IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02766-CMA-SKC

COLORADO UNION OF TAXPAYERS, INC.,

Plaintiff,

v.

JENA GRISWOLD, Colorado Secretary of State in her official capacity, and JUDD CHOATE, Director of Elections, Colorado Department of State, in his official capacity,

Defendants.

AMICUS CURIAE BRIEF OF CAMPAIGN LEGAL CENTER IN SUPPORT OF DEFENDANTS

Plaintiff Colorado Union of Taxpayers, Inc. (CUT) asserts constitutional challenges to various components of Colorado's issue committee disclosure regime, including the minimally burdensome registration requirement applicable to small-scale issue committees, *see* Colo. Const. art. XXVIII, § 2(10)(a); 8 Colo. Regs. § 1505-6:1(1.9); C.R.S. §§ 1-45-103(16.3), -108(1.5), and the additional contribution and expenditure reporting obligations that attend issue committee status for larger groups, *i.e.*, those that receive contributions or make expenditures aggregating above $5,000. However, this carefully tailored, two-tiered disclosure regime ensures that Colorado voters can learn who is behind the big-money groups seeking to sway their votes for or against ballot measures, and receive at least basic information about the smaller organizations engaged in ballot measure campaigns.

There is no question that Colorado has an important interest in providing this information to voters, nor that its disclosure framework is narrowly tailored to advance this

interest. The Colorado disclosure provisions challenged here equip voters with the information they need to participate effectively in their state's democratic process, while taking care not to unduly burden smaller-scale efforts to influence the passage or defeat of state ballot measures. They easily pass constitutional muster.

CUT contends that it "hasn't challenged [Colorado's] issue committee regime as a whole," but only "two particular pieces of it," Pl.'s MSJ Resp. 9 n.6—the small-scale committee registration requirement and the $5,000 reporting threshold, which CUT assails as "arbitrary" and not "substantially related to an important governmental interest." Pl.'s MSJ 17. But in fact, these are essential features of Colorado's disclosure system, and advance the same important informational interests served by the system as a whole.

Although CUT seeks to minimize the informational interest as "min[u]scule," Pl.'s MSJ Resp. 4, its weight is firmly established in Supreme Court precedent, which has long recognized that electoral transparency laws "do not prevent anyone from speaking," *Citizens United v. FEC*, 558 U.S. 310, 366 (2010), but "tangibly benefit public participation in political debate." *McConnell v. FEC*, 540 U.S. 93, 137 (2003). Indeed, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam). Ensuring that the electorate is "fully informed" about political messaging thus "alone is sufficient" to justify disclosure requirements, *Citizens United*, 558 U.S. at 368-69.

This is no less true with respect to ballot measure elections, where "[i]dentification of the source of advertising" enables voters "to evaluate the arguments to which they are being subjected." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978).

Indeed, the informational interest is particularly weighty in ballot measure races, where voters act as legislators and decide matters of great public significance while often being confronted with incomplete or misleading information about the interests vying for their votes. In this setting, "[p]ublic disclosure promotes transparency and accountability . . . to an extent other measures cannot." *Doe v. Reed*, 561 U.S. 186, 199 (2010).

The Supreme Court's recent decision in *Americans for Prosperity Foundation (AFP) v. Bonta*, 141 S. Ct. 2373 (2021), thus has no bearing on the constitutionality of Colorado's issue committee disclosure regime. Unlike the California non-public tax reporting rule at issue in *AFP*, which served "[m]ere administrative convenience," *id.* at 2387, Colorado's law advances the vital and well-established interest in an informed electorate. And unlike California's "blunderbuss approach" to donor disclosures, *id.* at 2391 (Alito, J., concurring), the disclosure requirements here are narrowly tailored to serve their informational objectives without unduly burdening small groups.

Finally, the claim that it was "unconstitutionally arbitrary" (2d Am. Compl. ¶ 82) for Colorado to *raise* the threshold at which contribution and expenditure reporting begins—by relieving issue committees from such reporting until they raise or spend more than $5,000—is doctrinally misconceived and contrary to the record. Line-drawing questions regarding the structure of reporting required under a particular disclosure law, including the monetary thresholds at which reporting obligations commence, are relevant to a law's tailoring, but receive substantial deference if they "rationally" advance the state's interest. *Buckley*, 424 U.S. at 83. Colorado's selection of a $5,000 threshold was well-founded and in line with analogous laws in other jurisdictions. It merits considerable deference.

ARGUMENT

I. Colorado's issue committee registration and disclosure requirements are supported by sufficiently important state interests.

A. The vital informational interests advanced by political disclosure laws are well established in Supreme Court and Tenth Circuit precedent.

Since *Buckley*, the Supreme Court has recognized three important interests served by electoral transparency requirements: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196. But under the informational interest alone, the Court has upheld disclosure laws relating to a wide range of political communications—including lobbying, *see United States v. Harriss*, 347 U.S. 612, 625 (1954); ads expressly advocating the election or defeat of candidates, *Buckley*, 424 U.S. at 64-68; "issue ads" that merely mention candidates, *see Citizens United*, 558 U.S. at 369; and broadcast ads addressing "political matters of national importance," *McConnell*, 540 U.S. at 240-43. These precedents, all of which assessed the constitutionality of a disclosure law based on the strength of the government's informational interest, bear directly on the Court's review here.

The Supreme Court has also repeatedly voiced approval of disclosure relating to ballot issue advocacy, where "[i]dentification of the source of advertising" enables voters "to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32; *see also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999) ("Through the disclosure requirements . . . voters are informed of the source and amount of money spent.'"); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299

(1981) ("The integrity of the political system will be adequately protected if [ballot measure] contributors are identified.").

In line with this precedent, the Tenth Circuit has recognized that the disclosure of independent expenditures to influence elections—including expenditures in connection to ballot measures—furthers valid informational interests.[1] It has affirmed both that "[v]oters certainly have an interest in knowing who finances support or opposition to a given ballot initiative," *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1280 (10th Cir. 2016), and that the Supreme Court "on three occasions . . . has spoken favorably of such requirements," *Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010).

CUT, however, devotes much of its summary judgment motion to speculation about a hypothetical monetary threshold below which the voters' informational interest ceases to exist, suggesting that this amount can be divined by comparing one committee's spending to the total spending by all committees in an election. *See* Pl.'s MSJ 11-14. According to CUT, "because small-scale issue committees are such minor players in ballot issue spending" overall, the voters' informational "interest is attenuated almost to the point of nonexistence" in every case. *Id.* at 12, 14.

[1] There is consensus among the circuits that the informational interest in ballot measure-related disclosure has significant weight. *See, e.g.*, *Justice v. Hosemann*, 771 F.3d 285 (5th Cir. 2014); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1251 (11th Cir. 2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 480 (7th Cir. 2012); *Family PAC v. McKenna*, 685 F.3d 800, 806-07 (9th Cir. 2012); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 41 (1st Cir. 2012). Indeed, multiple circuits have found that "[e]ducating voters [through disclosure] is at least as important, *if not more so*, in the context of initiatives and referenda as in candidate elections." *Madigan*, 697 F.3d at 480 (emphasis added); *see also Hosemann*, 771 F.3d at 298.

These arguments misunderstand the nature of the informational interest. Voters have an interest in knowing "the source of advertising" so they can "evaluate the arguments to which they are being subjected," *Bellotti*, 435 U.S. at 792 n.32, whether an ad costs $5,000 or $50,000. To be sure, the state still must show that its law satisfies the requisite tailoring standard and that the benefits of disclosure outweigh any First Amendment burdens imposed. But the voters' right to receive information about the "arguments to which they are being subjected" in an election, *id.*, does not zero out simply because the advertising cost is relatively low—in CUT's subjective estimation or as a proportion of total campaign spending.

The Tenth Circuit's approach is not to the contrary. CUT cites *Sampson* and *Coalition for Secular Government* for the proposition that the state's interest is "weak" or "non-existent" with respect to relatively small expenditures. *Id.* at 12. But neither case held that voters have *no* informational interest in *any form* of ballot measure disclosure triggered at spending thresholds such as those plaintiff challenges here. Instead, these decisions rendered only as-applied judgments as to whether Colorado's former issue committee reporting regime could permissibly be imposed on two very small groups spending only $782.02 and $3,500, respectively. *Sampson*, 625 F.3d at 1251-52; *Coal. for Secular Gov't*, 815 F.3d at 1277.

Indeed, the Tenth Circuit has refused to "draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures." *Sampson*, 625 F.3d at 1261. And in *Coalition for Secular Government*, it explicitly declined to rule on the facial validity of the $200 threshold for issue committee status under the Colorado

Constitution because the Court recognized that the strength of the informational interest would differ in the case of larger-scale expenditures or "complex policy proposals." 815 F.3d at 1278. And the Court also acknowledged the converse point: even "[a]n issue committee raising or spending a meager $200" still might permissibly be required to disclose more "limited information without violating the First Amendment." *Id*.

As the undisputed record here confirms, Colorado's issue committee disclosure requirements ensure that voters have the information necessary to "make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 U.S. at 371. That the law provides for relatively more extensive disclosure with respect to relatively larger groups—not because voters categorically lack an interest in smaller-dollar expenditures but to minimize the reporting burdens on small groups—is not a constitutional infirmity but a sign of proper tailoring.

B. *Americans for Prosperity Foundation v. Bonta* did nothing to undercut the compelling informational and anticorruption interests at stake here.

Although CUT peppers its briefing with references to the Supreme Court's recent ruling in *AFP*, *see* Pl.'s MSJ 17, 43, 51, its reliance is misplaced. While *AFP* reaffirmed that exacting scrutiny applies to the review of compelled disclosure laws, it said nothing to question the importance of transparency to a functioning democracy. This is because *AFP* did not concern elections, or even public disclosure, at all, and thus implicated none of the weighty public interests underlying electoral disclosure laws—a point the *AFP* petitioners themselves repeatedly highlighted in their arguments to the Court.

AFP reviewed a California rule that required "tens of thousands of charities each year" to file a list of their large donors with the state Attorney General on a non-public

basis. 141 S. Ct. at 2387. But because the required reporting was confidential, California asserted no interest in apprising the public of this information, claiming instead that the rule was necessary to police charitable fraud. Following a bench trial, however, the district court found that California almost never used these disclosures to investigate or pursue charitable wrongdoers, leading the Supreme Court to conclude that "California's interest [was] less in investigating fraud and more in ease of administration." *Id.* Accordingly, the law was insufficiently tailored given the "dramatic mismatch" between the "universal production" that California required and a claimed law enforcement interest that proved to be more aspirational than genuine. *Id*. at 2386. The "lack of tailoring to the State's investigative goals [was] categorical—present in every case—as [was] the weakness of the State's interest in administrative convenience." *Id*. at 2387.

AFP thus concerned a law that served "[m]ere administrative convenience," *id.*, not an electoral transparency measure. In fact, the *AFP* petitioners devoted much of their briefing to *distinguishing* electoral disclosure laws from California's charitable reporting rule. Far from questioning the governmental interest in electoral disclosure laws, they heralded such laws as "buttress[ing] trust and faith in public institutions, which is essential for our democracy." Br. of Pet'r 29, *AFP v. Bonta*, 141 S. Ct. 2373 (2021).

CUT also cites *AFP* for the standard of scrutiny here. Pl.'s MSJ 4-5. But *AFP* merely clarified that the "exacting scrutiny" applied in *Buckley*, *Citizens United*, and *Reed* "requires that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and that the disclosure requirement be narrowly tailored to the interest it promotes." 141 S. Ct. at 2385 (quoting *Reed*, 561 U.S.

at 196). The Court did not purport to change the "exacting scrutiny" standard it applied in those cases. *Id*. (suggesting that *Reed* had reviewed for narrow tailoring by considering "various narrower alternatives proposed by the plaintiffs").

Indeed, while narrow tailoring may represent an enhanced standard with respect to tax reporting laws, *cf. Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548-49 (1983), it marks little change in the arena of electoral disclosure. Exacting scrutiny has always entailed an analysis of whether an electoral disclosure law is carefully tailored. *See, e.g.*, *Worley*, 717 F.3d at 1249 (describing tailoring inquiry as "more than a rubber stamp"). While some courts may have used slightly different terminology than *AFP*'s "narrow tailoring" language, in practice, their assessments of the "fit" and "balance" of electoral disclosure laws reflects a rigorous tailoring analysis. *See, e.g.*, *Indep. Inst. v. Williams*, 812 F.3d 787, 789, 797 (10th Cir. 2016) (upholding provision that "serve[d] the legitimate interest of informing the public" about contributors to certain campaign ads because "its scope [was] sufficiently tailored to require disclosure only of funds earmarked for the financing of such ads").

II. Colorado's $5,000 issue committee reporting threshold is substantially related to its interest in informing voters about the sources of ballot issue spending.

A. Legislative determinations regarding where to set disclosure thresholds are entitled to substantial deference.

CUT challenges Colorado's $5,000 threshold for issue committee reporting as "arbitrary" and not "narrowly tailored" or "substantially related" to informing voters about ballot issue advocacy. *See* Pl.'s MSJ 14-17. But under the exacting scrutiny framework, lawmakers are not obliged to adopt "the highest reasonable threshold" for a campaign

disclosure law; legislative determinations regarding the precise dollar amounts that trigger reporting of contributions and expenditures are "judgmental decision[s]" entitled to substantial deference. *Buckley*, 424 U.S. at 83. Indeed, to survive any form of heightened First Amendment scrutiny, a law need not be "perfect, but reasonable"; the legislature need not adopt "the single best disposition[,] but one whose scope is 'in proportion to the interest served.'" *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (citation omitted). Even under *strict* scrutiny, the First Amendment "requires that [a statute] be narrowly tailored, not that it be 'perfectly tailored.' . . . The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as" securing transparency in elections. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (citation omitted).

Moreover, because determining the precise monetary threshold at which disclosure obligations commence is a policy and fact-driven inquiry uniquely within the legislature's expertise, the Supreme Court has long counseled deference to such judgments. Far from being incompatible with exacting scrutiny, such deference is fully consistent with the Court's recognition that "[w]here a legislature has significantly greater institutional expertise . . . the Court in practice defers to empirical legislative judgments." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S 377, 402 (2000). Accordingly, courts "apply less searching review to monetary thresholds—asking whether they are 'rationally related' to the State's interest" in educating the public about the sources of money in elections. *Del. Strong Families v. Att'y Gen. of Del.*, 793 F. 3d 304, 310 (3rd Cir. 2015).

In *Buckley*, for example, the Supreme Court upheld the $10 and $100 thresholds

for contribution recordkeeping and reporting in the Federal Election Campaign Act (FECA), finding that although the thresholds were "indeed low," they were not "wholly without rationality." 424 U.S. at 83. Although Congress had not "focused carefully on the appropriate level at which to require recording and disclosure," and instead had "adopted the thresholds existing in similar disclosure laws since 1910," the Court refused to "require Congress to establish that it has chosen the highest reasonable threshold." *Id.* The question of where to set disclosure thresholds was "necessarily a judgmental decision, best left . . . to congressional discretion." *Id.*

Since *Buckley*, courts have continued to accord substantial deference to lawmakers' choices on the particular thresholds in campaign disclosure laws, which are "inherently inexact." *Family PAC*, 685 F. 3d at 811.[2] Especially in the electoral context, the legislature remains "the institution best equipped in our governmental system" to determine the appropriate reporting threshold for issue committees, *Coal. for Secular Gov't*, 815 F. 3d at 1280, given its "particular expertise in matters related to the costs and nature" of political campaigns. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006).

B. The selection of a $5,000 threshold was not "arbitrary" but well-founded.

Colorado's $5,000 issue committee reporting threshold was the product of careful legislative consideration and is amply supported by the experiences of other states. The record confirms that the threshold was calibrated to ensure that Colorado's disclosure regime continues to serve its critical, voter-enacted objectives—informing the electorate

[2] *See also, e.g.*, *Nat'l Ass'n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1119 n.15 (9th Cir. 2019); *Del. Strong Families*, 793 F.3d at 310-11; *Worley*, 717 F.3d at 1251-52; *Nat'l Org. for Marriage*, 669 F.3d at 40-41.

about those who raise and spend money in ballot issue elections—without unnecessarily burdening small-scale committees. CUT has no evidence or argument to the contrary.

Nevertheless, CUT asserts that Colorado's $5,000 threshold is "arbitrary" and that its legislative history fails to "support any sort of reasoned legislative judgment." Pl.'s MSJ 16-17. This argument not only ignores the deference owed to the state legislature, but also disregards the actual record. The legislature approved the $5,000 threshold in 2016 after staff from the Colorado Secretary of State's office testified that the overwhelming volume of issue committee spending in recent years (approximately 93%) had come from a small number of committees that raised and spent far in excess of $5,000, while most issue committees' total expenditures remained well under $5,000. *See* Defs.' MSJ 14. Relying on this data, the General Assembly proceeded to limit comprehensive, ongoing reporting to "bigger-money issue committees," and to exempt "small-scale issue committees" from extensive disclosure obligations, in accordance with the Tenth Circuit's directives. *See Coal. for Secular Gov't*, 815 F.3d at 1279-80.

That choice also finds ample support in the laws of other jurisdictions. Deference to a monetary threshold is "all the more appropriate when . . . the state's thresholds are comparable to those in other states." *Randall*, 548 U.S. at 248. Here, Colorado's $5,000 threshold for issue committees to file reports is "comparable"—and in some cases, identical to or much higher than—analogous provisions elsewhere. Seven other states have adopted a $5,000 threshold for registration and reporting by committees that raise

or spend money in connection with ballot measures,[3] and as the State points out, many jurisdictions have significantly lower thresholds that trigger comprehensive disclosure of ballot issue campaign contributions and expenditures. *See* Def.'s MSJ Appx. 49-65.

Courts, for their part, have overwhelmingly rejected facial challenges to state ballot issue disclosure laws, including those with much lower thresholds than Colorado's. For example, the Fifth Circuit rejected a challenge to Mississippi's $200 registration threshold for initiative committees, finding that "[e]ven at lower levels of fundraising and expenditure, the disclosure regulations further Mississippi's interest in providing information to voters." *Hosemann*, 771 F.3d at 300. Similarly, the Eleventh Circuit upheld Florida's PAC disclosure scheme for ballot issue elections, which entailed a $500 threshold for registering and filing periodic reports and "first-dollar" reporting of contributions, "because knowing the source of even small donations is informative in the aggregate." *Worley*, 717 F.3d at 1251. And the Ninth Circuit approved a Washington law that required all committees to register but limited reporting to those that raised or spent more than $5,000, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 998 (9th Cir. 2010), finding the law "narrowly tailored such that the required disclosure increases as a political committee more actively engages in campaign spending." *Id.* at 1013.

So too here. Colorado's selection of a $5,000 threshold for full reporting by issue committees was grounded in detailed data about ballot issue spending presented to the

[3] *See* 10 Ill. Comp. Stat. §§ 5/9-1.8(e), 5/9-10; Me. Stat. tit. 21-A, § 1058B; Minn. Stat. §§ 10A.01(7c), 10A.14(1a); Neb. Rev. Stat. §§ 49-1413(1), 49-1455; N.M. Stat. Ann. §§ 1-19-26)(Q), 1-19-27(A); N.Y. Elec. Law §§ 14-100(1), 14-102(2); Wash. Rev. Code § 42.17A.005(41), Wash. Admin. Code § 390-16-105(2).

General Assembly at the time of enactment, and the threshold is commensurate with—and in many instances higher than—those enacted and upheld in other jurisdictions.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion for summary judgment and deny plaintiff's cross-motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2021, I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court of the U.S. District Court of the District of Colorado by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

/s/ Megan P McAllen
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