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Wayne Williams
Colorado Secretary of State
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Re: *Great Judges for a Great Colorado Declaratory Order and Advisory Opinion Public Comment*

To Whom it May Concern:

Please accept this public comment concerning the request for a declaratory order or advisory opinion under C.R.S. 24-4-105, 8 CCR 1505-3 Rule 1, and 8 CCR 1505-6 Rule 18.2.10 filed by the Great Judges for a Great Colorado committee (pending determination of the entity's status under law).

The petitioner is requesting determination of its status under Colorado campaign finance law.

Campaign Integrity Watchdog is Colorado's premier campaign finance accountability organization, having successfully prosecuted more violations (and violators) of Colorado's campaign finance laws (Colo. Const. Art. XXVIII and C.R.S. 1-45-101 et seq, collectively Fair Campaign Practices Act, FCPA) than any other entity in state history. CIW is uniquely qualified to offer comment regarding determination of appropriate committee registration status having won numerous cases on precisely this question of law. Additionally, CIW's principal officer, Matt Arnold, was the founder and principle officer of the entity cited as the closest legal precedent to the proposed "Great Judges for a Great Colorado" committee, ***Clear the Bench Colorado*** (cited below in *Colorado Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931 (2012)) previously represented by counsel (Scott Gessler, Steve Klenda) for the proposed entity.

CIW largely agrees with the analysis presented by petitioner, with some important caveats, dependent on the range of activities potentially taken by the prospective entity, that bear upon proper determination of the entity's status under Colorado law. Specifically:

Questions Presented:

1. Whether GJ4GC activities might constitute a "contribution" to a judicial candidate, absent the existence of a judicial candidate committee
2. If the committee must register as a political committee, must it abide by the contribution limits applicable to political committees under the Colorado Constitution and FCPA?

Factual Background:

If GJ4GC is registered with the IRS as a “political organization” then the question of the committee’s status under Colorado law would seem to be pre-determined: it should qualify and register as a 527 political organization pursuant to C.R.S. 1-45-108.5 et seq.

Such determination is consistent with both logic (a federal entity registered as a certain type should register as the same entity type under state law) and rule; specifically, 8 CCR Rule 7.1.1 states that a “Federal PAC that qualifies as a political committee under Colo. Const. Article XXVIII, section 2(12), must register with the Secretary of State’s office as a state political committee and follow all requirements for state political committees.” Similarly, a federal 527 political organization that qualifies as such per C.R.S. 1-45-108.5 should register with the Secretary of State’s office as a state 527 political organization.

The statement that the committee “will not make contributions to any judicial candidate’s retention committee” is misleading and irrelevant, as candidates in judicial retention elections typically do not form such committees (indeed, TRACER records indicate that no such committee has ever been formed in the history of Colorado’s retention elections). Further, the statement begs the question of whether the committee’s activities might constitute an indirect “contribution” to the candidate, as defined per Colo. Const. Art. XXVIII §2(5) et seq. Specifically:

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, **retention**, recall, or election. [emphasis added]

As the Colorado Supreme Court recently affirmed in 17SC149, *Campaign Integrity Watchdog v. Alliance for a Safe and Independent Woodmen Hills* (entered as 2018 CO 7 on 29 January 2018), reportable contributions include things of value given indirectly to committees or candidates; other case law shows that such reportable contributions can be as indirect and minor as “favorable publicity” given online.¹

Additionally, although the committee’s claim that “in order to amass adequate funds to meaningfully communicate with the public, it must be able to raise contributions from individuals or entities greater than \$575 every two years” may very well be true, it is legally irrelevant, since the same conditions may be said to hold for any other committee subject to contribution limits to support or oppose candidates.

¹ See OS 2015-0015, *Barela v. Liberty Common School*, in which the ALJ ruled that a Facebook post including favorable comments about a candidate and a link to a newspaper article about a candidate constituted a “contribution” by providing a “thing of value to the candidate, namely publicity” that was “given indirectly to her for the purpose of promoting her election.”

Discussion:

For campaign finance purposes, the term “candidate . . . includes a judge or justice of any court of record who seeks to be retained in office pursuant to the provisions of section 25 of article VI.”¹ Colorado law actually defines **THREE** types of campaign organizations that support candidates: independent expenditure committees and political committees, and **527 political organizations**.

Each of the above types of committees operates within certain constraints and allowances.

Colorado law recognizes three types, and **only** three types, of non-candidate committees that may legitimately engage in campaign activity to influence elections and to support or oppose candidates, two of which are statutory creations designed to provide exceptions (“*carve out*”) to the more general constitutionally-defined political committee type on meeting certain conditions:

- a. 527 “political organizations” defined in C.R.S. 1-45-103(14.5)
- b. “Independent Expenditure Committees” (IEC) defined in C.R.S. 1-45-103(11.5)
- c. “Political Committee” defined in Art. XXVIII §2(12) and C.R.S. 1-45-103(14)

Colorado campaign finance law defines “political organization” as follows:

(14.5) "Political organization" means a political organization defined in section 527 (e) (1) of the federal "Internal Revenue Code of 1986", as amended, that is ***engaged in influencing or attempting to influence*** the selection, nomination, ***election***, or appointment of any individual to any state or local public office in the state and ***that is exempt, or intends to seek any exemption***, from taxation ***pursuant to section 527 of the internal revenue code***. "Political organization" shall not be construed to have the same meaning as "political organization" as defined in section 1-1-104 (24) for purposes of the "Uniform Election Code of 1992", articles 1 to 13 of this title.

Colorado campaign finance law defines “independent expenditure committee” as follows:

(11.5) "Independent expenditure committee" means one or more persons that make an ***independent expenditure*** in an aggregate amount in excess of one thousand dollars or that collect in excess of one thousand dollars from one or more persons ***for the purpose of making an independent expenditure***. [C.R.S. 1-45-103(11.5)]

Colorado campaign finance law defines “political committee” as follows:

(12) "Political committee" means any ***person***, other than a natural person, or any group of two or more persons, including natural persons that have ***accepted or made contributions*** or expenditures in excess of \$200 to ***support or oppose the nomination or election*** of one or more candidates.” [Colo. Const. Art. XXVIII, §2(12) and C.R.S. 1-45-103(14)]

Notably, only one of the three above-listed committee types (the IEC) is solely defined by reference to making an “***expenditure***” (that is, engaging in “express advocacy”) while the other types are more broadly defined by the ***purpose*** of their activities (including contributions).

Consequently, the question of which entity designation is appropriate for petitioner GJ4GC hinges upon both the scope and purpose of their activities – including, crucially, whether petitioner’s activities might be deemed a contribution to judicial retention candidates.

As noted *supra*, petitioner has affirmed its registration with the IRS as a 527 political organization, which would indicate that its proper status under Colorado law (specifically, C.R.S. 1-45-108.5 *et seq*) would similarly be as a 527 political organization.

However, petitioner has also declared intent to engage in independent expenditures (only), which would indicated that its proper status under Colorado law (specifically, C.R.S. 1-45-107.5 *et seq*) might more properly be as an Independent Expenditure Committee (IEC).

Finally, petitioner has declared intent to abjure from making contributions to candidates, which would disqualify it from being an IEC and instead place it squarely within “political committee” status.

Given these facts and legal definitions, CIW concludes that petitioner should be considered to qualify as the following committee type based upon the following range of activities (tabular summary):

Committee Type	Federal 527 registration?	Independent Expenditure?	Contribution to (retention) candidate?
527 Political Organization	Yes	No	Yes
Independent Expenditure Committee	No	Yes	No
Political Committee	No	Yes or No	Yes

I. The committee should be regulated as a 527 political organization if...

As noted *supra*, petitioner’s registration with the IRS as a 527 political organization arguably pre-determines its entity status under Colorado law. However, the federal tax status and state campaign finance legal definitions do not perfectly overlap, and committee status should be based on actual regulated activity under Colorado law.

The committee does meet the necessary thresholds in the statutory definition – namely, that it “is engaged in influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office in the state and that is exempt, or intends to seek any exemption, from taxation pursuant to section 527 of the internal revenue code.”

Additionally, Colorado law regarding political organizations imposes no constraint on whether such entities may engage in advocacy, express² or otherwise, to influence candidate elections, nor imposes any constraint on whether such entities may contribute directly or indirectly to candidates. Such entities are also not subject to contribution limits under Colorado law, but must fully disclose all activity.

Consequently, petitioner may qualify as a 527 political organization per C.R.S. 1-45-108.5 if it accepts **or** makes contributions **or** expenditures while influencing or attempting to influence retention elections.

² Federal law may constrain a 527 political organization from express advocacy related to **federal** elections; it is unclear as to whether such constraints apply to state-level political advocacy.

II. The committee should be regulated as an Independent Expenditure Committee if...

As noted *supra*, the IEC entity type is a statutory carve-out from the broader definition of “political committee” set forth in constitutional language (and mirrored in implementing statutory language).

As such, an IEC is an entity with a very narrow range of activity: engaging **solely** in communications expressly advocating for or against candidates (“independent expenditure” as defined in statute) that is not coordinated with any candidate. Engaging in any form of contribution (including indirect, “in-kind” contributions) to other committees or candidates expressly disqualifies an entity from IEC status.

As noted by petitioner, the Colorado General Assembly made the decision to “create independent expenditure committees for the express purpose of ensuring that contributions limits do *not* apply to organizations making independent expenditures **only**.” [emphasis added]

Consequently, engaging in **any** other form of activity to influence elections, or to support or oppose candidates, that does not meet the definition of “independent expenditure” means that an entity is NOT “making independent expenditures **only**” and is therefore NOT an independent expenditure committee.

Therefore, so long as petitioner engages in **no other activity** but “independent expenditures” as narrowly defined in statute, and abjures from any activity that may constitute a “contribution” to a candidate (including judicial retention candidates) it may qualify as an IEC.

Petitioner’s reliance on the Secretary’s Rule 3.3 and 3.4 is, however, misplaced, as these rules not only exceed the Secretary’s authority, but are in direct conflict with controlling precedent defining both “contribution” and “political committee” under Colorado law.³

An administrative rule can hardly be “presumed constitutional” when it conflicts with the express language of the constitutional amendment it purports to modify. The Secretary’s rules 3.3 and 3.4 exceed the Secretary’s authority to add language to definitions that exist in the Colorado Constitution, where such added language contradicts the express intent and text of the constitutional definitions.

Since the Secretary’s rules 3.3 and 3.4 directly contradict not only the constitutional language,⁴ but also clear and unambiguous Colorado Supreme Court rulings on that very subject,⁵ the rules are *void ab initio* and cannot form the basis for any determination of petitioner’s entity status.

³ See 17SC149, *Campaign Integrity Watchdog v. Alliance for a Safe and Independent Woodmen Hills* (entered as 2018 CO 7 on 29 January 2018)

⁴ See Colo. Const. Art. XXVIII Section 2(5)(a)(II) and (IV), defining contributions (including “indirect”)

⁵ See 17SC149, *Campaign Integrity Watchdog v. Alliance for a Safe and Independent Woodmen Hills* (2018 CO 7)

III. The committee should be regulated as a Political Committee if...

Alternatively, petitioner could qualify as a “political committee” per Colo. Const. Art. XXVIII § 2(12). Of the various potentially applicable committee types, the “political committee” is the only one defined in the state constitution rather than a creation of statute, and thus precedential over statute or rule.

Petitioner has cited relevant precedent (*Colorado Ethics Watch v. Clear the Bench Colorado*)⁶ ruling that a similarly situated entity (CTBC) was a “political committee” under Colorado law. Petitioner argues that *CEW v. CTBC* is not controlling; CIW agrees in part and disagrees in part.

First, petitioner is correct to point out that “the court did not consider whether the judicial retention organization could be an independent expenditure committee” because CTBC’s counsel in the appellate case (Hale Westfall LLP) failed to raise the issue, despite direction from CTBC Director Matt Arnold at the time to raise the argument on appeal. Petitioner is therefore correct to point out that “neither the administrative court nor the court of appeals even considered whether Clear the Bench Colorado was an independent expenditure committee.”

Second, however, petitioner’s argument that *Colorado Republican Party* necessarily controls in the event of any conflict with *Clear The Bench* is not quite accurate, since the former not only addressed an entity significantly different than CTBC in scope and range of activity (which expressly did **not** include any involvement in judicial retention elections) but also did not address the “political committee” definition.

Third, petitioner accurately characterizes the fact that “*Clear the Bench* did not consider whether the committee at issue in that case only made independent expenditures” and appropriately raises the key question at issue: whether either entity (CTBC then, GJ4GC now) “could have been a political committee, if it contributed to judicial retention candidates.”

Consequently, the question hinges on whether CTBC’s activity then, or GJ4GC’s potential activity, could be considered to include a “contribution” as defined per Colo. Const. Art. XXVIII §2(5)(a) *et seq.*

The answer to that question in turn depends in part on whether the committee’s activity includes efforts solely to **oppose** judicial retention candidates, or includes activity to **support** incumbent judges – raising the possibility of *quid pro quo* corruption at the heart of the cited *SpeechNow.org* case finding that government cannot impose contribution limits on committees that do not “contribute to **or** coordinate with candidates.”⁷ The potential corruption nexus is decisive.

⁶ *Colorado Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931 (2012)

⁷ See also *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1096-1097 (10th Cir. 2013)

Different treatment of activity to support vs. oppose candidates in judicial retention elections justified

It is indisputable that “political committees encompass both coordinated and uncoordinated activities” and that the definition of “contribution” expressly includes “[A]nything of value given, directly **or indirectly**, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.”⁸

Among the justifications for limiting contributions and requiring disclosure in relation to candidate elections – expressly including retention elections for judicial candidates – is the potential for *quid pro quo* corruption.

Activities or communications to **oppose** the retention of judicial candidates pose no risk of *quid pro quo* corruption, since the retention election does not determine the successor to a non-retained judge; there is no possibility of *quid pro quo* between advocates of non-retention and an unknown successor.

Conversely, there **IS** a potential for *quid pro quo* corruption involving activities or communication to **support** the retention of a judicial candidate – since the candidate, retained in office, would remain in position to repay the favor to those supporting the candidate’s retention in office.

Consequently, there is a more stringent threshold for disclosure and contribution limits to committees acting to **support** the retention of one or more candidates in judicial retention elections.

Additionally, activities or communications to support the candidate’s retention in office expressly fall under the definition of “contribution” set forth in Colo. Const. Art. XXVIII, §2(5)(a)(IV). Specifically, a “contribution” to a candidate (including judicial retention candidate) includes:

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, **retention**, recall, or election. [emphasis added]

The range of activities constituting a “contribution” under the constitutional definition is quite broad (including a recent ruling that a Facebook post including favorable comments about a candidate and a link to a newspaper article about a candidate constituted a “contribution” by providing a “thing of value to the candidate, namely publicity” that was “given indirectly to her for the purpose of promoting her election.”)⁹ Essentially, any activity to support a candidate that does not fall under the definition of “expenditure” (express advocacy) could be considered a “contribution” under law.

⁸ Colo. Const. Art. XXVIII §2(5)(a)(IV)

⁹ OS 2015-0015, *Barela v. Liberty Common School* – not appealed.

Conclusion

For these reasons, Campaign Integrity Watchdog requests that the Secretary of State determine that petitioner is properly regulated as a 527 political organization pursuant to C.R.S. 1-45-108.5 **if** the entity registration as such with the IRS is determinative of its status under Colorado campaign finance law, per the Secretary's rules. Alternatively, CIW requests that the Secretary of State determine that petitioner is properly regulated as an Independent Expenditure Committee (IEC) **if and only if** its activity is restricted **solely** to "independent expenditures" (express advocacy communications) **opposing** candidates for judicial retention. Alternatively, CIW requests that the Secretary determine that petitioner is properly regulated as a "political committee" under Colorado campaign finance law **if** the entity engages in any activity **other than** "independent expenditures" (express advocacy communications, by law) **opposing** candidates for judicial retention, since any campaign other activity to **support** incumbent candidates raises the potential for quid pro quo corruption that underpins the regulatory requirement for both disclosure and contribution limits.

Campaign Integrity Watchdog takes no position on whether contribution limits otherwise applying to "political committees" under Colorado campaign finance law should apply to petitioner in any of the above scenarios.

Regards,

/signed/ Matt Arnold

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