COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED December 3, 2025 3:16 PM FILING ID: 532E474D43F0B CASE NUMBER: 2024SC540
Certiorari to the Court of Appeals, 2022CA2245 District Court, Denver County, 2021CV033166	
Petitioners: ANDREW KLINE, in his official capacity as Colorado Deputy Secretary of State and JENA GRISWOLD in her official capacity as Colorado Secretary of State, **v.** **Respondent:** NO ON EE—A BAD DEAL FOR COLORADO.	
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ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g).

> It contains 9,457 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(b).

> In response to each issue raised, it contains under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1 and C.A.R. 32.

/s/ Owen Yeates

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INTRODUCTION

Colorado's complicated campaign finance regime traps not just the unwary. Those wishing to speak about the most pressing issues of the day face a no-win situation: get the State's approval for every message, which "function[s] as the equivalent of prior restraint," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 335 (2010); "retain a campaign finance attorney" to preview every message, which violates the First Amendment, *id.* at 324; or face enormous fines after ideological opponents drum up some requirement to file a complaint.

Proposition EE's opponents hired an experienced campaign consultant, Sheila McDonald, to create No on EE. She formed the committee, hired a similarly experienced compliance officer, and strove to fulfill and exceed Colorado's demands. But they missed one of Colorado's ever-changing speech regulations and did not include the name of the committee's registered agent on its communications. Someone opposed to the committee filed a complaint for the missing name, and the State ran with it. Despite all the committee's efforts to comply and later mitigate, the Administrative Law Judge fined it $10,000, which the State increased to $30,000.

The registered agent speech mandate violated the First Amendment from the start. It is a content-based restriction on speech subject to strict scrutiny, which it cannot survive. The State therefore seeks review under the exacting scrutiny standard for disclosure and disclaimer regulations, even though the speech mandate is neither a traditional disclosure nor disclaimer.

Even if it were disclosure or disclaimer, the speech mandate could not survive exacting scrutiny. Only two governmental interests could support the rule, and the speech mandate lacks the necessary substantial relation and narrow tailoring to those interests. Registered agents are simply not committee officers; including agents' names on communications thus does not serve the identification interest, as it tells voters nothing about those controlling the communication. Nor does the registered agent's identity reveal those funding the committee, which might advance the informational interest.

And arguing that this speech mandate would inform voters because the registered agent might *sometimes* be an officer or donor only demonstrates lack of tailoring. If the State wants information about officers or donors on communications, then it should require that

information—which is what other states have done. Colorado has given no justification for its deviation, which not only under-informs but misleads voters—who expect that disclaimers and disclosure will inform them about those controlling committees or funding communications.

No on EE has disputed the speech mandate's lack of governmental interest and tailoring from the beginning, and the Court should affirm the decision below that this latest manifestation of Colorado's prolix campaign finance regime is unconstitutional.

ISSUES PRESENTED

1. Whether No on EE preserved its as-applied and facial constitutional challenges.
2. Whether the registered agent speech mandate violates the First Amendment.

STATEMENT OF THE CASE

On July 8, 2020, a tobacco and nicotine tax known as Proposition EE was placed on the November 2020 ballot. CF 93, 123. Cigarette maker Liggett Vector Brands approached Sheila McDonald to run an opposition campaign. CF 153, 165.

McDonald hired Sandy Partyka to be the filing agent and handle compliance for the No on EE opposition committee, and her brother, Patrick McDonald, to serve as the registered agent. CF 152-54. McDonald remained responsible for the committee, making all "strategic decisions," controlling its bank account, and signing its checks. CF 152. The State submitted that she is the "embodiment of the committee." CF 155.

To ensure compliance, McDonald sent Partyka—already "an experienced compliance officer," CF 169—to "attend a Webinar hosted by the Colorado Secretary of State to ensure [the committee was] in full compliance and to see if there was any new information," and "asked her to arrange a phone call with the Campaign Finance Office ... to walk through the in-kind donation rules and processes." CF 169; *see also* CF 76.

Because McDonald believes that "voters deserve to know how money is spent in" campaigns, the committee went beyond State requirements. CF 170. Its reporting included not just the amounts and sources of donations, but "how it was spent." CF 170; *see also* CF 125.

The committee's initial ads included the following disclaimer statement: "Paid for by No on EE: A Bad Deal for Colorado." CF 123. Those ads did not, however, include the name of the committee's registered agent, CF 124, as required by 1-45-108.3, C.R.S. 2023. *See* 1-45-108.3(1) (requiring disclaimer); *id.* (2) (incorporating requirements at 1-45-107.5(5)); and 1-45-107.5(5)(II) (identification of registered agent).

The committee's communications disputed whether funds from the tax would reach pre-schools, *see, e.g.*, CF 64, and someone whose email address indicates a pre-school affiliation, *see* CF 46, filed a complaint alleging that the committee had failed to include the registered agent's name in its disclaimers, CF 47. Using the existing disclaimer, however, the complainant not only obtained the registered agent's name from the committee's disclosures, but a slew of other information about the committee, which she included in her complaint. *See* CF 48-62.

After receiving the complaint, the committee "[i]mmediately ... worked to cure the alleged violation," reprinting door hangers, updating or removing billboards, updating the committee website, and replacing TV, radio, and digital ads. CF 124. The committee "significantly cooperated with the Division's review and investigation of the

complaint," "providing detailed evidence of its cure efforts" and responding to "a request for information." CF 125. The committee noted that the changing disclaimer requirements had confused others. CF 77; *see* CF 509-10 (noting changes).

Based on this information, the Secretary filed a complaint in the Office of Administrative Courts. *See* CF 91-101. In its response and at the administrative hearing, McDonald represented the committee pro se. *See* CF 87 (signed response); CF 150-51 (hearing).

McDonald attacked the registered agent speech mandate's constitutionality, disputing the relationship between the state's interests and the speech mandate. She stated that the committee's "inadvertent error in leaving off the registered agent's name" had not "in any way compromise[d] the voters' ability to know who was running this campaign," as that information was "available on the Secretary of State's website." CF 171. She also argued that merely knowing the agent's name was not enough, that voters would need to "go to the SOA website" to figure out who the agent was. *Id.*; *see also* CF 180 ("name brings nothing to the disclaimer"). She concluded the speech mandate

was "overly burdensome in light of actual benefit to the voter." *Id.* at CF 171.

McDonald also noted that she was a professional campaign consultant who had "work[ed] with [the Campaign Finance Office] a lot," CF 151, 168-69, 172; and that the committee had tried "to be transparent as possible," CF 170. McDonald averred that notwithstanding the committee's compliance efforts, she had not caught the speech mandate, *id.*; and that the TV stations, which "are strict regarding the disclaimer and will not run ads without the correct disclaimer," had also not caught the issue, *id.*

The ALJ found a violation of the registered agent speech mandate but, given substantial mitigation, limited the fine to $10,000. CF 184-88. The Secretary increased the fine to $30,000. CF 221.

The committee filed both a motion with the Secretary to vacate the final agency order and an appeal. It argued that the final order should be vacated because of multiple conflicts of interest in the Secretary's office, with staff members either having worked on the Yes on EE campaign or having family members who did. CF 230. The committee also argued that the speech mandate was unconstitutional. *See* CF 231-

33. Because the committee had also filed an appeal, the Secretary dismissed the motion to vacate. CF 250-51.

The committee's complaint on appeal argued that the speech mandate is unconstitutional. It stated that the speech mandate "provides no substantive information to the electorate." CF 6. And it argued that the statute was not narrowly tailored because voters could simply get information from the Secretary's website. *Id.*

The committee's opening brief argued that, as applied to the committee, the speech mandate provided "no substantive information to the electorate" as multiple people in Colorado shared its agent's name. CF 480. And it argued that the speech mandate was duplicative and unnecessary, as voters could not know who the agent was without going to the Secretary's website. *Id.*

The brief also attacked the speech mandate facially, arguing that the final order "identifies no governmental interest to be achieved through the disclosure." CF 480. It argued that the speech mandate is "unduly burdensome" because it would require reprinting and revising communications whenever a committee's registered agent changes. CF 480-81. And it concluded by asking for as-applied and facial relief: that

the court vacate the order as to the committee and hold the law unconstitutional. CF 485.

The district court noted both as-applied and facial arguments in the committee's filings, CF 528 & nn. 2-3, but it rejected them and affirmed the $30,000 fine, CF 535-37, 543. The court of appeals rejected the State's argument that the committee waived its facial constitutional challenge and held that the speech mandate was facially unconstitutional. *No on EE v. Beall*, 2024 COA 79, ¶¶ 13, 35. The State appealed.

SUMMARY OF THE ARGUMENT

Colorado's demand that issue committees state their registered agent's name on every communication is an unconstitutional violation of core political speech. It is doubly content based, as it singles out speech about candidates or ballot issues, when made by particular groups, and then forces those speakers to alter the content of their speech. As a content-based regulation of speech, it must survive strict scrutiny.

The State cannot avoid strict scrutiny by calling the registered agent speech mandate a disclosure or disclaimer regulation. "Disclosure"

requirements apply only to donor reporting, while "disclaimer" requirements encompass on-communication identification of the speaker. Registered agents are neither donors nor the individuals responsible for making a message, but merely individuals designated to report a committee's change of status and, perhaps, to receive service of process. Because the speech mandate is neither a disclosure nor traditional disclaimer, the State cannot claim that exacting scrutiny—the lower scrutiny applicable to such regulations—should be used here.

The speech mandate cannot survive strict scrutiny. The State cannot show that the speech mandate furthers a compelling interest. It has not even shown that it has a compelling interest here. And the speech mandate cannot survive even the relationship test or tailoring analysis under exacting scrutiny, much less strict scrutiny.

The speech mandate fails under exacting scrutiny, both facially and as applied to the committee. In claiming that the speech mandate is a disclosure or disclaimer regulation, the State can rely on only two governmental interests: for disclosure, the informational interest in advising voters as to who is donating money to support or oppose a ballot measure; and for disclaimers, an interest in identifying the

speaker of the communication. The State has identified no other viable interest.

Exacting scrutiny requires that the speech mandate be substantially related to a sufficiently important governmental interest, and that it be narrowly tailored to that interest. The State cannot show the necessary nexus between the speech mandate and either the informational interest or the identification interest.

The State has not demonstrated a relationship under the informational interest as applied to the committee. It has not shown that the committee's agent contributed any funding to the committee, such that giving his name would tell voters anything about those funding opposition to the Proposition.

The speech mandate likewise fails the nexus test facially. Because registered agents are not donors to committees, stating their names tells voters nothing about who is spending money to support or oppose a ballot issue.

The State has similarly failed to demonstrate a relationship under the identification interest as applied to the committee. It has not shown that the committee's agent has any control over the content of the

communication, or that voters would have any idea who he is, such that giving his name would tell voters anything about who is speaking.

The speech mandate fares no better facially. A registered agent can be any natural person and does not need to be an officer or employee of the committee, or anyone with decision-making authority or control over communications. Indeed, registered agents may be professionals representing hundreds of committees. Including agents' names does not tell voters who is speaking.

The State argues that the speech mandate should nonetheless be upheld because agents may sometimes be committee officers. But relying on happenstance demonstrates that the speech mandate has only a tenuous relationship to the asserted interests. And it shows that the speech mandate will mislead voters, who expect disclosures to always inform them about significant donors and disclaimers to tell them who in fact made a communication.

The registered agent speech mandate also fails exacting scrutiny's narrow tailoring test, which requires that the State demonstrate its need for a regulation if less intrusive alternatives exist. Given that efficiency is an illegitimate interest, the State has given no

constitutionally acceptable reason why it could not publish the information itself. And in arguing that the speech mandate should be allowed because it sometimes gives information about committee donors or officers, the State points to another alternative: requiring that communications state the names of officers or donors. The State has not shown why it would not serve its interests to have a requirement directly demanding the information it claims to want.

The speech mandate is also unconstitutional as part of a prolix campaign finance regime. A court previously warned that Colorado's system had gotten so complex that average citizens could not comply with it on their own. And the committee's extensive, futile efforts to comply with the regime show that the State has made the prolixity worse. It violates the First Amendment to force someone to get an attorney before speaking, and this regime is unconstitutional.

Lastly, the State incorrectly argues that the committee failed to preserve its constitutional arguments. Caselaw does not support the proposition that a party can waive its constitutional arguments in such situations. But even if waiver were possible, the committee preserved its arguments both in the administrative hearing and before the district

court. The committee's representative in the administrative hearing acted pro se, and she met the requirements for a pro se party to raise the committee's as-applied challenge. And the committee's counsel before the district court advanced both the committee's as-applied and facial arguments and asked for as-applied and facial relief.

ARGUMENT

I. THE REGISTERED AGENT SPEECH MANDATE FAILS STRICT SCRUTINY

The registered agent speech mandate is a content-based, compelled speech requirement that triggers strict scrutiny. The State labels the speech mandate a disclosure or disclaimer regulation to obtain review instead under exacting scrutiny. But the speech mandate requires neither a disclosure nor disclaimer, as traditionally understood, to qualify for exacting scrutiny, and it cannot survive strict scrutiny.

A. The speech mandate is doubly content based.

The government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quotation marks omitted). The registered agent speech mandate, however, "target[s] speech based on its communicative content" in two ways. *Id.*

First, it "singles out specific subject matter for differential treatment." *Id.* at 169. It targets speech about candidates or ballot issues, when made by particular groups. Second, the speech mandate "alter[s] the content of their speech" by "compelling individuals to speak a particular message," the registered agent name on the communication. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (cleaned up).

Because it is content based, the speech mandate is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. It may escape such scrutiny, which usually "is fatal in fact," only if some exception applies, such as applies to laws that "are traditional, widespread, and not thought to raise a significant First Amendment issue." *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 485 (2025). Hence the State seeks to pass the speech mandate off as a disclosure or disclaimer rule.

B. The speech mandate cannot obtain refuge from strict scrutiny as a disclosure or disclaimer rule.

The State cannot pass off the speech mandate as a disclosure or disclaimer rule, as it does not compel committees to identify the speaker making the communication or those financially backing the speaker.

In the campaign finance context, the line of cases sustaining limited disclosure has given it one meaning: donor disclosure. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 61 (1976) ("names of ... contributors"); *id*. at 62-63 ("contributors of $100 or more"); *Citizens United*, 558 U.S. at 366 ("names of certain contributors"); *Gaspee Project v. Mederos*, 13 F.4th 79, 89 (1st Cir. 2021) ("disclosure of relatively large donors"); *Indep. Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016) ("disclosure of donors").

Congress and other legislatures have turned the word "disclaimer" into a contronym, but as a campaign-finance term of art it too has a limited meaning: a speaker's claim of ownership over and responsibility for a communication. Congress designed disclaimers to compel speakers to stand by and take responsibility for their communications' content. *See, e.g.*, 148 Cong. Rec. S2096, S2134 (Mar. 20, 2002) (Statement of Sen. Collins) (Bipartisan Campaign Reform Act ("BCRA") would force

speakers to "stand by [their] ad[s]," ending "stealth attack ads" and "rais[ing] the level of discourse"). Accordingly, candidate communications must include a "statement that identifies the candidate and" that the candidate "approved the communication," 52 U.S.C. § 30120(d), while a non-candidate's communication must state "the name ... of the person or group that funded the advertisement" and that it was "not authorized by any candidate," *Citizens United*, 558 U.S. at 366 (quotation marks omitted).

Disclosure thus compels donor reporting to the state, while disclaimers compel speakers to acknowledge and take responsibility for their communications. The common meaning and statutory usage of the term "registered agent" shows that the speech mandate serves neither function.

Registered agents are conventionally individuals hired to receive legal service on another's behalf. *See, e.g.*, *Atwood v. Dotdash Meredith Inc.*, No. 1:24-cv-00046-TC-DAO, 2025 U.S. Dist. LEXIS 46352, at *3 (D. Utah Mar. 13, 2025) ("receive service of process"); *Acadian Props. Austin, LLC v. KJMonte Invs., LLC*, 650 S.W.3d 98, 107 (Tex. App. 2021) ("on whom process may be served"); *Elliott v. Am. States Ins. Co.*,

883 F.3d 384, 390 (4th Cir. 2018) ("accept service of process" (quotation marks omitted)).

Agents "can be" but are not "necessarily an owner, officer, director, or ... person" similarly related to an organization—indeed, one can use "professional registered agents for hire." *Business FAQs*, Colorado Secretary of State, https://perma.cc/A6X3-VJFL. Many such professional agents offer their services without relation to an organization's mission. *See, e.g.*, *Colorado Registered Agent Service*, Rocky Mountain Registered Agent, https://perma.cc/2Q57-66LM; *When You Want More*, Northwest Registered Agent, https://perma.cc/7AHR-C24M ("State compliance filing"); *Colorado Registered Agent*, Colorado Registered Agent, LLC, https://perma.cc/6VXJ-LW27 ("Periodic Report" and "additional filings").

Nothing in Colorado's campaign finance regime changes the core characteristics of registered agents: that they need be nothing more than someone who receives process. The statutes require only that the agent be "a natural person," § 1-45-108(1.5)(b)(I)(B) and (3)(b), C.R.S.; and that the agent report "when a 'small-scale issue committee'

becomes subject to the Act's requirements for issue committees." *No on EE*, ¶ 30 (quoting § 1-45-108(1.5)(c)(III), C.R.S.).

There is no "requirement in the law that" the registered agent have any "other connection to the issue committee." *Id*. The statues do not require that the agent "be an organizer, officer, or employee of the issue committee," or that the agent "be a donor." *Id*.

Since the speech mandate targets neither donors nor anyone with control over a committee or its communications, it is neither a disclosure nor a disclaimer requirement.

And even if they carried the weight of statute, the Secretary's regulations do not change this. *But see* Pet'rs Op. Br. 38 ("Op. Br."). The Secretary requires that a registered agent be someone "designated to receive mailings, to address concerns and questions regarding a committee, and [be] responsible for timely filing campaign finance reports." *Campaign Integrity Watchdog LLC v. Griswold*, 2025 COA 18, ¶ 54 (quoting Rule 1.28, 8 CCR 1505-6).[1] That does not require that

[1] It is also noteworthy that Rule 1.28 has no statutory authority for the duties the Secretary wishes to impose on registered agents. The Rule cites to § 1-45-108(3)(b) and § 1-45-109(4)(b), *see* Rule 1.28, but the first provision only requires the appointment of a registered agent. *See* § 1-45-108(3)(b). And the second does not mention registered agents and

agents donate to or control a committee, only that they funnel information to and from it.

As the speech mandate is neither a disclosure nor disclaimer within the meaning of First Amendment campaign finance precedent, the State cannot seek refuge under exacting scrutiny. This speech mandate is something new that only Colorado seems to require, *No on EE*, ¶ 24 n.9, and the State must therefore defend it against strict scrutiny.

C. The speech mandate fails under strict scrutiny.

The State cannot carry its heavy strict scrutiny burden to demonstrate that the speech mandate furthers a compelling interest and constitutes the least restrictive means to achieve that interest. *See Reed*, 576 U.S. at 171 (must further compelling interest); *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (least restrictive means test). The U.S. Supreme Court has treated the interests underlying disclosure and disclaimers as important governmental interests, *see, e.g., Citizens United*, 558 U.S. at 366-67, but it has not held that they are compelling interests. Indeed, the Tenth Circuit has indicated that the

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has been repealed. *See* § 1-45-109(4)(b); 2019 Colo. SB. 232 (May 29, 2019).

informational interest may have less value in the ballot context. *See Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010); *but see Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1248-49 (11th Cir. 2013) (may be compelling but reviewing as important interest). If the interest is not compelling, the speech mandate cannot further a compelling interest.

But even if the interest were compelling, the requirement does not further that interest. The discussion below demonstrates that it does not meet even the nexus requirement for exacting scrutiny.

Furthermore, given that the State itself can publish the demanded information, the speech mandate cannot meet the least restrictive means test.

II. THE SPEECH MANDATE ALSO FAILS EXACTING SCRUTINY

Even if the registered agent speech mandate were a disclosure or disclaimer, it would still fail exacting scrutiny. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021) (Roberts, C.J., op.) ("*AFPF*") (exacting scrutiny for disclosure); *Citizens United*, 558 U.S. at 366 (for disclosure and disclaimers). The government must demonstrate "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *AFPF*, 594 U.S. at 607

(quotation marks omitted). But even showing "a substantial relation ... is not enough to save a disclosure regime [if it] is insufficiently tailored." *Id*. at 609. The government must show that "the challenged requirement [is] narrowly tailored to the interest it promotes." *Id*. at 610.

Furthermore, the prophylactic nature of the speech mandate demands extra rigor in applying exacting scrutiny. The State justifies the speech mandate as a tool to make disclosure and disclaimer requirements more effective. Op. Br. 39-40 (arguing disclosure more efficient). This is a quintessential "prophylaxis-upon-prophylaxis approach," requiring that a court "be particularly diligent in scrutinizing the law's fit." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 221 (2014) (Roberts, C.J., controlling op.) (quotation marks omitted).[2]

To carry out these tests, however, the Court must know the applicable interests. There is only one possible interest for disclosure in the ballot context, and similarly only one possible disclaimer interest.

[2] Unless otherwise noted, *McCutcheon* citations will be to the controlling opinion.

A. The added burden for facial challenges makes no difference here.

The registered agent speech mandate is unconstitutional, both facially and as applied to the committee. In a First Amendment challenge, "a law may be invalidated as [facially] overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *AFPF*, 594 U.S. at 615 (quotation marks omitted). This "demanding showing" for facial challenges—that a substantial number of applications are unconstitutional—"is not required, however, where—as here—the" speech mandate is not "narrowly tailored to an important government interest." *Id.* at 617. But even if that showing were required, the speech mandate would still be unconstitutional facially and as applied to the committee, as there is no necessary relation between the State's asserted interests and the speech mandate.

The State makes much of the distinction between facial and as-applied challenges. But "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United*, 558 U.S. at 331.

It is necessary that a party have standing to bring a constitutional challenge, but the arguments pleaded and made are less important than "the breadth of the remedy" required. *Id.*; *see also Gessler v. Colo. Common Cause*, 2014 CO 44, ¶ 10 ("look to the breadth of the remedy" (quotation marks omitted)); *Citizens United*, 558 U.S. at 375-76 (Roberts, C.J., concurring) (question is not the label, but whether the constitutional claim or the government defense prevails).

B. The State may rely on only two narrowly delimited interests, one for disclosure and one for disclaimers.

1. The only possible disclosure interest is in informing voters about donors giving money for or against the Proposition.

Of the three governmental interests the Supreme Court has recognized for donor disclosure—fighting actual or apparent corruption, combatting circumvention of contribution limits, and the informational interest, *Buckley*, 424 U.S. at 66-68—only one applies to ballot measures. The interest in fighting actual or apparent corruption can only apply to candidates, where quid pro quo corruption—or exchanging "dollars for political favors"—is possible. *McCutcheon*, 572 U.S. at 192 (quotation marks omitted); *see Citizens United*, 558 U.S. at 359; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.15 (1995) ("risk

of corruption … is not present in a popular vote on a public issue" (citations and quotation marks omitted)); *Sampson*, 625 F.3d at 1255 (compiling cases).

The interest in combatting circumvention of contribution limits similarly cannot apply here. There can be no contribution limits where there is no risk of corruption. *See Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 297-98 (1981). And if there can be no contribution limits, there cannot be an interest in combatting the circumvention of such limits. *Republican Party v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013) (rejecting "freestanding" interest).

The informational interest does not save this speech mandate. That interest does not allow the government to compel speech about whatever might strike its fancy, but only information about *money*: "information as to where political campaign money comes from ... to aid the voters in" placing "candidate[s] in the political spectrum more precisely." *Buckley*, 424 U.S. at 66-67 (quotation marks omitted). This monetary disclosure "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions

of future performance in office." *Id.* at 67; *see also id.* at 81 ("spending that is unambiguously campaign related").

The informational interest is necessarily more limited in the ballot context. A ballot measure has no constituency to which it would anthropomorphically respond. It is not an interest in "advis[ing] the public generally what groups may be in favor of, or opposed to" a measure, but in "inform[ing] the public" about those interested enough to make "*contributions* or *expenditures* directed to that result." *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1032-33 (9th Cir. 2009) (emphasis in original); *see also Sampson*, 625 F.3d at 1256 ("knowing who is spending and receiving money").

And the informational interest does not even reach all contributions. To ensure that disclosure requirements in fact target monetary support for a candidate or ballot measure, courts have emphasized the importance of limiting disclosure to contributions earmarked to support advocacy. *See Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497 (D.C. Cir. 2016) (using cancer society example to explain earmarking); *Indep. Inst.*, 812 F.3d at 797 (earmarked contributions); *Lakewood Citizens Watchdog Grp. v. City of Lakewood*, No. 21-cv-01488-PAB, 2021

U.S. Dist. LEXIS 168731, at *33-36 (D. Colo. Sep. 7, 2021) (earmarking furthers interest); *Indep. Inst. v. Fed. Election Comm'n*, 216 F. Supp. 3d 176, 191 (D.D.C. 2016) (three judge panel) ("for the specific purpose").

2. The only approved interest for disclaimers is in identifying the speaker.

Disclaimers may be upheld by an identification interest—the "interest in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. That interest does not apply here. The little caselaw on disclaimer requirements arises from BCRA, which in part strengthened the Federal Election Campaign Act's existing stand by your ad provisions. BCRA required that a candidate (and others) "stand by his ad" by "clearly identify[ing] himself or herself as the sponsor." 148 Cong. Rec. at S2134. When Citizens United challenged BCRA's ban on its movie and advertisements, it also briefly argued against the disclaimer and disclosure requirements. *Citizens United*, 558 U.S. at 366.

In like fashion, the majority opinion in *Citizens United* closed with a brief analysis of disclosure and disclaimers, applying exacting scrutiny and sustaining the latter based on an interest in identifying "the person or group who is speaking." *Id.* at 368. Relatedly, and aligned with

Congress's concerns, the Court noted that identifying the speaker clarifies "that the ads are not funded by a candidate or political party." *Id.* (quotation marks omitted); *see also id.* at 369 ("who is speaking about a candidate").

3. The State has not demonstrated another interest.

Drawing from the dissent below, the State has asserted another interest: "identifying a natural person" to "interrupt[] the irrational assumptions created by deceptive corporate names and remind[ing] … that the advocacy is ... done by ... real people." Op. Br. 38-39 (quotation marks omitted). This argument fails for many reasons. Under either the general meaning or Article 45, registered agents receive service and make reports, but they don't do advocacy. It is dubious that voters will not understand that "real people" care about election outcomes. The First Amendment protects the speech of corporations—as corporations fulfilling their missions—and the public's right to hear them. *Citizens United*, 558 U.S. at 342-43. And, most importantly, the U.S. Supreme Court has not approved any such interest.

Courts have closely circumscribed compelled disclosure because it chills multiple protected First Amendment rights. *See AFPF*, 594 U.S.

at 605-607. January will mark 50 years since *Buckley v. Valeo*. In all the time since, the U.S. Supreme Court has recognized only three potential interests for disclosure in the campaign finance context. This asserted interest in identifying natural persons is not included.

And even though the committee challenged the government's interest more than five years ago, CF 6, 171, 180, the government has failed to produce any evidence demonstrating that this interest is important. *See, e.g., Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1175 and 1179 n.8 (9th Cir. 2007) (requiring that state provide evidence of interest). Furthermore, this asserted interest bears too strong a relationship to asserted interests that have been rejected in the ballot measure context, including the anti-distortion interest and the interest in preventing corporations from presenting their ideas. *See Citizens United*, 558 U.S. at 355.

Finally, this asserted interest is an illegitimate post-hoc rationalization. *See U.S. v. Virginia*, 518 U.S. 515, 533 (1996) ("justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

C. The State cannot show the necessary nexus between the asserted interests and the speech mandate.

The registered agent speech mandate fails the nexus requirement both because the scale is out of balance and there is no relationship between the weights on each side.

1. The First Amendment burdens far outweigh any interest.

Given the absence of any governmental interest, and the presence of irreparable First Amendment harm, the law must fail the nexus test. There is no informational or identification interest as the speech mandate is neither a disclosure nor disclaimer. And given that the First Amendment protects "the decision of both what to say and what *not* to say," *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796-97 (1988), and "[t]he loss of First Amendment freedoms … unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the burdens are necessarily great. Thus, whether facially or as applied, the State's non-existent interests are "far outweighed by the … burdens of the require[ment]," *Coal. For Secular Gov't v. Williams*, 815 F.3d 1267, 1276 (10th Cir. 2016), and the speech mandate is unconstitutional.

2. The informational interest is not related.

Even if the burden on speakers did not outweigh the State's purported interests, the speech mandate would still fail the nexus requirement for want of a proper relationship. The correct slant of the scale is a necessary but not a sufficient condition, as that alone does not guarantee "a 'relevant correlation' or 'substantial relation.'" *Buckley*, 424 U.S. at 64 & n.75 (citing *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963)); *accord Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008).

Courts have held repeatedly that heightened scrutiny requires a proper nexus between regulations and the interests asserted to justify them. *See e.g., Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 204 (1999) (law "no more than tenuously related"); *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) ("mere assertion" of a relationship is not enough). *Gibson*, 372 U.S. at 546 (cited in *Buckley*, 424 U.S. at 64 nn. 73 and 75) (requiring a "nexus" to "show a substantial relation"); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (compiling cases and requiring "reason why *continued* reporting ... necessary"); *N.J. Citizen Action v. Edison Twp.*, 797 F.2d 1250, 1265

(3d Cir. 1986) (requiring "particularized showing of the needed relationship").

As applied or facially, there is no relationship here. As applied to the committee, complying with the speech mandate would not provide any information that fulfills the informational interest. The State has provided no evidence that the committee's agent has contributed any money to the committee. Providing his name thus "provides the electorate with [no] information as to where political campaign money comes from," *Buckley*, 424 U.S. at 66 (quotation marks omitted), or about "who is spending and receiving money to support or oppose a ballot issue," *Sampson*, 625 F.3d at 1256.

Even if the State had shown a contribution to the committee by the agent, simply providing his name on the communication would not help voters more precisely place the ballot measure "in the political spectrum." *Buckley*, 424 U.S. at 67. Nineteen Patrick McDonalds live in Colorado, CF 480, and voters would not know to whom it referred. *But see* Op. Br. 40 (arguing the speech mandate provides "an instantaneous heuristic"). The State has also not shown that any of the 19 Patrick McDonalds would be a recognizable name and thus provide voters with

any information; there is no reason to suppose that *any* Patrick McDonald's service as a registered agent would skew a voter's view of Proposition EE.

The speech mandate does not fare better facially. As Colorado does not require "that the registered agent be a donor to an issue committee, much less a significant donor," *No on EE*, ¶ 27, the speech mandate provides no information about committee funding. Thus "[t]here can be no serious argument that" the speech mandate "inform[s] the public about an issue committee's sources of funding." *Id.* That is, there is "no set of circumstances" in which the speech mandate serves the informational interest, which certainly means that "a substantial number of its applications are unconstitutional, judged in relation to the [speech mandate's non-existent] legitimate sweep." *AFPF*, 594 U.S. at 615 (quotation marks omitted).

Finally, the State undermines itself in arguing that the disclosure caselaw applies to its novel speech mandate. Perhaps meaning the opposite, the State correctly observes "that is a difference in kind, not degree." Op. Br. 41. There is a difference in kind—a qualitative difference—between the two types of requirements. "If you can keep

your head when all about you are losing theirs, it's just possible you haven't grasped the situation." Jean Kerr, *Please Don't Eat the Daisies* 13 (1957) (quoted in Martha Minow, *Lecture: Reforming School Reform*, 68 Fordham L. Rev. 257, 257 (1999)). Rather than regard it as an inconsequential choice, the State should have seen the red flag when all the other "legislatures chose the donors, [while] in Colorado the General Assembly chose" the registered agent. Op. Br. 41.; *see No on EE*, ¶ 24 n.9 ("the only state … to require … the registered agent's name"). It indicates that all the other states understood the scope of the informational interest, while the General Assembly with its "difference in kind" misunderstood the statute or committed a scrivener's error in drafting it.

3. The speaker identification interest is not related.

There is likewise no relationship—as-applied or facially—to the identification interest. As applied to the committee, complying with the speech mandate provides no information about "who is speaking about [the ballot measure] shortly before an election." *Citizens United*, 558 U.S. at 369. The State has provided no evidence that Patrick McDonald had any influence or control over the content of the communication,

such that he was "the person or group who [was] speaking." *Id.* at 368. And, even if he had some control, the State has not shown how his name provides any information about the speaker. It has not shown that he would be known to voters, especially since he shares his name with 18 others.

The speech mandate also fails facially. "There is no requirement in the law that such person have any other connection to the issue committee," that the agent "be an organizer, officer, or employee of the issue committee," or anyone with control over the message. *No on EE*, ¶ 30. Agents do not even receive complaints. *Id.* Their only function is to report a committee's change of status. *Id.* There is no necessary relationship that gives the agent control over communications or the committee's identity.

Indeed, as an agent "can be any natural person," *id.*, individuals may create professional services representing dozens and even hundreds of committees. The State notes that one of these professional agents has registered for over 200 committees. Op. Br. 49-50. And, as with this agent, these professionals may represent individuals on both sides of the political aisle. *See* Robert Davis, *Dark Money Group Funding*

Denver Homeless Ballot Initiative, Denver VOICE (July 14, 2021), https://perma.cc/A7SV-62WS.[3] Such professional agents may provide services like filing compliance reports and accepting service, but they certainly do not control communications or represent their clients' viewpoints to the world. *See, e.g., Services*, polifi, https://perma.cc/N8SD-JW8T.

That such agents exist reflects the lack of any necessary relationship between the registered agent speech mandate and the identification interest. At the very least, it shows that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *AFPF*, 594 U.S. at 615.

4. The State's examples do nothing to show a relationship.

The State argues that the speech mandate cannot be held facially unconstitutional, however, because there may be instances in which a

[3] And even if an agent represented only members of a single party, there is no guarantee that the competing factions within each of our "big-tent" parties would have the same views on a measure. *Republican Party v. Kelly*, 247 F.3d 854, 901 (8th Cir. 2001) (Beam, J., dissenting); *see, e.g.*, Colin Robertson, *2021 Canada-U.S. Law Institute Distinguished Lecture: Working with the Biden Administration: What We Need to Do*, 45 Can.-U.S. L.J. 109, 112 (2021) (quoting Will Rogers: "I am not a member of any organized [political] party. I am a Democrat.").

registered agent happens to be a donor or happens to have some authority over the committee. *See* Op. Br. 46-50. Multiple points contradict the State's argument.

First, the state has had notice of constitutional challenges for over four years. At the administrative hearing, McDonald argued that the speech mandate failed to inform voters. CF 171, 180. The committee's complaint argued that the speech mandate "provides no substantive information to the electorate." CF 6. And its opening brief argued that the State had "identifie[d] no governmental interest." CF 480. In over four years, the state has failed to provide evidence that the speech mandate provides any information about donations or committee control beyond potential chance encounters. This indicates less a lack of notice than the lack of a logical relationship between the speech mandate and the asserted interests.

Second, the State should have had the evidence necessary to justify this law before the case ever started. If the General Assembly had sufficient justification to pass the law, the legislative record would contain it. A restriction on constitutionally protected liberties "must be genuine, not hypothesized or invented *post hoc* in response to

litigation." *Virginia*, 518 U.S. at 533. And "there must be *evidence*; lawyers' talk is insufficient." *Annex Books, Inc. v. City of Indianapolis*, 581 F.3d 460, 463 (7th Cir. 2009).

Third, these examples show only that the State is swinging at a proverbial piñata. That the mandate occasionally strikes a blow does not show that it knows where the target is (or whether anyone understands the fallout is "candy"). The State's justification could as easily support an on-communication disclaimer for a committee's cleaning person, who might have donated funds after learning about it. Or support alien registration requirements for anyone with a given ethnicity—even if they are citizens—because some people from that ethnic group happen to be aliens who must register and update their addresses. There must be a real, logical relationship between an interest and a law violating rights. Relying on happenstance for a connection demonstrates that the speech mandate is "no more than tenuously related to the" asserted interests, and the speech mandate "fail[s] exacting scrutiny." *Am. Constitutional Law Found.*, 525 U.S. at 204 (quotation marks omitted).

Fourth, as a true relationship is absent, voters will be misled rather than informed. The dissent below argues that voters rely on disclaimers to inform them about the source of a communication and thus whether to give it weight, and the State relies on the dissent's arguments. *No on EE*, ¶¶ 82-83; Op. Br. 38-40. But voters rely on that information because they expect it will always tell them who the speaker actually is or who has donated to the committee. By placing something on the communication that will provide the intended information only by happenstance, the State fundamentally misleads voters. And it has fatally undermined its own asserted interests.

D. The speech mandate fails narrow tailoring.

Even if the registered agent speech mandate survived the nexus test, it would still fail exacting scrutiny under narrow tailoring. Narrow tailoring is an even more rigorous test. "[F]it matters" when dealing with protected First Amendment speech, *McCutcheon*, 572 U.S. at 218, and the government must show that "the challenged requirement [is] narrowly tailored to the interest it promotes," *AFPF*, 594 U.S. at 609-10. That is, the government must "demonstrate [the] need for" the challenged law "in light of any less intrusive alternatives." *Id.* at 613.

Moreover, contrary to the dissent below, *No on EE*, ¶ 86, lack of narrow tailoring means that a challenger need not show that that a substantial number of a law's applications are unconstitutional, *AFPF*, 594 U.S. at 617. The State retains the burden to prove the statute's constitutionality.

"There is a dramatic mismatch ... between the" asserted interests and the speech mandate the State claims to have "implemented in [their] service." *Id.* at 612. The State had many alternatives, the least intrusive being publishing its desired message on the Secretary's website. The complainant here demonstrated how easy it is for voters to get information from the website and use it against speakers. *See* CF 48-62.

The State has not met the demand that it "demonstrate its need" for the speech mandate "in light of [this] less intrusive alternative[]." *AFPF*, 594 U.S. at 613. The closest it has come is in arguing that on-communication disclosure is more efficient. Op. Br. 39-40. But such efficiency goes to donor information—to disclosure—not to this novel speech mandate. More importantly, this interest is illegitimate. When the tailoring analysis in *AFPF* revealed that California's interest

similarly reduced to one in efficiency, the Court held it unconstitutional. *See AFPF*, 594 U.S. at 614-15.

The State itself points to another, obvious alternative when it states that "sometimes the registered agent also serves as an organizer, board member, employee, or significant donor of the committee." Op. Br. 47 (quotation marks omitted). Justifying the speech mandate because agents sometimes happen to be committee decision-makers or donors only demonstrates the law's "dramatic mismatch." *AFPF*, 594 U.S. at 612. If the State really wants information about decision-makers and donors, its law should require that a communication display the names of decision-makers and donors. The State has not shown why that would fail to serve its interests.

Colorado "is not free to enforce *any* [requirement] that furthers its interests." *AFPF*, 594 U.S. at 613. Because it has failed to "demonstrate its need for [the speech mandate] in light of any less intrusive alternatives," the law is unconstitutional. *Id.*

III. THE SPEECH MANDATE IS UNCONSTITUTIONALLY PROLIX

The committee's travails further demonstrate the unconstitutional prolixity of Colorado's campaign finance regime. "Prolix laws chill

speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Citizens United*, 558 U.S. at 324 (quotation marks omitted). The First Amendment prohibits laws that thus "force speakers to retain a campaign finance attorney ... before discussing the most salient political issues of our day." *Id.*

Colorado's campaign finance regime has a history of such convoluted complexity. Fifteen years ago, the Tenth Circuit noted that "[t]he average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth in Colorado's constitution, the Campaign Act, and the Secretary of State's Rules." *Sampson*, 625 F.3d at 1259. At that time, "[t]he Secretary of State's website acknowledged that the State's campaign finance laws and rules 'are complex,'" and an official "testified that she advises those with difficult questions to retain an attorney." *Id.* at 1260 (citation omitted).

Nonetheless, the State has repeatedly praised its complex system, even stating that the legislature built on its "success" by multiplying and extending requirements. CF 509, Op. Br. 37. About the time of

Sampson's criticisms, the General Assembly added a registered agent "disclaimer" requirement for certain communications. Op. Br. 36. In yet another bill, it created a disclaimer requirement for committees like No on EE, but did not require registered agents. *Id*. And with yet another bill in 2019, it "buil[t] on the success of the disclaimer requirement by expanding it to" other communications and speakers. *Id*. at 37.

The General Assembly only increased the snarl of constitutional, statutory, and regulatory requirements. McDonald testified that she is a professional campaign consultant who worked "a lot" with the Campaign Finance Office, CF 152, 172; she believes "that voters deserve to know" more about campaign finances than required by law, CF 170; she sent an "experienced compliance officer ... to attend [the Secretary's] Webinar ... to ensure ... full compliance and [learn] any new information," CF 169; she had the compliance officer call the Campaign Finance Office to verify "rules and processes," *id*.; and the committee worked with TV stations that "are strict … and will not run ads without the correct disclaimer," CF 170. These efforts to meet and exceed Colorado's requirements still resulted in a violation. And Colorado's

laws did not just confuse the committee. *See* CF 77 (other groups in violation); CF 170 (TV stations).

The State's description of the changes to its "disclaimer" requirements over the years evidences continually moving goalposts. Op. Br. 36-38; CF 509-10. And this after the Tenth Circuit warned that the entire regime was too "complex." *Sampson*, 625 F.3d at 1259-60. The First Amendment forbids what the State has created, a system "that force[s] speakers to retain a campaign finance attorney" just to speak. *Citizens United*, 558 U.S. at 324.

IV. THE COMMITTEE PRESERVED ITS CONSTITUTIONAL ARGUMENTS

Caselaw, the committee's actions, and the decisions below show that the committee did not waive its constitutional challenges.

A. Caselaw does not support waiver.

The State argues that authorities are split over whether arguments not raised before an ALJ are preserved. Op. Br. 31-32. For its supposed weight of authority favoring waiver, the State relies on *Williams v. Indus. Claim Appeal Off.*, 128 P.3d 335 (Colo. App. 2006), which was reversed on other grounds in *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006), and which appears to have been followed by only two other

courts. *See Carr v. Indus. Claim Appeals Off. of State*, No. 10CA0164, 2011 Colo. App. LEXIS 2973, at *11 (Colo. App. Jan. 20, 2011); *Schwartz v. Indus. Claim Appeals Off. of State*, No. 13CA0031, 2013 Colo. App. LEXIS 2334, at *8 (Colo. App. June 13, 2013).

But the weight of contemporary authority holds that a party may first raise constitutional arguments on appeal, especially where an agency may lack authority to review them. *See Kinterknecht v. Industrial Com.*, 485 P.2d 721, 724 (Colo. 1971) (only "judicial branch" may review constitutionality); *Arapahoe Roofing & Sheet Metal, Inc. v. Denver*, 831 P.2d 451, 454 (Colo. 1992) (reviewing cases); *see also Weinberger v. Salfi*, 422 U.S. 749, 767 (1975) (exhaustion "[p]lainly" satisfied if only constitutional claim remains); *INS v. Chadha*, 462 U.S. 919, 942 (1983) (constitutionality "a decision for the courts"); *Video Gaming Consultants, Inc. v. S.C. Dep't of Revenue*, 535 S.E.2d 642, 645 (S.C. 2000) (noting general rule that courts can decide constitutionality without administrative ruling).

Moreover, the court in *United Airlines v. Indus. Claim Appeals Off. of Colo.*, 2013 COA 48, rejected *Williams* because it may have misinterpreted caselaw about the scope of administrative authority and

the need for prior administrative review. *Id.* at ¶ 29. And multiple courts have followed *United Airlines*. *See Kenno v. Governor's Off. of Info. Tech.,* Nos. 21CA1948, 22CA0893, 2024 Colo. App. LEXIS 1791, at *10 (Colo. App. Feb. 29, 2024); *Russell v. Indus. Claim Appeals Off. of State*, No. 23CA0471, 2024 Colo. App. LEXIS 2578, at *10 (Colo. App. Jan. 11, 2024); *Becirovic v. Indus. Claim Appeals Off. of State*, No. 17CA1505, 2018 Colo. App. LEXIS 2416, at *5 (Colo. App. Aug. 16, 2018); and *Farmer v. Colo. Parks & Wildlife Comm'n*, 2016 COA 120, ¶ 16.

Both caselaw and the statute here cast doubt on the agency's authority to review constitutional issues. First, this Court held that "constitutionality is a matter to be raised by writ of error after the executive has performed its functions." *Colo. Dep't of Revenue v. Dist. Ct. of Cty. of Adams*, 470 P.2d 864, 867 (Colo. 1970). Second, the ALJ here lacked even the authority to make a final decision. § 1-45-111.7(6)(b), C.R.S.; CF 429-430 (discussing ALJ error in failing to submit decision to the Secretary). And the Secretary "is given the duty to see that the laws are faithfully executed," *Goebel v. Colo. Dep't of Insts.*, 764 P.2d 785, 800 (Colo. 1988), not the authority or inclination to

declare them unconstitutional. Third, the statutory scheme here specifically commissions the courts to review constitutionality. *See*, *e.g.*, § 1-45-111.7(6)(b), C.R.S. (final decision subject to judicial review under § 24-4-106); § 24-4-106(7), C.R.S. ("*The court shall* hold unlawful and set aside the agency action ... if ... [c]ontrary to constitutional right...." (emphasis added)); *id.* ("the court shall determine all questions of law").

B. The committee preserved its challenges.

Moreover, the committee preserved its challenges at each stage. Colorado requires only that a party "serve notice of the claim asserted, since the substance of the claim rather than the appellation applied to the pleading by the litigant controls." *Lafond v. Basham*, 683 P.2d 367, 369 (Colo. App. 1984) (citation omitted). The committee's arguments before the ALJ and the district court gave notice that the State needed to demonstrate important governmental interests, a relationship to those interests, and narrow tailoring.

Properly recognizing that the committee appeared pro se before the ALJ, the committee did not waive its as-applied arguments. Courts have a duty to "to ensure [that pro se parties are] not denied review of important constitutional issues" by "broadly constru[ing]" pleadings and

arguments. *People v. Bergerud*, 223 P.3d 686, 696-97 (Colo. 2010); *see also Rather v. Conte*, 849 P.2d 884, 885 (Colo. App. 1992) (complaint "liberally construed"); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (interpreting to "state a valid claim … despite the plaintiff's failure to cite proper legal authority"). And courts have applied this principle to appellate waiver. *See Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d Cir. 2013) (applying "relevant legal principle").

A pro se party retains only the "burden of presenting sufficient factual allegations on which a recognized legal claim could be based." *People v. Gess*, No. 17CA1497, 2019 Colo. App. LEXIS 2296, at *7-8 (Colo. App. Aug. 8, 2019). McDonald did so. She argued that the speech mandate failed tailoring because voters could get the agent's name from the Secretary's website, and that voters had to visit the website anyway. CF 171. And she argued that the law lacked a nexus because it failed to inform voters as to the agent's identity and was overly burdensome considering the "actual benefit to the voter." CF 171 and 180. McDonald may not have named "the relevant legal principle," *Mala*, 704 F.3d at 244, but she made the allegations necessary to put the State on notice. And the courts should have "broadly construed [her

arguments] to ensure [the committee was] not denied review of important constitutional issues." *Bergerud*, 223 P.3d at 696.

The committee's arguments and requested relief before the district court challenged the speech mandate both as applied and facially. It argued that there was no relationship between the speech mandate and the government's asserted interests as applied to the committee: given nineteen Coloradans share the agent's name, and the fact that whether any given agent plays any role in a campaign is a matter of pure speculation and happenstance, the agent's name "provide[d] no substantive information to the electorate." CF 480.

The committee's other arguments attacked the registered agent speech mandate facially, i.e., in general and thus beyond the committee's circumstances. The committee argued that the speech mandate failed tailoring—that not only could voters get the agent's name from the Secretary's website, but to make use of the name at all they had to go to the website. CF 480.

The arguments also attacked the speech mandate's necessary nexus, arguing that the State had "identifie[d] no governmental interest to be achieved through the disclosure." CF 480. And pointing to

circumstances outside the committee, the committee argued that the speech mandate is "unduly burdensome." CF 480-81.

Finally, the committee asked for both as-applied and facial relief. First, to vacate the action and fine against the committee. CF 485. Second, to hold that the speech mandate violated the First Amendment. *Id.*

The committee therefore made facial arguments—extending to circumstances beyond its own—and requested facial relief—that the law be declared unconstitutional. *See Citizens United*, 558 U.S. at 331 (examining "breadth of the remedy"). The State had notice of the constitutional challenges, but it failed to marshal evidence and defend against them.

C. The rulings below preserved the challenges.

Finally, the district court addressed both the as-applied and facial challenges on the merits. CF 528-37. Accordingly, the court of appeals had jurisdiction to rule on both challenges, and it properly held that the speech mandate violates the First Amendment. *See, e.g.*, *Brown v. Am. Standard Ins. Co.*, 2019 COA 11, ¶ 23 (preserved where court "recognized [the] contention" and "ruled on" it); *No on EE*, ¶ 13

(compiling authority); *see also Citizens United*, 558 U.S. at 330 (permitting "review … so long as it has been passed upon" (cleaned up)).

CONCLUSION

For the reasons above, the Court should affirm the decision of the Court of Appeals.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the above-captioned Answer Brief was served via CCEF this 3rd day of December, 2025, to the following:

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