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United States Court of Appeals
Tenth Circuit

August 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COLORADO UNION OF TAXPAYERS, INC.,

Plaintiff - Appellant.

v.

JENA GRISWOLD, in her official capacity as Colorado Secretary of State; JUDD CHOATE, in his official capacity as Director of Elections, Colorado Department of State,

Defendants - Appellees.

No. 22-1122
(D.C. No. 1:20-CV-02766-CMA-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **MURPHY**, Circuit Judges.

The plaintiff, Colorado Union of Taxpayers, spends money to advocate on issues appearing on Colorado ballots. Colorado Union's

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* Oral argument would not help us decide the appeal, so we have decided the appeal based on the appendices and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

advocacy allegedly violated state requirements for disclosure and registration. But Colorado Union challenged these requirements, invoking the First Amendment in a pre-enforcement action.

Responding to these challenges, the defendants moved for summary judgment[1] on standing and the merits. For standing, Colorado Union argues that it fears an enforcement action. The credibility of that fear involves a fact-issue that prevents summary judgment.

Standing

I. Colorado Union asserts standing based on a fear of enforcement.

For standing, a plaintiff must show

- an injury-in-fact
- that is traceable to the challenged conduct of the defendant and
- likely to be redressed by a favorable judicial decision.

Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016).

No one has brought an enforcement action against Colorado Union for violating the requirements involving disclosure or registration. But an injury-in-fact could exist if Colorado Union

- intended to engage in conduct that would (1) arguably violate the law and (2) give rise to a credible fear of an enforcement action or
- suffered from a chilling effect on the right to free speech.

[1] Colorado Union also moved for summary judgment, but this motion isn't at issue in the appeal.

See 303 Creative LLC v. Elenis, 6 F.4th 1160, 1171–72 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2023); *Rio Grande Found. v. City of Santa Fe*, 7 F.4th 956, 959 (10th Cir. 2021). If Colorado Union intentionally violated the requirements through protected speech, standing could exist if the fear of enforcement had been credible. *See Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). But even without a violation, Colorado Union could have standing based on the chilling of its speech. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc).

The district court concluded that standing didn't exist because Colorado's requirements hadn't chilled Colorado Union from exercising its right to speak.[2] But by the summary-judgment stage, Colorado Union had abandoned its theory of chilled speech, relying instead on an intent to violate the law and fear of future enforcement.[3] *See* Appellant's App'x vol. 1, at 118–20, 158–59 (briefing a fear of enforcement at the summary-

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[2] The district court concluded that Colorado Union had failed to satisfy its burden at the summary-judgment stage on the issue of standing. Appellant's App'x vol. 1, at 187. But the court dismissed the action rather than grant summary judgment to the defendants. *Id.*

[3] The defendants initially argued that Colorado Union had relied only on a chilling of its rights. But the defendants later acknowledged that Colorado Union had asserted "non-chill-based injuries." Appellees' Supp. Resp. Br. at 3.

judgment stage). So we consider the availability of summary judgment on two related questions:

1. Does Colorado Union's advocacy on ballot issues arguably violate Colorado's requirements?

2. Does Colorado Union credibly fear an enforcement action?

II. We assess standing based on the standard for summary judgment.

Standing is jurisdictional, and courts can ordinarily resolve disputed jurisdictional facts. *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 906 (10th Cir. 2012). But the defendants challenged jurisdiction through a motion for summary judgment. So we must apply the standard for summary judgment, viewing the evidence favorably to Colorado Union. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (applying the summary-judgment standard when the defendant challenges standing through a motion for summary judgment); *Zahourek Sys., Inc. v. Balanced Body Univ., LLC*, 965 F.3d 1141, 1143 (10th Cir. 2020) (stating that when we review a ruling on summary judgment, we view "the evidence in the light most favorable to the nonmoving party"). ¡

We not only view the evidence favorably to Colorado Union but also apply a low evidentiary bar for pre-enforcement standing on First Amendment claims. *See Peck v. McCann*, 43 F.4th 1116, 1133 (10th Cir. 2022); *accord Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003)

("As to whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low.").

Applying a low evidentiary bar and viewing the evidence favorably to Colorado Union, we consider whether a factfinder could reasonably find

- an intent to engage in conduct that arguably violated Colorado's requirements and
- a credible fear of an enforcement action.

See 303 Creative LLC v. Elenis, 6 F.4th 1160, 1172 (10th Cir. 2021) (stating the elements of standing for a pre-enforcement challenge), *rev'd on other grounds*, 143 S. Ct. 2298 (2023); *Planned Parenthood of the Rocky Mountains Servs. v. Owens*, 287 F.3d 910, 916 (10th Cir. 2002) (stating that the genuineness of an issue of material fact turns on whether a reasonable factfinder could find for the nonmovant).

III. Colorado imposes disclosure and registration requirements based on the amounts spent or received for advocacy on ballot issues.

We apply the summary-judgment standard and low evidentiary bar in light of Colorado's constitutional and statutory requirements for entities advocating on ballot issues. These requirements exist in two tiers.

The first tier addresses entities spending or accepting between $200 and $5,000 "for the major purpose of supporting or opposing" ballot issues. Colo. Rev. Stat. § 1-45-103(16.3)(a). These entities ("small-scale issue committees") are subject to modest requirements involving disclosure

and registration. *See* Colo. Rev. Stat. §§ 1-45-103(16.3)(a), 1-45-108(1.5)(b)(I); Colo. Const. art. XXVIII, § 2(10).

The second tier addresses entities that spend or accept over $5,000 and have a major purpose of supporting or opposing ballot issues. These entities (regular "issue committees") are subject to greater requirements for disclosure and registration. *See* Colo. Const. art. XXVIII, § 2(10)(a)(I) (providing that an issue committee is an entity that spends more than $200 *or* has a major purpose of ballot issue advocacy); Colo. Rev. Stat. §§ 1-45-103(12) (same), 1-45-108(1) (setting disclosure requirements for issue committees). Similar requirements apply to entities that spend or accept more than $5,000 even if they lack a major purpose of supporting or opposing ballot issues. *See* Colo. Rev. Stat. § 1-45-108(1.5)(c)(I)–(II) (imposing additional disclosure requirements when a small-scale issue committee spends more than $5,000).

Colorado Union asserts standing to challenge the constitutionality of the requirements for small-scale issue committees and regular issue committees. We separately consider standing for each challenge under the standard for summary judgment. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (noting that a plaintiff must separately demonstrate standing for each claim).

IV. Dismissal was not justified for the challenge as a small-scale issue committee.

In 2020, Colorado Union spent roughly $3,500 on ballot advocacy, which arguably triggered the requirements for small-scale issue committees. But Colorado Union refused to comply with the requirements for small-scale issue committees. Given this refusal, Colorado Union urges standing based on a credible fear of enforcement for this expenditure and similar expenditures in the future.

We consider the credibility of this fear by viewing the evidence favorably to Colorado Union. *See* Part II, above. Viewing the evidence this way, we consider whether a factfinder could reasonably find a credible fear of enforcement. *See id.*

A. A reasonable factfinder could find the factual foundation for an injury-in-fact.

The threshold issue is whether Colorado Union arguably fit the definition of a "small-scale issue committee." The defendants answer *no*, arguing that Colorado Union couldn't qualify as a small-scale issue committee because the organization lacked a major purpose of supporting or opposing ballot issues.

For this argument, the defendants rely on a Colorado regulation that defines "[i]ssue committee" as a person or group that spends more than $200 on ballot issues *and* has the major purpose of supporting or opposing ballot issues. 8 Colo. Code Regs. § 1505-6, Rule 1.9. But this regulation

conflicts with a state statute, which refers to the purpose of the expenditure itself rather than the organization. The statute provides that a small-scale issue committee is an issue committee that receives or spends less than $5,000 "*for* the major purpose of supporting or opposing any ballot issue." Colo. Rev. Stat. § 1-45-103(16.3)(a) (emphasis added); *see* p. 5, above.

Given this conflict, the statutory definition takes precedence. *See Cartwright v. State Bd. of Acct.*, 796 P.2d 51, 53 (Colo. App. 1990) (stating that "any regulation that is inconsistent with or contrary to a [state] statute is void"). Applying the statutory definition, a factfinder could reasonably find that Colorado Union

- had arguably triggered the requirements for a small-scale issue committee by spending roughly $3,500 for the major purpose of supporting or opposing ballot issues and
- would violate these requirements by refusing to register as a small-scale issue committee.

The resulting issue is the credibility of Colorado Union's fear of enforcement. In evaluating the credibility of that fear, we consider at least three factors:

1. whether "any person" can file a complaint,
2. whether Colorado Union has shown past enforcement over the same conduct, and
3. whether the defendants have disavowed future enforcement.

303 Creative LLC v. Elenis, 6 F.4th 1160, 1174 (10th Cir. 2021) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164–65 (2014)),[4] *rev'd on other grounds*, 143 S. Ct. 2298 (2023); *see* pp. 19–20, below.

1. Although any person can file a complaint, the Secretary of State's office retains some prosecutorial discretion.

Anyone can file a complaint for violating the requirements imposed on small-scale issue committees. Colo. Rev. Stat. § 1-45-111.7(2)(a). But the Secretary of State's office can ultimately decide whether to pursue an enforcement action.

Once a complaint is filed, the Secretary of State's office conducts an initial review to determine whether the complaint identifies a violation Colo. Rev. Stat. § 1-45-111.7(3)(b). If a violation is identified and isn't cured voluntarily, the Secretary of State's office decides whether to file its own complaint with a hearing officer. Colo. Rev. Stat. § 1-45-111.7(5). The Secretary of State's office can also move for dismissal. Colo. Rev. Stat. § 1-45-111.7(5)(a)(IV). And even if the Secretary of State's office

[4] The defendants distinguish *303 Creative* on the ground that it involved chilled speech. But *303 Creative* applied the same factors that the Supreme Court had used in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161–66 (2014). And *Susan B. Anthony List* did not involve a theory of chilled speech. In *Susan B. Anthony List*, the plaintiffs had alleged an intent to engage in arguably unlawful speech. *Id.* at 162. The *Susan B. Anthony List* factors bore on *303 Creative* because in both ordinary pre-enforcement cases and chilled speech cases, a plaintiff must show a credible fear of enforcement. *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). We have never interpreted a "credible fear" differently based on the plaintiff's theory of standing.

were to move for dismissal, the Deputy Secretary of State could deny that motion. Colo. Rev. Stat. § 1-45-111.7(5)(a)(IV); *see* Appellant's App'x vol. 2, at 202 (an order by the Deputy Secretary of State denying a motion to dismiss in a similar matter).

The defendants argue that even though any individual can file a complaint, the State decides whether to start an adversarial process. In our view, however, a favorable view of the evidence could support standing on the first factor.

The credibility of a fear of enforcement can be "bolstered by the fact that authority to file a complaint . . . is not limited to a prosecutor or an agency." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014). Under Colorado law, the authority to file a complaint extends beyond prosecutors and agencies to any person, enhancing the credibility of the plaintiff's fear. For example, Colorado Union could fear complaints from political opponents trying to gain an edge on hotly contested ballot issues. *See id.* ("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."). For political opponents, the temptation to file a complaint could lead Colorado Union to view itself as an "easy target." *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 790 (8th Cir. 2014) (cleaned up).

We have addressed a similar enforcement procedure, concluding in *303 Creative* that this factor weighed against summary judgment when another Colorado statute allowed either individuals or an agency to file an administrative complaint. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1169 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2023). There an individual's complaint would trigger an investigation by the agency to assess probable cause. *Id.* Though the statute allowed the agency to file a complaint, we concluded that this factor supported a credible fear of enforcement (for purposes of summary judgment) because individuals could start the process by filing their own complaints. *Id.* at 1174.

The same is true here. Any person can initiate an administrative action against Colorado Union, just as any person could have filed a complaint in *303 Creative*. This factor thus supports standing at the summary-judgment stage.

2. We need not decide whether Colorado Union has shown prior enforcement of the requirements for small-scale issue committees.

Colorado Union supports the second factor by pointing to another organization, Unite for Colorado, that was subject to enforcement for violating Colorado's requirements for issue committees. Unite for Colorado spent millions of dollars, so it was a regular issue committee—not a small-scale issue committee. On the other hand, Colorado Union could potentially fear enforcement given that the State was willing to

enforce the requirements for regular issue committees. For the sake of argument, however, we assume that this factor cuts against standing for Colorado Union's advocacy as a small-scale issue committee.

3. The defendants have not disavowed enforcement.

The third factor favors Colorado Union because the defendants haven't disavowed enforcement against Colorado Union. Appellees' Resp. Br. at 30; *see 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021) (concluding that this factor supported standing because the State of Colorado had declined to disavow future enforcement against the plaintiff), *rev'd on other grounds*, 143 S. Ct. 2298 (2023).

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Considering the various factors, a factfinder could reasonably find that Colorado Union had a credible fear of enforcement. Though there's no evidence of an enforcement action against small-scale issue committees, the defendants didn't disavow enforcement and any person could file a complaint.

B. Colorado Union didn't need to seek an advisory opinion before suing.

The defendants point out that Colorado Union could have requested an advisory opinion from the Secretary of State on the need to comply with the requirements for small-scale issue committees. *See* Colo. Rev. Stat. § 1-45-111.7(8)(a). But even with a request, the Secretary of State could

have declined to issue an advisory opinion. Colo. Rev. Stat. § 1-45-111.7(8)(b).

The potential availability of an advisory opinion doesn't foreclose a fact-issue on the credibility of Colorado Union's fear. Granted, the opportunity for an advisory opinion might create skepticism over Colorado Union's stated fear. But that skepticism assumes that

- Colorado Union's principals knew that they could ask for an advisory opinion and
- they believed that an advisory opinion could prevent an enforcement action.

A factfinder could reasonably reject both assumptions.

The president of Colorado Union testified that the organization didn't know about the procedure for an advisory opinion. Appellant's App'x vol. 2, at 48. If this testimony were credited, the factfinder would have little reason to consider Colorado Union's failure to seek an advisory opinion.

But even if the Secretary of State were to issue an advisory opinion favoring Colorado Union, the opinion wouldn't prevent anyone from filing a complaint. To the contrary, the advisory opinion could serve only to support an affirmative defense upon the filing of a complaint. Colo. Rev. Stat. § 1-45-111.7(8)(c).

At the summary-judgment stage, we thus conclude that the failure to seek an advisory opinion doesn't prevent a reasonable factfinder from crediting Colorado Union's fear of an enforcement action.

V. Dismissal was not justified for the challenge as a regular issue committee.

In 2019, Colorado Union spent $5,001 on a ballot issue. The size of that expense could trigger Colorado's requirements for disclosure and registration as a regular issue committee, and Colorado Union didn't comply with these requirements. So a factfinder could reasonably find the factual foundation for standing.

A. The inquiry involves factual issues on Colorado Union's intent to engage in arguably illegal conduct and potential enforcement of the statutory requirements.

We again ask whether Colorado Union has shown a dispute of fact on the elements for standing. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1182 (10th Cir. 2010). This inquiry involves two questions:

1. whether Colorado Union created a genuine fact-issue on an intent to engage in an arguably unlawful course of conduct and
2. whether Colorado Union created a genuine fact-issue involving a credible fear of an enforcement action.

See 303 Creative LLC v. Elenis, 6 F.4th 1160, 1171–72 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2023).

1. A factfinder could reasonably find an intent to arguably violate the requirements for regular issue committees.

Colorado Union didn't need "to confess that [it] will in fact violate the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014). Rather, Colorado Union needed only to show that potential liability could inherently lie based on the organization's planned advocacy. *303 Creative LLC*, 6 F.4th at 1173.

To satisfy this burden, Colorado Union presented a sworn statement that it

- intended to spend more than $5,000 on ballot issues and
- wanted to avoid registering.

Appellant's App'x vol. 2, at 35. This sworn statement creates a reasonable inference that Colorado Union intended to engage in conduct that would arguably violate the requirements for regular issue committees.

The defendants argue that the statutory requirements don't apply because Colorado Union lacks a major purpose of supporting or opposing ballot issues.[5] This argument rests on a misinterpretation of state law and a factual dispute.

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[5] Colorado Union's president acknowledged that the organization lacked "*the* major purpose" of supporting or opposing ballot issues. Appellant's App'x vol. 2, at 35 (emphasis added). Even if Colorado Union lacked *the* major purpose of advocacy on ballot issues, this advocacy could at least constitute *a* major purpose. *See Independence Inst. v. Coffman*, 209 P.3d 1130, 1139 (Colo. App. 2008) (stating that in the Colorado

The legal misinterpretation involves the role of a "major purpose." Colorado's constitution and statutes allow classification as a regular issue committee whenever an entity spends or accepts over $200 for advocacy on ballot issues. Colo. Const. art. XXVIII, § 2(10)(a)(II); Colo. Rev. Stat. § 1-45-103(12)(a).[6] A "major purpose" is required only if the entity spends or accepts a smaller amount. Colo. Const. art. XXVIII, § 2(10)(a); Colo. Rev. Stat. § 1-45-103(12)(a).

Granted, a state *regulation* defines "issue committee" more narrowly, requiring a major purpose of ballot advocacy *and* expenditures or contributions exceeding particular thresholds. 8 Colo. Code Regs. § 1505-6, Rule 1.9; *see Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 498 (Colo. App. 2010) (stating that even though article XXVIII of the Colorado Constitution uses "the ordinarily disjunctive 'or,' the Secretary of State has determined that" the requirement is triggered only when the entity spends or accepts more than $200 and has a major purpose of ballot

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Constitution, "article XXVIII uses 'a major purpose' instead of *Buckley*'s 'the major purpose'"); *see also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) ("A single organization can have multiple 'major purposes.'").

[6] Colorado's constitution and statutes require disclosures when an entity spends $200 or more on ballot issues. *See* text accompanying note. But we held in 2016 that the disclosure requirements were unconstitutional as applied to entities spending $3,500 or less. *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1280 (10th Cir. 2016).

advocacy); *Sampson v. Buescher*, 625 F.3d 1247, 1249 & n.1 (10th Cir. 2010) (noting that the Colorado Secretary of State interpreted the constitutional provision by replacing "or" with "and").

The defendants insist that they adhere to the regulation, not the state's constitution or statutes. But given the primacy of the state constitution and state statute, "we enforce the 'or' in the issue-committee definition just as it is written in the Colorado Constitution." *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1269 n.2 (10th Cir. 2016); *see Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 936–37 (Colo. App. 2012) (refusing to defer to the Colorado Secretary of State's determination of whether an entity is an issue committee under Colorado law based on the statutory definition). Under the constitutional and statutory definition, a factfinder could reasonably find that Colorado Union was at least arguably a regular issue committee in light of the evidence of an intent to continue spending more than $5,000 on ballot advocacy.

Second, even if we were to use the regulatory definition rather than the definition in the state constitution and state statutes, a factfinder could still reasonably find that Colorado Union arguably had a major purpose of supporting or opposing ballot issues.

When the district court granted summary judgment, Colorado law required consideration of the organization's

- stated objectives or

- demonstrated pattern of conduct based on past expenditures or involvement in communications supporting or opposing ballot issues.

Colo. Rev. Stat. § 1-45-103(12) (2020). The defendants acknowledged that these factors were "fact-intensive" and weren't "reducible to a formulaic application of either a minimum amount of expenditures or a predetermined ratio." Appellant's App'x vol. 2, at 129.

In contesting standing, however, Colorado Union argues that it will again advocate on ballot issues without complying with the constitutional or statutory requirements. In 2022, Colorado law changed the definition of a major purpose. So for future activities, an organization will have a "major purpose" of advocacy on ballot issues when spending

- at least 30% of its funds over 3 years on ballot issues or
- at least 20% of its funds over 3 years on a single ballot issue.

Colo. Rev. Stat. § 1-45-103(12)(b) (2022).[7] Based on the summary-judgment record, a factfinder could reasonably find that Colorado Union

[7] Before the Colorado legislature enacted this law, the state's intermediate court of appeals had rejected an administrative regulation that treated 30% of total spending on ballot issues as a "major purpose." *Colo. Ethics Watch v. Gessler*, 363 P.3d 727, 731–32 (Colo. App. 2013), *as modified on denial of reh'g* (2014). But the Colorado legislature later adopted the same test, which could arguably govern Colorado Union's future activities involving ballot issues.

had arguably satisfied this threshold. For example, Colorado Union presented evidence that it

- generally spends about $2,500 per year and
- would have liked to increase these expenditures to roughly $5,000 to $7,000 on 3 ballot issues in 2020.

Appellant's App'x vol. 2, at 35.

Colorado Union also presented evidence of its newsletters, which include advocacy on ballot issues. *See, e.g.*, *id.* at 37–38. For these newsletters, Colorado Union spent over $2,000 in 2019 and over $1,500 in 2020. *Id.* at 38. From this evidence, a factfinder could reasonably find satisfaction of the new statutory definition for a major purpose of advocacy on ballot issues.[8]

B. A factfinder could reasonably find that Colorado Union had credibly feared an enforcement action.

We consider at least three factors to determine the credibility of a fear of enforcement:

1. whether any person can file a complaint,
2. whether the law has been enforced in similar circumstances, and
3. whether the defendants have disavowed enforcement.

[8] The defendants attribute the proportion of funds on ballot advocacy to Colorado Union's heavy reliance on volunteer labor. But a factfinder could reasonably discount this explanation, for the summary-judgment record doesn't quantify Colorado Union's use of volunteers.

303 Creative LLC v. Elenis, 6 F.4th 1160, 1174 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2003); *see* pp. 8–9, above. Considering these factors, a factfinder could reasonably find a credible fear of enforcement.

1. Any person can file a complaint.

The same enforcement mechanisms exist for regular issue committees and small-scale issue committees: Any person can file a complaint, which triggers an investigation by the Colorado Secretary of State's office. Colo. Rev. Stat. § 111.7(5)(a)(I). The Secretary of State's office can then decide whether to proceed to an adversarial process or to seek dismissal. Colo. Rev. Stat. § 1-45-111.7(5)(a)(IV). That decision is reviewed by the Deputy Secretary of State. *Id.* We have already concluded that this procedure could reasonably support standing. *See* Part IV(A)(1), above.

2. A factfinder could reasonably find that the State has enforced the requirements under similar circumstances.

Colorado has brought an enforcement action against an issue committee: Unite for Colorado. This entity is an advocacy organization that spent more than $2 million advocating on ballot measures in 2020. Unite for Colorado allegedly violated the requirements for regular issue committees, and two private individuals filed a complaint. Appellant's App'x vol. 2, at 202, 207–08. The Secretary of State's office moved to

dismiss the complaint, but the Deputy Secretary of State denied that motion. *Id.* at 208–09.

That enforcement action could create a reasonable inference of a prior enforcement action in similar circumstances. We elsewhere concluded that a factfinder could reasonably rely on an enforcement action against one other individual who had operated a different kind of business. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2003). There the State argued that the plaintiff had lacked standing in part because the plaintiff hadn't shown prior enforcement. *Id.* at 1173–74. We disagreed because the challenged law (a statutory prohibition against discrimination) had been previously enforced through other litigation (culminating in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018)). *303 Creative*, 6 F.4th at 1173–74.[9]

The *Unite for Colorado* matter is at least as analogous to our case as *Masterpiece Cakeshop* was to *303 Creative*. Like Unite for Colorado,

[9] We also noted the filing of three complaints that had resulted in "no probable cause" findings. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021), *rev'd on other grounds*, 143 S. Ct. 2298 (2023). But those cases involved businesses that had *supported* same-sex marriage, and 303 Creative and Masterpiece Cakeshop were businesses that had *opposed* same-sex marriage. *Id.* Based on the evidence submitted by 303 Creative, we concluded that a factfinder could reasonably find a credible fear of enforcement from the refusal to serve same-sex couples. *Id.*

Colorado Union regularly spends money on ballot issues. In *303 Creative*, the State of Colorado pointed out that it wasn't actively enforcing the law. *303 Creative*, 6 F.4th at 1174. Here, though, the State of Colorado *is* currently enforcing the requirements for issue committees through an action against Unite for Colorado.

Granted, Unite for Colorado spent far more money on ballot issues than Colorado Union (millions rather than thousands). But a factfinder could reasonably infer that the amount of the expense wouldn't affect the prosecutorial decisions by the Deputy Secretary of State and the Secretary of State.

In fact, the Deputy Secretary of State declined to dismiss the complaint against Unite for Colorado because its expenses on ballot issues had constituted a "considerable or principal portion" of the organization's total activities. Appellant's App'x vol. 2, at 214–15. For this conclusion, the Deputy Secretary of State focused on Unite for Colorado's pattern of spending. *Id.* This approach could arguably apply to Colorado Union, which presented evidence showing that it in 2019, it had spent almost 40% of its total expenditures on advocacy involving ballot issues. *Id.* at 82–83; Appellant's App'x vol. 1, at 78.[10]

[10] The president of Colorado Union stated under oath that the organization

Despite the evidence of a pattern of expenditures on ballot advocacy, the State might consider the absolute amounts too low to warrant an enforcement action against Colorado Union. But that possibility may not torpedo Colorado Union's fear of an enforcement action. Though Colorado Union barely exceeded the $5,000 threshold in 2019, the amount was enough to satisfy the monetary threshold as a regular issue committee.

And *303 Creative* recognized standing despite differences between the plaintiff and the entity previously prosecuted. There the difference had involved the medium: The State of Colorado had enforced the law against someone who baked wedding cakes, and the plaintiff wanted to design wedding websites. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1723–24 (2018); *303 Creative*, 6 F.4th at 1174. Here the difference involves the amount of the expenditure. Colorado Union could reasonably view this difference as akin to the difference between a baker and website designer.

Given our recognition of a fact-issue on standing in *303 Creative*, we conclude that a factfinder could reasonably find a credible fear of

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- had spent roughly $13,000 in 2019 and
- wanted to spend roughly $5,000 to $7,000 on three ballot issues in 2020.

enforcement against Colorado Union even though it had spent less money on ballot issues than Unite for Colorado.

3. The defendants have not disavowed enforcement.

As with small-scale issue committees, the defendants refused to disavow enforcement. Appellees' Resp. Br. at 30. This factor could thus support standing. *See 303 Creative*, 6 F.4th at 1174; *see also* Part IV(A)(3), above.

* * *

Accordingly, all three factors could reasonably support a credible fear of enforcement.

Mootness

Though a genuine, material fact-issue exists on standing, the defendants argue that the case became moot when the period of limitations expired for Colorado Union's advocacy in 2019 and 2020.[11] We disagree.

A case becomes moot when circumstances change, preventing meaningful relief. *See S. Utah Wilderness All. v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). This case isn't moot because

- Colorado Union wants to continue advocating on ballot issues and

[11] The defendants discuss speech in 2020 and 2021. Appellees' Supp. Br. at 8. We assume that the defendants meant to refer to speech in 2019 and 2020 rather than 2021 because the suit had been filed in 2020.

- declaratory relief for past advocacy triggers an exception to mootness.

First, a factfinder could reasonably infer that Colorado Union continues to experience an injury-in-fact based on a desire to advocate on future ballot issues. In the complaint, Colorado Union alleged a desire to regularly advocate on ballot issues:

> [Colorado Union] . . . takes positions on ballot issues when appropriate and consistent with [Colorado Union's] mission. The organization has taken such positions many times and intends to continue doing so in the future, given that ballot issues relating to the expenditure of public funds—which are well within the scope of [Colorado Union's] mission—are a regular feature of statewide elections in Colorado.

Appellant's App'x vol. 1, at 14. Colorado Union added that it planned to advocate on ballot issues not only in the 2020 election, but also "in the future." *Id.* at 16.

Colorado Union also presented evidence of an intent to engage in future advocacy on ballot issues. This evidence included an affidavit stating that Colorado Union will inevitably wish to engage in ballot advocacy in the future. Appellant's App'x vol. 2, at 36.

Given the allegations and evidence of future advocacy on ballot issues, Colorado Union sought a declaratory judgment that would protect future advocacy as well as past advocacy. Appellant's App'x vol. 1, at 23–24. The claim for declaratory relief is thus not moot. *See Indep. Inst. v. Williams*, 812 F.3d 787, 789 n.3 (10th Cir. 2016) (concluding that a

challenge to Colorado's disclosure requirements for political advertisements didn't become moot when the election passed because the claimant intended to run similar advertisements in the future); *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1166 (10th Cir. 2023) (concluding that the end of an election did not moot a claim because the plaintiff wished to continue its advocacy after the election).

Even if the case were otherwise moot, an exception would apply for disputes that are capable of repetition yet evade review. *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1166 (10th Cir. 2023). Under this exception, a claim is not moot if

- the challenged action ends too quickly to be fully litigated and
- a reasonable expectation exists for the plaintiff to again experience the same injury.

Id.

The defendants don't question the first element, and "[c]hallenges to election laws may readily satisfy the first element, as injuries from such laws are capable of repetition every election cycle yet the short time frame of an election is usually insufficient for litigation in federal court." *Id.*

A factfinder could also reasonably find satisfaction of the second element through an intent to continue spending money on ballot issues without complying with the constitutional and statutory requirements.

Even if Colorado Union advocates in the future on ballot issues, however, the defendants argue that

- the potential for a future enforcement action turns on uncertainties surrounding the applicability of the "major purpose" test to Colorado Union's future activities and
- the existence of a credible fear is undermined by Colorado Union's past advocacy on ballot issues without regulatory action.

Appellees' Supp. Br. at 8–9. We reject both arguments.

First, Colorado Union presented sworn testimony of an intent to continue advocating on ballot issues and to spend at least $5,000 on ballot issues in 2020. Any expenditure exceeding $3,500 on a ballot issue would trigger the requirements even if the organization itself lacked a major purpose of advocacy on ballot issues. *See* pp. 7–8, above.[12]

Second, Colorado Union could credibly fear the filing of complaints from political opponents despite the absence of an enforcement action in 2019 and 2020. *See* p. 10, above.

The credibility of Colorado Union's fear thus entails a fact-issue that can't be resolved at summary judgment. *E.g.*, *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1216 (10th Cir. 2003).

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[12] The statute provides a threshold of $200. *See* p. 16, above. But we held in 2016 that the Colorado law was unconstitutional as applied to entities spending $3,500 or less. *See* note 6, above.

Merits

Because the district court found that standing didn't exist, the district court didn't address the merits of Colorado Union's challenge based on the First Amendment. We thus remand for the district court to consider the merits of the First Amendment challenge. *See Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005) ("Where an issue has been raised, but not ruled on, proper judicial administration generally favors remand for the district court to examine the issue initially.").

Disposition

We reverse the dismissal for lack of standing and remand for the district court to consider the merits of the parties' motions for summary judgment.

Entered for the Court

Robert E. Bacharach
Circuit Judge

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August 23, 2023

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RE: 22-1122, Colorado Union of Taxpayers v. Griswold, et al
Dist/Ag docket: 1:20-CV-02766-CMA-SKC

Dear Counsel:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. Rule 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R.35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Peter G. Baumann
Christopher Perry Beall
Randy Elf
Michael Kotlarczyk

CMW/lg