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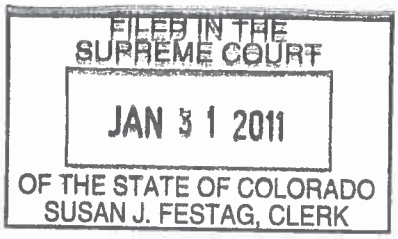
| COLORADO SUPREME COURT<br>101 West Colfax Avenue, Suite 800<br>Denver, CO 80202 |  |
| Colorado Court of Appeals<br>Case No. 08CA2689<br>Opinion by Judge Gabriel<br>Judges Casebolt and Booras concur<br><br>Office of Administrative Courts<br>Judge Robert N. Spencer<br>Case No. OS 2008-0028<br><br>**Petitioner:** COLORADO ETHICS WATCH<br><br>v.<br><br>**Respondents:** SENATE MAJORITY FUND, LLC; COLORADO LEADERSHIP FUND, LLC; and OFFICE OF ADMINISTRATIVE COURTS | **▲COURT USE ONLY ▲** |
| Attorney for Petitioner:<br>Luis Toro, #22093<br>Colorado Ethics Watch<br>1630 Welton Street, Suite 415<br>Denver, Colorado 80202<br>Telephone: (303) 626-2100<br>Fax: (303) 626-2101<br>E-mail: ltoro@coloradoforethics.org | Case Number: 10SC276 |
| **OPENING BRIEF** | |

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g). It contains 9,066 words according to Microsoft Office 2003.

This brief complies with C.A.R. 28(k). For the party raising the issue, it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (I:__) not to an entire document, where the issue was raised and ruled upon.

DATED: January 30, 2011.

By: _____
Luis Toro, #22093

Petitioner Colorado Ethics Watch ("Ethics Watch") respectfully submits its opening brief.

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Court granted certiorari to review the judgment of the Court of Appeals on the following issue in response to Ethics Watch's petition for a writ of certiorari:

> Whether the court of appeals properly interpreted and applied "for the purpose of expressly advocating the election or defeat of a candidate" as it appears in the definition of "expenditure" in article XXVIII, section 2(8)(a) of the Colorado Constitution.

## STANDARD OF REVIEW

On appeal from a motion to dismiss for failure to state a claim, appellate courts apply the same standards as trial courts. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). The Court must take all averments of material fact to be true and construe those facts in the light most favorable to the plaintiff. *Id.* Motions to dismiss for failure to state a claim are disfavored and should not be granted if relief is available under any theory of law. *Id.* The Court reviews the affirmance of a grant of a motion to dismiss de novo. *See id.*

## PRESENTATION OF ISSUE TO TRIAL COURT

The question presented was raised in SMF and CLF's motion to dismiss before the ALJ and Ethics Watch's response. (I:129-42, 176-86.) It was ruled upon by the ALJ in the Final Agency Decision. (I:246-50.)

## STATEMENT OF THE CASE

### Nature of the Case and Proceedings Below

This case asks the Court to interpret the term "expenditure" in Colo. Const. art. XXVIII, § 2(8). The Court of Appeals' decision holding that voters intended to limit the term "expenditure" to spending on ads that use so-called "magic words" provides a roadmap for the easy evasion of the requirements of Colorado campaign finance law established in Article XXVIII of the Colorado Constitution and in the Fair Campaign Practices Act (FCPA), C.R.S. §§ 1-45-101 – 118.

In Colorado, enforcement of campaign finance laws is left primarily to private parties, which are authorized by Colo. Const. art. XXVIII, §9(2) and C.R.S. 1-45-111.5(1.5)(a) to file a complaint with the Secretary of State alleging violations of Article XXVIII, the FCPA or the Secretary of State's related rules. The Secretary refers such complaints to an administrative law judge (ALJ) for an expedited hearing, and the ALJ's decision is subject to review in the court of appeals. Colo. Const. art. XXVIII, § 9(2).

Ethics Watch filed its complaint against Respondents Senate Majority Fund, LLC (SMF) and Colorado Leadership Fund, LLC (CLF) on September 10, 2010. The complaint alleged that Respondents' spending on print and television ads in support of specific candidates for the state legislature brought Respondents within the constitutional definition of "political committee," subject to registration requirements and contribution limits, and that the spending amounted to "independent expenditures" subject to reporting requirements. (I:2-101.)

SMF and CLF filed a motion to dismiss for failure to state a claim, arguing that spending on the ads could not be "expenditures" because the ads did not contain "magic words." (I:126-47.) Ethics Watch opposed the motion. (I:173-87.) The ALJ issued an Agency Decision granting the motion to dismiss. (I:243-51.)

Ethics Watch timely appealed the Agency Decision to the Court of Appeals, which affirmed the ALJ's order. This Court granted certiorari.

**Statement of Facts**

SMF's stated purpose is "supporting candidates for the state senate." (R:3, 8.) CLF's stated purpose is "electing Republicans." (R:3.) The major purpose of both SMF and CLF is the nomination or election of candidates

for public office in Colorado. (*Id.*) Neither SMF nor CLF registered as political committees with the State of Colorado. (R:4.)

SMF spent on print and television ads, and CLF spent on print ads, copies of which were filed with the complaint.

SMF's print ads contained the following messages:

1. Front side: "Lauri Clapp," the candidate's name, over a large photo of the candidate, with the message underneath reading "Standing up for a stronger Colorado." Reverse side: "Lauri Clapp is working to make Colorado even better." A photo of the candidate and others bearing the caption "Lauri Clapp is running for State Senate." A paragraph touting Clapp's record as a member of the State House for eight years, concluding "Lauri Clapp has the experience we need to make Colorado an even better place to live." Three paragraphs with the headings "Improving education," "Making health care more affordable," and "Strengthening our economy," each of which speaks of what the candidate "will work to" do or "can" do. "Contact Lauri Clapp at www.LauriClapp.net and thank her for working to make Colorado stronger." At the bottom is another banner reading "Lauri Clapp Experienced leadership for Colorado families."[1] (I:11-12.)

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[1] Ethics Watch is not relying on any allegation that the ad at p. 13 of the record was paid for by Respondents.

2. Front side: "Lauri Clapp A proven record of working for Colorado families" with a portrait of the candidate. Reverse side: "Lauri Clapp worked hard and got results for us." A list of awards given to the candidate. "Lauri Clapp is a fourth generation Coloradan who has a proven track record of getting results for Colorado families in the State House. Now she is running for State Senate to continue working to make Colorado a better place to live, work and raise our families." [Emphasis in original.] A list of laws sponsored by the candidate while she served in the state House. A photo of the candidate with a caption reading "Contact Lauri Clapp at www.LauriClapp.net or at 303-703-1352 and thank her for working hard for Colorado families." At the bottom of the ad is a large print message "Lauri Clapp is running for State Senate." (I:14-15.)

3. Front side: A photo of books, an apple and a key with the text "Education is the key to a child's future." Reverse side: A top banner reading "Lauri Clapp is improving schools and increasing opportunities for our children." A photo of the candidate with the caption "Lauri Clapp is running for State Senate." A paragraph reading "A quality education not only plays a critical role in preparing Colorado students for the workforce, but it also opens up opportunities for our kids to achieve their dreams. Lauri Clapp is committed to improving Colorado schools and will work to provide

the best education for every student." Four paragraphs bearing the headings "More Dollars in the classroom," "More quality teachers," "Increased accountability," and "A better workforce for a stronger economy," each with statements about what the candidate "will" do or what "will" happen due to the candidate's "commitment to recruiting the best teachers for our schools." The message "Contact Lauri Clapp at www.LauriClapp.net and thank her for working to improve our schools." At the bottom of the ad is a large print message "Lauri Clapp Better schools mean better jobs." (I:16-17.)

4. Front side: "Lauri Clapp Leadership and experience to improve our economy and create jobs" with a photo collage. Reverse side: "Lauri Clapp has a record of creating jobs and improving our economy." A photo of the candidate with the caption "Lauri Clapp is running for State Senate and will keep working to improve our economy." A message telling readers to "Call Lauri Clapp . . . and thank her for working to improve our economy." Three paragraphs touting the candidate's accomplishments as a member of the State House, concluding with "Lauri Clapp has the experience we need and we can trust her to stand up for our families and our values." [Emphasis in original.] Under the heading "Creating jobs," a bullet point list of how "Lauri Clapp will continue her work to bring jobs and business opportunities to Colorado." Under the heading "Solving our energy crisis," a bullet point

list of how "Lauri Clapp believes we can best accomplish" the goal. At the bottom is a large print message reading "Lauri Clapp Experienced leadership working for us." (I:18-19.)

5. Front side: "Colorado needs better paying jobs." Reverse side: "Shawn Mitchell can bring better paying jobs to Colorado." A photo of the candidate with the caption "Shawn Mitchell is running for State Senate." Text discussing the importance of better paying jobs and stating that "**State Senator Shawn Mitchell** knows that if we bring better paying jobs to Colorado, our families will have more money to spend on the things that matter." [Emphasis in original.] More text and bullet points regarding how Mitchell "can bring higher-paying jobs to Colorado." A photo with the caption "Contact Shawn Mitchell at www.mitchellforcolorado.com or at (303)866-4876 and thank him for standing up for better paying jobs." At the bottom is a large print message reading "State Senator Shawn Mitchell Creating better jobs for a better Colorado." (I:20-21.)

6. Front side: "Gas prices have your family running on <u>empty</u>. Here's a solution" with a photo of a fuel gauge pointed to "E" and a dollar bill. Reverse side: "Libby Szabo Smarter energy solutions for Colorado." A photo of the candidate next to the text "In today's rough economy, <u>everything costs more</u>. Filling up our gas tanks is emptying our wallets, and

Denver politicians are doing nothing to fix the problem. Libby Szabo is running for State Senate. She is a mom, a wife and a citizen activist – not a professional politician. She can help turn our economy around and bring gas prices down." [Emphasis in original.] Three paragraphs with the headings "Smarter energy solutions," "Independent leadership" and "A better economy" with text about what the candidate "believes" or "can" do. The message "Contact Libby Szabo at www.libbyszabo.com or at 303-946-0341 and tell her to keep fighting for smarter energy solutions." At the bottom is a large print message reading "Libby Szabo Standing up for our families." (I:22-23)

7. Front side: "Libby Szabo Fresh, energetic leadership for Colorado" with several candidate photos. Reverse side "can make Colorado a better place to live and work." Photo with caption "A native of Colorado and graduate of Wheat Ridge High School, Libby and her husband have deep roots in Jefferson County." Biographical information about the candidate, including that her "first-hand knowledge" as a "working mom . . . gives her a different perspective than a career politician. She can bring fresh ideas and energetic, independent leadership to the State Senate and help make Colorado a better place to live and work." A large print quote from Colorado Senator Mike Kopp that "Libby Szabo is exactly the kind of

trustworthy, common sense leader Colorado's hard working families need in the State Senate." A photo with the caption "Libby Szabo is running for State Senate." Text at the bottom reading "Fresh, energetic leadership for Colorado." (I;25-26.)

8. Front side: "Robert John Hadfield is working for Better Jobs & Lower Gas Prices." Reverse side: "Robert John Hadfield has a plan to turn our economy around" in large text. A photo of the candidate saying "Contact Robert John Hadfield at www.RobertJohnHadfield.com and thank him for working to turn our economy around." Text including three headings, "Create jobs," "Standing up against higher taxes" and "Lower energy prices," with text stating that the candidate "can help make Colorado a more business-friendly state," that he "believes we should eliminate wasteful government spending and lower taxes" and that "[h]e is committed to lowering energy prices" with three bullet points regarding the candidate's positions. Large text at the bottom reads "Robert John Hadfield is running for State Senate." (I;27-28.)

SMF's television ad, a copy of which was attached in compact disc format to the complaint and which may be found in the Electronic Appendix filed with the Court of Appeals, identified Szabo as a "State Senate Candidate," touted her plan to reduce gas prices if elected, told viewers to

contact the candidate at her website, and said that as a legislator she "will rise above partisan finger-pointing to get the job done right." (R: 3, 51.) The video showed an image of a quote from Senator Greg Brophy saying "she will be a shining star in the senate . . .". (Electronic Appendix, ellipsis in original).

CLF's print ads contained the following messages:

1. Front side: "John Bodnar: Working for energy independence and lower gas prices." Reverse: John Bodnar has a plan to lower gas prices now." Two paragraphs of text reading "With gas prices still the highest they've been in our lifetime, John Bodnar knows we have to find energy solutions now. He knows that Colorado families are struggling and believes that cleaner and more affordable energy sources will help get our economy back on track and lower gas prices." [Emphasis in original.] A section headed "A better economy" with text reading "John Bodnar knows we can turn our economy around by standing up against new taxes and reining in wasteful government spending." Another section, headed "Affordable energy solutions," including a bullet list of agenda items that Bodnar "is committed to lowering energy prices by" doing. A photo of Bodnar with the caption "John Bodnar is running for State House." Another photo of Bodnar

urging the reader to contact him at his website. Banner at bottom reading "John Bodnar Affordable energy for Colorado families." (I:30-31.)

2. Front side: "Holly Hansen is looking out for Adams County." Reverse: Top banner: Are high gas prices on your mind? Holly Hansen has a balanced energy plan to reduce energy costs." A paragraph reading "Holly Hansen knows that in order to lower gas prices, we have to end our dangerous dependence on foreign oil now. She's determined to find real solutions to our energy problems that will give our families real relief at the pump now. Holly Hansen is running for State House because she wants to:" followed by a bullet list of agenda items. A photo of Hansen urging the reader to contact her at her website. Bottom banner: "Holly Hansen is running for State House. She can help lower gas prices." (I:32-33.)

3. Front side: "Holly Hansen. Working to find energy solutions." Reverse: Top banner reading "Holly Hansen knows families are struggling from high gas prices." Introductory paragraph: "As a mom and small business owner, Holly Hansen understands that our economy is a mess and knows that Colorado families are facing tough times. She's running for State Representative to help get our economy back on track." A section headed "Turning the economy around" stating that "Holly Hansen believes" in "reigning in wasteful spending and standing up against new taxes" along

with "[w]orking to limit frivolous lawsuits." A section headed "Affordable energy solutions" saying that "She is committed to lowering energy prices by" taking action on a bullet list of agenda items. Contact information asking the reader to contact her at her website. Lower banner reading "Holly Hansen Lower gas prices for Colorado families." (I:34, 36.)

4. Three page folding ad. First page: There's No Sign of Relief at the Pump" with illustration of gas prices reading "Regular Unleaded Arm 9/10 Plus Unleaded Leg 9/10 Super Unleaded More 9/10." Second page: Top banner: "Spencer Swalm will help Colorado's families and work to lower gas prices." Photo of candidate with caption "Spencer Swalm is running for re-election to the State House." Two paragraph introduction, concluding "State Representative Spencer Swalm works hard each day promoting a balanced energy plan that will help turn our economy around and put money back into our pockets where it belongs." Two paragraphs, headed "Oppose higher taxes on energy" and "Energy solutions" stating what Rep. Swalm "believes." Text block reading "Contact Spencer Swalm at www.SpencerSwalm.com and thank him for looking for energy solutions right here at home." Bottom banner reading "State Representative Spencer Swalm Fighting for Colorado energy solutions." Third page: Top banner reading "Fighting for Real Energy Problems." Three paragraphs headed

"Advocating for Renewable Energy," "Cutting Energy Costs" and "Ending Our Dependence," each discussing what Rep. Swalm did or "wants us to work toward" "[a]s your State Representative." Stylized logo reading "Spencer Swalm State Representative" and "Contact Spencer Swalm at www.spencerswalm.com and thank him for standing up for Colorado families."

5. Front side: Top banner reading "Dave Kerber can help Colorado families by improving our economy." Two paragraphs about why Kerber is running for State House and what he "knows . . . to get Colorado back on the right path we need . . .". A bullet list explaining how "Dave Kerber can help bring more jobs to Colorado." Photo of the candidate with caption "Dave Kerber is running for State House." Bottom banner reading "Dave Kerber is running for State House." Reverse side: "Dave Kerber Making our future brighter by improving our economy." (I:39-40.)

6. Front: Top banner reading "State Representative Ken Summers is working for a better, stronger Colorado." Text beginning with "State Representative Ken Summers works hard every day to build a brighter future for Colorado." Quote from "Matt Knoedler, Former State Representative" saying that "When looking for a true leader in our community, we have to look at what is most important. Commitment, compassion and hard work is

what drives this community to greatness. Ken Summers possesses these qualities and has what it takes to lead this community to a better tomorrow." Photo of candidate and bottom banner reading "Ken Summers is running for re-election to the State House." Reverse: Three paragraphs with headings "Making our schools better," "Solving our energy crisis" and "Creating jobs" explaining what Ken Summers "knows," "believes" and "fights" for. Photo of candidate. Bottom banner reading "Ken Summers is running for re-election to the State House." (I:41-42.)

7. Front side: "Local leaders endorse Dave Kerber." Reverse: Top banner "Dave Kerber One of us, working for us." Favorable biographical information about Kerber, concluding with "Dave Kerber will fight to make Colorado to live, work and raise a family." To make clear what he was being endorsed for, the bottom banner reads "Dave Kerber is running for State House." (I:43-44.) (Emphasis in original.)

8. Front side: "Randy Baumgardner One of us, working for us." Reverse: Top banner reading "Randy Baumgardner will get results for Western Slope families." Favorable biographical text about Baumgardner. A bullet list of agenda items that "Western Slope families need." Text box reading "Contact Randy Baumgardner at www.randybaumgardner.com and thank him for standing up for Western Slope families." In a caption under

the candidate's photo and again in the bottom banner, text reading "Randy Baumgardner is running for the State House." (I:45-46.)

According to disclosure reports filed by Respondents SMF and CLF, each received contributions in excess of the $500 limit applicable to political committees. (I:53-101.) SMF's disclosure statements reveal contributions of $25,000 each from Bill Barrett Corp. and the Farmers Group, Inc., $15,000 from Encana Oil & Gas (USA), Inc., $14,500 from Philip Morris USA and $10,000 from Wal-Mart Stores, Inc., as well as some equally large contributions from individuals. (I:58, 66, 72, 74, 79.) Some large corporate contributions to CLF include $20,000 in three contributions from Copic Insurance Co, $20,000 from Qwest Communications, $15,000 each from Andarko Petroleum and Noble Energy, and $14,000 from Philip Morris USA. (I:86, 87, 92, 99.)

## ARGUMENT

### I. The Definition of Expenditure Reaches All Spending on Ads That Unmistakably Support or Oppose a Candidate.

#### A. The Court of Appeals' Analysis Did Not Start With The Language Of The Provision.

"[T]he court's duty in interpreting a constitutional amendment is to give effect to the electorate's intent in enacting the amendment." *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). "Courts must give words their

ordinary and popular meaning in order to ascertain what the voters believed the amendment to mean when they adopted it. Courts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate." *Id.* (citations omitted). In order to give effect to the voter's intent, the construe all Article XXVIII as a whole in order to harmonize its various provisions and avoid absurd results. *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 80 (Colo. 2008).

If a term in a constitutional amendment is ambiguous, then "courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Davidson*, 83 P.3d at 654-55; *see also State Engineer v. Castle Meadows, Inc.*, 856 P.2d 496, 504 (Colo. 1993) (in construing statute, Court considered "the object that the legislature sought to obtain by its enactment, the circumstances under which it was adopted, and the consequences of a particular construction"). One of the factors the Court should consider, as part of the circumstances surrounding the enactment of an amendment, is the state of the law as it existed at the time of the amendment. *See Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000); *see also People v. Cross*, 127 P.3d 71, 76 (Colo. 2006) (legislature presumed to accept previous judicial interpretation of statute when it "reenacts or amends a

statute and does not change a section previously interpreted by settled judicial construction").

The Court of Appeals did not follow this prescribed approach. Rather, it began with its own analysis of federal and state case law as it existed at the time Amendment 27 was approved, including the Court of Appeals' decision in *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001). Slip op. at 5-22. It concluded that *League of Women Voters* conclusively interpreted the term "express advocacy" and that voters must be presumed to have intended to incorporate that definition in Article XXVIII's definition of "expenditure." *Id.* at 33-34.

The Court of Appeals failed to follow the interpretive approach prescribed many times by this Court for state constitutional provisions. *See, e.g., Mesa County Bd. of County Comm'rs v. State*, 203 P.3d 519, 530 (Colo. 2009); *Davidson*, 83 P.3d at 654-55. The language, structure and purpose of Article XXVIII all support the conclusion that SMF's and CLF's spending falls under the constitutional definition of "expenditure."

### B. The Language, Structure and Purpose of Article XXVIII Support Ethics Watch's Interpretation of The Term "Expenditure."

Article XXVIII was added to the state constitution with the passage of Amendment 27 in 2002. It establishes a comprehensive regulatory scheme for campaign finance in Colorado, including contribution limits (Section 3),

voluntary spending limits (Section 4) and disclosure requirements (Sections 5, 6, 7 and 8).[2] Sections 9 and 10 provide enforcement mechanisms and sanctions for violations.

Section 2(8)(a), is part of the definitional section of Article XXVIII. It reads as follows:

> "Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

Colo. Const. art. XXVIII, §2(8)(a). This definition applies to a number of other provisions of Article XXVIII, including Section 5(1)'s independent expenditure disclosure requirement and Section 2(12)(a)'s definition of political committee as including "any group of two or more persons . . . that have accepted or made contributions or expenditures in excess of $200 to support of oppose the nomination or election of one or more candidates."

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[2] This Court has ruled that Sections 3(4) and 6(2) of Article XVIII violated the First Amendment of the United States Constitution to the extent they made it unlawful for corporations and labor unions to make expenditures expressly advocating the election or defeat of a candidate or fund electioneering communications. *In re Interrogatories Propounded by Governor Bill Ritter, Jr., Concerning the Effect of Citizens United v. Federal Election Comm'n, 558 U.S. --- (2010), on Certain Provisions of Article XXVIII of the Constitution of the State of Colorado*, 227 P.3d 892 (Colo. 2010).

Under Section 3(5), contributions to political committees are capped at $500 per contributor per election cycle, subject to adjustments for inflation pursuant to Section 3(13). Ethics Watch's complaint alleged violations of both the independent expenditure disclosure requirement and the political committee contribution limit, as well as failure to register as a political committee pursuant to C.R.S. § 1-45-108(3). Colo. Const. art. XXVIII, § 7 expressly contemplates the continued existence of the disclosure requirements of C.R.S. § 1-45-108.

The definition applies to other parts of Article XXVIII. Expenditures are considered "coordinated" with a candidate if they are "controlled by or coordinated with a candidate or candidate's agent," in which case they are "deemed to be both contributions by the maker of the expenditures, and expenditures by the candidate committee." Colo. Const. art. XXVIII, § 2(9). Coordinated expenditures trigger disclosure requirements and are subject to candidate contribution limits. *See* Colo. Const. art. XXVIII, § 3(1) (contribution limits); C.R.S. § 1-45-108(1) (disclosure requirements).

Nothing in the language of Section 2(8)(a) suggests that voters intended to treat the words "purpose of expressly advocating" as restricted to "magic words" and their so-called "equivalents" and providing an easy roadmap to circumvent the important provisions of Article XXVIII keyed to

the "expenditure" definition. Under the plain meaning of the words "express" and "advocate," voters intended to reach all ads that unmistakably communicate support or opposition to a candidate. *See Black's Law Dictionary* 601 (7th ed. 1999) (defining "express" as "Clearly and unmistakably communicated; directly stated"); *id.* at 55 (defining advocacy as "The act of pleading for or actively supporting a cause or proposal"); *see also Davidson*, 83 P.3d at 655 & n.5 (looking to version of Black's Law Dictionary that was current when amendment was adopted to determine plain meaning).

The fact that expenditures are defined as spending for the "purpose" of expressly advocating is also important. The complaint alleged that the declared purposes of SMF and CLF were "supporting candidates for the state Senate" and "electing Republicans," respectively. (I:2, 8.) On Respondents' motion to dismiss, Ethics Watch was entitled to an inference that SMF and CLF were spending consistently with those stated purposes. *See Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1291 (Colo. 1992).

The Court of Appeals disregarded this Court's admonition that "[c]ourts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the

electorate." *Davidson,* 83 P.3d at 654. It did this by adopting the *League of Women Voters* interpretation of the term "independent expenditure" in the old FCPA and applying it to the definition of "expenditure" in Article XXVIII, even though the *League of Women Voters* court itself "realize[d] that this approach permits the relatively easy circumvention" of the prior FCPA. 23 P.3d at 1277. Thus, the Court of Appeals provided an easy roadmap to circumvent not only the registration, disclosure and contribution limit laws at issue in this case, but also the provisions of Article XXVIII that treat coordinated expenditures as contributions. *See Rutt*, 184 P.3d at 75 ("[i]n order to have a 'coordinated expenditure,' there must first be an 'expenditure'").

The Court of Appeals believed that its narrow interpretation of the term "expenditure" was justified because Article XXVIII also includes a definition of "electioneering communication" that "may or may not include express advocacy of the election or defeat of that candidate." Slip op. at 26. This is no way contradicts Ethics Watch's view that "expenditure" was intended to apply to spending on candidate-related non-issue speech. The definition of "electioneering communication" includes "any communication" broadcast within the period thirty days before a primary or sixty days before a general election that "[u]nambiguously refers to any

candidate." Colo. Const. art. XXVIII, § 2(7). This definition applies to any ad that names a candidate during the defined time period "without regard to the communication's purpose." *Colo. Citizens for Ethics in Gov't v. Comm. for the American Dream*, 187 P.3d 1207, 1214 (Colo. App. 2008). *See also* Colo. Const. art. XXVIII, § 1 (finding that "the vast majority" – but not all – "televised electioneering communications goes beyond issue discussion to express electoral advocacy.") The definition is so broad that voters excluded ads that mention a candidate's name "only as part of the popular name of a bill or statute." *Id.* § 2(7)(b)(IV). "Electioneering communication" is an overlapping category, not a third category in between issue speech and express advocacy.

Looking to the language, structure and purpose of Article XXVIII, the Court of Appeals should have interpreted the "expenditure" definition as unambiguously applying to spending on any ads that unmistakably support or oppose a candidate's election, regardless of whether the ads use so-called magic words. It erred by adopting an overly technical interpretation that defeats the purpose of Amendment 27 by providing an easy way to circumvent its requirements. *See Davidson*, 83 P.3d at 654.

### C. The Challenged Ads All Unmistakably Supported The Election of Candidates.

Each of the challenged ads communicates an unmistakable message of support for the election of the identified candidates.

All of the ads share certain key traits. Each identified the candidate being supported as a candidate and the office each sought, e.g., "Lauri Clapp is running for State Senate," "Spencer Swalm is running for re-election to the State House." (I:15, I:37.) Certain themes run through the ads – that the candidates will, if elected, lower gas prices or lower taxes. All of them expressly support the identified candidates by touting what they can or will do once elected. These ads expressly discuss the positive results that will flow from electing the named candidate, communicating an unmistakable message of support. Unlike a true issue ad, these ads invite the reader to factor the information into their voting decisions by identifying the candidate and connecting favorable outcomes to their future service in office. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007) ("Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose--uninvited by the ad--to factor it into their voting decisions.")

CLF's "Local leaders endorse Dave Kerber" ad touted Kerber's academic and public service credentials, saying that "As our next State Representative, he will lower gas prices and get our economy back on track. Dave Kerber will fight to make Colorado a great place to live, work and raise a family." In addition, the ad included a large-print message reading "Local leaders endorse Dave Kerber." (Emphasis in original.) In case there was any confusion as to what Kerber was being endorsed for, the answer was found in large print on the other side: "Dave Kerber is running for State House." (I:45.)

As the Court of Appeals recognized, "endorse" is a "magic word." Slip op. at 35. Even though the *League of Women Voters* court said that the use of such words should be considered "express advocacy," 23 P.3d at 1278, the Court of Appeals ruled that the ad still did not advocate for Kerber's election because it did not "expressly exhort" anyone to vote for him. Slip op. at 35-36. One of the original "magic words," however, was "Smith for Congress," a phrase that contains no express exhortation. *See Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976).

The Court of Appeals' novel "express exhortation" requirement ignores the obvious: that an ad stating that a candidate for office is endorsed by the speaker, "local leaders" or anyone else has no reasonable

interpretation other than as a prompt to voters to take the endorsement into account when stepping into the voting booth. When the Court of Appeals concluded that the ad "was clearly intended to encourage the reader to vote for him," slip op. at 36, it should have reversed the ALJ. Spending on this ad was manifestly "for the purpose of expressly advocating" Kerber's election. Colo. Const. art. XXVIII, §2(8); *see also id.* § 2(8)(b)(III) (excluding certain editorial endorsements from expenditure definition).

Another CLF ad contained a candidate endorsement. Its "State Representative Ken Summers is working for a better, stronger Colorado" ad contains a quote from a "Former State Representative" beginning "When looking for a true leader in our community we have to look at what's important" and ending with "Ken Summers possesses these qualities and has what it takes to lead this community to a better tomorrow." (I:41.) This is directly above text stating "Ken Summers is running for re-election to the State House." (*Id.*) It cannot be reasonably disputed that when the speaker in the quote discusses "looking for a true leader in the community," what is meant is "voting for a State Representative." The message unmistakably promotes Summers' candidacy. The same analysis applies to SMF's television ad touting Libby Szabo's candidacy by, among other things,

including a quote that "she will be a shining star in the senate." (Electronic Appendix.)

The fact that some ads urge the reader to contact the candidate (often through their campaign websites) and thank them for some action does not somehow transform the ads into something other than express advocacy. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*") (disclaimer of endorsement did not transform ad into something other than express advocacy). In contrast, the ads at issue in *Wisconsin Right to Life*, told voters to contact a sitting senator and tell him to take a specific legislative action. 551 U.S. at 470 & n.6; *see also id.* at 473 (fact that ad directed viewers to website containing express advocacy did not transform issue ad into express advocacy but did "lend the electioneering interpretatio of the ads more credence.")

Even under the test the Court of Appeals said it was adopting, the ads should have been found to expressly advocate. Phrases such as "Ken Summers is running for re-election to the State House" or "Lauri Clapp is running for State Senate" – which are found in each of the challenged ads -- are substantially similar or synonymous to "Smith for Congress," one of the original "magic words" in *Buckley*'s footnote 52. *See League of Women Voters*, 23 P.3d at 1277. Properly construed, however, Amendment 27

broadened the definition of "expenditure" to all spending on ads that unmistakably support or oppose a candidate.

## II. Legislative History Demonstrates Amendment 27 Was Intended To Change The FCPA And Regulate To The Constitutional Limit.

The crux of the Court of Appeals' analysis was its agreement with SMF and CLF that "article XXVIII was intended to constitutionalize the prevailing definition of express advocacy at the time of article XXVIII's passage." Slip op. at 22. That definition, as the Court of Appeals held, was established in *League of Women Voters*, 23 P.3d at 1275-76. Slip op. at 33. Rejecting Ethics Watch's argument that the Federal Election Commission had defined the words "expressly advocating" – the precise words used in Article XXVIII's expenditure definition, not found in the provision under review in *League of Women Voters* – the Court of Appeals held that while "the *federal* definition of express advocacy was still in flux at the time Colorado voters amended our state constitution, such definitions were not binding on *state* courts in their interpretation of *state* campaign finance laws." Slip op. at 33 (emphasis in original). This was error.

The Court of Appeals misapplied the rule that legislators and voters are presumed to be familiar with the backdrop of existing law. The rule is just one indicator of legislative intent a court can use to interpret unclear language. *See Castle Meadows, Inc.*, 856 P.2d at 504. This legally presumed

understanding is not limited to judicial decisions, rather, it is presumed that legislators act "with full knowledge of relevant constitutional provisions, inherent judicial powers existing, and of previous legislation and decisional law on the subject." *Thompson v. People*, 510 P.2d 311, 313 (Colo. 1973) (*quoting Smith v. Miller*, 384 P.2d 738, 740 (Colo. 1963)). The rule has been applied in decisions holding that "[w]hen the legislature reenacts or amends a statute and **does not change** a section previously interpreted by **settled** judicial construction, it is presumed that it agrees with judicial construction of the statute." *Cross*, 127 P.3d at 76 (Colo. 2006) (emphasis added and quotation omitted).

Here, there was no settled judicial construction of Article XXVIII's expenditure definition, which was significantly different from the definition of "independent expenditure" interpreted in *League of Women Voters*, 23 P.3d at 1271. Thus, the Court of Appeals should have presumed that voters intended to change existing law, not lock *League of Women Voters* into the state constitution. *See Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 188-89 (Colo. 2009). The ways in which the definition changed indicate that voters intended to regulate ads purchased for the purpose of expressly advocating for or against a candidate up to the constitutional limit.

One aspect of the independent expenditure definition in the old FCPA, specifically the inclusion of "political messages which unambiguously refer to any specific public office or candidate for such office," was incorporated, with changes, into Article XXVIII's definition of "electioneering communications," not "expenditures." Compare C.R.S. § 1-45-103(7) (2000) with Colo. Const. art. XXVIII, § 2(7). Another key aspect of the old definition, the "payment of money by any person for the purpose of advocating the election or defeat of a candidate," was incorporated with changes into Article XXVIII's definition of "expenditure." Compare C.R.S. § 1-45-103(7) (2000) with Colo. Const. art. XXVIII, § 2(8). The phrase "purpose of advocating the election or defeat of a candidate" was changed to "purpose of *expressly advocating* the election or defeat of a candidate." [Emphasis added.] It was this latter change that the Court of Appeals ruled was intended to constitutionalize *League of Women Voters*' narrow and easily evaded definition of "independent expenditure" into the constitutional definition of "expenditure." Slip op. at 33-34.

To the extent the definition may have been inspired by case law, it appears far more likely the definition was changed to address the concerns expressed by the Tenth Circuit in *Citizens for Responsible Government State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000).

In that case, the Tenth Circuit refused to read the word "expressly" into the old FCPA's independent expenditure definition as a way of saving the definition from an as-applied overbreadth challenge under the First Amendment. *Id.* Notably, the Tenth Circuit did not state that the "magic words" test was constitutionally required. It said that the definition of "independent expenditure" would withstand First Amendment scrutiny only if it was "construed to apply only to expenditures that contain explicit words advocating the election or defeat of a clearly identified candidate." *See id.* It suggested that inserting the word "expressly" into the definition would achieve that result. *See id.* Voters included that word in Article XXVIII's expenditure definition. At the same time, voters intended Amendment 27 to serve the public interest through contribution limits, "full and timely disclosure of . . . independent expenditures," and "strong enforcement of campaign finance requirements." Colo. Const. art. XXVIII, § 1. This suggests that voters intended to regulate up to the constitutionally permissible limit – that is, to treat as candidate election-related spending all spending on ads that could not be construed as issue speech.

Another indication that voters intended to change the result of *League of Women Voters* is that Article XXVIII prescribes only civil penalties. Colo. Const. art. XXVIII, §§ 9 and 10. The *League of Women Voters* court thought

the potential problems with the old FCPA were "particularly troubling" because "criminal penalties are implicated" and on that ground distinguished *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 11 (Or. App. 1999). The removal of criminal penalties suggests that voters intended to avoid that objection.

Moreover, when Amendment 27 passed the new phrase employed in the expenditure definition – "expressly advocating" -- had been administratively defined by the Federal Election Commission ("FEC") as including any ad that "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s)." 11 C.F.R. § 100.22 (1995). The circuits were split on whether under *Buckley*, 424 U.S. 1, the First Amendment restricted regulation of election-related ads to those that contained so-called "magic words" or whether a more flexible test was permitted. *Compare Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) with *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). Thus, both the definition of the term "express advocacy" and the limits on the type of election-related speech that can legitimately be regulated under the First

Amendment were contested. There was no "settled judicial construction" to adopt. *See Cross*, 127 P.3d at 76.

Rejecting this argument, the Court of Appeals held that even if federal authorities had split on the question, *League of Women Voters* conclusively interpreted the phrase "expressly advocating" for purposes of Colorado law. Slip op. at 33. To the contrary, this Court has not hesitated to consider federal authority when construing Colorado campaign finance laws. *See Rutt*, 184 P.3d at 75-76. *League of Women Voters* itself represented an attempt to interpret United States Supreme Court cases such as *Buckley* and *MCFL*. *League of Women Voters*, 23 P.3d at 1276-77.

In view of the state of the law and the changes made between the old FCPA and Article XXVIII, the Court should determine that voters intended to sweep into the "expenditure" definition spending on as much election-related speech as the Constitution would permit.

## III. Ethics Watch's Approach Avoids Constitutional Concerns, While The Court of Appeals' Test Does Not.

The Court of Appeals ruled that "if express advocacy were to be defined only as speech that is not issue speech, as Ethics Watch contends, then the constitutional provision at issue would be subject to the precise vagueness concerns that *Buckley* and *League of Women Voters* sought to avoid in narrowly construing that phrase." Slip op. at 26-27; *see also id.* at

28. To the contrary are four United States Supreme Court decisions that resulted in the abandonment of the "magic words" test and rejected objections to a test that looks to whether an ad is reasonably susceptible of any interpretation other than an appeal to vote for or against a candidate.

The first of these key decisions was *MCFL*, 479 U.S. 238. At issue was spending on a special edition of an organizational newsletter that included the phrase "VOTE PRO-LIFE" and included a coupon "to be clipped and taken to the polls to remind voters of the name of the 'pro-life' candidates." *Id.* at 243. Next to the "vote" message was a disclaimer that "[t]his special election edition does not represent an endorsement of any particular candidate." *Id.* The court ruled that the ad "provide[d] in effect an explicit directive: vote for these (named) candidates" even though it also disclaimed any endorsement. *Id.* at 249. The *MCFL* court did not end its analysis with the fact that the word "Vote" (or "Vote for") was included in the newsletter. It read the ad as a whole and determined that it communicated an unmistakable message of advocacy for specific candidates. *See id.* at 249-50.

In formulating its regulatory definition of "expressly advocating," the FEC relied on *MCFL* to support its functional approach to determining whether an ad expressly advocates: "[F]inal rules in section 100.22 retain the

requirement that the communication be read 'as a whole and with limited reference to external events' because *MCFL* makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy." FEC, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35295 (July 6, 1995) (citing *MCFL*, 479 U.S. at 249-50); 11 C.F.R. § 100.22 (1995).

Next, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court read *Buckley*'s interpretation of the term "express advocacy" as "an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 540 U.S. at 190. It held that the "magic-words" test of *Buckley*'s footnote 52 had been proven unworkable in practice; that "the unmistakable lesson from the record in this litigation, as all three judges from the District Court agreed, is that *Buckley*'s magic-words requirement is functionally meaningless." 540 U.S. at 193. *McConnell* rejected the "meaningless" search for "magic words" and their equivalents in favor of examining whether the ad functioned as express advocacy for or against a candidate: "[A]lthough the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id.* at 193. Such speech may be regulated as related

to an election without fear of impermissibly burdening "genuine issue ads." *See id.* at 206.

Next, in *Wisconsin Right to Life*, the Chief Justice's controlling opinion held that the "indicia of express advocacy" include mentions of an election, political party, candidate or challenger and comments on a candidate's fitness for office. 551 U.S. at 470. On the other hand, an advertisement is genuine issue speech if it focuses on a legislative issue and urges voters to adopt a position on that issue and to contact public officials regarding that issue. *Id.* The ultimate question is whether the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*

Three justices concurred in *Wisconsin Right to Life*'s result but separately expressed their view that the "functional equivalent of express advocacy" test was too vague. *Wisconsin Right to Life*, 551 U.S. at 492-93 (concurring opinion of Scalia, J.). Those three justices have since abandoned that position, joining the majority in rejecting an argument that a film about presidential candidate Hillary Clinton was merely a documentary of her life, when there was "no reasonable interpretation of [the film] other than as an appeal to vote against Senator Clinton." *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876, 890 (2010).

In spite of all of this, the court below based its ruling against Ethics Watch partly based on the concern that "speakers would be unable to determine with assurance whether they were engaging in express advocacy if and when they mention the name of an elected official when discussing a legislative issue." Slip op. at 28. That concern was refuted by Chief Justice Roberts, responding to a similar objection in *Wisconsin Right to Life*:

> [W]e agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.

551 U.S. at 474 n.7. In light of this holding and *Citizens United*, 130 S. Ct. at 890, it is untenable to maintain that the "magic words" test is required to overcome a First Amendment vagueness objection. *See* Cal. Fair Political Practices Comm. Advisory Opinion 10-048, *James Bopp, Jr.* (April 13, 2010) ("The Court's conclusion on this point in *Citizens United* was consistent with its prior decisions, was essential to its holding (certainly not to be dismissed as "dictum"), and clearly indicates that "magic words" are *not* an absolutely essential component of a communication that may

constitutionally be regulated due to its express advocacy") (emphasis in original).

The Court of Appeals rejected Ethics Watch's reading of these cases, contending that *McConnell* did not apply the "functional equivalent" concept to identify "express advocacy" in communications not containing magic words. Slip op. at 28-29, citing *McConnell*, 540 U.S. at 205-06. It also noted that *Wisconsin Right to Life* narrowed, not expanded, the scope of the term "electioneering communication" under federal law. Slip op. at 29-30. The Court of Appeals' reading of *McConnell* is wrong and of *Wisconsin Right to Life* merely beside the point.

*McConnell*'s "magic words" discussion arose in the context of whether the definition of "electioneering communication" contained in 2 U.S.C. § 434(f)(3)(A)(i) was facially unconstitutional because it regulated and required disclosure of spending on ads regardless of whether they met Buckley's express advocacy definition. *McConnell*, 540 U.S. at 190-91. In the course of its discussion, the majority explained that *Buckley*'s footnote 52 was merely a list of "examples of words of express advocacy" and noted that "these examples eventually gave rise to what is now known as the 'magic words' requirement." *Id.* at 191. The majority went on to say that the record "unmistakably" demonstrated that "*Buckley*'s magic-words

requirement is functionally meaningless." *Id.* at 193. As an example, the majority identified an ad very similar to the ones in the record before this Court:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But 'her nose was not broken.' He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments--then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

*McConnell,* 540 U.S. at 194 n.77. The court observed that "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.* at 194. Later in the opinion, the *McConnell* majority rejected an overbreadth challenge based on the argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," holding that "the argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *Id.* at 206. Thus, the majority used the "functional equivalent of express advocacy" concept to distinguish between electoral advocacy and ads that had "no electioneering purpose," to determine that the regulation in question was not overbroad. *See id.*

The Chief Justice's opinion in *Wisconsin Right to Life* applied the "functional equivalent" test to determine whether the same electioneering communication definition that was upheld against a facial challenge in *McConnell* could withstand a challenge as applied to specific ads run before a Wisconsin Senate election. *Wisconsin Right to Life*, 551 U.S. at 469-70. Unlike *Buckley*'s footnote 52, *Wisconsin Right to Life* articulates a test for resolving as-applied challenges to regulations said to impermissibly burden issue speech. *See id.* at 474 & n.7. It also rejected the argument that the "magic words" test is necessary to overcome a First Amendment vagueness objection. See id.; *see also Citizens United*, 130 S. Ct. at 890.

Following these cases, the District of Columbia Circuit ruled that the FEC could not use the "magic words" test to limit the type of spending on ads that could be considered coordinated with a candidate, precisely because the "magic words" test failed to draw a meaningful distinction between election-related advocacy and issue speech. *Shays v. FEC*, 528 F.3d 914, 924-25 (D.C. Cir. 2008). While the "magic words" test is no longer operative, the principle that there is a difference between candidate advocacy and issue speech remains. Thus, the Fifth Circuit recently described *Buckley* itself as permitting regulation of all "unambiguously campaign related" speech and prohibiting Congress from regulating spending on "non-

campaign-related speech" as a contribution. *Republican Nat'l Comm. v. FEC (In re Cao)*, 619 F.3d 410, 418 (5th Cir. 2010) (*citing Buckley*, 424 U.S. at 81; *Shays*, 528 F.3d at 917). *See also Ex parte Ellis*, 279 S.W.3d 1, 13 (Tex. App. Austin 2008) (describing *Wisconsin Right to Life* as an application of *Buckley*); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 348 (4th Cir. 2009), *vacated on other grounds*, __ U.S. ___, 130 S. Ct. 2371 (2010) (FEC's "expressly advocating" definition "corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*.")

"Magic words" should be recognized as an early, imprecise way of distinguishing campaign-related speech from issue speech. *See McConnell*, 540 U.S. at 190. The difficulty in applying the "magic words" test is amply illustrated by the Court of Appeals' treatment of CLF's ad communicating an endorsement of Dave Kerber, which stands as further proof that the magic words test is itself unworkable and hopelessly vague. Slip op. at 35-36. That line has since been more clearly drawn, so that ads that have no reasonable interpretation other than as supporting or opposing a candidate's election may be regulated as such, with the "tie go[ing] to the speaker" in close cases. *See Wisconsin Right to Life*, 551 U.S. at 474. This line was captured in the FEC definition of "expressly advocating" that existed at the time

Amendment 27 was adopted and which remains in effect today, and captures the plain and natural meaning of those words.

If anything, it is the "magic words" test that now raises constitutional concerns. The District of Columbia Circuit rejected a proposed FEC regulation on "coordinated communications" that would have applied the "magic words" test to ads run outside of the "electioneering communications" time periods. *Shays*, 528 F.3d 914. The *Shays* court held that because the "magic words" test is "functionally meaningless," it did not "rationally separate[] election-related advocacy from other activity falling outside [the Federal Election Campaign Act]'s expenditure definition." *Id.* at 926. The same is true here – the presence or absence of "magic words" does not provide a reliable guide to whether an ad unmistakably communicates support for or opposition to a candidate for office. *See id.* Moreover, it is hard to imagine a governmental interest that would justify regulating ads that express their advocacy using "magic words" but not ads that express that advocacy using different words. *See McConnell*, 540 U.S. at 217. The Court of Appeals' interpretation of the term expenditure does not avoid a constitutional problem, it runs into one.

The same can be said of the Court of Appeals' novel "express exhortation" requirement, which finds no support in the relevant case law.

Indeed, the original list of "magic words" includes the phrase "Smith for Congress," which contains no action verb urging anyone to do anything. *Buckley*, 424 U.S. at 44 n.52. Spending on an ad that expressly supports a candidate's campaign may have a tendency to influence that candidate regardless of whether the ad exhorts a person to vote or merely extols the benefits of the candidate's expected future service in office. To the extent the principle that courts should avoid interpretations that might render a provision unconstitutional applies in this case, *see Buckley v. Chilcutt (In re Statement of Sufficiency for 1997-98 #40)*, 968 P.2d 112, 116 (Colo. 1998), that principle cuts in favor of an interpretation of "purpose of express advocacy" that adheres to the criteria explained in *Wisconsin Right to Life*, 551 U.S. at 470.

## CONCLUSION

The Court should reverse the judgment of the Court of Appeals and remand this case for further proceedings.

DATED: January 31, 2011.

By: _____

Luis Toro, #22093
1630 Welton Street, Suite 415
Denver, Colorado 80202
303-626-2100
ltoro@coloradoforethics.org

ATTORNEY FOR PETITIONER

## ADDENDUM

### Colo. Const. art. XXVIII, § 1:

Purpose and findings.

The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; that the rising costs of campaigning for political office prevent qualified citizens from running for political office; that because of the use of early voting in Colorado timely notice of independent expenditures is essential for informing the electorate; that in recent years the advent of significant spending on electioneering communications, as defined herein, has frustrated the purpose of existing campaign finance requirements; that independent research has demonstrated that the vast majority of televised electioneering communications goes beyond issue discussion to express electoral advocacy; that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas and can unfairly influence the outcome of Colorado elections; and that the interests of the public are best served by limiting campaign contributions, encouraging voluntary campaign spending limits, providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

### Colo. Const. art. XXVIII, § 2(8):

(a) "Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending

occurs or when there is a contractual agreement requiring such spending and the amount is determined.
(b) "Expenditure" does not include:
(I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;
(II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;
(III) Spending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business or payments by a membership organization for any communication solely to members and their families;
(IV) Any transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments made by a corporation or labor organization for the costs of establishing, administering, or soliciting funds from its own employees or members for a political committee or small donor committee.

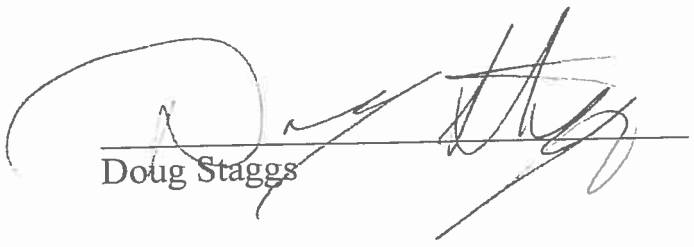
## CERTIFICATE OF MAILING

I certify that on January 31, 2011 I placed a copy of the foregoing OPENING BRIEF in the United States mail, postage prepaid and addressed as follows:

Steven Klenda, Esq.
Mario Nicolais, Esq.
Hackstaff Gessler LLC
1601 Blake Street, Suite 310
Denver, CO 80202

Jason R. Dunn, Esq.
Brownstein Hyatt Farber Schreck LLP
410 17th Street, Suite 2200
Denver, CO 80202

John W. Suthers, Esq.
Attorney General of Colorado
1525 Sherman St., 7th floor
Denver, CO 80203



Doug Staggs