COLORADO SUPREME COURT
101 West Colfax Avenue, Suite 800
Denver, Colorado 80202
Colorado Court of Appeals
Case No. 08CA2689
Opinion by Judge Gabriel
Judges Casebold and Borras concur
Office of Administrative Courts
Honorable Judge Robert N. Spencer
Case No. OS2008-0028

Petitioner:
COLORADO ETHICS WATCH

v.

Respondent:
SENATE MAJORITY FUND, LLC; COLORADO LEADERSHIP FUND, LLC and OFFICE OF ADMINISTRATIVE COURTS

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JOINT ANSWER BRIEF OF RESPONDENTS SENATE MAJORITY FUND, LLC AND COLORADO LEADERSHIP FUND, LLC

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all 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:

The brief complies with C.A.R. 28(g).

Choose one:

X It contains 8,001 words.

The brief complies with C.A.R. 28(k).

X For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Steven A. Klenda, #29196

Respondents, Senate Majority Fund ("SMF") and Colorado Leadership Fund, LLC, respectfully submits their Answer Brief.

Statement of Issues Presented for Review.

Respondents agree with the statements of Colorado Ethics Watch concerning the standard of review and preservation for appeal.

Statement of the Case.

Nature of the Case.

This case is a matter of statutory interpretation involving one question: what does the phrase "expressly advocate the election or defeat of a candidate" mean, as used in Colorado Constitution Article XXVIII, § 2(8)(a). If the Senate Majority Fund and Colorado Leadership Fund (individually the "SMF," and the "CLF," or collectively the "Respondents") expressly advocated, then they were required to meet political committee regulations, including reporting requirements and contribution limits. If SMF and CLF did not expressly advocate, then they were *not* regulated as political committees – although their communications may have nonetheless been regulated as electioneering communications, which trigger separate reporting requirements (whether the SMF or CLF made electioneering communications is not an issue in this case).

Colorado Ethics Watch ("CEW") filed a campaign finance complaint alleging that SMF and CLF paid for public communications that expressly advocated the election or defeat of a candidate. CEW included copies of advertisements that it alleged were paid for by SMF or CLF, and it cited language within the communications themselves. The SMF and CLF moved to dismiss CEW's complaint under the standard for "expressly advocate" articulated by the Colorado Court of Appeals in *League of Women Voters of Colorado v. Davidson*[1] (*"LOWV"*) in 2001, arguing that the complaint failed to allege that the communications contained words that specifically urged the election or defeat of a candidate. The trial court applied the test for "expressly advocate" in *LOWV,* found that the communications at issue did not meet this definition, and dismissed the complaint. The Court of Appeals unanimously agreed and affirmed. CEW argues that this Court should define the term "expressly advocate" in Article XXVIII as something different than the test articulated in *LOWV*. Specifically, CEW argues for a subjective "unmistakable advocates" test. This is a separate standard than CEW articulated at the Court of Appeals, where it called for the term "expressly advocate" to include all speech that is not "issue speech." The Respondents maintain that the standard in *LOWV* was and remains the definition for "expressly advocate" as used in Article XXVIII.

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[1] *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266 (Colo. App. 2001).

Proceedings and Disposition Below.

The SMF and CLF agree with CEW's description of the proceedings below.

Statement of the Facts.

The Senate Majority Fund and the Colorado Leadership Fund are each registered as "political organizations" under section 527 of the federal Internal Revenue Code and as a "political organizations" under state campaign finance laws.[4] The SMF and CLF were not and are not registered as a "political committee" under state campaign finance laws.[5] Between 2007 and 2008, the SMF and CLF filed regular reports detailing both their contributions and spending as political organizations.[6]

The SMF and CLF paid for and distributed multiple direct mail pieces during 2008 (individually a "Mailer"; collectively the "Mailers").[7] The Mailers varied in content, topics, and format, but shared several characteristics, according to CEW. In CEW's analysis, each of the Mailers:

1. Identified a specific candidate for state office;
2. Stated that the candidate was running for elective office;
3. Described the candidate's public positions on topics; and

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[4] R. 2, ¶ 3; R: 8.

[5] R. 4, ¶ 18.

[6] R. 53-80 (CEW's exhibits include a partial 527 Political Organization Report from the SOS's website. The full report also includes all spending, loans, loan payments, returned contributions, and returned spending.).

[7] R. 2, ¶ 5.

4. Stated what the candidate would do once elected to that office.[8]

Most of the Mailers also urged citizens to contact the candidates and thank them for taking the positions described in the individual Mailers.[9]

As alleged by CEW, the SMF and CLF spent over two hundred dollars ($200.00) on each Mailer.[10] CEW also alleges the SMF spent an additional one hundred fourteen thousand dollars ($114,000.00) to purchase television time (the "TV Commercial").[11] CEW filed its *Complaint* against the SMF and CLF on September 10, 2009,[12] claiming that both failed to file as a "political committee," file independent expenditure reports, or follow the contribution limitations imposed on "political committees."[13] In its complaint, CEW averred that to qualify as an expenditure, a communication must "expressly advocate" the election or defeat of a candidate.[14] But CEW did not allege that any Mailer (with the exception of one CLF Mailer that did not specifically exhort the reader to vote for or against a candidate) or the TV Commercial used specific words associated with "expressly advocating" such as: "vote for"," "vote against",

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[8] R. 2-3, ¶ 5.
[9] *See, e.g.*, R. 12.
[10] R. 3.
[11] *Id.*
[12] R. 6.
[13] R. 2-4.
[14] R. 3-4, ¶ 13.

"elect", "defeat", or "cast your ballot for."[15] Additionally, CEW failed to allege that the SMF or CLF distributed the Mailers.[16]

Summary of the Argument.

The Court of Appeals below correctly held that Amendment 27's definition of expenditure adopted the established judicial meaning of "express advocacy," which limits express advocacy to explicit words that advocate for or against the election of a specific candidate. The U.S. Supreme Court originated this "magic words" meaning 25 years before voters adopted Amendment 27, and the Tenth Circuit and the Colorado Court of Appeals applied it less than two years before voters adopted Amendment 27. Amendment 27 should be presumed to have adopted the established judicial construction of a legal term of art. Amendments 27's text shows that it adopted this definition, and its legislative history shows that the new structure that Amendment 27 it created to regulate political speech incorporates this definition. Amendment 27 reached any "constitutional limit" by creating a new category of political speech, electioneering communications, not by redefining express advocacy to be the functional equivalent of express advocacy.

The Court of Appeals correctly held that the Supreme Court has applied the functional-equivalent-of-express-advocacy test only to limit the reach of

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[15] R. 2-6.

[16] *Id.*

electioneering communications, not as a stand-alone definition of express advocacy. CEW's position opposes the Supreme Court's trend of limiting, rather than expanding, the political speech that can be regulated, and its preference for clear, understandable distinctions. The Supreme Court has rejected CEW's premise that compliance independently justifies further preventative regulation of speech, and also rejected any attempt to regulate speech that merely attempts to influence an election. Ultimately, CEW's standard that all speech that "unmistakably advocates" a candidates election or defeat is an impermissible purpose test, which ignores the reasonable alternative purpose of educating voters about relevant issues, even if those issues are associated with a candidate or relevant to an election.

Adopting CEW's position will constitutionalize a definition of express advocacy that neither the Supreme Court nor any other court has ever adopted. It will transform the "functional equivalent" test from a speech-protective, constitutional limit on the regulation of electioneering communications into an all-purpose substitute for *Buckley* established, bright-line definition of express advocacy. And it will retroactively subject virtually all candidate-specific political speech to contribution limits that are constitutionally suspect after *Citizens United.*

Argument.

The Court of Appeals' "magic word" construction of "expressly advocate" in Article XXVIII's definition of "expenditure" is a constitutionally required, speech-protective demarcation, not an "easy roadmap for evasion."

The U.S. Supreme Court has become ever more protective of political speech. Since at least *Buckley*, the Supreme Court has resolutely protected political speech from being chilled because a small subset of political speech—express advocacy—may be regulated to prevent corruption. The Supreme Court has consistently held that no compelling government interest justifies regulating issue advocacy, and self-consciously employed a bright-line "magic words" test to separate express advocacy from other political speech, with full knowledge that this test invites evasion. Recently, the Supreme Court has (1) further narrowed the constitutionally permissible justifications for regulating express advocacy, (2) emphasized that tests that categorize political speech must be objective and easily understandable, and (3) held that no compelling government interest justifies limiting independent expenditures.[17] Against this speech-protective backdrop, CEW asks this court to dramatically expand the scope of regulated political speech. CEW asks this Court to employ, as a stand-alone test of "express advocacy," the "functional equivalent" test that the Supreme Court adopted to limit the regulation of electioneering communications, and to apply

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[17] See, *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007); *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010).

this test so that it includes all speech that "unmistakably" supports or opposes a candidate. Under this expansive test, express advocacy includes all candidate-specific speech that intends to influence an election. CEW even asks this court to define a new category of regulable "issue speech" that includes all political speech is *not* the functional equivalent of express advocacy. This invitation to assume that all political speech is regulable unless a speaker shows otherwise reverses the Supreme Court's presumption that all political speech expect express advocacy is constitutionally protected.

I. Amendment 27 constitutionalized the established meaning of express advocacy.

The operative language in Amendment 27's definition of "expenditure"—"expressly advocating"—has been one of the most precisely defined and storied phrases in campaign-finance law for over twenty-five years. Amendment 27's legislative history and its text show that Amendment 27 defined "expenditure" by adopting the established definition of "expressly advocating." Accordingly, this definition was binding Colorado law when voters adopted Amendment 27.

A. When Colorado voters adopted Amendment 27, "express advocacy" had been consistently defined for over 25 years.

The operative term in Amendment 27's definition of "expenditure" is "expressly advocating." The Supreme Court first defined "expressly advocates" in 1976, in *Buckley v. Valeo.*[18] Since then, the Court has consistently applied this definition to provide a bright line that separates the narrow category of political speech—express advocacy—that the First Amendment allows to be regulated, from other political speech. The Tenth Circuit and the Colorado of Appeals both applied this definition less than two years before voters adopted Amendment 27. Given this, there should be little doubt that Amendment 27 defined expenditure by incorporating this established definition.

1. *Buckley v. Valeo defined expressly advocacy as speech that explicitly advocates a specific candidate's election or defeat.*

The terms "express advocacy" and "expressly advocates" stem from the United States Supreme Court's seminal campaign finance decision, *Buckley v. Valeo*[19] The Federal Election Campaign Act of 1971 ("FECA") limited expenditures "relative to a clearly identified candidate" to $1,000 and required contributions or expenditures

[18] *Buckley v. Valeo,* 424 U.S. 1 43-44 (1976).
[19] *Id.*

totaling over $100 in a calendar year to be disclosed.[20] To avoid vagueness that might chill political speech, *Buckley* construed FECA's expenditure limitation to apply not just to expenditures ""advocating the election or defeat of' a candidate," but more narrowly "only to expenditures for communications that *in express terms advocate* the election or defeat of a clearly identified candidate."[21] *Buckley* construed the term "expenditure" in the context of FECA's disclosure requirements the same way, "to reach only funds that *expressly advocate* the election or defeat of a clearly identified candidate."[22] Both limitations only apply to "communications that include *explicit words of advocacy* of election or defeat of a candidate."[23]

Although *Buckley* employed several variants of phrases that conjoin "express" and "advocate," it used them in the same way: to refer to "communications containing express words of advocacy of election or defeat."[24] These words, such as 'vote for,' 'elect,' 'support,' 'vote against,' 'defeat' and 'reject' include only explicit words that invite a voter to support or oppose a candidate's election or defeat.[25]

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[20] *Id.* at 39, 74-77.

[21] *Id.* at 42 and at 44 (emphasis added).

[22] *Id.* at 80 (emphasis added).

[23] *Id.* at 42, n.48 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) and 44 (emphasis added).

[24] *Id.* at 44.

[25] *Id.* n.52.

2. *The Tenth Circuit applied Buckley's express advocacy definition less than two years before voters adopted Amendment 27.*

The Tenth Circuit construed Colorado's pre-Amendment 27 version of the Fair Campaign Finance Practice Act ("FCPA") just under two years before Colorado adopted Amendment 27. *Citizen's for Responsible Government State Political Action Committee v. Davidson* applied *Buckley's* express-advocacy standard in an as-applied challenge to independent-expenditure disclosure requirements.[26] The FCPA defined "independent expenditure" as a:

> Payment of money by any person *for the purpose of advocating* the election or defeat of a candidate, which expenditure is not controlled by, or coordinated with, any candidate or any agent of such candidate. "Independent expenditure" includes expenditures for political messages *which unambiguously refer to any specific public office or candidate for such office.*[27]

This second sentence of this definition includes "political messages" that only "unambiguously refers to a candidate," without any advocacy.[28] *Davidson* held that this definition unconstitutionally extended the FCPA beyond express advocacy.[29] Like *Buckley, Davidson* held that "communications that *do not contain express words*

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[26] *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).

[27] *Id.* (quoting C.R.S. § 1-45-103(7) (2002)) (emphasis added).

[28] *Id.* at 1187-88; C.R.S. § 1-45-103(7) (2000).

[29] *Id.* at 1193-94.

advocating the election or defeat of a particular candidate" are protected political speech.[30]

Davidson cannot be distinguished (as CEW attempts to) because it "refused to read the word 'expressly' into the old FCPA's independent-expenditure definition."[31] This is false. *Davidson* did not *insert* "expressly" before "advocating" in this definition. But *Davidson did* read "advocating" as "expressly advocating" in order to save the provision from infirmity.

Davidson concludes that (1) rewriting the FCPA's independent expenditure definition to be constitutional required both changing "advocating" to "expressly advocating" in the first sentence and striking the italicized phrase from the second sentence, but (2) such an extensive revision would exceed the court's powers and function.[32]

To avoid holding the entire provision unconstitutional, *Davidson* first struck the second sentence because it "violated *Buckley* and its progeny" by reaching "advocacy with respect to public issues."[33] Then, the court narrowly construed the phrase "for the purpose of advocating" in the first sentence as applying "only to expenditures for communications that contain explicit words advocating the election or defeat of a

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[30] *Id.* at 1187 (emphasis added).

[31] Op. Br., 30:1-2.

[32] *Davidson,* 236 F.3d at 1194-95.

[33] *Id.* at 1194 (quoting *Vt. Right to Life Comm. v. Sorrell,* 221 F.3d 376, 387 (2nd Cir. 2000)).

clearly identified candidate."[34] *Davidson* saved this definition from overbreadth by doing exactly what CEW claims it did not: it interpreted "for the purpose of advocating" as "for the purpose of *expressly* advocating, as *Buckley* required."[35,36]

3. *League of Women Voters applied the Buckley express-advocacy definition seventeen months before voters adopted Amendment 27.*

Shortly after *Davidson* reaffirmed *Buckley's* magic-word definition of express advocacy, and less than seventeen months before Colorado adopted Amendment 27, the Colorado Court of Appeals followed suit.[37] The League of Women Voters asserted that a non-profit corporation violated several FCPA provisions by running ads that were independent expenditures and failing to register as a political committee.[38] An ALJ found that the ads were outside of the FCPA's scope because they did not contain any of the "magic words" that *Buckley* requires for express advocacy.[39] The League challenged the ALJ's use of *Buckley's* magic-words test.[40]

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[34] *Id.*

[35] *Id.* at 1195 (emphasis added).

[36] *Davidson* used the same technique to save the FCPA's definition of "political message." The court severed the definition's non-advocacy disjunctive, then narrowly construed "advocates" as "[expressly] advocates" without actually inserting "expressly." *Id.* at 1196 (bracketed "[expressly]" in original).

[37] *League of Women Voters of Colorado v. Davidson ("LOWV")*, 23 P.3d 1266 (Colo. App. 2001).

[38] *League of Women Voters v. Davidson*, 23 P.3d 1266, 1269 (Colo. App. 2001)

[39] *Id.* at 1270.

[40] *Id.* at 1270 and 1275.

The *League of Women Voters* court held that an ad's use of either *Buckley's* magic words or "substantially similar or synonymous words" determined whether an ad expressly advocated a specific candidate's election or defeat.[41] It then found that (1) none of the eight challenged ads expressly advocated because they did not explicitly urge a vote for an identified candidate; and (2) seven of the ads did not "come close to being express advocacy," because they only "favorably present[ed] the candidate's position on issues and experience, or unfavorably present[ed] the positions and experience of the other candidate, or both."[42]

B. Amendment 27 adopted *League of Women Voters'* established judicial construction of "express advocacy."

When voters adopted Amendment 27, *LOWV* and *Davidson*, to mean explicit words that advocate a candidate's election or defeat. Voters, like legislators, are assumed to be familiar with prior judicial interpretations of statutory language.[43] As a result, a word or phrase that has acquired a particular meaning should be construed according to this meaning.[44] Accordingly, a statute that uses language that has been judicially construed is assumed to have adopted this judicial construction.[45] Thus, the

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[41] *Id.* at 1277.

[42] *Id.*

[43] *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000) (voters assumed to know existing law when they amend or clarify a law).

[44] *Pierson v. Black Canyon Aggregates, Inc.*, 48 P. 2d 1215, 1219 (Colo. 2002)

[45] *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997).

lower court here correctly construed Amendment 27 as adopting the established definition of express advocacy.

Relying only on Article XXVIII's plain words to define "express advocacy," as CEW does, replaces a definition of a legal term of art backed by decades of consistent judicial construction with a definition that is supported by a rejected, discredited standard (§ I(C), *infra*), and a single textual authority: Black's Law Dictionary.[46] When an established definition of a legal term of art exists, statutory interpretation should not begin in a vacuum with a dictionary. Plain words are not an excuse to start with a clean slate.

The blinders that CEW's plain-words approach requires lead to an illogical result. "Express" is not a synonym of implied; it is its opposite.[47] "Express" means "stated explicitly" or "specifically identified to the exclusion of anything else."[48] Yet, CEW argues that voters intended "express" to include advocacy that is not explicit or voiced, but implied.

1. *Amendment 27 constitutionalized League of Women Voters' and Davidson's express advocacy definition.*

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[46] Op. Br. at 20.

[47] *Oxford Compact Thesaurus* 437 (2d ed. 2001) (listing "explicit" as opposite of "implicit").

[48] *Compact Oxford English Dictionary* 385 (2d ed. 2003).

Amendment 27 replicates (almost word for word) the changes that *LOWV* and *Davidson* required to make the FCPA's definition of expenditure constitutional. *LOWV* permitted regulating only expenditures made "for communications that 'expressly advocate the election or defeat of a clearly identified candidate.'"[49] Amendment 27 just strikes the phrase "clearly identified" that precedes "candidate." Under Amendment 27, an expenditure is:

> any purchase, payment . . . or gift of money by any person for the purpose of *expressly advocating the election or defeat of a candidate.*[50]

This definition incorporates the two changes that *Davidson* required as well. It adds "expressly" before "advocating," and it omits the second-sentence, non-advocacy qualifier that *Davidson* severed to make the FCPA's definition constitutional.

In short, Amendment 27 clarified Colorado law in exactly the way that *Davidson* and *LOWV* constitutionally required, based on *Buckley's* magic-words test. Voters did not intend to reject this test. They adopted it.

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[49] *LOWV* at 1277, (quoting *Buckley, supra* at 80).
[50] Colo. Const. art. XXVIII, § 2(8)(a) (emphasis added).

2. *The Bluebook's distinction between ads that "specifically urge" a candidate's election or defeat and those that do not confirms voters' intent to adopt the established meaning of express advocacy.*

The 2002 voter education pamphlet that explained Amendment 27 to registered voters (the "Bluebook") also reflects voters' intent to adopt *Buckley's* established definition of "expressly advocate." This court may rely on the Bluebook to discern voter intent.[51]

The Bluebook explains that Amendment 27 "intended to [] regulate two types of political advertisements," those that "specifically urge" a candidate's election or defeat and those that do not:

> The first are those that are made outside the control of a candidate and that *specifically urge* the election or defeat of a candidate. . . .
>
> The second type of political advertisement is one that clearly refers to a candidate *without specifically urging* the election or defeat of the candidate. These advertisements are regulated during the 30 days before a primary election and the 60 days before a general election. . . . Current law does not regulate this type of political advertising. [52]

The first type of communication was defined as an "independent expenditure." The second type of communication was a new category of regulated speech, an "electioneering communication." An independent expenditure must "specifically urge" a candidate's election or defeat; an electioneering communication need not.

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[51] *See generally Harwood v. Senate Majority Fund*, 141 P.3d 962, 965 (Colo. App. 2006).

[52] *See* Colo. Legislative Council, *Research Publication No. 502-1, 2002 Ballot Info. Booklet: Analysis of Statewide Ballot Issues* 3-4 (2002).

Independent expenditures include a call to action; electioneering communications need not.

This categorical distinction is so critical that the Bluebook italicized the phrases "*specifically urge*" and "*without specifically urging.*" It is critical because it relies on and incorporates *Buckley's* differentiation between express advocacy and other speech that existed when voters adopted Amendment 27. Advocacy that does not "specifically urge" can only be regulated if it is an electioneering communication. All other political speech is constitutionally protected.

Structurally, then, Amendment 27 recognizes three types of communications: (1) express advocacy (independent expenditures); (2) time-specific, candidate-specific speech that does not advocate for a candidate's election or defeat (electioneering communications); and (3) unregulated protected speech. The first two categories are governed by separate constitutional reporting requirements and financing limitations.[53] This reinforces Amendment 27's recognition that these categories are distinct, and that this distinction hinges on whether speech expressly advocates. Amendment 27's distinct structure, which the Bluebook describes, shows that Amendment 27 did not overturn *LOWV's* distinction between express and non-express advocacy. Amendment 27 adopted it.

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[53] *See* Colo. Const., art. XXVIII, § 3 (contribution limits), § 5 (independent expenditures), and (electioneering communications).

C. The meaning of "express advocacy" was not in doubt when voters adopted Amendment 27.

Despite the Colorado Court of Appeal's and the Tenth Circuit's contemporaneous reliance on *Buckley's* express-advocacy test, CEW asserts that that there "was no settled judicial construction of Article XXVIII's expenditure definition."[54] To sow doubt, CEW invokes a single case, *FEC v. Furgatch*, and asserts that circuits were split.[55] But, *Furgatch* created no doubt in Colorado (or elsewhere). In addition to *Davidson's* and *LOWV's* reliance on *Buckley, LOWV* directly considered and rejected *Furgatch.*

Furgatch is a Ninth Circuit outlier that deviated from *Buckley* to adopt its own test for express advocacy.[56] Like CEW's various proposed tests here, *Furgatch's* express-advocacy test is context-based. It defines "express advocacy" as speech that is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate,"[57] and (again similarly to what CEW proposes here), it includes speech that "is unmistakable, unambiguous, and suggestive of only one meaning."[58]

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[54] Op. Br. at 32.

[55] *Id* at 31.

[56] Op. Br. at 31 (citing *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.1987).

[57] *LOWV* at 1273 (quoting *Furgatch* at 864).

[58] *Id.* at 1275.

LOWV rejected *Furgatch's* "context-based standard . . .or *any comparable approach.*"[59] By rejecting "any comparable approach," *LOWV* also rejected the only other source on which CEW relies for a conflict: a 1995 FEC regulation, commonly known as § 100.22(b), that also defines "expressly advocating."[60] This regulation stems directly from *Furgatch.*[61]

All told, when voters adopted Amendment 27, *Furgatch* and § 100.22(b) were not competing definitions of express advocacy. They were a single rejected and discredited outlier. Indeed, when voters adopted Amendment 27, all six circuits that had reviewed either the *Furgatch* test or § 100.22(b) had rejected this standard, including the Tenth Circuit in *Davidson.*[62] Shortly after Colorado voters adopted Amendment 27, the Sixth Circuit also rejected their standard and followed *Buckley* 's express advocacy definition.[63] Even within the Ninth Circuit support for *Furgatch* has withered. Both the Washington State Supreme Court and the California Court of

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[59] *Id.*.

[60] Op. Br. at 31(citing 11 C.F.R. § 100.22 (1995)).

[61] *Express Advocacy*, 60 Fed. Reg. 35292, 35295 (Jul. 6, 1995).

[62] See *Faucher v. Fed. Election Comm'n*, 928 F.2d 468, 470-471 (1st Cir. 1991); Fed. *Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2nd Cir. 1980) (en banc); *Fed. Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Chamber of Commerce v. Moore*, 191 F. Supp. 2d 747 (Miss. 2000); *Iowa Right to Life Comm., Inc., v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d. 1174, 1187 (10th Cir. 2000).

[63] *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir. 2004).

Appeals have rejected the *Furgatch* test.[64] And the Ninth Circuit itself retreated from its *Furgatch* formulation, emphasizing that "context" considerations remained "ancillary, peripheral to the words themselves."[65]

CEW's reliance on the FEC's definition of "expressly advocating" in § 100.22(b) as controlling law stretches the presumption that the legislature is familiar with existing (i.e. settled and controlling) law into an absurdity. A presumption that voters intend to adopt a conflicting federal regulation instead of controlling Colorado law makes certainty in Colorado law nearly impossible. In CEW's hands, § 100.22(b) both creates a conflict and resolves this conflict by setting Colorado's "constitutional limit." Under CEW's rationale, a federal regulation that implements a federal statute effectively trumps a state court's interpretation of similar state law. This is absurd. If voters intended to adopt § 100.22(b), Amendment 27 would have defined expenditure by either incorporating § 100.22(b) directly or by using similar language. Its failure to do so shows that did not intend to change the definition of "expressly advocating" as it existed under Colorado case law at the time.

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[64] *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 4 P.3d 808, 820-821 (Wash. 2000); *Governor Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 471 (Cal. App. 2002).

[65] *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003).

D. Amendment 27 reached any "constitutional limit" by regulating electioneering communications, not by redefining express advocacy.

CEW's argues that Amendment 27's changes to the definition of "independent expenditure" shows that "voters intended to regulate up to the constitutionally permissible limit."[66] To support this claim, CEW asserts that Amendment used "expressly advocating" (in contrast with only "advocating" in the FCPA) as a "new phrase" to achieve full disclosure of independent expenditures.[67] This argument conflates Amendment 27's expanded reporting requirements with its explicit reliance on *Buckley* to narrow the definition of express advocacy.

As noted above, Amendment 27 expanded Colorado's disclosure requirements by defining a new category of political speech, electioneering communications, which does not require express advocacy to regulate. This action expanded Colorado's disclosure requirements to the constitutional limit that *McConnell* approved roughly a year after voters adopted Amendment 27: electioneering communications can be regulated only to the extent that they are the functional equivalent of express advocacy. Neither *McConnell* nor Amendment 27 purported to expand the regulation of express advocacy to include its functional equivalent.

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[66] Op. Br. at 30.
[67] Op. Br. at 30.

The proof is straightforward: Contrary to CEW's claims that "expressly advocating" was a "new phase", the key term in the definition of expenditure—"express advocacy"—did not change. *Davidson* read "advocacy" in the old FCPA as "express advocacy"; Amendment 27 used "express advocacy" as *Davidson* and *LOWV* required. CEW's conclusion that voters "intended to sweep into the 'expenditure' definition as much election-related speech as the Constitution would permit" is not only unsupported, it misunderstands what Amendment 27 intended and in fact accomplished.[68]

In accordance with *LOWV* and *Davidson*, Amendment 27 defined a bright-line distinction between express advocacy and non-express advocacy. Amendment 27 relied on this bright line to create a time-specific, new category of political speech, electioneering communications, which could be regulated. Amendment 27 swept new speech into its ambit through this new category, which did not alter the established definition of express advocacy.

CEW's position that Amendment 27 effectively redefined express advocacy to include its functional equivalent removes the requirement that express advocacy be *express*. As *LOWV* explains, express advocacy requires more than merely identifying a candidate, lauding (or criticizing) a candidate's characteristics or qualifications, or

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[68] Op. Br. at 32.

explaining a candidate's plans upon election. An ad must contain explicit words of advocacy to "specifically urge."

II. The Court of Appeals here followed Supreme Court precedent by construing Amendment 27 to avoid speech-chilling overbreadth and vagueness.

With two exceptions, which we address below, CEW has not alleged that any of the communications at issue contain "magic words" similar words that explicitly urge electoral action. Thus, if the court agrees that *LOWV* constitutionalized the then-prevailing definition of express advocacy, it can end its analysis and affirm. Even if the ads are the "functional equivalent of express advocacy," that test applies only to electioneering communications, and CEW has not alleged that SMF or CLF failed to comply with the reporting and disclosure requirements for electioneering communications.

If, however, the court does not believe that Amendment 27 adopted the established definition of express advocacy, it should still affirm because the opinion below correctly construed Amendment 27 to comply with Supreme Court precedent.

A. The Court of Appeals correctly rejected CEW's invitation to apply *McConnell* and *WRTL* to speech other than electioneering communications.

CEW asserts the Court of Appeals misread *McConnell* as refusing to apply the "functional equivalent of express advocacy" to identify regulable political speech.

CEW also contends that the Court of Appeals recognition that *FEC v. Wisconsin Right to Life*[69]("WRTL") narrowed the definition of electioneering communications is "beside the point."[70] To the contrary, the Court of Appeals construed both *McConnell* and *WRTL* correctly.

McConnell found that Congress' definition of "electioneering communication" was not overbroad, but rather "easily understood and objectively determinable."[71] Yet, *McConnell* still restricted the reach of "electioneering communications" to express advocacy or its functional equivalent. Without such a restriction, the court concluded that electioneering communications would reach candidate-specific speech that there is no constitutional justification to regulate.[72] Thus, *McConnell* applied "functional equivalency" to further limit the scope of political speech that was included within a circumscribed, objective, and easily-understood definition of "electioneering communication," not as a general way to distinguish between regulable and non-regulable political speech.

Similarly, *WRTL* detailed the "functional equivalent of express advocacy" test not to replace *Buckley's* bright-line test for express advocacy, but to resolve an "as applied" challenge to the definition of "electioneering communication" that *McConnell* had

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[69] *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007).
[70] Op. Br. at 37.
[71] *McConnell v. FEC,* 540 U.S. 93, 192-194 (2003).
[72] *Id.* at 206.

already found to be facially constitutional. Justice Roberts, the originator of *WRTL's* four-part functional-equivalent test, carefully stated that this test "is only triggered if the speech first meets the brightline requirements of *BCRA* § 203 [time-specific and candidate-specific electioneering communication standards] in the first place." The Court of Appeals' view that *WRTL*'s functional-equivalency test did not apply outside of the context of electioneering communications is not "beside the point."[73] It is the central point.

The litany of arguments that CEW employs to avoid *WRLT* and *LOWV* each fail. First, CEW asserts that *Buckley's* magic words test "raises constitutional concerns" because this test is "no longer operative."[74] But neither *WRTL* nor *McConnell* held this. These cases simply acknowledged the under-inclusiveness of *Buckley's* "magic words" that *Buckley* itself recognized.[75] *Buckley* also recognized the reason for this under-inclusiveness that CEW finds "hard to imagine":[76] it provides a bright-line demarcation between protected and regulable political speech.[77]

Second, *Shays v. FEC's* invalidation of an FEC regulation based on *Buckley's* magic-words test does not show that this test is irrelevant. *Buckley* employed the

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[73] Op. Br. at 37.
[74] Op. Br. at 39.
[75] *McConnell*, 540 U.S. at 192-194; *WRTL*, 551 U.S. at 474.
[76] Op. Br. at 41.
[77] *Buckley*, at 424 U.S. at 41-44.

"magic words" test as a speech-protective, limiting statutory construction. Because this test is limited to "magic words," it might well be unworkable to implement a statute that seeks to reach speech beyond magic words. *Buckley* cannot and does not attempt to define the functional equivalent of express advocacy. Further, *Citizens United* has eliminated any persuasive force that *Shays* might have once had. *Shays* faulted the FEC for failing to vindicate statutory interests, like preventing influence, that *Citizens United* later found insufficiently compelling to regulate political speech.

Third, *Citizens United* does not show, as CEW argues, that three justices abandoned their view that the functional equivalent test is hopelessly vague. *Citizens United* considered the functional-equivalent test only as applied, not its facial validity. Much like a stopped clock shows the right time twice a day, even an otherwise vague test can yield a crisp result when applied to an extreme case.

Finally, CEW also makes much of the Court of Appeals "express exhortation" requirement. But this requirement is neither novel nor unsupportable. "Exhortation" reflects the Bluebook's explanation that an ad must "specifically urge," and distinguishes factual statements (e.g. "Smith is running for Congress") from calls to action. The phrase "express exhortation" just emphasizes what "express advocacy" requires: advocacy must explicitly call a voter to support or oppose a candidate. It also implement's *WRTL's* acknowledgement that so-called "issue advocacy" is

constitutionally protected as long as support or opposition to a candidate is "uninvited by the ad."[78] Requiring words to "exhort" is not inconsistent with *Buckley's* recognition that "Smith for Congress" expressly advocates despite "no action verb urging anyone to do anything." The verb—"vote" or (more generally) "support"—in the phrase "Smith for Congress" is read into the preposition "for." Such questions of grammatical syntax are entirely different than a communication's implied intent.

B. Since Amendment 27, the Supreme Court has only expanded the First Amendment protection of political speech and narrowed the justifications for regulating it.

This court's consideration of Article XXVIII occurs against the backdrop of an intense and clarifying period of significant, First Amendment, campaign-finance decisions by the U.S. Supreme Court. These cases began with *McConnell's* limited accommodation of Congress' efforts to define and regulate "electioneering communications."

The key post-*McConnell* cases, *FEC v. Wisconsin Right to Life* ("*WRTL*")[79], and *Citizens United v. FEC*[80] further clarified and narrowed the scope of *McConnell's* functional-equivalent, electioneering-communication test. *McConnell* stated that the

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[78] *WRTL*, 551 U.S. at 470 (2007).
[79] *WRTL*, 551 U.S. 449 (2007).
[80] *Citizens United*, 130 S.Ct. 876 (2010).

justifications for regulating express advocacy also applied to electioneering communications that intended to or had the effect of influencing voters' decision.[81] In contrast, *WRTL* disavowed not only a "free-ranging intent-and-effect test," it also rejected any "discovery or inquiry" into contextual factors.[82] *WRTL* took pains to emphasize that its "functional equivalent" test was a speech-protective, objective test that forbids regulation "*unless* an ad is subject to no reasonable interpretation *other than* as an appeal *to vote for or against* a specified candidate."[83] Thus, *WRTL* held that "discussion of issues cannot be banned because they *might* be relevant to an election," and any uncertainty must be resolved in favor of protecting speech.[84] Indeed, *WRTL* defined the functional equivalent of express advocacy so narrowly that justices on both the left and the right charged that *WRTL* had effectively overruled *McConnell*.[85]

Just this past year, *Citizens United* significantly narrowed the permissible justifications for regulations that might chill political speech.[86] To do this, the Supreme Court took a rare step: it reconsidered and overruled a past precedent,

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[81] *McConnell*, 540 U.S. at 105.

[82] *WRTL* at 474 n. 7.

[83] *Id.* (emphasis added).

[84] *Id.* (emphasis added).

[85] *Id.* at 499 n.6 (Scalia, J.) (noting "seven Justices of this Court, having widely divergent views concerning the constitutionality of the restrictions at issue, agree that the opinion effectively overrules *McConnell* without saying so")

[86] *Citizens United*, 130 S.Ct. at 912 ("informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights").

Austin v. Michigan Chamber of Commerce, which upheld a ban on independent expenditures by unions or corporations to prevent corporate wealth from distorting the electoral process. [87]

The potential of complex regulations to impermissibly chill speech permeates *Citizen's United. Citizens United* severely criticized a campaign-finance regime so complex and ambiguous that two years of litigation were needed to determine if an independent expenditure was constitutional.[88] The Supreme Court reconsidered and overruled *Austin* because it could not resolve *Citizens United's* claims without otherwise chilling speech.[89] *Citizens United* notes that a combination of regulatory complexity, ambiguous tests, and administrative deference chill speech and function as an effective prior restraint that the First Amendment prohibits.[90] It concludes that "independent expenditures, *including* those made by corporations, do not give rise to corruption or the appearance of corruption."[91] Accordingly, *Citizens United* held that no compelling government interest justifies regulating corporate independent

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[87] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652.

[88] *Id.* at 894 (noting that Citizens United learned whether it could speak two years after its opportunity to persuade voters had passed) and 895 ("As additional rules are created for regulating political speech, any speech arguably within their reach is chilled.").

[89] *Id.* at 893.

[90] *Id.* at 895-96.

[91] *Id.* at 909 (emphasis added).

expenditures.[92]

In the process, *Citizens United* clarified and established the following speech-protective guideposts for evaluating the scope of the First Amendment protections in the campaign-finance context:

- Only the government's interest in preventing *quid pro quo* corruption is sufficiently compelling to justify regulating political speech.[93]

- The potential of influence, favoritism, access, or ingratiation does not rise to the level of *quid pro quo* corruption that justifies regulating independent expenditures.[94]

- *Austin's* "anti-distortion" rationale, i.e. an interest in preventing the distorting effects of aggregated corporate wealth or in leveling electoral opportunities, does not justify regulating independent expenditures.[95]

- Broadly speaking, robust political debate is encouraged by more speech, not more regulation.[96]

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[92] *Id.* at 913.

[93] *Id.* at 909.

[94] *Id.* at 910-11 (extensively citing *McConnell*).

[95] *Id.* at 904-05, ("The rule that political speech cannot be limited based on speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.")

[96] *Id.* at 907 ("Factions should be checked by permitting them all to speak . . . .") (citing The Federalist No. 10, p. 130 (B. Wright ed.1961) (J. Madison)) and 911 ("it is our law and our tradition that more speech, not less, is the governing rule.)

C. CEW's proposed "unmistakably advocates" standard opposes the Supreme Court's recent, consciously speech-protective decisions.

Instead of following the Supreme Court's speech-protective trend, CEW attempts to reverse this trend by proposing a stand-alone test for express advocacy that opposes it. Although *WRTL* stressed that First Amendment standards must be both easily-understood and objective, CEW's standard is neither. Ultimately, CEW's test is a shifting, uncertain standard that looks to an ad's purpose and regulates all speech that arguably has the a purpose of influencing an election in any way. The Supreme Court has rejected not only CEW's standard, but also its premise.

1. CEW fails to articulated a consistent standard for express advocacy.

Although *WRTL* stresses that any regulation of speech must be objective and readily understandable, CEW has never articulated a consistent standard to define express advocacy. It changed its position below, and it blurs the issue here.

The functional-equivalent test that CEW advances here differs from the test that CEW advanced before the ALJ, where CEW argued that "expressly advocate" was merely a signal that was intended to ever-evolve over time to include all communications "up to the limit permitted by the First Amendment as described in United States Supreme Court case law" at a particular moment.[97] In the Court of

[97] R.I, 181, ALJ Op. Br. at 21.

Appeals, and seemingly in this court, CEW argues that expenditure should apply to "all ads that cannot be classified as issue speech."[98]

The qualifier "seemingly" is appropriate because it is difficult to discern exactly what standard CEW advances. The functional-equivalency test that *WRTL* describes is not the same test that CEW employs. CEW most frequently describes "expenditure" by referring to spending on communications that "unmistakably" advocate for a candidate's election or defeat.[99] "Unmistakably" is not a shorthand for *WRTL's* functional equivalency test, which requires speech to have no reasonable interpretation other than advocating for a candidate's election or defeat.[100] A communication can "unmistakably" advocate for or against a candidate, but still avoid any advocacy to vote for or against a candidate. A conclusion that an ad "umistakably" advocates depends on a listener's varying subjective interpretation. *WRTL* forbids this.[101]

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[98] Op. Br. at 21:16-17; Op. Br. at 30:14-17.
[99] Op. Br. at *E.g.* 15:§ I; 20:2; 22:1st full ¶; 23:10; 25:17: 27:2; 41:12.
[100] *WRTL*, 551 U.S. at 474, fn. 7.
[101] *WRTL*, 551 U.S. at 493-94.

2.CEW's "unmistakably" advocates test is an impermissible purpose test.

The way that CEW applies its test to the ads at issue in this case shows that, CEW's "unmistakably" standard is a disguised "purpose" test, which the Supreme Court has explicitly and repeatedly rejected.

CEW complains that it was entitled to an inference that SMF and CLF spent in accordance with their stated purposes of supporting state Senate candidates and electing Republicans.[102] CEW charges that each ad at issue here "communicates an unmistakable message of support for the election of the identified candidates," by linking positive results to an electoral outcome, and inviting listeners "to factor the information into their voting decisions."[103] In CEW's view, an ad that is "clearly intended to influence an election" qualifies as the functional equivalent of express advocacy.[104]

This view is just a disguised variant of the "purpose" test that *WRTL* rejected. *WRTL* explained:

> The *McConnell* Court did not find that a "vast majority" of the issue ads considered were the functional equivalent of direct advocacy. Rather, it found that such ads had an "electioneering purpose." For the reasons we have explained, *"purpose" is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy.*[105]

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[102] Op. Br. at 20.
[103] *Id.* at 23 and 25.
[104] *Id.* at 34 (quoting *McConnell* at 193).
[105] *WRTL* at 476 n.8 (emphasis added).

Thus, *WRTL* "decline[d] to adopt a test for as-applied challenges turning on the speaker's intent to affect an election" because "an intent-based test would chill core political speech."[106] Despite this admonition, CEW equates an intent to influence an election, i.e. an "electioneering purpose," with the functional equivalent of express advocacy. But "it *is not enough* to establish that the ads can only reasonably be viewed as advocating or opposing a candidate."[107]

An "electioneering purpose" is "not enough" because the First Amendment forbids suppressing the discussion of issues just because issues are relevant to an election.[108] Political speech can inform and educate about issues—issues that may be relevant to an election or associated with a candidate—and even support a candidate, without directly inviting a voter to take this information into account in a voting decision.

CEW's "unmistakably" standard ignores the reasonable alternate purpose of factual statements that inform listeners that a candidate is "running for office" or that "local leaders endorse" a candidate. CEW equates these factual statements as similar to one of *Buckley's* magic words, "Smith for Congress." But statements that communicate the opinions or conclusions of others or explain or provide a context for issue or other information inform listeners of facts. They provide reasons to

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[106] *Id.* at 467-68.
[107] *Id.* at 474 (emphasis added).
[108] *Id.* at 475.

support a candidate and put these reasons into context. This has a reasonable alternate purpose of informing and educating voters about relevant issues and a candidate's position on these issues. In Justice Robert's words, such an ad "conveys information and educates" so that voters might later "choose—uninvited by [by informed by] the ad— to factor [this information] into their voting decisions."[109]

3. *A preventative intent or effect does not save CEW's "unmistakably advocates" test.*

In addition to being a disguised purpose test, CEW's standard has a deeper, more problematic flaw: the Supreme Court has rejected CEW's view that ensuring compliance with, or preventing the evasion of, valid "core" regulations justifies additional, supplemental or preventative speech regulations. In *WRTL*, the FEC urged the Supreme Court to adopt an expansive definition of "functional equivalent" to ensure that issue advocacy did not circumvent contribution limits that applied to express advocacy.[110] *WRLT* rejected this "prophylaxis-upon-prophylaxis" approach. *WRTL* held that, to survive strict scrutiny, each speech restriction must separately and independently be supported by a compelling government interest.[111]

CEW employs the very reasoning that *WRTL* rejected. CEW urges an expansive definition of "expressly advocating" for the same reason that the FEC

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[109] *WRTL*, 551 U.S. 449, 470 (2007).
[110] *WRTL*, 551 U.S. 449, 479 (2007).
[111] *WRTL* at 477-480.

urged a broad definition of functional equivalence: to prevent speakers from circumventing other regulations (in CEW's words, providing an "easy roadmap for evasion"). Like the FEC, CEW provides no independent, separate justification for its broad approach.[112] Like the FEC's uniformly rejected approach in § 100.22(b), CEW seems to presume that preventing evasion of existing constitutional speech regulations justifies broadly redefining "expressly advocating." *WRTL* forbids this bootstrapping.

CEW's secondary (or perhaps alternative) invitation to redefine "express advocacy" as all speech that can't be proven to be "issue speech" exemplifies this forbidden bootstrapping.[113] Instead of independently justifying such a vast approach, CEW simply shifts the burden of proof to speakers, who must prove that a communication is "not issue speech" to avoid regulation.

D. CEW's definition of "express advocacy" retroactively subjects independent expenditures to penalties and constitutionally suspect contribution limits.

Finally, adopting one of CEW's tests for "express advocacy" will retroactively regulate and penalize independent political speech that speakers believed was

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[112] CEW does suggest that an ad that "may have a tendency to influence that candidate" is improper, Op. Br. at 42, but *Citizens United* rejected this justification. *CU*, 130 S.Ct. at 884.

[113] Op. Br. 21 and 30 ("expenditure was intended to apply to spending on candidate-related non-issue speech"; voters intended "to treat as candidate election-related spending all spending on ads that could not be construed as issue speech.")

protected when they spoke. Colorado defines a "political committee" as including candidate-related "expenditures" that exceed $200, and imposes a $500 contribution limit to a political committee per election cycle.[114] Changing the definition of expenditure from *LOWV's* express-advocacy standard to a different standard will retroactively subject political speech to regulation, and subject speakers to penalties for non-compliance with retroactive regulations that change the controlling law on which speakers relied when they decided to speak. Rather than being subject the $1,000 reporting and disclosure requirement for independent expenditures in effect, speakers will be subjected to a $500 ex-post-facto contribution limit and fines for violating this limit. By applying a new standard retroactively, CEW will succeed in "exact[ing] a cost after speech occurs."[115] The First Amendment forbids this.[116]

Perhaps more significantly, adopting CEW's definition will subject the independent expenditures at issue in this case to contribution and expenditure limitations for political committees that are, at best, constitutionally suspect. *Citizen United* invalidated one of Amendment 27's expressed purposes—limiting the disproportionate influence of wealth—and held that limitations on independent expenditures do not give rise to the one remaining valid justification for regulating

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[114] Op. Br. 18-19.

[115] *Citizens United,* 130 S.Ct. at 896 (citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 267 (1964)).

[116] *Id.*

political speech—the appearance of or actual *quid pro quo* corruption.[117] This makes the contribution and expenditure limits that redefining expenditure will impose on independent expenditures deeply problematic. Although the legality of these limits is not directly before this Court here, this Court should not create a new constitutional issue by subjecting even more political speech to these suspect limits.[118]

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[117] Colo. Const., art. XXVIII, § 1; *Citizens United* at 904-05 and 909.

[118] *Catholic Health Initiatives Colo. v. City of Pueblo*, 207 P.3d 812, 822 (Colo. 2009) ("the court has an obligation to avoid statutory interpretations that invoke constitutional deficiencies").

Conclusion.

FOR THESE REASONS, this Court should affirm.

Respectfully submitted this 4th day of April 2011.

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CERTIFICATE OF SERVICE

I certify that on this April 4, 2011, the foregoing **JOINT ANSWER BRIEF OF RESPONDENTS SENATE MAJORITY FUND, LLC AND COLORADO LEADERSHIP FUND, LLC** was mailed to all parties and other interested persons via US First Class Mail, Postage Pre-paid as following:

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