DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, Colorado 80202	DATE FILED: February 5, 2019 2:55 PM CASE NUMBER: 2017CV34617
Plaintiffs: COLORADO UNION TAXPAYERS FOUNDATION and TABOR COMMITTEE v. **Defendant:** CITY OF DENVER COLORADO	**▲ COURT USE ONLY ▲** Case No: 2017CV34617 Courtroom: 259
ORDER	

THIS MATTER came before the Court for a bench trial on February 4, 2018, between Plaintiffs Colorado Union of Taxpayers Foundation ("CUT") and Tabor Committee ("TABOR") (collectively "Plaintiffs") and Defendant City and County of Denver ("Denver"). Plaintiffs are non-profit corporations based in Colorado. Plaintiffs are challenging Denver's reporting requirements, arguing that the ordinance chills constitutionally protected free speech. Plaintiffs seek an injunction and for the Court to declare Denver's disclosure requirements unconstitutional under the First Amendment. The threshold issue presented at trial was whether Plaintiffs had standing to challenge D.R.M.C. § 15-35(c)–(d). The Court incorporates, as though fully stated herein, those findings made in open court today and as follows below.

As ruled in open court, standing is a threshold issue that must be satisfied in order to decide a case on the merits. *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 892 (Colo. 2002). Plaintiffs must satisfy two criteria to establish standing: (1) suffered an injury-in-fact, and (2) the harm must have been to a legally protected interest. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). Notably, standing in Colorado has traditionally been relatively easy to satisfy. *Id.*

Plaintiffs allege harm to their constitutional right to free speech, clearly satisfying the second prong. On that basis, the Court need only address the first prong: whether Plaintiffs have sufficiently established an injury-in-fact. *Id.* Injury in fact may be proven by showing that the action complained of has caused or has threatened to cause injury. *See Grossman v. Dead*, 80 P.3d 952, 958 (Colo. App. 2003). And, a party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct. *See Davis v. Federal Election Commission*, 554 U.S. 724, 733 (2008) (discussing test for federal standing); *Citizens for Responsible Gov't State Political Action Committee v. Davidson*, 263 F.3d 1174, 1192 (10th Cir. 2000) (discussing federal standing requirements). However, standing is not satisfied by a remote possibility of future injury or an injury that is overly indirect and incidental. *Id.*; *see also Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011) (citing *Barber v. Ritter*, 196

P.3d 245–46 (Colo. 2008)).

In the context of a taxpayer-plaintiff, Colorado provides for broad standing when the plaintiff argues that a governmental action harms their constitutional rights. *See id.* (addressing broad taxpayer standing). Colorado also relaxes standing in First Amendment cases where there is a facial challenge claiming the statute is vague or overbroad. *See People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 356 (Colo. 1985). In the same line of cases, standing is relaxed when there is a danger of chilling free speech, allowing litigants to challenge the statute because the very existence of rule may cause people to refrain from constitutionally protected free speech. *Lorenz v. State*, 928 P.2d 1274, 1285 (Colo. 1996). As a preliminary note, the Court finds that neither taxpayer nor First Amendment standing tests apply to the present case. First, Plaintiffs have not claimed taxpayer status nor are they alleging an injury based on an unlawful expenditure. Second, Plaintiffs argue that they are entitled to broad standing under the First Amendment, alleging both a facial and as-applied constitutional challenge. However, Plaintiffs did not provide any argument or evidence of a facial challenge: they did not claim the ordinance is broad, vague, or that it may cause others to chill free speech. Instead, Plaintiffs only provided evidence of an as-applied challenge. Specifically, Plaintiffs allege that the ordinance *may* chill one of their donor's right to free speech by requiring them to choose between disclosure and anonymity. As such, the Court finds that the general standing analysis is applicable and that Plaintiffs are required to satisfy the requisite injury-in-fact with a concrete, not remote, injury. *See Ainscough v. Owens*, 90 P.3d at 856; *Hickenlooper v. Freedom from Religion Foundation, Inc.*, 338 P.3d 1002, 1006–09 (Colo. 2014). The Court notes that the injury-in-fact requirement ensures that an actual controversy exists so that the matter is proper for judicial resolution. *Freedom from Religion Foundation*, 338 P.3d at 1006–07.

At trial, the Court heard credible testimony from Daniel Volkosh about Denver Municipal Code § 15-35(c)–(d). In 2017, Denver adopted an amended Chapter 15, which addresses municipal elections and campaign finances. Mr. Volkosh explained that there are four separate types of committees—the only subset at issue in the case at hand is an issue committee. The parties do not dispute that Plaintiffs are neither a political or candidate committee. The 2017 amendment changed the definition of "issue committee," which is now defined as a group which receives money or in-kind contributions of $500.00 or more for the purpose of supporting or opposing a ballot issue or question in Denver. In other words, a group that advocates or opposes a municipal ballot measure is defined as an issue committee. Issue committees are required to file reports for each month before an election, beginning in the month that an issue committee is formed, containing a pre-election, post-election, and year-end report. The report must include the name and address of any person who donates more than $50.00 to support the communication. Additionally, for donors of more than $200.00, the report must also provide the person's occupation and employer. The reports are published on Denver's public website. If a group fails to timely file a proper report, the group is subject to a penalty of $50.00 per calendar day that the report is late not to exceed $500.00 per deadline violation.

Contrary to Plaintiffs' contentions, Mr. Volkosh persuasively stated that the code is only applicable to Denver municipal ballot measures. Even if the ballot contains state and municipal measures, the ordinance only applies to the municipal ballot questions. And, the reporting requirements are only triggered if a group *raises and spends* $500.00 *for the purpose of supporting or opposing* a Denver ballot measure. This distinction weighs against Plaintiffs

contention that they are an issue committee merely by spending $500.00 in an election cycle. And, Mr. Volkosh persuasively testified that although "support/oppose" is not defined in the code, a determination concerning whether a communication "supports/opposes," or whether a group is an issue committee, is made by a neutral hearing officer (after a citizen complaint initiates the process). Tellingly, Mr. Volkosh stated that Denver has only received two complaints since 2016 both of which were cured and did not require a neutral hearing officer. Mr. Volkosh also persuaded the Court that that communications giving the pros and cons of a ballot measure do not rise to support or oppose and would not cause a group to become an issue committee. This distinction is of note because if a particular group does not arise to a committee, then it is not subject to the challenged reporting requirements.

The Court also heard credible testimony from Penn Pfiffner, chairman of the TABOR Committee, and Marty Neilson, president and founder of Colorado Union of Taxpayers Foundation. The Court was not persuaded that Plaintiffs are or will be considered an issue committee or be required to comply with Denver's reporting requirements. First, Mr. Pfiffner testified that although the TABOR Committee has never communicated with Denver voters about a Denver municipal measure in the past, it would like to and would if it had more resources. Considering the ordinance, Mr. Pfiffner stated that he personally sent an email to the board of directors, instructing them not to speak to Denver voters in the last election for fear of the reporting requirements. However, the TABOR Committee did not produce a single donor that testified he or she would be forced to choose between free speech and anonymity, or that they would not donate to the non-profit organization if they had to disclose their personal information. Similarly, Ms. Neilson explained that CUT has not, nor will, support/oppose a ballot measure – CUT's purpose is to present information, educationally, to voters in hopes they will make the decision to not raise taxes. Candidly, Ms. Neilson testified that CUT does not tell voters how to vote. On that basis, neither witness persuaded the Court that the non-profits would be considered an issue committee, triggering the reporting requirements because they did not present any credible plans to support or oppose a Denver ballot measure, they did not sufficiently explain why neither organization had never communicated with Denver voters in the past, and they did not offer any evidence that a donor would no longer donate to the cause or experience chilled speech due to the possible disclosure.

The Court also heard testimony that both Mr. Pfiffner and Ms. Neilson have experienced ideological harassment. Mr. Pfiffner testified that neighbors egged his house and threw a rock into his car after he placed candidate yard signs in his lawn during the 2004 election. Likewise, Ms. Neilson testified that during the 2016 election she was nearly run off the road, honked at, and flipped off while driving around Boulder, Colorado, for what she believed was in response to her political bumper sticker. However, the Court finds the testimony speculative and is not persuaded that either incident occurred or was related to the witnesses being attacked for their positions on taxes, for speaking to the voters on municipal issues, or for their positions in the non-profit organizations. In the same manner, the Court heard additional testimony from Mr. Vincent Vernuccio and Dave Trabert supporting Plaintiff's position that they are and will continue to be subject to ideological harassment because of their political beliefs, which will

increase if they are required to disclose donor lists.[1] Mr. Vernuccio credibly described an incident in Vancouver, WA, where he was spit on by a protestor because of his beliefs and stance on right to work legislation. Mr. Vernuccio was also threatened by an anonymous caller during a remote NPR interview, causing him to feel unsafe. However, Mr. Vernuccio acknowledged that he has never been attacked at his personal residence, that he did not have any experience with Colorado elections or public policy and that he did not directly advocate for taxpayers. Next, the Court heard testimony from Dave Trabert, president of the Kansas Policy Institute, who speaks directly to voters about government spending and tax policy. Mr. Trabert testified that he has several incidents with protestors and members of the public including violent, disturbing, and threating emails to his work account and via tweeter. On three two separate occasions, Mr. Trabert filed police reports. And, as most recent as last month, Mr. Trabert filed a police report due to harassment by an individual who made disturbing phone calls and emails after becoming upset with the non-profit organization. The Court does not condone the language used in the messages. However, the messages, although indecent, occurred primarily from 2013-14 and did not occur in Colorado. More importantly, the situation is not applicable to the present matter because Mr. Trabert is the face of the Kansas Institute Policy, not merely a donor, and, the Court heard credible testimony from Plaintiffs in this matter that none of the above-referenced incidents (or anything remotely similar) have ever occurred in Colorado. Mr. Trabert also admitted that the Kansas Policy Institute does not advocate or oppose ballot measures, nor does he weigh in on Colorado elections or public policy issues. Therefore, although Mr. Trabert and the Kansas Policy Institute are more akin to Plaintiffs, the harm experienced by Mr. Trabert and Mr. Vernuccio is too far removed from the present situation to make it real or immediate for Plaintiffs.

Based on the evidence and testimony in the record, the Court holds that Plaintiffs lack standing to challenge the D.R.M.C. § 15-35(c)–(d). The Court finds that Plaintiffs have not shown any evidence that they are or will be required to comply with Denver's campaign finance reporting requirements. Specifically, the Court finds that Plaintiffs do not, and have never, communicated with Denver voters on a Denver ballot measure. Additionally, Plaintiffs have not produced any persuasive evidence that they have or are likely to experience real, immediate, or future harm because of the municipal code. Therefore, the Court finds that neither Plaintiffs have standing to challenge D.R.M.C. § 15-35(c)–(d). On that basis, the matter is hereby DISMISSED for lack of jurisdiction.

Dated this 5th day of February, 2019.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Chief Judge

[1] The Court is aware that this issue goes to whether the ordinance is constitutional, *i.e.*, whether it chills and violates Plaintiffs' right to free speech. However, the Court also finds the issue relevant to whether Plaintiff's have standing.