

OFFICE OF THE SECRETARY OF STATE

STATE OF COLORADO

IN THE MATTER OF THE COLORADO REPUBLICAN PARTY'S PETITION FOR
DECLARATORY ORDER

FINAL AGENCY DECISION

I, Suzanne Staiert, Deputy Secretary of State, reviewed the Petition for Declaratory Order filed by the Colorado Republican Party on November 8, 2013, and conducted a hearing in accordance with section 1505 of the Colorado Code of Regulations¹ and section 24-4-105 (11), C.R.S.

Procedural Facts

Petitioner, Colorado Republican Party, is a Colorado unincorporated non-profit association and a major political party as defined in section 1-1-104(22), C.R.S.

Petitioner filed its Petition for Declaratory Order ("Petition") with the Secretary of State on November 8, 2013, requesting "confirmation that its independent expenditure committee may raise funds in any amounts from any source permissible under Colorado law."²

On December 5, 2013, the Secretary of State issued a Notice of Hearing in accordance with state law.³ The Secretary provided notice of the hearing to the Petitioner, and published the notice in the Colorado Register⁴ and on the Secretary of State's official website⁵.

Before the hearing, the Secretary received several written comments related to the Petition and published them on the Secretary of State's website⁶. None of the commenters intervened in the Petition under section 1505-3, Rule 1.5.

I, as the Secretary's designee, held the hearing on January 7, 2014; Petitioner and several members of the public testified. The hearing was broadcast live through the Secretary of State's website.⁷

¹ 8 Colo. Code Regs. §1505-3.

² Petition, p. 1.

³ Colo. Rev. Stat. §24-4-105(2)(a); 8 Colo. Code Regs. §1505-3, Rule 1.4(B).

⁴ 36 Colo. Reg. 23 (December, 2013).

⁵ <http://www.sos.state.co.us/>

⁶ <http://www.sos.state.co.us/pubs/elections/CampaignFinance/opinion.html>

At the hearing I heard testimony regarding the Secretary’s jurisdiction to issue a declaratory order in this matter and on the merits of the Petition.

Having reviewed the Petition and considered matters raised in written comment and at the hearing, and being fully advised in this matter, I find that the Secretary of State lacks jurisdiction to issue a declaratory order in this matter but will instead issue an advisory opinion.

Analysis

1. The Secretary of State declines to issue a declaratory order.

The Colorado Administrative Procedure Act mandates that every agency “provide by rule for the entertaining, in its sound discretion, and prompt disposition of petitions for declaratory orders.”⁸

Accordingly, Secretary of State Rule 1.1 states that “[a]ny person may petition the Secretary of State for a declaratory order to terminate controversies or to remove uncertainties as to the applicability to the petitioner of any statutory provisions or any rule or order of the Secretary of State as required by CRS 24-4-105(11).”⁹

In determining whether to rule on a petition, the Secretary may consider a number of factors, including:

- (1) Whether a ruling on the petition will terminate a controversy or remove uncertainties as to the applicability to the petitioner of any statutory provision, rule or order of the Secretary.
- (2) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Secretary or a court involving one or more of the petitioners.
- (3) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the Secretary or a court but not involving any petitioner.
- (4) Whether the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or opinion.¹⁰

The Petitioner has the burden of proving all facts stated in the Petition, all facts necessary to show the nature of the controversy or uncertainty, the manner in which the statute, rule, or order

⁷ A recording of the hearing is available at http://www.sos.state.co.us/pubs/info_center/audioArchives.html

⁸ Colo. Rev. Stat. §24-4-105(11).

⁹ 8 Colo. Code Regs. §1505-3, Rule 1.1.

¹⁰ 8 Colo. Code Regs. §1505-3, Rule 1.2(B).

in question applies or potentially applies to the Petitioner, and any other facts the Petitioner desires the Secretary to consider.¹¹

The Secretary may refuse to grant declaratory relief where it will not terminate the uncertainty or conflict giving rise to the proceedings.¹²

Here, Petitioner asserts that the Secretary has jurisdiction to issue a declaratory order in this matter because there is uncertainty that “one or more persons or organizations would file a complaint against [it] under Colo. Const. Art. XXVIII, §9 (2) (a), asserting violations of both §3 (3)’s contribution limits and §3 (4)’s source limitations (e.g., corporate contribution prohibition regarding political parties).”¹³

While the Secretary agrees there is uncertainty in this area of campaign finance law, a declaratory order will not remove uncertainty for the Petitioner because the Secretary does not have the enforcement authority to resolve the matters raised in the Petition. Additionally, a declaratory order would not prevent a person or organization from filing a campaign finance complaint against Petitioner.

- a. *Colorado law provides that the courts are the enforcement authority for campaign finance violations, not the Secretary.*

Declaratory relief would not terminate the uncertainty Petitioner faces because the constitution limits the Secretary’s enforcement authority.

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution.¹⁴ Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and creates an enforcement process.¹⁵ Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA).¹⁶ The Secretary of State further regulates campaign finance practices by rules.¹⁷

Article XXVIII sets forth the Secretary’s campaign finance enforcement authority. Section 10 of the Article requires the Secretary to impose a penalty of fifty dollars per day for each day that an entity fails to file a required filing.¹⁸ Section 9 outlines the process for enforcement of all other

¹¹ 8 Colo. Code Regs. §1505-3, Rule 1.4(B).

¹² *See Lakewood Fire Protection Dist. v. Lakewood*, 710 P.2d 1124, 1126 (Colo. Ct. App. 1985).

¹³ Petition, p. 6.

¹⁴ *Arnold v. Coloradans for a Better Future, et. al*, OS2012-0024 & OS2012-0025, 7 (OAC 2012).

¹⁵ *Id.*

¹⁶ Colo. Rev. Stat. §§1-45-101 to 118.

¹⁷ 8 Colo. Code Regs. §1505-6.

¹⁸ Colo. Const. Article XXVIII, Sec. 10(2)(a).

violations of Article XXVIII and the FCPA.¹⁹ That section states that any person who believes that there has been a violation of the constitution or FCPA may file a written complaint with the Secretary.²⁰ The Secretary must refer complaints to an administrative law judge (ALJ), who determines whether a campaign finance violation occurred and issues an order, sanction, or other authorized relief.²¹

While administrative agencies generally have authority and discretion to make determinations regarding statutes and rules within its jurisdiction,²² section 9 is “carefully designed to keep the Secretary of State out of the litigation process.”²³ The constitutional framework for enforcement of campaign finance violations is unlike other enforcement authority under the Secretary’s jurisdiction.²⁴ It provides the Secretary with very limited enforcement authority, which devalues any declaratory order the Secretary might issue in the realm of campaign finance.

b. *A declaratory order would not terminate a controversy or remove an uncertainty for the Petitioner, because courts fail to give deference to the Secretary’s opinion.*

In addition, ALJs and courts do not defer to the Secretary’s interpretations.²⁵ As such, it is unlikely a court would give any deference to a declaratory order in this matter.

The Secretary has “discretion to decide whether to rule upon a petition for declaratory relief in appropriate circumstances.”²⁶ The efficacy and versatility of declaratory order proceedings to develop well-founded agency policies and standards is well recognized.²⁷ But in this case, a declaratory order would not remove uncertainty in the application of Colorado law to the

¹⁹ Colo. Const. Article XXVIII, Sec. 9.

²⁰ *Id.*

²¹ *Id.*

²² See Colo. Rev. Stat. §24-4-106 (providing that, in reviewing an agency action, a court shall affirm the agency decision unless it finds that the agency action is, among other things, arbitrary and capricious, an abuse of clearly unwarranted exercise of discretion, or based upon findings of fact that are clearly erroneous when the record is considered as a whole.)

²³ *Colo. Ethics Watch v. Clear the Bench Colo.*, OS 2010-0009 (OAC 2010); see also Colo. Const. Article XXVIII, Sec. 9(2) (stating that “the secretary of state and the administrative law judge are not necessary parties” to judicial review of an agency decision.).

²⁴ *E.g.* Initiative petition complaint hearings under Colo. Rev. Stat. §1-40-132 or notary applications and renewal denials under Colo. Rev. Stat. §§12-55-103 and 12-55-108.

²⁵ See *Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 937 (Colo. Ct. App. 2012) (holding that the Secretary’s position is not entitled to deference because “an agency’s statutory construction is not binding on an appellate court, particularly where, as here, the underlying facts are undisputed and the issue presented is one of law.”)

²⁶ *Nat’l Institute of Nutritional Ed. v. Meyer*, 855 P.2d 31, 32 (Colo. Ct. App. 1993) (citing 8 Colo. Code Regs. 1505-3, Rule 1; Colo. Rev. Stat. §24-4-105(11)).

²⁷ *Colo. Office of Consumer Counsel v. The Mountain States Telephone and Telegraph Co.*, 816 P.2d 278, 285 (Colo. 1991).

Petitioner’s conduct, because the ultimate enforcement authority—the ALJ and Colorado courts—will not defer to the Secretary’s opinion.

In 2009, an organization sought the Secretary’s advice and guidance regarding its appropriate filing status under applicable campaign finance laws.²⁸ The Secretary advised the organization that under the Secretary’s interpretation of applicable constitutional, statutory, and regulatory provisions, the organization should register as an issue committee.²⁹ A citizen filed a complaint against the issue committee and both the ALJ and the appeals court found that the Secretary’s advice to the organization was not entitled to deference and was not persuasive in its determination of the case.³⁰ The ALJ also found that a party cannot be equitably estopped from asserting a claim under campaign finance laws because a committee relied to its detriment on the Secretary’s advice.³¹

Unfortunately, the Secretary is unable to provide the public with more clarity regarding campaign finance laws. The lack of clarity in the interpretation of Colorado’s laws may in and of itself injure First Amendment rights of Colorado citizens.³²

To get the relief it seeks, the Petitioner might:

- File a declaratory judgment action in state court;
- File a declaratory judgment action in federal court; or
- Act as proposed and await a complaint related to its activity.

In sum, the Secretary declines to issue a declaratory order in this case because it will not finally resolve Petitioner’s uncertainty.

But the Secretary does believe that the issues presented by the Petitioner are of importance to campaign finance in the State of Colorado, and will likely result in a lawsuit in state or federal court or before an ALJ. For that reason, the Secretary issues the following advisory opinion related to Petitioner’s proposed conduct.

²⁸ *Clear the Bench Colo.*, 277 P.3d at 933.

²⁹ *Id.*

³⁰ *Id.* at 936-937.

³¹ *Colo. Ethics Watch v. Clear the Bench Colo.*, OS 2010-0009, 11 (OAC 2010).

³² *See Buckley v. Valeo*, 424 U.S. 1, FN48 (1976) (“In such circumstances, vague laws may not only ‘trap the innocent by not providing fair warning’ or foster ‘arbitrary and discriminatory application’ but also operate to inhibit protected expression by inducing ‘citizens to ‘steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked.’”).

2. Advisory opinion regarding political parties and independent expenditure committees under Colorado law.

Although an advisory opinion is not binding and carries no precedential value, parties may offer them as persuasive evidence in cases where no precedent exists. The Secretary's purpose in issuing an advisory opinion is to provide clarification regarding the agency's interpretation of current campaign finance laws.

The issue presented by the Petition is a novel one in Colorado. This advisory opinion is confined to the conduct proposed in the Petition and based solely on the facts provided. It is the Secretary's opinion that a political party may form an independent expenditure committee (IEC) for the purpose of making independent expenditures and may raise funds in any amount from any permissible source. But a political party IEC must ensure that its expenditures are truly independent and in no way coordinated with any candidate or the political party.

a. Colorado law allows the Petition's proposed conduct.

Under Colorado law, a political party may form an IEC for the purpose of making independent expenditures and that committee may raise funds in any amount from any permissible source.

An independent expenditure is an expenditure that is not controlled by or coordinated with any candidate or agent of such candidate.³³ Expenditures that are controlled by or coordinated with a candidate or candidate's agent are deemed to be both contributions by the maker of the expenditures and expenditures by the candidate committee.³⁴ The Secretary outlines what constitutes coordination with a candidate committee or political party in rule.³⁵

The FCPA provides for the formation and registration of IECs:

Any person that accepts a donation that is given for the purpose of making an independent expenditure in excess of one thousand dollars or that makes an independent expenditure in excess of one thousand dollars must register with the appropriate officer³⁶ within two business days of the date on which an aggregate amount of donations accepted or expenditures made reaches or exceeds one thousand dollars.³⁷

³³ Colo. Const. Article XXVIII, Sec. 2(9).

³⁴ *Id.*

³⁵ See 8 Colo. Code Regs. §1505-6, Rule 1.4.

³⁶ The Secretary of State's office is the "appropriate officer" for all committee filings other than filings related to municipal candidates or ballot issues.

³⁷ Colo. Rev. Stat. §1-45-107.5(3)(a).

Both the constitutional and statutory definition of “person” includes a political party.³⁸ Colorado law only specifically prohibits foreign corporations from making independent expenditures in connection with an election in Colorado.³⁹ Therefore, Colorado law permits political parties to form and register an IEC in Colorado.

Upon forming an IEC, a political party is afforded all of the rights and responsibilities of any other person who forms an IEC.⁴⁰ While Colorado law provides source restrictions⁴¹ and contribution limits⁴² for political parties, there are no source restrictions or contribution limits for IECs.⁴³

In a recent decision by an ALJ, the court found that the framework for IECs under the FCPA is seemingly in conflict with the Colorado Constitution.⁴⁴

The Constitution provides that a contribution is:

- (I) The payment, loan pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, small donor committee, or political party;
- (II) Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party;
- (III) The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, small donor committee or political party;
- (IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate’s nomination, retention, recall, or election.⁴⁵

³⁸ Colo. Const. Article XXVIII, Sec. 2(11); Colo. Rev. Stat. §1-45-103(13).

³⁹ Colo. Rev. Stat. §1-45-107.5.

⁴⁰ See *FEC v. Colo. Rep. Federal Campaign Committee*, 533 U.S. 431, 444 (2001) (quoting *Colo. Rep. Federal Campaign Committee v. FEC*, 518 U.S. 604, 616 (1996) (“the independent expression of a political party’s views is ‘core’ First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.”)).

⁴¹ Colo. Const. Article XXVIII, Sec. 3(4).

⁴² Colo. Const. Article XXVIII, Sec. 3(3).

⁴³ See Colo. Rev. Stat. §1-45-103.7(2.5) (stating that an independent expenditures committee is not treated as a political committee for purposes of contribution limits in Colo. Constitution); see also Colo. Const. Article XXVIII, §2(13) (defining “political party”) and Colo. Rev. Stat. §1-45-103(11.5) (defining “independent expenditure committee”).

⁴⁴ *Arnold*, OS2012-0024 & OS2012-0025 at 8.

⁴⁵ Colo. Const. Article XXVIII, Sec. 2(5)(a).

Thus, a contribution under the constitutional definition “not only includes the value of money and gifts given directly to a candidate committee (subsections I, III and IV), but also the value of money and gifts given indirectly for the benefit of the candidate (subsections II and IV).”⁴⁶

The constitution’s prohibition against indirect contributions that benefit a candidate conflicts with the FCPA, under which IEC spending that benefits a candidate is not considered a contribution unless that spending is coordinated with or controlled by the candidate or candidate committee. Though the FCPA’s exception regarding IECs is not “expressly stated within the constitutional definition of ‘contribution,’ it is implied as a consequence of United States Supreme Court case law.”⁴⁷

Consistent with the U.S. Supreme Court’s holding in *Buckley v. Valeo*, Article XXVIII’s limitations on expenditures for advertising in support of a candidate “must yield to the First Amendment unless the expenditures have been coordinated with or controlled by the candidate and thus are, in the Supreme Court’s words, ‘disguised contributions.’”⁴⁸ Further, the Supreme Court’s more recent holding in *Citizens United v. Fed. Election Comm’n*, requires the Secretary to “give the benefit of any doubt to protecting rather than stifling speech.”⁴⁹

As a result, the Secretary presumes that the statutory framework for independent expenditures and IECs is constitutional and interprets Colorado law to allow for the protection of Petitioner’s right to free speech. As presented in the Petition, the conduct proposed by the Petitioner—that it will raise funds for its IEC in an unlimited amount from any permissible source, so long as its expenditures are not coordinated with or controlled by any candidate or candidate committee—is allowed under Colorado law.⁵⁰

⁴⁶ *Arnold*, OS2012-0024 & OS2012-0025 at 8.

⁴⁷ *Id.*; see also *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴⁸ *Id.* at 9.

⁴⁹ *Citizens United*, 538 U.S. 310 (2010).

⁵⁰ See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (holding, post-*Citizens United*, that limits on contributions for the purpose of making independent expenditures promote no anti-corruption interest); see also *Buckley*, 424 U.S. at 19-21 (holding that spending in support of a candidate is subject to greater First Amendment protection from regulation than is a contribution to a candidate because limits on spending generally curb expressive and associational activity more than do contribution limits.).

b. *Petitioner must ensure the absence of “coordination” to avoid the potential for corruption or the appearance of corruption.*

Whether an expenditure is truly independent, *i.e.* not coordinated with a candidate, candidate committee or political party, is a question of fact and not a legal presumption.⁵¹

Section 5(3) of Article XXVIII states:

Expenditures by any person on behalf of a candidate for public office that are coordinated with or controlled by the candidate or the candidate’s agent, or political party shall be considered a contribution to the candidate’s candidate committee, or the political party, respectively.⁵²

Courts have consistently upheld restrictions on coordinated contributions, finding that allowing such restrictions reflects “the importance of the interests that underlie contribution limits—interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’”⁵³

But courts have also repeatedly struck down limits on independent expenditures, reasoning that independent expenditures do not pose the same risk of corruption or the appearance of corruption as direct contributions.⁵⁴ As a result, it is critical that the activity proposed by the Petitioner be truly independent of the party and the party’s candidates.⁵⁵

The Petition outlines the proposed structure and operation of Petitioner’s IEC, emphasizing that the structure ensures that coordination of expenditures will not occur with candidates or with the party. Petitioner stresses that its IEC will be managed by an independent executive director and advised by an independent management committee, and that beyond the director and

⁵¹ *See Colo. Rep. Federal Campaign Committee v. FEC*, 518 U.S. 604, 619-620 (1996) (stating that “we cannot take the cited materials as a empirical, or experience-based, determination that, as a factual matter, all party expenditures are coordinated with a candidate.”).

⁵² Colo. Const. Article XXVIII, Sec. 5(3); *see also Republican Party of New Mexico v. King*, 2013 U.S. App. LEXIS 25084, 10 (10th Cir. 2013); *FEC v. Colo. Rep. Federal Campaign Committee*, 533 U.S. 431 (2001).

⁵³ *McConnell v. FEC*, 540 U.S. 93, 137 (2003) (quoting *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 440-441 (2001) (Colorado II)).

⁵⁴ *See Buckley*, 424 U.S. 1; *see also Colo. Rep. Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480 (1985); *Citizens United v. FEC*, 558 U.S. 310 (2010); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁵⁵ *See King*, 2013 U.S. App. LEXIS at FN4 (“coordination breaks the essential independence of the expenditure and has always been deemed the functional equivalent of a candidate contribution.”).

committee's initial appointment, the party will have no degree of management or control over any of the IEC's plans, projects, activities, or expenditures.⁵⁶

Petitioner also outlines several additional "safeguards" to ensure the independence of its IEC, including prohibiting the IEC executive director and management committee from:

- Holding any office or position within the political party at an level;
- Serving as a delegate to any party assembly or convention where any party candidate is nominated or designated to the primary election ballot;
- Participating in the nomination or designation of any party candidate for public office;
- Actively participating on the campaign committee of any candidate that will be the beneficiary of any independent expenditure made by the IEC in the election cycle;
- Soliciting any non-public information from any candidate, candidate committee, or agent of a candidate seeking election in the current election cycle, regarding campaign strategy, plans, projects, activities or needs; and
- Soliciting any non-public information from the party's campaign strategy, plans, projects, activities or needs.⁵⁷

In addition, under the Petitioner's proposed scheme, officers, agents, and committees of any party committee affiliated with the party are prohibited from making any "requests or suggestions to the executive director or to any member of the management committee of the IEC, or consulting with or providing any direction with respect to the development, creation, production or dissemination of any independent expenditure or electioneering communication paid for by the IEC."⁵⁸ Petitioner also asserts that the only persons authorized to sign checks, authorize transfers, or obligate or expend IEC funds will be the IEC executive director and one or more members of the management committee.⁵⁹

While state law does not define coordination, under Secretary of State Rule 1.4,⁶⁰ an expenditure is coordinated with a candidate or political party if the expenditure or spending is "at the request, suggestion, or direction of, in consultation with, or under the control of" a candidate committee or political party.⁶¹ The rule also states that the terms "candidate committee or political party" include an agent, employee, board member, director, or officer of that candidate committee or

⁵⁶ Petition, pp. 16-17.

⁵⁷ Petition, pp. 16-17.

⁵⁸ Petition, pp. 17-19.

⁵⁹ Petition, p. 19.

⁶⁰ 8 Colo. Code Regs. §1505-6, Rule 1.4.

⁶¹ *Id.*


political party.⁶² There is little Colorado case law discussing the definition of “coordination” as it applies to Colorado campaign finance law.⁶³

The fact that the party exercises control over the appointment—and presumably removal—of the IEC’s executive director and management committee is potentially problematic. While the facts presented in the Petition are not indicative, *per se*, of improper coordination, Petitioner must tread carefully. In addition to the safeguards outlined in the Petition, the Secretary recommends the party implement additional controls for the appointment and removal of the IEC leadership, including provisions that the director and committee members may only be removed for cause, *e.g.* evidence of fraud or malfeasance. Any person who believes that a violation of Article XXVIII or the FCPA has occurred, including improper coordination with a candidate or political party, may file a written complaint regarding such conduct, for referral to an ALJ.⁶⁴

Finding

For the reasons set forth above, the Secretary of State declines to grant Petitioner’s request for a declaratory order in this matter. Instead, the Secretary issues an advisory opinion on the merits finding that, as proposed, political parties may operate an independent expenditure committee in the State of Colorado and may raise funds in any amount from any permissible source.

Dated this 07th day of February, 2014.


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⁶² 8 Colo. Code Regs. §1505-6, Rule 1.4.5.

⁶³ *Rutt v. Poudre Education Ass’n*, 151 P.3d 585 (Colo. Ct. App. 2006) discussed “coordination” in the context of political campaign contributions. But the Colorado Supreme Court overturned this case on appeal in *Colo. Education Ass’n v. Rutt*, 184 P.3d 65 (Colo. 2008) (finding that “it is not necessary to the resolution of this case to define ‘coordination’ under article XXVIII as the court of appeals did, and thus we leave this issue for another day.”).

⁶⁴ Colo. Const. Article XXVIII, Sec. 9(2)(a).