No. 14-1463
United States Court of Appeals
for the Tenth Circuit

INDEPENDENCE INSTITUTE,
a Colorado nonprofit corporation,
Plaintiff–Appellant,

v.

WAYNE WILLIAMS,
in his official capacity as
Colorado Secretary of State,[1]
Defendant–Appellee.

On Appeal from the United States District Court
for the District of Colorado, No. 14-cv-2426 (Jackson, J.)

Appellee Secretary of State's Answer Brief

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Oral Argument Is Requested
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[1] Under Fed. R. App. P. 43(c)(2), Wayne Williams, the sitting Colorado Secretary of State, is automatically substituted for prior Defendant–Appellee Scott Gessler, who ceased to hold office on January 13, 2015.

Corporate Disclosure Statement

Because Defendant–Appellee is a state government officer, no corporate disclosure statement is required under Federal Rule of Appellate Procedure 26.1.

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Statement of Related Cases

In compliance with 10th Cir. R. 28.2(C)(1), Appellee states that there are no prior or related appeals in this Court.

Issue Presented on Appeal

Did the district court correctly apply *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and other binding precedent when it held that Colorado's definition of "electioneering communication" need not include a "functional equivalent of express advocacy" or "campaign-related" test?

Statement of the Case and Facts

A. Factual Background.

In the weeks before the 2014 election, Plaintiff Independence Institute—through counsel, the Center for Competitive Politics—filed two similar but unsuccessful lawsuits. Both suits attempted to challenge reporting and disclosure requirements that apply to electioneering communications, *i.e.*, communications that unambiguously refer to a candidate for office and are disseminated to the electorate shortly before an election. *See* 52 U.S.C. § 30104(f)(3)(A); Colo. Const. art. XXVII, § 2(7).

Legal challenges to electioneering disclosure rules are not new. In 2003, the Supreme Court held that disclosure requirements (but not necessarily speech *bans*) could apply to "the entire range of 'electioneering communications.'" *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 196 (2003). A few years later, the Supreme Court struck down the federal ban on corporate electioneering. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). At the same time, however—in the only portion of *Citizens United* that commanded an

eight-to-one majority of the Justices—the Supreme Court reaffirmed *McConnell* by upholding electioneering *disclosure* laws against a First Amendment challenge. *Id*. at 366–71.

1. The District of Columbia lawsuit.

Independence Institute's first suit, filed in the United States District Court for the District of Columbia, challenged federal disclosure rules as applied to a radio advertisement directed at Colorado's two United States Senators, both of whom were Democrats and one of whom was up for reelection. *Independence Institute v. Fed. Election Comm'n*, 2014 U.S. Dist. LEXIS 141526, No. 14-1500 (D.D.C. Oct. 6, 2014). Independence Institute argued that because the advertisement was not "express advocacy" or "its functional equivalent," it was exempt from electioneering disclosure requirements under the First Amendment. *Id*. at *9–10.

The district court rejected this argument, reasoning that *Citizens United* "refused to draw a line between express advocacy and issue advocacy in the . . . disclosure context." *Id.*, at *20. Because Independence Institute was required only to report donations for and

spending on the advertisement—and was neither prohibited from running the advertisement nor subject to spending or donation caps—settled precedent dictated that Independence Institute's First Amendment claims be denied. *Id*. at *34–35.

Independence Institute has appealed that decision.

2. This lawsuit and the advertisement at issue.

The second lawsuit, on appeal here, was filed in the District of Colorado the same day the first suit was filed. Here, Independence Institute challenges provisions of Colorado law that are, in relevant respects, identical to the federal law at issue in the District of Columbia case. *See* J.A. 158 (district court's order) (noting that the "substance of the [state and federal] requirements is essentially the same").

Plaintiff bases these challenges on a separate advertisement, this one directed at Colorado Governor John Hickenlooper. At the time the ad was to be broadcast, Governor Hickenlooper was the Democratic candidate for reelection.

The complaint alleges that Plaintiff planned to distribute the advertisement "over local broadcast television in Colorado." J.A. 13

¶ 29. The ad advocated for an "audit" of the healthcare exchange Colorado established under the controversial Patient Protection and Affordable Care Act. J.A. 13 ¶¶ 29, 31. It asserted that "thousands of Coloradoans lost their health insurance due to the new federal law" and "there's talk of a new $13 million fee on your insurance." J.A. 13–14 ¶ 31. The ad then argued, "[i]t's time for a check-up for Colorado's health care exchange" and urged viewers to "[c]all Governor Hickenlooper and tell him to support legislation to audit the state's health care exchange." J.A. 14 ¶ 31.

3. The advertisement satisfies the objective definition of electioneering.

Plaintiff concedes that, as a matter of state law, its advertisement is subject to Colorado's electioneering disclosure requirements.[2] Specifically,

- the advertisement unambiguously referred to Governor Hickenlooper and would have been broadcast in the 60 days before the 2014 election, J.A. 26 ¶¶ 86–87; *see* Colo. Const. art. XXVIII, § 2(7)(a) (defining "electioneering communication" as a communication that

[2] The relevant constitutional provisions, statutes, and administrative rules governing electioneering disclosure in Colorado are set out in Addendum A to this brief.

"unambiguously refers to any candidate," is "broadcasted . . . within . . . sixty days before a general election," and is "broadcasted to . . . members of the electorate");

- Independence Institute would have spent more than $1,000 on the advertisement, J.A. 13 ¶ 30; *see* Colo. Const. art. XXVIII, § 6(1) (requiring disclosure only when a person "expends one thousand dollars or more per calendar year on electioneering");

- Independence Institute planned to seek "donations greater than $250 from individual donors" "for this specific advertisement," J.A. 14 ¶¶ 32–33, making those donations reportable, Colo. Const. art. XXVIII, § 6(1) (requiring disclosure of donor information only for donors who "contribute[ ] more than two hundred and fifty dollars per year");

and, finally,

- the fundraising effort would have been "independent of [Plaintiff's] general fundraising efforts for other programs," J.A. 14 ¶¶ 32–33, meaning that donations for the ad would have satisfied Colorado's earmarking requirement, Colo. Const. art. XXVIII, § 6(1) (requiring disclosure of only those donations made "for an electioneering communication"); 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 11.1 (requiring disclosure of only those donations "specifically earmarked for electioneering communications").

Plaintiff also concedes that no exceptions to Colorado's electioneering disclosure rules apply. Independence Institute is not a press entity,[3] and its "paid advertisement on commercial broadcast

[3] Plaintiff's decision not to raise a claim based on Colorado's press exemption makes the Court's recent decision in *Citizens United v.*

[*footnote continued on following page . . .*]

television," J.A. 21 ¶ 93, would not qualify under the exemption for news articles, editorials, and similar publications or broadcasts. *See* Colo. Const. art. XXVIII, § 2(7)(b)(I)–(II). Nor is Independence Institute in the "regular business" of making communications such as the advertisement at issue in this case. J.A. 21–22 ¶ 94; *see* Colo. Const. art. XXVIII, § 2(7)(b)(III) (exempting from disclosure any communications "made in the regular course and scope of [a person's] business"). Nor does the advertisement refer to Governor Hickenlooper "only as part of the popular name of a bill or statute." Colo. Const. art. XXVIII, § 2(7)(b)(IV).

Gessler inapposite. *Citizens United v. Gessler*, 773 F.3d 200 (10th Cir. 2014), *pet. for reh'g pending*.

And even if that decision were relevant, Plaintiff's allegations foreclose any relief under it. In *Citizens United v. Gessler*, this Court made clear that its expansion of Colorado's press exemption applies only to entities that have "spoken sufficiently frequently and meaningfully (not in 30-second sound bites) over an extended period of time." *Id.* at 215. The advertisement at issue here is, in fact, a 30-second sound bite. *See* J.A. 13 ¶ 29. And ads like the one at issue are neither a "substantial" nor "regular" part of Plaintiff's business, J.A. 25 ¶ 94, meaning that Plaintiff has not spoken with the frequency that this Court contemplated would entitle a speaker to a press exemption.

Plaintiff is therefore not similarly situated to a newspaper, a television or radio news station, or a book publisher. In the context of this case, Plaintiff is simply an interest group that sought to distribute a one-off ad timed to coincide with last year's general election and directed at a Democratic gubernatorial candidate.

4. Colorado law requires information regarding the advertisement and its funding to be disclosed to the voters.

Ads like Plaintiff's are subject to Colorado's electioneering disclosure rules, which require reports to be filed after a communication satisfying the definition of electioneering is actually broadcast. *See* Colo. Const. art. XXVIII, § 2(7)(a). Reports are then due every other week until the election, with a final report due 30 days later. Colo. Rev. Stat. § 1-45-108(2)(a)(I)(D)–(E). Because communications are not reportable unless and until they are broadcast within sixty days before

an election, a person wishing to engage in electioneering must file at most five reports. *Id.*[4]

These reports must include three pieces of information:

First, "spending on such electioneering communications," including a list of "all spending of $1,000 or more" and the "name, address, and method of communication." Colo. Const. art. XXVIII, § 6(1); 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 11.3.

Second, "[t]he name of the candidate(s) unambiguously referred to in the electioneering communication . . . ." 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 11.5.

Third, donor information, including name, address, and, if the donor is a natural person, occupation and employer. But this information must be reported only for those donors (1) who "contribute[ ] more than two hundred and fifty dollars" and (2) whose donations are "*for* an electioneering communication." Colo. Const. art. XXVIII, § 6(1) (emphasis added). This means that, for corporate

[4] For primary elections, the relevant time period is 30 days before the election; only three reports are therefore necessary for electioneering communicated during a primary election period.

speakers like Plaintiff, only donations "*specifically earmarked for electioneering*" must be disclosed. 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 11.1 (emphasis added). This earmarking limitation protects from disclosure information about donors who support a corporation's general mission or a corporation's non-electioneering activity.

B. Procedural History.

Plaintiff filed its complaint on September 2, 2014, and two days later filed a motion for preliminary injunction. J.A. 3. Although the election was only two months away, Plaintiff did not request a temporary restraining order or expedited treatment of the case. *See id.*

To obviate the need for an evidentiary hearing, Plaintiff and the Secretary entered into a joint stipulation through which Plaintiff conceded its donors would not "be subject to threats, harassment, or reprisals as a result of the Institute's filing of an electioneering communications report." J.A. 69–70. The parties also stipulated that Plaintiff's motion for preliminary injunction would be treated as a motion for summary judgment. *Id.* The Court accepted this stipulation

two days later. J.A. 4. Subsequently, the Secretary filed a response to Plaintiff's motion and a separate cross-motion for summary judgment. J.A. 4, 72.

On October 15, 2014, the district court heard arguments on the parties' opposing motions for summary judgment. J.A. 5. The following week, on October 22, the district court issued an order denying Plaintiff's claims and granting summary judgment in favor of the Secretary. J.A. 146–61. The court entered final judgment on the same day. J.A. 162–63.

In its order, the court explained that when it comes to pure disclosure rules, "[t]he First Amend[ment] does not 'erect[ ] a rigid barrier between express advocacy and so-called issue advocacy.'" J.A. 160 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 193 (2003)). Indeed, "every circuit court to have analyzed this issue since *Citizens United* [including the Tenth Circuit] has come to the same conclusion, that the distinction between issue speech and express advocacy has no place in the context of disclosure requirements." J.A. 156–57. As a result, the district court held that Plaintiff's

advertisement could constitutionally be subject to Colorado's disclosure requirements.

Summary of the Argument

McConnell and *Citizens United* held that attempts to distinguish between "issue advocacy" and "express advocacy" are unnecessary when it comes to disclosure-only laws governed by the objective definition of electioneering. The definition alone is sufficient to trigger disclosure. Plaintiff cites no case to the contrary, and there is none: since *Citizens United* was decided in 2010, every circuit court to address the question has held that, in the context of disclosure-only laws, the distinction between issue advocacy and express advocacy is no longer viable. Both parties agree that Plaintiff's 30-second television advertisement satisfies the objective definition of electioneering. Under binding case law, the ad may therefore be subject to campaign finance disclosure.

In any event, Colorado's disclosure-only electioneering law satisfies exacting scrutiny. It informs the electorate about spending on television ads that discuss political candidates and appear just before

elections. And the scope of the disclosure it requires is tailored to the informational interest at stake, limited by the requirement that only information about those who specifically earmark their donations for electioneering need be included in electioneering reports. These disclosures allow members of the public to decide for themselves how to interpret electioneering communications. Voters need not take corporations like Plaintiff at their word when they claim their ads are not intended to be "campaign-related."

In attempting to justify its argument in favor of layering a "campaign-related," "functional equivalent," or "promotes-attacks-supports-opposes" test on top of Colorado electioneering law, Plaintiff misreads the applicable precedent. For example, Plaintiff fails to distinguish court decisions analyzing narrow electioneering laws with those that analyze more extensive regulations governing political committees or "PACs." Because Plaintiff's arguments are based on a misapprehension of the governing law, none of them supports Plaintiff's requested relief.

Argument

A. Standard of Review.

Plaintiff's claims in this case are "as-applied," J.A. 28, 31 ¶¶ 98 , 112, meaning that they "test[ ] the application of [Colorado's electioneering laws] to the facts of [this] concrete case." *Faustin v. City & Cnty. of Denver*, 423 F.3d 1192, 1196 (10th Cir. 2005). The only task before the Court, therefore, is to determine whether Plaintiff's advertisement, as described in the complaint, may be constitutionally subject to disclosure as an electioneering communication. Because this case is on appeal from an entry of summary judgment, the Court reviews Plaintiffs' as-applied claims de novo. *Digital Ally, Inc. v. Z3 Tech., LLC*, 754 F.3d 802, 810 (10th Cir. 2014).

Plaintiff concedes that in conducting this de novo review, the Court must apply the "exacting scrutiny" test. Op. Br. at 11. The Supreme Court has held that this test stands in contrast to the more stringent "strict scrutiny" test, which applies to laws that "ban[ ] or restrict[ ]" or otherwise "censor" speech. *Citizens United*, 558 U.S. at

340. Disclosure-only laws, in contrast, are subject to a more relaxed standard of review:

> Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking." The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.

Id. at 366–367 (internal citations omitted).

This Court recently affirmed that "exacting scrutiny" applies in cases challenging disclosure-only laws. *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 790 (10th Cir. 2013) ("The district court correctly concluded [plaintiff's] claims implicate *only disclosure requirements* which are subject to exacting scrutiny, requiring 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" (quoting *Citizens United*, 558 U.S. at 366–67 (emphasis added)).

B. Colorado can constitutionally require disclosure of speech that meets the objective definition of electioneering.

Plaintiff's chief argument is that so-called issue speech (*i.e.*, speech that does not by its terms advocate for a particular electoral result) is exempt from even modest disclosure requirements. Under that view, because Colorado's electioneering laws are not restricted by a "functional equivalent of express advocacy" or "campaign-related" test, they fail exacting scrutiny. Op. Br. at 26.

But both *McConnell* and *Citizens United* held that, in cases like this one, the relevant test is the objective definition of electioneering; neither a "functional equivalent" test nor a subjective inquiry into whether a particular communication is "campaign related" is necessary. Indeed, grafting such a test onto the definition would make it less objective and more difficult to apply.

Every circuit court to address the question since *Citizens United*—including this one—agrees. The distinction between issue speech and express advocacy does not control the constitutionality of narrow, event-driven, disclosure-only campaign finance laws.

1. *McConnell* held that disclosure-only laws may be applied to the "entire range" of electioneering communications.

Buckley v. Valeo, 424 U.S. 1 (1976), as Plaintiff says in the Opening Brief, "is the starting point for all campaign finance jurisprudence in the modern era." Op. Br. 12. It is not, however, the end point. *Buckley*'s holdings were "specific to the statutory language" the Court considered forty years ago, before electioneering laws were enacted in the early 2000s. *McConnell*, 540 U.S. at 192; *cf. McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1447 (2014) ("[T]his case cannot be resolved merely by pointing to three sentences in *Buckley* that were written without the benefit of full briefing or argument on the issue. . . . We are confronted with a different statute and different legal arguments, at a different point in the development of campaign finance regulation."). *Buckley* held that a particular statutory phrase—"for the purpose of . . . influencing . . . [an] election"——is unconstitutionally vague, and must be confined by an "express advocacy" limitation, when used to trigger both speech restrictions and disclosure requirements.

424 U.S. at 63, 77–78. That phrase is not at issue in this case, however, because Colorado electioneering law does not employ it.

Because *Buckley*'s analysis was confined to the statutory language before the Court, that decision did not "erect[ ] a rigid barrier between express advocacy and so-called issue advocacy." *McConnell*, 540 U.S. at 193. "[T]he express advocacy limitation, in both the expenditure and disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *Id.* at 192–93.

The question, then, is whether the "specific statutory language" of Colorado's electioneering law raises the concerns that motivated *Buckley*'s express-advocacy limitation.[5] Precedent on this question is clear: the "components [of the definition of electioneering] are both

[5] To be sure, *some* state statutes implicate the constitutional concerns at issue in *Buckley*—particularly those that impose contribution or expenditure limits. Those statutes are often given limiting constructions similar to *Buckley*'s "express advocacy." *See, e.g.*, *Vt. Right to Life v. Sorrell*, 758 F.3d 118, 135 (2d Cir. 2014) (upholding a "narrowing construction" for language that triggered political-committee status and therefore subjected regulated groups to contribution limits and organizational requirements). But that does not mean the First Amendment compels *every* state statute to be similarly limited.

easily understood and objectively determinable," and "raise none of the vagueness concerns that drove [the Supreme Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194. In short, if a communication satisfies the objective definition of electioneering, it may be subject to disclosure. *See id*. at 194–99.

Here, Plaintiff does not argue that Colorado's objective definition of electioneering—which is identical in relevant respects to the federal definition upheld in *McConnell*—is vague. In fact, Plaintiff concedes that the definition unambiguously applies to the advertisement at issue here. *See* J.A. 26–27. Consequently, "the constitutional objection that persuaded the Court in *Buckley* to limit [the reach of other campaign finance laws] to express advocacy is simply inapposite." *McConnell*, 540 U.S. at 194. And because Colorado's electioneering law mandates only disclosure, and does not impose spending limits or speech bans, that law may reach "*the entire range*" of communications that meet the objective definition of electioneering. *Id*. at 196 (emphasis added). "Functional equivalent" or "campaign-related" tests, which would further limit this objective definition, are not required.

2. In *Citizens United*, the Supreme Court struck down a speech ban but reaffirmed the portion of *McConnell* that pertained to disclosure-only electioneering laws.

Plaintiff's Opening Brief neglects to discuss *McConnell*'s holding that disclosure may be required of the "entire range" of electioneering. Plaintiff also fails to adequately distinguish that particular holding from another portion of *McConnell*, in which the Court analyzed the now-invalidated *ban* on corporate electioneering. It was that *ban*—and not the disclosure rules—which the Court found necessary to limit to "the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. This nuance is vital to understanding both *McConnell* and two cases that followed it.

In *Wisconsin Right to Life v. Federal Election Commission* ("*WRTL II*"), 551 U.S. 449 (2007)—a splintered opinion that garnered a majority on the question of mootness only—the Court applied the "functional equivalent" test on an as-applied basis to avoid deciding the issue it would later confront in *Citizens United*. Specifically, the principal opinion said, "*McConnell* held that express advocacy . . . by a corporation shortly before an election *may be prohibited*, along with the

functional equivalent of such express advocacy. We have no occasion to revisit that determination today." *WRTL II*, 551 U.S. at 482 (opinion of Roberts, C.J.) (emphasis added). As a result, *WRTL II* said nothing about electioneering disclosure laws or *McConnell*'s analysis of them.

What did emerge from that opinion, however, was a reluctance on the part of the Supreme Court to layer on top of existing campaign finance laws subjective "intent and effects" tests. "Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [the definition of electioneering] . . . ." *Id.* at 468.[6]

[6] The principal opinion in *WRTL II* was joined by only Chief Justice Roberts and Justice Alito. The three other Justices necessary to support the judgment (*i.e.*, that the government could not ban the particular advertisements at issue) expressed serious reservations with even a functional equivalent test: "There is a fundamental and inescapable problem with all of these various tests. Each of them (and every other test that is tied to the public perception, or a court's perception, of the import, the intent, or the effect of the ad) is impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights of the large segment of society to which [the electioneering ban] applies." *WRTL II*, 551 U.S. at 492 (Scalia, J., concurring in part and concurring in the judgment).

Three years later, in *Citizens United*, the Court did "have occasion to revisit" the corporate electioneering ban, and this time, the Court struck it down. *Citizens United*, 558 U.S. at 365. It goes without saying that this holding was highly significant. With respect to the issues raised here, however, it is irrelevant. Colorado electioneering law, like federal law, is now a disclosure-only regime. *See In re Interrogatories by Ritter*, 227 P.3d 892, 894 (Colo. 2010).

Yet *Citizens United* did reach another question germane to Plaintiff's claims here: whether electioneering laws that have been narrowed to require only disclosure must nonetheless be confined to speech that is the functional equivalent of express advocacy. The Court, in the only portion of the opinion joined by eight of the nine Justices, said no—it was not necessary to use *WRTL II*'s functional equivalent test, or any other test, to confine electioneering disclosure laws:

> The principal opinion in [*WRTL II*] limited [federal] restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into [electioneering] disclosure requirements. . . .

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. . . . [W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United, 558 U.S. at 368–369 (internal citations omitted).

The eight Justices further held they "now *adhere* to [*McConnell*] as it pertains to the disclosure provisions." *Id*. at 368 (emphasis added). As explained above, *McConnell* held that disclosure may apply to the "entire range" of electioneering. *McConnell*, 540 U.S. at 196. *Citizens United*, in adhering to *McConnell*, reaffirmed that holding.

The Court underscored this point by holding that disclosure laws may apply even to advertisements that "only pertain to a commercial transaction." *Citizens United*, 558 U.S. at 369.[7] This is because "the

[7] Plaintiff suggests that the Court came to this conclusion because commercial speech is subject to less First Amendment protection than non-commercial speech. Op. Br. at 45. That argument is dubious, given that *Citizens United* made no mention of it. It also fails to account for *McConnell*'s holding, which *Citizens United* reaffirmed, that a communication which satisfies the "easily understood and objectively determinable" definition of electioneering may be subject to disclosure. *McConnell*, 540 U.S. at 194. Indeed, the fact that express advocacy may be subject to more regulation than ads like those at issue here does not

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public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.*; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 & n.32 (1977) ("[P]eople in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . Identification of the source of [corporate] advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."). Thus, an "informational interest alone is sufficient" to justify electioneering disclosure rules. *Citizens United*, 558 U.S. at at 369.

In light of this governmental interest in an informed electorate, the Court described the kind of "campaign finance system" (which had "not existed before") that properly serves the functions of the First

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mean the First Amendment values one over the other. *See Buckley*, 424 U.S. at 48 ("Advocacy of the election or defeat of candidates . . . is no less entitled to protection under the First Amendment than the discussion of political policy generally . . . ."). The difference is that the definition of electioneering is "easily understood and objectively determinable"—and electioneering laws require *only disclosure*, rather than more stringent regulation such as contribution limits or ongoing PAC-like regulation. *McConnell*, 540 U.S. at 194.

Amendment: a system "that pairs corporate independent expenditures with *effective disclosure*." *Citizens United*, 558 U.S. at 370 (emphasis added). As the Court explained, "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371. The eight Justices in the *Citizens United* majority therefore made clear that in "adher[ing]" to *McConnell*, it was reaffirming the validity of disclosure rules applied to advertisements that meet the objective definition of electioneering. *Id.* at 369.[8]

[8] According to Plaintiff, *Citizens United* upheld application of disclosure rules only because the ads at issue in that case were "*designed to encourage* citizens to watch a full-length feature film that advocated against Hillary Clinton." Op. Br. at 21 (emphasis added). *Citizens United*, however, did not adopt a "designed to encourage" test, or any other test. *Citizens United*, 558 U.S. at 368–69. And the Court has cautioned against adopting tests that compromise the objective definition of "electioneering" and might lead to "a trial on every ad." *WRTL II*, 551 U.S. at 468 (opinion of Roberts, C.J.). The advantage of electioneering laws is that they are "easily understood and objectively determinable." *McConnell*, 540 U.S. at 194. Adding a "designed to encourage" test would muddy the waters.

Citizens United is therefore dispositive of Plaintiff's claims in this case. Both parties agree Plaintiff's ad satisfies the objective definition of electioneering. According to Supreme Court precedent, this means the ad can be subject to disclosure.

3. Every federal circuit court to address the question has held that disclosure-only laws need not distinguish between issue speech and express advocacy.

Plaintiff argues that *Citizens United*'s adherence to *McConnell* was nonbinding dicta. Op. Br. at 20 n.10, 45 n.15 (quoting *Wis. Right to Life v. Barland*, 751 F.3d 804, 836 (7th Cir. 2014)); *see also* J.A. 56 (making the same argument below). But even assuming this passage from *Citizens United*—which, again, garnered an 8-to-1 majority of the Court—was dicta, lower courts "are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013).

Indeed, *Barland*, the very case Plaintiff relies upon to support the "dicta" argument, itself held that this portion of *Citizens United* is binding: "This [passage from *Citizens United*] was dicta. . . . Still, the

Supreme Court's dicta must be respected, and on the strength of this part of *Citizens United*, we said in [*Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012)] that the '*distinction between express advocacy and issue discussion does not apply in the disclosure context*.'" *Barland*, 751 F.3d at 836 (emphasis added) (internal citations omitted).

Every other circuit court to address the question agrees with *Barland* that the so-called "dicta" of *Citizens United* is binding, and the distinction between issue speech and express advocacy does not apply in the disclosure-only context.[9] The Tenth Circuit is no outlier. The Court

[9] *See, e.g., Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132 (2d Cir. 2014) ("*Citizens United* removed any lingering uncertainty . . . . [T]he Supreme Court expressly rejected the 'contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy . . . .'" (citation omitted)); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 591 n.1 (8th Cir. 2013) ("Iowa's disclosure law covers both express advocacy and issue advocacy. Disclosure requirements need not 'be limited to speech that is the functional equivalent of express advocacy.'" (citations omitted)); *Madigan*, 697 F.3d 464, 484 (7th Cir. 2012) (noting that state electioneering laws "may constitutionally cover more than just express advocacy and its functional equivalents"); *Real Truth About Abortion v. Fed. Election Comm'n*, 681 F.3d 544, 552 (4th Cir. 2012) (explaining that "mandatory disclosure requirements are permissible when applied

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recently said, "the Supreme Court not only rejected the 'magic words' standard . . . but also found that disclosure requirements could extend beyond speech that is the 'functional equivalent of express advocacy' to address even ads that 'only pertain to a commercial transaction.'" *Free Speech*, 720 F.3d at 795 (adopting the opinion of the district court).

There is no support for Plaintiff's contention that Colorado's electioneering laws violate the First Amendment because they lack a "campaign-related" test or because they apply to ads, like Plaintiffs, that are not the "functional equivalent of express advocacy." As the district court held, adopting Plaintiff's preferred approach to Colorado electioneering regulation would not only contravene Supreme Court precedent but would also lead to regulation-by-trial, a "subjective

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to ads that merely mention a . . . candidate"); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 54–55 (1st Cir. 2011) ("We find it reasonably clear, in light of *Citizens United*, that the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws."); *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1014–16 (9th Cir. 2010) ("[The plaintiff's] position is that . . . express advocacy[ ] may be subject to disclosure requirements, whereas [issue advocacy] is constitutionally sacrosanct . . . . [this] argument has been foreclosed by the Supreme Court's opinion in *Citizens United*.").

review of all arguably political speech made close in time to an election." J.A. 155. Nothing in the decisions of the Supreme Court or the decisions of the circuit courts suggests that such an approach is consistent with the First Amendment.

C. Colorado's electioneering law satisfies exacting scrutiny as applied to Plaintiff's advertisement.

Because Plaintiff's ad meets the definition of electioneering, *Citizens United* and *McConnell* entirely resolve this case—the ad is subject to Colorado's disclosure rules.

Plaintiff nonetheless claims that Colorado law fails exacting scrutiny. This argument is, again, foreclosed by case law. Colorado has a legitimate interest in an informed electorate, and its electioneering disclosure rules are substantially related to that interest.

1. Colorado law is narrowly drawn to require disclosure of only donations made specifically to fund communications that meet the objective definition of electioneering.

Plaintiff argues that "[n]ot all disclosure related to political speech serves th[e] narrow, finite governmental interest" of an informed electorate." Op. Br. at 26. This may be true. But *McConnell* and

Citizens United have already determined that at least with respect to communications that meet the objective definition of electioneering, the government has an interest in providing the public with information about a corporate speaker and its donors. *See Republican Party v. King,* 741 F.3d 1089, 1095 n.3 (10th Cir. 2013) ("The [Supreme] Court upheld [electioneering] disclosure requirements at issue in *Citizens United* because they provided the electorate with information about the identity of the speaker and did not impose a chill on political speech, even for independent expenditures.").

Colorado's electioneering laws are designed to provide the electorate with precisely the kind of information that *Citizens United* found "sufficient" to justify the burdens of disclosure. 558 U.S. at 369. Colorado law directly targets individual communications, like Plaintiff's 30-second television advertisement, that mention candidates in the run-up to elections. And the laws impose no more burden on this speech than necessary—only corporate donors whose contributions are "specifically earmarked" for electioneering are required to be disclosed in electioneering reports.

Two recent district court cases demonstrate the line between permissible and impermissible disclosure regimes. In *Delaware Strong Families v. Biden*, the District Court for the District of Delaware invalidated a law requiring extensive disclosures for all third-party advertisements made during an election period. Civ. No. 13-1746-SLR, 2014 U.S. Dist. LEXIS 43121 (D. Del. Mar. 31, 2014). The Delaware law did not include an earmarking provision like Colorado's: it required any organization making a third-party advertisement to disclose *all* of its donations. *Id*. at * 2. Thus, all "contributors to any charitable organization, e.g., those advocating such causes as a cure for cancer or support for wounded war veterans," would have to be disclosed. *Id*. at *38 n. 21. To the court, requiring this level of disclosure was "[l]ike the metadata collected by the National Security Administration [sic]." *Id*. at *38 n. 22.

In contrast to this relatively expansive Delaware law, the federal electioneering laws—which, like Colorado's laws, include an earmarking requirement, *see* 11 C.F.R. § 104.20(c)(9)—fall on the other side of the line. The District Court for the Eastern District of Virginia

upheld federal electioneering provisions as applied to advertisements that merely mentioned the presidential administration and did not directly or indirectly advocate for a particular electoral result. *Hispanic Leadership Fund v. Fed. Election Comm'n*, 897 F. Supp. 2d 407 (E.D. Va. 2012). Those ads exhorted viewers to contact public officials and express views on a public policy matter (for example, one ad urged viewers to "[T]ell the White House it's time for an American energy plan"). *Id.* at 429–31. The court rejected the plaintiff's argument that the federal electioneering laws could not constitutionally "requir[e] disclosure for 'issue advocacy.'" *Id.* at 431.

These decisions make clear that Colorado's electioneering framework falls on the right side of exacting scrutiny. Colorado employs targeted disclosure requirements to further the goal of an informed electorate, and the disclosure requirements are substantially related to that goal. The First Amendment does not preclude application of these disclosure rules to Plaintiff's ad.

2. The Secretary has consistently challenged Plaintiff's description of the advertisement as "genuine issue advocacy."

At several points in the Opening Brief, Plaintiff claims that "both Parties have 'stipulate[d] that the ad . . . can be classified as genuine issue advocacy.'" Op. Br. at 26 (quoting the district court's order). Plaintiff further characterizes its ad as not belonging to that "new brand of advertisements" that amount to "sham issue advocacy." *Id.* at 16. For example, Plaintiff argues that the ad at issue here "is simply not comparable" to the ads in *Citizens United*, and based on that comparison alone, Plaintiff's ad is exempt from electioneering disclosure rules. *Id.* at 21. This characterization, Plaintiff argues, proves that Colorado has no legitimate governmental interest in requiring disclosure of Plaintiff's ad. *Id.* at 21–22; *see also id* at 26–31 (claiming that Plaintiff "was not a supporter nor was it an opponent of Governor Hickenlooper's campaign for re-election").

These arguments require crediting Plaintiff's subjective characterization of its own ad as "unambiguously *not* campaign-related." *Id.* at 22 (emphasis in original). The point of electioneering

disclosure, however, is to arm voters with information allowing them to evaluate for themselves the character of a particular electioneering communication. This is why precedent, including *Citizens United*, upholds such laws on the basis that "the distinction between issue discussion and express advocacy has no place in First Amendment review of these sorts of disclosure-oriented laws." *McKee*, 649 F.3d at 54–55. "[T]he 'marketplace of ideas' has become flooded with a profusion of information and political messages. . . . Disclosing the identity and constituency of a speaker engaged in political speech thus 'enables the electorate to make informed decisions and give proper weight to different speakers and messages.'" *Id.* at 57 (quoting *Citizens United*). "At the very least, [disclosure rules] avoid confusion by making clear that the ads are not funded by a candidate or political party." *Citizens United*, 558 U.S. at 368.

The Secretary does agree that Plaintiff's advertisement is "issue speech," insofar as the ad's literal words are not "the functional equivalent of express advocacy." But the Secretary did not concede that the government is precluded from allowing the electorate to decide for

itself whether a particular electioneering communication is, in fact, "*genuine* issue advocacy" by a speaker with no interest in an impending election, or is instead something more. *See, e.g.*, J.A. 19–20 (emphasis added).

During argument before the district court, counsel for the Secretary explained, "We are conceding that the plain text of this ad is issue speech. *What we're not conceding* is that the people can't deem this [ad] to be more than that." J.A. 193:13–15 (emphasis added); *see also id.* at 193:21–194:1 (quoting *Buckley*, 424 U.S. at 45 ("It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign."). The Secretary's counsel elaborated,

> Plaintiff in this case says its ad is not campaign related because it is not pejorative. I disagree. I find this ad pejorative just on the plain text. . . . [I]t implies that Governor Hickenlooper is not doing all he can to fix the [controversial Affordable Care Act]. . . .

> The Supreme Court said in [*WRTL II*, 551 U.S. at 467–69] . . . that you cannot condition . . . the applicability of campaign finance laws on subjective intent and effects tests.
>
> Now, let's assume for a minute that the plain text of this ad is not perjorative. What happens when this ad runs and there's a[n] ominous sounding soundtrack behind it[?] What happens when the narrator uses a pejorative tone of voice[?]
>
> My point is not that those things are relevant. The point is we shouldn't have to get into it. The important aspect of Colorado law is that it's objective and so it requires disclosure and the public can decide for itself what is pejorative, what's neutral, what's flattering, or anything else in between.

J.A. 193:18–194:16.

3. Plaintiff conflates the narrow electioneering disclosure laws at issue with broader disclosure requirements applicable to political committees.

In attempting to show that Colorado's laws are not tailored to the informational interests *Citizens United* found sufficient to satisfy exacting scrutiny, the Opening Brief confuses electioneering laws—which are keyed to specific communications—with laws that more broadly regulate the activities of campaign-related groups such as political committees (or "PACs"). *See* Op. Br. at 12–15 (discussing

Buckley's analysis of a law that "required 'political committees' to disclose contributor information to the federal government for subsequent publication"). For example, Plaintiff claims that the D.C. Circuit's decision in *Buckley* struck down a law that "sought the same scope of government power that the Secretary claims here." *Id.* at 32. But the law before the D.C. Circuit required reporting "as if such person were a *political committee*." *Id.* at 31 (quoting *Buckley v. Valeo*, 519 F.2d 821, 870 (D.C. Cir. 1975)) (emphasis added). The D.C. Circuit was not analyzing more narrowly focused electioneering laws.

As explained above in Section B, neither *Buckley* nor any other Supreme Court case since has imposed a "campaign related" or "express advocacy" test on any disclosure-only electioneering law.[10] The reason

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[10] Plaintiff conceded below that, in the nearly forty years since *Buckley* was decided, "the courts have yet to explicitly articulate a test for . . . 'unambiguously campaign related' speech." J.A. 133. Plaintiffs still fail to cite a case in which a "campaign related" test was applied to limit the scope of a disclosure-only electioneering law.

The Secretary's research has turned up only one case that even applied such a test, *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010). But *Herrera* involved PAC-type regulation, not electioneering laws. *Id.* at 672–73 (explaining that the law at issue required plaintiffs to, among other things identify "the bank used . . . for

[*footnote continued on following page . . .*]

for this is plain once the differences between PAC regulation and electioneering disclosure are understood.

a. Political committee regulation is more extensive than electioneering regulation.

In Colorado, as in many other states, "political committee" status triggers more significant regulation than the rules that apply to electioneering. For that reason, the definition of "political committee" has been construed to incorporate *Buckley*'s "express advocacy" and "major purpose" tests. *See Colo. Ethics Watch v. Senate Majority Fund LLC*, 269 P.3d 1248, 1258 (Colo. 2012) (contrasting "narrowly defined" electioneering laws with broader political committee regulations and adopting the "express advocacy" test to avoid "the vagueness and over-breadth concerns from *Buckley*"); *see also Alliance for Colo.'s Families v.*

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all expenditures or contributions," and file extensive ongoing reports "until the treasurer files a report that affirms that the committee has dissolved or no longer exists and that is bank account has been closed"). The Court specifically distinguished these PAC regulations from electioneering laws: "[T]he ads were not mailed within 30 days of a primary election or 60 days of a general election. . . . [and] were not regulable 'electioneering communications.'" *Id.* at 674–75 (quoting the district court's order).

Gilbert, 172 P.3d 964, 972–73 (Colo. App. 2007) (holding that an organization could be regulated as a PAC only if it satisfied *Buckley*'s "major purpose" test, *i.e.*, only if its "major purpose" was to support or oppose political candidates).

If a group meets the definition of a political committee, it is subject not just to disclosure requirements, but also contribution limits of $550 per contributor per election cycle. Colo. Const. art. XXVIII, §§ 2(12), 3(5); 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 10.14 (adjusting the original $500 contribution limit for inflation).

Additionally, the disclosure requirements for political committees are much broader than those that apply to electioneering communications. First and most importantly, unlike electioneering disclosure, reporting for political committees does not include an earmarking requirement. *All* contributions to political committees above a threshold amount must be reported—it does not matter whether a contribution is made to fund regulated speech or not. Colo. Rev. Stat. § 1-45-108(1)(a)(I); *cf. Buckley*, 424 U.S. at 63 ("[Political committee] records must include the name and address of *everyone*

making a contribution in excess of $10 . . . ." (emphasis added)). Second, PAC reporting is based on lower dollar thresholds: political committees must report all contributions of $20 or more on an itemized basis, including the name and address of each contributor. Colo. Rev. Stat. § 1-45-108(1)(a)(I).

Political committees must also register with the Secretary of State and update their registrations within ten days of any change. *Id.* § 1-45-108(3); 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 12.1. They must regularly report all contributions and expenditures, even in off-election years, and they must do so until they file a notice of termination with the Secretary. Colo. Rev. Stat. § 1-45-108(2). And they may terminate only if they "no longer intend[ ] to receive contributions or make expenditures" and they have "a zero balance" with "no cash or assets on hand and no outstanding debts or obligations." 8 Colo. Code Regs. § 1505-6, Campaign Finance Rule 12.3.

Electioneering regulation, in contrast, is tied to, and limited to, specific communications made during specific time periods. Only spending *on* those communications, and only donations *for* those

communications, need be reported. Colo. Rev. Stat. § 1-45-108(1)(a)(III). When the election is over, nothing more is required. Colo. Const. art. XXVIII, § 6(1) ("The last such report shall be filed thirty days after the applicable election."). Thus, application of the electioneering laws here would not force Plaintiff to broadly "publicize the names and addresses of the Institute's donors," Op. Br. at 7; it would require disclosure only of donors who both donated more than $250 and specifically earmarked their donations for electioneering.

b. Case law distinguishes between electioneering regulation and PAC regulation.

The case law recognizes the significant distinction between PAC-type disclosure regimes and event-driven regimes like Colorado's electioneering law. And the cases make clear that constraints placed on the regulation of PACs are not constitutionally required to be placed on more limited disclosure rules, such as those that govern electioneering.

In *Wisconsin Right to Life v. Barland*, for example, the Seventh Circuit struck down a law "specifically designed to bring issue advocacy within the scope of the state's PAC regulatory system." 751 F.3d at 834.

This regulatory system was extensive—far more extensive than Colorado's electioneering laws—requiring anyone spending over $300 on candidate-related communications to, among other things (1) "appoint a treasurer" who would be "personally liable for violations of the reporting duties and other requirements"; (2) "maintain a separate depository account"; (3) file a registration document and keep it up to date; (4) pay annual registration fees; and (5) "file frequent, detailed reports" and thereby "open their books to public inspection" in both election and non-election years. *Id.* at 813–15.[11] The court distinguished these "PAC-like" burdens from electioneering disclosures,

[11] Plaintiff argues that the prospect of filing "*multiple* disclosure reports" alone is constitutionally problematic. Op. Br. at 37–38 (emphasis in original). But multiple reports are not what courts emphasize when analyzing PAC-like burdens; it is the extensive regulation of an entity's overall activities, even outside of election seasons, that distinguishes PAC regulations. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 873 (8th Cir. 2012) ("To comply with Minnesota's law, [a small group seeking to fund a political billboard] must create and register a political fund, appoint a treasurer, keep detailed records, and file ongoing reports with the Board. The [group] must continue to file *even if* [they] do not continue to 'speak.' To escape these ongoing burdens, the [group] must file a termination statement. Before they can do that, they must dispose of the political fund's assets . . . ." (emphasis in original)).

describing "the onetime, event-driven disclosure rule for federal electioneering communications" as "far more modest." *Id.* at 836. It further noted that "*Citizens United* approved event-driven disclosure for federal electioneering communications" and "[i]n that specific and narrow context, the Court declined to enforce *Buckley*'s express-advocacy limitation." *Id.*

In *Real Truth About Abortion, Inc. v. Federal Election Commission*, meanwhile, the Fourth Circuit upheld federal disclosure regulations as applied to a group that intended to broadcast advertisements critical of then-presidential-candidate Barack Obama but which did not explicitly call for his defeat. 681 F.3d 544, 545–48 (4th Cir. 2012). In doing so, the court distinguished state laws that, like laws regulating PACs, "imposed a variety of restrictions on campaign speech, including limits on acceptable contributions and expenditures." *Id.* at 553. Because the challenged federal regulations "only implement[ed] disclosure requirements," which "occasion a lesser burden on speech," it was "constitutionally permissible to require disclosure for a wider variety of speech than mere electioneering." *Id.*

4. Plaintiff's suggestions for "as-applied exceptions" to the scope of electioneering laws violate Supreme Court precedent.

Plaintiff suggests three possible "as-applied exceptions" to Colorado's electioneering laws and offers them as solutions to avoiding the case-by-case adjudication that would be required if courts adopted a "campaign-related" test. Op. Br. at 50–55. First, Plaintiff offers what it describes as the "simple, objective test" from *Federal Election Commission v. Massachusetts Citizens for Life* ("*MCFL*"), 479 U.S. 238 (1986), which was once used to determine whether a nonprofit corporation could be subject to the now-invalidated "ban on corporate independent expenditures." Op. Br. at 51. Second, Plaintiff suggests that the Court adopt the *WRTL II* "functional equivalent of express advocacy" test. *Id.* Finally, Plaintiff urges the Court to adopt the "backup definition" for electioneering communications, which includes a so-called "promotes-attacks-supports-opposes" or "PASO" test. *Id.* at 53.

None of these options comports with the case law. The first two directly contradict *Citizens United*, which, as explained above, distinguished between electioneering *bans* and electioneering *disclosure*

rules. *Citizens United* explicitly rejected a "functional equivalent" test and made no suggestion that the *MCFL* test should be used as a stand-in. *Citizens United*, 558 U.S. at 368–369.

Plaintiff's final suggestion is just as problematic. It ignores *McConnell*, which rejected any reliance on the "backup" definition for electioneering: "[Federal law] also provides a 'backup' definition of 'electioneering communication,' which would become effective if the primary definition were 'held to be constitutionally insufficient . . . .' We *uphold all applications of the primary definition* and accordingly have no occasion to discuss the backup definition." 540 U.S. at 190 n.73 (emphasis added; citations omitted). As explained above in part B.2., *Citizens United* "adhered" to *McConnell*'s analysis of electioneering disclosure laws; it would be illogical to read this "adherence" to mean that the backup definition of electioneering, which *McConnell* declined even to "discuss," is now constitutionally required.

D. Plaintiff cannot resurrect as-applied claims it deliberately waived below.

Although the goal of this lawsuit is to establish a new legal test to be applied every time Colorado attempts to require disclosure of

electioneering, Plaintiff insists that its claims are only as-applied and not facial. And, in Plaintiff's view, because the "Supreme Court has already explicitly held that *McConnell* does not foreclose future as-applied challenges," nothing prevents the Court from finding in favor of Plaintiff and layering a "campaign related" or "functional equivalent" test on top of Colorado electioneering law. Op. Br. at 36.

In *McConnell* and *Citizens United*, however, the Court set out to clarify precisely when an electioneering communication could be subject to disclosure. In each, the Court upheld disclosure for communications that met the objective definition of electioneering—*McConnell* as a facial matter and *Citizens United* on an as-applied basis. As a result, those decisions recognized only one viable as-applied challenge to electioneering disclosure requirements, an as-applied challenge based on *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). That case, however, did not contemplate distinctions between issue speech, express advocacy, or "campaign related" communications; it focused on a plaintiff's specifically articulated harm to individual donors.

On this point, *McConnell* explained, "In *Buckley*, unlike *NAACP*, we found no evidence that any party had been exposed to economic reprisals or physical threats as a result of the compelled disclosures. We acknowledged that such a case might arise in the future. . . . [Here,] our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges . . . . ." *McConnell*, 540 U.S. at 198–99. The Court explained that in future challenges, plaintiffs would bear the burden of satisfying the *NAACP* test: "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* (quoting *Buckley*, 424 U.S. at 74). *Citizens United* reaffirmed this holding:

> In *McConnell*, the Court recognized that [electioneering disclosure rules] would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. . . . Citizens United, however, has offered no evidence that its members may face similar threats or reprisals.

Citizens United, 558 U.S. at 370.

Here, not only has Plaintiff failed to offer evidence that donors who earmarked their donations for the ad would have been subject to "threats or reprisals," Plaintiff deliberately waived any such claim in a joint stipulation the district court effectuated by formal order. J.A. 4, 69–70; *see Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005) ("[I]ssues not raised below are waived on appeal."). Although Plaintiff repeatedly cites *NAACP* in its brief and claims that "[t]he ability to associate free of compelled state disclosure is a hard-won victory of the civil rights era," Op. Br. at 11, it cannot resurrect a claim based on *NAACP* on a record devoid of evidentiary support, nor can Plaintiff pursue such a claim on appeal after it has gone on record stating that the claim is no longer a part of this case.

E. Plaintiff's status as a 501(c)(3) corporation is irrelevant to whether Colorado may require disclosure of Plaintiff's electioneering communications.

As a final matter, Plaintiff suggests that its status as a 26 U.S.C. § 501(c)(3) corporation weighs in favor of its First Amendment claims. Op. Br. at 7. But the public's interest in information about an entity

that finances and distributes electioneering communications does not change based on the subsection of the Internal Revenue Code from which the entity derives its federal tax treatment. As the Seventh Circuit explained, "the voting 'public has an interest in knowing who is speaking about a candidate shortly before an election,' whether that speaker is a political party, a nonprofit advocacy group, a for-profit corporation, a labor union, or an individual citizen." *Madigan*, 697 F.3d at 490 (quoting *Citizens United*, 558 U.S. at 369).

Plaintiff improperly assumes that because § 501(c)(3) corporations are prohibited from engaging in *some* forms of "political advocacy," they may not be subject to *any* disclosure rules. Op. Br. at 29. But Colorado need not forgo enforcing its campaign finance regulations merely because of Plaintiff's professed compliance with unrelated tax laws. And the fact that § 501(c)(3) corporations are forbidden from engaging in what *federal tax law* defines as "political advocacy" does not mean that Colorado is prohibited from requiring Plaintiff to disclose information about electioneering that might not fit that tax-related definition. Indeed, this argument—that Plaintiff must be exempt from

electioneering laws because it does not engage in what the tax code calls "political advocacy"—is a variation on its attempt to import an "express advocacy" or "PASO" test into the objective definition of electioneering. As discussed above, adopting such tests here would violate Supreme Court precedent.

Additionally, at least two courts have held that it is *unlawful* for campaign finance laws and regulations to impose different disclosure rules based on the particular tax category of a corporation. In *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28, 124–28 (D.D.C. 2004), the United States District Court for the District of Columbia invalidated a regulation that excluded communications paid for by § 501(c)(3) corporations but not communications paid for by other types of corporations. *See id.* at 127 (noting that the regulation was "troubling" because "the IRS in the past has not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are so considered under [federal campaign finance law]"). Similarly, in *Center for Individual Freedom v. Tennant*, the court invalidated a law that exempted "communication[s] paid for by any organization operating

under § 501(c)(3)." 706 F.3d 270, 289 (4th Cir. 2013). The court held that "by exempting communications by § 501(c)(3) organizations from the definition of 'electioneering communication,' West Virginia likely deprived the electorate of information about these organizations' election-related activities." *Id*. at 289. The court "therefore invalidate[d] the § 501(c)(3) exemption while leaving the rest of the 'electioneering communication' definition intact." *Id*. at 290.

Finally, Plaintiff ignores that only those donors whose contributions are specifically earmarked for electioneering are required to be included in electioneering disclosure reports. Thus, the privacy of Plaintiff's donors is not at risk as a general matter. Colorado law simply imposes evenhanded disclosure requirements on all those who fund electioneering, regardless of whether their donations go to § 501(c)(3) corporations or other entities.

The policy considerations that drive the federal government to categorize corporate entities for tax purposes need not bind states like Colorado who seek to provide the public with information about groups

that engage in electioneering. Plaintiff's status as a § 501(c)(3) group does not insulate it from electioneering disclosure rules.

Conclusion

Because Plaintiff's advertisement satisfies the "easily understood and objectively determinable" definition of electioneering, binding precedent forecloses the relief requested in this case. *McConnell*, 540 U.S. at 194; *Citizens United*, 558 U.S. at 368–69. In any event, disclosure of Plaintiff's spending on the ad, as well as disclosure of information about donations specifically earmarked for the ad, furthers Colorado's interest in an informed electorate, an interest which "alone is sufficient" to justify the burdens of disclosure. *Citizens United*, 558 U.S. at 369. The district court's order should be affirmed.

Oral Argument Is Necessary

Plaintiff asks the Court to interpret a number of lengthy Supreme Court opinions to impose new legal restrictions on Colorado's regulation of electioneering communications. The statewide importance of the

issues, and the nuances of the relevant case law, suggest that oral argument is necessary.

Respectfully submitted on February 25, 2015.

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Privacy Redactions and Digital Submission

I certify that with respect to this **Appellee Secretary of State's Answer Brief**,

(1) all required privacy redactions have been made in compliance with 10th Cir. R. 25.5;

(2) if additional paper versions of this document are required to be filed, the ECF submission is an exact copy of those paper versions;

(3) the digital submissions have been scanned for viruses with the most recent version of the commercial virus scanning program System Center Endpoint Protection, Version 1.193.540.0, which was updated on February 21, 2015, and according to that program the digital submissions are free of viruses.

Date: February 25, 2015.

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Certificate of Service

I certify that on February 25, 2015, I electronically filed this **Appellee Secretary of State's Answer Brief** using the court's CM/ECF system, which will send notification of this filing to the following:

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Addendum A
to the Secretary's Answer Brief

Text of Constitutional Provisions, Statutes,
and Administrative Rules Governing
Electioneering Disclosure in Colorado

Colo. Const., Art. XXVII, Section 2. Definitions.

(7)(a) "Electioneering communication" means any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

(I) Unambiguously refers to any candidate; and

(II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and

(III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

(b) "Electioneering communication" does not include:

(I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;

(II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;

(III) Any communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families;

(IV) Any communication that refers to any candidate only as part of the popular name of a bill or statute.

Colo. Const., Art. XXVII, Section 6. Electioneering communications.

(1) Any person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state in accordance with the schedule currently set forth in 1-45-108 (2), C.R.S., or any successor section. Such reports shall include spending on such electioneering communications, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year to such person described in this section for an electioneering communication. In the case where the person is a natural person, such reports shall also include the occupation and employer of such natural person. The last such report shall be filed thirty days after the applicable election.

(2) ~~Notwithstanding any section to the contrary, it shall be unlawful for a corporation or labor organization to provide funding for an electioneering communication; except that any political committee or small donor committee established by such corporation or labor organization may provide funding for an electioneering communication~~.

[**Editor's Note**: In the case of **In re Interrogatories by Ritter**[, 227 P.3d 892 (Colo. 2010)], the [Colorado] Supreme Court declared subsection (2) of this section unconstitutional in light of *Citizens United v. Federal Election Commission*, 558 U.S.[310] (2010).]

Colo. Const., Art. XXVII, Section 10. Sanctions.

(2)(a) The appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to . . . section 6 . . . of this article, or section[ ] 1-45-108, . . . C.R.S., . . . is not filed by the close of business on the day due. . . .

Colo. Rev. Stat. § 1-45-108. Disclosure – definition.

(1)(a)(III) Any person who expends one thousand dollars or more per calendar year on electioneering communications shall report to the secretary of state, in accordance with the disclosure required by this section, the amount expended on the communications and the name and address of any person that contributes more than two hundred fifty dollars per year to the person expending one thousand dollars or more on the communications. If the person making a contribution of more than two hundred fifty dollars is a natural person, the disclosure required by this section shall also include the person's occupation and employer.

. . .

(2)(a)(I) [S]uch reports that are required to be filed with the secretary of state shall be filed:

> . . .
>
> (D) On the first Monday in September and on each Monday every two weeks thereafter before the major election;
>
> (E) Thirty days after the major election in election years . . . .

Colo. Rev. Stat. § 1-45-111.5. Duties of the secretary of state – enforcement – sanctions.

. . .

(1.5)(c) In addition to any other penalty authorized by article XXVII of the state constitution or this article, an administrative law judge may impose a civil penalty of fifty dollars per day for each day that a report, statement or other document required to be filed under this article that is not specifically listed in article XXVIII of the state constitution is not filed by the close of business on the day due. . . .

8 Colo. Code of Regulations 1505-6,
Campaign Finance Rule 11. Electioneering Communications

11.1 If a person spending money for electioneering communications is a corporation or labor organization, disclosure of the names and addresses of persons contributing $250 or more used to make electioneering communications shall only be required if the money is specifically earmarked for electioneering communications. [Section 1-45-108(1)(a)(III), C.R.S.]

11.2 All contributions of $250 or more received for electioneering communications during a reporting period, including non-monetary contributions, shall be listed individually on the electioneering report. [Article XXVIII, Section 6(1)]

11.3 All spending of $1,000 or more per calendar year shall be listed individually on the electioneering report, including name, address, and method of communication. [Article XXVIII, Section 6(1)]

11.4 Entities making electioneering communications shall maintain all financial records for 180 days after any general election in which the entity received contributions. If a complaint is filed against the entity making electioneering communications, the entity shall maintain financial records until final disposition of the complaint and any consequent litigation.

11.5 The name of the candidate(s) unambiguously referred to in the electioneering communication shall be included in the electioneering report. [Article XXVIII, Section 2(7)(I)]

11.6 Submission of electioneering communication disclosure reports

> 11.6.1 Committees are not required to file electioneering communication reports separate from regularly filed independent expenditure disclosure reports so long as any expenditure or spending subject to Article XXVIII, Section 6 and Rule 11.5 is identified as an electioneering communication. The disclosure of electioneering expenditures or spending on a regularly filed report shall include the name of the candidate referred to in the electioneering communication.