SUMMARY
March 28, 2024

2024COA31

No. 23CA0989, *Colorado Department of State v. Unite for Colorado* — Election Law — Initiative and Referendum — Fair Campaign Practices Act — Issue Committees — Major Purpose —Disclosure

In this campaign finance dispute, the Colorado Department of State challenges the district court's determination that appellee organization did not have a major purpose of supporting or opposing any ballot initiative in the 2020 election. Construing the statutory scheme applicable to the 2020 dispute, which has since been repealed and replaced, a division of the court of appeals concludes, as a matter of first impression, that the Department had authority to consider the organization's ballot initiative spending in the aggregate, as opposed to considering its spending on a proposition-by-proposition basis. Applying its conclusion of law, the division holds that the Department acted within its discretion

by finding that the organization had a major purpose of ballot initiative advocacy and was, thus, required to follow the disclosure and reporting requirements of an issue committee. The division rejects the organization's First Amendment challenges to the 2020 legal framework, reverses the district court's order, and remands with instructions to reinstate the Department's final decision.

COLORADO COURT OF APPEALS **2024COA31**

Court of Appeals No. 23CA0989
City and County of Denver District Court Nos. 22CV30098 & 22CV30101
Honorable David H. Goldberg, Judge

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

Plaintiffs-Appellants,

v.

Unite for Colorado,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FOX
Schutz and Moultrie, JJ., concur

Announced March 28, 2024

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¶ 1 In this campaign finance dispute, plaintiffs, the Colorado Department of State and Jena Griswold, in her capacity as Colorado Secretary of State (collectively, the Department), and Christopher P. Beall, in his capacity as Colorado Deputy Secretary of State (the Deputy), appeal the district court's determination that defendant, Unite for Colorado (Unite), did not have a major purpose of supporting or opposing any ballot initiative in the 2020 election. Construing the statutory scheme applicable to the 2020 dispute, which has since been repealed and replaced, we conclude that the Department had authority to consider the organization's ballot initiative spending in the aggregate, as opposed to considering its spending on a proposition-by-proposition basis. We therefore reverse and remand with instructions to reinstate the Department's final decision.

I. Background

A. Legal Background

¶ 2 The ballot initiative process reserves for the people of Colorado the power to propose laws and constitutional amendments independent of the General Assembly. Colo. Const. art. V, § 1; *Colo. Cmty. Health Network v. Colo. Gen. Assembly*, 166 P.3d 280, 284-85

(Colo. App. 2007). But before a proposed law or constitutional amendment is submitted to Colorado voters at the polls, the initiative's proponent must gather a certain number of signatures according to Colorado Constitution article V, section 1(2). § 1-40-109(1), C.R.S. 2023.

¶ 3 As relevant here, Colorado's campaign finance laws require that issue committees — groups that have a major purpose of supporting or opposing "any" ballot issue or ballot question — disclose to the Department their contributions, donors, expenditures, and obligations. Colo. Const. art. XXVIII, § 2(10)(a); § 1-45-103(12)(a), C.R.S. 2023; § 1-45-108(1)(a)(I), C.R.S. 2023. Issue committees must also register as such with the Department shortly before contributing, receiving contributions, or making expenditures to support or oppose a ballot initiative. § 1-45-108(3.3).

B. Factual History

¶ 4 Unite is a nonprofit corporation that was formed in Colorado in November 2019. Unite began operating in January 2020 under an executive manager, Dustin Zvonek, and a registered agent and board member, Katie Kennedy. Unite did not employ anyone else.

¶ 5 Unite's articles of incorporation omit its organizational purposes, but its website at the time described it as "an issue advocacy organization that believes in a smaller, more accountable government." Unite's mission included supporting state and local policies that "increase economic opportunity and greater government transparency" and opposing policies it deemed "harmful to Colorado's economic wellbeing, and efforts to unnecessarily grow the size and reach of government." Zvonek oversaw Unite's operations and chose the causes that Unite supported and opposed.

¶ 6 Unite's expenditures totaled $17,174,246.70 in 2020. It spent over four million dollars to support or oppose three ballot initiatives on Colorado's 2020 ballot; it supported Propositions 116 and 117 and opposed Proposition 113:

- Proposition 116 advanced a state income tax rate reduction. Colo. Sec'y of State, *Amendments and Propositions on the 2020 Ballot*, https://perma.cc/PR32-J4HW.
- Proposition 117 urged the adoption of a statute that would require voter approval of certain newly created

state enterprises that would be exempt from the Taxpayer's Bill of Rights. *Id.*

- Proposition 113 advocated for an agreement among the states to elect the President of the United States by national popular vote. *Id.*

¶ 7 In total, Unite spent $4,026,017.26 to support or oppose these propositions, amounting to approximately 23.44% of its total expenditures.[1] Unite contributed to the initiatives as follows:

Prop.	**Qualification and Contributions**	**Advertising**	**Total**	**% Annual Spending**
117	$783,314.08	$1,026,896.08	$1,810,210.16	10.54%
116	$764,996.25	$200,002.00	$964,998.25	5.62%
113	$250,000.00	$1,000,808.85	$1,250,808.85	7.28%
Total	**$1,798,310.33**	**$2,227,706.93**	**$4,026,017.26**	**23.44%**

[1] On November 15, 2023, this court, by a single-judge order, granted the parties' stipulated motion to file two opening briefs — a suppressed version and a public version in which the details of Unite's expenditures are redacted. Considering our conclusion that Unite is an issue committee and was required to report its expenditures, we vacate the prior order.

¶ 8 Unite spent $1,810,210.16 (10.54% of its annual expenditures) supporting Proposition 117.[2] Unite made sixteen separate expenditures in support of Proposition 117 between May and October 2020, with $1,026,896.08 of that total devoted to advertising and the rest to signature gathering and printing costs.

¶ 9 To support Proposition 116, Unite made ten separate expenditures between May and September 2020. Unite spent $964,998.25 (5.62% of its annual expenditures) supporting Proposition 116, with $200,002 going to advertising and the rest going to signature gathering and printing costs.

¶ 10 Unite spent $1,250,808.85 (7.28% of its annual expenditures) opposing Proposition 113, with $1,000,808.85 going to advertising and the rest as donations to another issue committee opposing the measure. Unite made ten separate expenditures between September and November 2020 to oppose Proposition 113.

¶ 11 Unite approached the proponents of Propositions 116 and 117 in the spring of 2020 about running the signature gathering efforts

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[2] Zvonek testified that any collective signature gathering expenditures for Propositions 116 and 117, as documented in the relevant financial record, should be divided between the propositions equally.

for those initiatives. Beginning in May 2020, Unite assumed signature gathering responsibility for both propositions. Unite's in-kind contributions were accompanied by a letter stating that Unite "does not have the major purpose" of supporting or opposing the initiative in question.

¶ 12 The record does not clearly identify where Unite spent the remainder of its budget in 2020. But some evidence in the record suggests that Unite contributed over one million dollars to Unite for Colorado Action IEC (UCA), an independent expenditure committee supporting political candidates. Unite also spent some of its budget opposing John Hickenlooper's campaign for the United States Senate in 2020. In a deposition, Zvonek testified that Unite's business expenses included his consulting fee, attorney fees, accountant fees, and "regular expenses," but that Unite did not have building expenses because it did not operate from an office. Zvonek testified that he spent much of his time in 2020 getting the organization up and running, developing partnerships, and soliciting contributions to support Unite's mission. Contributions were not designated for specific causes.

¶ 13 Believing it did not fit the issue committee criteria, Unite did not register with the Department or disclose its contributions and expenditures.

C. Procedural History

¶ 14 Section 1-45-111.7, C.R.S. 2023, establishes Colorado's campaign finance complaint procedures. A complainant files a campaign finance complaint with the Department, § 1-45-111.7(2)(a), and the Elections Division of the office then conducts an initial review, § 1-45-111.7(3)(a). Following that initial review, the Elections Division does one of the following:

1. Files a motion to dismiss the campaign finance complaint with the Deputy. § 1-45-111.7(3)(b)(I).
2. Allows the violating party an opportunity to cure any alleged violations. § 1-45-111.7(3)(b)(II).
3. Files a formal complaint with a hearing officer (ALJ). § 1-45-111.7(3)(b)(III).
4. Conducts further investigation before determining whether to file a complaint or move to dismiss. *Id.*

¶ 15 If the Elections Division files a motion to dismiss, but the Deputy denies the motion, the Elections Division must file a

complaint with an ALJ. § 1-45-111.7(5)(a)(IV). After a hearing, the ALJ makes an initial determination, which is subject to review by the Deputy after exceptions are filed. § 1-45-111.7(6)(b); *see also* § 24-4-105, C.R.S. 2023 (defining the applicable procedures for proceedings before an ALJ). The Deputy issues the final agency decision, which is subject to judicial review by the district court. § 1-45-111.7(6)(b); *see also* § 24-4-106, C.R.S. 2023 (outlining the applicable procedures for judicial review of agency action).

¶ 16 In August 2020, two registered voters filed a campaign finance complaint with the Department against Unite alleging that Unite was an issue committee that had failed to comply with Colorado's disclosure and registration requirements.

¶ 17 After its investigation, the Elections Division moved to dismiss the campaign finance complaint, concluding that the complainants did not allege sufficient facts to support a conclusion that Unite had a major purpose of supporting or opposing a ballot measure. The Elections Division thought the statutory scheme restricted its analysis to an organization's involvement in *a* ballot issue or ballot question, rather than an organization's general involvement in initiative advocacy. So it concluded that Unite's expenditures for or

against each proposition did not amount to a major purpose compared to its other expenditures.

¶ 18 The Deputy at the time, Ian Rayder, disagreed. He concluded that the Elections Division "placed too much weight on the proportion of [Unite's] disclosed expenditures and communications related to the initiatives as relative to [Unite's] overall activities, and not enough weight on the consistent pattern of conduct demonstrated by [Unite's] activities." The Deputy found that Unite made repeated, consistent expenditures for signature gathering and broadcast communications, evidencing a major purpose of supporting or opposing each initiative.

¶ 19 The Elections Division then filed a formal complaint in the Office of Administrative Courts alleging that Unite failed to register as an issue committee, in violation of section 1-45-108(3.3), and failed to disclose its contributions and expenditures, in violation of section 1-45-108(1)(a)(1).

¶ 20 The parties stipulated to the relevant facts and exhibits. There was no dispute that Unite failed to register and disclose. The parties only disputed whether Unite was required to do so. After a hearing, the ALJ found that Unite had a major purpose of

supporting or opposing the ballot initiatives, as evidenced by its "continuous" spending, which "constituted a considerable portion of its total activities," and by its "funding [of] written and broadcast communications."

¶ 21 The Elections Division filed an exception to one of the ALJ's conclusions of law.[3] The new Deputy, Christopher P. Beall, issued the final agency order. The Deputy disclaimed the inaccurate legal conclusion the ALJ reached, as the Elections Division requested, but otherwise adopted the ALJ's findings of fact. The Department concluded that Unite had a major purpose of supporting or opposing the ballot initiatives and ordered Unite to comply with the statutory obligations of an issue committee and pay a fine of $40,000.

D. District Court Proceedings

¶ 22 The Department filed a complaint to judicially enforce the final agency order in the district court. Unite simultaneously appealed

[3] The ALJ concluded that Unite's expenditures in excess of $200 to support or oppose a ballot initiative was an independent, standalone basis to conclude that Unite is an issue committee. The Deputy, recognizing that the Secretary has adopted a narrower definition of an issue committee, disclaimed that legal conclusion.

the final agency order, and the district court consolidated the cases, ordered the parties to brief the issues, and held a hearing.

¶ 23 In a written order entered following the hearing, the district court reversed the final agency decision. The court concluded that the Department erred by considering Unite's ballot initiative efforts in the aggregate. Instead, the court reasoned, the operative statute requires the Department to consider Unite's actions on a proposition-by-proposition basis. Because the Department did not do so, the final decision was arbitrary, capricious, and contrary to law, said the court.

¶ 24 This appeal followed.

II. Legal Framework

A. Standard of Review

¶ 25 "Whether an entity has 'a major purpose' of supporting or opposing a ballot issue necessarily requires interpretation of the meaning of that phrase and application of the standard to particular facts." *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 500 (Colo. App. 2010).

¶ 26 "The interpretation of a constitutional provision and the application of a constitutional standard present questions of law

subject to de novo review." *Id.*; *see also Indep. Inst. v. Coffman*, 209 P.3d 1130, 1135 (Colo. App. 2008). When construing a constitutional provision, courts should "give effect to the intent of the electorate adopting the amendment." *In re Interrogatory on House Joint Resol. 20-1006 Submitted by Colo. Gen. Assemb.*, 2020 CO 23, ¶ 30. We therefore look to the language of the text and give words their plain and ordinary meanings. *See id.*

¶ 27 "[A]dministrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Johnson v. Dep't of Safety*, 2021 COA 135, ¶ 19 (quoting *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990)). "We must review the record in a light most favorable to the administrative decision . . . ." *Colo. State Bd. of Med. Exam'rs v. Thompson*, 944 P.2d 547, 551 (Colo. App. 1996). "The agency's findings of fact are entitled to deference unless they are unsupported by competent evidence or reflect a failure to abide by the statutory scheme." *Farmer v. Colo. Parks & Wildlife Comm'n*, 2016 COA 120, ¶ 13.

B. Colorado's Campaign Finance Laws

¶ 28 The Fair Campaign Practices Act (FCPA) was added to the Colorado Revised Statutes by an initiated petition approved by voters in 1996.[4] *See* Colo. Exec. Order No. D 0001 97 (Jan. 15, 1997), https://perma.cc/HA4E-4RCY. In 2003, Colorado voters then used the initiative process to codify the state's campaign finance framework in Colorado's Constitution. Colo. Const. art. XXVIII, § 1. Colorado voters declared that the public interest is "best served by . . . providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements." *Id.*

¶ 29 The law required, as it does today, that ballot initiative advocacy groups — or issue committees — register with the Department and disclose their contributions and expenditures. *Compare* § 1-45-108(1), (3), C.R.S. 1997, *with* § 1-45-108(1)(a)(I), (3.3), C.R.S. 2023. An issue committee is any non-natural person

[4] The Fair Campaign Practices Act (FCPA) was originally enacted as the Campaign Reform Act of 1974 and was re-enacted as the FCPA in 1996.

or group that (1) "has a major purpose of supporting or opposing any ballot issue or ballot question" or (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). Despite the article's use of "or," the Department has determined that an organization must satisfy both subsections to qualify as an issue committee. Dep't of State Rule 1.20, 8 Code Colo. Regs. 1505-6. No party challenges that determination.

¶ 30 Colorado's jurisprudence thereafter held that the FCPA's "major purpose" standard requires a fact-specific, multi-factor analysis. *See Indep. Inst*, 209 P.3d at 1139 ("Constitutional provisions need not be so exact as to eliminate any need for such fact-specific analysis."); *see also Cerbo*, 240 P.3d at 502-04; § 1-45-103(12), C.R.S. 2011; *Colo. Ethics Watch v. Gessler*, 2013 COA 172M, ¶¶ 33-35.

¶ 31 In 2022, the General Assembly passed Senate Bill 22-237, which concerned "measures to promote increased transparency of funds used in ballot measure campaigns." S.B. 237, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022); *see also* § 1-45-103(12)(b),

C.R.S. 2023. The amendment provided a concrete component to the definition of a "major purpose," replacing the prior "totality of the circumstances"-style inquiry. Ch. 400, sec. 1, § 1-45-103(12)(b), 2022 Colo. Sess. Laws 2852. Under the new law, an issue committee's spending reflects a major purpose if, in the last three calendar years, its spending to support or oppose a single ballot initiative exceeded 20% of its total expenditures, or its aggregated spending to support or oppose more than one ballot initiative exceeded 30% of its total expenditures. § 1-45-103(12)(b).

¶ 32 Unite failed to register and disclose in 2020, two years before the General Assembly amended the definition of a "major purpose." Absent evidence to the contrary, "[a] statute is presumed to be prospective in its operation." § 2-4-202, C.R.S. 2023; *Aurora Pub. Schs. v. A.S.*, 2023 CO 39, ¶ 39. The General Assembly expressed no intent that the 2022 amendment apply retroactively. *See* Ch. 400, sec. 5, 2022 Colo. Sess. Laws at 2853. Thus, we presume it does not apply here.

C. Applicable Law

¶ 33 Because the 2022 amendment does not apply, we must examine the law as it existed in 2020 to determine the meaning of a "major purpose" and whether Unite met that definition.

¶ 34 "When an organization is deemed an issue committee, it must fully comply with reporting requirements . . . in article XXVIII and the FCPA." *Indep. Inst.*, 209 P.3d at 1135. Section 1-45-103(12)(a), C.R.S. 2020, adopts article XXVIII's definition of "issue committee." *See* Colo. Const. art. XXVIII, § 2(10)(a) (an "issue committee" is any group that has a major purpose of ballot initiative advocacy or has accepted or made contributions or expenditures over $200 to support or oppose any ballot initiative).

¶ 35 In 2008, a division of this court first attempted to decipher the meaning of a "major purpose." *See Indep. Inst.*, 209 P.3d at 1137. The division concluded that the term "a major purpose" is not inherently vague. *Id.* at 1139. Instead, the division concluded that the following factors are relevant to the analysis: (1) the purposes stated in the entity's charter, articles of incorporation, and by-laws; (2) the purposes of its activities and annual expenditures; and (3) the scope of issues addressed in its print and electronic

publications. *Id.* The division also cited with approval various factors that the ALJ in that case considered, including "the length of time the [entity] had been in existence, its original purpose, its organizational structure, the various issues with which it had been involved, and the amount of money expended on . . . ads in proportion to its annual budget." *Id.*

¶ 36 The General Assembly later codified *Independence Institute*'s guidance via added section 1-45-103(12)(b). Ch. 270, sec. 4, § 1-45-103, 2010 Colo. Sess. Laws 1241. That amendment provided, as it continued to do in 2020, that

> (b) For purposes of section 2(10)(a)(I) of article XXVIII of the state constitution, "major purpose" means support of or opposition to a ballot issue or ballot question that is reflected by:
>
> (I) An organization's specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or
>
> (II) An organization's demonstrated pattern of conduct based upon its:
>
> (A) Annual expenditures in support of or opposition to a ballot issue or ballot question; or
>
> (B) Production or funding, or both, of written or broadcast communications, or both, in

> support of or opposition to a ballot issue or ballot question.
>
> (c) The provisions of paragraph (b) of this subsection (12) are intended to clarify, based on the decision of the Colorado court of appeals in *Independence Institute v. Coffman*, 209 P.3d 1130 (Colo. App. 2008), cert. denied, section 2(10)(a)(I) of article XXVIII of the state constitution and not to make a substantive change to said section 2(10)(a)(I).

§ 1-45-103(12)(b), C.R.S. 2020.

¶ 37 Almost simultaneously, another division of this court expanded on *Independence Institute*'s definition of "a major purpose." *See Cerbo*, 240 P.3d at 501. Perceiving no ambiguity in the term, the division concluded that "major" means "notable or conspicuous in effect or scope: considerable, principal." *Id.* (quoting Webster's Third New International Dictionary 1363 (2002)). Because the term includes the indefinite article "a," the phrase "a major purpose" includes "organizations for which promoting a ballot issue is but one major purpose." *Id.* The division therefore concluded that "an organization has 'a major purpose' of supporting a ballot issue if such support 'constitutes a considerable or principal portion of the organization's total activities.'" *Id.* (citation omitted). In addition to the factors *Independence Institute*

recognized, the *Cerbo* division highlighted the importance of the timing of an organization's formation relative to its ballot initiative advocacy and the interrelatedness of the organization and the proposition's proponents or opponents. *Id.* at 502-03.

¶ 38 Taking these sources of law together, we conclude that the following factors were relevant to the "major purpose" analysis in 2020:

1. an organization's specifically identified objectives in its organizational documents (including a comparison between its original and modified objectives if applicable);
2. the purposes of its activities and annual expenditures relative to its ballot-initiative-related activities and expenditures;
3. the scope of issues addressed in its print and electronic publications relative to its ballot-initiative-related communications;
4. the length of time of the organization's existence relative to its ballot initiative advocacy;
5. the organization's structure;

6. the interrelatedness of the organization and the proposition's proponents or opponents; and
7. the various issues with which the organization had been involved.

See § 1-45-103(12)(b), C.R.S. 2020; *Cerbo*, 240 P.3d at 501-04; *Indep. Inst.*, 209 P.3d at 1139.

¶ 39 In 2013, another division of this court deemed the term "demonstrated pattern of conduct," a statutory component of the "major purpose" definition, ambiguous. *Colo. Ethics Watch*, ¶ 26. The division concluded that a former Secretary's attempt to measure a "major purpose" using only a percentage of total expenditures was arbitrary and capricious. *Id.* at ¶ 32. The division reasoned that sole reliance on a percentage metric "does not evaluate the consistent or characteristic combination of expenditures made by an organization but, instead, imposes a threshold that applies regardless of how many expenditures are made and whether the expenditures are consistent or characteristic." *Id.* at ¶ 33. Such a limited analysis, said the division, is "manifestly contrary to section 1-45-103(12)(b)'s use of

the phrase 'pattern of conduct' in its definition of 'major purpose.'" *Id.* at ¶ 35.

III. Scope of the Major Purpose Standard

¶ 40 The district court concluded that the Department erred because the operative statute required it to consider Unite's issue-related activities on a proposition-by-proposition basis. The Department appeals the district court's legal conclusion, arguing that the constitutional phrase authorized it to consider an entity's aggregated ballot activity. Thus, we must interpret the phrase "has a major purpose of supporting or opposing *any* ballot issue or ballot question" and determine whether the Department improperly aggregated Unite's 2020 ballot activities when assessing this issue.[5] Colo. Const. art. XXVIII, § 2(10)(a) (emphasis added).

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[5] Unite initially claims that the Department waived the aggregation argument because the Elections Division did not assert it during the administrative proceedings. But the Elections Division argued that Unite's expenditures on Propositions 113, 116, and 117 evidenced a "demonstrated pattern of conduct" reflecting a major purpose. *See* § 1-45-103(12)(b)(II), C.R.S. 2023. When the ALJ asked how many major purposes an entity can have, counsel for the Elections Division responded, "An organization can have a major purpose in ballot advocacy as is demonstrated here and also have a major purpose in . . . wanting to elect one or more candidates." The ALJ then determined that Unite's aggregated ballot spending

¶ 41 We begin with the plain language of the constitutional provision: "any ballot issue or ballot question." The Department argues that "any" has an expansive meaning that could include multiple ballot initiatives. Unite argues that the singular nouns "ballot issue" and "ballot question" foreclose that interpretation.

¶ 42 Nothing in the constitutional text precludes the Department from considering an entity's ballot spending in the aggregate. Even assuming that the word "any," as used here, is ambiguous, binding case law provides that the word "any" has an expansive meaning. *Babb v. Wilkie*, 589 U.S. 399, 405 n.2 (2020). "When used as an adjective in a statute, the word 'any' means 'all.'" *BP Am. Prod. Co.*

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constituted a "considerable portion of its total activities" and imposed a fine based on Unite's aggregate ballot initiative advocacy. Under these circumstances, where the aggregation issue was not directly articulated but permeated every level of the proceedings, we decline to resolve the appeal on the basis of waiver. *See Avicanna Inc. v. Mewhinney*, 2019 COA 129, ¶ 25 ("Waiver is the intentional relinquishment of a known right."). Further, any prejudice to Unite was resolved when the parties briefed the issue before the district court, received a judicial determination on the merits, and argued the issue again on appeal. *Farmer v. Colo. Parks & Wildlife Comm'n*, 2016 COA 120, ¶¶ 18-19 (exercising discretion to consider waived claim where claimed prejudice was minimized by opportunity to brief in district court and on appeal); *see also United States v. Williams*, 836 F.3d 1, 17 (D.C. Cir. 2016) (reviewing the record and concluding that the district court understood counsel's argument and ruled accordingly).

v. Colo. Dep't of Revenue, 2016 CO 23, ¶ 18 (quoting *Stamp v. Vail Corp.*, 172 P.3d 437, 447 (Colo. 2007)). The voters' use of the word "any" to modify "ballot issue or ballot question" means ballot issues or questions of any kind. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008); *see also K9Shrink, LLC v. Ridgewood Meadows Water & Homeowners Ass'n*, 278 P.3d 372, 378 (Colo. App. 2011) (holding that the phrase "any commercial pet-related activities" unambiguously means "any activity, relating to pets, from which one attempts to earn business income").

¶ 43 Thus, we interpret the constitutional text to mean "has a major purpose of supporting or opposing *all* ballot issues or ballot questions," or perhaps, even more succinctly, "has a major purpose of supporting or opposing ballot issues or ballot questions."

¶ 44 Nevertheless, the district court (and certain actors within the Department) concluded that the statutory text foreclosed this result. The statute read, "For purposes of section 2(10)(a)(I) of article XXVIII of the state constitution, 'major purpose' means support of or opposition to *a* ballot issue or ballot question . . . ." § 1-45-103(12)(b), C.R.S. 2020 (emphasis added). But the General Assembly clarified that "issue committee," as defined in the statute,

"shall have the same meaning as set forth in section 2(10) of article XXVIII of the state constitution." § 1-45-103(12)(a), C.R.S. 2020. Thus, the legislature intended that, in the event of a discrepancy between the constitution and the statute, the constitutional definition controls. *See Lang v. Colo. Mental Health Inst.*, 44 P.3d 262, 266 (Colo. App. 2001) ("[I]f the state constitution and statute are in conflict, the state constitution is paramount.").

¶ 45 Several other considerations bolster our conclusion. First, our conclusion is consistent with the public's intent when it adopted article XXVIII. *See* Colo. Const. art. XXVIII, § 1 ("[T]he interests of the public are best served by . . . strong enforcement of campaign finance requirements."). It is also consistent with the General Assembly's intent to restrict anonymous spending on ballot initiatives when it codified *Independence Institute*. Ch. 270, sec. 1(e), 2010 Colo. Sess. Laws 1239 ("The absence of any disclosure or disclaimer requirement in connection with communications supporting or opposing statewide ballot issues leads to a perception of purposefully anonymous interests attempting to influence the outcome of the election on measures amending the state

constitution or the Colorado Revised Statutes through the expenditure of large sums of money.").

¶ 46 Second, our conclusion is consistent with judicial interpretations of the "major purpose" standard at the time. *Cerbo* and *Independence Institute* established that the "major purpose" test was a fact-specific analysis that required consideration of an entity's collective spending — whether ballot initiative related or not. *See Cerbo*, 240 P.3d at 502-04; *Indep. Inst.*, 209 P.3d at 1139. Having to consider an entity's spending on each ballot initiative in isolation would frustrate the intent of the existing legal framework. The *Colorado Ethics Watch*, ¶ 33, division made clear that the relevant consideration was the *pattern* of consistent, characteristic conduct. Reducing the analysis to a percentage failed to effectuate the holistic nature of the law as it existed in 2020. *Id.* Therefore, forcing consideration of each ballot initiative on its own without reference to any other would fail to effectuate the 2020 meaning of "major purpose."

¶ 47 Finally, to the extent that Unite frames the Department's focus on the "pattern of conduct, not necessarily the overall percentage of

spending" as a "brand new standard," we disagree. The Department's focus adhered to the law as it existed in 2020. *See id.*

¶ 48 For these reasons, we conclude that the Department's aggregation of Unite's ballot activities for the purpose of assessing whether Unite had a major purpose of ballot initiative advocacy did not violate the law. *See Cerbo*, 240 P.3d at 500; *Indep. Inst.*, 209 P.3d at 1135.

IV. Application of the Major Purpose Standard

¶ 49 Having determined that the Department properly considered Unite's aggregated activity, we next turn to whether Unite had a major purpose of supporting or opposing ballot initiatives. To do so, we consider the factors identified in section 1-45-103(12)(b), C.R.S. 2020; *Cerbo*, 240 P.3d at 501-04; and *Independence Institute*, 209 P.3d at 1139.

¶ 50 The first factor is an organization's objectives as identified in its organizational documents. § 1-45-103(12)(b)(I), C.R.S. 2020; *Indep. Inst.*, 209 P.3d at 1139; *see also Cerbo*, 240 P.3d at 503-04 (addressing organizations whose purposes and activities change over time). Unite's organizational documents do not suggest its purpose or objectives. To the extent that its website could serve as

a quasi-organizational document, we conclude that it does not foreclose ballot initiative advocacy. At the time of the complaint and investigation, Unite's website stated that it

> is an issue advocacy organization that believes in smaller, more accountable government. [It] will support policies that increase economic opportunity and greater government transparency. [It] will oppose policies that would be harmful to Colorado's economic wellbeing, and efforts to unnecessarily grow the size and reach of government.

But we, like the division in *Cerbo*, are persuaded that actions speak louder than words. Therefore, this factor does not weigh heavily in either direction. *See Cerbo*, 240 P.3d at 503 ("An organization should not be permitted to evade its obligations under the [FCPA] simply by articulating a purpose broad enough to include a *potentially* large number of activities.").

¶ 51 The second factor is the purposes of an organization's activities and annual expenditures relative to its ballot-initiative-related activities and expenditures. *Indep. Inst.*, 209 P.3d at 1139. Here, Unite spent over four million dollars (just under a quarter) of its seventeen million dollar budget on ballot initiative advocacy. It did so by making over thirty expenditures between May and

November 2020 that directly related to qualifying or advertising the initiatives. This amounted to a "consistent [and] characteristic combination of expenditures." *Colo. Ethics Watch*, ¶ 33. While the record evidence is sparse, some evidence suggests that Unite's other primary focus was the 2020 United States Senate race, evidenced by its million dollar contribution to UCA. Its other activities, as reflected in the record, concerned developing partnerships and soliciting contributions. We thus conclude that this factor weighs in favor of a conclusion that Unite's ballot initiative advocacy constituted one of its major purposes in 2020, though not its only major purpose. *See Cerbo*, 240 P.3d at 501.

¶ 52 The third factor is the scope of issues addressed in the organization's print and electronic publications relative to its ballot-initiative-related communications. § 1-45-103(12)(b)(II), C.R.S. 2020; *Indep. Inst.*, 209 P.3d at 1139. Again, the record suggests that Unite devoted some of its print and media communications to the United States Senate race. But it also made twelve separate expenditures for written and broadcast communications to support and oppose the propositions, spanning mediums such as radio, the internet, and text messages. Of the four million dollars it spent on

ballot initiative advocacy, $2,227,706.93 of it went toward written and broadcast communications to amplify its positions. Thus, this factor weighs in favor of a conclusion that ballot initiative advocacy was a major purpose of Unite.

¶ 53 The fourth factor is the length of time of the organization's existence relative to its ballot initiative advocacy. *Cerbo*, 240 P.3d at 502. "Where an organization has a track record of engaging in a variety of activities over a relatively long period of time, it may indicate that supporting or opposing a particular ballot issue is not a major purpose of the organization." *Id.* "Conversely, however, the absence of such a track record may indicate that an activity in which an organization is engaged may be a major purpose of the organization." *Id.*

¶ 54 Unite began operating in January 2020. Zvonek testified that, in January, he began searching for causes that would further Unite's mission. Within several months, Zvonek identified Propositions 116 and 117 and took over signature gathering efforts to qualify those initiatives for the 2020 ballot. Relative to the organizations at issue in *Cerbo* and *Independence Institute*, we conclude that Unite falls on the *Cerbo* side of the spectrum.

Compare Cerbo, 240 P.3d at 502 (organization operated for mere days before engaging in ballot initiative advocacy), *with Indep. Inst.*, 209 P.3d at 1134, 1139 (organization operated for years before engaging in ballot initiative advocacy). Thus, this factor, too, weighs in favor of a finding of a major purpose.

¶ 55 The fifth factor is the organization's structure. *Indep. Inst.*, 209 P.3d at 1139. While the Department argues that Unite's minimal structure of one board member and one contracted executive was unfit for any purpose other than electoral advocacy, we conclude that the record neither supports nor undermines that argument. We, accordingly, draw no conclusions from this factor.

¶ 56 Similarly, we draw no conclusions from the sixth factor — the interrelatedness of the organization and the proposition's proponents, *Cerbo*, 240 P.3d at 503 — because the record reveals no unique overlap between Unite and any of the propositions' proponents or opponents.

¶ 57 The seventh and final factor is the various issues with which the organization had been involved. *Id.* Unite began operating in January 2020, so it had not been involved in considerable activity before its ballot advocacy work. While the record does not reveal

every issue on which Unite worked in 2020, it suggests that Unite largely focused on ballot initiatives and the Senate race. But comparing Unite's activities to the vast activity of the organization in *Independence Institute*, 209 P.3d at 1134, including years of research and public education preceding the challenged activity, we conclude that this factor weighs in favor of concluding that ballot initiative advocacy was a major purpose of Unite.

¶ 58 For these reasons, we conclude that the Department's final decision that Unite had a major purpose of ballot initiative advocacy in 2020 complied with the operative legal framework. *See* § 1-45-103(12)(b), C.R.S. 2020; *Cerbo*, 240 P.3d at 501-02; *Indep. Inst.*, 209 P.3d at 1139.

V. First Amendment Issues

¶ 59 Unite next claims that the registration and disclosure requirements, *see* § 1-45-108(1)(a)(I), (3.3), C.R.S. 2020, as applied to Unite, unconstitutionally compel speech and burden anonymous speech and association. Unite also argues that the pre-2022 scheme is unconstitutionally vague and the Department's decision was a retroactive application of new law. We address and reject each argument in turn.

A. Applicable Law and Standard of Review

¶ 60 "The First Amendment prohibits government from 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'" *Ams. for Prosperity Found. v. Bonta*, 594 U.S. ___, ___, 141 S. Ct. 2373, 2382 (2021) (quoting U.S. Const. amend. I). The First Amendment also safeguards the rights to anonymous speech and association. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342-43 (1995).

¶ 61 Reporting and disclosure requirements can infringe on the right of association. *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)); *see also NAACP v. Alabama*, 357 U.S. 449, 462 (1958). But not all burdens on the freedom of association violate the First Amendment. *Sampson*, 625 F.3d at 1255.

¶ 62 Campaign finance disclosure requirements can be upheld if they survive exacting scrutiny. *Id.* "Under that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Bonta*, 594 U.S. at ___, 141 S. Ct. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186,

196 (2010)). "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (quoting *Reed*, 561 U.S. at 196). And the disclosure regime must be narrowly tailored to the government's asserted interest. *Id.* Narrow tailoring requires a fit between the challenged law and the state interest to be served, such that the law does not sweep into its breadth more than is required. *See id.* at 2384-85.

¶ 63 We review First Amendment challenges arising from registration and reporting requirements de novo. *Cerbo*, 240 P.3d at 500.

B. Rights of Anonymous Speech and Association

¶ 64 The state has a recognized informational interest in knowing who is spending and receiving money to support or oppose a ballot initiative. *Indep. Inst.*, 209 P.3d at 1142; *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1278 (10th Cir. 2016); *Sampson*, 625 F.3d at 1259; *see also Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 202-03 (1999) (noting that disclosure of initiative sponsors and their spending responds to the "substantial state interest" of preventing "affluent special interest groups" from dominating the initiative process); *Citizens Against Rent Control/Coal. for Fair Hous.*

v. City of Berkeley, 454 U.S. 290, 299-300 (1981) (holding that while contribution limits impair free expression, the "integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed"); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments" presented to them.).

¶ 65 The people of Colorado have confirmed their interest in the disclosure of ballot initiative contributors. *See* Colo. Const. art. XXVIII, § 1 ("[L]arge campaign contributions made to influence election outcomes allow wealthy . . . special interest groups to exercise a disproportionate level of influence over the political process . . . and can unfairly influence the outcome of Colorado elections . . . ."); *see also* Ch. 270, sec. 1(e), 2010 Colo. Sess. Laws at 1239; Ch. 400, 2022 Colo. Sess. Laws at 2851-53.

¶ 66 "[T]he strength of the public's interest in issue-committee disclosure depends, in part, on how much money the issue committee has raised or spent." *Coal. for Secular Gov't*, 815 F.3d at 1278. The more money spent, the stronger the public's interest in

disclosure. *See id.* Here, because the undisclosed spending exceeded four million dollars, we conclude that the state's informational interest was substantial.[6] *See id.*

¶ 67 Of course, we must weigh the substantial state interest against "the actual burden on First Amendment rights." *Bonta*, 594 U.S. at ___, 141 S. Ct. at 2383 (quoting *Reed*, 561 U.S. at 196). The regulatory scheme undoubtedly imposes some burden on issue committees, including providing detailed financial information and personal information about donors. *See Coal. for Secular Gov't*, 815 F.3d at 1278-79 (considering burdens of Colorado's registration and disclosure regime to a small organization in light of technical improvements). But the ALJ found that Unite failed to present evidence of how it was burdened by the requirements:

> [T]here is no evidence . . . of the number of these contributors, whether they are natural persons, their levels of sophistication, or how they would be affected by having to disclose. There has been no assertion that the

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[6] Because the state has a substantial informational interest in Unite's disclosure, we need not decide whether a political candidate's endorsement or alignment with a ballot initiative is sufficient to invoke the state's interest in preventing corruption. *See Sampson v. Buescher*, 625 F.3d 1247, 1256 (10th Cir. 2010) ("[Q]uid pro quo corruption cannot arise in a ballot-issue campaign.").

> disclosure laws are burdensome to an apparently large organization such as Unite with its own website and a total of $17 million in expenditures.

Notably, Unite provided no evidence that it would lose contributions based on the disclosure requirement or that it had to spend exorbitant amounts of time or money to comply. *See id.* at 1279-80; *Sampson*, 625 F.3d at 1260. Giving the ALJ's finding the requisite deference, *Farmer*, ¶ 13, we perceive no error.

¶ 68 While *Bonta* recognized that the "actual burden" continues to play a role in the exacting scrutiny analysis, it also made clear that narrow tailoring is the critical inquiry. 594 U.S. at ___, 141 S. Ct. at 2383. Here, we see no mismatch between the substantial state interest and the regulatory regime. Coloradans recognized their interest in preventing wealthy special interest groups from anonymously exercising undue influence on the political process. And the "major purpose" analysis, as it existed in 2020, was designed to capture those interests. The multi-factor test allowed consideration not only of an organization's spending, but of its structure, the timing of its creation, and its advertising activities, to determine whether it was the type of organization that Colorado

voters intended to regulate. In response to the Tenth Circuit's 2016 opinion in *Coalition for Secular Government*, the General Assembly carved out an exception to the disclosure and reporting requirements for "small-scale issue committees" spending less than $5,000. § 1-45-108(1.5), C.R.S. 2020. This exception removed from the ambit of the "major purpose" test those "persons," *see* Colo. Const. art. XXVIII, § 2(11), that did not represent the wealthy special interests that Colorado voters envisioned.

¶ 69 We conclude that Unite is precisely the type of organization that the people of Colorado envisioned in passing article XXVIII. Unite jumped into ballot initiative activity shortly after forming and dedicated its time — outside of developing partnerships and solicitating contributions[7] — to election-related activity. It spent over four million dollars in ballot initiative advocacy during the 2020 election — including over two million dollars in advertisements intended to influence voters. Its spending

[7] Because it was not addressed by the parties and is unnecessary to our decision, we do not address the question whether, or under what circumstances, developing partnerships and soliciting donations may be deemed part of an organization's ballot issue advocacy activities.

amounted to approximately a quarter of its total budget. Unlike the organizations in *Coalition for Secular Government* and *Sampson*, which spent under $3,500 and $2,000, respectively, Unite spent millions of dollars in the 2020 election. *See Coal. for Secular Gov't*, 815 F.3d at 1274-75; *Sampson*, 625 F.3d at 1261. The 2020 "major purpose" test was narrowly tailored to identify Unite as a candidate for regulation while excluding organizations that allocated only nominal portions of their expenditures to ballot activity, existed for a long period of time preceding the ballot activity, or declined to influence the electorate through multi-media advertisements.

¶ 70 Thus, we conclude that the challenged statutory scheme is narrowly tailored to the state's informational interest in knowing who supports or opposes Colorado's ballot initiatives, and in what financial amount.

C. Vagueness

¶ 71 Unite next argues that the 2020 "major purpose" test is unconstitutionally vague, as evidenced by the General Assembly's later repeal of the framework in favor of a bright line rule.

¶ 72 A law "violates due process requirements when it contains language so vague that it fails to provide fair notice of what conduct

is prohibited." *Sellon v. City of Manitou Springs*, 745 P.2d 229, 233 (Colo. 1987). "A state-imposed sanction violates due process if the underlying law or regulation 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *In re Abrams*, 2021 CO 44, ¶ 23 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). We apply a heightened standard when the challenged regulation "threatens to inhibit protected speech." *Id.*

¶ 73 But "neither scientific nor mathematical exactitude in legislative draftsmanship" is required. *Sellon*, 745 P.2d at 233. If the enactment at issue fails to define a term used therein, we apply the term's commonly accepted meaning. *Id.*; *see also Price v. City of Lakewood*, 818 P.2d 763, 766 (Colo. 1991). "[A] vagueness challenge fails 'where reasonable persons would know that their conduct puts them at risk.'" *Abrams*, ¶ 24 (citation omitted).

¶ 74 Unite fails to identify with specificity which term it believes is unconstitutionally vague. To the extent that Unite asserts that the phrase "major purpose" is unconstitutionally vague, divisions of this court have addressed and rejected the argument. *See Cerbo*,

240 P.3d at 504 ("[W]e reject [the organization's] contentions that the phrase 'a major purpose' in article XXVIII, subsection 2(10)(a)(I) is unconstitutionally vague . . . ."); *Indep. Inst.*, 209 P.3d at 1139 ("We perceive no basis to conclude that this phrase is invalid in all respects or that it cannot be constitutionally applied to any multi-issue committee."). The General Assembly had further amended the statute to provide additional guidance for the meaning of the term before Unite's 2020 spending. *See* Ch. 270, sec. 4, § 1-45-103, 2010 Colo. Sess. Laws at 1241. To the extent Unite takes issue with the constitutional phrase "has a major purpose of supporting or opposing *any* ballot issue or ballot question" (emphasis added), we have given the term its commonly understood meaning in concluding that it could include aggregated ballot activity. *See Sellon*, 745 P.2d at 233.

¶ 75 We conclude that the 2020 framework was sufficient to put Unite on notice that it could be fined for its failure to register and disclose, notwithstanding the district court's disagreement with the agency's interpretation of law. First, Unite disclaimed having a major purpose in the letters accompanying its in-kind contributions, suggesting its awareness of the interplay between

contributions supporting a ballot initiative and the major purpose standard. Unite knew that it engaged in a pattern of repeated expenditures soon after its formation, a significant portion of which went to written and broadcast communications. These factors weighed in favor of a "major purpose" finding under the operative statute and settled case law at the time. And a division of this court has questioned considering only an organization's spending ratio without addressing the other factors. *Colo. Ethics Watch*, ¶ 33.

¶ 76 While the General Assembly opted to replace the standard existing as of 2020 with a new statutory standard in 2022, we do not believe that fact alone renders the prior framework unconstitutionally vague.[8] Even assuming the law was modified to clarify an ambiguous term or prevent unnecessary lawsuits, Unite has not shown that the prior framework failed to provide notice of the prohibited conduct or encouraged "seriously discriminatory enforcement," as the vagueness doctrine requires. *Abrams*, ¶ 23

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[8] Because we are applying the operative statutes as they existed in 2020, we do not address, and therefore express no opinion regarding, whether the 2022 statutory amendments conflict with the constitutional provisions set forth in article XVIII of the Colorado Constitution.

(quoting *Williams*, 553 U.S. at 304). For these reasons, Unite's vagueness challenge fails.

D. New Interpretation Retroactively Applied

¶ 77 Finally, Unite claims that the Department's interpretation amounted to a new rule of law that it applied retroactively to Unite. We disagree.

¶ 78 Administrative adjudications are generally given retroactive effect unless they "establish a new rule of law." *Marinez v. Indus. Comm'n*, 746 P.2d 552, 556 (Colo. 1987) (citation omitted); *see also De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) ("A statute, order, or edict 'operates retroactively' when it seeks to impose 'new legal consequences to events completed before its' announcement.") (citation omitted).

¶ 79 We are not persuaded that the Department's final decision "attache[d] new consequences to past conduct." *De Niz Robles*, 803 F.3d at 1168. Indeed, controlling law at the time established a holistic, multi-factor analysis and discouraged reliance on percentages alone. *See* § 1-45-103(12)(b), C.R.S. 2020; *Colo. Ethics Watch*, ¶ 33; *Cerbo*, 240 P.3d at 501-04; *Indep. Inst.*, 209 P.3d at 1139. That the Department considered Unite's pattern of conduct

— including all of its ballot initiative advocacy — in finding that it had a major purpose of supporting or opposing any ballot initiative did not break new ground.

VI. Disposition

¶ 80 For these reasons, we reverse the judgment and remand the case with instructions to reinstate the Department's final decision.

JUDGE SCHUTZ and JUDGE MOULTRIE concur.