

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80203</p>	<p>DATE FILED: October 29, 2023 5:59 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAUFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN,</p> <p>v.</p> <p>Respondents: JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP,</p> <p>and</p> <p>Intervenor: COLORADO REPUBLICAN STATE CENTRAL COMMITTEE, and DONALD J. TRUMP.</p>	
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PETITIONERS' RESPONSE TO MOTION TO RECUSE JUDGE WALLACE

Petitioners respond to Intervenor Trump's Motion to Recuse Judge Wallace and contend that several factors weigh against recusal in this situation. First, the rule prohibiting political contributions does not apply here. Second, the \$100 contribution to the Colorado Turnout Project ("CTP") made before Judge Wallace became a judge does not reasonably call into question the judge's impartiality. For these reasons, Trump's motion fails.

When assessing a motion for disqualification, a judge is required to accept as true the facts stated in the motion and accompanying affidavits. *People v. Botham*, 629 P.2d 589, 595 (Colo. 1981). The judge must look only to the legal sufficiency of the motion and affidavits. To be legally sufficient, the documents must "state facts from which it may reasonably be inferred that the judge has a bias or prejudice that will prevent him from dealing fairly with the defendant." *Id.* Facts are required; conclusory statements, conjecture, and innuendo do not suffice. *Carr v. Barnes*, 580 P.2d 803, 805 (Colo. 1978).

A. The Rule Prohibiting Political Contributions Does Not Apply Here

The rule prohibiting political contributions does not apply here. Contrary to Trump's

assertion, Colo. CJC Canon 2, Rule 2.11(A)(4) does not list contributions to a political organization as a circumstance that mandates recusal. Instead, it is Colo. CJC Canon 4, Rule 4.1(4) that discusses contributions to a political organization. It states that “a judge or a judicial candidate shall not . . . solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office.” *Id.* The Code defines a “judicial candidate” as “a sitting judge who is seeking selection for judicial office by appointment or retention.” Colo. CJC Terminology.

Judge Wallace was neither a judge nor a judicial candidate on October 15, 2022, when the alleged contribution was made. As Exhibit A to the Gessler affidavit itself makes clear, Judge Wallace was employed as a lawyer at the law firm Ballard Spahr on that date. Judge Wallace was not sworn in as a judge until January 10, 2023. Press Release, Governor Jared Polis Appoints Mark T. Bailey and Sarah B. Wallace to the 2nd Judicial District Court (Aug. 18, 2022) (“Sarah B. Wallace will fill the vacancy created by the retirement of the Honorable Ross Buchanan, *effective January 10, 2023.*” (emphasis added)).¹ “The fact of past political activity alone will rarely require recusal” *Higganbotham v. Okla. ex rel. Okla. Transp. Comm’n*, 328 F.3d 638, 645 (10th Cir. 2003); *see also id.* (“It is, of course, ‘an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.’”) (*quoting United States v. Alabama*, 828 F.2d 1532, 1543 (11th Cir. 1987); *In re Martinez-Catala*, 129 F.3d 213, 221 (1st Cir. 1997) (“Former affiliations with a party may persuade a judge not to sit; but they are rarely a basis for compelled recusal.”); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (“Courts that have considered whether pre-judicial political activity is . . . prejudicial regularly conclude that it is not.”) (collecting cases).

¹ [Press Release, Governor Jared Polis Appoints Mark T. Bailey and Sarah B. Wallace to the 2nd Judicial District Court, Governor Jared D. Polis](#) (Aug. 18, 2022).

A contribution to CTP is also not a “contribution to a political organization” under applicable rules. The Judicial Code defines “political organization” in relevant part as “a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.” Colo. CJC Terminology. Trump does not allege that CTP is a political party or affiliated with a political party or candidate, nor does CTP’s website support this definition, and instead states that it is a federal PAC “focused on defeating Lauren Boebert and electing Democrats across Colorado.” [The Colorado Turnout Project – Take action and create a meaningful and lasting impact.](#) (last accessed Oct. 29, 2023); see also Federal Election Commission, Colorado Turnout Project, About This Committee (identifying CTP as a nonqualified, unauthorized PAC) (last accessed Oct. 29, 2023), [COLORADO TURNOUT PROJECT - committee overview | FEC.](#) Thus, even if a violation of Rule 4.1(4) mandated recusal—it does not—the provision does not apply here.

B. The CTP Contribution Does Not Reasonably Call Into Question the Judge’s Impartiality

Section 2.11(A) requires a judge to “disqualify himself or herself in any proceeding in which the judge’s impartiality may reasonably be questioned.” The Code then provides a non-exhaustive list of circumstances where a judge’s impartiality may reasonably be questioned. The CTP contribution does not fit within any of those circumstances.

Trump cites Section 2.11(A)(4), which applies where a judge, “while a judge or judicial candidate,” has “made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way.” But, as discussed above, the contribution at issue was not made while Judge Wallace was a judge or judicial candidate.

The \$100 contribution to CTP is also not a “public statement . . . that commits or appears

to commit the judge to reach a particular result.” In trying to argue otherwise, Trump cites *Federal Election Commission vs. Massachusetts Citizens for Life*, 479 U.S. 238, 260–261 (1986) (“*MCFL*”), a First Amendment case addressing whether campaign finance restrictions could be applied to a non-profit political organization’s expenditure on a newsletter advocating for pro-life positions and candidates.² It had nothing to do with recusal or whether a contribution might give rise to questions about a judge’s impartiality. While the Court noted in this very different context that people contributing to political organizations generally know and even support positions those organizations espouse, it certainly does not stand for Trump’s proposition that contributing to a political organization means that the person embraces all of the positions of the political committee or all its words.

Trump’s citation to *Buckley v. Valeo*, 424 U.S. 1, 21 (1976) is even further afield. *Buckley* is another campaign finance case, which established that restrictions on campaign contributions implicate First Amendment concerns. Trump claims that the long-standing Supreme Court view is that “[a] contribution serves as a general expression of support for the candidate and his views.” The full quote, however, is: “A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” *Id.* *Buckley* goes on to characterize the expression of a political contribution as an “undifferentiated, symbolic act.” *Id.* In other words, the *Buckley* quote stands for the commonsense fact that a contribution does not indicate why the contributor is supporting the recipient. A contribution to a candidate does not mean that the donor supports every position

² The Court held that the rationale for allowing restrictions on expenditures by corporations did not apply to non-profit political organizations because people contributing to political organizations did so knowing the political positions they would take, whereas shareholders in corporations do not. Hence, imposing restrictions on campaign expenditures applicable to corporations to non-profit political organizations violated the First Amendment. *MCFL*, 479 U.S. at 260-261.

the candidate takes and every statement the candidate makes. Rather, it is a general, broad communication of support.

In any event, Trump mischaracterizes the CTP’s mission and hence what views any contribution could reasonably be seen as conveying. The motion claims CTP’s “sole focus” is “rooting out officeholders and political figures associated with January 6, 2021,” quoting parts of CTP’s “Our Story” page. But the motion ignores the other statements on that page and what CTP actually says on its “Our Mission” page. That page asserts that

The Colorado Turnout project aims to lay the groundwork to build robust networks of opposition against these three remaining Republican representatives. We are working to build the foundation for the Democratic candidates who will oppose them in 2022– well before their campaigns get off the ground.

[The Colorado Turnout Project, Our Mission](#) (last accessed Oct. 23, 2023). Likewise, a sentence in the “Our Story” page reads: “We aim to strengthen Colorado’s democratic congressional majority and expand it by taking the remaining three Republican seats in our state,” asking supporters to help them “remove hate-mongers like Boebert from Colorado’s house delegation.” In other words, CTP’s broad purpose is to elect Democratic House members from Colorado. While CTP states that some of the politicians it seeks to defeat were engaged in the events of January 6th, that is far from its “sole focus.”

The Colorado Supreme Court has historically recognized a distinction between a “public interest” and a “private interest” in the context of a motion to disqualify. In *Russell v. Wheeler*, 439 P.2d 43 (Colo. 1968), plaintiffs sought to disqualify a judge in a school bond election contest where the judge had publicly expressed approval of a new school building and the bonds to finance it. The court said that in considering the judge's interest in the case, “it is necessary to differentiate between what may be said to be a ‘private’ interest and a ‘public’ interest in the subject matter of the controversy and the outcome of it.” *Id.* at 46. The Court found that:

while the judge would need to recuse if he had a personal or private interest in the case, the interest of the judge here is in our view a public interest and is not the same character of interest which compels disqualification as would a private interest. A public interest is an interest shared by citizens generally in the affairs of local, state or national government. An interest which a judge may have as a citizen in a public question or issue is no basis per se for his removal as the trial judge in an action contesting an election determinative of the public question or issue. It is in this area of public interest that a judge upon being challenged as he was in the case at bar, may in his discretionary prerogative remove himself, but if he refuses, his decision will not be reversed unless it is shown convincingly that his interest was so intense that a probability existed that his decision would be tainted.

Id. The Court further concluded that the motion and affidavits were “insufficient to show that the county judge had such an interest in the bond election contest or that he was so prejudiced against the contest action that he should have as a matter of law disqualified himself.” *Id.* at 47. *See also Zoline v. Telluride Lodge Assn.*, 7322 P.2d 635, 639 (Colo. 1987) (“[A] public interest is one shared by other citizens, and a judge’s interest as a citizen in a public issue is not a basis per se for removal as trial judge.”). To the extent that Judge Wallace’s contribution to CTP suggests anything, it suggests a public interest that does not give rise to disqualification.

Date: October 29, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served this document on October 29, 2023, by Colorado Courts E-filing and/or via electronic mail upon all parties and their counsel:

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