COLORADO SUPREME COURT 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Colorado Court of Appeals Case No. 08CA2689 Opinion by Judge Gabriel Judges Casebolt and Booras concur Office of Administrative Courts Judge Robert N. Spencer Case No. OS 2008-0028 **Petitioner:** COLORADO ETHICS WATCH v. **Respondents:** SENATE MAJORITY FUND, LLC; COLORADO LEADERSHIP FUND, LLC; and OFFICE OF ADMINISTRATIVE COURTS	FILED IN THE SUPREME COURT APR 21 2011 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲**COURT USE ONLY** ▲
Attorneys for Petitioner: Luis Toro, #22093 1630 Welton Street, Suite 415 Denver, Colorado 80202 Telephone: (303) 626-2100 Fax: (303) 626-2101 E-mail: ltoro@coloradoforethics.org Chantell Taylor, #33059 1536 Wynkoop St., #100 Denver, CO 80202	Case Number: 10sc276
REPLY 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 5,006 words according to Microsoft Office 2003.

This brief complies with C.A.R. 28(k). Respondents have agreed with Ethics Watch's statements regarding preservation of issues and the standard of review in Ethics Watch's opening brief.

DATED: April 21, 2011.

By: 
Luis Toro, #22093

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

INTRODUCTION AND SUMMARY OF REPLY

This case presents a question of first impression regarding the interpretation of a voter-initiated amendment to the state constitution. Respondents argue that voters who enacted Article XXVIII of the Colorado Constitution through the passage of Amendment 27 in 2002 intended to take the Court of Appeals' interpretation of different language in an old statute and enact that definition into Article XXVIII, knowing that the definition permitted the "relatively easy circumvention" of that statute. *See League of Women Voters v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001).

To the contrary, voters significantly changed the definitions of key terms in Colorado campaign finance law when they enacted Amendment 27. *League of Women Voters* did not interpret the term "expressly advocating," and courts in other jurisdictions were split on the issue whether the First Amendment allowed regulation of ads that advocated for or against candidates without using so-called "magic words." Respondents urge the Court to disregard its precedents and rule that voters intended to enact a toothless, self-defeating amendment as Colorado's constitutional law on campaign finance.

The question whether the so-called "magic words" test is constitutionally required was resolved in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007) and *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876, 890 (2010). Respondents and *amici* supporting affirmance sometimes act as if they wish to relitigate *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) or *Wisconsin Right to Life* itself, rather than address the question upon which the Court granted certiorari. The only federal constitutional question in this case is whether there is a need for the Court to select a construction of "expenditure" at issue to avoid infirmity under the First Amendment as construed by the U.S. Supreme Court. The test has been established by that court: the "indicia of express advocacy" are that ads "mention an election, candidacy, political party, or challenger" and "take a position on a candidate's character, qualifications, or fitness for office." *Wisconsin Right to Life*, 551 U.S. at 470; *see also Citizens United*, 130 S. Ct. at 890. The First Amendment does not require the Court to adopt a looser test.

ARGUMENT

I. Voters Did Not Intend To "Constitutionalize" *League of Women Voters'* Test.

In a case involving the interpretation of a voter-initiated constitutional amendment, it should not be controversial to argue that "[c]ourts must give

words their ordinary and popular meaning in order to ascertain what the voters believed the amendment to mean when they adopted it." *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). Yet this proposition, and its corollary that courts should avoid narrow or technical interpretations that defeat the purpose of a constitutional amendment, *see id.*, are directly attacked by Respondents Senate Majority Fund, LLC ("SMF") and Colorado Leadership Fund, LLC ("CLF") in their Response.

According to SMF and CLF, it would be wrong for the Court to interpret the definition of "expenditure" in Amendment 27 as a question of first impression, even though the Court has never construed that term or the term "independent expenditure" in the old Fair Campaign Practices Act ("FCPA"). *See Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 78 (Colo. 2008) (assuming without deciding that payments to union staff for communications with members met the definition of "expenditure"). SMF and CLF are wrong, however, to suggest that the Court should start its analysis by accepting Respondents' selective reading of the background case law and only then reach the language of the provision.

Respondents' argument that *League of Women Voters*, 23 P.3d 1366 must control the interpretation of Article XXVIII's expenditure definition continues to suffer from several fatal flaws. It has long been the law in

Colorado that it is presumed that the legislature agrees with a settled judicial interpretation of a statute when it reenacts the statute "and does not change a section previously interpreted by settled judicial construction." *Tompkins v. De Leon*, 595 P.2d 242, 243-244 (Colo. 1979). Voters, presumably aware of this law as well, thoroughly rewrote Colorado campaign finance law through Amendment 27. They must be presumed to have intended a change in the law. *See Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 188-89 (Colo. 2009).

Amendment 27 separated the "expenditure" definition from the definition of "independent expenditure," which is defined as an expenditure that is not coordinated with a candidate. Colo. Const. art. XXVIII, §§ 2(8)(a) and (9). Article XXVIII's "independent expenditure" definition also provides that coordinated expenditures are "contributions by the maker of the expenditures, and expenditures by the candidate committee." *Id.* § 2(9). Thus, voters intended for the same definition of "expenditure" to apply to both coordinated and independent expenditures as well as to the definition of "political committee" and other provisions of Article XXVIII and the FCPA. The significant revisions to the definition sections of Article XXVIII refute any suggestion that voters intended to "constitutionalize" *League of Women Voters*.

The *amicus* brief of Colorado Common Cause, unrefuted by Respondents and their supporting *amici*, demonstrates the purpose of Amendment 27 was to change Colorado's campaign finance law through the initiative process and bring it in line with changes being made at the federal level. *See also* Legislative Council of the Colorado General Assembly, 2002 Ballot Information Booklet, 1 ("This proposal changes Colorado campaign finance law and places the changes in the state constitution.") The "expenditure" definition in Article XXVIII is modeled after the definition of "expenditure" in the federal Bipartisan Campaign Reform Act of 2002 ("BCRA"). Compare 2 U.S.C. § 431(9)(A) *with* Colo. Const. art. XXVIII, § 2(9). Just as federal law permits use of the "no reasonable interpretation" test to determine whether an ad expressly advocates for or against a candidate, *see Citizens United*, 130 U.S. at 889-90, so too should Colorado law. *See People v. Rodriguez*, 112 P.3d 693, 700-01 (Colo. 2005) (looking to case law interpreting provision of Missouri Constitution upon which provision of Colorado Constitution was based).

SMF's and CLF's discussion of the "electioneering communication" definition in Colo. Const. art. XXVIII, § 2(7) does nothing to advance their argument. Colorado's "electioneering communication" definition contains no reference to advocacy whatsoever. A communication is an electioneering

communication if it unambiguously identifies a candidate and is sent to the electorate during the defined time period. *Id.*; *see also Colo. Citizens for Ethics in Gov't v. Comm. for the American Dream*, 187 P.3d 1207, 1214 (Colo. App. 2008). In contrast, spending on ads are "expenditures" if the purpose of the spending is to expressly support or oppose candidates or ballot measures. Colo. Const. art. XXVIII, § 2(8). These two categories were described in the Bluebook as ads that "clearly refer[] to a candidate without specifically urging the election or defeat of a candidate" and ads that "specifically urge the election or defeat of a candidate." Legislative Council of the Colorado General Assembly, 2002 Ballot Information Booklet, 3-4.

SMF and CLF would have the Court rule that when voters read the words "specifically urge" in the Bluebook, they understood that as meaning only ads that used specific magic words (and apparently, not all ads that use such words) and not other ads that also communicate an identical, unmistakable message of support or opposition to a candidate's election but avoid such words. It would have been easy for the Bluebook authors to say that independent expenditure regulation was limited to ads containing phrases such as "vote for" or "reject," but instead they used a broader phrase. A reasonable voter would view the ads in this case as specifically urging the election of the identified candidates. The Libby Szabo TV ad, the

"Local leaders endorse Dave Kerber" ad, and all of the ads at issue identify someone as a candidate, take a position on their fitness for office ("She will be a shining star in the senate") and what he or she will do when elected. These ads all display the "indicia of express advocacy" – they "mention an election, candidacy, political party, or challenger" and "take a position on a candidate's character, qualifications, or fitness for office." *Wisconsin Right to Life*, 551 U.S. at 470.

Certainly there is nothing in the Bluebook or the language of Article XXVIII that suggests an intent to draw an artificial distinction between ads that advocate for a candidate using "magic words" and other ads that carry the identical message – the "functional equivalent" of a "magic words" ad – and leave the latter completely outside of the regulatory regime. Respondents would have the Court hold that voters intended that a candidate could go so far as help write the ad and appear in it and yet not have spending on that ad count as a coordinated expenditure, so long as the ad did not use a magic word (or even if it did, the magic word was not accompanied by an express exhortation or the undefined type of magic word into which an exhortation could be read). The Court should reject this narrow, technical interpretation of the language of Article XXVIII because it

would defeat the purpose of the amendment that enacted it. *See Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004).

Respondents' other arguments supporting their position that voters intended to lock *League of Women Voters* into the state Constitution require little refutation. Respondents fail to explain to the Court how *League of Women Voters*, a Court of Appeals decision that would not be binding on this Court had it been reviewed on certiorari, could become a "settled construction" that would prevent the Court from independently determining the meaning of the words used.

SMF and CLF claim that *Citizens for Responsible Gov't Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000) adopted the "magic words" test, but all the Tenth Circuit did in that case was cite *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) for the proposition that "express words of advocacy of election or defeat" are required for an ad to be subject to regulation, then state that "communications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy." *Citizens for Responsible Gov't*, 236 F.3d at 1187. Notably, *Citizens for Responsible Gov't* defined express advocacy as the category of ads that cannot be considered issue speech, defeating any suggestion of Respondents or *amici* supporting affirmance that Ethics

Watch's view that "express advocacy" is equivalent to "non-issue speech" is in any way controversial or unprecedented. *See id.*

Respondents' discussion of *FEC v. Furgatch*, 807 F.2d 857, and the FEC's regulatory definition of "expressly advocating," 11 C.F.R. § 100.22 (1995), only highlights the fact that there was no settled construction of the language at issue. Courts presume that legislators and voters are aware of "previous legislation and decisional law on the subject," *Thompson v. People*, 510 P.2d 311, 313 (Colo. 1973) (quotation omitted) and that they intend to acquiesce to a "settled judicial construction" of statutory language when they reenact such language without change. *People v. Cross*, 127 P.3d 71, 76 (Colo. 2006). There was no such "settled construction." While some courts rejected the *Furgatch* approach, the FEC's regulatory interpretation of "expressly advocating" largely tracked it. 11 C.F.R. § 100.22; *see also State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10 (Or. App. 1999). Contrary to Respondents' argument at p. 20 of their brief, courts do not presume that voters mentally litigate open questions in the voting booth, reject one line of authority as a "discredited outlier," and adopt the purported majority view.

Respondents also ignore that *Furgatch*'s analysis has for all intents and purposes been adopted by the U.S. Supreme Court. *See* Paul S. Ryan, *Wisconsin Right to Life and the Resurrection of Furgatch*, 19 Stan. L. &

Pol'y Rev. 130 (2008). But whether *Furgatch* was a mere "outlier" or the decision that ultimately prevailed when the circuit split was resolved does not control the outcome of this case. What matters is that there was no "settled judicial construction" of the language in the "expenditure" definition for voters to adopt, and so the Court of Appeals' holding that voters intended to lock *League of Women Voters*' interpretation of "independent expenditure" into Article XXVIII's definition of "expenditure" was error. *See Cross*, 127 P.3d at 76.

II. Ethics Watch Advocates Use Of The Indicia Of Express Advocacy Identified By The U.S. Supreme Court.

Respondents (and *amici* supporting affirmance) would rather accuse Ethics Watch of wanting the expenditure definition to reach "implied" advocacy, or consider the subjective intent of the maker of the expenditure, than discuss the legal standard Ethics Watch actually advocates. Ethics Watch's position is that advocacy for or against can be express even without use of "magic words." The "indicia of express advocacy" identified in *Wisconsin Right to Life*, 551 U.S. at 470, should be applied to the "expenditure" definition in Colo. Const. art. XXVIII, § 2(8).

Perhaps the most revealing argument on this point is found in Respondents' brief, in which they argue that "Smith for Congress" – one of *Buckley*'s original examples of "magic words" – actually expressly exhorts a

vote for Smith because "[t]he verb – 'vote' or (more generally) 'support' – in the phrase 'Smith for Congress' *is read into* the preposition 'for.'" Respondents' Brief at 28 (emphasis added).

Respondents' concession that an "express exhortation" can be "read into" the language of an ad requires reversal of the Court of Appeals. Once it is acknowledged that express advocacy can be "read into" a phrase that contains no verbs, then courts must articulate a test to determine when advocacy for or against a candidate can be "read into" an ad. Yet Respondents and *amici* supporting affirmance fail to articulate a test that would yield the result that "Smith for Congress" expressly advocates for Smith's election but "Local leaders endorse Dave Kerber . . . Dave Kerber is running for State House" does not expressly advocate for Kerber's election. No such test exists.

An ad can communicate an unmistakable message of support or opposition to a candidate's election even without using magic words, for example, *Hillary: The Movie* in *Citizens United*, 130 U.S. at 890 and the Dave Yellowtail ad described in *McConnell,* 540 U.S. at 194 n.77. Moreover, a genuine issue ad might actually use a magic word in the course of its issue discussion ("Tell Senator X to vote for this bill"). "Smith for Congress" is express advocacy, not because there is some imagined rule of

English usage that requires the word "vote" to be "read into" the ad – there is none -- but because a reasonable person would not interpret such an ad as anything other than an appeal to vote for Smith. This is exactly the test applied in *Wisconsin Right to Life* and which Ethics Watch advocates for here. Like the ads in this case, "Smith for Congress" identifies the candidate and the office for which he or she is running. The only difference is that the advocacy in Respondents' ads is even more explicit because the ads also make the case why voters should support the identified candidates, for reasons of biography, positions on issues, or because prominent persons believe they will excel in office. *Wisconsin Right to Life*'s "indicia of express advocacy" are more present in Respondents' ads than in "Smith for Congress."

Notably, *Buckley* did not say that an ad does or does not expressly advocate for or against a candidate based on the presence or absence of "magic words." To the contrary, *Buckley*'s footnote 52 gave "examples of words of express advocacy" that "eventually gave rise to what is now known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191. The *McConnell* court sensibly recognized that searching for "magic words" is no way to determine whether an ad expressly advocates for or against a candidate. *Id.* at 193. The record in this case – replete with examples of ads

that advocate in favor of candidates that the Respondent committees have the stated purpose of supporting – shows the same for purposes of Colorado law.

"Magic words" and their "equivalents" as described in *League of Women Voters* cannot be the test, because there is no workable formula to identify "equivalents" to the "magic words." The predictability Respondents and their *amici* claim to crave does not exist if an express exhortation to vote is "read into" the phrase "Smith for Congress" but not "Local leaders endorse Dave Kerber" or "When looking for a true leader in our community we have to look at what's important . . . Ken Summers possesses these qualities and has what it takes to lead this community to a better tomorrow . . . Ken Summers is running for re-election to the State House."

The only test that produces predictable results is the one articulated by Chief Justice Roberts in *Wisconsin Right to Life*, ultimately to be embraced by the *Citizens United* majority: An ad is the "functional equivalent" of a magic word ad if there is no reasonable interpretation of the ad other than as an appeal to support or oppose a candidate. *Wisconsin Right to Life*, 551 U.S. at 470; *Citizens United*, 130 S. Ct. at 890 (2010). Chief Justice Roberts laid out a clear test explaining why ads calling on viewers to contact an

incumbent Senator standing for re-election and tell him to stop filibustering judicial nominees did not expressly advocate for the Senator's defeat:

> [A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Wisconsin Right to Life, 551 U.S. at 469-70. These factors provide all the certainty anyone needs to determine whether his or her spending will be considered for the purpose of expressly advocating the election or defeat of a candidate. *See id.*, at 474 & n.7.

It should go without saying that the fact that some (but not all) of the ads tell the reader to take some action other than voting for the candidate, such as visiting the candidate's website or contacting the candidate to tell him or her to "keep fighting," does not transform the ads into issue speech. As early as *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249-50 (1986) – a case that predated Amendment 27 – the U.S. Supreme Court recognized that disclaimers cannot transform an ad that otherwise expressly

advocates for candidates into something else. In *McConnell*, the court gave the example of an ad that exhorted voters to "Call Bill Yellowtail. Tell him to support family values" as one that could not credibly be viewed as one discussing the issue of family values. *McConnell,* 540 U.S. at 194 n.77. Respondents fail to distinguish their ads that include similar sham calls to action from the ads found to expressly advocate in these cases.

Respondents' argument that Ethics Watch's interpretation of the term "expenditure" would chill speech because it is overly complex is foreclosed by *Wisconsin Right to Life* and *Citizens United*, in which the test was applied without difficulty. *Wisconsin Right to Life* lays out in clear fashion the distinction between express advocacy and issue speech, forbids the consideration of subjective intent to determine an ads' meaning, and requires that "ties" be resolved in favor of the party engaging in political spending. 551 U.S. at 474.

Moreover, the test Ethics Watch urges be applied to the "expenditure" definition has existed since 2007 in a Secretary of State regulation restrictin the application of the "electioneering communication" definition, as a way of avoiding as-applied challenges to the law, using the same *Wisconsin Right to Life* factors Respondents claim here are too vague and complicated to apply. Colorado Secretary of State, Rules Concerning Campaign and

Political Finance, 8 CCR § 1505-6, Rule 9.4 (2007). If anything, it is Respondents who would complicate Colorado campaign finance law by having the *Wisconsin Right to Life* test apply to narrow the electioneering communications definition, while using a different and even narrower test to determine whether spending is an "expenditure" under Article XXVIII. The losers would be the people of Colorado, who enacted Article XXVIII as a way of strengthening enforcement of Colorado campaign finance law. Colo. Const. art. XXVIII, § 1.

III. The Rule That Courts Prefer Interpretations That Avoid Constitutional Problems Supports Ethics Watch's Interpretation Of "Expenditure."

Not all of the discussion of First Amendment issues contained in the briefs of Respondents and supporting amici are germane to the question before the Court, which is the proper interpretation of the term "expenditure" in Colo. Const. art. XXVIII, §2(8). Arguments about vagueness and overbreadth are germane because the Court of Appeals reasoned that voters must be presumed to have wanted to avoid a possible First Amendment vagueness objection that purportedly would result from applying anything other than the *League of Women Voters* test. Ethics Watch argues that no vagueness concerns remain in view of *Wisconsin Right to Life*, 551 U.S. at 470 and *Citizens United*, 130 S. Ct. at 890. Ethics Watch

also contends that it is the Court of Appeals' decision that raises constitutional concerns, because it is difficult to justify regulating spending on ads that contain magic words but not spending on other ads that are functionally equivalent but avoid those words. *See McConnell*, 540 U.S. at 217; *see also Shays v. FEC*, 528 F.3d 914, 924-25 (D.C. Cir. 2008). These are the First Amendment issues in this case.

Respondents' arguments regarding the rejected rationales for the outright ban on corporate independent expenditures at issue in *Citizens United*, Respondents' Brief at 28, are not germane to the Colorado's "expenditure" definition. The definition is incorporated into to the "political committee" definition and its contribution limits, which were not overruled in *Citizens United*, 130 S. Ct. at 909; *see also Buckley*, 424 U.S. at 20-21 (limits on contributions to political committees place "only a marginal restriction upon the contributor's ability to engage in free communication.") The "expenditure" definition is also built into the "independent expenditure" definition and its related disclosure requirements. Colo. Const. art. XXVIII, §§ 2(9), 5. The First Amendment does not bar reasonable disclosure and disclaimer requirements such as those in Article XXVIII.

Respondents overstate the holding of *Citizens United* in the summary at p. 31 of their brief. The portions of the decision cited by Respondents do

not state broadly that any "regulation" of independent expenditures are prohibited unless they meet the stated criteria. What is prohibited is "banning" or "suppressing" such speech based on the speaker's identity as a corporation. *See Citizens United*, 130 S. Ct. at 904-05, 908. In the same opinion, an 8-1 majority affirmed federal disclaimer and disclosure requirements for independent expenditures. *Citizens United*, 130 S. Ct. at 914. That form of regulation remains permissible under the First Amendment.

Citizens United reaffirmed that disclosure and disclaimer laws are justifiable "based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." *Id.* (*quoting Buckley*, 424 U.S. at 66) Article XXVIII's "expenditure" definition applies across the board to disclaimer and disclosure requirements as well as political committee contribution limits; any arguable concern about its application to contribution limits is not a reason to restrict the definition in a way that would frustrate the purpose of disclosure and disclaimer requirements.

Moreover, Respondents overlook the fact that the *Citizens United* court applied the "no reasonable interpretation" test to reject a potential narrower ground for resolving that case. It specifically rejected the argument

that the motion picture in question was really just a documentary of the life of Hillary Clinton as opposed to an ad against her presidential candidacy. Writing for the Court, Justice Kennedy applied the "no reasonable interpretation" test articulated by Chief Justice Roberts in *Wisconsin Right to Life* to determine that *Hillary: The Movie* could be treated as express advocacy. *Id.* at 890.

Despite all of Respondents' and *amici*'s protests to the contrary, this is the same test Ethics Watch urges the Court to apply to the "expenditure" definition in this case. It is the test already approved by the U.S. Supreme Court as not overly vague or speech-chilling, and which sensibly recognizes that a political ad can expressly advocate for or against a candidate with or without the use of any specific "magic words." *See Wisconsin Right to Life*, 551 U.S. at 474 & n.7; *Citizens United*, 130 S. Ct. at 890. *Amicus* Colorado Education Association goes so far as to urge the Court to adopt the approach in Justice Scalia's concurrence in *Wisconsin Right to Life*, instead of the controlling opinion of the Chief Justice which was reaffirmed in *Citizens United*, 130 S. Ct. at 890. Brief of Colorado Education Ass'n at 14. The question, however, is whether controlling federal authority requires a more limited interpretation of the "expenditure" definition, not how the Court would have decided *Wisconsin Right to Life*.

Respondents' argument that *Wisconsin Right to Life* and *Citizens United* are necessarily limited to federal electioneering communication cases, and that outside of that context the First Amendment prohibits regulation of election-related spending unless it is on ads containing "magic words," continues to lack any support. The defined time window for electioneering communications provides no guidance as to whether the substance of the communication advocates for or against a candidate. Respondents have no substantive response to the District of Columbia Circuit's analysis in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008), which struck down the FEC's proposed use of the "magic words" test to determine whether a campaign ad outside of the federal electioneering communications window would be considered a coordinated communication, on the ground that application of a meaningless and easily evaded test was contrary to the purposes of the statute the FEC was charged with administering. *Id.* at 924-25.

Lacking any answer to *Shays* on the merits, Respondents attempt to undermine it by arguing that the "purposes" of BCRA to which *Shays* referred were ruled improper in *Citizens United*. To the contrary, the problem with using the "magic words" rule to determine whether an ad was subject to the coordinated communications rule was that candidates would

be able to "ask wealthy supporters to fund ads on their behalf, so long as those ads contain no magic words." *Shays*, 528 F.3d at 925. Such coordinated communications do indeed raise the specter of *quid pro quo* corruption because they are tantamount to a contribution to a candidate and their regulation is easily justified under the First Amendment for that reason. *See Citizens United*, 130 S. Ct. at 901-902 (*quoting Buckley*, 424 U.S. at 47-48); *see also* Colo. Const. art. XXVIII, § 2(9) (deeming coordinated expenditures to be contributions to the candidate). In addition, the *Shays* plaintiff's asserted injury was that he was "illegally denie[d] information about who is funding presidential candidates' campaigns." *Id.* at 923. The government's interest in using campaign finance disclosure and disclaimer laws as a way to provide information to voters is unquestionably legitimate. *Citizens United*, 130 S. Ct. at 914.

The fundamental point of *Shays*, like *McConnell* and *Wisconsin Right to Life*, is that the "magic words" test does not meaningfully distinguish between ads that expressly advocate for or against candidates and those that do not. To give meaning and effect to the voters' enactment of Amendment 27, the Court should interpret "expenditure" to apply to spending on all ads that cannot be interpreted as genuine issue ads and that carry the "indicia of express advocacy" identified in *Wisconsin Right to Life*, 551 U.S. at 470.

IV. Reversal Will Not Retroactively Subject Respondents To Liability.

Respondents' last-ditch argument is to argue that reversal would somehow subject them and others retroactively to contribution limits. Nothing could be further from the truth. Amendment 27 was passed in 2002 and its "expenditure" definition has not changed since then. The complaint herein was filed in 2008.

Moreover, Respondents' argument regarding possible constitutional challenges to the contribution limit contained in Colo. Const. art. XXVIII, § 3(5) really proves Ethics Watch's point that narrowing the "expenditure" definition is not required to address post-*Citizens United* First Amendment concerns. Those concerns (if any) would apply to the contribution limit and not to the scope of the "expenditure" definition. The claim for violation of § 3(5) is only one of Ethics Watch's three claims; the other two relate to committee registration and independent expenditure disclosure requirements. (I:3-5.) Reversal and remand would not prevent SMF and CLF from presenting defenses to the claim under § 3(5). Much the same can be said about amicus Colorado Education Association's criticisms of C.R.S. § 1-45-107.5 (2010), passed after *Citizens United*, which contains disclosure requirements regarding independent expenditures above and beyond those in

Article XXVIII. Any concerns about the effect of that statute are not a reason to restrict Article XXVIII's definition of "expenditure."

CONCLUSION

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

DATED: April 21, 2011.

By: _____

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

Chantell Taylor, ##33059
1536 Wynkoop St., #100
Denver, CO 80202

ATTORNEYS FOR PETITIONER

CERTIFICATE OF MAILING

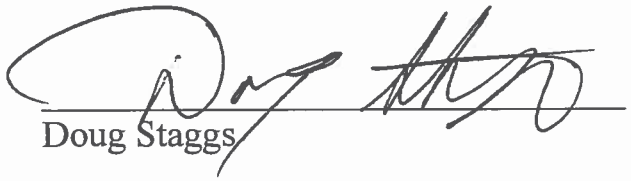
I certify that on April 21, 2011 I placed a copy of the foregoing REPLY BRIEF in the United States mail, postage prepaid and addressed as follows:

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

Martha M. Tierney, Esq.
Kelly Garnsey Hubbell + Lass LLC
1441 18th Street, Suite 300
Denver, CO 80202



Doug Staggs

Colorado Supreme Court
Issue Information Checklist

Case Number: 2010SC276 **File Date:** 04/29/2010

Short Caption: Colorado Ethics Watch v Senate Majority Fund **At Issue Date:** 04/22/2011

Case Type: Cert Petition - To COA - Civil

General Statement of Issue(s):

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.

Issue Index Coding:

1900 - Ballots and Elections

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