**Case No. 13-1108**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

JOELLE RIDDLE, GARY HAUSLER, KATHLEEN CURRY, THE COMMITTEE TO ELECT KATHLEEN CURRY AND THE LIBERTARIAN PARTY OF COLORADO

**Plaintiffs/Appellants**

v.

JOHN HICKENLOOPER, in his official capacity as Governor of the State of Colorado, and SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado,

**Defendants/Appellees**

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On Appeal from the United States District Court for the District of Colorado
The Honorable Phillip A. Brimmer, District Court Judge
District Court Case No. 1:10-cv-01857-PAB-KMT

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# APPELLANTS' PRINCIPAL BRIEF

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Respectfully submitted,

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Appellants request oral argument.
Digital submissions are included in their native PDF format.
May 2, 2013

## CORPORATE DISCLOSURE STATEMENT

Appellants The Committee to Elect Kathleen Curry and the Libertarian Party of Colorado, by undersigned counsel, pursuant to Fed.R.App.P. 26.1, hereby disclose the following:

1. **Parent Entities:**

   None.

2. **Publicly held entities that own ten percent or more of company stock:**

   None.

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## PRIOR OR RELATED APPEALS

There are no prior or related appeals.

On January 11, 2011, at the request of the parties under the procedure provided for by Colo. App. R. 21.1(a), the District Court entered an Order Certifying Question to the Colorado Supreme Court [Docket No. 39], certifying the following question to the Colorado Supreme Court:

> Are C.R.S. §§ 1-45-103.7(3) and (4) consistent with Colo. Const. Art. XXVIII, §§ 3(1) and (2) to the extent that they prohibit the candidate committee of a write-in candidate, who was not on a primary election ballot, from accepting, and donors from contributing, the same aggregate amount of funds as may be contributed to or accepted by the candidate committee of a candidate who appears on both a primary and the general election ballot in the same election cycle?

The Colorado Supreme Court initially accepted the certified question on February 4, 2011 [Docket No. 42]. The parties filed briefs with the Colorado Supreme Court and argued the question before the Court. The Colorado Supreme Court issued an order on October 11, 2011, vacating its order accepting the certified question and returned the matter to the District Court [Docket No. 44].

## 1. JURISDICTIONAL STATEMENT:

The Appellants' causes of action arise under the First Amendment of the United States Constitution, as incorporated into the Fourteenth Amendment, which guarantees the freedoms of political expression and political association, and under the Fourteenth Amendment, which guarantees equal protection of the laws. (The Appellants will be referred to herein collectively as "the Contributors.")

This lawsuit seeks to redress the deprivation by the Appellees under color of state law of rights secured by the United States Constitution. (The Appellees, John Hickenlooper, the Governor of the State of Colorado, and Scott Gessler, the Secretary of State of the State of Colorado, who are being sued in their official capacities, will be referred to herein collectively as "the Secretary.") This lawsuit is authorized by 42 U.S.C. §§ 1983 and 1988. Jurisdiction is proper in this Court pursuant to 29 U.S.C. § 1331 and 1343.

On February 27, 2013, the United States District Court for the District of Colorado entered its Order (Aplt. App. at 146-178) granting the Secretary's motion for summary judgment and denying the Contributors' motion for summary judgment. The District Court entered its Final Judgment on that same day. *Id*. at 179-80. The Contributors timely filed a Notice of Appeal on March 19, 2013. *Id*. at 181-82. FRAP 4(a)(1)(A).

The Order and Final Judgment dispose of all of the claims of both the Contributors and the Secretary. This Court has jurisdiction over all appeals from final decisions of the U.S. District Court. 28 U.S.C. § 1291.

## 2. STATEMENT OF THE ISSUES:

COLO. CONST. article XXVIII, Section 3, sets an aggregate amount that a person or small donor committee may contribute to a candidate committee for a primary election and an equal aggregate amount that a person or small donor committee may contribute to a candidate for a general election. The Secretary has interpreted Section 3 to mean that the amount a supporter of a candidate who is not listed on a primary election ballot is limited to the aggregate amount established for a general election.

The Colorado General Assembly enacted legislation to implement Section 3 that does not differentiate between a contribution ostensibly made for a primary election from one made for a general election. Thus, based on the Secretary's interpretation of Section 3 and its implementing statute, a supporter of a candidate who appears on a primary ballot may contribute twice as much money to his candidate of choice as a supporter of a candidate running for the same office who is not listed on a primary election ballot is permitted to contribute to his candidate of choice. Moreover, all of the money contributed to the candidate who appears on

a primary election may be contributed after the primary election and spent entirely on the general election.

1. Does the Secretary's interpretation of Colorado's restrictions on campaign contributions violate the freedoms of political expression and association and the guarantee of equal protection under the laws of persons who want to contribute the same amount to a candidate who does not appear on the primary ballot as another person is allowed to contribute to a candidate seeking the same office whose name appears on the primary ballot?

2. Can Colorado's restrictions on campaign contributions be reasonably interpreted so as not to impose two different contribution limitations based on whether a candidate is listed on a primary election ballot so that it passes constitutional muster?

## 3. STATEMENT OF THE CASE

### A. THE NATURE OF THE CASE

This case challenges Colorado's regulation of campaign contributions. In November 2002, Colorado Contributors passed Amendment 27, which amended Article XXVIII of the Colorado Constitution to include several new campaign financing provisions. *See Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d

1137, 1139 (10th Cir. 2007). The provision at issue herein is Section 3 of Article XXVIII.

Section 3(1) of Article XXVIII provides that "no person, including a political committee, shall make to a candidate committee, and no candidate committee shall accept from any one person, aggregate contributions for a primary or a general election in excess of" certain provided amounts. Colo. Const. Art. XXVIII, § 3(1). For candidates to the Colorado house of representatives, such as Appellant Kathleen Curry in 2010 and in 2012, the provision limits contributions to two hundred dollars. *Id.*

The Colorado General Assembly passed C.R.S. § 1-45-103.7 to implement Section 3. Section 1-45-103.7(3)(a) allows a candidate committee to accept "[t]he aggregate contribution limit specified in [Section 3(1)] for a primary election at any time after the date of the primary election in which the candidate in whose name the candidate committee is accepting contributions is on the primary ballot." Section 1-45-103.7(3)(b) allows a candidate committee to accept "[t]he aggregate contribution limit specified in [Section 3(1)] for a general election at any time prior to the date of the primary election." Finally, Section 1-45-103.7(4) also allows a candidate committee to "expend contributions received and accepted for a general election prior to the date of the primary election" and also allows a candidate

committee to "expend contributions received and accepted for the primary election in the general election."

The Secretary interprets Section 3 and C.R.S. § 1- 45-103.7(3) and (4), as placing a limitation on a person wishing to contribute to a state house candidate who is only running in the general election to a limit of $200, while allowing supporters of a state house candidate running in both a primary and the general election to contribute $400 to their candidate of choice.

The Contributors argue that Article XXVIII, § 3 of the Colorado Constitution and related statutes, specifically C.R.S. §§ 1-45-103.7(3) and (4), as interpreted by the Secretary, violate their freedoms of political expression and political association and their right to equal protection of the laws. Contributors contend that Section 3 may be reasonably interpreted so as to avoid these constitutional infirmities.

### B. THE COURSE OF PROCEEDINGS

Appellants Joelle Riddle, Gary Hausler, Kathleen Curry and The Committee to Elect Kathleen Curry filed their initial Complaint for Declaratory and Injunctive Relief on August 4, 2010 [Docket No. 1]. Because of the upcoming general election, these parties filed Plaintiffs' Motion for Preliminary Injunction and Memorandum of Law in Support Thereof [Docket No. 7] seeking a court order enjoining the Secretary from enforcing the contribution limits set forth in

COLO.CONST. Article XXVIII, Section 3(1) and (2) against any person or small donor committee to the extent that any person or small donor committee makes a contribution to a candidate committee of an unaffiliated candidate or a candidate committee of a minor political party candidate whose name is not placed on the primary election ballot in an amount that Section 3 and related statutes allow a person or small donor committee to contribute to a candidate committee of major political party candidate who is running for the same elective office in a given election cycle.

The District Court held an evidentiary hearing on that motion on September 16, 2010. Aplt. App. at 183-392 [Transcript at pp. 1-206]. The District Court denied the plaintiffs' motion for preliminary injunction holding that the contribution limits of Amendment 27 did not violate plaintiffs' First Amendment rights or Fourteenth Amendment rights. *Id*. at 373-392. [Tr. at 191-206].

On January 11, 2011, at the request of the parties under the procedure provided for by Colo. App. R. 21.1(a), the District Court entered an Order Certifying Question to the Colorado Supreme Court [Docket No. 39], certifying the following question to the Colorado Supreme Court:

> Are C.R.S. §§ 1-45-103.7(3) and (4) consistent with Colo. Const. Art. XXVIII, §§ 3(1) and (2) to the extent that they prohibit the candidate committee of a write-in candidate, who was not on a primary election ballot, from accepting, and donors from contributing, the same aggregate amount of funds as may be contributed to or accepted by

> the candidate committee of a candidate who appears on both a primary and the general election ballot in the same election cycle?

The Colorado Supreme Court initially accepted the certified question on February 4, 2011 [Docket No. 42]. The parties filed briefs with the Colorado Supreme Court and argued the question before the Court. The Colorado Supreme Court issued an order on October 11, 2011, vacating its order accepting the certified question and returned the matter to the District Court [Docket No. 44].

The originally plaintiffs, Joelle Riddle, Gary Hausler, Kathleen Curry and The Committee to Elect Kathleen Curry, were joined by The Libertarian Party of Colorado, and together filed the First [sic] Amended Complaint for Declaratory and Injunctive Relief on January 19, 2012. Aplt. App. at 13-38. (This complaint was actually the second amended complaint filed in the case.)

In their complaint, the Contributors seek a declaratory judgment that Section 3 and related statutes violate the Contributors' freedoms of political expression and association as guaranteed by the First Amendment to the United States Constitution. The Contributors base their request on the undisputed fact that Section 3 and related statutes allow supporters of a major party candidate to contribute twice as much money to their candidate of choice, regardless of whether she faces a primary election opponent, as supporters of unaffiliated, write-in or minor political party candidates who do not face an opponent in a primary election

are allowed to contribute to their candidate of choice. The Contributors pose these constitutional arguments both as a facial challenge (Aplt. App. at 26-27) and as an as applied challenges. *Id*. at 28-29.

The Contributors also seek a declaratory judgment that Section 3 and related statutes violate the Contributors' right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. The Contributors base their request on the same undisputed fact that Section 3 and related statutes treat supporters of major party candidates in a constitutionally significant way. The Contributors pose these constitutional arguments both as a facial challenge (Aplt. App. at 30-32) and as an as applied challenge. *Id*. at 32-34.

Finally, the Contributors also seek a permanent injunction enjoining the Secretary from enforcing Section 3 and related statutes that would prevent a person from contributing the same amount of money to a candidate committee of an unaffiliated candidate or a candidate committee of a minor political party candidate whose name is not placed on the primary election ballot as a person may contribute to a major political party candidate who is running for the same elective office. *Id*. at 34-36.

The Secretary filed an answer to this complaint. *Id*. at 39-47.

On February 24, 2012, the Contributors filed Plaintiffs' Motion for Summary Judgment Pursuant to Fed.R.Civ.P. 56 and Memorandum in Support

Thereof. *Id*. at 48-68. This motion was fully briefed. (The Secretary's response is found at pp. 73-100; the Contributors' reply at pp. 118-127.)

On August 6, 2012, the Secretary filed a Motion for Summary Judgment (*id*. at 99-100) and a Memorandum of Law in Support of Motion for Summary Judgment. *Id*. at 101-117. This motion was fully briefed. (The Contributors' response is found at pp. 128-140; the Secretary's reply at pp. 141-145.)

### C. Disposition Below

By Order entered on February 27, 2013, the District Court granted the Secretary's motion for summary judgment and denied the Contributors' motion. Aplt. App. at 146-178.

The District Court held that Section 3 was unambiguous and that it limited contributions on a per election basis, treating the primary election and general elections as separate events, rejecting the Contributors' contention that the FEC's interpretation of FECA was instructive. Aplt. App. at 157-58.

The District Court also held that Section 3 did not violate the Contributors' First Amendment rights because the Section "does not link contribution limitations to the identity of the candidates or contributors, but rather focuses on the process of nomination." *Id*. at 163. The District Court also held that the Contributors' First Amendment argument failed because they did not establish that the $200 limitation on contributions "significantly interferes with their ability to support their favored

candidates." *Id*. at 164. In effect, the District Court based its decision on the First Amendment issue on the effect the limitation had on the Contributors exercise of their First Amendment rights and rejected any notion that the First Amendment analysis involved a balance between the Contributors' rights and those of persons supporting candidates who appear on a primary ballot. *Id*. at 164-65. Continuing on this line of reasoning, the District Court also held whether a per-election limitation of $200 prevented corruption or the appearance of corruption was a matter left to the voters to decide, ignoring the fact that the Secretary interprets the regulatory system as allowing a supporter of a major party candidate to contribute $400 to his favored candidate after the primary, all of which can be used for the general election. *Id*. at 166-67.

The District Court also rejected the Contributors' equal protection argument based on its determination that supporters of primary-participant candidates are not similarly situated to the Contributors. *Id*. at 171. The District Court also dismissed the Contributors' argument that the fact that a supporter of a primary-participant candidate may wait until after the primary to contribute $400 to his favored candidate, all of which may be used for the general election, has no bearing on making a determination whether the Contributors are being treated differently from supporters of primary-participant candidates. *Id*. at 173.

Based on these, and other findings, the District Court granted the Secretary's motion for summary judgment and denied the Contributors. *Id*. at 178.

### 3. STATEMENT OF THE FACTS.

The following facts were set forth in the Contributors' Motion for Summary Judgment and were not disputed by the Secretary. Thus, the Court may consider these facts as undisputed. *See* Fed. R. Civ. P. 56(e) ("If a party . . . fails to properly address another party's assertion of fact . . ., the court may . . . (2) consider the fact undisputed for purposes of the motion . . . ."); *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283–84 (10th Cir. 2010) (opponent's response to summary-judgment motion must raise a factual dispute that is material to the motion).

1. At the time the original compliant was filed on August 4, 2010, Appellant Kathleen Curry was the incumbent State Representative in the Colorado General Assembly representing State House District 61. Aplt. App. at 50 (making the factual assertion supported by affidavit); *id*. at 73 (Secretary admitting this factual assertion).

2. At the time of the Complaint was filed, Ms. Curry was running for re-election seeking a fourth term as State Representative representing State House District 61 as an unaffiliated candidate in the 2010 general election as a write-in candidate. *Id*. at 50 (making these factual assertions supported by affidavit); *id*. at

73 (Secretary denying that Ms. Curry ran as an "unaffiliated" candidate in 2010, but admitting that she ran as a write-in candidate in 2010).

3. Appellants Joelle Riddle and Gary Hausler contributed $200 to the Committee to Elect Kathleen Curry for the 2010 general election and wanted to contribute another $200 to the Committee to Re-Elect Kathleen Curry for the 2010 general election, but could not do so pursuant to Section 3. *Id.* at 50 (making these factual assertions supported by affidavits); *id*. at 73 (Secretary admitting these factual assertions).

4. Other persons contributed $200 each to Appellant the Committee to Elect Kathleen Curry and expressed a desire to contribute another $200 each. Curry wanted the Committee to Elect Kathleen Curry to accept additional contributions from Riddle and Hauser, as well as other supporters who have expressed a similar desire to contribute more than the $200 limitation imposed by the Colorado constitution, but could do so without the risk of civil penalties.[1] *Id.* at 50-51 (making these factual assertions supported by affidavit); *id*. at 73 (Secretary admitting these factual assertions).

5. Curry faced two opponents in the 2010 general election for House District 61: Roger Wilson, a Democrat; and Luke Korkowski, a Republican. Both

[1] Pursuant to COLO.CONST. article XXVIII, section 10(1), persons are subject to civil penalties for violating the campaign contribution limits set forth in section 3(1) and (2).

of her opponents were on the primary election ballot. *Id.* at 51 (making these factual assertion supported by affidavit and documents generated by the Secretary); *id*. at 73 (Secretary admitting these factual assertions).

6. Neither of these candidates faced an opponent in the primary election. The fact that Messrs. Wilson and Korkowski ran unopposed in the primary election is not unusual. Over the last three election cycles preceding the filing of the First Amended Complaint (2006, 2008 and 2010), out of the 590 primary elections involving offices subject to the Section 3 campaign contribution limits, only 63 (10.7%) involved contested elections. During this same time, only 1 out of the 28 (3.6%) minor political party candidates on the general election ballot were on a primary election ballot. *Id.* at 51-52 (making the factual assertion supported by affidavit and documents generated by the Secretary); *id*. at 73 (Secretary admitting these factual assertion, but denying "any suggestion that the lack of formal opposition reduces a major party candidate's fundraising requirements").

7. Kathleen Curry lost the 2010 general election to Roger Wilson. The final vote total was: Roger Wilson: 9,657; Kathleen Curry: 9,298; and Luke Korkowski: 8,987. *Id.* at 52 (making the factual assertion supported by the pleadings); *id*. at 73 (Secretary admitting these factual assertion).

8. The Libertarian Party of Colorado is qualified as a Minor Political Party under the laws of the State of Colorado, § 1-4-1301, *et seq*. *Id.* at 52 (making

the factual assertion supported by the pleadings); *id*. at 73 (Secretary admitting these factual assertion).

### 4. SUMMARY OF THE ARGUMENT

The only constitutional basis for restricting campaign contributions is to prevent corruption or the appearance of corruption. Placing limitations on the amount that supporters may contribute to candidates who do not appear on a primary election ballot to one-half of the amount another person may contribute to a candidate running for the same office but whose name appears on a primary election ballot will not prevent corruption or the appearance of corruption. Because the Secretary's interpretation of Section 3 restricts the amount a supporter of a candidate who does not appear on a primary ballot is not closely drawn to match this important interest, it is unconstitutional.

It is beyond peradventure that it would be unconstitutional if Colorado imposed a two-tiered system that would allow supporters of major party candidates to contribute twice as much money to their candidates over a two-year election cycle as supporters of unaffiliated or minor party candidates were allowed to contribute to their candidates. The Secretary attempts to avoid such a constitutional quicksand by purporting to base the disparate treatment of contributors on the assertion that candidates who appear on a primary election ballot, as opposed to candidates who do not, have to spend money on the primary

election and should, therefore, be eligible to receive contributions for the primary election. This pretense is betrayed, however, by the Secretary's interpretation of Colorado's campaign limitations that allows a person to wait until the primary election is over and then contribute both the "primary election contributions" and the "general election contribution" to a major party candidate that that candidate may then spend entirely on the general election.

A reasonable interpretation of Section 3 negates the constitutional infirmities that fatally infect the Secretary's implementation of Section 3. The Federal Election Commission ("FEC") adopted such an interpretation of the Federal Election Campaign Act ("FECA"), which, like Section 3, provides for separate limitations on contributions made for a primary election and for those made for a general election. Specifically, the FEC interprets FECA, which was adopted more than thirty years before Amendment 27, as allowing a supporter of candidate who does not appear on a primary ballot to contribute to that candidate in the maximum amount allowed for a primary election as well as allowing that supporter to contribute up to the maximum amount allowed for a general election. In other words, the FEC interprets FECA as treating supporters of candidates who do not appear on the primary ballot the same as supporters of candidates who do appear on a primary ballot.

As part of its regulations, the FEC, unlike Colorado, actually differentiates between contributions made for a primary election from contributions made for a general election by requiring money contributed for a primary election to be spent for expenses incurred before the primary election. A supporter of a federal candidate cannot "game" the federal system in the roughshod manner in which the Secretary is allowing contributors to do so in state elections in Colorado.

## 5. ARGUMENT

### A THE STANDARD OF REVIEW FOR CROSS MOTIONS FOR SUMMARY JUDGMENT INVOLVING FIRST AMENDMENT CLAIMS

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "We review the district court's grant of summary judgment *de novo*, applying the same legal standard as the district court." *Constitution Party of Kansas v. Kobach*, 695 F.3d 1140, 1144 (10th Cir.2012), quoting *US Airways, Inc. v. O'Donnell,* 627 F.3d 1318, 1324 (10th Cir.2010) (quotation marks, citation omitted).

"Cross-motions for summary judgment are treated separately; the denial of one does not require the grant of another." *O'Donnell*, 627 F.3d at 1324. In this case, there is no dispute regarding any of the material facts that the Contributors rely upon in support of their motion for summary judgment. Thus, this Court must

make a determination whether, as a moving party, the Contributors are "entitled to judgment as a matter of law based on the record, " and the Court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the Secretary. *Id*., citing to *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir.2005). Conversely, this Court must make a determination whether, as a moving party, the Secretary is entitled to judgment as a matter of law viewing evidence and drawing reasonable inferences therefrom in the light most favorable to the Contributors.

In First Amendment cases, an appellate court is obligated "to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Snyder v. Phelps*, 131 S.Ct. 1207, 1216 (2011) (quotations omitted); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Barker v. Del City,* 215 F.3d 1134, 1137 (10th Cir. 2000).

### B. SECTION 3, AS INTERPRETED BY THE SECRETARY, VIOLATES THE CONTRIBUTORS' RIGHT TO FREEDOM OF POLITICAL EXPRESSION AND ASSOCIATION AS WELL AS THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS

The Secretary's interpretation of Section 3 renders it unconstitutional because it imposes asymmetrical restrictions on the right of supporters of certain candidates for elective office in violation of their freedoms of political expression and association, as guaranteed by the First Amendment, and their rights to equal protection under the laws, as guaranteed by the Fourteenth Amendment.

In the context of a constitutional challenge to limitations on campaign contributions, the Supreme Court has recognized that limits on contributions "implicate fundamental First Amendment interests" *i.e.,* "the freedoms of political expression and political association." *Buckley v. Valeo*, 424 U.S. 1, 15, 21, 22 (1976). To pass constitutional muster, the government must demonstrate 'that the [campaign contribution] limits are 'closely drawn' to match a 'sufficiently important interest.'" *Randall v Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25). *See also*: *McConnell v. Federal Election Commission*, 540 U.S. 93, 136 (2003) (overruled by *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 913 (2010) as applied to independent campaign expenditures but not as applied to campaign contributions); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000).

The only interest that the Supreme Court has recognized as being legitimate and compelling for restricting campaign finances is "preventing corruption or the appearance of corruption." *Davis v. Federal Election Comm'n*, 554 U.S. 724, (2008), citing, among other cases, *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm*., 533 U.S. 431, 456 (2001) and *Nixon v. Shrink*, 528 U.S. at 387-88, both of which were decided before the Contributors passed Amendment 27.

The Secretary's interpretation of Section 3 renders the contribution limitation contained therein facially unconstitutional as well as unconstitutional as applied to the Contributors and as applied to persons who want to contribute the maximum permitted by law to a candidate of Appellant the Libertarian Party of Colorado who does not face a primary election opponent.

In order to prevail on a claim that a law is facially unconstitutional, the plaintiff must show that the law is unconstitutional in all its applications. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Because the Contributors are alleging a violation of their First Amendment rights, a showing that the law is overbroad may be sufficient to invalidate its enforcement. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 1191 n. 6, 170 L.Ed.2d 151 (2008).

There are certain statutory provisions that are relevant to determining whether the Secretary's interpretation of Section 3 is constitutional. First, pursuant to § 1-4-101(3), C.R.S., all nominations by major political party candidates for all elective state officers and members of the general assembly must be made by primary election. Second, unaffiliated candidates obtain access to the general election ballot by nominating petition as set forth in § 1-4-802, C.R.S., or by running as write-in candidates. Unaffiliated candidates and write-in candidates do not participate in primary elections. Third, if only one candidate from one of the minor political parties, such as the Libertarian Party of Colorado, is designated for an office by petition or assembly, that candidate shall be the candidate of the minor party at the general election and that candidate's name is not listed on the primary ballot. § 1-4-1304(1)(d), C.R.S.

The voters of Colorado decided that imposing certain limits on the amount of money persons and small donor committees may contribute to candidates will achieve the state's interest of preventing corruption or the appearance of corruption. *See* Colo.Const., art. XXVIII, Section 1. If the limitations that Colorado imposes on major party candidates serves those interests, there is no rational basis for the Secretary to interpret the regulatory scheme as imposing a more stringent limitation on the amount of money a person or small donor

committee may contribute to another candidate simply because that candidate's name is not listed on a primary election ballot.

For example, because Colorado has decided that placing a limit of $400 on the aggregate amount a person may contribute to a state house representative candidate of a major political party in a given election cycle will prevent corruption or the appearance of corruption, then it is not necessary to limit contributions by supporters of state representative candidates who are unaffiliated, running as a write-in candidate or as a nominee of a minor political party who does not face a primary election opponent to $200 and not allow them to instead contribute $400. To suggest otherwise defies credulity – one would have to accept the premise that the integrity of unaffiliated, write-in and minor party candidates can be purchased at half the price of major party candidates.

Because it is not necessary to burden the rights of supporters of unaffiliated, write-in or candidates of minor political parties, such as the Libertarian Party, who are running without a primary election opponent by limiting their right to contribute to such candidates to an one-half of what the law allows a person to contribute to a major party candidate, the two-tiered system proposed by the Secretary's interpretation of Section 3 is unconstitutional because it not "closely drawn" to serve the State's interest without unnecessarily impinging of the

freedoms of political expression and political association of supporters of unaffiliated candidates. *Randall*, 548 U.S. at 247; *Buckley*, 424 U.S. at 25.

Whether contribution limits serve the State's interests of preventing corruption or the appearance of corruption is not dependent on whether that candidate's name was on a primary election ballot, whether he faced a contested primary, or whether the candidate's party nominated the candidate directly to the general election ballot. There is no purchase to the suggestion that allowing a supporter to contribute $400 to a state representative candidate who faces an expensive primary election fight and goes on to prevail at the general election will serve State's interests to prevent corruption or appearance of corruption, but that allowing a supporter of an unaffiliated candidate, write-in candidate or minor party candidate running for the same office to contribute the same aggregate $400 will not serve those same interests if the unaffiliated candidate or minor party candidate does prevail.

In *Davis*, the Supreme Court held that §319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. §441a-1(a), part of the so-called "Millionaire's Amendment," was unconstitutional. That provision raised the contribution limitations for candidates whose opponent's contributions to their own campaigns exceeded certain thresholds. The Court observed that it had "never

upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other . . . " 128 S.Ct. at 2771.

Moreover, as a practical matter, only about 11% of major political party candidates face a primary election opponent. Thus, the contribution restriction is overly broad in any event because in about 89% of the cases the fact that a major political party candidate's name is on the primary ballot has no practical effect.

Finally, not only do the contribution limitations impinge on the First Amendment rights of supporters of unaffiliated candidates, write-in candidates and minor party candidates, they also impinge on the First Amendment rights of unaffiliated candidates and minor party candidates since the practical effect of such limits necessarily restricts the candidate's ability to disseminate their political speech.

The Secretary's interpretation of the contribution limitations set forth in Section 3 also violates Contributors' right to equal protection of the laws that the Fourteenth Amendment guarantees. To establish a claim for violation of the Equal Protection Clause, Contributors must show: (1) that a similarly situated person or group (ii) received more favorable treatment from the government and (iii) there was no sufficient reason for the government's differing treatment of the two groups. *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1047 (10th Cir. 2009). A person or group is "similarly situated" to another person or group when the two are alike in

"all relevant respects." *See Coalition for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008).

"The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Police Dept. v. Mosley*, 408 U.S. 92, 101 (1972) (citing *Williams v. Rhodes*, 393 U.S. 23, 69 (1968).

In this case, the supporters of major party candidates and minor party candidates who face a primary opponent receive more favorable treatment from the government than the supporters of unaffiliated candidates, write-in candidates and minor party candidates who do not face a primary election opponent and there is no sufficient reason for the government's differing treatment of the two groups. These two groups are alike in "all relevant respects." For the reasons set forth above, the fact that the candidates that one group supports have their names on the primary ballot is not a relevant consideration is achieving the state interests upon which campaign contribution limits are based, *i.e*., to prevent corruption and the appearance of corruption.

In addition, major party candidates and minor party candidates who face a primary opponent receive more favorable treatment from the government than unaffiliated candidates, write-in candidates and minor party candidates who do not face a primary election opponent and there is no sufficient reason for the

government's differing treatment of the two groups. These two groups are alike in "all relevant respects." The fact that one group may have to expend more money in a primary election does not justify a different set of contribution limitations because the only basis for such a system would be that candidates running in primary elections might have to spend more money to ultimately be elected. While this may be true in some instances, allowing persons to contribute more to such candidates does not serve the narrow interest of preventing corruption or the appearance of corruption, the only state interest that can justify campaign contribution limits.

In fact, allowing such candidates to receive more money than other candidates not facing primary election opponents militates against this interest since it could appear that candidates that are allowed to receive more money from individuals than other candidates may be subject to more "influence" from their contributors than candidates who can only receive half as much from their supporters. Moreover, in almost all cases, a Democrat candidate in a district that is heavily Democrat who prevails in a primary election contest will actually have to spend much less in aggregate to win the election than his unaffiliated, write-in or Libertarian Party candidate opponent who faced no primary opposition. Thus, there is no justification in allowing individuals to contribute twice as much to the

Democrat candidate in such a district than his unaffiliated, write-in or Libertarian Party candidate opponent.

It is axiomatic that ballot access restrictions that discriminate based upon the political beliefs of a candidate violates their right to freedom of speech and freedom of association. *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983) (holding, after finding that an early filing deadline placed a particular burden on "*an identifiable segment of Ohio's independent-minded voters*" that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status").

Furthermore, in *Buckley*, the Court rejected the argument of minor political parties and independent candidates that they be exempted from the contribution limits imposed by FECA based on the argument that the result of such limitations would have a discriminatory impact on them, holding that "any attempt to exclude minor parties and independents *en masse* from the Act's contribution limitations overlooks the fact that minor party candidates may win elective office or have a substantial impact on the outcome of an election." 424 U.S. at 34.

In rejecting the claim that the campaign contribution limitations in FECA invidiously discriminated against minor political parties, the *Buckley* Court noted "that the Act applied the same limitations on contributions to all candidates

regardless of their present occupations, ideological views, or party affiliations" *Id*. at 31. By contrast, in this case, the contribution limits invidiously discriminate against unaffiliated candidates, write-in candidates and minor political party candidates since these limits, in fact, restrict their ability to contribute to such candidates.

There is no constitutionally sufficient reason for the government's differing treatment of the two groups. Thus, article XXVIII, Section 3(1) and (2) violates the right of equal protection of the laws of the supporters of unaffiliated candidates, write-in candidates and minor party candidates who do not face a primary election opponent as well as the candidates' right of equal protection of the laws. *Kleinsmith*, 571 F.3d at 1047.

The law is not "narrowly tailored" to meet the "legitimate objectives" of the campaign contribution limits and, therefore, violates the right of equal protection of the laws of the supporters of the unaffiliated candidates and candidates of minor party candidates whose names are not placed on the primary election ballot. *Mosley*, 408 U.S. at 101.

As applied to the Libertarian Party, the supporters of major party opponents received more favorable treatment from the government than the supporters of Libertarian Party candidates. These two groups are alike in "all relevant respects."

In addition, major party candidates receive more favorable treatment from the government than Libertarian Party candidates and there is no sufficient reason for the government's differing treatment between Libertarian Party candidates, on the one hand, and their major party opponents on the other hand. These two sets of groups are alike in "all relevant respects."

There is no reason to treat a supporter of a Libertarian Party candidate who runs unopposed within his party and faces no formal primary opponent different from a supporter of his Republican Party opponent who runs unopposed within his party and faces no formal primary opponent. The supporter of the Libertarian candidate can only contribute one-half of what a supporter of the Republican candidate can contribute.

The District Court's decision is flawed because it fails to acknowledge that although the Secretary's interpretation of Section 3 purports to impose two separate limitations, one for the primary election and one for the general election, in practice there is no such distinction. Supporters of primary-participant candidates are allowed to contribute both the so-called "primary election" contribution and the so-called "general election" contribution after their candidate has won the primary and all of that money can be used exclusively in the general election. Contributions made to a primary-participant candidates are totally untethered to primary or general election campaigns. Thus, supporters of primary-

participant candidates are being treated in a different manner than supporters of minor party and unaffiliated candidates and such disparate treatment does not prevent corruption or the appearance of corruption.

### C THE ONLY FAIR CONSTRUCTION OF SECTION 3 THAT CONTAINS IT WITHIN FEDERAL CONSTITUTIONAL BOUNDS ALLOWS AN INDIVIDUAL TO CONTRIBUTE THE SAME AMOUNT TO CANDIDATES RUNNING FOR THE SAME OFFICE REGARDLESS OF WHETHER THE CANDIDATE'S NAME IS LISTED ON A PRIMARY ELECTION BALLOT

"[T]he court's duty in interpreting a constitutional amendment is to give effect to the electorate's intent in enacting the amendment." *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004), citing *In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 538 (Colo.1996). The *Davidson* Court, quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo.1996), also noted that "[l]anguage in an amendment is ambiguous if it is reasonably susceptible to more than one interpretation. If the intent of the Contributors cannot be discerned from the language, courts should construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment." *Id*. (internal citations and quotations omitted).

In determining voter intent, the Court must presume that the voters knew the existing law at the time they adopt a voter-approved initiative. *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964, 968 (Colo.App.2007).

It is also presumed that when voters pass a state constitutional measure that they intend that the state constitutional amendment comports with the federal constitution. Thus, in *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755-57 (Colo. 2000), the Colorado Supreme Court, in answering a question certified by the United States District Court for the District of Colorado, declined to give a broad reading to a provision of the of the Fair Campaign Practices Act that would implicate federal constitution rights of freedom of association and freedom of speech.[2] *See also*: *Fashion Valley Mall, LLC v. N.L.R.B.*, 524 F.3d 1378, 1380 (D.C. Cir. 2008) (recognizing that when interpreting state constitutional provisions, state courts may make a "special effort to construe the state constitution so as to avoid any potential conflict with federal constitutional law"); *U.S. West Communications, Inc. v. Arizona Corp. Com'n*, 34 P.3d 351, 355 (Ariz. 2001) ("Whenever possible, however, we construe the Arizona Constitution to avoid conflict with the United States Constitution and federal statutes.")

The Supreme Court recently reiterated the principle that: "[c]ourts should construe statutes as necessary to avoid constitutional questions." *Citizens United v. Federal Election Comm'n*, 538 U.S. ---, 130 S.Ct. 876, 891 (2010).

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[2] While *Common Sense Alliance* involved interpretation of a statute, when interpreting voter approved constitutional provisions courts are "guided by general principles of statutory interpretation and aids in construction." *Rocky Mountain Animal Defense v. Colorado Div. of Wildlife*, 100 P.3d 508, 514 (Colo.App. 2004).

Thus, if this Court can ascribe a reasonable interpretation to Amendment 27 that avoids a conflict with the United States Constitution, that interpretation would prevail over another reasonable interpretation that does not pass federal constitutional muster.

The language of Section 3 is ambiguous. It may be reasonably interpreted as the Secretary does, *i.e.*, providing for a two-tiered system that allows an individual to contribute twice as much to a candidate whose name is listed on a primary election ballot than another candidate running for the same office whose name is not listed on a primary election ballot.

Section 3 may also be read to allow an individual to make contributions to candidates for a primary election up to the limit proscribed by Section 3 and to also make contributions to candidates for a general election up to the limit proscribed by Section 3 regardless of whether their names are listed on a primary election ballot. This is the system adopted by the Congress and the Federal Election Commission based upon a statutory scheme that limits campaign contributions that is very similar to Section 3 of Article XXVIII of the Colorado Constitution.

In 1971, Congress passed the Federal Election Campaign Act of 1971, PL 92-225. FECA establishes a limit on the amount a person may contribute to a candidate for a federal political office (or to her authorized political committee) with respect to "any election." 2 U.S.C. § 441a(a)(1)(A). In turn, FECA defines

"election" to mean "a general, special, primary, or runoff election." 2 U.S.C. § 431(l)(A). FECA also provides that, with the exception of contributions for presidential elections, that the contribution limits "apply separately with respect to each election." 2 U.S.C. § 441a(a)(6). Thus, the federal statutory scheme that imposes limits on campaign contributions for candidates seeking federal office is based, like Amendment 27, on a "per election" basis, differentiating between primary elections and general elections.

To implement the campaign contribution limits enacted by Congress, Congress established the FEC. 2 U.S.C. § 437c. The FEC issued regulations to implement FECA and as part of those regulations defined of what constitutes a "primary election" for independent candidates and other candidates whose names do not appear on a primary election ballot for purpose of enacting the campaign contribution limitations imposed by FECA:

> (4) With respect to individuals seeking federal office as independent candidates, or without nomination by a major party (as defined in 26 U.S.C. 9002(6)), the primary election is considered to occur on one of the following dates, at the choice of the candidate:
>
> (i) The day prescribed by applicable State law as the last day to qualify for a position on the general election ballot may be designated as the primary election for such candidate.
>
> (ii) The date of the last major party primary election, caucus, or convention in that State may be designated as the primary election for such candidate.
>
> (iii) In the case of non-major parties, the date of the nomination

by that party may be designated as the primary election for such candidate.

(5) With respect to any major party candidate (as defined at 26 U.S.C. 9002(6)) who is unopposed for nomination within his or her own party, and who is certified to appear as that party's nominee in the general election for the office sought, the primary election is considered to have occurred on the date on which the primary election was held by the candidate's party in that State.

11 C.F.R. § 100.2(c)(4) and (5).

Thus, the FEC has interpreted the language of the FECA as imposing campaign contribution limitations on a "per election" basis in the same manner as proposed herein by the Contributors. Thus, under the federal regulatory system, during a primary election an individual may contribute the same amount to an independent candidate or to a major or minor party candidate who is not subject to a primary election as they may contribute to a candidate running for the same office whose name appears on a primary election ballot. Similarly, for the general election, an individual may contribute the same amount to an independent candidate or minor party candidate who is not subject to a primary election as they may contribute to a candidate running for the same office whose name appears on a primary election ballot.

The Contributors' interpretation of Section 3, similar to the interpretation adopted by the FEC when construing similar contribution limitation language found in FECA, is the correct interpretation because it passes constitutional muster.

## 7. CONCLUSION AND RELIEF SOUGHT

The only reasonable interpretation of the contribution limitations set forth in Section 3 of Article XXVIII of the Colorado Constitution that comports with federal constitutional law is one that allows individuals to contribute the same amount of money to candidates running for the same public office regardless of whether a candidate's name appears on a primary election ballot.

If, on the other hand, the Court accepts the Secretary's interpretation of Section 3, then Section 3 violates the Contributors' freedoms of political expression and association as guaranteed by the First Amendment and the rights to equal protection under the laws as guaranteed by the Fourteenth Amendment.

The Contributors seek the following relief. A reversal of the District Court's decision granting the Secretary's motion for summary judgment with directions to enter summary judgment in favor of Contributors.

## STATEMENT REGARDING ORAL ARGUMENT

Because this case involves various federal constitutional claims involving the interpretation of state constitutional and statutory provisions, the Contributors suggest that oral argument would be of assistance to the Court in deciding this case. While the material facts are undisputed, there is a dispute regarding which facts are actual material to deciding this appeal.

Respectfully submitted this 2nd day of May, 2013.

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## CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 (a)(7)(B)

Pursuant to F.R.A.P. 32(a)(7)(c), counsel for Appellants hereby certifies that the foregoing brief complies with the volume limitations of F.R.A.P. 32(a)(7) (B) and that the brief contains 7,668 words as measured by the word processing system (Microsoft Word for Mac 2011, Version 14.3.2) used to prepare this brief.

/s/ William E. Zimsky

## DIGITAL CERTIFICATION

I do hereby certify that these digital submissions have been scanned with the most recent version of AVG Anti-Virus, Version 2012.0.2241, updated on May 2, 2013 and, according to the program, are free of viruses; and all required privacy redactions have been made.

/s/ William E. Zimsky

## CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2013, a true and correct copy of the foregoing **Appellants' Principal Brief** was filed and served via CM/ECF and that a true and correct copy was sent via the Court's CM/EFC system to the following and that one hard copy of this Brief will be sent via First Class, U.S. Mail, postage prepaid on or before May 3rd, 2013 addressed as follows:

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