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SUMMARY
August 1, 2024

2024COA79

No. 22CA2245, *No on EE v. Beall* — Constitutional Law — First Amendment — Freedom of Speech; Election Law — Fair Campaign Practices Act — Disclaimer Statement — Registered Agent Disclosure

A division of the court of appeals holds that section 1-45-108.3(1), C.R.S. 2023, violates the First Amendment to the United States Constitution insofar as it requires an issue committee to disclose the name of its registered agent in election-related communications to the public. The dissent concludes that the facial challenge was not adequately developed in the district court or on appeal, and would therefore not address it. Alternatively, the dissent concludes that the registered agent disclosure requirement is narrowly tailored to serve an important governmental interest and the facial challenge therefore fails.

COLORADO COURT OF APPEALS **2024COA79**

Court of Appeals No. 22CA2245
City and County of Denver District Court No. 21CV33166
Honorable Marie Avery Moses, Judge

No on EE — A Bad Deal for Colorado, Issue Committee,

Plaintiff-Appellant,

v.

Christopher Beall, in his official capacity as Colorado Deputy Secretary of State; and Jena Griswold, in her official capacity as Colorado Secretary of State,

Defendants-Appellees.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE J. JONES
Hawthorne*, J., concurs
Schutz, J., dissents

Announced August 1, 2024

West Group Law and Policy, Suzanne M. Taheri, Denver, Colorado, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Peter G. Baumann, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Plaintiff, No on EE — A Bad Deal for Colorado, Issue Committee (No on EE), appeals the district court's judgment affirming a final agency order by the Deputy Secretary of State, defendant Christopher Beall, fining it for violating section 1-45-108.3, C.R.S. 2023, of the Fair Campaign Practices Act (the Act), sections 1-45-101 to -118, C.R.S. 2023.

¶ 2 As relevant in this case, section 1-45-108.3 requires an "issue committee" such as No on EE to disclose certain information in or on a "communication" supporting or opposing a "ballot issue or ballot question . . . that is broadcast, printed, mailed, delivered; placed on a website, streaming media service, or online forum for a fee; or that is otherwise distributed." § 1-45-108.3(1).[1] The information that must be disclosed includes (again, as relevant in this case) the name of the "person" (as defined in article XXVIII, section 2(11) of the Colorado Constitution, *see* § 1-45-103(13), C.R.S. 2023) paying for the communication and the name of the "natural person who is the registered agent [of the entity paying for

[1] This requirement applies only if the issue committee spent more than $1,000 on such a communication in a calendar year. § 1-45-108.3(1), C.R.S. 2023.

the communication] if [that entity] is not a natural person." § 1-45-107.5(5)(a)(I)-(II), C.R.S. 2023; § 1-45-108.3(1)-(2).

¶ 3 The Deputy Secretary affirmed and modified the initial decision of an administrative law judge (ALJ) who had found that No on EE had failed to identify its registered agent on numerous communications during the 2020 election cycle.

¶ 4 On appeal from the district court, No on EE raises several arguments for reversal. One — whether the registered agent disclosure requirement is constitutional — is dispositive. We hold that this compelled speech requirement violates the Free Speech Clause of the First Amendment to the United States Constitution. We therefore vacate the district court's judgment and the final agency decision.

I. Background

¶ 5 No on EE was formed in 2020 to oppose a statewide tobacco and nicotine tax measure — Proposition EE — that was to be on the November 2020 ballot. There is no dispute that No on EE is an "issue committee" as defined in the Colorado Constitution and the Act. *See* Colo. Const. art. XXVIII, § 2(10); § 1-45-103(12). As required by sections 1-45-108(3.3) and -109(1)(c), C.R.S. 2023, No

on EE registered with the Secretary of State's office. *See also* Colo. Const. art. XXVIII, § 2(1); § 1-45-103(1). Its registration included the information required by section 1-45-108(3), such as the name of the natural person authorized to act as its registered agent, the address and telephone number for its principal place of operations, and its purpose. *See* § 1-45-108(3)(b), (c), (e), (3.3).

¶ 6 No on EE spent several million dollars on communications opposing Proposition EE during the 2020 election cycle. It concedes that its communications were "communications" subject to the disclosure requirement of section 1-45-108.3. Initially, No on EE's election-related communications included its name as the entity paying for the communications but did not identify its registered agent.

¶ 7 About one month before the election, a citizen, referencing a variety of materials and reports No on EE had filed with the Secretary of State, filed a campaign finance complaint with the Secretary alleging that No on EE had violated and was violating section 1-45-108.3(1) by failing to disclose its registered agent's name on its election-related communications. By that time, No on EE had spent between 3 and 3.5 million dollars on such

communications. Immediately upon receiving the complaint, No on EE altered its communications to include its registered agent's name.

¶ 8 Following an investigation, the Secretary of State's Elections Division filed a complaint with the Office of Administrative Courts. *See* § 1-45-111.7(3), (5), C.R.S. 2023. The matter was heard by an ALJ, who issued an initial decision finding that No on EE had violated the registered agent disclosure requirement. The ALJ imposed a fine of $10,000 under Department of State Rule 23.3, 8 Code Colo. Regs. 1505-6.[2]

¶ 9 Neither No on EE nor the Elections Division filed exceptions to the ALJ's initial decision. Ordinarily, that would have rendered the initial decision a final order not subject to review, including judicial review. *See* § 24-4-105(14)(b)(III), (14)(c), C.R.S. 2023; *Lanphier v. Dep't of Pub. Health & Env't*, 179 P.3d 148, 151 (Colo. App. 2007).

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[2] The Elections Division requested a fine of between $150,000 and $350,000 based on the amount of communication expenditures. Because neither the Colorado Constitution nor any Colorado statute sets forth a monetary penalty for the type of campaign finance violation at issue, under section 1-45-111.5(1), C.R.S. 2023, the penalty is governed by a rule adopted by the Secretary of State — Department of State Rule 23.3, 8 Code Colo. Regs. 1505-6. No on EE doesn't challenge that rule.

But in this case, the Deputy Secretary initiated agency review on his own motion. *See* § 1-45-111.7(6)(b); § 24-4-105(14)(a)(II).

¶ 10 The Deputy Secretary affirmed the ALJ's factual findings but modified the penalty by increasing it to $30,000. The Deputy Secretary reasoned that $10,000 was insufficient to deter future unlawful conduct, though there were mitigating factors — primarily that No on EE began complying after receiving the complaint — justifying a reduction from the amount sought by the Elections Division. No on EE then sought review in district court. *See* § 1-45-111.7(6)(b) ("The final agency decision is subject to review under section 24-4-106."); § 24-4-106(3), (4), C.R.S. 2023 (providing for judicial review of agency action in district court).

¶ 11 No on EE's district court complaint asserted that the registered agent disclosure requirement violates the First Amendment, the fine violates the Eighth Amendment's excessive fines prohibition, and the Deputy Secretary abused his discretion by imposing a $30,000 penalty. Following briefing (there was no hearing), the district court affirmed the Deputy Secretary's final agency order. As for No on EE's First Amendment claim, the court said it was "unclear . . . whether No on EE is making an as applied

or facial First Amendment challenge to the disclosure requirement." (Footnotes omitted.) It considered, and rejected, both. And it rejected No on EE's Eighth Amendment and abuse of discretion claims.

II. Discussion

¶ 12 No on EE raises four arguments for reversal on appeal: (1) the district court violated No on EE's right to due process by rejecting its as-applied First Amendment challenge based on its failure to raise that challenge with the ALJ;[3] (2) the registered agent disclosure requirement violates the First Amendment as applied to No on EE; (3) the registered agent disclosure requirement violates the First Amendment on its face; and (4) the $30,000 penalty violates the Eighth Amendment. We agree with No on EE's third argument and don't address the others.

¶ 13 The Secretary of State and the Deputy Secretary (the two named defendants) argue that we should decline to review No on EE's facial challenge to the registered agent disclosure requirement

[3] Though the district court rejected the as-applied challenge on this basis, the court also rejected it on the merits.

because No on EE didn't raise it in the district court.[4] But as they concede, the district court thought there was enough in the complaint to raise the issue for judicial review, and the district court addressed it on the merits. We view the complaint similarly. Therefore, the issue is preserved. *See Brown v. Am. Standard Ins. Co. of Wis.*, 2019 COA 11, ¶¶ 21-23 (issue preserved where the district court recognized and addressed it); *Battle N., LLC v. Sensible Hous. Co.*, 2015 COA 83, ¶ 13 (despite ambiguity in the party's presentation, issue was preserved where the district court ruled on it); *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010) (issue preserved for appeal where the party presented the "sum and substance" of it to the district court); *see also Gravina Siding & Windows Co. v. Gravina*, 2022 COA 50, ¶ 30 (the merits of

[4] A party isn't required to raise a facial constitutional challenge in agency proceedings to preserve it for judicial review because an agency doesn't have authority to determine that issue. *See Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1198 (Colo. 1993); *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 504 (Colo. App. 2010) (addressing a challenge to Colo. Const. art. XXVIII, § 2(10)(a)(I)).

a district court's ruling are reviewable on appeal even if the district court addressed the issue sua sponte).[5]

¶ 14 The dissent says we shouldn't address the facial challenge because it is "undeveloped." But that just isn't so. No on EE's opening brief asserts that "the registered agent disclosure requirement fails on both 'as applied' and facial grounds," goes on to invoke the "exacting scrutiny" and "narrowly tailored" test — which, as discussed below, applies to a facial challenge to a compelled speech requirement — and then goes on for several pages arguing why the registered agent disclosure requirement doesn't satisfy that test, discussing facial challenge case law along the way. Perhaps the opening brief doesn't go into law-review-article depth on the issue, but it certainly develops the argument. We turn, then, to the merits.

A. Standard of Review

¶ 15 Section 24-4-106(7) governs judicial review of agency action. It provides several limited bases for setting aside an agency action,

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[5] The complaint filed in the district court expressly asserts that the disclosure requirement fails the test applicable to facial challenges to compelled disclosure requirements under the First Amendment and cites cases addressing such challenges.

one of which is that it is "[o]therwise contrary to law." § 24-4-106(7)(b)(IX).

¶ 16 No on EE's facial challenge to the registered agent disclosure requirement presents a pure question of law. We review such questions de novo. *See Aurora Pub. Schs. v. A.S.*, 2023 CO 39, ¶ 36; *Campaign Integrity Watchdog v. All. for a Safe & Indep. Woodmen Hills*, 2018 CO 7, ¶ 19; *see also Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1275 (10th Cir. 2016) (reviewing de novo a constitutional challenge to registration and disclosure requirements imposed by Colo. Const. art. XXVIII and the Act).

B. Applicable Law

¶ 17 Before setting forth the law applicable to the question before us, we emphasize what is not before us. No on EE doesn't challenge the requirement that an issue committee disclose the name of its registered agent when it registers with the Secretary of State. *See* § 1-45-108(3), (3.3).[6] It only challenges the requirement that an issue committee disclose the name of its registered agent in covered election-related communications to the voting public.

[6] The registered agent's identity can be seen by members of the public on the Secretary of State's website.

¶ 18 It appears to be settled law that such a disclosure requirement can withstand a First Amendment challenge only if it survives "exacting scrutiny" and is "narrowly tailored" to the government's asserted interest in requiring the disclosure. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607-12 (2021) (Roberts, C.J., joined by Kavanaugh and Barrett, JJ., in the discussion of exacting scrutiny, and joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ., in the discussion of narrow tailoring); *id.* at 622 (Alito, J., joined by Gorsuch, J., concurring in part and concurring in the judgment) (agreeing that a requirement to disclose the names and addresses of major donors to the state attorney general failed exacting scrutiny but opining that strict scrutiny could apply to some disclosure requirements); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010) (applying exacting scrutiny to a requirement that televised electioneering communications disclose the name and address of the person or group that funded the advertisement); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (applying exacting scrutiny to a challenge to a requirement to disclose certain information to the FEC); *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1243-47 (10th Cir. 2023); *No on E, San Franciscans*

Opposing the Affordable Hous. Prod. Act v. Chiu, 62 F.4th 529, 538-44 (9th Cir. 2023); *Campaign Integrity Watchdog*, ¶ 39 (applying exacting scrutiny to a contribution reporting requirement).[7]

¶ 19 Under the exacting scrutiny standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe v. Reed*, 561 U.S. 186, 196 (2010); *accord Citizens United*, 558 U.S. at 366-67; *Buckley*, 424 U.S. at 64; *Campaign Integrity Watchdog*, ¶ 39. "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Doe*, 561 U.S. at 196 (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008)); *accord Ams. for Prosperity Found.*, 594 U.S. at 607-08 (Roberts, C.J., joined by Kavanaugh and Barrett, JJ.) (plurality opinion); *No on E*, 62 F.4th

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[7] In this context, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)); *accord Moody v. NetChoice, LLC*, ___ U.S. ___, ___, 144 S. Ct. 2383, 2397 (2024). Failure to satisfy the "exacting scrutiny" test necessarily means the statute is unconstitutionally overbroad under that standard. *Ams. for Prosperity Found.*, 594 U.S. at 607-12.

at 539. But that "is not enough to save a disclosure regime that is insufficiently tailored." *Ams. For Prosperity Found.*, 594 U.S. at 609 (Roberts, C.J., joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ.).[8]

¶ 20 "Narrow tailoring is crucial where First Amendment activity is chilled — even if indirectly — '[b]ecause First Amendment freedoms need breathing space to survive.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The means need not be the least restrictive to achieve the interest the disclosure requirement promotes, but they must be "in proportion to the interest served." *Id.* (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014)). This requires us to consider whether the government has "demonstrate[d] its need" for the disclosure requirement "in light of any less intrusive alternatives." *Id.* at 613; *see McCullen v. Coakley*, 573 U.S. 464, 494 (2014); *Wyo. Gun Owners*, 83 F.4th at 1247.

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[8] *Rio Grande Foundation v. Oliver*, ___ F. Supp. 3d ___, 2024 WL 1345532 (D.N.M. Mar. 29, 2024), contains a very helpful discussion of the state of the law in this area.

C. Analysis

¶ 21 We conclude that the registered agent disclosure requirement does not withstand exacting scrutiny.

¶ 22 To begin, we examine the state's purported important governmental interest.

¶ 23 The cases addressing disclosure requirements for election-related communications directed to the voting public have concerned, almost exclusively, required disclosures of the person or entity making or paying for the communication or (in some cases, and) financial donors supporting the communication. In *Citizens United*, for example, the Court considered a statute requiring that televised election-related communications funded by anyone other than a candidate say who was responsible for the content of the advertisement and display the name and address of the person or group funding the advertisement. 558 U.S. at 366; *see also No on E*, 62 F.4th at 532-34 (compelled disclosure of major donors in advertisements supporting or opposing a candidate for municipal office); *Gaspee Project v. Mederos*, 13 F.4th 79, 83 (1st Cir. 2021) (compelled disclosure of name of the organization supporting or opposing a referendum and the names of its five largest donors on

the electioneering communication itself); *cf. Wyo. Gun Owners*, 83 F.4th at 1229, 1231 (compelled statement of donors paying for an election-related communication to the Wyoming Secretary of State, which is information thereby made available to the public); *Indep. Inst. v. Williams*, 812 F.3d 787, 789-90 (10th Cir. 2016) (compelled disclosure of financial donors who funded an advertisement in reports to the Colorado Secretary of State, which is information thereby made available to the public); *Smith v. Helzer*, 614 F. Supp. 3d 668, 673 (D. Alaska 2022) (compelled disclosure of donors to organizations that made independent expenditures in candidate elections in reports to the Alaska Public Offices Commission).

¶ 24 Neither the parties nor the dissent cites any case, and we haven't found one, dealing with the type of disclosure requirement before us.[9] Nonetheless, we find some guidance in the compelled disclosure cases addressing organizations supporting or opposing candidates or ballot measures and their donors.

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[9] Our research discloses that Colorado is the only state in the Union to require disclosure of the registered agent's name in an election-related communication. Nor do federal laws require such disclosure.

¶ 25 In *Buckley*, the Court recognized three legitimate justifications for requiring reporting and disclosure of campaign finances:

> (1) such reporting and disclosure is essential to detecting violations of contribution limits; (2) publicizing large contributions can deter actual corruption or the appearance of corruption; and (3) providing information about such finances can give the voters a better understanding of a candidate's place on the "political spectrum" and the interests to which the candidate is "most likely to be responsive." 424 U.S. at 67-68; *see Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010); *Campaign Integrity Watchdog*, ¶ 40; *see also Citizens United*, 558 U.S. at 367 (recognizing the governmental interest in "'provid[ing] the electorate with information' about the sources of election-related spending" (quoting *Buckley*, 424 U.S. at 66)).

¶ 26 But as the Tenth Circuit Court of Appeals has recognized, the first and second of these justifications don't really apply to disclosure requirements for ballot-issue committees (like No on EE).

Sampson, 625 F.3d at 1256.[10] And the defendants in this case don't rely on either justification.

¶ 27 That leaves the informational interest, to which courts have continued to give weight in this context. *See, e.g.*, *Citizens United*, 558 U.S. at 367; *No on E*, 62 F.4th at 540; *Gaspee Project*, 13 F.4th at 86. *But see Sampson*, 625 F.3d at 1256-57 (casting doubt of the validity of this justification in the ballot issue context). Keep in mind, however, that this interest has heretofore been cast as one concerning the name of the person or entity paying for a candidate's or an issue committee's election-related activities, such as advertising, or the sources of money (donors) funding such activities. There can be no serious argument that requiring an issue committee to disclose the name of its registered agent serves the governmental interest in informing the public about an issue

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[10] The dissent says we rely too heavily on *Sampson*. But we cite it only for the purpose of indicating that there is a legitimate question whether certain of the governmental interests recognized in *Buckley* apply, as a logical matter, in the ballot issue context. The *Sampson* court's discussion of that question didn't turn on the fact the plaintiff raised an as-applied challenge, as the dissent suggests, but on distinctions between candidates for office and ballot issues. In any event, no one has suggested that either of the first two interests recognized in *Buckley* are implicated by the registered agent disclosure requirement.

committee's sources of funding. There is no requirement in Colorado law that the registered agent be a donor to an issue committee, much less a significant donor. Thus, to the extent the state would assert such an interest in this context, there would be a "dramatic mismatch . . . between the interest [the state] seeks to promote and the disclosure regime that [it] has implemented in service of that end." *Ams. for Prosperity Found.*, 594 U.S. at 612.

¶ 28 The district court found that the state has an informational interest in "provid[ing] voters with more information about the person speaking," and that the disclosure requirement furthers this interest by obligating an issue committee to "identify[] at least one person associated with the issue committee." On appeal, the defendants try to provide a little more specificity. They say the informational interest is identifying "the legal face of the organization" or "ensur[ing] [Colorado's] voters know the name of a person associated with an organization."

¶ 29 Assuming that this purported informational interest is "important," we aren't satisfied that there is a "substantial relation" between the registered agent disclosure requirement and that interest. *Doe*, 561 U.S. at 196. As we see it, the question in this

context is whether the information the issue committee must disclose in its communications to the voting public will materially assist voters in determining how to cast their ballots. *See McConnell v. Fed. Elections Comm'n*, 540 U.S. 93, 197 (2003) (acknowledging the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace" (quoting *McConnell v. Fed. Elections Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003))), *overruled on other grounds by Citizens United*, 558 U.S. 310. But the defendants haven't shown that knowing the name of an issue committee's registered agent will materially assist voters, at least not to the extent required by the "substantial relation" test.

¶ 30 The registered agent can be any natural person. § 1-45-108(3)(b). There is no requirement in the law that such person have any other connection to the issue committee. The registered agent doesn't have to be an organizer, officer, or employee of the issue committee, nor, as previously noted, does that person have to be a donor to the issue committee. The only role of a registered agent expressly identified in the Act is to report to the Secretary of State when a "small-scale issue committee" becomes subject to the Act's

requirements for issue committees. § 1-45-108(1.5)(c)(III). The registered agent is not even the person on whom a citizen would serve a campaign finance violation complaint. Such complaints must be filed with the Secretary of State. § 1-45-111.7(2).[11]

¶ 31 Perhaps the Elections Division serves the registered agent with notice of curable violations, *see* § 1-45-111.7(3)(b)(II) ("[T]he division shall notify the respondent and provide the respondent an opportunity to cure the violations."); requests for information in the course of an investigation of a possible campaign finance violation, *see* § 1-45-111.7(5)(a)(II); or a campaign finance violation complaint, *see* § 1-45-111.7(5)(a)(IV), but the Act isn't clear on these matters. More importantly, even if the Elections Division may serve the registered agent with notices, requests, and complaints relating to campaign finance violations, that doesn't make the registered

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[11] The dissent says, "The registered agent of an issue committee may also serve as an organizer, board member, employee, or significant donor of the committee." *Infra* ¶ 87. But in this context, maybe isn't enough. And in any event, complying with the disclosure requirement wouldn't tell anyone whether a registered agent is also connected to the issue committee in any such capacity. Indeed, in this case, the registered agent is merely the brother of a "political consultant" who claims to be "in charge of the issue committee." The defendants don't even assert that knowing this registered agent's name told the voters anything useful.

agent's identity something a voter would likely take into consideration when determining how to vote on a ballot measure. Indeed, the defendants don't even try to explain how knowing the name of the registered agent — as opposed to some other person with a closer connection to the issue committee — will *actually* assist voters.[12]

¶ 32 In sum, the registered agent is the "legal face" of the issue committee only in a very limited sense, and not in any sense that has relevant meaning to the voting public. That person's identity may not tell the voter anything about "where political campaign money comes from," *Buckley*, 424 U.S. at 66 (quoting H.R. Rep. No. 92-564, at 4 (1971)); *see also Gaspee Project*, 13 F.4th at 91 ("[O]n-ad donor information is a more efficient tool for a member of the public who wishes to know the identity of the donors backing the speaker."); the true purpose of independent groups "hiding behind dubious and misleading names," *McConnell*, 540 U.S. at 197

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[12] The registered agent may be the person a plaintiff would serve with process in an action against an issue committee unrelated to violations of the Act. But we fail to see how that fact renders the registered agent's identity valuable in terms of affecting a person's decision how to vote on a ballot measure.

(quoting *McConnell*, 251 F. Supp. 2d at 237); or even "who supports and opposes ballot measures," *Fam. PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012).[13] And contrary to the dissent's position, the mere possibility that disclosure of the registered agent's name might, in some cases, provide relevant information to someone can't be sufficient if "exacting scrutiny" is to mean anything. *See Ams. for Prosperity Found.*, 594 U.S. at 612-13 (noting the "dramatic mismatch" between the state's asserted ends and the means employed, and holding that exacting scrutiny isn't satisfied by "*any* disclosure regime that furthers [the state's] interests" and that a disclosure requirement that furthers a governmental interest "in

[13] We assume for purposes of our decision that these are legitimate governmental interests in this context.

some cases . . . falls far short of satisfying the means-end fit that exacting scrutiny requires").[14]

¶ 33 Lastly, we address the dissent's heavy reliance on the fact No on EE doesn't challenge the requirement that it disclose the name of its registered agent to the Secretary of State. We assume that such a disclosure serves a legitimate interest: as discussed, the Secretary of State needs to know whom to serve with documents. But that interest isn't implicated in any way by the disclosure requirement at issue in this case. And the dissent doesn't cite any authority for the novel proposition that because the state can legitimately compel disclosure in one context it can necessarily compel disclosure in a different context. Each such category of

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[14] The dissent relies on a case in which a *donor* disclosure requirement was at issue, *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021). That case doesn't stand for the broad proposition that the government has a substantial interest in reminding the public that human beings form issue committees. Rather, it says that an "on-ad *donor* disclaimer provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names." *Id.* at 91 (emphasis added). The defendants haven't asserted, much less shown, that identifying issues committees' registered agents on election-related communications to the public will enable a similar frequency or degree of such "evaluat[ion]." As noted, under the statute, the registered agent need not be a person who is part of or involved in forming an issue committee, nor need the registered agent be a donor to an issue committee.

compelled disclosure must stand or fall on its own merits, following the application of the "exacting scrutiny" test. *See Ams. for Prosperity Found.*, 594 U.S. at 617-18 (rejecting the state's argument that it could require disclosure to it of certain donor information because that information is already disclosed to the Internal Revenue Service; "each governmental demand for disclosure brings with it additional chill" and the state's and the IRS's disclosure requirements presented different issues).

¶ 34 Because there isn't a substantial relationship between the compelled disclosure requirement and a sufficiently important governmental interest, it follows that the registered agent disclosure requirement imposed on issue committees under section 1-45-108.3 violates issue committees' free speech rights under the First Amendment.[15]

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[15] Because of our determination that the defendants have failed to identify a sufficiently important governmental interest served by the registered agent disclosure requirement, we don't need to decide whether the disclosure requirement is narrowly tailored. But we observe that for many of the same reasons the disclosure requirement fails the first part of the "exacting scrutiny" test, it would also appear not to be "narrowly tailored" to serve the government's purported interest. *See Ams. for Prosperity Found.*, 594 U.S. at 613-18.

III. Disposition

¶ 35 The district court's judgment is vacated, and the case is remanded to the Deputy Secretary to dismiss the complaint. *See* § 1-45-111.7(3)(b)(I).

JUDGE HAWTHORNE concurs.

JUDGE SCHUTZ dissents.

JUDGE SCHUTZ, dissenting.

¶ 36 "[D]eclaring a statute unconstitutional is one of the gravest duties impressed upon the courts," one which we undertake only upon proof beyond a reasonable doubt that a statute is unconstitutional. *People v. Moreno*, 2022 CO 15, ¶ 9 (quoting *People v. Graves*, 2016 CO 15, ¶ 9). The majority opinion concludes that No on EE has met this substantial burden. For two reasons, I respectfully disagree with this conclusion.

¶ 37 First, No on EE did not adequately develop the constitutional facial challenge that is the heart of the majority opinion. Second, even if we were to reach this undeveloped issue, the facial challenge fails on the merits. For these reasons, I dissent.

¶ 38 Because I also conclude that the fine imposed on No on EE was not unconstitutionally disproportionate, I would affirm the district court's opinion.

I. Factual Background

¶ 39 As the majority notes, it is undisputed that No on EE is a single purpose issue committee formed to oppose Proposition EE, a proposed tobacco and nicotine tax measure that appeared on the November 2020 ballot. No on EE's activities were funded almost

entirely by a single cigarette manufacturer, Liggett Vector Brands, LLC. No on EE spent more than $4 million on billboards, television advertisements, streaming ads, and a small number of door hangers expressing opposition to Proposition EE.

¶ 40 As an issue committee, No on EE was required to disclose the "person" paying for its election-related communications. § 1-45-107.5(5)(a)(I)-(II), C.R.S. 2023; § 1-45-108.3(1)-(2), C.R.S. 2023. For purposes of campaign practices, the Colorado Constitution defines a "person" as "any natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons." Colo. Const. art. XXVIII, § 2(11). Because No on EE is not a living entity, it was also required to disclose on its election-related communications the name of the natural person — i.e., a human being — who served as its registered agent. That person was Patrick McDonald. Mr. McDonald is the brother of Sheila McDonald, who described herself as a political consultant, the officer in charge of No on EE, and the person who made all its strategic decisions and signed all its checks.

¶ 41 In early October 2020, after receiving notice of the citizen complaint filed with the Secretary of State, No on EE took immediate curative action to remediate its failure to comply with the registered agent disclosure requirement. Specifically, No on EE reprinted door hangers to add the name of the registered agent; added the registered agent's name to 30% of the committee's billboards (and took down those billboards that could not be corrected); revised No on EE's website to include the registered agent's name; and within thirty-six hours of the complaint, revised all its television, digital, and radio advertisements to include the name of the registered agent.

A. The Administrative Proceedings

¶ 42 At the hearing held on the complaint before an ALJ, No on EE did not raise any constitutional challenge — whether facial or as applied — to the registered agent disclosure requirement. Rather, No on EE focused on its mitigation efforts to support an argument that any fine should be minimal. The Secretary of State requested a fine of between $150,000 and $300,000, roughly 5-10% of No on EE's unlawful expenditures. The ALJ found that No on EE had violated the registered agent disclosure requirement but assessed a

minimal fee of $10,000 — approximately .0033% of No on EE's total unlawful expenditures.

¶ 43 As noted in the majority opinion, no party filed exceptions to the ALJ's findings and conclusion. But as authorized by statute, § 1-45-111.7(6)(b), C.R.S. 2023, the Deputy Secretary of State initiated a review of the ALJ's decision. The Deputy Secretary affirmed the ALJ's factual findings but increased the fine to $30,000, or roughly 1% of No on EE's unlawful expenditures.

B. The District Court Proceedings

¶ 44 No on EE appealed the Deputy Secretary's decision to the district court. *See id.*; *see also* § 24-4-106, C.R.S. 2023 (addressing judicial review of an agency decision). As noted in the majority opinion, the complaint asserted the registered agent disclosure requirement violates the First Amendment, the fine was disproportionate in violation of the Eighth Amendment, and the Deputy Secretary abused his discretion by imposing the $30,000 fine. Nowhere in the complaint did No on EE assert that it was making a facial challenge to the registered agent disclosure requirement.

¶ 45 In its brief in support of its complaint, No on EE elaborated on its First Amendment challenge, representing that it "challenges the necessity and thus the constitutionality, *as applied to its committee*, of the requirement to list the registered agent in campaign materials." (Emphasis added.) Again, No on EE made no mention of a facial constitutional challenge.[1]

¶ 46 In its order affirming the Deputy Secretary's decision, the district court noted that it struggled to determine whether the complaint intended to assert a facial or an as-applied challenge. Ultimately, the district court considered and rejected No on EE's

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[1] The majority opinion notes that the complaint references and applies the "test applicable to facial challenges," presumably referencing the complaint's argument that a disclosure requirement is subject to the exacting scrutiny standard, which requires that the statute be narrowly tailored to serve a sufficiently important governmental interest. *Supra* ¶ 13 n.5; *see Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607-12 (2021) (Roberts, C.J., joined by Kavanaugh and Barrett, JJ., in the discussion of exacting scrutiny, and joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, JJ., in the discussion of narrow tailoring). But courts consider the exacting scrutiny standard in both as-applied and facial challenges. Thus, the standard was referenced to support No on EE's as-applied challenge.

developed as-applied constitutional challenge,[2] as well as its undeveloped facial challenge. The district court also rejected No on EE's Eighth Amendment challenge to the amount of the fine and concluded that the assessed fine was well within the Deputy Secretary's discretion.

II. The Parties' Appellate Arguments

¶ 47 On appeal, as before the district court, No on EE asserts the registered agent disclosure requirement violates its First Amendment rights. With respect to this issue, No on EE concedes that it "did not raise constitutional objections during the administrative hearing." In describing the constitutional challenge it raised before the district court, No on EE's opening brief states that it contested "the necessity, and the constitutionality, *as applied to its committee*, of the requirement to list the registered agent in campaign materials." (Emphasis added.) Later in its

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[2] The district court rejected the as-applied challenge on the grounds that it was not asserted in the administrative proceedings and was therefore unpreserved. The court also rejected as unpreserved the specific argument that the registered agent disclosure requirement was not supported by a compelling governmental interest. The court then rejected the merits of No on EE's argument that the registered agent disclosure requirement is unduly burdensome.

opening brief, No on EE makes the conclusory statement that the "registered agent disclosure requirement fails on both 'as applied' and facial grounds." Aside from this single statement, No on EE's opening brief contains no argument, evidentiary reference, or rationale in support of a facial constitutional challenge to the registered agent disclosure requirement.[3]

¶ 48 No on EE also contends that the $30,000 fine was grossly disproportionate to its unlawful conduct, and that the Deputy Secretary abused his discretion by imposing the $30,000 fine.

¶ 49 The Secretary and Deputy Secretary of State argue that No on EE failed to preserve both its as-applied and facial First Amendment challenges. Indeed, they are so confident that the facial challenge is unpreserved, they do not substantively address it in their answer brief. With respect to the as-applied challenge, the Secretary and Deputy Secretary argue that, even if it was preserved,

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[3] In concluding that the facial challenge is developed on appeal, the majority relies on this single reference coupled with the fact that the opening brief discusses case law applying the exacting scrutiny standard. *Supra* ¶ 14. But as previously noted, we consider the exacting scrutiny standard in assessing both as-applied and facial challenges. No on EE's discussion of these standards in its opening brief was in furtherance of its self-described as-applied challenge, not a facial challenge.

it fails on the merits. Finally, they argue that the $30,000 fine is not constitutionally disproportionate and that the Deputy Secretary acted within his discretion by assessing the fine.

¶ 50 I turn now to the merits of the parties' contentions. I begin by addressing the First Amendment issues and then address whether the fine was within the Deputy Secretary's discretion and survives Eighth Amendment scrutiny.

III. The First Amendment Challenge

¶ 51 A party may challenge the constitutionality of a statute either on its face or as applied. "[A]n as-applied challenge alleges that the statute is unconstitutional as to the specific circumstances under which a defendant acted." *People v. Ford*, 232 P.3d 260, 263 (Colo. App. 2009). Subject to a limited exception discussed below, a party "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

¶ 52 We review challenges to the constitutionality of a statute de novo. *See, e.g.*, *Coffman v. Williamson*, 2015 CO 35, ¶ 13.

A. Preservation

¶ 53 "It is axiomatic that in civil cases, issues not raised in or decided by the trial court generally will not be addressed for the first time on appeal." *Brown v. Am. Standard Ins. Co. of Wis.*, 2019 COA 11, ¶ 21; *Gebert v. Sears, Roebuck & Co.*, 2023 COA 107, ¶ 25. "To properly preserve an argument for appeal, the party asserting the argument must present 'the sum and substance of the argument' to the district court." *Gebert*, ¶ 25 (quoting *Madalena v. Zurich Am. Ins. Co.*, 2023 COA 32, ¶ 50).

¶ 54 The preservation of constitutional challenges in administrative proceedings is nuanced. Because an administrative body does not have the authority to declare a statute unconstitutional on its face, there is no need to raise a facial challenge before the administrative body to preserve the issue. *See, e.g.*, *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 540 (Colo. App. 2010). Thus, to preserve a facial challenge, the party need only assert the challenge in the district court proceedings. *Id.* But the rule is different for as-applied challenges.

¶ 55 Because the resolution of an as-applied challenge depends on the development of fact-specific issues, a party must first assert the

claim before the administrative agency, and the failure to do so constitutes a waiver. *See Williams v. Indus. Claim Appeals Off.*, 128 P.3d 335, 339 (Colo. App. 2006) (refusing to consider as-applied challenge not raised during administrative proceedings), *rev'd on other grounds sub nom. Williams v. Kunau*, 147 P.3d 33 (Colo. 2006). *But see United Airlines v. Indus. Claim Appeals Off.*, 2013 COA 48, ¶ 29 (on direct appeal of an administrative decision to a division of this court, the division declined to follow *Williams* and considered the unpreserved as-applied challenge).

1. The As-Applied Challenge Was Not Preserved

¶ 56 As noted previously, on appeal, No on EE agrees that it asserted an as-applied challenge before the district court. But No on EE also concedes that it failed to assert the as-applied constitutional challenge in the administrative proceedings. And it does not dispute the Secretary and Deputy Secretary's argument that such a failure generally amounts to a waiver. But No on EE attempts to avoid the waiver by arguing that it had no motivation or reason to assert the as-applied challenge in the administrative proceedings because it was willing to accept the fine imposed by the Deputy Secretary. No on EE argues that it elected to assert the as-

applied challenge only after the Deputy Secretary increased the fine to $30,000. This increase of the fine, No on EE argues, excuses its initial failure to assert the as-applied challenge. The argument is without merit.

¶ 57 The as-applied challenge related to the enforceability of the registered agent disclosure requirement. Such a defense was available to No on EE irrespective of the amount of fine that was ultimately imposed for the violation of the statute. Moreover, the process by which the Deputy Secretary acted to increase the fine was a statutory component of the administrative proceedings, § 1-45-111.7(6)(b), and a potential increase of the fine was therefore foreseeable.

¶ 58 No on EE's argument is akin to a defendant failing to challenge the constitutionality of a statute that forms the basis of a civil judgment or criminal conviction, and then attempting to assert the defense once it sees the amount of the monetary judgment or sentence imposed. No on EE cites no authority authorizing such tactics, and I am aware of none. Thus, No on EE's argument that its failure to raise the as-applied challenge in the administrative

proceeding is excused by the fact that the ultimate fine could not have been foreseen is unpersuasive.

¶ 59 Because No on EE failed to preserve its as-applied challenge, that challenge was waived, and I would not consider it on appeal.

2. No on EE Failed to Develop a Facial Challenge

¶ 60 No on EE does not even attempt to meet its obligation to provide a citation to the record where it preserved its facial challenge to the registered agent disclosure requirement in the district court. *See, e.g.*, *Aspen Springs Metro. Dist. v. Keno*, 2015 COA 97, ¶ 39 (our appellate rules require "a party raising an issue on appeal to provide a citation to the precise location in the record where that party took action to preserve the issue for appellate review"); C.A.R. 28(a)(7)(A). The Secretary and Deputy Secretary expressly argue in their answer brief that No on EE failed to preserve any facial challenge. No on EE elected to not even file a reply contesting the lack of preservation. *See, e.g.*, *People v. Jackson*, 2020 CO 75, ¶ 60 ("The People do not argue otherwise. We take such silence to be the People's implicit concession of the issue."). But in addition to this implied admission, both in the

district court and on appeal, No on EE unequivocally characterizes its claim as an as-applied constitutional challenge.

¶ 61 Nonetheless, the district court — finding it unclear whether No on EE was attempting to assert an as-applied or facial challenge — chose to reject the facial challenge on the merits. As the majority notes, that decision effectively moots No on EE's failure to preserve the issue in the district court.[4] *See, e.g.*, *Gravina Siding & Windows Co. v. Gravina*, 2022 COA 50, ¶ 31.

¶ 62 Though the facial challenge was effectively preserved by the district court's order, that does not change the fact that No on EE wholly failed to develop a facial challenge, both in the district court and on appeal. That is somewhat understandable because No on EE concedes that it was pursuing an as-applied challenge before the district court. Nevertheless, we are still left with no arguments from the parties that address the merits of the facial challenge decided by the majority.

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[4] Because the district court declined to reach the merits of the as-applied challenge both as a whole and with respect to the compelling governmental interest prong, we do not have a decision on the merits of the as-applied challenge. As discussed more fully above, the as-applied challenge is unpreserved.

¶ 63 While we have some discretion, our firmly established general practice is to decline to address threadbare and undeveloped arguments. *See, e.g.*, *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 41 n.12, *aff'd*, 2021 CO 56. The need for such judicial restraint is particularly amplified when contemplating the "grave[] dut[y]" of declaring a statute unconstitutional based on a constitutional challenge. *Moreno*, ¶ 9; *see also Moody v. NetChoice, LLC*, ___ U.S. ___, ___, 144 S. Ct. 2383, 2397 (2024) ("Claims of facial invalidity often rest on speculation about the law's coverage and its future enforcement" [and] "threaten to short circuit the democratic process by preventing duly enacted laws from being implemented in constitutional ways.") (quoting *Wash. State Grange*, 552 U.S. at 450-51).

¶ 64 Nor do equitable considerations counsel in favor of addressing this undeveloped facial challenge. *Cf. JW Constr. Co. v. Elliott*, 253 P.3d 1265, 1272 (Colo. App. 2011) ("Because we do not perceive that the fairness, integrity, or public reputation of the trial court's proceedings will be called into question if we decline to exercise our discretion, we will not review this unpreserved contention."). No on EE is a single-purpose issue committee. It is backed by millions of

dollars in contributions from a sophisticated and motivated commercial entity. No on EE was represented both in the district court and on appeal by competent legal counsel experienced in issue committee litigation.

¶ 65 Given these circumstances, I conclude it is not proper to address the undeveloped facial constitutional challenge to the registered agent disclosure requirement. As the Supreme Court recently explained in exercising similar caution,

> The problem for this Court is that it cannot undertake the needed inquiries. "[W]e are a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L.Ed.2d 1020 (2005). . . . And even were we to ignore the value of other courts going first, we could not proceed very far. The parties have not briefed the critical issues here, and the record is underdeveloped. So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones.

NetChoice, ___ U.S. at ___, 144 S. Ct. at 2398-99.

B. The Facial Challenge

¶ 66 Even if I were to assume, for the sake of argument, that the undeveloped facial challenge should be addressed on the merits, I would reject it.

¶ 67 Generally, a party asserting a facial challenge "has the daunting burden of showing 'no set of circumstances exists under which the Act would be valid, *i.e.* that the law is unconstitutional in all of its applications.'" *Indep. Inst. v. Coffman*, 209 P.3d 1130, 1143 (Colo. App. 2008) (Connelly, J., specially concurring) (quoting *Wash. State Grange*, 552 U.S. at 449); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1250 (11th Cir. 2013) (rejecting a facial challenge to issue committee disclosure requirements and stating that the "[c]hallengers cannot prevail unless they can prove 'that no set of circumstances exists under which the [regulations] would be valid'" (quoting *Salerno*, 481 U.S. at 745)).

¶ 68 In First Amendment cases, however, a party may establish that a statute is facially overbroad if the statute's legitimate sweep captures a substantial number of unconstitutional applications. *See, e.g.*, *NetChoice*, ___ U.S. at ___, 144 S. Ct. at 2397. In the overbreadth context, a law will be invalidated if it threatens or

deters others from engaging in activities that are protected by the First Amendment. *Id.* "Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Wash. State Grange*, 552 U.S at 449 n.6 (quoting *New York v. Ferber*, 458 U.S. 747, 769-71 (1982))). "But that is so only if the law's unconstitutional applications substantially outweighs its constitutional ones." *NetChoice*, ___ U.S. at ___, 144 S. Ct. at 2397.

¶ 69 Consistent with its failure to develop a facial challenge in the district court, No on EE does not develop an overbreadth argument on appeal. Indeed, it does not even mention the word. Instead, No on EE's argument is that the registered agent disclosure requirement is not narrowly tailored to serve an important governmental interest and the disclosure requirement "is both unduly burdensome and redundant."

¶ 70 Given the absence of any overbreadth argument by No on EE, I would not apply the overbreadth standard in this case. As the Supreme Court has cautioned, "We generally do not apply the

'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Wash. State Grange*, 552 U.S. at 449 n.6. Indeed, a factual record and developed arguments often play a key role in overbreadth challenges. *See, e.g.*, *Ams. for Prosperity*, 594 U.S. at 615-17 (sustaining a facial challenge to a donor disclosure requirement applicable to charitable entities and noting that the challengers "introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence"). We have no such developed factual record here. *See also NetChoice*, ___ U.S. at ___, 144 S. Ct. at 2409 (declining to address a First Amendment facial challenge because the parties and lower courts did not develop the necessary factual and legal issues).

¶ 71 The Supreme Court has repeatedly recognized the legitimate policy considerations that underpin disclaimer laws. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366-71 (2010); *Buckley v. Valeo*, 424 U.S. 1, 75-76 (1976) (per curiam). In doing so, the Court has noted that "[d]isclaimer 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.'" *Citizens United*, 558 U.S. at 366 (citations omitted). Against this backdrop, the Supreme Court has described disclosure and disclaimer regimes, in the election-law context, as "less restrictive alternative[s] to more comprehensive regulations of speech." *Gaspee Project v. Mederos*, 13 F.4th 79, 85 (1st Cir. 2021) (quoting *Citizens United*, 558 U.S. at 369).

¶ 72 Nonetheless, because of their First Amendment implications, disclaimer laws are subject to "exacting scrutiny." *Id.* To survive such scrutiny, the Secretary and Deputy Secretary must demonstrate "a substantial relation between the disclosure requirement and a sufficiently important government interest." *Ams. for Prosperity Found.*, 594 U.S. at 607 (plurality opinion) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). This analysis requires courts to balance the public interest served by the disclosure requirement against the burdens the law imposes on the disclosing party. *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1277 (10th Cir. 2016). Although the government need not choose the least restrictive means of achieving its legitimate objective, the law must be narrowly tailored to achieve the government's interest. *Ams. for Prosperity Found.*, 594 U.S. at 609-10. The standard

"require[s] a fit that is not necessarily perfect, but reasonable," and "the challenged requirement must be narrowly tailored to the interest it promotes." *Id.* (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014)). I turn next to that interest.

C. Colorado's Information Interest in the Registered Agent Disclosure Requirement

¶ 73 *Citizens United* was a landmark case. It extended the reasoning of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) — which struck down a law that prohibited corporate spending on ballot initiatives — to invalidate a federal law that prohibited independent corporate expenditures on candidate elections. *Citizens United*, 558 U.S. at 364-65. Since that ruling, the residents of Colorado and every other jurisdiction across the country have been inundated with political advertisements — for candidates and ballot issues — sponsored by entities that are not human beings.

¶ 74 *Citizens United* also upheld, against First Amendment challenges, reasonable disclosure requirements that compel a political advertisement to reveal the identity of the entity that has paid for it. *Id.* at 366-71. The Supreme Court has reasoned that

such information serves important governmental interests and "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights], particularly when the 'free functioning of our national institutions' is involved." *Buckley*, 424 U.S. at 66 (quoting *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)).

¶ 75 These informational interests are at the heart of article XXVIII of the Colorado Constitution. And section 1-45-108.3 is part of the Fair Campaign Practices Act (FCPA), which gives effect to those constitutional mandates. *See* §§ 1-45-101 to -118, C.R.S. 2023. Disclosure requirements are central to the purpose and function of both article XXVIII and the FCPA. *See* H.B. 1370, 67th Gen. Assemb., 2d Reg. Sess., 2010 Colo. Sess. Laws 1240 ("The absence of any disclosure or disclaimer requirement in connection with communications supporting or opposing statewide ballot issues leads to a perception of purposefully anonymous interests attempting to influence the outcome of the election on measures amending the state constitution or the Colorado Revised Statutes through the expenditure of large sums of money.").

¶ 76 The Court in *Buckley* addressed governmental interests in the context of disclosure requirements for a candidate:

> The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. . . .
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. . . . In enacting these requirements [Congress] may have been mindful of Mr. Justice Brandeis' advice:
>
> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the [campaign] contribution limitations . . . .

Buckley, 424 U.S. at 66-68 (footnotes omitted).

¶ 77 The Tenth Circuit has reasoned that the second and third *Buckley* factors are not as pronounced in the issue committee context as they are in the context of advertisements promoting particular candidates. *See Sampson v. Buescher*, 625 F.3d 1247, 1255-56 (10th Cir. 2010). Although the majority leans heavily on *Sampson*, the case is legally and factually distinguishable from the present dispute.

¶ 78 First, the court decided *Sampson* based on an as-applied challenge, not a facial challenge, which is the sole basis for the majority opinion. *Id.* at 1254. Second, the disclosure requirements at issue in *Sampson* obligated the campaign committee to disclose the names and address of every donor who contributed more than $20 and the occupation and employer of any person who contributed more than $100. *Id.* at 1250. Third, the campaign committee in *Sampson* was comprised of residents of unincorporated Douglas County, Colorado, who opposed annexation of their subdivision into Parker. *Id.* at 1249. The committee spent less than $1,000 opposing the annexation effort. *Id.* at 1261. For the as-applied challenge in *Sampson*, these facts

carried the day, leading to a holding that the disclosure requirements were unconstitutional.

¶ 79 Even so, the court's analysis in *Sampson* acknowledged the important policies that are at the core of Colorado's constitutional provisions requiring issue committee disclosures:

> The people of the state of Colorado hereby find and declare . . . that *large campaign contributions* made to influence election outcomes *allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process;* . . . that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas *and can unfairly influence the outcome of Colorado elections;* and that the interests of the public are best served by . . . providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

Id. at 1261 (quoting Colo. Const. art. XXVIII, § 1). But the court concluded that these "purposes have little to do with a group of individuals who have together spent less than $1,000 on a campaign." *Id.* Thus, based on these unique facts the court held "[t]here is virtually no proper governmental interest in imposing disclosure requirements on ballot-initiative committees that raise

and expend so little money, and that limited interest cannot justify the burden that those requirements impose on such a committee." *Id.* at 1249; *see also Worley*, 717 F.3d at 1249 (*Sampson* "did not invalidate a law that required disclosures in the ballot issue context. Instead it held the law unconstitutional as applied to those plaintiffs because 'the governmental interest in imposing . . . regulations is minimal, if not nonexistent, in light of the small size of the contributions.'" (quoting *Sampson*, 625 F.3d at 1261)).

¶ 80 Contrast that with the operative facts of this dispute. No on EE is a corporate entity, not a group of neighbors. No on EE's sole function was to oppose a nicotine tax ballot issue on behalf of a corporate cigarette company. It was not funded by de minimis contributions from human beings, but rather millions of dollars in contributions from a single corporate entity. It spent nearly four million dollars opposing the ballot issue, more than three million of that total spent in violation of Colorado's disclosure requirements.

¶ 81 Here, unlike *Sampson*, Colorado's informational interest is substantial, indeed at the heart of the concerns that animate article XXVIII and the FCPA. Moreover, unlike *Sampson*, No on EE does not challenge the requirement that it disclose a list of its donors. It

challenges the constitutionality of a statute that merely requires it to identify its registered agent. And at the same time, No on EE does not challenge the requirement that it file with the Secretary a disclosure identifying (1) its full name; (2) all affiliated candidates and committees; (3) its street address and telephone number for its principal place of business; and (4) the identify of a human being authorized to act as its registered agent. § 1-45-108(3), C.R.S. 2023. Yes, that is correct. No on EE does not challenge its obligation to disclose the name of its registered agent to the Secretary — which it has done — but it asks us to strike down as unconstitutional on its face a statute that merely requires it to disclose the identity of its registered agent on advertisements broadcast to the public.

¶ 82 In sum, the facts of this case — in contrast to those present in *Sampson* — illustrate the important governmental interests served by the registered agent disclosure requirement. The public is substantially benefitted by the disclosure of a human being, rather than a corporate name that is often deceptively misleading, such as "No on EE — A Bad Deal for Colorado." The purpose of using this type of entity name is to send a political message that the subject

ballot issue is bad, the proponent is virtuous, and the proponent speaks for many people. Disclosure requirements act as a check against the viewer's impulsive reaction:

> As we have explained, "[c]itizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin." And even though citizens have become reliant on such cues, they may be too easily overlooked or obscured. The public is "flooded with a profusion of information and political messages," and the on-ad donor disclaimer provides an instantaneous heuristic by which to evaluate generic or uninformative speaker names.

Gaspee Project, 13 F.4th at 91 (quoting *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011)).

¶ 83 While *Gaspee Project* dealt with the disclosure of a small number of donors on advertisements, the requirement for disclosing a registered agent on advertisements serves the same purpose: it interrupts the irrational assumptions created by deceptive corporate names and reminds the observing public that the advocacy is, at the end of the day, done by nothing more or less than real people. As the Supreme Court explained in *Citizens United*, in the absence of such disclosure requirements, issue committees could run election-related advertisements "while hiding

behind dubious and misleading names." 558 U.S. at 367 (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003)).

¶ 84 Against this constitutional backdrop, I reject No on EE's argument that the registered agent disclosure requirement is redundant. The argument may have some initial rational appeal because, as previously noted, the statute already requires an issue committee to register with the Secretary and, incident thereto, to disclose the name of its registered agent. But the disclosure requirement for advertisements arises in an entirely separate and distinguishable circumstance — an advertisement directed to the voting public that is designed to persuade the observer to a political conclusion. In such circumstances, many consumers have neither the resources nor the inclination to stop what they are doing to conduct research on the Secretary's filing system to determine who the human beings behind the advertisement are. The disclosure requirement on an advertisement, unlike the Secretary's filing system, provides voters with an immediate reminder that the

advertisement is attributed to a person. For this reason, the advertising disclosure requirement is not redundant or irrational.[5]

¶ 85 I also reject No on EE's argument that the registered agent disclosure requirement is unduly burdensome. No on EE does not contest its obligation to list its name on the subject advertisements. At most, the registered agent disclosure would require an additional line of print. No on EE attempts to make the proverbial mountain out of this requirement by suggesting that a committee would be unduly burdened by having to change the name of its registered agent on ads if the registered agent died during the campaign. But the facts of this case belie a suggestion that such an eventuality would create an undue burden. When notified of its omission, No on EE was able to correct its advertisement and circular in less than thirty-six hours. This is hardly a substantial burden when compared to the statute's plainly legitimate sweep. *See NetChoice*, ___ U.S. at ___, 144 S. Ct. at 2397.

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[5] No on EE criticizes the final agency order because it "identifies no governmental interest to be achieved through the disclosure." This criticism is ironic and ill-founded given that No on EE made no constitutional argument before the ALJ or Deputy Secretary.

¶ 86 The majority reasons that the registered agent requirement is not narrowly tailored because the registered agent "doesn't have to be an organizer, officer, or employee of the issue committee, nor . . . does that person have to be a donor to the issue committee." *Supra* ¶ 30. But this is a facial challenge. In such circumstances, even in the context of a First Amendment overbreadth challenge, the burden is on the challenger — No on EE — to "carry its burden" that the registered agent requirement is unconstitutional in a "substantial number of its applications" in view of the requirements "plainly legitimate sweep." *See NetChoice*, ___ U.S. at ___, 144 S. Ct. at 2397, 2409; *see also United States v. Hansen*, 599 U.S. 762, 770 (2023) ("Because it destroys some good along with the bad, '[i]nvalidation for overbreadth is strong medicine' that is not to be 'casually employed.' To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008))).

¶ 87 The registered agent of an issue committee may also serve as an organizer, board member, employee, or significant donor of the

committee.[6] *See, e.g.*, *Colo. Dep't of State v. Unite for Colo.*, 2024 COA 31, ¶ 4. While Patrick McDonald did not serve in those capacities, he was the brother of Sheila McDonald, who was No on EE's chief operating officer, political strategist, and signed all its checks. Moreover, we can all think of local and national political leaders, social media influencers, pundits, commentators, celebrities, activists, or ordinary citizens whose disclosure as the registered agent of an issue committee would tell voters something of meaning about the associated advertisement. And in all instances the identification of the registered agent serves the important governmental purpose of disavowing the voting public of the notion that the advertisement flows from the "dubious and misleading name" of the issue committee rather than a human

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[6] The majority criticizes this observation as speculative. *Supra* ¶ 30 n.11. But the criticism amplifies the problems with addressing the substance of the undeveloped facial challenge. *See NetChoice*, ___ U.S. at ___, 144 S. Ct. at 2394 (vacating lower courts' decision because NetChoice's facial constitutional challenge to statute on First Amendment grounds was not adequately developed by the parties and lower courts). Because No on EE failed to assert the facial challenge in the district court, we have no factual record by which to assess the burden and tailoring of the registered agent disclosure requirement as it relates to issue committees. As a result, the analysis necessarily requires reliance on anecdotal observations.

being. *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 197).

¶ 88 The relationship between the legitimate governmental interest need not be a perfect fit, so long as it is reasonable. *Ams. for Prosperity Found.*, 594 U.S. at 609. While one could quibble with whether it would be best to require the disclosure of the registered agent, the chief executive officer, or a board member, ultimately it is the province of the legislature — not the judiciary — to draw such lines.

¶ 89 It is also important to note that neither No on EE nor the majority identifies any speech that is squelched or even deterred because of the disclosure requirement. Moreover, to the extent that any speech is compelled, it is solely the name of a human being whom No on EE already disclosed through the registration process. Given this obviously de minimis burden, I cannot conclude that any burden associated with the disclosure requirement exceeds its plainly legitimate sweep.

¶ 90 For these reasons, even if I were to reach the merits of the undeveloped facial challenge, I would conclude that No on EE has failed to prove beyond a reasonable doubt that the registered agent

disclosure requirement of section 1-45-108.3 is unconstitutional on its face.

IV. The Imposed Fine Is Not Unconstitutionally Punitive

¶ 91 No on EE also argues that the $30,000 fine the Deputy Secretary imposed violates its rights under the Eighth Amendment. I disagree.

¶ 92 Unlike its facial First Amendment challenge, No on EE timely preserved its claim that this fine violates the Eighth Amendment. We review such claims de novo. *People v. Cardenas*, 262 P.3d 913, 914 (Colo. 2011).

¶ 93 The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." These constitutional protections extend to civil cases to prohibit a fine that "is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Thus, "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.*

¶ 94 First, much of No on EE's Eighth Amendment argument is predicated on its assumption that the registered agent disclosure requirement serves no legitimate governmental purpose. For the reasons explained in the preceding section, I reject this premise.

¶ 95 Second, No on EE argues that the $30,000 fine was based on "arbitrary and unknowable standards." In support of this proposition, No on EE argues that prior to the assessment of this fine, Colorado's largest fine for a violation of campaign disclosure requirements was $500. No on EE asserts that the present fine — which is sixty times higher — proves that the current fine is excessive. But No on EE compares apples to oranges. The $500 fine was imposed on an entity that spent a total of $6,000 on unlawful advertisements, so that fine was 8.33% of the total unlawful expenditure. In contrast, No on EE spent at least $3,000,000 on unlawful communications, so the Deputy Secretary's imposed fine was 1% or less of that total. If anything, the comparison between the two fines illustrates that the fine imposed on No on EE was proportionately less severe.

¶ 96 In imposing the $30,000 fine, the Deputy Secretary noted that the ALJ failed to cite any legal authority or provide a reasoned

explanation for the $10,000 fine that the ALJ had imposed. In contrast, the Deputy Secretary relied on regulations that set a presumptive amount for unlawful election communications. *See* Dep't of State Rule 23.3.3(d)(1), 8 Code Colo. Regs. 1505-6 (suggesting a fine of at least 5% of the cost of offending election communications that are mitigated prior to the election). Consistent with the concept of proportionality that is at the heart of the Eighth Amendment's prohibition against excessive fines, the regulation ties the amount of the fine to the amount of unlawful expenditures, which is a reasonable proxy for the impact that the expenditures had on the election process.

¶ 97 Working from the suggested fine of at least 5%, the Deputy Secretary noted that No on EE took substantial curative measures to remediate the unlawful communications. The record contains ample factual support for these adjustments and the Deputy Secretary's reasoning. Therefore, the regulation's starting fine percentage and the Deputy Secretary's downward adjustments were knowable and rationale. The resulting $30,000 fine was not arbitrary or disproportionate to No on EE's unlawful conduct, and

therefore the fine did not violate No on EE's Eighth Amendment rights.

V. Conclusion

¶ 98 Because I would affirm the district court's judgment, I respectfully dissent.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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