freedom v. Madigan,* 697 F. 3d 464, 484 (7th Cir. 2012) ("every circuit [aside from the Tenth] that has reviewed First Amendment challenges to disclosure requirements since *Citizens United* has concluded that such laws may constitutionally cover more than just express advocacy and its functional equivalents"); *see also The Real Truth About Abortion, Inc. v. FEC,* 681 F.3d 544, 551-52 (4th Cir. 2012),

Accordingly, the plain language of Amendment 27, together with this Court's adoption of *Buckley*'s footnote 52, establishes that the use of the "magic words" in a communication are both a necessary and sufficient condition for that communication to qualify as express advocacy. CSG nonetheless contends that the drafters of Amendment 27 did not intend Colorado's disclosure regulations to encompass lengthy policy papers whose primary focus is issue speech rather than express advocacy.

### A. The policy paper qualifies as "express advocacy" under any definition.

As a factual matter, the Secretary disagrees with CSG's claim that the policy paper merely educates voters about the issues, rather than urging them to vote against the personhood amendment. It does both. Although it is lengthy, thoroughly researched, and touches on a variety

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*cert. den.* No. 12-311 (Jan. 7, 2013) ("If mandatory disclosure requirements are permissible when applied to ads that merely mention a federal candidate, then applying the same burden to ads that go further and are the functional equivalent of express advocacy cannot automatically be impermissible"); *Human Life of Wash., Inc. v. Brumsickle,* 624 F.3d 990, 1016 (9th Cir. 2010), *cert. den.* 131 S.Ct. 1477 (2011) (rejecting argument that "unadulterated issue advocacy" is constitutionally exempt from disclosure requirements).

of topics, the intent of the paper as an electoral appeal is clearly expressed in its last sentence: "If you believe that 'human life has value,' the only moral choice is to vote against Amendment 62." *CD,* p. 69. And this is hardly the only time the paper mentions Amendment 62. In addition to closing with a direct appeal to vote against personhood, the paper's first sentence by identifying its topic: "Amendment 62, set to appear on Colorado's 2010 ballot…." *CD,* p. 36. In 33 pages of text the phrase "Amendment 62" appears no fewer than 76 times. *Id.*

Viewing the paper as a whole makes clear that its discussion of the evils of personhood simply forms the basis of the paper's call to action. The fact that, unlike many campaign advertisements, the paper actually takes the time to explain why the reader should oppose personhood does not neutralize this underlying purpose. Nor does mere length and depth of discussion convert an explicit appeal to oppose the personhood amendment back into an educational document that discusses only issues and thus does not qualify as express advocacy. To the contrary, the thoroughness of the policy paper merely reflects CSG's

efforts to reach those voters who are not easily swayed by 30-second commercials or one-page flyers. CSG's decision to engage in a more sophisticated form of express advocacy does not afford it a "free pass" to do so without complying with Colorado's disclosure requirements.

CSG counters by distinguishing its policy paper from the "special edition" newsletter mailed out by the plaintiff organization in *MCFL*, arguing that it was merely a "flyer that was found to have no content counterbalancing its express advocacy." *Open. Br.* at 17. But the Secretary is aware of no case – anywhere – suggesting that courts should weigh a communication's policy content against its election-focused statements in order to determine whether it qualifies as express advocacy.[8] Such a test would be entirely unworkable in practice, and would undoubtedly give rise to substantial concerns about vagueness and overbreadth.

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[8] In a footnote, CSG suggests that the Supreme Court ordered new briefing and argument when the government stated that a "single line of express advocacy in a book could trigger regulation and possible censorship as an electioneering communication." *Open Br.* at 19 n.1. The regulations imposed on Colorado issue committees, however, do not "censor" speech. They simply require disclosure, an outcome that the *Citizens United* court endorsed by a vote of 8-1.

### B. The policy paper is comparable to campaign communications that the Supreme Court has previously denoted as "express advocacy."

Because Amendment 27 is patterned after federal caselaw, there are a number of useful parallels between CSG's paper and the materials that qualified as express advocacy – albeit in the candidate context – in *MCFL* and *Citizens United v. FEC,* 130 S.Ct. 876 (2010). Express advocacy can take many different forms, and whether a document qualifies depends on far more than its length. The newsletter in *MCFL* was not a simple one-page flyer, but was instead an eight-page "special edition" packed with information on the pro-life positions of primary candidates for "Congress, state Governor, and state legislature." *FEC v. Massachusetts Citizens for Life, Inc.,* 589 F.Supp. 646, 648 (D. Mass. 1984). It contained *none* of *Buckley*'s "magic words." Nonetheless, the Supreme Court determined that it qualified as express advocacy, holding that a communication need not use the "magic words," but could be "less direct" so long as the "essential nature" of the message is "express electoral advocacy." *MCFL,* 479 U.S. at 249.

*Citizens United* presents an even more obvious parallel. *Hillary: The Movie* was a full-length feature film, much of which was focused on educating the viewer about Hillary Clinton's background and conduct during the Clinton administration. Like the newsletter in *MCFL,* and in obvious contrast to the paper at issue here, *Hillary* contained none of *Buckley*'s magic words. Instead it was primarily biographical and educational in nature. As Citizens United itself described the script:

> Although Senator Clinton's candidacy was the backdrop for the 90-minute documentary, neither the movie's narrator nor any of the individuals interviewed during the movie expressly advocated her election or defeat as President. *The movie instead presents a critical assessment of Senator Clinton's record as a U.S. Senator and as First Lady in order to educate viewers about her political background.*
>
> The documentary focuses principally on five aspects of Senator Clinton's political record: the Clinton Administration's firing of the White House Travel Office staff; incidents of official retaliation against a woman who accused President Clinton of sexual harassment; Senator Clinton's failure to adhere to campaign finance restrictions while a candidate for U.S. Senate; her record on job-creation, health-care, and national security issues; and the Clinton Administration's abuse of the pardon power.

Brief for Appellant at 5-6, *Citizens United v. FEC*, No. 08-205 (U.S. filed Jan. 8, 2009) (internal citations omitted, emphasis added). Despite the lack of "magic words," the Supreme Court brushed off Citizens United's suggestion that its documentary was primarily educational and informational, and thus did not qualify as express advocacy. Notably, the *Citizens United* Court did not employ the unworkable approach suggested by the Plaintiff here: parsing out the contents of *Hillary* to evaluate whether it contained a sufficient measure of advocacy to counterweigh its educational and informational components. Indeed, the Court found that *Hillary* qualified as express advocacy even though it contained *none* of *Buckley*'s magic words, and despite the fact that the vast majority of the 90-minute film was devoted to educating the viewer about then-Senator Clinton's allegedly checkered past.

Although the medium and style differ, the basic approach of CSG's paper is closely comparable to that used in *Hillary*. Both movie and paper are lengthy and purport to be primarily educational. Despite this educational undercurrent, both movie and paper have a clear goal in

mind – electoral opposition. The movie expressed this through interviews and commentary that the Supreme Court held amounted to the functional equivalent of express advocacy. The paper advocates far more explicitly by stating, among other things, that "If you believe that 'human life has value,' the only moral choice is to vote against Amendment 62." *CD,* p. 69.

To be perfectly clear, it is CSG's use of the language of express advocacy, *i.e.* the explicit appeal to vote against the personhood amendment, that ensures that its policy paper qualifies as express advocacy under the Colorado Constitution. *See Senate Majority Fund, supra.* If that sentence were simply excised, and assuming that 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.

### C. The Supreme Court has endorsed far-reaching disclosure requirements.

Much of CSG's argument focuses on the purported "distinction between issue speech, which may not be regulated, and express advocacy, which may." *Open. Br.* at 14, *citing Buckley,* 424 U.S. at 43. This broad statement is accurate when the regulation in question prohibits speech or limits campaign expenditures.[9] But to the extent that CSG suggests that "issue speech" may not be regulated through disclosure, it is incorrect. The primary question in *Citizens United* and *Wisconsin Right to Life v. FEC,* 551 U.S. 449 (2007) ("*WRTL II*") was not whether the plaintiff corporations were required to disclose their sources of funding. Instead, the question was whether the plaintiff corporations were allowed to speak at all. In *Citizens United,* the

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[9] In fact, the cited portion of *Buckley* addressed a cap on independent expenditures in the period leading up to a federal election. The Court's general approval of mandatory disclosure requirements appears in an entirely separate section of the opinion – one that has never been interpreted as drawing a bright line between express and issue advocacy for the purposes of mandatory disclosure. *See Citizens United,* 130 S.Ct. at 915 ("we reject Citizens United's contention that disclosure requirements must be limited to speech that is the functional equivalent of express advocacy").

plaintiff corporation did not qualify for the *MCFL* exemption and was therefore prohibited from engaging in electioneering communications under federal law. 130 S.Ct. at 887-88. Likewise, the corporate Plaintiff in *WRTL II* successfully challenged a ban on advertisements that were not express advocacy or its functional equivalent. *WRTL II*, 551 U.S. 469-74. Consistent with well-settled precedent addressing outright bans on political speech, the Supreme Court in both cases applied strict scrutiny in order to ensure maximum protection for speech relating to policy issues in the context of a candidate election. But when it comes to disclosure, the Supreme Court's approach is far more lenient because "disclosure requirements impose no ceiling on campaign-related activities." *Buckley,* 424 U.S. at 64; *see also Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010) (applying exacting scrutiny standard to disclosure); *but see Sampson, supra* (invalidating disclosure requirement for small issue committee based in part on burden of compliance when weighed against value of public disclosure).

To summarize, neither the plain language of Amendment 27 nor the Supreme Court's interpretation of analogous federal provisions

lends support to CSG's claim that its policy paper does not constitute express advocacy. CSG offers no support, either in the language of Amendment 27 or in the cases interpreting it or analogous federal provisions, for the proposition that the policy content of a communication should be weighed against its election-focused speech in order to determine whether it qualifies as express advocacy under Colorado law. Such a test would be unworkable in practice in any event, and would likely raise the specter of vagueness and overbreadth. This Court should interpret the definition of Amendment 27 in a manner consistent with the provision's plain language and the opinion in *Senate Majority Fund*. If a communication contains the "magic words," it qualifies as express advocacy and thus, in the context of a ballot initiative, triggers reporting and disclosure requirements if made by a group that satisfies both the spending threshold and the "a major purpose" test.

## IV. CSG's policy paper does not qualify for the press exemption to the definition of expenditure.

CSG contends in the alternative that even if the policy paper constitutes express advocacy, it is still not an expenditure because it qualifies for the press exemption. CSG's position, however, relies on an untenable reading of § 2(8)(b)(I). Published as a standalone document, the policy paper simply does not qualify under any reasonable construction of Amendment 27.

### A. The paper does not qualify for the press exemption because it does not appear in a "newspaper, magazine, or other periodical publication."

Like federal campaign finance law, Amendment 27 exempts certain press activities from its definition of expenditure. Article XXVIII, § 2(8)(b)(I) provides that "expenditure" does not include "[a]ny 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[.]" CSG asserts that its policy paper is an "opinion or commentary writing," and therefore should qualify for the press exemption.

This interpretation of the press exemption suffers from two intractable difficulties. First, it elides the provision's key language, which exempts articles, editorials and commentaries only when they appear *in a newspaper, magazine, or other periodical.* When interpreting the Colorado Constitution, this Court has long adhered to the bedrock principle of "constru[ing] statutory and constitutional provisions as a whole, giving effect to every word and term contained therein, whenever possible." *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273 (Colo. 2001). As Amendment 27 is written, the phrase "in a newspaper, magazine, or other periodical" modifies several previous phrases, including "opinion or commentary writing," and thus limits the sources in which a writing may appear in order to qualify for the press exemption. To conclude otherwise would render meaningless the phrase "in a newspaper, magazine, or other periodical," a result that is highly disfavored. *See Well Augmentation Subdistrict v. City of Aurora*, 221 P.3d 399, 420 (Colo. 2009).

Second, broadening the press exemption to include advocacy of the type contained in the policy paper, irrespective of where and how it is

published, would allow the press exemption to swallow the general rule requiring reporting and disclosure. The press exemption was never designed to encompass standalone advocacy on ballot initiatives by groups who exist for that purpose. Rather, it was intended to preserve traditional press activities, such as the publication of editorials and letters to the editor, undertaken in the broader context of news reporting. CSG's parade of horribles notwithstanding, academics, think tanks, and other commentators need not be concerned so long as their opinions are published in a journal or other periodic publication. Moreover, if the authors spend or receive less than $200 writing and disseminating the article – a figure that is entirely plausible given the ease of digital transmission – registration would not be required irrespective of where it is published. And, in any event, if providing opinion or commentary on the ballot initiative in question is not one of the group's major purposes, reporting and disclosure would not be required at all. *See Independence Institute,* 209 P.3d at 1134 (think tank that aired radio commercials opposing two referenda was not required to register as issue committee because it did not have "a major

purpose" of supporting or opposing those referenda); *cf. New Mexico Youth Organized,* 611 F.3d at 679 (organization that spent only 0.5% of its budget on election-related communications did not have major purpose of electioneering).

### B. The policy paper is not a periodical publication.

In the alternative, CSG maintains that the policy paper is a "periodical publication" because it was published at regular intervals in advance of the 2008 and 2010 general elections.

Amendment 27 does not define "periodical publication," and no published Colorado cases have interpreted the provision either. But because Amendment 27's press exemption is modeled after federal law, this Court may "turn to the analogous federal statute and related case law" as an aid to interpretation. *Furlong v. Gardner,* 956 P.2d 545, 551 (1998). 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).

As CSG notes, the Federal Election Commission has interpreted the press exemption broadly in an attempt to keep pace with the rapidly changing landscape of digital media. *See, e.g.,* FEC Advisory Opinion 2005-16 ("Fired Up") at 5 (blogger's websites qualified for press exemption because "websites are both available to the general public and are the online equivalent of a newspaper, magazine, or other periodical publication"). But while the manner of distribution is relatively unimportant, content and frequency are both key to assessing whether a publication qualifies as a "periodical."

In *Bailey v. State of Maine Comm'n on Governmental Ethics and Election Practices,* 2012 U.S. Dist. LEXIS 141310 (D. Me. Sept. 30, 2012), for example, a federal district court considered whether a website attacking a gubernatorial candidate qualified for Maine's press exemption (which, like Colorado's, is patterned after the federal statute). The *Bailey* court looked first to the Supreme Court's opinion

in *MCFL,* which declined to apply the press exemption to MCFL's "special edition" in part because it was "not published through the facilities of the regular newsletter...[and] [n]o characteristic of the Edition associated it any way with the normal MCFL publication." *Id.* at *40, *quoting MCFL,* 479 U.S. at 250. *Bailey* also considered the FEC's interpretation, which has defined "periodical publication" as including publications that appear "at regular intervals (usually weekly, bi-weekly, monthly or quarterly) and contain[] articles of news, information or entertainment." *Id.* at 41, *quoting* 71 Fed. Reg. 18589-01 at 18610 (discussing FEC Advisory Opinion 1980-109 (James Hansen)).

CSG's policy paper satisfies none of these indicia. Like the *MCFL* special edition, it is a project apart from CSG's regular organizational activities, which consist primarily of a frequently updated blog[10] 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. That CSG itself views the policy paper as distinct from these endeavors is evidenced by the fact that it has

[10] The blog may be viewed at http://www.seculargovernment.us.

historically raised money specifically to support its publication of the paper. *CD,* p.7 (¶¶ 47-48).

The content and timing of CSG's paper also weigh against its claim. The publication schedule – coincident with biannual general elections in which the personhood amendment appears on the ballot – is too infrequent and too irregular to qualify under the definition of "periodical" for the purposes of Amendment 27. The paper's content is also problematic. Periodicals that qualify for the federal press exemption, for example, contain "articles of news, information or entertainment." *Bailey, supra.* While the paper itself arguably is made up of a single "article," it simply does not satisfy Amendment 27's model for the press exemption, which contemplates opinion or commentary writings that are included as part of a more broadly focused news or entertainment publication.

Accordingly, this Court should conclude that CSG's paper does not qualify for the press exemption, either as a standalone opinion or commentary writing or as an independent periodical publication.

## V. CSG's policy paper is a "written or broadcast communication," and therefore should be considered in evaluating whether the organization has "a major purpose" of advocating against the personhood amendment.

CSG contends that its policy paper should not be considered a "written or broadcast communication" under § 1-45-103(12)(b)(II)(B), and that the resources that it devotes to the paper should therefore not be considered in evaluating whether it has "a major purpose" of opposing the personhood amendment.

In *Independence Institute,* the court of appeals considered a challenge to Colorado's registration and reporting requirements for what was then defined as "multi-purpose issue committees." Multi-purpose issue committees are not defined or mentioned in Amendment 27 or related statutes, but at the time of the litigation in *Independence Institute* were defined by the Secretary's Election Rule 3.8. 209 P.3d at 1135. Election Rule 3.8 has since been repealed, but the intent of the rule was to clarify the reporting obligations for issue committees whose purposes were not limited to supporting or opposing ballot issues or ballot questions. Colorado law, of course, diverges from federal law and

some states in that it requires registration and disclosure from a group that has "a major purpose," rather than "the major purpose" of engaging in express advocacy. Colo. Const. art. XXVIII § 2(10)(a).

The Independence Institute mounted a facial challenge to the constitutional definition of "issue committee" and the Secretary's regulations on "multi-purpose issue committees," arguing primarily that the provisions were vague and overbroad. The Tenth Circuit has not addressed this question directly, but challenges of this type have met with varying degrees of success in the federal courts. *Compare Leake,* 525 F.3d at 289 (striking down as unconstitutionally vague North Carolina definition of issue committee that utilized "a major purpose" test); *and Human Life of Washington,* 624 F.3d at 1009-1010 (declining to follow *Leake* and upholding disclosure law's application to an organization that has its "primary or one of the primary purposes" affecting the outcome of ballot measure elections).

In *Independence Institute* the Colorado Court of Appeals rejected the plaintiff's facial vagueness challenge, concluding that "a major purpose" can be reasonably determined via a fact-specific analysis of the

organization's history, organizational documents, "the purposes of its activities and annual expenditures; and the scope of issues addressed in its print and electronic publications." 209 P.3d at 1139. Based on the holding in *Independence Institute*, the General Assembly subsequently passed legislation intended "to clarify" the definition of issue committee contained in the state constitution. § 1-45-103(12)(c). The language of that legislation differed somewhat from the holding in *Independence Institute,* providing that "major purpose" means support of or opposition to a ballot issue or ballot question that is reflected by:

> (I) An organization's specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or
>
> (II) An organization's demonstrated pattern of conduct based upon its:
>
> (A) Annual expenditures in support of or opposition to a ballot issue or ballot question; or
>
> (B) Production or funding, or both, of written or broadcast communications, or both, in support of or opposition to a ballot issue or ballot question.

§ 1-45-103(12)(b).

CSG urges this Court to adopt a narrow interpretation of "written or broadcast communication" that is simply not supported by the plain language of the statute. "Written or broadcast communication" is undefined; therefore, the words in the phrase are given their plain and ordinary meaning. *Hall v. Walter,* 969 P.2d 224, 229 (Colo. 1998). While the rules of statutory construction disfavor surplusage, neither will they tolerate an interpretation that leads to an absurd result or one that is inconsistent with the plain language of the statute in question. *See Rose v. Allstate Ins. Co.*, 782 P.2d 19, 23 (Colo. 1989). All that the statute does is attempt to provide clarity to a constitutional provision that has been previously subject to challenge on vagueness grounds. In that context and in light of the statute's purpose, minor surplusage does not raise interpretive concerns. In short, even if "written or broadcast communication" is a subset of "expenditure," such surplusage causes no interpretive difficulties and the statute is therefore in no need of an alternative narrowing construction.

In adopting a statutory clarification of "major purpose," the General Assembly expressly disclaimed any attempt to "make a

substantive change" to the constitutional definition of "issue committee." § 1-45-103(12)(c). What the legislature did make clear, however, is that it considers the production or funding of written or broadcast communications that are intended to influence ballot issue elections to be an important factor in assessing an organization's major purpose. The production or funding of such communications becomes particularly important to the "major purpose" question if the organization has a "demonstrated pattern" of engaging in such activity.

Because CSG plainly *has* demonstrated a pattern of producing and funding written communications that are designed to influence votes on the personhood amendment, there is simply no reasonable reading of § 1-45-103(12) that would move the policy paper outside of the statute's scope. And although its pattern of publishing the policy paper is not dispositive in itself, the statute makes clear that it is a factor for CSG – and if called upon to do so, the courts – to consider when assessing whether CSG has "a major purpose of supporting or opposing any ballot issue or ballot question." Colo. Const. art. XXVIII § 2(10)(a)(I).

## VI. *Sampson v. Buescher* cast doubt on the validity of the $200 threshold for issue committees.

In *Sampson,* the Tenth Circuit Court of Appeals held that Colorado's registration and reporting requirements unconstitutionally burdened the First Amendment rights of association of small issue committees. 625 F.3d at 1254. The Tenth Circuit refused, however, to "draw a bright line below which an issue committee cannot be required to report contributions and expenditures." *Id.* at 1261.

Shortly thereafter, the Secretary's office commenced rule-making to implement the *Sampson* decision. As part of the process, the Secretary published proposed Rule 4.27 (since recodified as Rule 4.1, but referred to as Rule 4.27 herein). The Proposed Statement of Basis, Purpose, and Specific Statutory Authority stated that the Secretary intended "to provide guidance in light of the ruling of the Tenth Circuit" in *Sampson*. In drawing the line to determine when small issue committees must register and report, the Secretary considered various relevant factors, including "[t]he public's informational interest in knowing who is spending and receiving money to support or oppose

ballot measures" and "[t]he burden presented by registration and reporting by groups of various sizes, including the cost of complying." *CD,* p. 389. As adopted, Rule 4.27 set a $5,000 floor. *CD,* p. 387-388. Groups or individuals who accepted or expended less than $5,000 during an election cycle would be exempt from campaign finance reporting and disclosure requirements; likewise, groups that accepted or spent more than $5,000 were required to begin reporting only after they reached the $5,000 threshold.

In arriving at this enforcement threshold, the Secretary set forth the rationale for the new rule based upon the *Sampson* analysis:

> The Secretary of State has also carefully considered the reasoning expressed by the Court in the *Sampson* case. In particular, while the Court stated, "We do not attempt draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures" the Court nevertheless did say that the "Plaintiffs' contributions and expenditures" in that case were "well below the line". According to the Court's opinion (at footnote 5), the Plaintiffs' contributions and expenditures were $2,239.55 and $1,992.37. (Namely $813.53 in in-kind contributions, plus $1,426 in cash contributions, for a total $2,239.55 in contributions, all of which were expended except for $247.18 that remained

> in the bank account, for a total of $1,992.37 in expenditures.) Therefore, it appears from the Court's opinion that the minimum threshold must be "well above" the $2,239.55 in contributions and $1,992.37 in expenditures of the Plaintiffs in the *Sampson* case.

*CD,* p. 389.

Shortly after its adoption, Colorado Common Cause and Colorado Ethics Watch sued to invalidate Rule 4.27, arguing that its promulgation exceeded the Secretary's rule-making authority. Common Cause and Ethics Watch argued that the holding in *Sampson* was narrow, and that it applied only to local annexation committees that spend a minimal amount of money in a type of election that was unlikely to have been considered by voters who enacted Article XXVIII. On the assumption that *Sampson* was limited to its particular facts, CCC argued that the $200 threshold remains in effect for all issue committees except those formed in support of, or in opposition to, annexation. The Secretary asserted a counterclaim, arguing that "the definition of issue committee is unenforceable unless and until the General Assembly enacts a statute, or the Secretary promulgates a rule, that establishes a minimum level of contributions or expenditures that

triggers the formation of an issue committee." *Colorado Common Cause,* 2012 COA 147, ¶ 14. In essence, the Secretary maintained that the opinion in *Sampson* created a gap in Amendment 27 that, unless filled by constitutional amendment, legislation, or administrative rule, effectively eliminated the spending threshold, and with it, all disclosure requirements for issue committees in Colorado.

The trial court agreed with the plaintiffs, holding that the Secretary exceeded his authority in promulgating Rule 4.27. *CD,* p. 349-358. Citing *Sanger v. Dennis,* 148 P.3d 404, 410 (Colo. App. 2006), the trial court concluded that "Colorado's reporting and disclosure standards for issue committees presumptively remain applicable, other than in 'similar context[s]' to *Sampson*." *CD,* p. 352. Finding that there could be contexts not similar to the facts in *Sampson,* the trial court concluded that Colo. Const. art. XXVIII, § 2(10)(a)(II) remained in effect. *CD,* p. 358.

On August 30, 2012, the court of appeals affirmed. *Colorado Common Cause*, 2012 COA 147. The court of appeals' reading of Sampson differed slightly from the trial court's, but it nonetheless

rejected the Secretary's position that Sampson had effectively eradicated Colorado's reporting and disclosure scheme for small issue committees. The court rejected the Secretary's argument "that Sampson created a gap in the law, triggering his obligation to promulgate a rule." *Id.* ¶ 23. Instead, the court of appeals held that Sampson provides "persuasive authority with regard to future applications of the campaign finance laws in a similar context, but does not render those laws completely inoperative." Id. at 12.

In the wake of *Colorado Common Cause*, the ruling in *Sampson* is limited to circumstances in which "the organization is concerned only with a single ballot issue and when the contributions and expenditures are slight." 625 F.3d at 1259. In determining whether the regulations are burdensome, an issue committee deciding whether to register – and a court reviewing any follow-up lawsuits – must determine whether "the financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their political effort and the governmental interest in imposing those regulations is minimal, if

not non-existent, in light of the small size of the contributions." *Id.*, at 1261.

The instant case is not postured in a manner that would permit this Court to simply declare an expenditure threshold below which groups engaging in express advocacy are exempt from registration and disclosure laws. That is either a legislative or administrative function, or both. What this Court can do, however, is consider the scope of the *Sampson* opinion and declare whether it applies broadly, *i.e.* to all small issue committees, or narrowly, to only those committees that are similarly situated to the annexation-opposing *Sampson* plaintiffs. As evidenced by the Secretary's rule adoption and *certiorari* petition in *Colorado Common Cause,* he believes that the only reasonable and practical reading of the *Sampson* decision is one that reads the $200 threshold as unconstitutional across the board. To hold otherwise would be to ignore the reality that as-applied challenges can and often do lead to broad categorical rules. *See, e.g. Citizens United,* 130 S.Ct. at 893 ("the distinction between facial and as-applied challenges" has no "automatic effect" on the "pleadings and disposition" of a case); Richard

H. Fallon, *Commentary: As-Applied and Facial Challenges and Third Party-Standing*, 113 Harvard L. Rev. 1321, 1338 (2000) ("familiar and recurring kinds of tests illustrate how as-applied adjudication can inevitably result in facial invalidations").

Moreover, a narrow reading of *Sampson* would not simply encourage, but indeed necessitate, case-by-case litigation in order to force Colorado's compliance with a Tenth Circuit opinion that the Secretary believes is categorical in effect. While a prompt and binding acknowledgment of *Sampson*'s broad impact would leave Colorado with *no* reporting threshold for a time, this Court would have an opportunity to consider whether the Secretary has authority to fill in the gap left by *Sampson* when it considers the pending *certiorari* petition in *Common Cause*. And, of course, a definitive ruling could prompt a legislative fix to a problem that is only likely to grow more serious with the passage of time.

## CONCLUSION

Based on the foregoing reasoning and authorities, the Secretary respectfully requests that this Court hold that CSG's policy paper: 1) is express advocacy; 2) does not qualify for the press exemption; and 3) is a written or broadcast communication. In addition, the Secretary respectfully requests that this Court construe *Sampson* as applying broadly to all small issue committees in Colorado.

Respectfully submitted this 16th day of January, 2013.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 16th day of January 2013 addressed as follows:

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