
Nos. 08-1389, 08-1415

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**KAREN SAMPSON, NORMAN FECK, LOUISE SCHILLER, TOM SORG,
WES CORNWELL, and BECKY CORNWELL**

Plaintiffs-Appellants/Cross-Appellees

v.

BERNIE BUESCHER,

Defendant-Appellee/Cross-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO**

**The Honorable Richard P. Matsch, District Judge
District Court No. 06-CV-01858-RPM-MJW**

**CORRECTED OPENING BRIEF OF PLAINTIFFS-
APPELLANTS/CROSS-APPELLEES**

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ORAL ARGUMENT REQUESTED

**SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED WITH
DIGITAL SUBMISSION SENT VIA EMAIL**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellants/Cross-Appellees hereby make the following disclosure: Plaintiffs-Appellants/Cross-Appellees Karen Sampson, Norman Feck, Louise Schiller, Tom Sorg, Wes Cornwell, and Becky Cornwell are not subsidiaries or affiliates of a publicly owned corporation and no publicly owned corporation, not a party to the appeal, has a financial interest in the outcome of this case.

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STATEMENT OF RELATED CASES

Defendant-Appellee Bernie Buescher filed a cross-appeal in this case. *See Karen Sampson, et al. v. Bernie Buescher*, Docket No. 08-1415 (10th Cir., docketed on October 29, 2008). Other than the cross-appeal, there are no other related cases, or prior appeals.

INTRODUCTION

This is a civil rights challenge to campaign finance laws in Colorado that chill citizen speech about ballot initiatives. During the spring of 2006, Plaintiffs¹ decided to oppose the proposed annexation of their neighborhood into a nearby town. They discussed the issue with neighbors; they distributed flyers; they wrote letters to the editor of the local newspaper and the town council; they placed “No Annexation” signs on their lawns. A few months later they were sued by the chief proponent of annexation under a provision of Colorado law that allows private citizens to enforce the campaign finance laws against other citizens. The complaint alleged that Plaintiffs spoke out against annexation without first registering as an “issue committee” and reporting their activities to the State under the campaign finance laws that apply to ballot issues.

The District Court in this action later found that the complainant used Colorado’s campaign finance laws in an attempt to intimidate the Plaintiffs and silence their speech, and that “[b]y permitting this intimidation, Colorado’s campaign finance laws had the effect of stifling political speech in violation of the First Amendment as it was applied to these plaintiffs.” *Sampson v. Coffman*, No. 06-cv-01858, Slip Op. at 32 (D. Colo. Sept. 18, 2008) (attached hereto as

¹ For ease of reference, Plaintiff-Appellants/Cross-Appellees will refer to themselves as “Plaintiffs” and to the Defendant-Appellee/Cross-Appellant as the “Secretary.”

Addendum A). The Court nonetheless upheld the laws over Plaintiffs' challenge. This appeal followed.

STATEMENT OF JURISDICTION

This appeal follows the district court's order of September 18, 2008, which substantially denied Plaintiffs' cross-motion for summary judgment and substantially granted Defendant's cross-motion for summary judgment.

Jurisdiction over this action was proper in the district court under 28 U.S.C. §§ 1331 and 1343.

Plaintiffs filed a timely notice of appeal on October 15, 2008, following the entry of final judgment in the case, which disposed of all parties' claims on September 18, 2008. Appellate jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err in concluding that Colorado's campaign finance laws did not apply to the Plaintiffs' activities prior to December 14, 2006, when the Town of Parker published a notice of election, despite the Secretary of State's rule establishing that the laws apply when a citizen petition is circulated? Slip Op. at 22-24.
2. After properly finding that Colorado's private enforcement provision could be used to chill First Amendment rights and that it had been used for that purpose against the Plaintiffs, did the District Court err in upholding the provision over a First Amendment challenge? *Id.* at 28-32, 39-41.
3. Did the District Court err in concluding that Colorado's registration and disclosure requirements for ballot issue committees did not violate the First Amendment because they served a legitimate state interest once a notice of election was published? *Id.* at 37-39, 41.

4. Did the District Court err in concluding that Colorado's requirement that ballot issue committees disclose the identity, address, and often employer of all contributors did not violate the rights of anonymous speech and association under the First Amendment? *Id.* at 36-37.

STATEMENT OF THE CASE

On September 19, 2006, Plaintiffs filed a three-count complaint pursuant to 42 U.S.C. § 1983 alleging that Colorado law violated the First Amendment to the United States Constitution in three respects. First, Plaintiffs claimed that Colo. Const. art. XXVIII, § 9(2)(a), which allows “any person” to bring a private action to enforce the campaign finance laws, unconstitutionally chills free speech. Second, Plaintiffs challenged the registration and disclosure requirements for issue committees, C.R.S. §§ 1-45-108(3), 108(1)(a)(I) and (II); Colo. Const. art. XXVIII, §§ 3(9) and 7, as an unconstitutional burden on rights to speech and association that serves no compelling interest and is not narrowly tailored. Third, Plaintiffs challenged the disclosure provisions of C.R.S. §§ 108(1)(a)(I) and (II) and Colo. Const. art. XXVIII, § 7 as a violation of rights to anonymous speech and association.

Following discovery, the parties filed cross motions for summary judgment on all claims on November 30, 2007. On April 15, 2008, the District Court heard oral argument on the motions. At the hearing, the Court asked the parties whether the campaign finance laws even applied to the annexation election at the heart of

Plaintiffs' case. The campaign finance laws in Colorado apply to speech about ballot propositions by creating and regulating entities called "issue committees." An issue committee is, in essence, any group of individuals that raises or spends more than \$200 to "support or oppose a ballot issue or ballot question." Colo. Const., art. XXVIII, § 2(10)(a). Thus, if what the group is supporting or opposing is not a "ballot issue or ballot question," the campaign finance laws do not apply.

The District Court had raised this question once before, prior to discovery, and both parties explained in briefs that the annexation was, indeed, a ballot question to which the campaign finance laws applied. Aplt. App. 42-95. In part, the District Court's question related to the fact that when the private complaint was filed against the Plaintiffs, no annexation election had yet been scheduled. Instead, the proponents of annexation had circulated a petition to hold an election and had submitted it to the town council. Subsequently, while Plaintiffs' lawsuit was pending, the Secretary adopted new Rule 1.6, which clarified, consistent with the Secretary's long-standing policy, that a matter becomes a "ballot issue or ballot question" under the campaign finance laws when a citizen petition is circulated and signed by at least one person. Aplt. App. 1562-1564. Thus, consistent with their previous positions in this case, both parties stated at the hearing that annexation was a ballot issue or question at the time the private complaint was filed against the Plaintiffs in July 2006.

Following the summary judgment hearing, the District Court again ordered the parties to brief the question of whether a ballot issue or ballot question existed at the time the private enforcement complaint was filed against the Plaintiffs. Aplt. App. 2272-2275. The parties filed their supplemental briefs on June 9, 2008, with both parties again taking the position that a ballot issue or ballot question existed at that time. Aplt. App. 2276-2291, 2348-2370.

The District Court issued its decision on the cross-motions for summary judgment on September 18, 2008. Despite both parties' agreement that annexation was a ballot issue or question when the private complaint was filed against the Plaintiffs, the District Court concluded that the parties, and the Secretary's Rule 1.6, were wrong. According to the District Court, annexation did not become a ballot issue or ballot question under Colorado's campaign finance laws until the town published a notice of election on December 14, 2006. Having concluded that the campaign finance laws should not have been applied to the Plaintiffs before that time, the District Court denied Plaintiffs' claims to the extent they challenged the application of the laws prior to that date. In the alternative, the Court held that if its statutory analysis was wrong and the registration and reporting requirements for issue committees applied to the Plaintiffs prior to December 14, 2006, those laws violated the Plaintiffs' First Amendment rights. This appeal followed.

STATEMENT OF FACTS

I. The Annexation Dispute

Plaintiffs are residents of a neighborhood known as “Parker North,” which is located in unincorporated Douglas County, Colorado, just outside of the Town of Parker. Aplt. App. 461 (¶ 2), 474 (¶ 2). In early 2006, David Hopkins, another resident of the neighborhood, initiated an effort to annex Parker North into the Town. Aplt. App. 544-545 (12:25–13:6). Under Colorado law, an annexation election will be held if at least 10% of the residents of a neighborhood sign a petition requesting such an election. C.R.S. § 31-12-107. On February 21, 2006, Mr. Hopkins submitted a petition with the necessary signatures at a meeting of the town council. Aplt. App. 479 (¶ 5).

Plaintiffs Karen Sampson, Norm Feck, and Tom Sorg attended the meeting and heard Mr. Hopkins speak in favor of annexation. Aplt. App. 462 (¶ 5), 479 (¶ 5), 484 (¶ 4). They, like many other residents of Parker North, had moved to the neighborhood in large part to avoid living within the town, and they became convinced that annexation would result in higher taxes and fewer government services. As a result, they decided to speak out in opposition to annexation. Aplt. App. 462 (¶ 8), 479-480 (¶ 8), 484 (¶ 6).

After the meeting, Norm wrote a letter to the Mayor and the Parker Town Council expressing his opposition to annexation, which he copied to all the

residents of Parker North. Aplt. App. 462 (¶ 6). Karen and Tom later met with Norm and several other neighbors, and soon they began actively opposing the issue. Aplt. App. 462-463 (¶¶ 6-8), 479 (¶¶ 4, 6-7), 483-485 (¶¶ 3, 5-9). They walked the neighborhood to discuss annexation with neighbors, and they wrote letters and distributed flyers with information about the annexation. Aplt. App. 462-463 (¶¶ 8-9), 479-480 (¶ 8), 484-485 (¶¶ 6-10). Tom, along with another Parker North resident, started an email discussion group for all residents of Parker North to discuss and debate the issue. Aplt. App. 484 (¶ 7).

Through their efforts, Karen, Norm, and Tom met other residents of Parker North who shared their opposition to annexation. Aplt. App. 480 (¶ 9), 485-486 (¶¶ 10-11). Among them were Plaintiffs Louise Schiller and Wes and Becky Cornwell, each of whom became actively involved with Karen, Norm, and Tom in opposing the annexation. Aplt. App. 475 (¶ 6), 488-489 (¶¶ 3-5). Wes, who runs a printing business, ended up printing “No Annexation” signs and selling them to residents of Parker North at cost. Soon, the signs were popping up on lawns throughout the neighborhood. Aplt. App. 531-532 (¶¶ 2, 4-5).

At some point, Tom Sorg discovered that Mr. Hopkins’s petition allowed individuals who signed it to remove their names if they chose. Tom made this known throughout the neighborhood, and by March, enough residents of Parker

North had removed their signatures from the petition to have it deemed invalid. Aplt. App. 485 (¶¶ 9-10).

Soon thereafter, Patsy Putnam, a resident of Parker North who supported annexation, learned that Mr. Hopkins's petition had been declared invalid. Aplt. App. 557-558 (17:9-12, 21:17-22). She convinced him to launch another annexation petition, and the two set out to gather the necessary signatures to hold an election. *Id.* at 559-560 (27:19-28:4, 29:10-12). This time, Mr. Hopkins did not include language in the petition allowing residents to remove their signatures. Aplt. App. 254-261.

The Plaintiffs soon began efforts to oppose the second annexation petition as well. Aplt. App. 463 (¶ 10), 485-486 (¶ 11). As the District Court noted in its opinion, part of the Plaintiffs' goal was to convince the Town not to hold an annexation election at all. Slip Op. at 3, 35. But as much of their efforts focused on convincing their neighbors to oppose annexation and to vote against it if an election were eventually held. Aplt. App. 248-250, 270-271. Thus, Plaintiffs continued to try to convince their neighbors to oppose annexation, they purchased and distributed No Annexation signs, they mailed a post card to all residents of Parker North summarizing the reasons to oppose annexation, and they continued to discuss and debate the issue on the Internet, often with Mr. Hopkins himself. Aplt. App. 484-485 (¶¶ 7-8), 248, 270-271. Mrs. Putnam and Mr. Hopkins engaged in

similar efforts to promote their side of the issue. They gave newspaper interviews, printed signs, created their own website, and even held a pro-annexation rally. Aplt. App. 561-562 (36:16–17, 37:3–16), 405-406. Annexation had spawned a vigorous debate within the neighborhood, and months before the Town scheduled an election, the campaigns for and against the issue were well underway. Slip Op. at 8.

On May 16, 2006, Mrs. Putnam and Mr. Hopkins submitted their petition to the Town. Aplt. App. 561 (35:14–22). At a meeting on June 19, 2006, the Town Council scheduled a meeting for August 14, 2006, to address the petition and determine when to hold an election on the issue of annexation. Aplt. App. 463 (¶ 12), 486 (¶ 16).

At the end of June, Mrs. Putnam concluded after reading a newspaper article about the annexation that the opponents of annexation were negatively impacting the chance that an election would be held. Aplt. App. 564-565 (45:10–20, 79:15–80:6). Within a few days, she filed a campaign finance complaint against the Plaintiffs, whom she believed to be the most “blatantly caustic” of annexation’s opponents. *Id.* at 562-563 (40:9–16, 42:4–25). The complaint alleged that annexation was a “ballot issue or ballot question” under Colorado’s campaign finance laws, and that, by joining together to oppose it, the Plaintiffs violated those laws by failing to register as an “issue committee” and comply with the disclosure

and other requirements for issue committees. Aplt. App. 582 (¶¶ 8-14).

Representing Mrs. Putnam in the private enforcement action was Mr. Hopkins, who, in addition to being a proponent of annexation, is also a lawyer.

II. Colorado’s Campaign Finance Laws

Under Colorado law, “issue committee” includes any group of two or more persons that (1) “has a major purpose of supporting or opposing any ballot issue or ballot question” and (2) “has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.” Colo. Const. art. XXVIII, § 2(10)(a); Secretary of State Rule 1.7, 8 C.C.R. § 1505-6 (2004). The terms “contribution” and “expenditure” include, in essence, anything of value given to or spent by an issue committee. *See* Colo. Const. art. XXVIII, §§ 2(5)(a) and 2(8)(a).

Issue committees must file a registration statement with the Secretary of State listing the issue committee’s name, an address and telephone number for its principal place of operations, the name of someone authorized to act as its registered agent, any affiliated candidates or committees, and the committee’s purpose. C.R.S. § 1-45-108(3). Registration statements also must describe the ballot issues or questions that the issue committee will support or oppose, and committees are prohibited from supporting or opposing issues that are not listed on their registration statement. *Id.*; Secretary of State Rule 2.5, 8 C.C.R. § 1505-6.

Issue committees must open a separate bank account to fund their activities, and all contributions received must be deposited into this account and all expenditures must be made from it. Colo. Const. art. XXVIII, § 3(9).

Once registered, an issue committee must regularly file reports with the Secretary of State for state ballot initiatives or with the county clerk and recorder for local ballot initiatives. C.R.S. § 1-45-109(1). In off-election years, reports must be filed quarterly. *Id.* § 108(2)(a)(I)(A). In years involving a “major election”—defined as the election that decides the committee’s issue—issue committees must file monthly reports beginning the sixth month preceding the election, bi-weekly reports beginning two months before the election, and one report thirty days after the election. *See id.* §§ 108(2)(a)(I)(C), 108(2)(a)(I)(D), 108(2)(a)(I)(E), and 108(2)(a)(III).

The required reports must list all “contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made, and obligations entered into by the committee.” C.R.S. § 1-45-108(1)(a)(I). For contributions over \$100, the report must also include the occupation and employer of the contributor. *Id.* § 108(1)(a)(II); Colo. Const. art. XXVIII, § 7; *see also* Aplt. App. 371-387. All reports, whether for local or statewide issue committees, are considered public records and made available on the Secretary of State’s website. C.R.S. § 1-45-109(4)-(5).

Violations of the registration and reporting requirements for issue committees can result in civil penalties, including fines of \$50 per day for failure to file required forms. Colo Const. art. XXVIII, § 10(2)(a); Slip Op. at 14; Aplt. App. 592. In addition, Colorado law creates a private cause of action under which “any person” may enforce the campaign finance laws against individuals alleged to have violated them. Colo. Const. art XXVIII, § 9(2)(a). Private enforcement proceedings are initiated when a complaint is filed with the Secretary of State. *Id.* As the District Court stated, “Colorado has not established any requirements for” private complaints. Slip Op. at 30. As long as the complaint is in writing and alleges a violation of the campaign finance laws, the Secretary “must refer” it to an administrative law judge (“ALJ”) within three days “without any review of its sufficiency other than for compliance with [minimal] procedural requirements.” *Id.* (citing Secretary of State Rule 6.3, 8 C.C.R. § 1505-6). Once the action is before an ALJ, the private complainant is responsible for prosecuting the respondent. Aplt. App. 600. If the ALJ determines that a violation occurred, the judge’s decision “shall include any appropriate order, sanction, or relief authorized by” article XXVIII of the Colorado Constitution. Colo. Const. art XXVIII, § 9(2)(a). The decision may be enforced by the Secretary of State or by a private party in a separate enforcement proceeding, and the prevailing party in such an action is entitled to reasonable attorney fees and costs. *Id.*

It was this provision under which Mrs. Putnam filed her complaint against the Plaintiffs.

III. The Private Enforcement Proceeding Against the Plaintiffs

Mrs. Putnam's complaint threatened the Plaintiffs with sanctions for their allegedly "illegal activities" and claimed that anyone who had contacted them or received a lawn sign from them might be subject to "investigation, scrutinization and sanctions for Campaign Finance violations." Aplt. App. 581-582. She followed her complaint with a subpoena that demanded, among other things, the names and addresses of "all persons who are or may be members of the Respondent's issue committee or group;" "all persons sold, gifted, or transferred signs, banners or any campaign information;" and "all communications amongst the Respondents or anyone else" concerning the issue of annexation. Aplt. App. 602-603; *see also* Colo. Const. art. XXVIII, § 9(2)(c) (authorizing ALJs to issue subpoenas for private complainants).

Stunned that they had allegedly violated the law by speaking out against annexation, the Plaintiffs hired a lawyer. Aplt. App. 463-464, 465 (¶¶ 13, 21), 486-487 (¶¶ 14, 20-21), 476 (¶ 10), 553 (¶ 9), 489 (¶ 6), 480-481 (¶¶ 11, 14, 17). On her advice, they registered an issue committee, "No Annexation," with the Secretary of State on July 16, 2006, listing Plaintiff Becky Cornwell as the committee's registered agent. *Id.* at 489-490 (¶ 7). No Annexation remains an

open issue committee today. *See* Colorado Secretary of State Elections Center, Committee Detail for No Annexation, <http://www.sos.state.co.us/cpf/CommitteeDetailPage.do?coId=20065638891> (last visited Feb. 12, 2008).

Soon after Plaintiffs registered their issue committee, Mrs. Putnam, through her lawyer, David Hopkins, sent Plaintiffs a letter demanding that they sign a “Stipulation and Guilty Plea.” According to this document, Plaintiffs were to “plead guilty to all charges” and “under penalty of perjury . . . declare and swear” that:

- they were “individually and collectively . . . GUILTY of all charges” alleged in Mrs. Putnam’s complaint;
- that they would, within one week, register as an issue committee and comply with the campaign finance laws or “abandon[] [their] group of two or more persons who oppose the Parker North Annexation and remove[e] all signs and campaign materials . . . from sight;”
- that they would turn over all documents responsive to Mrs. Putnam’s subpoena and serve the court with a “collective, unanimous sworn statement abandoning [their] group” and “further attest[] under penalty of perjury that [they] have removed from sight all signs and campaign materials;”
- that they agreed to “suffer all sanctions” imposed by any court if they failed to abide by the terms of the “guilty plea.”

Aplt. App. 605-606. If the Plaintiffs signed the document, Mrs. Putnam would then dismiss her complaint against them “without prejudice.” *Id.* at 606. Mr. Hopkins’s letter stated that the offer was “non-negotiable,” that all of the Plaintiffs must sign the “guilty plea,” and he gave them four days to comply. *Id.* at 608. As

the District Court later stated, “[t]he coercive nature of this demand is self evident.” Slip Op. at 32.

The Plaintiffs’ attorney, Sara Streight, responded to Mr. Hopkins’s letter on July 25, 2006, pointing out that her clients had registered an issue committee and requesting that Mrs. Putnam therefore dismiss the complaint. Aplt. App. 610-611. In all events, however, Ms. Streight stated that her clients would not sign any “guilty plea” as they did not believe they were “guilty” of anything other than exercising their rights to free speech. *Id.* Mr. Hopkins responded on behalf of Mrs. Putnam, declining to dismiss her complaint unless the Plaintiffs signed the guilty plea, because “without a sanction for non-compliance, the law is of no effect.” Aplt. App. 613. Over the course of the next month, the Plaintiffs made further appeals to Mrs. Putnam to drop her case against them, but to no avail. Aplt. App. 615-619. Mrs. Putnam insisted on a hearing. Aplt. App. 571 (106:4–5) (“They continued to say we’re not guilty and so we were not willing to drop it.”).

A hearing was held in the case on September 20, 2006. Slip Op. at 7. All of the Plaintiffs took the day off of work to attend. Aplt. App. 480-481 (¶ 13), 476 (¶ 12), 487 (¶ 17), 533 (¶ 12). In his opening remarks, Mr. Hopkins stated that Mrs. Putnam was no longer seeking sanctions against the Plaintiffs for their alleged violations of the campaign finance laws. Aplt. App. 571 (105:9–16). After several hours of testimony by Mrs. Putnam, Mr. Hopkins approached Plaintiffs’ counsel

and suggested that the parties resolve the matter without further proceedings. Aplt. App. 548 (61:21–25). Later that afternoon, the parties executed a “Stipulation and Entry of Judgment” dismissing the case. Aplt. App. 621-624; Slip Op at 7-8. As the District Court found, the Plaintiffs “felt compelled to enter into the Stipulated Judgment to avoid the cost of continuing to defend themselves in the ALJ proceeding.” *Id.* at 40.

Within days of the hearing, Mrs. Putnam and Mr. Hopkins sent a letter to the residents of Parker North that, in the District Court’s words, “improperly characterize[ed] the stipulation as a court ruling that the plaintiffs were guilty of law violations and were trying to hide their identities and activities.” Slip Op. at 32. The letter declared, in bold type, “NO ANNEXATION VIOLATES LAW. COURT RULES Tom Sorg, Norm Feck, Karen Sampson, Louise Schiller, Becky Cornwell & Wes Cornwell GUILTY. Mrs. Putnam mercifully waives all fines.” Aplt. App. 626-627. Mrs. Putnam later wrote a letter to the local newspaper explaining her purpose in making these claims: “It is significant that the respondents were proven and admitted to being an issue committee because now the statements of these respondents individually as well as a group can be used to evaluate the veracity of their position and that of the issue committee they are admittedly a part of.” Aplt. App. 629. Mr. Hopkins followed with a letter of his own, repeating the false claim that the Plaintiffs had admitted their “guilt” and

calling on residents of Parker North to vote against the Plaintiffs' position in the election. Aplt. App. 631.

The election was held on February 6, 2007. Annexation was defeated, 352 to 21. Slip Op. at 8.

IV. The Burden of Colorado's Campaign Finance Laws on Ballot Issue Speech

As the District Court found,

[t]here can be no doubt that Putnam and Hopkins used the private enforcement provisions to attempt to silence the plaintiffs by the filing of the complaint in July. That is clear from their demand for a confession and the implied threat that anyone who opposed the annexation may find themselves responding to a complaint against them.

Slip Op. at 39; *see also id.* at 30-32 (reviewing facts and operation of private enforcement provision and stating that “[b]y permitting this intimidation, Colorado’s campaign finance laws had the effect of stifling political speech in violation of the First Amendment as it was applied to these plaintiffs”).

Since 2000 alone, over 200 private enforcement actions have been brought under the private enforcement provision. Aplt. App. 415.² While the District Court did not specifically cite evidence concerning the experience of any other groups or individuals under the law, Plaintiffs included ample evidence in the record demonstrating that the private enforcement provision not only can be used

² The Secretary of State’s complaint log is available at http://www.elections.colorado.gov/WWW/default/Campaign%20Finance/fcpa_log.pdf.

to gain an advantage in an election or chill First Amendment rights, but that it has been and will continue to be used for those purposes. *See* Aplt. App. 415-417, 434-435, 1192-1194 (¶¶ 4-6, 10), 1203-1205, 1198-1199, 1207-1208 (¶¶ 4, 7, 12), 1223-1225 (¶¶ 4, 10-11, 13, 17), 633-720, 861 (37:19–39:1), 874-875 (36:4–37:11).

Plaintiffs also introduced evidence demonstrating that the registration and disclosure requirements for issue committees are very burdensome for those, like the Plaintiffs, who wish to join together and speak out for or against ballot issues. *See, e.g.*, Aplt. App. 417-422, 440-444, 1051-1101. As the Secretary of State’s office itself frankly admits, the “[l]aws and rules relating to campaign and political finance are often complex and unclear.” Aplt. App. 748; *see also* Aplt. App. 750-751 (“The laws and rules governing campaign finance are complex.”); 762 (36:20–21). The Secretary publishes a 92-page manual designed to provide guidance to citizens who must comply with the laws. Aplt. App. 584-598. The manual makes clear, however, that it is to be used for “reference and training purposes only” and does not provide definitive answers to questions about the campaign finance laws. *Id.* 585. For definitive answers, citizens must consult the laws and rules themselves, which comprise nearly fifty pages of the Secretary of State’s campaign finance manuals. *Id.* For those who do not understand the “complex and unclear”

laws and rules governing campaign finance, the Secretary of State’s advice is simple: hire a lawyer. *Id.*; Aplt. App. 763 (37:4-7), 765 (46:13–18).

Becky Cornwell, the registered agent of Plaintiffs’ issue committee, experienced the burdensome registration and disclosure requirements first hand. Aplt. App. 490 (¶ 8). She spent well over twenty hours researching the legal requirements for issue committees, opening a bank account, talking to Douglas County officials about filing requirements, and filing No Annexation’s periodic disclosure forms. *Id.* 490-495. Becky had particular difficulty determining when she and her six co-Plaintiffs had become a “group” under the definition of issue committee and figuring out how to report the individual expenditures each of them had made over the course of several months. *Id.* 491-493 (¶¶ 13, 17(d)), 495 (¶ 18d)). She could find no answers to her questions in the materials provided by the Secretary of State or Douglas County, so she sought advice from the Douglas county elections office, which initially gave her the wrong information. *Id.* 491-492 (¶¶ 13, 15), 494-495 (¶¶ 18-20). The Secretary of State’s office provided more definitive answers to some of Becky’s questions, but depositions in this case revealed that even the Secretary’s office could not answer others questions she had. Aplt. App. 755, 769-770 (6:23–25, 63:18–65:22), 773 (78:16–25, 79:13–15). Other groups in Colorado have had similar problems with the registration and disclosure provisions, and many have been subjected to private enforcement

proceedings for their errors. Aplt. App. 648-685, 822-855, 1228-1244, 415-417, 434-435.

The District Court, too, recognized the burden that the registration and disclosure provisions imposed on the Plaintiffs. After reviewing some of the same questions that vexed Becky Cornwell, the Court stated, “[t]he breadth of this restriction on citizens’ freedoms to associate and communicate is not supportable by any rational governmental purpose.” Slip Op. at 26. While the Court concluded that the burden was unjustified only *before* the Town of Parker published a notice of election, that conclusion was based on a flawed interpretation of both Colorado law and governing First Amendment precedent.

SUMMARY OF ARGUMENT

The District Court effectively sidestepped the constitutional issues in this case by concluding, contrary to both parties’ positions throughout this case, that Colorado’s campaign finance laws did not apply to the Plaintiffs’ activities when the private enforcement action was filed against them in July 2006. Based on this incorrect interpretation of Colorado law, the District Court improperly analyzed the constitutional issues in this case, concluding that once the Town of Parker published a notice of election, the State had a legitimate interest in requiring the Plaintiffs to comply with registration and disclosure laws for issue committees. The Court then refused to reach the merits of Plaintiffs’ challenge to the private

enforcement provision, and it denied Plaintiffs' claim that the disclosure laws violated the right to anonymous speech without applying any level of scrutiny to that claim at all.

The District Court misapplied both Colorado law and federal constitutional law. First, the Secretary of State's Rule 1.6, the ballot issue campaign finance laws applied to the Plaintiffs' activities when the private enforcement action was filed against them in July 2006. The Rule is a reasonable interpretation of Colorado law that the District Court was not free to ignore.

Second, the District Court improperly failed to reach the merits of Plaintiffs' challenge to the private enforcement provision. As the District Court recognized, Plaintiffs presented a justiciable challenge to Colorado's private enforcement provision. As the District Court also recognized, the private enforcement provision lacks any safeguards for First Amendment rights and delegates unguided discretion to private citizens to enforce the campaign finance laws. Having found that the private enforcement provision can be used to chill speech and, in fact, was used against the Plaintiffs for that purpose, the District Court should have struck the provision down.

Finally, the District Court applied the wrong standard of scrutiny to Plaintiffs' challenges to the registration and disclosure provisions for issue committees. Laws that burden First Amendment rights must be narrowly tailored

to advance a compelling state interest. The District Court, however, upheld the registration and disclosure laws for issue committees on the basis of a mere legitimate interest even after rejecting the Secretary's evidence in support of those laws. Under the correct standard of scrutiny, those laws are unconstitutional because the Secretary failed to advance a compelling state interest or demonstrate that the laws are narrowly tailored.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Mullin v. Travelers Indem. Co.*, 541 F.3d 1219, 1222 (10th Cir. 2008).

ARGUMENT

The State of Colorado imposes onerous regulations and disclosure requirements on virtually any group that exercises its fundamental rights to speak out for or against ballot issues and to associate for that purpose, including the obligation to disclose its supporters' identities, addresses, and often employers. To encourage enforcement of these laws, the State has armed every citizen with the ability to file private enforcement actions against those they believe have violated the campaign finance laws, on the theory that individuals involved in political debates will have the greatest incentive to file enforcement actions against their opponents.

This case has proved that theory true. As the District Court found, “there can be no doubt” that Mr. Hopkins and Mrs. Putnam used the private enforcement provision to harass and intimidate the Plaintiffs and to gain an advantage in the annexation election. Slip Op. at 39, 32. They were able to do that because, as the District Court further recognized, the private enforcement provision is, in effect, an unchecked delegation of authority to private citizens to enforce campaign finance laws as they see fit. *Id.* at 32, 30. Summing up, the District Court stated, “No reasonable person would believe that simply sharing their views with neighbors and expressing them in the manner shown in this case would result in their being hauled before an administrative law judge to defend themselves against general accusations of law violations and be exposed to monetary penalties and publicly condemned as law violators.” *Id.* at 40. Yet, as a result of Colorado’s campaign finance laws, that is precisely what happened here.

On the basis of these findings, the District Court should have struck down the challenged laws. The Supreme Court has repeatedly held that the law must give adequate breathing room to First Amendment rights and may not delegate unguided discretion to officials in their enforcement. The District Court found that the private enforcement provision chills speech, but still upheld it. The Supreme Court has also held that laws that burden speech must survive strict scrutiny, under which the government must demonstrate that the laws are narrowly tailored to

serve a compelling state interest. Yet, here, after rejecting the Secretary's evidence in support of the registration and disclosure laws, the District Court upheld them on the ground that they served a mere legitimate state interest.

The District Court arrived at these conclusions by adopting a unique and unprecedented approach to the constitutional questions in this case, under which the constitutionality of the laws turned on the point in time at which Colorado's campaign finance laws applied to the Plaintiffs' activities. The District Court concluded that if those laws applied at the time the annexation petition was being circulated and considered by the Town, then the campaign finance laws violated the Plaintiffs' First Amendment rights. Slip Op. at 26, 39-40. After the Town published a notice of election in December 2006, however, the Court concluded that the State had a legitimate interest in requiring the Plaintiffs to comply with the registration and disclosure provisions for issue committees. *Id.* at 40-41. The Court then went on to "interpret" the campaign finance laws not to apply until the notice of election was published, rather than at the petition stage when the complaint was filed against the Plaintiffs. *Id.* at 15, 16-20, 24. Based on that interpretation, the Court found the laws constitutional. *Id.* at 40-41.

The District Court's approach was wrong as a matter of Colorado law and as a matter of federal constitutional law. The Secretary of State's Rule 1.6 answered the question of when Colorado's campaign finance laws applied to the annexation,

and the District Court was not at liberty to ignore it. Moreover, the District Court's approach did not cure the constitutional defects in the campaign finance laws in any event. Even assuming the District Court's approach were correct, that would simply have changed the *timing* of Plaintiffs' obligation to register an issue committee and comply with the requirements for issue committees. It would not have changed their obligation to comply with those laws, the fact that they were sued in a private enforcement action, the nature of their rights to speak and associate, the burden of the laws on those rights, or the nature of the State's interest in registration and disclosure. In short, the District Court's approach was not only an incorrect interpretation of Colorado law, it was a pointless one as well.

This Court should thus reject the District Court's "interpretation" of Colorado law and its approach to the constitutional issues in this case, but should nonetheless adopt the District Court's findings with respect to the burdens the campaign finance laws impose on individuals like the Plaintiffs and the fact that they permit abuse of First Amendment rights.

I. The District Court Incorrectly Applied Colorado Law And Thus Incorrectly Analyzed The Constitutional Issues In This Case.

In concluding that the campaign finance laws did not apply to the Plaintiffs' activities when Mrs. Putnam filed her complaint against them, the District Court appeared motivated equally by its view that the campaign finance laws *should not* be applied in that manner as by its view that the laws allegedly *could not* be

interpreted to apply that way. As near as Plaintiffs can tell, the District Court’s reasoning went something like this: “A petition for an annexation election is qualitatively different” from other types of citizen initiative petitions, because the former “is a request to the governing body to consider a proposal for annexation which is a matter within its discretion.” Slip Op. at 24. Thus, when the Plaintiffs began opposing annexation in the spring of 2006, their activities were not “electoral” in nature, they were akin to any effort by citizens to convince their representatives to exercise discretionary authority. *See id.* at 35. As the Court put it, “[t]here is no principled basis for distinguishing these efforts to avoid annexation of their property from any other opposition to proposed action of representative government by the legislative process” such as the placement of a stop light, a zoning decision, or the like. *Id.* at 26-27. Accordingly, the District Court concluded that if the campaign finance laws did apply to the Plaintiffs’ activities during the petition stage, “[t]he breadth of [their] restriction on citizens’ freedom to associate and communicate is not supportable by any rational governmental purpose.” *Id.*; *see also id.* at 25 (stating that freedom of speech and association “are directly implicated if the state requirements of registration, reporting, and disclosure were applicable to these plaintiffs when they first began their activities opposing the Putnam petition”). In short, according to the District Court, “Speech addressed to the Town Council as elected representatives of the

Town of Parker is different from speech addressing the qualified electors and landowners in Parker North in the election process.” *Id.* at 35.

As a result of this analysis, the District Court concluded that the campaign finance laws must be read narrowly in order to avoid a constitutional issue. *Id.* at 14, 15. It accomplished this by deciding that the Secretary’s Rule 1.6, under which annexation became a ballot issue or ballot question at the latest on May 16, 2006—well before Mrs. Putnam filed her complaint—was wrong. According to the Court’s own “interpretation” of the law, annexation did not become a ballot issue or question until the Town of Parker published its notice of election on December 14, 2006. Slip Op. at 15-20, 24.

The District Court’s approach was wrong in virtually every way. First, the Secretary’s Rule 1.6 was a reasonable interpretation of the relevant laws and the District Court was not entitled to ignore it. Second, the particulars of annexation law have no bearing on when a matter becomes a ballot issue or question that is subject to Colorado’s campaign finance law, and much of what the District Court concluded about the annexation laws was wrong in any event. Third, speech about an annexation petition is in no way constitutionally unique and is protected neither more nor less than speech about an annexation election or any other government action. In any event, the Plaintiffs were at all times attempting to convince *both* the Town *and* the voters to oppose annexation. Thus, while the District Court was

correct to see the application of the campaign finance laws to the Plaintiffs as repugnant to the First Amendment, it should not have rewritten those laws to avoid that result. It should have ruled them unconstitutional.

A. The District Court Should Have Deferred to the Secretary’s Rule 1.6.

Whatever questions might have previously existed about the time at which Colorado’s campaign finance laws apply to a citizen initiative, the Secretary’s Rule 1.6 resolved them. Under that rule, annexation became a ballot issue or question at the latest by May 16, 2006, when Mr. Hopkins submitted his signed petition to the Parker town council. *See* Rule 1.6, 8 C.C.R. 1505-6; Aplt. App. 254-262. It is true, as the District Court pointed out, that the ALJ in the Plaintiffs’ enforcement proceeding questioned whether annexation was a “ballot issue or ballot question” to which the campaign finance laws applied, and the Plaintiffs argued at the time that no ballot issue or question existed until August, when the Town decided to hold an election. Aplt. App. 2293-2317. However, the ALJ did not rule in Plaintiffs’ favor, and by adopting Rule 1.6, the Secretary later confirmed that Mrs. Putnam’s position on that issue was correct. In short, the Plaintiffs *lost that debate*. The District Court’s effort to turn back the clock and proceed as though the Plaintiffs prevailed on that question was improper.

As the District Court recognized, annexations clearly come within the statutory definition of “ballot question,” which includes any “state or local

government matter involving a citizen petition or referred measure, other than a ballot issue.” C.R.S. § 1-1-104(2.7); Slip Op. at 16, 24. Thus, the only question is the time at which annexation became a “ballot question,” which the definition does not answer. The Secretary adopted Rule 1.6 pursuant to his constitutional and statutory authority to answer precisely that question. Aplt. App. 2273, 2375, 2379-2380 (29:19-30:9, 36:6-21). *See also* Act of May 14, 2008, ch. 226, 2008 Colo. Sess. Laws 854 (postponing expiration of Secretary of State’s regulations).

Under Rule 1.6, annexation became a “ballot issue or ballot question” at the latest when the second annexation petition was submitted to the Town of Parker on May 16, 2008. At that point, the petition had been circulated and signed by at least one person under subsection (d) of the rule; alternatively, it was a “signed petition” that had been “submitted to the appropriate election official in accordance with law” under subsection (e). *See* Aplt. App. 559 (28:11-15), 463 (¶ 10), 475-476 (¶ 7), 485-486 (¶ 11), 631, 822-834. Rule 1.6 is consistent with both the Secretary’s long-standing policy of maximum disclosure and the only Colorado decision on point. *See* Aplt. App. 56-58, 771 (69:20-70:7), 780 (105:14-16), *Colorado for Family Values v. Meyer*, 936 P.2d 631, 632 (Colo. App. 1997) (concluding that campaign finance laws apply at the petition stage of a ballot proposition).

Rule 1.6 was thus an entirely reasonable interpretation of state law that the District Court was bound to follow. *See Macias v. N.M. Dep't of Labor*, 21 F.3d 366, 369-370 (10th Cir. 1994) (holding that federal courts must defer to state agency interpretations of statutes unless they are clearly incorrect); *see also Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (Colo. 1996) (stating that Colorado courts must defer to reasonable agency rules); *Mile High Greyhound Park, Inc. v. Colo. Racing Comm'n*, 12 P.3d 351, 353-54 (Colo. App. 2000) (same). The District Court was bound to follow Rule 1.6 despite the fact that the Secretary adopted it after the Plaintiffs' private enforcement proceeding was concluded, for, as the Supreme Court has stated, where "a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 n.3 (1996); *see also First Nat. Bank of Chi. v. Standard Bank & Trust*, 172 F.3d 472, 478 (7th Cir. 1999) (stating that an agency clarification of law after the fact is entitled to deference unless the clarification plainly conflicts with earlier interpretations).

The District Court's conclusion that the campaign finance laws did not apply to the Plaintiffs' activities prior to the publication of the notice of election was therefore wrong and should be reversed.

B. Colorado’s Campaign Finance Laws Apply to Annexation No Differently Than They Apply to any Other Issue.

The District Court spent roughly seven pages of its decision justifying its opinion that annexation is somehow different from other subjects to which the citizen initiative process applies in Colorado, but this discussion is entirely irrelevant to the statutory question of when the campaign finance laws apply. Slip Op. at 16-20, 23-25. Colorado’s campaign finance laws do not single out annexation for special treatment, and, as even the District Court recognized, the definition of “ballot question” applies to petitions for annexation on its face. Slip Op. at 16, 24.

In any event, the District Court’s reading of the annexation laws was simply wrong. Contrary to the Court’s view, a petition for an annexation election is not a mere request to a local government to hold an election “within its discretion.” Slip Op. at 24. Under Colorado law, a valid annexation petition requires that “an election *shall* be called.” C.R.S. 31-12-112 (emphasis added). The annexation process is no different in this respect from that for any ballot proposition at the state level. Once the petition is declared valid and other procedural requirements are met, the law provides that an election must be held. *See* Colo. Const. art V, § 1.

Moreover, while the approval of annexation in an election only authorizes the municipality to annex land, but does not require it to do so, many initiatives at

both the local and state level simply empower governments to take actions in their discretion.³ And ballot propositions can and do cover the same subjects as laws passed by the legislature. *See McKee v. Louisville*, 200 Colo. 525, 529 (Colo. 1980) (stating that “[t]he right of initiative pertains to any measure, whether constitutional or legislative, and, in the case of municipalities, it encompasses legislation of every character”); *Minch v. Town of Mead*, 957 P.2d 1054, 1057 (Colo. Ct. App. 1998) (stating that “[a]nnexation is a legislative function” to which “[t]he constitutional right of initiative pertains”). In short, the District Court’s view that annexation is somehow different is simply incorrect.

While the District Court was correct to recognize that “[t]here is no principled basis” for distinguishing the Plaintiffs’ opposition to annexation from opposition to any actions of a legislature or local government, Slip Op. at 26, the same can be said for *any* ballot proposition. Speech about ballot propositions is no different from speech about any government action. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (stating that electoral advocacy is “no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation”). And, indeed, the

³ *See, e.g.,* Amendment 50, *Limited Gaming in Central City, Black Hawk, and Cripple Creek* (Colo. 2008) (authorizing certain cities to alter laws concerning casino gaming) (available in the 2008 bluebook at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/2008EnglishVersionforInternet.pdf (last visited Feb. 13, 2009)); Referendum A, *Revenue Bonds for Water Projects* (Colo. 2003) (authorizing Colorado Water Conservation Board to raise money by issuing bonds) (available in the 2003 bluebook at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2003/ballot/2003BlueBookforInternet2.pdf (last visited Feb. 13, 2009)).

record makes clear that from the beginning, the Plaintiffs were not simply opposing the prospect of the Town holding an annexation election; they were seeking to convince their neighbors to oppose it and to vote against it as well. Aplt. App. 248-250, 270-271. In sum, while the District Court’s approach was entirely wrong, it correctly recognized a central point of Plaintiffs’ case—that Colorado’s campaign finance laws that apply to ballot issues regulate speech “at the heart of the First Amendment’s protection.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

II. Colorado’s Private Enforcement Provision Violates the First Amendment.

Despite finding that “[t]here can be no doubt that Putnam and Hopkins used the private enforcement provisions to attempt to silence the plaintiffs,” Slip Op. at 39, and despite finding that the provision violated the First Amendment by permitting this abuse, *id.* at 30, 32, the District Court refused to strike it down. *Id.* at 41. The Court apparently believed that it could not reach the merits of Plaintiffs’ challenge, despite concluding that Plaintiffs had standing to assert their challenges and that the case was not moot. *Id.* at 25. The only explanation the Court provided was that “[t]he constitutionality of the procedure following a citizen complaint in an election that is within the coverage of the Colorado Constitution, statutes and regulations is not an issue that can be determined on this

record, given the termination of the ALJ proceeding in this case by settlement.” *Id.* at 41.

Yet, even on the District Court’s own terms, this conclusion makes no sense, for the Court correctly found that the Plaintiffs’ “First Amendment rights were violated when they felt compelled to enter into the Stipulated Judgment to avoid the cost of continuing to defend themselves in the ALJ proceedings.” *Id.* at 40. In effect, the District Court appears to have concluded that although the institution and maintenance of the private enforcement action violated the Plaintiffs’ rights, the fact that they settled in order to avoid a further violation of their rights deprived them of the opportunity to challenge the law that led to that violation.

Whatever the proper interpretation of the District Court’s reasons for failing to reach the merits of Plaintiffs’ challenge to Article XXVIII, § 9(2)(a) of the Colorado Constitution, that decision was wrong, as Plaintiffs demonstrate in the first section, below. Following that, Plaintiffs show that the private enforcement provision violates the First Amendment because it includes no safeguards for First Amendment rights and delegates unguided discretion to private citizens.

A. The District Court Should Have Reached The Merits of Plaintiffs’ Challenge to the Private Enforcement Provision.

Plaintiffs asserted both facial and as-applied challenges to the private enforcement provision. *Aplt. App.* 435-436. As they demonstrated in their supplemental briefing to the District Court, Plaintiffs clearly had standing to mount

both types of claims regardless of when the annexation became a ballot issue or question under the campaign finance laws. Aplt. App. 2360-2367. The District Court seemed to recognize this, stating that the “standing has been established by the application of the law” to the Plaintiffs and “all parties agree that the legal questions have not become moot.” Slip Op. at 25. In short, Plaintiffs clearly suffered an injury in fact sufficient to confer standing. *See, e.g., Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1192 (10th Cir. 2000).

It is thus not clear why the District Court seemed to believe that the settlement of Plaintiffs’ private enforcement proceeding prevented the Court from reaching the merits. *See* Slip Op. at 41. The settlement did not diminish the injury that Plaintiffs suffered from having been subjected to a private enforcement action or the threat that they would be subjected to another one in the future. *See, e.g., Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988) (recognizing that self-censorship is “a harm that can be realized even without an actual prosecution”); *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (holding that protestor had standing to challenge hate crimes law even though prosecution against him under the law had been dropped). Indeed, the District Court held that the private enforcement action violated the Plaintiffs’ rights, so their injury is indisputable. Slip Op. at 32, 39.

The District Court’s decision not to reach the merits of Plaintiffs’ challenge to the private enforcement provision may have been related to its decision to reject all of Plaintiffs’ facial claims. Slip Op. at 15. But even if the Court had been correct to do so—which it was not—Plaintiffs could still maintain their prospective as-applied challenge. *See Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (allowing plaintiff to proceed with prospective as-applied challenge).

In any event, the District Court’s decision to reject Plaintiffs’ facial claims was based on a misreading of *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008). That case involved a facial overbreadth challenge to a state law that regulated the mechanics of the primary election system. *Id.* at 1189. The Supreme Court in *Washington State Grange* itself recognized that the standard for facial challenges to laws that govern the mechanics of an election is different from the standard for facial challenges to laws that impact free speech. In the latter case, a law is facially invalid if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Id.* at 1190 n.6 (internal quotation marks omitted). Thus, the District Court’s conclusion that Plaintiffs must demonstrate that the challenged laws are unconstitutional in *all* of their applications was wrong. *See, e.g., N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 300 (4th Cir. 2008) (holding

that *Washington State Grange* rule regarding facial challenges did not apply to cases involving the right to free speech).

Finally, the District Court appeared to believe that the record was somehow insufficient to support a challenge to the private enforcement provision. Slip Op. at 41. However, the application of the provision and its procedures are clear as a matter of law and were undisputed. Aplt. App. 1287, 107-108, 127; *see also* Slip Op. at 13-14, 28, 30. Moreover, the record contained ample evidence demonstrating both the provision's application to the Plaintiffs and to others in Colorado. *See* Aplt. App. 414-417, 632-746, 1191-1249. The Court's vague suggestion that the record was incomplete should thus be disregarded.

B. Colorado's Private Enforcement Provision Provides No Safeguards for First Amendment Rights and Delegates Unguided Discretion to Private Citizens to Enforce the Campaign Finance Laws.

The District Court was correct to find not only that the private enforcement provision was used to intimidate and silence Plaintiffs' speech, but that the provision permits such abuse in violation of the First Amendment. Slip Op. at 28, 30, 32, 39. This Court should adopt those findings and strike the provision down.

The Supreme Court has long recognized that First Amendment rights need breathing space to survive. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964); *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Court has thus paid particular attention to laws, causes of action, and even constitutional

standards that threaten to impose high costs or liability on those who exercise First Amendment rights. As the Court stated in a recent campaign finance case, even the prospect of litigation can “constitute[] a severe burden on political speech.” *FEC v. Wisc. Right to Life, Inc. (WRTL II)*, 127 S. Ct. 2652, 2666 n. 5.

Perhaps the seminal case on this point is *New York Times v. Sullivan*, in which the Court held that Alabama’s standards for libel actions were “constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments . . .” 376 U.S. at 264. Recognizing that speakers will “steer far wide[] of the unlawful zone” in order to ensure that their speech poses no risk of liability, *id.* at 279, the Court established a heightened pleading standard for libel actions brought by public officials in order to prevent the self-censorship and chilling effect the threat of liability will have on speech. *Id.* at 271-72, 277-80.

In an early decision following *New York Times v. Sullivan*, the Supreme Court described its rationale succinctly:

Our touchstones are that acceptable limitations [on speech] must neither affect ‘the impartial distribution of news’ and ideas, nor . . . constitute a special burden on the press, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150-51 (1967) (applying actual malice standard to actions brought by any public figure) (internal citations omitted). The Court thus applied the actual malice standard to a range of private causes of action that impact free speech. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46, 52, 56 (1988) (applying actual malice standard to causes of action for intentional infliction of emotional distress); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (requiring plaintiffs in libel actions to prove falsity); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring showing of culpability in defamation actions brought by private figure); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (applying actual malice standard to invasion of privacy tort).

The Court's concern for the chilling effect that result from the threat of liability for speaking out finds its expression in other lines of jurisprudence as well. Thus, the Supreme Court has held that laws that grant too much discretion to enforcement officials violate the First Amendment by raising the prospect of content or viewpoint discrimination. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-60, 772 (1988) (license for news rack placement unconstitutional because it gave too much discretion to government officials); *City of Houston v. Hill*, 482 U.S. 451, 465-467 (1987) (law criminalizing interference with police officer unconstitutional because it gave too much discretion to police).

Colorado's private enforcement provision thus violates a fundamental tenet of the First Amendment. It contains no safeguards for free speech and grants virtually unlimited discretion to private parties to enforce laws that impact core political speech. *See* Slip Op. at 28, 30, 32, 39. Indeed, as the Secretary admitted below, delegating authority to private citizens with an incentive to enforce the laws against their political opponents was a primary purpose of the provision. Aplt. App. 1354, 1295-1296, 1299. And, as two of the Secretary's experts admitted, political opponents often use private enforcement actions strategically in elections. Aplt. App. 861 (37:19-39:1) (Colorado political consultant Floyd Ciruli testifying that private enforcement actions are used as a strategic tool during campaigns); Aplt. App. 874-875 (36:4-37:11) (Robert Stern, lawyer and ex-employee of the California FPPC, testifying that most private complaints filed in California were either baseless or brought to gain an advantage in an election); *see also* Aplt. App. 913, 928-929 (report recommending that California private enforcement provision be reformed because it can be used for political gain or to silence speech); *Cf. Nike, Inc. v. Kasky*, 539 U.S. 654, 680 (Breyer, J., dissenting from dismissal of certiorari) (arguing that statute creating private cause of action for false advertising chills speech).

The District Court's apparent view that it lacked sufficient evidence to address the private enforcement provision was thus clearly wrong. As the Supreme

Court has made clear, to be unconstitutional a statute need only “lend[] itself to selective enforcement against unpopular causes.” *NAACP v. Button*, 371 U.S. at 435; *see also Seattle Affiliate of the Oct. 22nd Coal. v. City of Seattle*, 550 F.3d 788, 794 (9th Cir. 2008) (holding that licensing schemes with subjective standards can result in self-censorship and thus “are incapable of redress through an as-applied challenge”). The evidence cited above, along with the private enforcement provision itself, and the facts of Plaintiffs’ case are enough to establish that it lends itself to selective enforcement. But Plaintiffs provided evidence of other instances in which the provision has been used for political gain and to harass. Aplt. App. 415-417, 1193 (¶ 8), 1196, 648-746. Plaintiffs also showed that enforcement actions have been brought in Colorado for minor infractions such as reporting information on incorrect forms;⁴ failing to list a single address, employer, or occupation;⁵ and making math errors or using calculation methods with which complainants disagree.⁶ Enforcement actions have even alleged disclosure obligations where none existed.⁷ As one of the Secretary’s experts admitted, “[c]ertainly, if there are minor mistakes or technical violations and people are being sued . . . that clearly would make people reluctant to get involved.” Aplt.

⁴ Aplt. App. 822-834 (failing to use forms provided by the Secretary of State’s office).

⁵ Aplt. App. 1228-1244 (failing to list a proper street address for a contribution); Aplt. App. 836-846 (candidate failed to report the employer of one of his \$100 contributors).

⁶ Aplt. App. 648-685 (adding expenditures incorrectly); Aplt. App. 848-855 (calculating contributions by dividing funds raised by number of fundraiser attendees rather than listing contribution from each).

⁷ Aplt. App. 1218-1221.

App. 900 (250:12–16). And, indeed, Plaintiff Becky Cornwell, No Annexation’s registered agent, was “constantly worried about being sued for even the smallest error.” Aplt. App. 490 (¶ 8).

The private enforcement provision is therefore unconstitutional both as applied and on its face. *See, e.g., Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 794 (1988) (ruling that statute “must necessarily chill speech” because it created uncertainty and the possibility of litigation for speakers); *City of Houston*, 482 U.S. at 465-467 (striking down statute on its face because it gave “unguided discretion” over enforcement to police); *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (stating that the “chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure”).

III. Colorado’s Registration and Disclosure Provisions for Issue Committees Unconstitutionally Burden Rights to Speech and Association.

The District Court upheld Colorado’s registration and disclosure provisions for issue committees on the grounds that the State had a legitimate interest in maintaining the integrity of an election once the Town of Parker published its notice of election on December 14, 2006. As demonstrated above, the District Court’s distinction between the petition stage and the election stage of a ballot proposition—whether for annexation or some other subject—finds no support in either State law or federal constitutional law. In this part, Plaintiffs demonstrate

that Colorado’s registration and disclosure laws for issue committees, C.R.S. §§ 1-45-108(3), 108(1)(a)(I) and (II); Colo. Const. art. XXVIII, § 3(9), violate the First Amendment whether they apply at the petition stage or the election stage.

A. The Supreme Court Has Never Extended the Constitutional Rationale for Campaign Finance Laws to the Ballot Issue Context.

The District Court’s decision, and the Secretary’s argument, below, were based on the incorrect premise that all campaign finance laws are created equal—that because the Supreme Court has upheld campaign finance laws in the candidate context, the laws are equally valid in the ballot issue context. But that premise is wrong. The Supreme Court has only addressed the constitutionality of campaign finance laws in the ballot issue context in two cases, and in both it struck down the laws because the rationale for candidate campaign finance laws—the elimination of corruption—does not apply to ballot issues. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-97 (1981); *Bellotti*, 435 U.S. at 789-92. In short, the Supreme Court has not held, as the District Court seemed to believe, *see* Slip Op. at 35, that government may regulate *electoral advocacy* as such. *See, e.g., Buckley*, 424 U.S. at 48; *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). The Supreme Court has held that the government may regulate *campaign financing* in the candidate context to the extent the laws serve to eliminate actual or apparent corruption of *candidates*. *See City of Berkeley*, 454 U.S. at 296-97 (“*Buckley* identified a single narrow exception to the rule that limits on political activity were

contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . .”).

While the Supreme Court has upheld disclosure laws, it again has done so only in the candidate context and only to the extent that the laws advanced the otherwise constitutional purposes of candidate campaign finance laws. Thus, in *Buckley*, the Court identified three interests that disclosure laws served, but made clear that all applied in the candidate context. *See* 424 U.S. at 67-68. As the Court itself stated, disclosure of contributions to candidates provided voters 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*.” *Id.* at 66-67 (emphasis added); *see also id.* at 79-80 (narrowing the reach of disclosure provisions so as to cover only “spending that is unambiguously related to the campaign of *a particular federal candidate*”) (emphasis added). A few years after *Buckley*, the Court confirmed in *Brown v. Socialist Workers ’74 Campaign Committee*, that the interests announced in *Buckley* were indeed limited to the candidate context, stating that in *Buckley* “[t]he Court found three government interests sufficient in general to justify requiring disclosure of information concerning campaign contributions and expenditures: *enhancement of voters’ knowledge about a candidate’s possible allegiances and interests*, *deterrence of corruption*, and the enforcement of contribution limitations.” 459

U.S. 87, 92 (1982) (emphasis added); *see also Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008) (striking down disclosure provision applied to candidates because law to which it was related was struck down). These decisions make clear that candidate campaign finance cases provide support for disclosure laws in the candidate context *only*; they do not provide support for ballot issue disclosure laws.

While it is true, as the District Court noted, that the Supreme Court has alluded to the utility of disclosure laws in the ballot issue context, it has done so only in dicta and only in cases in which it struck down laws that burdened speech about ballot issues. *See Buckley v. Am. Const. Law Found. (ACLF)*, 525 U.S. 182, 202-204 (1999); *City of Berkeley*, 454 U.S. at 298-300; *Bellotti*, 435 U.S. at 791-92 & n.32; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-54 (1995) (noting that discussion of disclosure in *Bellotti* was dicta).

In short, Colorado's registration and disclosure laws find no support in either the Supreme Court's candidate campaign finance cases or its cases dealing with laws regulating ballot issues. To be constitutional, Colorado's laws must satisfy strict scrutiny. As demonstrated below, the District Court's decision fell far short of demonstrating that they do.

B. Colorado's Registration and Disclosure Laws for Issue Committees Fail Strict Scrutiny.

The Supreme Court has long held that laws that burden First Amendment rights must satisfy strict scrutiny. *See, e.g., WRTL II*, 127 S. Ct. at 2664 ("Because

[the statute] burdens political speech, it is subject to strict scrutiny.”); *McIntyre*, 514 U.S. at 347 (“When a law burdens core political speech, we apply ‘exacting scrutiny’”); *City of Berkeley*, 454 U.S. at 298 (“As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny.”). As this Court has held in the context of candidate disclosure laws, “We apply strict scrutiny where . . . the ‘deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct in requiring disclosure.’” *Davidson*, 236 F.3d at 1198 (quoting *Buckley*, 424 U.S. at 65); *see also id.* at 1197.

Under strict scrutiny, the government bears the burden of demonstrating that the laws advance a compelling state interest and are narrowly tailored. *Id.* at 1198. As the Supreme Court has stated “[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation.” *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 265 (1986). To satisfy this standard, the government “must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citations omitted); *see also*

Republican Party of Minn. v. White, 536 U.S. 765, 781 (2002) (state must present more than assertion and conjecture to justify restriction on speech).

The Supreme Court recently made clear that even *candidate* disclosure laws—which the Court has upheld in certain circumstances— “cannot be justified by a mere showing of some legitimate state interest.” *Davis. v. FEC*, 128 S. Ct. at 2775 (citing *Buckley*, 424 U.S. at 64). “Instead, there must be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed and the governmental interest ‘must survive exacting scrutiny.’”⁸ *Id.*

The District Court failed to apply anything approaching the proper level of scrutiny to Colorado’s registration and disclosure laws for issue committees. The Court identified the State’s interest as “the transparency that may be served by identification of the proponents and opponents of the measure under consideration” which information “may be of considerable importance to the voting public.” Slip Op. at 34. The Court then stated that the burden imposed by the registration and disclosure laws after the notice of election was published “appears to present a factual dispute—as does the justification for those requirements.” *Id.* at 37. It then stated that the Plaintiffs must demonstrate adverse effects from the laws “to

⁸ The Court has used the term “exacting” scrutiny interchangeably with “strict” scrutiny. See *Buckley v. ACLF*, 525 U.S. at 192 n.12; *id.* at 206 (Thomas, J., concurring); *McIntyre*, 514 U.S. at 345-46 & n.10.

warrant some level of scrutiny,” and then rejected both side’s expert witness testimony, on the grounds that “[t]here is no scientific method that can measure the adverse effects claimed by the plaintiffs. The defendants’ witnesses offer no better support for their opinions.” *Id.* at 39. Despite having rejected the State’s evidence, the District Court still upheld the laws. *Id.* at 41.

The District Court erred in three significant respects. First, the Court did precisely what the Supreme Court in *Davis* held that courts may not do—it upheld the registration and disclosure laws on the mere recitation of a legitimate state interest. The District Court did not subject the State’s alleged interest in maintaining the integrity of elections to exacting scrutiny, and it did not determine whether there was a substantial relation between the alleged interest and the information sought to be disclosed. The District Court stated simply that the information “may be” helpful to voters, and it upheld the law. Slip Op. at 34. But the fact that voters may find certain information helpful is neither a sufficiently compelling reason to justify mandatory disclosure, nor does the simple recitation of that claim satisfy strict scrutiny. *See McIntyre*, 514 U.S. at 348 (“The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.”).

Moreover, it is not at all clear that “maintaining the integrity of an election” is even a legitimate reason to impose registration and disclosure laws on those who simply wish to advocate passage or defeat of a ballot issue. Colorado’s ballot issue campaign finance laws do not deal with the mechanics of an election or the process of getting an issue on the ballot; they regulate speech about ballot issues. *Cf. ACLF*, 525 U.S. at 191-92, 204-05 (distinguishing “valid ballot-access provisions” designed to protect “the integrity of the initiative process” from laws that affect right to free speech). The District Court relied on *City of Berkeley* for this alleged interest, Slip Op. at 36, but that case did not involve the constitutionality of disclosure laws, it involved the constitutionality of contribution limits applied to ballot issue committees, which the Supreme Court struck down. *See* 454 U.S. at 298-300. The Supreme Court’s discussion of disclosure was dicta, as the District Court recognized, and the Supreme Court did not analyze the State’s disclosure laws at all, much less under the standard discussed in *Davis*. *City of Berkeley* does not support Colorado’s registration and disclosure laws.

Second, the District Court reversed the burdens, effectively requiring the Plaintiffs to show that the laws did not satisfy strict scrutiny, rather than requiring the Secretary to show that they did. This is clear from the fact that the District Court rejected both sides’ evidence, but still upheld the law. Slip Op. at 38-39. As the Supreme Court has made clear, the *government* must not only show that that

laws burdening First Amendment rights satisfy strict or “exacting” scrutiny, it must also present actual evidence to meet its burden. *See Davis*, 128 S. Ct. at 2775; *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228-29 (1989) (striking down ban on party primary endorsements because the State presented no evidence that the law served the state’s alleged interest in preventing confusion).

For the same reason, the District Court was wrong to conclude that the burden of the laws on the Plaintiffs’ rights “appear[] to present a factual dispute.” Slip Op. at 37. Both the Supreme Court and the Tenth Circuit have held that disclosure laws burden First Amendment rights. *See, e.g., Davis*, 128 S. Ct. at 2775; *Davidson*, 236 F.3d at 1197, 1198. Indeed, in *MCFL*, the Supreme Court discussed in detail the various burdens that laws very similar to Colorado’s registration and disclosure laws impose on small groups like the Plaintiffs. *See* 479 U.S. at 253-54, 262-63; *see also WRTL II*, 127 S. Ct. at 2671 n.9 (stating that “PACs impose well-documented and onerous burdens, particularly on small non-profits”); *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1145 n.6 (10th Cir. 2007) (same). Plaintiffs were thus required to do no more than demonstrate that Colorado’s registration and disclosure laws are similar to those the Supreme Court has held are burdensome, which they did. Aplt. App. 440-445. But Plaintiffs produced additional evidence of burden, including the following undisputed facts: the Secretary has admitted that Colorado’s registration laws are

“complex and unclear,” Aplt. App. 748, 750-751, 762 (36:20–21); one of the Secretary’s experts admitted that the laws can be difficult to understand and apply, Aplt. App. 978; employees of the Secretary and Douglas County have had difficulty understanding and applying those laws, Aplt. App. 773 (78:16-25), 769 (63:18-65:22), 492 (¶ 14), 2164; the Secretary publishes a lengthy manual designed to help citizens understand its laws, and it advises them to seek legal advice if they have problems, Aplt. App. 585, 763 (37:4–7), 765 (46:13–18); and Plaintiff Becky Cornwell had difficulty understanding and applying the laws. Aplt. App. 490-495. Indeed, the District Court itself recognized some of the difficult questions that the application of the laws posed for the Plaintiffs. *See* Slip Op. at 26. *See also* Aplt. App. 417-420, 440-442 (discussing burden of laws).

This evidence was more than enough to demonstrate that the laws burdened First Amendment rights, which is all Plaintiffs had to show. The fact that the Secretary claimed to dispute the precise *level* of that burden is immaterial and did not preclude summary judgment in Plaintiffs’ favor. In any event, if there were a genuine issue of material fact, the proper course would have been to hold a trial, not rule in favor of the Secretary.⁹

⁹ The District Court claimed that “the parties have suggested that these disputed should be determined by a jury.” Slip Op. at 38. This is only half correct, in that the Plaintiffs position was that the Court should hold a trial only if it first concluded that the Secretary could meet its burden under strict scrutiny. Aplt. App. 2446-48, 2496-97.

Plaintiffs also introduced the empirical studies of two experts demonstrating both that disclosure laws negatively impact privacy rights and that they are difficult for ordinary citizens to understand and apply. Aplt. App. 1051-1190, 988-1050, 420-424, 442-444, 448-451. The District Court rejected this expert testimony on the grounds that the “surveys and experiments of the plaintiffs’ opinion witnesses are not a sufficient support for their opinions” and that “[t]here is no scientific method that can measure the adverse effects claimed by the plaintiffs.” Slip Op. at 39. The Court’s claim that “no scientific method” can measure these effects was baseless and should be disregarded. *See Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997) (holding that special master’s conclusion that “there is no scientific method for determining the cause of a mental disorder” was error based on “his own preconceived notions relating to psychiatric proof”). But the District Court also improperly disregarded the *studies* that Plaintiffs’ experts conducted simply because it disagreed with their *opinions* about those studies. These studies stand apart from the experts’ opinions, however, and can be evaluated on their own merits. The District Court simply dismissed them out of hand. Although Plaintiffs’ expert testimony was not strictly necessary for establishing that the registration and disclosure laws burden their rights, that testimony and the studies on which it relied are relevant to determining the extent of the burden and to Plaintiffs’ anonymous speech claim as well. This Court

should thus consider Plaintiffs' expert testimony and studies as well as the other evidence on which Plaintiffs' relied.

Finally, the District Court failed to analyze whether the registration and disclosure laws were narrowly tailored. Plaintiffs demonstrated below that Colorado's registration and disclosure laws are far more burdensome and require the reporting of far more information than necessary to further any legitimate interests Colorado may have. Aplt. App. 454-457, 1299-1302. The District Court failed to address these arguments at all.

In sum, having rejected the Secretary's evidence, the District Court should have concluded that the Secretary could not meet its burden under the First Amendment, and it should have ruled Colorado's registration and disclosure laws unconstitutional. *See also*, Aplt. App. 440-445, 1297-1299, 2193-2201. To the extent the Secretary attempts to resuscitate the arguments it made below, Plaintiffs will respond to those arguments in their reply brief.

IV. Colorado's Disclosure Laws Violate Rights to Anonymous Speech and Association.

The District Court denied Plaintiffs' claim that Colorado's disclosure laws for issue committees, C.R.S. §§ 108(1)(a)(I) and (II) and Colo. Const. art. XXVIII, § 7, violate rights to anonymous speech and association simply by distinguishing the Supreme Court's decision in *McIntyre*. Slip Op. at 37. Like its approach to

Plaintiffs' other claims, the District Court failed to apply any level of scrutiny to Plaintiffs' anonymous speech claim. It also misread *McIntyre*.

The Supreme Court has held that disclosure laws burden speech and are subject to strict scrutiny. That is clear not only from *McIntyre*, 514 U.S. at 347, but also from the Court's recent decision in *Davis*, where it reaffirmed that disclosure laws can "seriously infringe on privacy of association and belief" and applied exacting scrutiny. *See* 128 S. Ct. at 2774-75. Thus, whether or not *McIntyre* is distinguishable, the District Court was obliged to apply strict scrutiny to Plaintiffs' claim. Its failure to do so is grounds for reversal alone.

As the Plaintiffs demonstrated in its summary judgment motions, Colorado's disclosure laws fail strict scrutiny because the State's interest was nothing more than the "simple interest in providing voters with additional relevant information," which the Supreme Court rejected in *McIntyre*, and because the disclosure laws "reveal[] unmistakably the content of [a person's] thoughts on a controversial issue." 514 U.S. at 348, 355. *Aplt. App.* 457-458, 1302-1304, 2201-2202. In short, forcing someone to disclose a contribution to an issue committee is no different than peering into the ballot box. *See, e.g., Common Sense Alliance v. Davidson*, 995 P.2d 748, 756 (Colo. 2000) ("A vote for or against a ballot measure is most assuredly an exercise of free speech; an economic contribution to a

committee designed to support or oppose a ballot measure is similarly of constitutional magnitude.”).

The District Court dismissed this point, stating that the right to vote is not at issue in this case. Slip Op. at 36-37. This is true, but entirely irrelevant. Plaintiffs discussed the right to a secret ballot for the same reason the Supreme Court discussed it in *McIntyre*—to demonstrate that the First Amendment protects privacy of association and belief, and that disclosure laws violate those rights. *See* 514 U.S. at 342-43. Moreover, Plaintiffs did not rest solely on the argument that ballot issue disclosure laws effectively divulge one’s vote on an issue; Plaintiffs provided ample evidence that the laws violate citizens’ privacy of belief and association. Aplt. App. 423-424, 448-451, 1000-1003 (¶¶ 31, 33-39), 1006-1007 (¶ 46). *See also* Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times, Feb. 7, 2009, at BU3. This Court should therefore reverse the District Court not only because it failed to apply any level of scrutiny to Colorado’s ballot issue disclosure laws, but also because the laws fail the proper level of scrutiny.

Moreover, the District Court misread *McIntyre* in any event. First, the Court appeared to believe that the decision applies only to laws that affect a single individual’s rights, rather than individuals who associate with one another. Slip Op. at 37. This is an incorrect reading of *McIntyre*, *see* 514 U.S. at 342, and it

ignores *Davis*'s recognition that disclosure laws impact privacy of *association*. See 128 S. Ct. at 2775. More importantly, it ignores the fact that Colorado's disclosure laws do, indeed, affect individuals' privacy by requiring issue committees to disclose the names, addresses, and sometimes employers of their individual contributors. Second, the District Court appeared to believe that *McIntyre* did not apply to cases involving campaign finance disclosure laws. Slip Op. at 37. But this ignores the fact that the Court in *McIntyre* distinguished the laws at issue in *Buckley*, not on the grounds that they were "campaign finance laws" but because they served interests—preventing candidate corruption—that were not present in *McIntyre*. See 514 U.S. at 354-56. The entire discussion of *Buckley* in *McIntyre* would have made no sense if the Court intended simply to exempt campaign finance laws from the decision's reach. Finally, the District Court believed that *McIntyre* turned on the laws' impact on the content of speech. Slip Op. at 37. However, the Court in *McIntyre* discussed the law's affect on content only to distinguish it from laws that merely affect the mechanics of an election, to which a lesser standard of scrutiny applies. See 314 U.S. at 344-46. The Court went on to strike down the law in *McIntyre* because it compelled individuals to disclose their views and because it served no compelling state interest, not because it was content-based. *Id.* at 355-57.

Accordingly, the District Court's denial of Plaintiffs' anonymous speech and association claim should be reversed.

CONCLUSION

This Court should reject the District Court's framework for analyzing the issues in this case, which was largely based on its incorrect interpretation of Colorado law. The District Court was correct, however, in finding that the private complaint provision allowed a private party to violate the Plaintiffs' First Amendment rights and that the State lacked any rational reason for imposing registration and disclosure provisions on groups like the Plaintiffs' at the petition stage of a ballot question. The District Court also correctly rejected the Secretary's evidence in support of the registration and disclosure provisions. On the basis of those findings, this Court should rule Colorado's private enforcement provision, Colo. Const. art. XXVIII § 9(2)(a), and its registration and disclosure provisions for ballot issues, C.R.S. §§ 1-45-108(3), 108(1)(a)(I) and (II); Colo. Const. art. XXVIII, §§ 3(9) and 7, unconstitutional under the First Amendment and enter judgment in Plaintiffs' favor.

STATEMENT REGARDING ORAL ARGUMENT

Due to the novel and important constitutional issues in this case and the District Court's rejection of the Secretary of State's interpretation of Colorado law, Plaintiffs respectfully request oral argument.

Dated: February 18, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in FRAP 32(a)(5)(A) for a brief produced with a proportional font. This brief contains 13,798 words and is 1,177 lines, not including the Table of Contents, Table of Authorities, Corporate Disclosure Statement, Statement Regarding Oral Argument, and Addendum permitted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I hereby certify that a copy of the foregoing **CORRECTED OPENING BRIEF OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES** (1) was submitted in digital format, (2) is an exact copy of the written document filed with the Clerk, and (3) has been scanned for viruses with the Trend Micro OfficeScan Corporate Edition, version 8 SP1 and according to the program, is free of viruses.

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