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.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Tammy Holland files this motion for summary judgment and asks that the Court (1) declare that the private-enforcement provisions of Section 9(2) of Article XXVIII of the Colorado Constitution and Colo. Rev. Stat. § 1-45-111.5(1.5)(a) are unconstitutional; and (2) permanently enjoin the Colorado Secretary of State from administering those provisions.

INTRODUCTION

This case is a First Amendment challenge to Colorado's system of private campaign-finance enforcement. Like every state in the nation, Colorado has a complex campaign-finance regime regulating political speech and participation. Unlike every other state, however, Colorado outsources enforcement of these laws to "[a]ny person." Colo. Const. art. XXVIII, § 9(2)(a).

This system plays out exactly as one would expect: It is used relentlessly to target people based on their political views. Plaintiff Tammy Holland, for example, was sued—twice—by complainants who took offense at what they perceived to be her criticisms of school-board election practices. Her experience is far from unique. The Colorado Secretary of State—the state's chief campaign-finance administrator—freely admits that the laws are not enforced impartially. Pl.'s Statement of Undisputed Material Facts 1 (SUMF) ("Q. Do the laws get enforced impartially under the private-enforcement system? A. No."). Colorado's most prolific filer of private-enforcement complaints even champions the system as a tool for waging "political guerilla legal warfare" against disfavored viewpoints. *Id.* 2, 3. In turn, the system sows confusion about what the campaign-finance laws actually require. It invites complaints that "tie up the judicial system and lead to government waste" (in the words of a former Secretary of State). *Id.* 4. And far from combatting corruption and promoting transparency—the stated goals

of Colorado's campaign-finance laws—the system is used to extract secret payoffs, influence political campaigns, and shut down speakers. *See* pages 14-17, 23-24, below.

In this way, Colorado's private-enforcement system violates the First Amendment at a bedrock level. "The principle of viewpoint neutrality . . . underlies the First Amendment itself." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). But nothing prevents private complainants in Colorado from harnessing the full power of the state to haul people into court based on their political views. That is profoundly unconstitutional. "No citizen—Republican or Democrat, socialist or libertarian—should be targeted or even have to fear being targeted on those grounds." *In re United States*, 817 F.3d 953, 955 (6th Cir. 2016). Tammy Holland's motion for summary judgment should be granted.

BACKGROUND

A. Tammy Holland and her newspaper ads.

Tammy Holland lives in Strasburg, Colorado, on a farm with her husband and eighth-grader son. She worked as a preschool teacher for nearly two decades, and in recent years, she has become extremely concerned about the state of public education in America. In particular, she believes that so-called Common Core curricula and the growing use of standardized testing stifle students' intellectual curiosity and subject children to needless stress.

Holland grew especially concerned in 2014, when she saw that Byers School District (where her son was a student) had adopted these practices. SUMF 5. She repeatedly tried to exempt her son from the standardized-testing program, and she began speaking out at school-board meetings. *Id.*

Holland ultimately withdrew her son from Byers School District. *Id.* 6. Even so, she remains committed to fixing the standardized-testing regime now in place in Colorado. *Id.* And if Byers School District were to implement standards other than Common Core, she would gladly re-enroll her son there. *Id.* To that end, Holland began placing ads in her local newspaper—*The I-70 Scout*, published every Tuesday—in which she critiqued Common Core and standardized-testing programs. *Id.* 7. Between January and September 2015, she placed around 14 of these ads. *Id.*

Holland's two most recent submissions ran in September 2015. *Id.* 8. These ads concerned the then-upcoming school-board election in Byers. *Id.* On their face, neither ad expressly advocated for or against any particular candidate. *See id.* Although Holland had personal preferences about which candidates should and should not be elected, she did not intend for her ads to urge a particular electoral outcome. *Id.* 9. Rather, the ads were intended to—and did—invite readers to educate themselves about the full slate of candidates, stressing the importance of "careful consideration of each candidate's objectives." *Id.*

Due to Colorado's unique system of private campaign-finance enforcement, Holland promptly found herself sued—two times—by local school officials who alleged that her ads violated Colorado's campaign-finance laws.

B. Colorado's system of private campaign-finance enforcement.

Colorado's campaign-finance code, the Secretary of State acknowledges, is "not an easy or readily apparent area of law." *Id.* 10. The laws are memorialized in Article XXVIII of the Colorado Constitution; in the Fair Campaign Practices Act, Colo. Rev. Stat. §§ 1-45-101 *et seq.*; in 30 pages of regulations promulgated by the Secretary; in 15 years' worth of advisory opinions;

in hundreds of administrative-court rulings; and lastly, in a non-binding, 140-page *Campaign and Political Finance Manual*. The laws regulate who can contribute to campaigns, how much can be contributed, and when political participants must register and report—as political committees, for example, or issue committees, or small-scale issue committees, or political organizations, or candidate committees, and so on. A recent commentator summed up the system as "byzantine." Christopher Jackson, *Campaign Finance Law in Colorado*, 46 Colo. Law. 35, 36 (2017). And the Tenth Circuit has agreed, remarking that "'[t]he average citizen cannot be expected to master on his or her own the many campaign financial-disclosure requirements set forth' in the Colorado Constitution, the Act, and the Secretary's rules." *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1277 (10th Cir.), *cert. denied*, 137 S. Ct. 173 (2016) (quoting *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010)).

To enforce this body of law, Colorado authorizes "[a]ny person" to file a complaint with the Secretary alleging that someone has violated the campaign-finance code. Colo. Const. art. XXVIII, § 9(2)(a); *see also* Colo. Rev. Stat. § 1-45-111.5(1.5)(a). The government does not investigate or prosecute these complaints. SUMF 11. Rather, the Secretary is required to refer every complaint to the Office of Administrative Courts, Colo. Const. art. XXVIII, § 9(2)(a), where the private complainant is empowered to proceed "as if they were prosecuting a case," SUMF 11. This includes discovery, depositions, third-party subpoenas, demands for fines, appeals to the Colorado Court of Appeals, and even petitions to the Colorado Supreme Court.

C. The two private-enforcement complaints against Tammy Holland.

Days after Tammy Holland placed her ads, in September 2015, Tom Turrell—the Superintendent of Byers School District—filed a private campaign-finance complaint against

her. *Id.* 12. He alleged that Holland violated campaign-finance laws in two ways. First, he claimed, Holland should have registered a "political committee" under Colorado law. *Id.* 13. Second, he asserted that she should have included a "paid for by" disclaimer on her ads, under federal campaign-finance law. *Id.* In accordance with the Colorado Constitution's mandate, the Secretary automatically referred the complaint to the Office of Administrative Courts. *Id.* 12.

Although Turrell's complaint was meritless, Holland had no way of knowing that. *Id.* 14. She has no experience with campaign-finance laws, and, on receiving notice of the complaint, she had no way to evaluate whether the claims had merit. *Id.* To protect herself and her family, she felt compelled to hire a private law firm to defend her. *Id.* But two days before the court hearing, Turrell withdrew his complaint. *Id.* 15. He did not alert Holland to this development, and she did not receive notice of the dismissal until the night before the hearing. *Id.*

Given the dismissal's last-minute timing, Holland's attorneys spent a considerable amount of time preparing her defense, incurring more than $3,500 in fees. *Id.* 16. Two days after the court dismissed the complaint against her, Holland filed a motion to recover those fees. *Id.* 17. But that only triggered a second private-enforcement complaint. At a school-board meeting held the following week, school-board member Tom Thompson—who was running for reelection and had been named in Holland's ads—announced that he was preparing to re-file the complaint in his own name. *Id.* 18. Following a discussion about Holland's pending request for attorneys' fees, he further warned that "I think you'd better keep your lawyer"—a statement another board member characterized as a "threat." *Id.* 19.

The following morning, Turrell left a message on Holland's answering machine. *Id.* 20. In that message, he confirmed that Thompson and another school-board member were preparing

to file a second campaign-finance complaint against her, but, he advised, "if you would consider dropping the countersuit for fees and expenses, that they would consider it being all done." *Id.*[1]

Holland did not respond to the voicemail, and, true to his word, Thompson re-submitted the original complaint two days later. *Id.* 21. He made clear that he filed the complaint in response to what he perceived to be Holland's criticism of incumbent candidates and the electoral process. "If I got to choose what would happen," he said, "I'd ask for an ad in the paper apologizing for what [Holland] said." *Id.* 22. "I don't want anything out of it except that." *Id.* Both Thompson and Turrell further confirmed that their decisions to sue were motivated in part by other public statements made by Holland, which they construed as unfairly criticizing the school-board election process. *Id.* 23.

Thompson's complaint was materially identical to Turrell's. *Id.* 21. And like the earlier complaint, it was without merit. Even so, it took nearly six months—and full summary-judgment briefing—before the administrative court dismissed the case. *Id.* 24.

ARGUMENT

The Colorado Constitution authorizes "[a]ny person" to sue any other person over any alleged violation of the state's campaign-finance regime. Colo. Const. art. XXVIII, § 9(2)(a). No other state in the nation has this law, and for good reason: The system fuels lawsuits that are intended not to neutrally enforce campaign-finance laws, but to distract, harass, intimidate, and silence political opponents. Deploying governmental power to target disfavored viewpoints is the principal evil against which the First Amendment's Speech Clause protects. Yet Colorado's private-enforcement system invites "[a]ny person" to do precisely that. Any law that creates such

[1] Turrell appears to have been referring to Holland's motion for attorneys' fees.

a risk of viewpoint discrimination is presumptively unconstitutional (Section I). And whatever standard of First Amendment review applies, the Secretary cannot satisfy it here (Section II).

I. Colorado's private-enforcement system is presumptively unconstitutional because it permits complainants to single out disfavored speech for enforcement.

The government's power to prosecute its citizens for talking about public affairs carries with it an unmatched potential for abuse and an unparalleled capacity to chill speech. For that reason, a law that even lends itself to viewpoint-discriminatory enforcement is suspect, because "history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991). When it comes to regulating speech, the First Amendment's foundational principle is "the need to eliminate the impermissible risk of discriminatory enforcement." *See id.*

Colorado's private-enforcement system violates this principle at a basic level. The state's campaign-finance regime can be used to visit immense burdens on political participants. Yet instead of installing checks to prevent these tools from being used in a viewpoint-discriminatory manner, Colorado's law invites—even depends on—discriminatory enforcement. In this way, Colorado's private-enforcement system is uniquely susceptible to abuse and presumptively unconstitutional under the First Amendment.

A. Colorado's campaign-finance law delegates to "[a]ny person" the state's formidable power to police political speech.

Colorado's campaign-finance code, in the Secretary's words, is "not an easy or readily apparent area of law." SUMF 10. The law has as its sole purpose the regulation of core constitutionally protected activity. It secures no "private rights" and provides no "remedy for a private loss," *id.* 25, and all fines under the law "are payable solely to the state." Def.s' Mot.

Dismiss 6 (ECF 17). Yet even though "the government is the real party in interest," *id.*, enforcement is assigned elsewhere. "[A]ny person" is empowered to "advanc[e] a public claim" against anyone else for any violation of Colorado's campaign-finance law. SUMF 25.

That delegated power is vast. Upon filing a private-enforcement complaint, any person is authorized to proceed "as if they were prosecuting a case." *Id.* 11. Win or lose, complainants can impose on their targets all the costs and risks of a government-enforcement action—from discovery to third-party subpoenas to the threat of crippling fines. *See* Colo. Const. art. XXVIII, §§ 9(2)(a), 10(2)(a) (setting per-violation fines at up to $50 per day); 1 Colo. Admin. Code 104-1:9, -1:15, -1:18 (discovery procedures). Appeals can linger for years. With good reason, the Secretary has likened the process to a criminal prosecution. *See* Mot. Dismiss 5.

As with any "'quasi-criminal'" law governing political speech, *see id.* 6, the consequences for respondents are profound. As the Supreme Court has consistently recognized, "potential litigation" of the sort Colorado invites "must necessarily chill speech in direct contravention of the First Amendment's dictates" by exposing speakers to "the costs of litigation and the risk of a mistaken adverse finding." *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 794 (1988); *see also FEC v. Wis. Right to Life*, 551 U.S. 449, 468 n.5 (2007) (Opinion of Roberts, C.J.) ("[L]itigation constitutes a severe burden on political speech."); R. & R. 8 (ECF 63) (collecting authority), *adopted by* Order (ECF 68).

Colorado's history bears this out. Tammy Holland, for example, incurred thousands of dollars in legal fees to defend against the first private-enforcement complaint she faced. SUMF 16. She suffered enormous strain in her family life, compounded by the threat of fines and reputational harm in her small community. *Id.* 26. But for the private-enforcement system she

would continue to make newspaper ads about educational issues. *Id.* 27. Because nothing prevents "[a]ny person" from putting her through the enforcement process all over again, however, she no longer speaks out about the issues that matter to her. *Id*.

Nor is Holland's experience unique. Many respondents find the enforcement process intimidating, costly, and time-consuming. *Id.* 28. One respondent—a first-time candidate for an unpaid school-board position—was sued months after the relevant election over mistakes he had fixed voluntarily long before. *Id.* 29. The complainant publicly accused the candidate of perjury and asked the court to award $10,000 in fines, more than the candidate's life savings. *Id.* 30. Pro bono counsel devoted around $38,000 worth of time to defend the case. *Id.* 31. For his part, the candidate has described the experience as "devastating" and "humiliating." *Id.* 32. It "changed the trajectory" of his life; he resigned from the school board and moved. *Id.*

In other cases, respondents are stripped of sensitive information. *See, e.g.*, *id.* 33 (finding that complainant violated protective order by "disclosing to a journalist financial information that he obtained from documents produced by [the respondent]"). In still others, they are forced to devote substantial time and resources to defending themselves. One respondent traveled from Durango to Denver for a hearing; the complainant—on vacation—never appeared. *Id.* 34. Another respondent was fined $2,050, but because she had been "required to vacate her home address under a Divorce Decree from her ex-husband," she said she had not received notice that the case even existed. *Id.* 35. (The private-enforcement system does not require formal service of process. Colo. Rev. Stat. § 24-4-105(2)(A); Colo. Const. art. XXVIII, § 9(1)(f).) The court declined to reopen her case. Requiring the complainant to "reprosecute" with the other side

present would be "burdensome and contrary to the strong enforcement of campaign finance requirements." SUMF 36.

Colorado's most prolific complainant—Campaign Integrity Watchdog (CIW)—touts all these burdens as features to be exploited. "Discovering, documenting, and prosecuting campaign finance law violations by the opposition keeps ***them*** off-balance and diverts resources they could otherwise allocate to come after *you*," an advertising brochure states. *Id.* 3. "Given enough resources," CIW's director has written, "waging 'Lawfare' doesn't even require courtroom victories – if opponents can be distracted, forced to divert resources (time & money), and get smeared in the (often-complicit) media – then it's a definite 'win' for the attackers." *Id.* 2.[2] Put differently—and as the Supreme Court recognized 50 years ago—"[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

The Secretary's Office contests none of this. It concedes that private-enforcement complaints can "irreparably harm small entities, thereby violating their first amendment rights." SUMF 10. It concedes that the private-enforcement system sees "unfair and egregious abuse" of discovery tools to "virtually ransack any of the [respondent's] information he or she pleases." *Id.* It concedes that defending against private-enforcement complaints can be costly and even

[2] *See also* SUMF 37 ("Mainstream Colorado is no more, because Matt Arnold and Campaign Integrity Watchdog took them to task, took them to court, beat them up, made Mark Grueskin spend his time and money, and even though the judge bought the line that 'the dog ate their homework,' they shut down."); *id.* ("[W]e can go after these guys, . . . use the Leftist lawfare, use that blunt instrument, that club, that they've been using to beat us up for years, and pick it up, and shove it right back in their face, and beat 'em bloody."); *id.* 38 ("Campaign Integrity Watchdog will be very active in the coming months, and a few folks that are of the, shall we say, 'progressive' persuasion will probably end up spending a lot of money in places they hadn't planned on spending money.").

"bankrupt" and "close" targeted speakers. *Id.* And it concedes that "being a respondent is a major distraction and causes people stress in their lives and causes them to decide they don't want to run afoul of this again." *Id.* 39; *see also id.* ("[S]mall 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."). Faced with the prospect of private-enforcement complaints, the Secretary testified, "you may decide it's not worth it." *Id.*

B. The private-enforcement system places no constraints on viewpoint-discriminatory enforcement.

Every enforcement regime places burdens on responding parties. What makes Colorado's private-enforcement system so unusual—and so constitutionally unsound—is that it outsources all the powers of an enforcement agency but with none of the "explicit guidelines or ethical obligations" that constrain state officials in the exercise of their discretion. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014). That blind spot is dispositive; without any check on viewpoint-discriminatory enforcement, the law is presumptively unconstitutional.

1. On its face, the private-enforcement system has no check on viewpoint discrimination.

When a law grants its enforcers the discretion to target speech they dislike, the inherent "risks to free expression" can be "effectively alleviated only through a facial challenge." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988). That is because "[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Thus, "the success of a facial challenge on the grounds that a[] [law] delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised

his discretion in a content-based manner, but whether there is anything in the [law] preventing him from doing so." *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

These principles control here. Colorado's private-enforcement system gives unchecked power to "private attorney[s] general" who have the greatest incentive to deploy that power against people whose viewpoints they dislike. *See* SUMF 40. Not even the Secretary can point to anything in the law "that prevents complainants from targeting their political opponents." *Id.* 41.[3] And the Colorado courts agree: "Nothing in either article XXVIII or the FCPA [Fair Campaign Practices Act] discourages such motivation." *Id.* 40. If anything, the private-enforcement system *depends* on viewpoint-discriminatory complainants, for "if political partisans were barred from filing complaints, very few complaints would ever be filed." *Id.* "[T]he way the system is set up," the Secretary confirms, "logically, that's what's happening." *Id.* 1. "The motivation to file is to file to affect your opponent." *Id.*; *see also id.* ("Q. Affect them negatively? A. Yes.").

[3] When asked whether there is anything "in the private enforcement law that prevents complainants from targeting their political opponents," the Secretary identified only the provision authorizing recovery of attorney's fees. *See* SUMF 41; Colo. Rev. Stat. § 1-45-111.5(2). That provision does not even arguably check viewpoint-discriminatory enforcement. First, as construed by the state courts, a respondent cannot claim attorney's fees "simply because [the complainant] may have been politically motivated." SUMF 40. Second, any fee award would come only after the respondent has retained counsel and weathered the enforcement process. *Cf. Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 475 (6th Cir. 2016). Third, Colorado courts construe the fee-shifting provision narrowly, lest fee awards "improperly chill enforcement of these laws." SUMF 42; *see also id.* 43 ("I think to be honest with you that rarely will there be a case under this amendment that will ever meet that test [for attorney's fees] just because it is so complicated and requires -- I mean it requires a lot of time."). Lastly, respondents have no way to enforce fee awards. *McGihon v. Cave*, --- P.3d ----, 2016 WL 2957205, at *3 (Colo. App. May 19, 2016) (holding that the campaign-finance code "leaves a respondent awarded fees and costs without a remedy under either the FCPA [Fair Campaign Practices Act] or article XXVIII to enforce that award").

This raises constitutional concerns of the highest order, for "[t]he principle of viewpoint neutrality . . . underlies the First Amendment itself." *Bose Corp.*, 466 U.S. at 505. In 2003, in fact, a majority of the Supreme Court acknowledged that crowdsourcing speech-code enforcement presents serious First Amendment problems. In *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), the Court dismissed an appeal challenging California's "'private attorney general'" system for prosecuting false advertising, *id.* at 665. Five Justices, however, acknowledged "the importance of the First Amendment concerns at stake." *See id.* at 684 (Breyer, J., dissenting); *see also id.* at 663 n.5 (Stevens, J., concurring). Writing for himself and Justice O'Connor, Justice Breyer further underscored that "[t]he delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums." *Id.* at 679 (Breyer, J., dissenting). Because such a system "disproportionately burdens speech," he wrote, "it is likely, if not highly probable, . . . that heightened scrutiny applies" and that "the First Amendment consequently forbids it." *Id.* at 681. A unanimous Court echoed these concerns more recently, in *Susan B. Anthony List*, 134 S. Ct. 2334. Holding the threat of prosecution under Ohio's false-statement law "substantial," the Court emphasized the "real risk of complaints from . . . political opponents" when enforcement power is vested in "'any person.'" *Id.* at 2345.

That reasoning applies equally to Colorado's private-enforcement system. With no check on viewpoint-motivated enforcement, the Secretary rightly admits that "[t]here is real potential for abuse of the system." SUMF 44. That should be the end of the matter. "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and

pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill*, 310 U.S. at 97-98. "[E]ven if the discretion and power are never actually abused," *City of Lakewood*, 486 U.S. at 757, the *opportunity* for abuse works an unconstitutional harm.

2. The record of viewpoint discrimination highlights the grave defects in the private-enforcement system.

Of course, Colorado's system is in fact abused ruthlessly, and the record of viewpoint-based enforcement drives home the need for facial relief here. For example—

- Plaintiff Tammy Holland was sued twice by school officials who wanted to force her to "apologize" for commenting on a local school-board election in a way they thought questioned the integrity of the electoral process. *See* pages 4-6, above.
- A legislative candidate sued two citizens whom he accused of sending and posting online messages critical of his candidacy. SUMF 45.
- A Broomfield mayoral candidate sued a rival candidate for reusing yard signs from an earlier campaign. *Id.* 46.
- In 2008, the Democratic and Republican candidates for a Pueblo County Commissioner seat prosecuted dueling complaints against each other. *Id.* 47.
- Between 2012 and the present, a former candidate for Colorado University Regent has prosecuted four complaints against an organization that criticized his fitness for office (along with several ancillary proceedings). *Id.* 48. In the candidate's words, "[t]hose kinds of people need to be dragged into court and need to be prosecuted and need to be found guilty and forced to pay fines and penalties and also made public and exposed for the cowardly, backstabbing scum that they are." *Id.*

These are not anomalies; from a sample of 291 private-enforcement cases filed between 2002 and 2016, Plaintiff's expert witness identified direct or circumstantial evidence of viewpoint-discriminatory motivation in over 70 percent. *Id.* 49.

In fact, some complainants use the private-enforcement system with the express goal of silencing speech they dislike. In 2016, for instance, Campaign Integrity Watchdog (CIW) offered to stop suing the Colorado Republican Party on the "non-negotiable" condition that the party shut down an advocacy arm that Matthew Arnold, CIW's founder, disliked. *Id.* 50. CIW has even taken to filing complaints to suppress criticism of CIW and Arnold personally—and to coerce public statements favorable to CIW. Earlier this year, CIW filed a private-enforcement complaint against the Denver County Republican Central Committee after a party officer "disparage[d] CIW and it[]s non-attorney representative." *Id.* 51. That criticism, Arnold said, put the party "on my radar." *Id.* Days after filing the complaint, CIW offered to close the case with a stipulated judgment—but only if party officers would sign a "non-disparagement agreement" to bar them from making "any statements" criticizing CIW's behavior in "any . . . past cases . . . ." *Id.* 52. "[T]he public attacks on CIW and its officer have to stop," Arnold insisted. *Id.* 53.

In a still more troubling example, CIW settled a complaint against the Arapahoe County Republican Party on the conditions that the party (1) publicize statements favoring Arnold and (2) refrain from criticizing CIW, Arnold, and members of Arnold's family. Under the terms of the "settlement agreement"—which was never divulged to the court—the party would "distribute[] to the county party mass email list . . . a message clarifying . . . the lack of any malicious intent to deceive . . . on the part of Matt Arnold" in connection with a political squabble. *Id.* 54. The party further agreed "to refrain from any public statements or

communications, including mass distribution of email to the county party distribution list or statement[s] to the press, that attack, disparage, or otherwise engage[] in adverse action targeting Campaign Integrity Watchdog as an entity, or Arnold or any member of his immediate family personally, for any actions occurring prior to the date of this agreement, including any actions relating to Arnold's previous candidacy for office and/or the campaign finance complaint leading to this settlement." *Id.* Even now, violating that "proscription" would expose the party to "a civil penalty of $10,000 payable to Campaign Integrity Watchdog LLC." *Id.*

These problem are not limited to a single bad actor; dozens of complaints are prosecuted by political campaigns (or their allies) against rival campaigns (or their allies). *Id.* 49. In 2015, for example, two men were sued after they opposed a local development and annexation project. *Id.* 55. The complainant dropped the case, but only after the respondents agreed to "refrain from spending money in any way to oppose the . . . Development, aside from incidental, personal expenses." *Id.* 56. Similarly, in a different First Amendment case, the district court found that "[t]here can be no doubt that [the complainants] used the private enforcement provisions to attempt to silence the [respondents] by the filing of the complaint . . . ." *Sampson v. Coffman*, No. 06-cv-01858, 2008 WL 4305921, at *20 (D. Colo. Sept. 18, 2008), *aff'd in part, rev'd in part*, 625 F.3d 1247 (10th Cir. 2010). "[T]he use of private complaints as the primary method of enforcement," the court remarked, "aggravates the damaging effects of the substantive limitations on the freedoms of speech and assembly." *Id.* at *15.

Again, the Secretary's testimony bears this out. The Secretary concedes that "[t]he problems that we've seen in the campaign-finance system now are not hypothetical." SUMF 57. The Secretary concedes that recent years have seen at least 80 percent of private-enforcement

complaints being prosecuted to target political opponents. *Id.* 58; *see also id.* 57 ("These complaints have played out time and time again."). The Secretary concedes that "generally, it's a political opponent filing against another political opponent." *Id.* 1. Most importantly, the Secretary concedes that this pattern of viewpoint discrimination follows directly from the private-enforcement system:

> Q. Okay. Would you say that it's almost an inevitable consequence of the private enforcement law that it will be used by people to negatively affect their political opponents?
>
> A. In many cases, yes.

Id. That concession alone supports judgment for Tammy Holland. Colorado's private-enforcement law puts no check on viewpoint-discriminatory enforcement, and as a result, the system is used—relentlessly—to target speakers based on their viewpoints. A law that permits such breathtaking violations of First Amendment rights is unconstitutional on its face.

C. The private-enforcement system is fundamentally different from laws that vest enforcement authority in government agencies.

Saddled with a uniquely abuse-prone law, the Secretary maintains that Colorado's private-enforcement system is no more susceptible to viewpoint discrimination than any other regime. Mot. Dismiss 15. But in truth, Colorado's law is constitutionally infirm in a way that laws entrusted to government enforcement are not. When a law relies for its enforcement on a government actor, that power is vested in "representative[s] . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Duckett v. Mullin*, 306 F.3d 982, 994 (10th Cir. 2002) (citation omitted). Granted, there is the "possibility" those representatives may misuse their power to target disfavored viewpoints. Mot. Dismiss 15. That is why every law regulating speech undergoes such searching review. But on their face,

state-enforced laws incorporate constraints on the enforcers to act impartially. *See Susan B. Anthony List*, 134 S. Ct. at 2345 ("Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents."); *cf.* Colo. Const. art. XII, § 8. For that reason, delegating to an executive-branch actor the power to enforce a facially valid law does not, on its face, create an unacceptable risk of discriminatory enforcement.

The same cannot be said of Colorado's private-enforcement system. In Colorado, "the raw power to suppress speech through force" is outsourced—unchecked—to private complainants with the greatest impulse to abuse it. *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989). There is no background duty of impartiality. *See* SUMF 1 ("Q. Do the laws get enforced impartially under the private-enforcement system? A. No."). By authorizing "any person" to police their opponents' political speech, Colorado's system thus presents singular First Amendment concerns that other enforcement systems do not.

Nor is it any answer to say that the opportunity for viewpoint discrimination is acceptable because the enforcers are private complainants rather than government officials. Colorado voters could not have entrusted to a state enforcement agency a campaign-finance code that lent itself to discriminatory application. *See Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965); *Thornhill*, 310 U.S. at 97-98. No more can Colorado circumvent that First Amendment principle by outsourcing viewpoint-discriminatory enforcement to the world at large. "As the government cannot itself censor citizens for ideological reasons, so too it cannot authorize one group of citizens to censor another." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 463 (1996). Enforcing Colorado's campaign-

finance laws is an obvious exercise of state power. And by authorizing any person to "advanc[e] a public claim," SUMF 25, the private-enforcement system delegates to private complainants the power to "act as prosecutors . . . in the stead of the state[]," *id.* 59; *see also id.* 60 ("Q. So from your perspective as CIW, you are stepping into the shoes of the State to enforce the law? A. Yes."). As the Secretary concedes, "the government is the real party in interest," Mot. Dismiss 6, meaning the First Amendment applies with full force.

II. The Secretary cannot rehabilitate Colorado's private-enforcement system.

Colorado's private-enforcement system is so abuse-prone that the soundest course would be to invalidate it with no further inquiry into the state's asserted interests (Section A). Yet even if the Court were to review the system under strict or intermediate scrutiny, the Secretary's burden would be an impossible one. The system undermines every state interest the Secretary invokes (Section B). And recent legislative half-measures do not redeem the law (Section C).

A. Because the private-enforcement system invites viewpoint-discriminatory abuse, no further inquiry is necessary to invalidate it.

Because the "opportunity for abuse" of Colorado's private-enforcement system is "self-evident," *see Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (citation omitted), it is virtually per se invalid. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"—full stop. *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *see also Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

This categorical approach is borne out by one of the few cases involving a law similar to Colorado's. In 2014, the Eleventh Circuit invalidated a crowdsourced anti-loitering ordinance without entertaining any argument on the government's asserted interests. In *Bell v. City of*

Winter Park, 745 F.3d 1318 (11th Cir. 2014), plaintiffs challenged a law that authorized any homeowner to post legally enforceable signs banning "loitering" in "public area[s]" near their property. *Id.* at 1324. The court of appeals held the law "facially unconstitutional and invalid," and it did so without giving the city the chance even to file its answer. *Id.* at 1325. Although "content neutral," the court reasoned, the law "grant[ed] private citizens unbridled discretion to invoke the City's power to regulate speech in public fora." *Id.* By "provid[ing] a citizen with immense discretion to use the police to enforce the loitering provision," the law "create[d] a risk of targeted enforcement based on the content or viewpoint of an individual's speech." *Id.* That "unprecedented" delegation of power could not be squared with the First Amendment under any circumstances. *See id.* at 1324; *see also id.* at 1325 ("The amount of discretion . . . is alarming.").

This case is similar. Colorado's delegation of power is so unrestrained and the risk of viewpoint-discriminatory enforcement so high that nothing can possibly justify it. At base, the private-enforcement system surrenders government control over how—or even whether—the campaign-finance laws are enforced. *See* SUMF 61 ("Article XXVIII, § 9(2) is carefully designed to keep the Secretary of State out of the litigation process. . . . Nothing in § 9(2) gives the Secretary any ability to control or oversee the conduct of the litigation."). Whatever interests the state may have in functioning, reliable campaign-finance laws, delegating to private actors full power to enforce and shape those laws cannot possibly further the state's interests.

B. Even if it were not per se unconstitutional, the private-enforcement system would fail any level of First Amendment scrutiny.

In any event, the private-enforcement law fails strict scrutiny and any other level of First Amendment review. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340. That is why laws burdening

political speech "are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* The Secretary cannot meet that burden here. Nor could he meet even lesser standards of First Amendment review. Not only does the Secretary have no evidence that the private-enforcement system is tailored to the state's asserted interests, the system affirmatively subverts those interests. Under any level of First Amendment review, such a self-defeating system cannot stand.

1. The Secretary cannot show that the private-enforcement system is necessary to achieve the asserted governmental interests.

In his motion to dismiss, the Secretary asserted that "private enforcement advances Colorado's substantial governmental interest in ensuring transparency in elections" and the state's derivative interest in ensuring "compliance with its campaign finance laws." Mot. Dismiss 19. That is because, the Secretary claimed, private enforcement "is both more effective and more efficient than committing that task to a state office with limited resources." *Id*. But for two reasons, that appeal to efficiency lacks merit.

First, the Supreme Court has held "simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795. That disposes of the Secretary's defense root and branch.

Second, even if efficiency could justify abridging speech, there is no basis for concluding that Colorado's system is more efficient than any of the dozens of state campaign-finance laws that do not resort to private enforcement. At the motion-to-dismiss stage, this Court rightly rejected the Secretary's efficiency-based defense because "there is no factual record upon which this court could reach such conclusions." R. & R. 9 (ECF 63), *adopted by* Order (ECF 68). Now at summary judgment, there continues to be no such record. The Secretary has no evidence that

its interests "would not be served equally well by an alternative system of enforcement that did not rely on private enforcement." SUMF 62. The Secretary has no evidence that "the campaign-finance enforcement systems in other states operate less efficiently than Colorado's system of private campaign-finance enforcement." *Id.* 63. The Secretary has no evidence that "voters in Colorado are more knowledgeable than voters in states that do not rely on private campaign-finance enforcement regarding the sources of [campaign] funding." *Id.* 64. And the Secretary has no evidence that "persons regulated under Colorado's campaign-finance laws exhibit higher rates of compliance with those laws as a result of Colorado's system of private enforcement than do persons subject to regulation in other states that do not rely on private enforcement." *Id.* 65.

These gaps are decisive. "To meet the requirement of narrow tailoring" under any level of First Amendment scrutiny, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014) (intermediate scrutiny). Like Colorado, every state claims the same anticorruption and transparency interests to support their campaign-finance laws. But alone among the 50 states, Colorado has delegated campaign-finance enforcement wholesale to private parties.[4] That choice presents unique opportunities for abuse, yet there is no evidence it does anything to advance the state's goals.

[4] A minority of other states authorize private enforcement in limited circumstances. *See, e.g.*, *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 741 (Tex. 2017). These systems are all narrower than Colorado's, though they raise similar First Amendment concerns.

2. The private-enforcement system subverts the state's claimed interests.

If anything, the record suggests that Colorado's private-enforcement system undercuts the government's claimed interests at every turn. It is exploited for corrupt ends. It sows confusion. And as then-Secretary of State Bernie Buescher acknowledged in 2010, it attracts complaints that "only tie up the judicial system and lead to government waste." SUMF 4.

First, the private-enforcement system invites corruption and undermines electoral transparency. Campaign Integrity Watchdog's practices, for example, vividly illustrate the system's vulnerabilities. CIW, Colorado's leading filer of private-enforcement complaints, has used the system to broker secret agreements to extract payoffs, to secure debt forgiveness, and to influence political campaigns:

- In 2016, CIW dropped a case in exchange for a $4,500 "settlement" paid not to the State of Colorado, but to CIW directly. *Id.* 66.
- In 2016, CIW sought to extract $10,000 from the Colorado Republican Party, warning that otherwise, "the beatings will continue until morale improves." *Id.* 50.
- In 2015, CIW agreed not to "investigate or bring any legal or administrative action at any time" against two respondents "or any of their Related Organizations" in exchange for their forgiving an attorney-fee award they had won against CIW. *Id.* 67.
- In 2015, CIW agreed to a stipulated judgment awarding $600 to the State of Colorado and secretly forgiving $23,175 in potential fines—on the condition that the respondent agree to promptly shutter its advocacy operations. *Id.* 68.
- This year, CIW settled a case against the Arapahoe County Republican Party for a $100 penalty to the state, but only after the party consented to a penalty-backed gag

order on any criticism of CIW, Matthew Arnold, or "his immediate family personally." *Id.* 54.

- In 2013 or 2014, CIW negotiated with the son of a county candidate for a "consulting services agreement" under which CIW would be paid to single out the candidate's opponent for private-enforcement complaints. *Id.* 69. (CIW testified that the agreement was never executed. *Id.*)

If performed by a state officer, many of these acts would be felonies. *See, e.g.*, 18 U.S.C. § 1951 (extortion "under color of official right"). They are precisely the sort of abuses that Colorado's campaign-finance laws are meant to curtail. Yet by virtue of the private-enforcement system, the law itself has become a vehicle for censorship, misuse of the judicial process, and corruption.

Second, far from "ensuring transparency in elections and compliance with [Colorado's] campaign finance laws," *see* Mot. Dismiss 19, the private-enforcement system leaves the regulated community at a loss as to what "compliance" even means. Political participants regularly contact the Secretary's Office seeking guidance about what the laws require. But no matter what the Secretary advises—or how closely that guidance is followed—nothing prevents complainants from filing lawsuits and advancing a different view of the law.

This is not hypothetical. In one case, for example, the Secretary advised a group called Clear the Bench to register as an "issue committee." SUMF 70. Clear the Bench did so, but it was nonetheless sued by a complainant who alleged it should have registered as a "political committee" instead. *Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 932 (Colo. App. 2012). After two years, the Colorado courts ruled for the complainant. *Id.* Despite following the

Secretary's guidance to the letter, Clear the Bench was subjected to years of litigation and a ruling declaring it a lawbreaker.

Nor is that case an outlier. In the past three years alone, there have been at least 10 private-enforcement cases in which the Secretary believes that the complainants (and even the courts) misconstrued the campaign-finance laws. SUMF 71. The Secretary has even refused outright to interpret unsettled questions, reasoning that whatever his Office may say, its guidance "would not prevent a person or organization from filing a campaign finance complaint." *Id.* 70; *see also id.* (remarking on the Secretary's "very limited enforcement authority, which devalues any declaratory order the Secretary might issue in the realm of campaign finance"). The only ways for a speaker to get an authoritative answer to a campaign-finance question, the Secretary has explained, are to file a declaratory-judgment action or "await a complaint." *Id.* With the private-enforcement system in place, "the Secretary is unable to provide the public with more clarity regarding campaign finance laws"—a state of affairs the Secretary concedes "may in and of itself injure First Amendment rights of Colorado citizens." *Id.*

Third, outsourcing enforcement is inefficient by any measure. Many complainants are *pro se*, with no litigation experience, no training in Colorado's complex campaign-finance laws, and no ethical duties. And the administrative courts, in the Secretary's words, "are often more suited for—and better trained in—workers' compensation cases." *Id.* 10. The system, predictably, is chaotic. One legislative candidate—displeased at online criticism—filed a handwritten complaint and then bombarded the court with copies of sexually graphic MySpace posts. *Id.* 45. Other complainants have no notion at all of how the process works. Both men who sued Tammy Holland, for example, had no idea that filing a complaint would propel them into a

prosecutorial role, with Tom Thompson describing the process as "misleading and convoluted." *Id.* 72, 73. In another instance, complainants voluntarily dismissed their case, explaining that "how [we] became responsible for prosecution of the case remains a mystery to us." *Id.* 74.

At the same time, more sophisticated complainants exploit the system with an eye to maximizing costs. "Even if unsuccessful," Matthew Arnold has written, "the complaints divert resources (time, attention, and money); if successful, complaints can result in substantial fines for minor errors (and, of course, provide fodder for attack ads and mailers either way)." *Id.* 75. To give just one example, last year a respondent was sued over misreporting two $3.00 contributions. *Id.* 76. For that error, the complainant demanded $36,000 in fines. *Id.*

This is "lawfare" at its worst, *see id.* 2, and it visits immense costs on speakers and the state alike. Upon being sued, many respondents—like Tammy Holland—feel no choice but to hire defense lawyers. Of the 31 private-enforcement complaints filed in 2016, for example, respondents retained counsel in 19. *Id.* 77. Of the 25 cases filed in 2015, respondents retained counsel in all 25. *Id.* As the Tenth Circuit has recognized, "[t]his is a substantial burden." *Sampson*, 625 F.3d at 1260; *see also Coal. for Secular Gov't*, 815 F.3d at 1277. And thousands of dollars in public money go to waste as well. The Secretary's Office spends tens of thousands of dollars paying the Office of Administrative Courts to hold hearings and draft decisions in cases that no publicly accountable enforcement agency would ever consider pursuing. *See id.* 78. After a two-day hearing, for instance, the school-board candidate discussed at page 9, above, was fined $50. *Id.* 31. The Secretary has even spent tens of thousands of dollars to advocate *against* complainants' misinterpretations of the campaign-finance laws. *See id.* 78. All of these burdens follow directly from the private-enforcement system, which invites the politically motivated

complainant to "pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Robert Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 5 (1940).

C. The 2017 amendment does not redeem the private-enforcement system.

Elsewhere, the Secretary has suggested that a recent legislative amendment mitigates the First Amendment problems with the private-enforcement system. Reply Supp. Mot. Dismiss 12, *Rocky Mountain Gun Owners v. Williams*, 14-cv-2850 (D. Colo. May 24, 2017). In truth, however, that amendment (H.B. 17-1155) only compounds the system's unconstitutionality.

House Bill 17-1155 provides a qualified affirmative defense to a subset of political actors who may be sued under the private-enforcement system. Under that amendment, a respondent who is sued for "a failure to file other information required to be filed or disclosed" may try to avoid penalties by "cur[ing]" the deficiencies alleged in the complaint. Colo. Rev. Stat. § 1-45-109(c)(I). The respondent first must "file an addendum to the relevant report that cures any such deficiencies." *Id.* Next, the respondent must appear in court, where it "has the burden of demonstrating good faith or substantial compliance . . . by a preponderance of the evidence." *Id.* § 1-45-109(c)(II). If the respondent carries that burden, no penalty is to be assessed. *Id.* § 1-45-109(c)(I)-(II). But if it fails to do so, it is subject to mandatory minimum penalties. *Id.*

This cure period does not remedy the private-enforcement system's flaws. It is at best an affirmative defense, and "[w]here a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial." *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004). On top of that, the cure period "is incomplete and insufficient, even on its own terms." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002). Many respondents are ineligible altogether. If a complaint alleges that someone wrongly failed to

register as a "political committee" or "issue committee," the cure period does not apply. SUMF 79. If a complaint alleges a violation of contribution limits, the cure period does not apply. *See id.* Nor, critically, is it available for the least sophisticated targets of private-enforcement suits: speakers who had no idea they might be regulated in the first place. Tammy Holland would not have been eligible for the cure period. *Id.* Nor would the school-board candidate discussed at page 9. In fact, of the 24 cases in which the administrative courts ruled against respondents in 2015, fully 20 included violations that would not be covered by the cure period. *Id.* 80.

Even when it theoretically applies, moreover, the cure period promises a new round of costly satellite litigation about whether the complainant's view of the law is correct, whether the respondent sufficiently cured the alleged deficiencies, whether the respondent proved its subjective "good faith," and more. Often, these are not simple questions. *See* 8 Colo. Code Regs. 1505-6:18.2.3 (setting forth non-exclusive four-part test for evaluating substantial compliance). Those problems are only magnified by the introduction of mandatory-minimum penalties. If a respondent elects to contest a private-enforcement complaint, the courts have discretion as to what sanction to impose. *See Patterson Recall Comm. v. Patterson*, 209 P.3d 1210, 1218-19 (Colo. App. 2009). But paradoxically, a respondent who "cures" may be subject to thousands of dollars in *mandatory* penalties if it ultimately "fails to satisfy its burden of demonstrating either good faith or substantial compliance." Colo. Rev. Stat. § 1-45-109(c)(II). This poses a serious dilemma for respondents—not least because the campaign-finance code is often unclear about what needs to be reported and because complainants are often wrong on the law.

These problems are unavoidable byproducts of Colorado's unconstitutional system. Whatever half-measures the General Assembly may devise, the fundamental First Amendment

defect—the delegation of enforcement power to "[a]ny person"—remains enshrined in the Colorado Constitution. Even with a cure period in place, prudent respondents still will need to hire attorneys, still will be exposed to subpoenas and examination, and still will be required to appear in court. For many others, the cure period is not available at all. This jigsaw approach adds much to the complexity of an already complex regime, but it does not stop the threat of retaliatory lawsuits from dissuading ordinary Coloradans from speaking out about public affairs. *See Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1183 n.9 (D. Colo. 2014), *aff'd*, 815 F.3d 1267 (10th Cir. 2016) ("The sheer expense and delay of unnecessary litigation chills, if not freezes entirely, prospective speakers' resolve to exercise their First Amendment rights."). The private-enforcement system's constitutional flaws are embedded in the state constitution, and the system is used tirelessly to violate the First Amendment rights of people like Tammy Holland. Only a judgment of facial invalidity will put a stop to this persistent abridgement of free speech.

CONCLUSION

This motion for summary judgment should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I served a true and complete copy of this document, including all accompanying declarations and exhibits, on the following counsel by CM/ECF:

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