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CASE NUMBER: 2017CV34617

DISTRICT COURT, 2nd JUDICIAL DISTRICT DENVER COUNTY STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
PLAINTIFFS: COLORADO UNION OF TAXPAYERS FOUNDATION; and TABOR COMMITTEE DEFENDANT: CITY OF DENVER COLORADO	Case Number: 2017CV034617 Ctrm.: 259
Matthew R. Miller (17PHV5301*)* Aditya Dynar (18PHV5350) GOLDWATER INSTITUTE 500 E. Coronado Road Phoenix, AZ 85004 (602) 462-5000 Fax: (602) 256-7045 litigation@goldwaterinstitute.org James M. Manley (CO Bar No. 40327) PACIFIC LEGAL FOUNDATION 3217 E Shea Blvd, #108 Phoenix, AZ 85028 (916) 419-7111 Fax: (916) 419-7747 jmanley@pacificlegal.org	
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT	

COME NOW Plaintiffs, Colorado Union of Taxpayers Foundation and TABOR Committee, on behalf of their members and by and through undersigned counsel, and moves,

pursuant to C.R.C.P. 56, for summary judgment because there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law. Pursuant to C.R.C.P. 121 § 1-15(8), counsel for Plaintiffs in good faith conferred with opposing counsel about this Motion prior to filing. Support for this Motion is provided in a Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed concurrently herewith.

WHEREFORE, Plaintiffs respectfully request that summary judgment be entered in their favor.

Dated: August 24, 2018

/s/ Matthew R. Miller
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MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Summary judgment should be entered for Plaintiffs Colorado Union of Taxpayers Foundation and TABOR Committee. As shown below, Defendant City of Denver (the "City" or "Denver") has adopted an ordinance requiring non-profit groups to submit reports to the City that include the names, addresses, occupations, and employers of their donors whenever those groups speak about proposed municipal ballot measures. Those reports are then made available by the City for public inspection, exposing non-profit donors to the threat of ideological harassment, retaliation, and intimidation. Defendant has shown no legitimate interest in this information beyond speculation that the information *could* prove useful to voters. This informational interest is insufficient to overcome the constitutionally-protected free-speech, associational, and privacy rights of the non-profit Plaintiffs in this case.

In contrast to Defendant's theory of an informational interest in donor identities, Plaintiffs introduce herein substantial evidence of harm, including donors' fear of having their identities revealed, direct ideological harassment of Plaintiffs' employees, and evidence that groups holding similar views have been harassed around the nation. . This evidence of constitutional harm is more than enough to overcome Defendant's minimal informational interest in donors' identities. The law is therefore unconstitutional under both the First Amendment to the U.S. Constitution, and the free-speech clause of the Colorado Constitution, Art. II, § 10, as shown below.

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Colo. R. Civ. P. 56, Plaintiffs, Colorado Union of Taxpayers Foundation and TABOR Committee, support their motion for summary judgment with this statement of undisputed material facts.

1. On September 11, 2017, Denver adopted Council Bill No. CB17-0866. This ordinance amended Chapter 15 of the Denver Revised Municipal Code, which addresses municipal elections and campaign finances. Council Bill No. CB17-0866 attached as Ex. 1.

2. Under the new law, groups that communicate with voters about proposed municipal ballot measures are required to file periodic reports with the City. *Id.* at 9; DENVER, COLO., REV. MUN. CODE §§ 15-35 and 15-35.5 (together the "Ordinance"). These reports—which the City makes public—include personal information about the group's donors. Ex. 1 at 9–10; DENVER, COLO., REV. MUN. CODE §§ 15-35(c)(3)–(4) and 15-35.5(c)(8); Denver's Resp. to Interrog. No. 4 attached as Ex. 2.

3. If a group merely communicates information about a ballot measure, but does not take a position, that group is considered to have engaged in "electioneering communications" under the Ordinance. Ex. 1 at 11; DENVER, COLO., REV. MUN. CODE § 15-35.5(a).

4. A group that engages in $1,000 or more worth of electioneering communications must file a report that includes the name and address of every person who donated $25 or more for the purpose of making the communications. Ex. 1 at 12; DENVER, COLO., REV. MUN. CODE § 15-35.5(c)(8).

5. A different category applies to groups that encourage voters to reject or support a ballot measure. Groups that spend more than $500 to communicate with voters about a proposed

municipal ballot measure—and advocate for its passage or defeat—are defined as "issue committees." Ex. 1 at 5; DENVER, COLO., REV. MUN. CODE § 15-32(l).

6. Issue committees are required to file a report that includes the name and address of every person who donates $50 or more to support the communications. Ex. 1 at 9; DENVER, COLO., REV. MUN. CODE § 15-35(d)(3).

7. For people who donate $200 or more, the issue committee must also report to the City that person's occupation and employer. Ex. 1 at 10; DENVER, COLO., REV. MUN. CODE § 15-35(d)(4).

8. Thus, almost any communication with voters about a proposed ballot measure requires a non-profit organization to disclose the names and addresses (and sometimes occupations and employers) of people who gave money or in-kind contributions to support the communication. It does not matter if the communication is supportive, opposed to, or neutral on the measure. Ex. 1; DENVER, COLO., REV. MUN. CODE , art. III, Chpt. 15.

9. These reports—including the personal information of donors—are made available for public review and inspection on the City's website, which can be accessed anywhere in the world. Ex. 2, Resp. No. 4.

10. Groups engaged in electioneering communications are required to file a report when they first spend $1,000 or more, plus an additional report for each subsequent expenditure, "regardless of the amount." Ex. 1 at 11; DENVER, COLO., REV. MUN. CODE § 15-35.5(a).

11. Electioneering communication reports are required to be filed within 48 hours of the expenditure being made. *Id.*.

12. For issue committees, reports are due each month after a group becomes an issue committee. Thus, if a group begins communicating with voters in June, and the election is held in November, that group would be required to submit reports for June, July, August, September, October, and November, plus a "post-election report" and a "year-end report." Ex. 1 at 9; DENVER, COLO., REV. MUN. CODE § 15-35(c).

13. Groups that fail to file the proper reports and refuse to provide their donor lists to the City are subject to penalties of $50 per day, up to $500 per deadline violation. Ex. 1 at 14; DENVER, COLO., REV. MUN. CODE § 15-40.5(a).

14. Defendant's rule 30(b)(6) deponent, Mr. Daniel Volkosh, stated that donations, even if they are not specifically earmarked to pay for communications about a particular ballot proposition must be reported. Volkosh Transcript attached as Ex. 3 at 14:8–14:24.

15. Donations must be reported to the City if expenditure on electioneering communication above the specified threshold "refers to any candidate, ballot issue or ballot question," not just Denver-specific matters. Ex. 1 at 3; DENVER, COLO., REV. MUN. CODE § 15-32(i)(1).

16. Plaintiff Colorado Union of Taxpayers Foundation ("CUT") is a non-profit group incorporated in 2009 under section 501(c)(3) of the Internal Revenue Code and based in Lyons, Colorado. CUT's Answer to Pattern Interrog. # 3.1 attached as Ex. 4.

17. CUT has a sister organization, the Colorado Union of Taxpayers. The Committee is incorporated as a 501(c)(4) group and rates the legislature every year. The Foundation is a 501(c)(3) that works on educating the citizenry on tax issues. Dep. of Marty Neilson attached as Ex. 5 at 7:1–15.

18. The CUT Foundation is a plaintiff in this lawsuit. The CUT Committee is not. *Id*.

19. CUT describes itself as an "advocacy group for taxpayers." Its mission is to "remind the Legislators, we, the taxpayers, are well able to make our own decisions on how we spend our own money. The job of the Colorado Assembly is to enforce our freedoms to establish contracts between one-another and not to simply redistribute our earnings as they see fit." *See* http://www.coloradotaxpayer.org/aboutus.html.

20. As part of its educational mission, CUT purchases radio advertisements to inform voters about pending ballot propositions. Ex. 5 at 9:17–10:5.

21. For instance, CUT has paid for radio spots "on specific issues, giving the pros and cons of a tax issue." *Id.* at 9:20–22. For instance, CUT has paid for radio ads "when Amendment 69 was on the ballot." *Id.* at 22:2–3. The goal of these radio ads is to "explain to people the effect of the law that's being proposed." *Id.* at 51:13–15.

22. A thirty-second radio advertisement costs between $7,500 and $10,000 per month at local Denver radio stations such as 630 KHOW and KOA NewsRadio. The same advertisement costs between $2,500 to $4,000 per month at 710 KNUS. Aff. of Kelly Day attached as Exhibit 6 ¶¶ 4–5.

23. CUT would engage in purchasing radio ads that educated Denver voters about proposed municipal ballot measures if one of those measures impacted CUT's mission to promote responsible governmental spending and low tax burdens on Colorado citizens. Ex. 5 at 9:17–22.

24. Marty Neilson, President of CUT, has personally been subjected to harassment and intimidation based on her political stance. Ex. 5 at 36:5–19.

25. Plaintiff TABOR Committee ("TABOR") is a non-profit group incorporated in 2009 under section 501(c)(4) of the Internal Revenue Code and based in Lakewood, Colorado. Cert. of Good Standing, attached as Ex. 7.

26. TABOR also has a sister organization, the TABOR Foundation. The Foundation is incorporated as a 501(c)(3) group and works on education. The TABOR Committee is a 501(c)(4) that works on advocacy. Deposition of Penn Pfiffner attached as Ex. 8 at 16:5–16, 12:9–18.

27. The TABOR Committee is a plaintiff in this lawsuit. The TABOR Foundation is not. Ex. 8 at 15:5–14.

28. The goal of TABOR is to protect the Colorado Taxpayers Bill of Rights, which the group describes as "the gold standard" for restraining government's intrusive growth and ensuring fiscal responsibility. Ex. 15.

29. As part of its advocacy mission, TABOR undertakes activities designed to "address legislative and ballot measures affecting [the Taxpayers Bill of Rights]." *Id.*

30. For instance, TABOR Committee informs voters about ballot questions going to Denver voters for approval in a "Denver decides ballot issue forum." Ex. 8 at 34:6–7.

31. TABOR's board of directors work for the organization and the time they spend is an in-kind contribution to TABOR Committee. *Id.* at 9:3–11. For example, Dana West, a web master and a member of the board, actively maintains the website. *Id.* at 30:16–25.

32. The cash and in-kind contributions spent on communicating about ballot questions meets and exceeds the thresholds of the challenged law. *Id.* at 51:21–52:14.

33. At least one donor of TABOR Committee explicitly wants to remain anonymous and does not want to be identified. *Id.* at 46:21–47:16.

34. Employees of the TABOR Committee have been subject to threats of violence and harassment. *Id.* at 53:25–54:4.

35. Penn Pfiffner, chairman of the TABOR Committee, *id.* at 7:16–17, has been subjected to "intimidation and harassment for his political stances." *Id.* at 54:3–4.

36. Deposition testimony shows that TABOR would engage in communications that encourage Denver voters to support or oppose proposed municipal ballot measures if one of those measures affected its mission to promote responsible governmental spending and low tax burdens on Colorado citizens. *Id.* 54:22–55:25.

37. Non-profit organizations like Plaintiffs face intimidation and harassment. Reprisals and threats directed in recent years against individuals or organizations holding similar views to that of Plaintiffs are as follows:

A. In 2014, Dave Trabert, President of the Kansas Policy Institute, a 501(c)(3) non-profit with a similar free-market mission, received vulgar and threatening emails and Tweets based on the work his organization performs. Trabert Affidavit attached as Ex. 9 ¶¶ 3–4. One email read, "Hey asshole, we know who signs your checks for the propaganda you spew. We know where you live and we're watching you. Go crawl back into the hole from which you came!" *Id.* ¶ 6. A Tweet directed at Mr. Trabert read, "KOCH (just say the word) … makes 1

wish some crazy could get them a bullet between the eyes!" *Id.* ¶ 7. He received other emails with explicit threats of sexual violence. *Id.* ¶ 8.

B. Between approximately 2002-2009, Lynn Harsh, CEO of the Freedom Foundation, a Washington, D.C. based free-market non-profit, was subjected to repeated acts of intimidation and vandalism based on her work. Harsh Affidavit attached as Ex. 10 ¶ 4. Acts of vandalism directed at Ms. Harsh include slashing her car's tires at her office, spray painting of the windows of her home, plastic cutlery bizarrely arranged in her yard, and her trash being rifled through routinely. *Id.* ¶¶ 7–11.

C. In 2013, F. Vincent Vernuccio, former Director of Labor Policy at the Mackinac Center for Public Policy, a Michigan-based free-market non-profit group that has a similar mission as the Plaintiffs', was spat upon by people who oppose his work. Vernuccio Affidavit attached as Ex. 11 ¶¶ 4–5. He has been shouted down by ideological opponents to the extent that the people shouting him down needed to be removed by police. *Id.* ¶ 6. During an appearance on a radio program, he received a threatening phone call indicating something dangerous would be waiting for him when he returned home, prompting his employer to perform a security check of his home before he returned. *Id.* ¶ 7.

38. Defendant asserts that it has an "interest in preserving the integrity of the political system and its elections by maintaining an informed electorate, including through public disclosure. This includes the public disclosure of the names and addresses of each person who makes a contribution or a contribution in kind to an issue committee that has an aggregate amount or value of $50.00 or more within a calendar year and the occupation and employer of

any natural person if the sum of that person's contribution and contributions in kind to an issue committee is $200.00 or more in a calendar year." Ex. 2 Answer to Interrog. No. 1.

39. "Disclosure of this information serves the purpose and interest of providing the electorate with information about the source and amount of money contributed to an issue committee in support or opposition of a municipal ballot issue or ballot question. Disclosure of this information will aid the voters in evaluating the arguments to which they are being subjected and in deciding whether to support or oppose the issue or question. The information about the source and amount of money contributed to issue committees aids the voters in making informed decisions and giving proper weight to different speakers and messages." *Id.*.

40. Referring to the Defendant's written response, Mr. Volkosh, Defendant's Rule 30(b)(6) deponent, testified that Defendant wants its voters "to be making … informed decision[s]," "want[s] them to be correctly evaluating … the arguments that are being made to them." Ex. 3 at 20:1–4.

41. The City offers no evidence that voters regularly access this information, or that the information actually sways anyone's vote. Ex. 3 at 31:5–17.

42. When asked what Mr. Volkosh meant by "preserving the integrity of the political system and its elections," he testified, it means "making sure that, if someone is telling our voters to vote a certain way …, it could be a Denver resident, or it could be someone who's outside of Denver, on a municipal issue, we think our voters deserve to know who is speaking to them so that they may make an informed decision about the value of that communication." *Id.* at 23:7–16.

43. Mr. Volkosh testified that there was no specific reason and nothing specific occurred in a previous Denver election that led the City to be concerned about the integrity of its electoral process. *Id.* at 24:16–19.

44. Mr. Volkosh testified that, in considering the law, Defendant did not "talk about the wisdom of" the dollar amounts that trigger disclosure under the challenged Ordinance. *Id.* at 28:24–29:2.

45. Mr. Volkosh testified that the purpose of requiring disclosure of employers of donors is to incentivize the public to "do their own investigation" into "specific employer[s] or corporation[s]." *Id.* at 30:7–15.

46. Mr. Volkosh agreed that if certain groups chose to remain silent as a result of the challenged disclosure Ordinance, "that would result in less information being conveyed to voters." *Id.* at 32:15–18.

47. Mr. Volkosh testified that the City did not consider an alternative system of voluntary disclosure. *Id.* at 32:25–33:6.

48. Mr. Volkosh testified that "information to voters is [the] predominant" interest of the City in mandating disclosure of donors. *Id.* at 36:15–20.

49. Mr. Volkosh testified that the stakeholder meetings that were held to solicit public input before adoption of the challenged provision were attended by government officials, representatives from Colorado Ethics Watch, and Common Cause, but not attended by nonprofit groups opposed to the disclosure of donors. *Id.* at 36:21–38:18.

50. Colorado Ethics Watch is a nonprofit corporation registered with the Colorado Secretary of State. Cert. of Good Standing attached as Ex. 12.

51. Common Cause, or Common Cause Education Fund, is a Washington, D.C., based nonprofit corporation registered with the Colorado Secretary of State. Certificates of Good Standing attached as Ex. 13.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate under C.R.C.P. 56(c) if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). A material fact is one that will affect the outcome of the case. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984). When reviewing a motion for summary judgment, courts review the pleadings and the documentary evidence in the light most favorable to the nonmoving party. *Peterson*, 829 P.2d at 376. For the reasons demonstrated herein, Plaintiffs are entitled to entry of summary judgment as a matter of law. The compelled disclosure of the identities of Plaintiffs' donors—in exchange for being allowed to speak about municipal ballot measures—violates the First Amendment to the U.S. Constitution and Art. II, § 10 of the Colorado Constitution.

II. DENVER CANNOT CONDITION THE RIGHT TO ENGAGE IN CONSTITUTIONALLY PROTECTED SPEECH ON ONE'S WILLINGNESS TO APPEAR ON A GOVERNMENT LIST.

As a condition of allowing Plaintiffs CUT and TABOR to engage in constitutionally protected speech, Denver requires Plaintiffs to disclose their donors' personal information to the City, and thereby subject those donors to publication of their names, addresses, occupations, and the identities of their employers on a government-maintained website accessible anywhere in the

world. This violates the First Amendment to the U.S. Constitution, and Article II, § 10 of the Colorado Constitution, because Defendant's "informational interest" in donors' names, addresses, employers, and occupations is insufficient to overcome the chilling effect that disclosure will have on Plaintiffs' speech. Denver's Ordinance forces non-profit groups who wish to speak about ballot measures to make an unconstitutional choice between speaking—and exposing their donors to ideological harassment—and remaining silent. This Hobson's choice constitutes an unconstitutional chilling of political speech.

A. Plaintiffs are entitled to a declaratory judgment and permanent injunction because the Ordinance violates the First Amendment.

Forcing non-profit groups that want to speak publicly about proposed ballot measures to publicly divulge personal and confidential information about their donors violates the First Amendment to the U.S. Constitution.

In two separate cases, the Tenth Circuit recently struck down reporting requirements for non-profits wishing to engage in speech about ballot measures. Both *Sampson v. Buescher,* 625 F.3d 1247, 1255 (10th Cir. 2010), and *Coal. for Secular Gov't v. Williams,* 815 F.3d 1267, 1275-76 (10th Cir. 2016), held that the court should apply "exacting scrutiny" to anti-privacy mandates like the Denver Ordinance. That means the burden is on the government to demonstrate a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Williams,* 815 F.3d at 1275-76 (*citing Citizens United v. FEC,* 558 U.S. 310, 366–67 (2010) (internal quotations omitted)). The "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id*. at 1276. Plaintiffs, on the other hand, must show that they suffer a "substantial" burden in complying with

the disclosure requirements. *Id*. at 1279. As shown below, the Plaintiffs have met their burden, and Defendant has not.

Denver lacks a compelling governmental interest that would outweigh the substantial First Amendment injury that disclosure of donors' information would cause. Denver claims that donors' identities will be useful to voters because the government wants voters "to be making … informed decision[s]," and "want[s] them to be correctly evaluating … the arguments that are being made to them." Statement of Facts ("SOF") ¶ 40. But the City offers no evidence that voters regularly access this information, that the information actually sways anyone's vote, or what it would mean for someone to "correctly" evaluate[1] the speech of non-profits. SOF ¶ 41. This is especially true at the donation thresholds that Denver has established. It strains credulity that someone will choose to vote for or against a ballot measure upon learning that a particular individual gave $25 to a group that spoke about the measure.

In contrast to Denver's unsupported theory of its informational interest, Plaintiffs introduce substantial and uncontested evidence that ideological harassment is a serious and realistic concern for them and their donors. Testimony shows that representatives for both CUT and TABOR have personally experienced ideological harassment. SOF ¶¶ 24, 35. Testimony shows that at least one donor to TABOR has specifically instructed the group not to disclose his identity out of fear of repercussions on the business he owns. SOF ¶ 33. And the evidence shows that that fear is entirely reasonable. Affidavits attached to this motion show that representatives of groups with views similar to Plaintiffs' have been spat upon, had their houses

[1] Denver's desire for voters to "correctly" evaluate different speakers also violates the black-letter law tenant that—absent evidence of outright fraud or illegality—the government should remain impartial about how voters decide to cast their ballots.

vandalized, and received threats of harm and sexual violence from their ideological opponents. SOF ¶ 37. Evidence in other court cases shows that right-leaning groups with political positions similar to Plaintiffs', and their donors, have experienced sustained ideological harassment, up to and including death threats. *See, e.g.*, *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1055–56 (C.D. Cal. 2016).

The threat of ideological harassment and intimidation is what motivated the U.S. Supreme Court to hold, in *NAACP v. Alabama*, that supporters of non-profit groups have a First Amendment right to anonymity. 357 U.S. 449, 466 (1958). There is a "vital relationship," the Court unanimously recognized, "between freedom to associate and privacy in one's associations." *Id*. at 1171–72. As shown herein, Defendant has done nothing to show that its purported "informational interest" should allow it to pierce the constitutionally protected anonymity of non-profit donors in order to put their names, addresses, occupations, and employers on a government list.

1. The government's interest in knowing the identities of small donors is minimal.

When spending and contribution triggers are low—as here—the government's informational interest is presumed to be "minimal, if not non-existent." *Sampson*, 625 F.3d at 1261. Here, the Ordinance forces the Plaintiffs to disclose their donors' confidential information once they spend either $500 (issue committees) or $1,000 (electioneering communications) to communicate with voters about a Denver ballot measure. Testimony shows that CUT's radio advertisements, which seek to educate voters about ballot measures, would qualify as "electioneering communications" and thus subject it to those reporting requirements. SOF ¶¶ 3, 21. Further, testimony shows that TABOR, which actively encourages voters to support or

oppose certain ballot measures, would qualify as an "issue committee" under the Ordinance and thus be subject to those reporting requirements. SOF ¶¶ 5, 29. Anyone wishing to communicate with the public is virtually guaranteed to exceed the statutory spending thresholds because radio advertisements, websites, and mailers cost money to develop and distribute. SOF ¶ 22. Furthermore, groups must reveal the identities of donors who give as little as $25. SOF ¶ 4. For donors giving $200 or more, groups must also report their occupations and employers. SOF ¶ 7.

At these low monetary thresholds, Defendant's interest is, minimal at best. The precise point at which the government's interest in disclosure *becomes* significant under the First Amendment is not specified in either *Sampson* or *Williams*, but *Sampson* held that the government's interest was "minimal, if not non-existent" when the spending trigger was $200. 625 F.3d at 1261. *Williams* declined to address whether the $200 trigger in that case was facially invalid, but held that while the government might have a substantial interest in disclosure from "an issue committee [that] has raised and spent $10 million," the government's interest was "minimal where an issue committee raises or spends $3,500." *Id*. at 1277-78. This Court does not need to decide exactly where the minimal/substantial line is in order to find that the amounts in this case—triggers of $500 and $1,000—fall far below it.

2. Plaintiffs have a significant fear that their donors will be harassed and intimidated.

Weighing against this minimal governmental interest is the possibility that Plaintiffs' donors will be subjected to ideological harassment if their names, addresses, occupations, and employers are made available for public inspection. Plaintiffs have introduced two types of evidence to demonstrate the burden they face: (1) testimony that representatives for each group

have personally been harassed and that their donors fear harassment, and (2) evidence that groups holding similar views have been harassed.

First, representatives for both plaintiffs testified that they have personally experienced instances of ideological harassment. SOF ¶¶ 24, 35. Second, Plaintiff TABOR testified that it has at least one donor who is extremely concerned about remaining anonymous, and who fears severe business consequences if his identity is revealed. SOF ¶ 33.

Plaintiffs have also introduced evidence that groups with similar views have routinely experienced the kind of harassment that Plaintiffs now fear. SOF ¶ 37. In *Buckley v. Valeo*, the Supreme Court held that a group can establish a likelihood of harassment by showing "evidence of reprisals and threats directed against individuals or organizations holding similar views." 424 U.S. 1, 74 (1976). Justice Alito confirmed this reading of *Buckley* in his concurrence in *Doe v. Reed*, 561 U.S. 186, 204 (2010) (Alito, J., concurring). As Justice Alito noted, *Buckley* holds that "unduly strict requirements of proof could impose a heavy burden on speech," and that because "speakers must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim," a plaintiff "need show only a reasonable probability that disclosure will lead to threats, harassment, or reprisals." *Id.* (internal citations and quotations omitted). "Significantly," Justice Alito continued, "[*Buckley*] also made clear that … groups that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id.* (citation and internal quotations omitted).

The evidence in this case is more than sufficient to show that Plaintiffs credibly fear ideological harassment, based on documented examples of such harassment experienced by groups with "similar views."

Perhaps the best example of a group with similar views being harassed is the documented harassment of a pro free-market organization in *Harris*, *supra*. There, the non-profit showed that its associates had been subjected to "threats, attacks, and harassment, including death threats." 182 F. Supp. 3d at 1056. Their families, including their grandchildren, had been subjected to similar threats. *Id*. A supporter of the organization had "encountered boycotts of his nationwide stores" and picketing of his stores. *Id*. "[T]his Court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members." *Id*.

Plaintiffs can also document harassment and intimidation of other free market non-profit groups. Affidavits attached to this motion show that individuals associated with right-leaning non-profits are routinely subjected to harassment, threats, and intimidation by their ideological opponents.

- Dave Trabert is the President of the Kansas Policy Institute, a 501(c)(3) non profit with a similar free-market mission and size as the Foundation. As his affidavit shows, Mr. Trabert has received vulgar and threatening emails and Tweets based on the work his organization performs. One email read, "Hey asshole, we know who signs your checks for the propaganda you spew. We know where you live and we're watching you. Go crawl back into the hole from which you came!" A Tweet directed at Mr. Trabert read, "KOCH (just say the word) … makes 1 wish some crazy could get them a bullet between the eyes!" Mr. Trabert has also attached, to his affidavit, emails he received which detail explicit threats of sexual violence. SOF ¶ 37(A) and Ex. 9.

- Lynn Harsh is the former CEO of the Freedom Foundation, a Washington, D.C. based free-market non-profit. As her affidavit shows, Ms. Harsh was, during her time as CEO, subjected to repeated acts of intimidation and vandalism based on her work. Acts of vandalism directed at Ms. Harsh include the slashing of her car's tires at her office, the spray painting of the windows of her home, plastic cutlery

(bizarrely) being arranged in her yard, and her trash being rifled through routinely. SOF ¶ 37(B) and Ex. 10.

- F. Vincent Vernuccio is the former Director of Labor Policy at the Mackinac Center for Public Policy, a Michigan-based free-market non-profit group that has a similar mission as the Foundation. As his affidavit shows, Mr. Vernuccio was, during his time at the Mackinac Center, routinely subjected to harassment and intimidation based on the work he did. His affidavit shows that he has been spat upon by people who oppose his work. It shows that he has been shouted down by ideological opponents to the extent that the people shouting him down needed to be removed by police. It shows that once, during an appearance on a radio program, he received a threatening phone call indicating something dangerous would be waiting for him when he returned home. His employer was alarmed enough to perform a security check of the home before he returned. SOF ¶ 37(C) and Ex. 11.

The Kansas Policy Foundation, Freedom Foundation, and Mackinac Center are all non-profit groups holding views that are similar to those of the Plaintiffs in this case. As the affidavits show, individuals associated with these groups have endured serious harassment, threats, trespasses, and other types of retaliation, assault, and injury. It is perfectly credible, then, for Plaintiffs to worry about their donors' identities being disclosed by Defendant.

Taken together, this evidence satisfies the requirement in *Buckley*, 424 U.S. at 74, which says that plaintiffs can challenge the constitutionality of a disclosure requirement by showing that groups with "similar views" have experienced ideological harassment, and that Plaintiffs' donors will likely suffer the same from the compelled disclosure of their donors' confidential information. The harm of disclosure in this case is far from speculative, and, as in *Harris*, 182 F. Supp. 3d at 1056, Plaintiffs do not have to wait until they receive threats, or endure vandalism, or be spat upon, before they can assert their rights under the First Amendment.

B. Plaintiffs are entitled to a declaratory judgment and permanent injunction because the Ordinance violates the free-speech clause of the Colorado Constitution.

The free-speech clause of the Colorado Constitution provides an independent basis for granting summary judgment to Plaintiffs. The Colorado Constitution has "a long tradition of providing grea*ter protection* of free speech under the Colorado Constitution than does the first amendment." *Colo. Libertarian Party v. Sec'y of State of Colo.*, 817 P.2d 998, 1008 (Colo. 1991) (Lohr, J. concurring) (emphasis added); *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1054 (Colo. 2002) (same). And, indeed, the text of the Colorado free-speech clause differs greatly from the First Amendment. It provides, in relevant part, that "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty." COLO. CONST., art. II, § 10. Plaintiffs seek here the right to "speak, write, or publish" on the subject of Denver ballot measures. The disclosure requirements "impair" that freedom by requiring Plaintiffs to choose between silence and violating the privacy of their donors. This does not leave the plaintiffs "free to speak, write, or publish whatever [they] will on any subject."

Colorado courts have found that the state Constitution provides greater protection than the First Amendment in several different contexts. For instance, in *Bock v. Westminster Mall Co.*, the Colorado Supreme Court found that the state Constitution protects the right to distribute pamphlets in the common areas of a shopping mall, calling the mall a "latter-day public forum." 819 P.2d 55, 62 (Colo. 1991). According to the court, the second clause of Art. II, § 10 is "an affirmative acknowledgement of the liberty of speech, and therefore of greater scope than that guaranteed by the First Amendment." *Id.* at 59.

Directly relevant to the question of anonymity in this case, in *Tattered Cover, Inc.*, the state supreme court again found that Art. II, § 10 provides greater protection for speech than its federal counterpart. The question in *Tattered Cover* was what test should be applied when the government seeks customer purchase histories from a third-party, innocent bookseller. *Id*. at 1047. "Anonymity," the court noted, "is often essential to the successful and uninhibited exercise of First Amendment rights, precisely because of the chilling effects that can result from disclosure of identity." *Id*. at 1052. Due to the constitutional value of anonymity,[2] the court concluded that "because our state constitution provides more expansive protection of speech rights than provided by the First Amendment, it follows that the right to purchase books anonymously is afforded even greater respect under our Colorado Constitution than under the United States Constitution." *Id*. at 1054.

Thus, not only has the Colorado Supreme Court found that the state free-speech clause provides more protection than the First Amendment, it has expressly found that the Colorado Constitution provides enhanced protection for one's right to remain anonymous. Plaintiffs in this case claim a right to donor anonymity due to a fear that those donors will be harassed and intimidated by their ideological opponents. Plaintiffs have substantiated that claim with a significant amount of evidence that both they and similar groups have experienced harassment

[2] Although in recent years it has become commonplace to denigrate the legal protections afforded to anonymous speech, the fact that the authors of *The Federalist, Common Sense, A Summary View of the Rights of British America*, and other founding-era writings published their views anonymously shows the important value and longstanding tradition of anonymous political speech. Many others have chosen to write under pseudonyms. The Supreme Court once noted that the pseudonymous "Jabberwocky verse of Lewis Carroll" was "unquestionably" protected by the Constitution. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

ranging from name-calling, to vandalism, to threats of death and sexual violence. SOF ¶¶ 24, 34, 35, 37. Given that anonymity is "afforded even greater respect under [the] Colorado Constitution," *Tattered Cover*, 44 P.3d at 1054, the Ordinance is unconstitutional under Art. II, § 10 even if this Court finds—which it should not—that the Ordinance does not violate the First Amendment.

CONCLUSION

For the foregoing reasons, summary judgment should be entered for Plaintiffs CUT and TABOR and against Defendant.

Dated: August 24, 2018

/s/ Matthew R. Miller

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2018 a true and correct copy of the foregoing motion for summary judgment was filed and served via Colorado Courts E-Filing to the following parties:

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