IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-00138-RM-MLC

TAMMY HOLLAND,

Plaintiff,

v.

WAYNE W. WILLIAMS, *in his official capacity as Colorado Secretary of State*,

Defendant.

REASON FOUNDATION AND CATO INSTITUTE'S OBJECTIONS TO MOTION TO RESTRICT OF CAMPAIGN INTEGRITY WATCHDOG LLC [ECF 137]

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Pursuant to District Court of Colorado Local Civil Rule 7.2, Reason Foundation and Cato Institute jointly submit this Objection to the Motion to Restrict submitted by Campaign Integrity Watchdog ("CIW"), ECF No. 137.

STATEMENT OF INTEREST

The Reason Foundation is a non-partisan and non-profit public policy think tank, founded in 1978. Reason advances a free society by developing, applying, and promoting libertarian principles, including individual liberty, free markets, and the rule of law. Reason produces respected public policy research on a variety of issues and publishes the critically-acclaimed *Reason* magazine. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant legal and constitutional issues.

The Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Both Reason and Cato regularly comment on and participate in public policy debates regarding campaign finance and First Amendment issues. Furthermore, Reason has publicly commented on this specific case in the past,[1] and is interested in having complete information about the case in order to continue these discussions in the future.

[1] Anthony L. Fisher, *Colorado Mom Sued Over Newspaper Ads Encouraging Voter Turnout in School Board Election: Colorado's campaign finance laws are 'rife with abuse'*, REASON (Jan. 22, 2016), http://reason.com/blog/2016/01/22/colorado-campaign-finance-laws-abuse.

BACKGROUND

Tammy Holland was sued twice for purchasing a local newspaper advertisement to inform her fellow small-town community about the slate of candidates in a local school board election. Because of her free expression, Ms. Holland was subjected to two lawsuits by local school members using Colorado's byzantine campaign finance regime.[2] The second plaintiff later explained that he sued because he "just personally believe[s] it's unfair for people to be able to throw rocks and not be accountable."[3] However, under that description, Ms. Holland and too many others are forced to expend time, money, and resources because "any person" (Colo. Const. art. XXVIII, § 9(2)(a)) did not like the purported "rocks" they threw – i.e., the particular words they wrote.[4] As the Sixth Circuit recently cautioned in a case involving viewpoint discrimination, "[n]o citizen, Republican or Democrat, socialist or libertarian—should be targeted or even have to fear being targeted on those grounds."[5]

The current Colorado campaign finance regime is not only exceedingly complex, but also leads to viewpoint discrimination-based legal battles like those Ms. Holland has endured. First, as to its complexity, the regime is not confined to a single set of rules, but instead is memorialized in a scattered array of mandates: Article XXVIII of the Colorado Constitution; the

[2] Dan Elliott, *Colorado 'outsourced' campaign finance enforcement*, USA TODAY (Jan. 27, 2016), *available at* https://www.usatoday.com/story/news/2016/01/27/colorado-outsourced-campaign-finance-enforcement/79394636/; Kathy Smiley, *Byers School, Parent Dispute Alleged Violation of Political Ad Law*, THE I-70 SCOUT (Oct. 29, 2015), *available at* http://i-70scout.com/blog/2015/10/byers-school-parent-dispute-alleged-violation-of-political-ad-law/ (last visited Jan. 11, 2018).
[3] *See Smiley*, *supra* note 2.
[4] COLO. REV. STAT. § 1-45-111.5(1.5)(a).
[5] *United States v. NorCal Tea Party Patriots*, 817 F.3d 953, 955 (6th Cir. 2016).

Fair Campaign Practices Act[6]; and regulations, advisory opinions, judicial decisions, hundreds of administrative court rulings, and in a lengthy *Campaign and Political Finance Manual*.[7]

Second, Colorado is unique among all 50 states in essentially "outsourcing" its own campaign finance regulation. As a result, the enforcement procedure itself is void of actual oversight and therefore incentivizes retaliatory litigation. Colorado law instructs that "[a]ny person who believes that a violation of either the secretary of state's rules concerning campaign and political finance or this article has occurred may file a written complaint with the secretary of state not later than one hundred eighty days after the date of the occurrence of the alleged violation."[8] Filing a complaint requires the Secretary of State to automatically forward it to the Office of Administrative Courts, triggering full-scale campaign finance litigation driven by the individual plaintiff, concluding with a court hearing and decision by an administrative law judge—much like a trial.[9] This lengthy process has been triggered by alleged reporting errors as low as $6.[10] Even the director of CIW fully acknowledges that the procedure invites "political guerilla legal warfare (a.k.a. Lawfare)."[11] As one Colorado judge remarked, "[I]f political partisans were barred from filing complaints, very few complaints would ever be filed."[12]

As Ms. Holland instinctively understood in placing her ad, American citizens' ability to stay informed and meaningfully participate in civic affairs hinges on first having access to public

[6] COLO. REV. STAT. §§ 1-45-101-118.
[7] *See* Pl.'s Compl. ¶ 21, ECF No. 1.
[8] COLO. REV. STAT. § 1-45-111.5(1.5)(a).
[9] COLO. CONST. ART. XXVIII, § 9(2)(a); COLO. REV. STAT. § 1-45-111.5(1.5)(a).
[10] *See Campaign Integrity Watchdog v. Colo. Republican Party PAC*, OS2016-0002 (Office of Admin. Cts. Apr. 12, 2016).
[11] Matt Arnold, *Turning the Tables: Fighting Back against the Left's Lawfare in Colorado* B-7, COMMON SENSE NEWS (Feb. 2014), https://issuu.com/avinnola/docs/csn_digital_press_ed_feb_14 (last accessed Jan. 11, 2018).
[12] Ex. 32 to Declaration of Samuel B. Gedge Supp. Pl.'s Mot. Summ. J., ECF No. 129-35 (providing Order Denying Def.'s Mot. for Att'y Fees 4, *Colo. Ethics Watch v. Senate Majority Fund, LLC*, OS2008-0028 (Office of Admin. Cts. Jan. 7, 2009), *aff'd*, 275 P.3d 674 (Colo. App. 2010)).

information. Similarly, in the courtroom, "[i]t cannot be reasonably disputed that the public has a general right to inspect and copy judicial records and documents."[13] The filing of a document, as Plaintiff did here, "gives rise to a presumptive right of public access."[14] As the court decides CIW's Motion to Restrict such access, Reason Foundation and Cato Institute offer this response in an effort to promote principles of transparency, public access, and freedom from political persecution.

DISCUSSION

CIW's Motion to Restrict should be denied. Few people who speak about politics expect to be dragged into the courtroom for doing so, and fewer still have the resources to withstand protracted litigation. As a school board member in Ms. Holland's town put it, "[i]t is a misleading and a convoluted process" that results in "a private person like myself trying to interpret and enforce statutes."[15] The Secretary of State's own office admitted that because of this hassle of potentially violating the regime, "small groups . . . who aren't sophisticated in campaign finance and run afoul of these types of enforcement actions, may not want to participate or run for office or speak about political issues."[16] In other words, only the "sophisticated" may speak and survive.

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[13] *Am. Friends Serv. Comm. v. City & Cty. of Denver*, 2004 U.S. Dist. LEXIS 18474, at *17-18 (D. Colo. Feb. 19, 2004) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)); *see also Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) ("[T]he tradition that litigation is open to the public is of very long standing . . . . People who want secrecy should opt for arbitration.") (citing *Nixon*, 435 U.S. at 597-99, *In re Reporters Comm. For Freedom of the Press*, 773 F.2d 1325, 1331-33 (D.C. Cir. 1985)).

[14] *Exum v. U.S. Olympic Comm.*, 209 F.R.D. 201, 205 n. 3 (D. Colo. 2002) (citing *Nixon*, 435 U.S. at 597, *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 460-61 (10th Cir. 1980); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987); *Leucadia, Inc. v. Applied Extrusion Techs., Inc*., 998 F.2d 157, 161-62 (3d Cir. 1993) ("The existence of this right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now 'beyond dispute.'")).

[15] *See, e.g.*, *Critics: Colorado 'outsourced' campaign finance enforcement*, DAILY MAIL (Jan. 26, 2016), *available at* http://www.dailymail.co.uk/wires/ap/article-3418223/Colorados-trial-like-campaign-finance-fire.html.

[16] Ex. 1 to Declaration of Samuel B. Gedge Supp. Pl.'s Mot. Summ. J. 12, ECF No. 129-4.

By way of analogy, because Colorado's campaign finance laws are uniquely burdensome, one may argue that such citizen suit plaintiffs essentially function as "prosecutors" by clothing themselves as "the state" to prosecute campaign finance law-breakers. In fact, the Colorado Secretary of State's *Campaign and Political Finance Manual* explicitly instructs that once litigation begins, "complainants must gather evidence related to the complaint and present that evidence at the hearing *as if they were prosecuting a case*."[17] As the director of CIW explained, "With any other law, the district attorney will prosecute the case and it's the state enforcing the state's laws."[18]

In the criminal context, there is a presumption that plea agreements remain open, given the bedrock principle of the United States Supreme Court that "[p]ublic access to criminal trials is essential to the proper functioning of the criminal justice system."[19] Similar to the public interest in how a case is prosecuted, there is a distinct public interest when an individual chooses to stand in the shoes of the state to indict his or her political foes. This is all the more important to the public interest when those foes are targeted for their viewpoints, which the First Amendment squarely prohibits.

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[17] *See Colorado Campaign and Political Finance Manual* 35, COLO. SEC'Y OF STATE (rev. Oct. 2016), *available at* http://www.sos.state.co.us/pubs/elections/CampaignFinance/files/CPFManual.pdf (last accessed Jan. 11, 2018) (emphasis added).

[18] *See, e.g.*, Corey Hutchins, *Federal lawsuit attacks Colorado's money-in-politics enforcement system*, THE COLO. INDEP. (Jan. 21, 2016), *available at* http://www.coloradoindependent.com/157191/colorado-money-in-politics-lawuit.

[19] *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 10 (1986); *see also Richmond Newspapers v. Virginia*, 448 U.S. 555, 574 (1980) ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel . . . ."); *Washington Post v. Robinson*, 935 F.2d 282, 292 (D.C. Cir. 1991) (vacating orders sealing the plea agreement of a criminal defendant cooperating in the prosecution of Mayor Berry for cocaine possession) ("Under the first amendment, plea agreements are presumptively open to the public and the press."); *United States v. Haller*, 837 F.2d 84, 85-89 (2d Cir. 1988); *In re Copley Press, Inc*., 518 F.3d 1022, 1026 (9th Cir. 2008); Brian Westley, *Access to Plea Agreements*, REPORTER'S COMM. FOR FREEDOM OF THE PRESS (last accessed Jan. 11, 2018), *available at* https://www.rcfp.org/secret-justice-access-plea-agreements/access-plea-agreements (highlighting the "presumption" that plea agreement records remain open).

CIW now seeks to forever seal information relating to settlement of campaign finance cases.[20] But prohibiting public access to this information would only heighten the threat to free speech in Colorado, and run afoul of precedent from both this Court and the Supreme Court.

Both the Supreme Court and this Court recognize that "[j]udges have a responsibility to avoid secrecy in court proceedings because 'secret court proceedings are anathema to a free society.'"[21] In that vein, there exists a "common-law right of access to judicial records," which "is premised upon the recognition that public monitoring of the courts fosters important values such as respect for the legal system."[22] Despite this "presumption that documents essential to the judicial process are to be available to the public, . . . they may be sealed when the public's right of access is outweighed by interests which favor nondisclosure."[23] Motions to restrict such access are governed by The District Court of Colorado Local Rule of Practice 7.2, which requires the moving party to: (1) identify the document for which restriction is sought; (2) explain the interest to be protected and why such interest outweighs the presumption of public access; (3) identify a clearly defined and serious injury that would result if access is not restricted; and (4) explain why no alternative will suffice.[24]

Importantly, "[t]he fact that the parties agree to a Protective Order . . . is of no moment. It does not dictate the Court's decision or change its analysis, as the right of access belongs to the

[20] CIW Mot. Restrict Public Access 2, ECF No. 137.
[21] *Johnstown Feed & Seed, Inc. v. Cont'l W. Ins. Co.*, 2009 U.S. Dist. LEXIS 23507, at *3 (D. Colo. Mar. 26, 2009) (quoting *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo. 1996) (Kane, J.)).
[22] *Johnstown*, 2009 U.S. Dist. LEXIS 23507, at *3 (citing *Nixon v. Warner Commn's, Inc.*, 435 U.S. 589, 597 (1978); *In re Providence Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002)).
[23] *Johnstown*, 2009 U.S. Dist. LEXIS 23507, at *3-4 (citing *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997)).
[24] *See EEOC v. Columbine Health Sys.*, 2017 U.S. Dist. LEXIS 152986, at *32 (D. Colo. Sept. 19, 2017) (citing D.C. Colo. L. Civ. R. 7.2).

public who, necessarily, was not a party to such an agreement."[25] Nevertheless, in its Motion to Restrict, CIW appears to base its entire argument on the fact that settlements were produced under a protective order.[26] As the local rules instruct, however, "that is not material to the public's right of access."[27]

What should be "material" to all Coloradans is the perpetual enforcement of a scheme that a school board member in Ms. Holland's town described as "a system that everyone seems to hate."[28] Furthermore, the real-world impact of Colorado's private enforcement system is an issue of public interest that should not only concern Coloradans but also is one with which many in the United States are sadly familiar. In a recent case in which the IRS targeted individuals and non-profits because of their political viewpoints, for example, the Sixth Circuit began its opinion by stating, "Among the most serious allegations a federal court can address are that an . . . agency has targeted citizens for mistreatment based on their political views."[29]

In Colorado, while a government agency itself may not be doing the targeting, the Colorado campaign finance scheme empowers "any person" to wage political "Lawfare," often against individuals with no legal background and few resources to fight back. In order to meaningfully improve this law that "everyone seems to hate," it is vital that the public have full information about how these laws are enforced. This is especially the case here, where CIW's objection is based on the existence of a protective order, which this Court has squarely rejected

[25] *See, e.g.*, *Aptive Envt'l, LLC v. Town of Castle Rock*, 2017 U.S. Dist. LEXIS 185224, at *3 (D. Colo. Nov. 8, 2017); *see also Columbine Health*, 2017 U.S. Dist. LEXIS 152986, at *32 ("The fact that the parties agree to restriction or that there is a Stipulated Protective Order in place does not dictate the Court's decision or change its analysis, as the right of access belongs to the public, which is not a party to the parties' agreement or protective order.") (citing D.C. Colo. L. Civ. R. 7.2(c)(2)).
[26] *See generally* CIW Mot. Restrict Public Access, ECF No. 137.
[27] *Aptive*, 2017 U.S. Dist. LEXIS 185224, at *4; *see also Columbine Health*, 2017 U.S. Dist. LEXIS 152986, at *32.
[28] *See* Elliott, *supra* note 2.
[29] *NorCal*, 817 F.3d at 955.

as irrelevant. As courts throughout the nation continue to acknowledge the grave threat posed by those who target individuals and groups merely because of their political beliefs, it is our hope that Colorado does the same in contemplating its uniquely onerous campaign finance laws. Permitting public access to accurate information about the enforcement of these laws is vital to future consideration of the state's campaign finance regime.

Respectfully submitted,

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I certify that I am a member of good standing of the bar of this court, per District of Colorado Local Attorney Rule 5(a).

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**Application filed; admission pending per requirement of District of Colorado Local Attorney Rule 5(a).*

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, I filed these Objections to Motion to Restrict Public Access with the U.S. District Court of the District of Colorado through the electronic CM/ECF platform. The Notice of Electronic Filing ("NEF") generated through this ECF filing constitutes service of the document on the parties' counsel.

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