COLORADO SUPREME COURT 101 W. Colfax Avenue, Suite 800 Denver, CO 80203	
Appeal from Colorado Court of Appeals Opinion by Judge Richard L. Gabriel, Judges James S. Casebolt and Laurie Ann Booras concur Case No. 08CA2689	
Office of Administrative Courts Robert N. Spencer, Administrative Law Judge Case No. OS 2008-0028	
Petitioner-Appellant: COLORADO ETHICS WATCH **Respondents-Appellees:** SENATE MAJORITY FUND, LLC; COLORADO LEADERSHIP FUND, LLC; and OFFICE OF ADMINISTRATIVE COURTS	**▲COURT USE ONLY▲**
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BRIEF OF AMICUS CURIAE COLORADO EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS-APPELLEES' POSITION

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). It contains 4,114 words. Further, the undersigned certifies that the brief complies with C.A.R. 28(k). It contains under separate headings, sections addressing the standard of review and preservation for appeal.

Mark G. Grueskin

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STATEMENT OF ISSUES PRESENTED

Whether the voters of Colorado, in adopting Article XXVIII of the Colorado Constitution, intended to enact an imprecise standard for "express advocacy" that revolves around how those messages are understood rather than what they actually say about a specifically named candidate.

STATEMENT OF CASE

Amicus adopts the statement of the case, presented by Appellant in its Opening Brief.

STATEMENT OF FACTS

Amicus adopts the statement of the facts, presented by Appellant in its Opening Brief.

The interest of amicus curiae, the Colorado Education Association ("CEA"), is as follows.

CEA has an undisputed, strong, and constitutionally protected interest in preserving the ability to financially support groups that inform voters about persons in public life. *See, e.g., Sanger v. Dennis*, 148 P.3d 404, 414 (Colo. Ct. App. 2006) (CEA was one of the plaintiff organizations whose political voice and associational interests were stymied by secretary of state's interpretation of Article XXVIII). CEA helps to fund certain "political organizations" – groups organized

under Section 527 of the Internal Revenue Code. C.R.S. § 1-45-103(14.5) (by definition, such groups are engaged in "influencing or attempting to influence" the election of persons "to any state or local office"). Affidavit of Lynne Garramone Mason ("Mason Affidavit") ¶¶5, 11. Many of the communications that are funded address individuals who are involved in low-profile elections – local school board, state legislature, or the State Board of Education – where public awareness is often lacking. *Id.* at ¶6.

SUMMARY

Colorado Ethics Watch ("Ethics Watch") advocates a unique test for express advocacy of candidates for elected office based on whether or not that entity was sending messages that were "unmistakably" messages of support or opposition of a named candidate. Ethics Watch's test is one that relies on the understanding of the listener, viewer, or reader of the message, and as such, cannot be a reliable, advance guidepost for political speakers.

Should this Court reverse the Court of Appeals and embrace the position taken by Ethics Watch in this appeal, there will be a least two adverse consequences of that result. First, the "unmistakably support or oppose" standard requires political speakers to project, without any specific standards, how their message will be received. Speakers cannot know whether their words will be

tested against large or small, sophisticated or unsophisticated audiences, and thus political speech will be chilled.

Second, contributors (such as the amicus here) will no longer be able to set clear parameters to recipient 527 political organizations for the types of communications to be funded with their contributions. If such funds, intended for use in issue advocacy messages, actually are used for express advocacy of candidates, the recipient organizations will be converted into de facto "political committees" or "independent expenditure committees," and contributors – including CEA – will be subject to campaign finance litigation and significant fines for violating the low contribution limits applicable to political committees or failing to file reports that only contributors to independent expenditure committees must file. Both the litigation and the real potential for thousands of dollars of fines make the prospect of this type of political involvement increasingly unattractive.

Other than urging this Court to retain and apply the express advocacy test used by the Court of Appeals rather than create a new, unworkable one, CEA does not purport to apply that standard to the facts at hand.

LEGAL ARGUMENT

Ethics Watch argues for an express advocacy standard that is unique and a departure from the law that voters adopted and the Courts have construed since the enactment of Article XXVIII of the Constitution.

> Looking to the language, structure and purpose of Article XXVIII, the Court of Appeals should have interpreted the "expenditure" definition as unambiguously applying to spending on any **ads that unmistakably support or oppose a candidate's election**.

Opening Brief at 22 (emphasis added); *see id.* at 23, 25, 27, 33, 41.

The existing standard for express advocacy is clear: "express advocacy, under Colorado law, requires (1) the use of the *Buckley* 'magic words' or substantially similar or synonymous words, and (2) an express exhortation that the reader, viewer, or listener take action to elect or defeat a candidate." *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2010 Colo. App. LEXIS 368 (Colo. Ct. App. 2010), citing *Buckley v. Valejo*, 424 U.S. 1, 44 n.52 (1976). In other words, to be "express advocacy," the ad must tell a voter to do something in connection with a candidate for state or local office and indicate what that something is. The first element of that test was announced by the Court of Appeals in *League of Women Voters v. Davidson,* 23 P.3d 1266 (Colo. Ct. App. 2001). The second underscores that a coincidental appearance of the magic words in an ad is not sufficient to comprise express advocacy; the communication must point the voter in a specific

electoral direction and give him at least a slight push. These acts are perceived quite differently than ads reflecting issue advocacy. Mason Affidavit, ¶8.

"Political organizations" are groups formed under Section 527 of the Internal Revenue Code, 26 U.S.C. § 527(e)(1), and pay for political messages that refer to candidates by name within two "windows" of time – thirty days before a primary election or sixty days before a general election – and are sent to "an audience that includes members of the electorate for such public office." Colo. Const., art. XXVIII, sec. 2(7)(a)(II), (III) (defining "electioneering communication); C.R.S. § 1-45-103(14.5) (defining "political organization"). The messages themselves do not directly tell voters how they should cast their ballots; they do provide useful information in informing the public, including voters, about policy issues of the day. *Id.*, ¶¶5-7. To reflect this distinction, 527 political organizations – like any entity that pays for "electioneering communications" – engage in "spending" rather than making "expenditures," the latter being defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of **expressly advocating the election or defeat of a candidate**." Colo. Const., art. XXVIII, sec. 2(8); C.R.S. § 1-45-108.5(1)(b).

There is no suggestion that limiting the ability of non-candidate committee, non-political party organizations to speak politically advances the only true

premise for campaign finance regulation – combating actual or apparent corruption of elected office holders. These groups do not – and cannot – coordinate their paid messaging with candidate committees, because if they did, they coordinated expenditures would be treated as contributions to the candidate committees. Colo. Const., art. XXVIII, sec. 5(4). Such contributions would be well in excess of the appropriate candidate contribution ceilings. *See id.*, sec. 3(1). Non-coordinated spending of this nature simply does not give rise to these concerns. *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 909-10 (2010).

Ultimately, the First Amendment does not support erecting artificial hurdles to political speech.

> The most important thing to bear in mind when addressing the issue advocacy/express advocacy distinction is that to preserve core First Amendment freedoms, the standard applied is an exacting one, with any doubt about whether a communication is an exhortation to vote for or against a particular candidate to be resolved in favor the First Amendment freedom to express.

Washington State Republican Party v. Public Disclosure Comm'n, 4 P.3d 808, 820 (Wa. 2000). The shift to a standard of "unmistakably" supporting or opposing a candidate would violate this precept.

A. Ethics Watch 's proposed standard is inherently ambiguous.

The starting point for this discussion ought to provoke no debate. Political speech requires the maximum amount of protection. And ambiguity in standard setting is inconsistent with this goal.

> 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period....' Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.

Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 474 (2007) (citations omitted).

The standard advanced by Ethics Watch – that a communication is express advocacy if it "unmistakably" supports or opposes the election or defeat of a candidate – is plainly unworkable. What message one listener (or viewer or reader) takes from a television or radio ad, or a piece of direct mail or brochure, can be entirely different than what another person hears, sees or reads.

For example, if CEA informs voters that a person in public life (a candidate for school board, for example) supports additional funding for public schools, a pro-public education voter might see that as a reason to support the candidate, whereas a small government or anti-tax voter could see that as a reason to oppose

her. *See* Mason Affidavit, ¶7. Or where an environmental organization informs the public that a person has been involved in endangered species preservation, one voter may see that activity as a reason to support this particular candidate, while another voter may see the candidate as a paternalistic meddler and have reason to oppose him.

In any election, there is also a mass of voters for whom public the matters discussed in such messages (education and environment in the above examples) are tertiary political issues. They will interpret the above-described communications as being neither reasons to vote for or vote against the named candidate. For such voters, these messages may help in developing a broader context for various policy debates, but they are not necessarily clear, direct, persuasive edicts about how a person should vote. For those audiences, the communications are not "unmistakable" reasons to vote for or against the named candidate or even a reason to vote for anyone running for that particular office. *Id.*, ¶8.

This raises important questions about what a political speaker would have to consider before funding or sending such messages. How many people must take the message as an unmistakable electoral signal about the named candidate? Must it be a majority, a reasonably sized minority, a notable group, a few people, or just one individual? And what political worldview – dedicated partisan, informed

citizen, blank slate, or legal expert – is the one that frames the determinations of whether the communication advocated the election of any individual, first by the speaker and then by a court?

Because these questions are largely unanswerable, the Court can imagine the conundrum faced by political groups and speakers, as a practical matter, in implementing this standard. The question for the speaker is, how will a message be processed by the listening public. As one federal circuit noted, regulation of political speech is inherently flawed where it

> shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer. This is precisely what *Buckley* warned against and prohibited. *Buckley* recognized that the distinction between "express advocacy" and "issue advocacy" can easily "dissolve in practical application...." In no event, the Court said, could the distinction depend on the understanding of the audience. This, the Court said, would put "'the speaker . . . wholly at the mercy of the varied understanding of his hearers....'" Relying on audience impression to determine the advocacy category would "compel[ ] the speaker to hedge and trim" and curtail the right of free expression.

Virginia Society for Human Life, Inc. v. Federal Election Comm'n, 263 F.3d 379 (4th Cir. 2001) (citations omitted).

Regulatory nuance is no friend of the First Amendment. The better approach – the one that preserves the fullest range of political speech – is to avoid contextual, situational, or evolving niceties about political expression. After all,

"the words 'expressly advocating' mean exactly what they say." *Federal Election Commission v. Central Long Island Tax Reform,* 616 F.2d 45, 53 (2d Cir. 1980).

That essentially was what *League of Women Voters, supra,* held. *Buckley*'s "magic words" were the standard, expanded only by the inclusion of their synonyms. 23 P.3d at 1277. And this – not the complex and uncertain federal standards then in place – is what voters had to contemplate, in terms of an express advocacy standard, when they considered it as part of the proposed Article XXVIII at the 2002 general election.[1]

B. The proposed Ethics Watch standard will have two adverse effects.

A court may consider the consequences that stem from a particular interpretation of the law. *Buckley v. Chilcutt*, 968 P.2d 112, 120 (Colo. 1998). In this instance, those consequences threaten First Amendment expression in serious ways.

1. Chilling political speech

In the electoral context, the inherent ambiguity of any standard that affects the substance of political speech and the willingness of political speakers to come

[1] As Ethics Watch notes, the federal regulation, 11 C.F.R. § 100.22(b), contained the standard of how a "reasonable" person would react to any given ad. Opening Brief at 31. Unfortunately, "this sort of ad hoc, totality of the circumstances-based approach provides neither fair warning to speakers that their speech will be regulated nor sufficient direction to regulators as to what constitutes political speech." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008).

forward is intolerable. Neither a 527 political organization nor any of its funders ought to wonder whether their communications are within the law. And yet, as demonstrated above, that is precisely the Catch 22 that the "unmistakably support or oppose" language would broach.

The problems with open-ended terms in campaign finance regulation is that they "provide little ex ante notice to political speakers as to whether their speech will be regulated." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 284 (4th Cir. N.C. 2008). The inevitable result of such uncertainty is that "ordinary political speech will be chilled, the very speech that people use to express themselves on all sides of those issues about which they care most deeply." *Id.*

The antidote to a First Amendment chill is clarity. And clarity, in this realm, is the direct product of precise language in establishing the text for what is express advocacy. "The question is not whether (a particular) commercial is susceptible to a reasonable belief that it called for a vote against (the named candidate) but whether it is susceptible only to an interpretation that it called for such a vote." *Washington State Republican Party, supra*, 4 P.3d at 823.

Further complicating the lives of those who discuss political issues is the fact that there is no mechanism by which clarity regarding specific messages may be obtained. As a matter of practice and as an accommodation to the public,

Colorado's Secretary of State sometimes provides advisory opinions on campaign finance issues but does not do so according to any guidelines or timelines and, to the best of the knowledge of the undersigned, has never done so regarding proposed ads. Left to their own devices, then, political speakers – whether on the stump or in a recording studio – "are left to guess and wonder whether a regulator, applying supple and flexible criteria, will make a post hoc determination that their speech is regulable as electoral advocacy." *N.C. Right to Life, Inc., supra*, 525 F.3d at 284. And because in Colorado, that regulator includes any person who files a campaign finance complaint, the political speaker's potential peril is significant.

Very few representations in the stream of public debate are absolutely "unmistakable" in terms of what they mean. The Ethics Watch standard is not – but should be – the constitutional equivalent of a property description. Like any other boundary, it should contain "[p]oints and lines (that) are definite, certain, unmistakable… (or) monuments which control all other descriptions, courses or distances." *Link v. Jones*, 62 P. 339, 340 (Colo. Ct. App. 1900). Merely using the word "unmistakably" does not communicate the limits needed to speak freely about issues of the day. In contrast, the *League of Women Voters* test for express advocacy (as well as the slightly expanded standard set forth by the Court of

Appeals in this case) provided such definition, rather than imprecision that threatens First Amendment expression.

Over the course of its history, the labor movement has had to contend with vague directives of this nature. For instance, in the 1940s, a national labor leader planned to give a speech in the State of Texas and, upon his arrival there, he was served with a temporary restraining order, the substance of which was to prevent him from "soliciting" persons to join named unions without first obtaining an organizer's card, as required by state law. He went ahead with his scheduled speech, addressing the advantages of workers organizing and a general invitation to join the Oil Workers Industrial Union, Local No. 1002, and thereby support the labor movement throughout the country. He asked one specific nonunion member in the audience to join the union. At the conclusion of his speech, he was arrested.

Writing for the Court, Justice Rutledge focused on the First Amendment implications of imprecise standards on speech – here, what it meant to "solicit" a person to become a union member.

> Furthermore, whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the

> mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely.

Thomas v. Collins, 323 U.S. 516, 535 (1945). The Court struck down the Texas statute, given this inherent lack of clarity about its reach.

The same may be said of "unmistakably." It offers no clear-cut distinction or security for free discussion and is anything but a sharp line for political speakers. Justice Scalia, noting that the Court in an earlier decision had observed, "[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day," wrote in his concurrence in *Wis. Right to Life* that a better path is "the express-advocacy line, set in concrete on a calm day by *Buckley*, several decades ago." 551 U.S. at 499. Justice Scalia's metaphor should guide this Court's consideration of this matter.

2. Creating unforeseeable campaign finance liability for contributors

If Ethics Watch prevails here and the standard for express advocacy shifts from the status quo, 527 political organizations that cross the "unmistakably" line will be "political committees" or "independent expenditure committees" rather than "political organizations." Compare Colo. Const., art. XXVIII, sec. 2(12) with C.R.S. §§ 1-45-103(11.5), (14.5). Political committees are subject to a severe contribution limit – $525 every two years. Colo. Const., art. XXVIII, sec. 3(5); 8 CCR 1505-6 (Rule 12.3.f). Independent expenditure committees have filing requirements that no other entity in Colorado has. C.R.S. § 1-45-107.5(4)(a), (c) (various corporate entity disclosures, reporting of independent expenditures within forty-eight hours after obligating funds). Donors to independent expenditure committees have reporting obligations that donors to no other entity have. C.R.S. § 1-45-107.5(4)(b) (donors of $1,000 or more must file their own contribution reports with the appropriate officer). Political organizations operating under section 527 of the Internal Revenue Code have no limitations on the contributions received – either as to source or amount, and the committees, not the donors, do all the reporting. C.R.S. § 1-45-108.5(1).

Where a violation of the constitutional or statutory provisions relating to campaign finance occurs, significant financial penalties can be imposed upon

hearing a citizen complaint. For instance, any person who violates a contribution limit to entities such as a political committee is subject to a penalty of at least two times and potentially five times of the amount contributed in violation of this limit. Colo. Const., art. XXVIII, sec. 10(1). A person who fails to file required one or more reports is fined $50 per day for each day that the report is not filed. *Id.*, sec. 10(2).

Currently, CEA clearly informs its 527 political organization funding recipients that they must stay out of the realm of "express advocacy." Mason Affidavit, ¶¶9-10. The express advocacy line drawn by the Colorado courts has not been a challenging one for these groups to use. But the "unmistakably support or oppose" standard is not nearly as definable. And if the 527 political organization that pays for and transmits political messages is later sued because it has not lived within the strictures of a political committee or an independent expenditure committee because one or more of its messages qualify under Ethics Watch's standard of express advocacy, CEA can be (and most likely will be) sued for violating the $525 contribution limit to political committees and/or the failure to file independent expenditure committee donor reports. *See Davidson v. Comm. for Gail Schoettler, Inc.*, 24 P.3d 621, 622 (Colo. 2001) (recipient entity and contributor were both sued for placing funds in entity that was later deemed to be

political committee), Mason Affidavit, ¶11. That is particularly unfair because CEA typically does not even know the specifics of the messages that are to be communicated until long after its contribution has been received, deposited, and spent. If the 527 political organization inadvertently crossed the "unmistakably" line, as is possible in the heat of a campaign, *see Alliance for Colorado's Families v. Leland Gilbert*, 172 P.3d 964, 966 (Colo. Ct. App. 2007), CEA would have potential liability in the tens or hundreds of thousands of dollars, even though it did not authorize its funding to be used for express advocacy. While CEA could be sued today if its recipient crossed that line, the existing "express advocacy" standard is so clear that recipient organizations do not have a difficult time complying with it.

Obviously, if a free-floating test is approved by the Court, CEA and others interested in funding electioneering communications will become that much more hesitant to provide funding for such messages. The potential liability would simply be too great. Given the United States Supreme Court's caution about approving a standard for political speech that could subject speakers and supporters to open-ended litigation, *Citizens United, supra*, 130 S.Ct. at 889, this concern is a substantial one.

CONCLUSION

Lawyers who write briefs (and perhaps justices who write opinions) often crystallize a point of law in a single, hopefully pithy sentence. Sometimes one sentence really does say it all. Or so lawyers would like to believe. The truth is, we never know – not to an absolute certainty – how that one line or paragraph or page in a brief will be received by the reader.

The same is true for those who write radio and television ad scripts concerning political issues. Those authors simply cannot be sure how their semantic works of art will be understood by the listener or viewer. Unfortunately, when an ad writer miscalculates, significant financial penalties can be imposed on the sponsor of the communication and its donors.

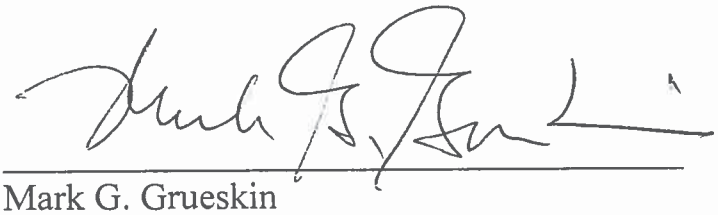
The "unmistakably support or oppose" standard, being urged on this Court, assumes that there is real certainty in such messaging. Beginning with *Buckley*, courts warned that evaluating express advocacy based on what is heard or what is intended, rather than what is actually said, is a flawed technique for structuring a campaign finance system. This test will certainly chill constitutionally protected speech by independent groups. It will likewise put CEA and other donors in the precarious position of discovering, after the fact, that they violated campaign finance laws (either for failing to live within political committee contribution limits

or failing to file donor reports for independent expenditures), based solely upon the perception of what a third party recipient of their contribution did with those funds. Besides the financial penalty involved, the prospect of litigation over whether there has been such a violation will create a serious disincentive for speakers and donors who distribute or fund issue advocacy relating to topics of the day and candidates. That trade-off is constitutionally unacceptable and unnecessary.

This Court should uphold the Court of Appeals' decisions concerning the appropriate standard for express advocacy.

Respectfully submitted this 4th day of April, 2011.

ROTHGERBER JOHNSON & LYONS LLP

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 2011, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS-APPELLEES' POSITION** was placed in the United States mail, postage prepaid, to the following:

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