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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Paul M. Sherman
Samuel B. Gedge
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
E-mail: psherman@ij.org
sgedge@ij.org

Clifford L. Beem
A. Mark Isley
Danielle C. Beem
BEEM & ISLEY, P.C.
730 17th Street, #850
Denver, CO 80202
Tel.: (303) 894-8100
Fax: (303) 894-8200
E-mail: clbeem@beemlaw.net
amisley@beemlaw.net
dcbeem@beemlaw.net

Attorneys for Plaintiff

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INTRODUCTION

Q: Do the laws get enforced impartially under the private enforcement system?

A: No.

Pl.'s Statement of Undisputed Material Facts (SUMF) 1.

That concession—from the deposition of the Colorado Secretary of State and not contested by the Secretary—captures why Plaintiff Tammy Holland is entitled to summary judgment. The Colorado Constitution outsources to "[a]ny person" the power to enforce the state's campaign-finance laws. These laws serve only to regulate core First Amendment activity, meaning that "the need to eliminate the impermissible risk of discriminatory enforcement" is at its peak. *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991). Yet, as the Secretary concedes, Colorado's private-enforcement system places no check on viewpoint-discriminatory enforcement; "[a]ny person" is free to bring down the full power of the state on his or her political rivals. Such an enforcement system cannot be squared with the First Amendment.

The Secretary nonetheless suggests that the case be set for trial. But no material facts are in dispute—not least because the Secretary disclaims any obligation to justify the private-enforcement system. There is no dispute that the system visits "evident and inherent" burdens on political participants. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745 (2011). The Secretary concedes as much. SUMF 39. There is likewise no dispute—much less a factual one—that the private-enforcement system allows for viewpoint discrimination. Nor is there any evidence on which a fact-finder could conclude that the system is appropriately tailored to serve a compelling enough state interest. The undisputed record evidence shows the opposite: The system sows confusion, it is exploited for corrupt ends, and it "tie[s] up the judicial

system and lead[s] to government waste." *Id.* 4; *see also* Pl.'s Mot. Summ. J. (MSJ) 23-27. The private-enforcement system violates the First Amendment, and no factual dispute precludes judgment for Tammy Holland.

ARGUMENT

I. Colorado's private-enforcement system violates the First Amendment because it places no constraint on viewpoint-discriminatory enforcement.

A. The Colorado Constitution delegates to "[a]ny person" full power to enforce the state's campaign-finance laws. Colo. Const. art. XXVIII, § 9(2)(a). These laws serve only to regulate political participation, with complainants exercising power "in the stead of the state[]." SUMF 59. Yet unlike a publicly accountable official, these complainants are subject to no constraints on viewpoint discrimination. They are free (in the words of Colorado's most prolific complainant) to deploy the enforcement system for "political guerilla legal warfare." *Id.* 2.

That is unconstitutional. Among the First Amendment's bedrock principles is "the need to eliminate the impermissible risk of discriminatory enforcement." *Gentile*, 501 U.S. at 1051. But the private-enforcement system does no such thing. Quite the opposite; as construed by the Colorado courts, "[n]othing in either article XXVIII or the FCPA [Fair Campaign Practices Act] discourages such motivation." SUMF 40. Even without the record of abuse Holland has developed, *see* MSJ 10, 14-17, 23-27, "even the *risk* of viewpoint discrimination runs afoul of the First Amendment," *Hand v. Scott*, --- F. Supp. 3d ----, 2018 WL 658696, at *9 (N.D. Fla. Feb. 1, 2018). Because the private-enforcement system vests its enforcers with "unbridled discretion," it creates "risks to free expression that can be effectively alleviated only through a facial challenge." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988); *see*

also Thornhill v. Alabama, 310 U.S. 88, 98 (1940) (reasoning that discretion is "not . . . any less pernicious" in enforcement authorities than in licensing authorities).

B. The Secretary accepts that the private-enforcement system places no check on viewpoint-discriminatory enforcement. *See* SUMF 1 ("I think the way the system is set up, logically, that's what's happening."); *see also* Sec'y Br. 26 ("Colorado's private enforcement system can be used by complainants who are improperly motivated."); MSJ 12, 16-17. Yet the Secretary offers four theories to try to excuse that defect: He asserts that the motivation of the person prosecuting the private-enforcement lawsuit is irrelevant; he contends that Colorado's system is no worse than any other; he notes that a handful of other states have similar laws; and he disavows any obligation to justify the system at all. Each of these arguments lacks merit.

1. Foremost, the Secretary argues that it makes no difference that the private-enforcement system invites viewpoint discrimination because enforcers' motives are not "pertinent." Sec'y Br. 19. That is wrong. "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). And when the state's coercive power is used to police political speech, the enforcer's motive is absolutely pertinent. After all, "[a]mong the most serious allegations a federal court can address are that an Executive agency has targeted citizens for mistreatment based on their political views." *In re United States*, 817 F.3d 953, 955 (6th Cir. 2016). Yet far from eliminating the "impermissible risk of discriminatory enforcement," *Gentile*, 501 U.S. at 1051, Colorado's private-enforcement system opens the door to that "cardinal First Amendment sin," Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 Ariz. L. Rev. 439, 443 (1995).

The Secretary ignores these principles and the precedent supporting them. "[A] violation is a violation," the Secretary asserts. Sec'y Br. 20. So unless a particular complaint is "patently frivolous" or "unfounded," *id.* 21, 25, the Secretary claims, it does not matter whether the enforcer is exercising the state's power on viewpoint-discriminatory grounds, *see id.* 24-25.

The Secretary cites no support for this proposition, and for good reason: None exists, and First Amendment precedent refutes the Secretary's premise. For example, a criminal prosecution—no matter how meritorious—faces outright dismissal if it would not have been brought but for "genuine animus against the defendant for an improper reason or in retaliation for exercise of legal or constitutional rights." *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992) (citation omitted). That is because "[a]n action that is otherwise permissible or authorized" violates the First Amendment "if it is taken in order to retaliate and suppress speech." *Klen v. City of Loveland*, No. 7-cv-347, 2012 WL 2297905, at *5 (D. Colo. June 18, 2012). The "'quasi-criminal'" sphere of campaign-finance enforcement is no different. *See* Mot. Dismiss 6 (ECF 17). Whether or not a violation has occurred, the decision to bring government power to bear cannot constitutionally be based on the target's political views.[1]

These principles apply with special force here, where the complexity of Colorado's campaign-finance laws all but guarantees that most regulated speakers will slip up. As the Secretary acknowledges, filers will "inevitably make a mistake." SUMF 10; MSJ 3-4. Thus, the private-enforcement system is uniquely susceptible to what then-Attorney General Robert

[1] For this reason, it makes no difference that the Secretary expects that a pending bill may let respondents collect on attorney-fee awards. Sec'y Br. 16 & n.6. Whether or not fees can be collected, they are available only if a complainant's actions are frivolous—narrowly defined—not "simply because [the complainant] may have been politically motivated." MSJ 12 n.3.

Jackson described as "the greatest danger of abuse of prosecuting power": that the enforcer will "pick[] some person whom he dislikes or desires to embarrass, or select[] some group of unpopular persons and then look[] for an offense." *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 5 (1940); *see also* MSJ 24 (describing proposed "consulting services agreement" contemplating exactly that). Put more simply, Colorado's private-enforcement system allows the complainant to "pick people that he thinks he should get, rather than pick cases that need to be prosecuted," Jackson, *supra*, at 5. Particularly in the First Amendment context, such a law cannot stand. *Cf. Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement.").

2. The Secretary excuses this constitutional infirmity by arguing that "every type of [enforcement] system is vulnerable to abuse" and that Colorado's is no worse than any other. Sec'y Br. 18; *see also id.* 9-11, 17-19. That argument also lacks merit. As Holland's opening brief explains, there is a fundamental difference between entrusting law enforcement to a state agency and entrusting it to the public at large. By law, government officials must behave neutrally; their "obligation to govern impartially is as compelling as [their] obligation to govern at all." MSJ 17 (quoting *Duckett v. Mullin*, 306 F.3d 982, 994 (10th Cir. 2002)); *cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) (discussing "explicit guidelines" and "ethical obligations" of government officials). As the Secretary concedes, however, Colorado's private-enforcement system incorporates no such "background duty of impartiality." MSJ 18; *see also* SUMF 1. That—to answer the Secretary's question—is how "Colorado's system compares negatively to other, constitutionally acceptable mechanisms." *See* Sec'y Br. 18.

That is also how Colorado's system differs from the campaign-finance enforcement mechanisms of most other states, including Florida (which the Secretary discusses at length). In Florida, anyone can submit a complaint about campaign-finance violations to the state's Elections Commission. Doubtless most of these complaints are politically motivated. But unlike in Colorado, the power to enforce the law rests with the Commission, not with the private accuser. Fla. Stat. § 106.25(2); *Goff v. Ehrlich*, 776 So. 2d 1011, 1012 (Fla. Dist. Ct. App. 2001) ("Chapter 106 does not confer a private right of action."). That difference is dispositive. Snitching on a political rival is not the same as directly exercising the state's enforcement power. *See Wakeland v. Montano*, 203 F.3d 836, *3 (10th Cir. 2000) (table) ("Merely making reports to law enforcement authorities does not constitute state action."). Whatever a Florida complainant's motives, the state's enforcement power lies with a "neutral" actor "charged with a 'background duty of impartiality.'" Sec'y Br. 11. Enforcement power in Colorado does not.

3. The Secretary also appeals to the regimes of four other states that delegate a degree of enforcement power to private actors. *Id.* 11-17. These types of systems "raise similar First Amendment concerns" as Colorado's. MSJ 22 n.4; *accord* Joseph O'Sullivan, *Is this guy a Washington state watchdog or a partisan annoyance?*, The Seattle Times, May 30, 2017. Moreover, while state courts in Washington and Texas have upheld their private-enforcement systems, the challengers in both states objected chiefly to the potential for "meritless" or "frivolous" lawsuits. *Fritz v. Gorton*, 517 P.2d 911, 934 (Wash. 1974); *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 739 (Tex. 2017). Although Holland maintains both cases were wrongly decided—*Fritz*, decades before most of the Supreme Court precedent on which she relies—neither court addressed the core issue here: Whatever an enforcement action's merits,

if enforcers "target speech *because of* 'particular views taken by speakers on a subject,' viewpoint discrimination is afoot." *Pahls v. Thomas*, 718 F.3d 1210, 1230 (10th Cir. 2013).

4. Finally, the Secretary renounces his obligation to justify the private-enforcement system at all. The general rule, of course, is that any time "a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012) (citation omitted). Yet the Secretary says this rule applies only when a challenged law is "substantive" or "impose[s] affirmative obligations" or "restrictions" on speakers. Sec'y Br. 5. When a law infringes First Amendment rights in other ways, the Secretary suggests, the burden of proof should be reversed. *Id.*

The Secretary cites no authority for this theory, and it is unfounded; "[t]he 'distinction between laws burdening and laws banning speech is but a matter of degree.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011); *cf. Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion) ("[I]t is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures."). Thus, in *Bennett*, 564 U.S. at 748, and *Davis v. FEC*, 554 U.S. 724, 738-40 (2008), the Supreme Court applied strict scrutiny to laws that placed no affirmative obligations or restrictions on the challengers, but infringed their speech by aiding their opponents. Those burdens triggered First Amendment review. Likewise here, the private-enforcement system burdens political speakers, so it is the government's duty to justify it.

The Secretary also argues that because Tammy Holland "raise[s] a First Amendment facial challenge," she "bears the burden of proof." Sec'y Br. 3. That, too, is incorrect, as *Doe v. City of Albuquerque*—the Secretary's leading authority—makes clear. *Id.* 5. Like the Secretary,

the City of Albuquerque defended that case by "argu[ing] that there was 'no burden upon the City to prove anything'" in response to a facial First Amendment challenge. *Doe*, 667 F.3d at 1123. The Tenth Circuit rejected that view. Evaluating a facial challenge, the court reasoned, "involves an examination of whether the terms of the statute itself 'measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contain[] a constitutional infirmity that invalidates the statute in its entirety.'" *Id.* at 1127 (quoting Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 387 (1998)). "The relevant constitutional test . . . remains the proper inquiry." *Id.* Because Albuquerque's challenged law infringed First Amendment rights, the city was thus "erroneous[]" in saying "that it had no burden to do anything in response to [the plaintiff's] summary judgment motion." *Id.* at 1115.

These principles control here. "In a facial challenge" like this one, the courts "simply 'apply[] the relevant constitutional test to the challenged statute . . . .'" *iMatter Utah v. Njord*, 774 F.3d 1258, 1266 (10th Cir. 2014). Here, the test is straightforward: A speech-regulating law violates the First Amendment if it places no constraint on viewpoint-discriminatory enforcement. On its face, Colorado's private-enforcement system is such a law. As a result, it is either presumptively unconstitutional—meaning the Secretary has an affirmative burden to show sufficient tailoring to a sufficient state interest—or per se invalid. *See* MSJ 19-27.[2]

[2] The Secretary also draws heavily on precedent involving the First Amendment overbreadth doctrine, Sec'y Br. 3, but as in *Doe*, this lawsuit "is not properly characterized as an overbreadth challenge," 667 F.3d at 1123 n.7. That is because Holland "does not contend that the [private-enforcement system] has some legitimate sweep that threatens to chill the constitutional expressive activity of others outside of that sweep." *See id.* Rather, she "asserts a personal right to be judged under a constitutionally valid rule of law," Isserles, *supra*, at 387, and the private-

II. No factual dispute precludes entry of judgment for Tammy Holland.

Although he disclaims any burden to justify the private-enforcement system, the Secretary also argues that the law's constitutionality raises factual issues that demand a trial. That is incorrect. Contrary to the Secretary's suggestion, there is no factual dispute that the private-enforcement system allows for viewpoint-discriminatory enforcement. Nor is there a factual dispute that the system burdens political participants. And regardless of the level of First Amendment scrutiny, the Secretary has submitted no evidence on which a fact-finder could conclude that the system is tailored to any state interest.

A. No factual dispute precludes the Court from determining that the private-enforcement system invites viewpoint discrimination.

The Secretary contends that there is a factual question "whether improperly motivated complaints are more common under the Colorado model than in other states." Sec'y Br. 19. But again, that emphasis on "complaints"—rather than enforcement—misses the point. Unlike the regimes of most other states, Colorado's private-enforcement system gives "[a]ny person" the power not just to complain about campaign-finance violations, but to directly exercise the state's enforcement power. That feature makes Colorado's system invalid in a way that the laws of most "other states" are not. This Court needs no "counterfactual baseline" or "comparative analysis" (*id.* 18, 19) to hold that the private-enforcement system violates the First Amendment.

The Secretary also suggests that specific complainants in Colorado may not in fact have been acting in a viewpoint-discriminatory manner. Sec'y Br. 19-20. That is similarly beside the point. "[T]he success of a facial challenge on the grounds that a[] [law] delegates overly broad

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enforcement system is not such a law because it allows for viewpoint-discriminatory enforcement.

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). Put differently, "[t]he question is not whether discriminatory enforcement occurred" in a particular case, but whether Colorado's system makes "discriminatory enforcement . . . a real possibility." *Gentile*, 501 U.S. at 1051. As the Secretary has acknowledged, "[t]here is real potential for abuse of the system." SUMF 44. That should be the end of the matter.

The Secretary's determination to litigate individual complainants' motives only underscores the need for facial relief. Sec'y Br. 19-20 (discussing Tom Thompson, Tom Turrell, Margaret Perl, and Campaign Integrity Watchdog). Without a background duty of impartiality, a complainant's "*post hoc* rationalizations" and "the use of shifting or illegitimate criteria" will always make it "difficult for courts to determine in any particular case whether the [enforcer] is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood*, 486 U.S. at 758. Even Campaign Integrity Watchdog denied engaging in viewpoint discrimination, Sec'y SUMF 4, despite direct evidence to the contrary, SUMF 2-3, 38, 48, 50-54, 68-69.

The Secretary's objection to Dr. Milyo's analysis drives home the point. Sec'y Br. 19. The Secretary takes no issue with his finding that, out of 291 private-enforcement cases, at least 136 involved parties aligned on opposing political campaigns. (Another 50 involved Campaign Integrity Watchdog or its director.) Rather, the Secretary says it is impossible to infer from that evidence that a complainant was motivated—even in part—by the respondent's political views.[3]

[3] The Secretary incorrectly states that Holland estimates that "approximately" 70 to 80 percent of private-enforcement complaints have been filed on viewpoint-discriminatory grounds. Sec'y Br.

Of course, why people sue their political rivals is hardly a mystery, even if we cannot look into their hearts. And, to be sure, some complainants may have a mix of motives. Tom Turrell, for example, explained that his decision to sue Tammy Holland reflected both concerns about perceived campaign-finance violations and frustration with her public statements about local politics. *Compare* SUMF 23, *with* Sec'y Resp. Pl.'s SUMF 23. But that difficulty in discerning an enforcer's state of mind spotlights why an enforcement system like Colorado's violates the First Amendment. Because it places no check on enforcers' discretion, "the difficulty of effectively detecting, reviewing, and correcting content-based censorship" can be addressed only through "immediate" facial relief. *City of Lakewood*, 486 U.S. at 759; *see also Summum v. City of Ogden*, 297 F.3d 995, 1005 (10th Cir. 2002) ("The Supreme Court has expressed considerable concern that post hoc rationalizations may obscure viewpoint discrimination.").

B. No factual dispute precludes the Court from determining that the private-enforcement system burdens political speakers.

The Secretary also contends that there is a factual dispute over whether the private-enforcement system places burdens on political speakers. Sec'y Br. 23-24, 26. There is not.

1. Foremost, getting sued in a civil-enforcement action is an "evident and inherent" burden. *Bennett*, 564 U.S. at 745. The Supreme Court has recognized this point for decades.[4] So,

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18. That is just the percentage for which Holland's expert uncovered direct or circumstantial evidence of viewpoint discrimination. Whether or not public-record evidence exists, the Secretary and the Colorado courts alike acknowledge that virtually every complainant enforces the law in a viewpoint-discriminatory manner. *See* MSJ 12, 17; SUMF 1, 40.

[4] *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004); *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 794 (1988); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 n.21 (1978); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982).

too, did this Court when it denied the Secretary's motion to dismiss. R. & R. 7-8 (ECF 63), *adopted by* Order (ECF 68); *see also* Volokh Amicus Br. 4 (ECF 40). As a result, this Court "do[es] not need empirical evidence to determine that the law at issue is burdensome." *See Bennett*, 564 U.S. at 746.

If more were needed, the record removes all doubt. The Secretary's office itself has stated that private-enforcement complaints can "bankrupt" and "close" political groups. SUMF 10. The Secretary's office has stated that private-enforcement complaints can "irreparably harm small entities, thereby violating their first amendment rights." *Id.* The Secretary's office has also stated that the private-enforcement system "allows frivolous and litigious complainants to potentially violate the free speech and due process rights of those seeking to lawfully participate in political discourse." *Id.* The Secretary's 30(b)(6) representative testified:

> A. . . . [I]f you aren't somebody who is sophisticated, you're not a candidate running for a major party, you're not somebody who is kind of a repeat player or somebody who can afford to hire an attorney or an accountant, and you speak on an issue and find yourself the subject of a complaint, it is not in your general course of business, and so you may decide it's not worth it.
>
> Q. Why wouldn't it be worth it?
>
> A. Because 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. The Secretary's 30(b)(6) representative also testified that the private-enforcement system "stops people from participating in the political process." *Id.* None of this is disputed.

Plaintiff Tammy Holland testified to similar effect. "Being the subject of campaign-finance complaints caused [her] 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 and share her views widely about

educational issues, but because nothing prevents any person from putting her through the enforcement process all over again, she no longer speaks out about the issues that matter to her." *Id.* 27; *cf. Bennett*, 564 U.S. at 744 (looking to plaintiffs' declarations). Holland's experience is much like Matthew Sheldon's, who quit politics in Colorado as a direct result of being subjected to the private-enforcement system. SUMF 32.

These concerns are justified, particularly given the conduct of groups like Campaign Integrity Watchdog (CIW)—Colorado's highest-volume filer of private-enforcement complaints—which has advertised its services by announcing that "[d]iscovering, 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*." *Id.* 3. (It is undisputed that almost all private-enforcement respondents in recent years have had to hire counsel to defend themselves. *Id.* 77.) CIW's director has endorsed the system as a means to "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.* 37; *id.* 2, 75. He has further boasted of "shut[ting] down" a group by making its lawyer "spend his time and money" defending against a meritless complaint. *Id.* 37. In another case, CIW leveraged the private-enforcement system to stifle criticism of the organization and its founder. *Id.* 54. CIW settled yet another case on the condition that its target terminate all advocacy operations. *Id.* 68.

In sum, the record proves the obvious: The private-enforcement system burdens speakers.

2. As against all this, the Secretary points to one witness's testimony that "any fear [she] had of being dragged into a campaign finance lawsuit wouldn't stop [her] from speaking [her] mind" in the future. Sec'y Br. 24. The Secretary also notes that participants in a field study

conducted by Holland's expert witness gave "mixed" answers to the question whether responding to private-enforcement complaints limited their ability to participate in the activity that led to the complaint. *Id.* 23. (The Secretary overlooks a separate finding that "24 participants [out of 34] indicate that their experience has had a negative impact on their willingness and enthusiasm to get involved in political activities in the future." Pl.'s Resp. Sec'y SUMF 18.)[5]

That different people may react differently to being sued is not surprising. Nor does it generate a triable fact issue on whether Colorado's law burdens speakers. In *Bennett*, for example, the Supreme Court held that a matching-funds provision burdened speech even though "some candidates may be willing to bear the burden." 564 U.S. at 745. Likewise here, that some targets of private-enforcement complaints may persevere with their political advocacy "does not make the law any less burdensome." *See id.* Colorado's private-enforcement system burdens respondents, and it makes many reasonable people—Tammy Holland among them—unwilling to engage fully in our democratic process. The Secretary concedes as much, *see* page 12, above, and nothing in the record creates a genuine dispute of material fact.

C. There is no evidence on which a fact-finder could conclude that the private-enforcement system is sufficiently tailored to a sufficient state interest.

Nor does the record provide a basis to conclude that the private-enforcement system satisfies any level of First Amendment scrutiny. The Secretary ignores Holland's argument that the private-enforcement system is so defective as to be per se invalid. MSJ 19-20. The Secretary

[5] The Secretary notes that Dr. Milyo's survey is not "statistically significant" because the pool of respondents was small. Sec'y Br. 23. But Dr. Milyo "ma[d]e no attempt to describe this sample as representative of the larger set of respondents, or to conduct any tests of statistical significance." SUMF Reply 28. "Instead," he explained, "these data are analyzed as case studies of persons who are willing to discuss their experiences as respondents to private enforcement actions." *Id.* The Secretary's expert agreed that data from such a survey "can be useful." *Id.*

presents no evidence that the system is tailored to any state interest. *Id.* 20-22. The Secretary does not even rebut evidence that the system "subverts the state's claimed interests." *Id.* 23-27.

The Secretary's silence appears to follow from his belief that the government has no obligation to justify Colorado's private-enforcement system. That belief is misplaced. *See* pages 7-8, above. Whatever the level of scrutiny, "[i]n the First Amendment context, fit matters." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014) (plurality opinion). And no matter if a lawsuit seeks facial or as-applied relief, "when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." *Doe*, 667 F.3d at 1120 (citation omitted). The Secretary has not carried that burden, and his "refusal to provide any evidence in response to [the] summary judgment motion" is case-dispositive. *Id.* at 1131. "'[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue,' Federal Rule of Civil Procedure 56 'requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.'" *Id.* at 1135. The Secretary has not done so here, meaning Holland is entitled to summary judgment.

III. The Secretary's residual arguments lack merit.

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

As Holland's opening brief explained, the 2017 amendment to Colorado's campaign-finance statute (H.B. 17-1155's cure period) solves none of the First Amendment problems discussed above. MSJ 27-29. Viewpoint-discriminatory complainants can still haul opponents into court; respondents still need to defend themselves. The only difference is that some respondents can try to deflect fines by carrying "the burden of demonstrating good faith or

substantial compliance." Colo. Rev. Stat. § 1-45-109(4)(c)(II). But "[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*, 542 U.S. at 670-71. That is especially true here, since respondents face mandatory fines if they invoke the cure period unsuccessfully. MSJ 27-28.

Beyond appealing to "legislative discretion," the Secretary ignores these shortcomings. Sec'y Br. 29. He also writes off the most obvious flaw in the amendment: It provides no protection at all to the most vulnerable targets of the private-enforcement system. The Secretary promises that H.B. 17-1155 applies "in a large number of cases." *Id*. But the provision would not have protected Tammy Holland had it been in place in 2015. *See* MSJ 28. Nor would it have protected respondents in fully 20 of the 24 cases that year in which the administrative courts found campaign-finance violations. *Id*.; *see also* Statement Stip. Facts ¶¶ 13, 15 (ECF 129-63) (detailing similar figures for 2014 and 2016). Nor—despite the Secretary's suggestion to the contrary—would it have protected Matt Sheldon, the school-board candidate who testified to a "devastating" experience with the private-enforcement system. MSJ 9, 28; Sec'y Br. 24.

At the same time, H.B. 17-1155 makes one thing clear: The General Assembly is aware of the serious problems with Colorado's private-enforcement system. Because the system is entrenched in the state constitution, however, lawmakers are powerless to meaningfully address these problems through the legislative process. Only a judgment that the private-enforcement system is unconstitutional will free the General Assembly to enact a system that enforces the state's campaign-finance laws effectively, impartially, and consistent with the First Amendment.

B. Section 1983 is the proper vehicle for vindicating First Amendment rights.

Likewise without merit is the Secretary's view that Holland's claim may entitle her to

relief under the Declaratory Judgment Act but not the Civil Rights Act. "Whether or not Plaintiff is entitled to summary judgment on her claim for declaratory judgment," the Secretary suggests, "she does not qualify for relief under 42 U.S.C. § 1983 because the Secretary's role in Colorado's private enforcement system for campaign finance is purely ministerial." Sec'y Br. 6.

As a First Amendment plaintiff, Holland is entitled to relief under Section 1983. And the Secretary is the proper party to defend such an action because, "by virtue of his office," he "has some connection with the enforcement of the act." *Ex Parte Young*, 209 U.S. 123, 157 (1908). Colorado law "confers upon [the Secretary] the obligation to enforce and administer the state's campaign finance laws." *Sanger v. Dennis*, 148 P.3d 404, 409 (Colo. App. 2006). As to the private-enforcement system specifically, he is charged by law with "refer[ring] [each] complaint to an administrative law judge . . . ." Colo. Const. art. XXVIII, § 9(2)(a); Sec'y SUMF 2. He has also exercised his power to promulgate rules relating to the private-enforcement system. Colo. Const. art. XXVIII, § 9(1)(b); 8 Colo. Code Regs. 1505-6:18.2. That involvement easily amounts to state action under the Fourteenth Amendment and Section 1983 alike. Wright & Miller, *Federal Practice & Procedure* § 3573.2 at 586 (3d ed. 2008) ("[I]f requisite state action is present to satisfy the Fourteenth Amendment, this is enough to satisfy the color-of-law requirement of § 1983.").

The authority on which the Secretary relies is not to the contrary. All those cases—and all the tests the Secretary discusses—address whether state action may be imputed to a private party's private conduct. Sec'y Br. 6-9. Here, however, it is the Secretary's direct "connection with the enforcement of the [challenged law]"—a quintessentially public act by a public officer—that makes him the proper party to defend the private-enforcement system. *See Ex Parte*

Young, 209 U.S. at 157. His concession that a favorable judgment would redress Holland's injury only confirms the point, for "there is a common thread between Article III standing analysis and *Ex parte Young* analysis." *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013); Sec'y Br. 6 ("The Secretary does not . . . challenge Plaintiff's standing under Article III.").

Further, it makes no difference that the Secretary sees his role as ministerial; Section 1983 suits are often brought against officials "acting . . . in a ministerial capacity." *See Peterson v. Lacabe*, No. 10-cv-59, 2010 WL 4220024, at *3 (D. Colo. Oct. 20, 2010). "[E]ven 'entirely ministerial' duties can be sufficient" for Section 1983 actions, because "'the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights.'" *Constitution Party of Penn. v. Cortes*, 824 F.3d 386, 396 (3d Cir. 2016). That is why the Secretary is always the defendant in challenges to Colorado's campaign-finance laws (Sec'y Br. 1 n.1)—even, as here, over objections that his role is "purely ministerial," Sec'y Scheduling Order Br. at 15, *Sampson v. Coffman*, No. 06-cv-1858 (D. Colo. Jan. 19, 2007).

C. The Court should enter an enforceable judgment without delay.

"In the event that this Court were to issue a ruling in Plaintiff's favor before election day," the Secretary urges that the Court "stay the ruling pending appeal or . . . at least delay the effective date of any injunction until after the election so that the General Assembly can address the issue in early 2019." Sec'y Br. 2 n.2. If such a judgment were entered, the Secretary would of course be free to appeal and move for an accompanying stay. But it would be premature for the Court to grant a stay before any appeal has been filed and before the Secretary has carried his burden to justify one. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The Secretary's request that an adverse judgment be subject to freestanding "delay" is even less justified. The Secretary's

footnote cites no basis for this request, and Holland is aware of none. Further, the only effect of such a delay would be to allow complainants like CIW to persist in filing lawsuits under an invalid law—a state of affairs that would raise all types of constitutional and practical issues.

More fundamentally, the Secretary's request reflects a mistaken view that the relief Holland seeks is "drastic" and "broad[]." Sec'y Br. 1, 2. It is not. Judgment for Holland would not displace a single campaign-finance requirement. Nor would it disrupt the Secretary's separate power to enforce the law against tardy filers. *See Colo. Ethics Watch v. Gessler*, 363 P.3d 727, 728 (Colo. App. 2014). Rather, it would invalidate an abuse-prone system that violates countless Coloradans' rights; that impairs the Secretary's ability to offer authoritative guidance; that imposes enormous burdens over trivial violations; and that disserves the state's interests by distorting campaign-finance laws over the Secretary's objections, wasting state resources, and inviting corruption. MSJ 23-27. An enforceable judgment should be entered without delay.

CONCLUSION

Tammy Holland's motion for summary judgment should be granted.

Dated: February 22, 2018.

Respectfully submitted,

s/ Samuel B. Gedge
Paul M. Sherman
Samuel B. Gedge
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
E-mail: psherman@ij.org
sgedge@ij.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2018, I served a true and complete copy of this document, including the accompanying declaration and exhibits, on the following counsel by CM/ECF:

Matthew D. Grove
COLORADO ATTORNEY GENERAL'S OFFICE
Ralph L. Carr Colorado Judicial Center
1300 Broadway
Denver, CO 80203
E-mail: matt.grove@coag.gov

s/ Samuel B. Gedge
Samuel B. Gedge
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
Fax: (703) 682-9321
E-mail: sgedge@ij.org