CITIZEN COMMENT

SECOND RULEMAKING HEARING
May 3, 2011

To: Colorado Secretary of State Scott Gessler

Re: Proposed Rulemaking for Rules Concerning Campaign and Political Finance - 8 CCR 1505-6

Precis: The proposed rule under consideration is partially responsive to the United States constitutional infringements created by Colorado Constitution Article XXVIII, Campaign and Political Finance, as articulated by the United States Court of Appeals Tenth Circuit. However, the Secretary of State Rulemaking process cannot be used as a substitute for the creation of new law under the procedures established to amend the state constitution.

Reporting requirements for issue committees cannot rationally be enforced until such time as a new state constitutional provision is approved by the electorate, and this rulemaking process may be useful to the extent that it results in a draft recommendation for the legislature to consider.

Discussion: The Secretary's proposal to amend rules pertaining to campaign finance, subsequent to a public hearing on May 3, 2011, for which this written comment is submitted, has been initiated in response to a ruling by the Tenth Circuit Court of Appeals in Sampson v. Buescher, Nos. 08-1389, 08-1415 (10th Cir. 2010).

The essence of that ruling is that Article XXVIII of the Colorado state constitution unduly burdens the rights of free association and speech in certain circumstances and is therefore unconstitutional in part.

The court noted that clear direction from the United States Supreme Court is lacking in regard to issue committee reporting requirements, finding that "The Supreme Court has sent a mixed message regarding the value of financial disclosure in a ballot issue campaign." The dicta in three cases have "spoken favorably of such requirements," but that "absence of the precise and careful analysis necessary to resolve a particular issue fully presented to the Court makes it difficult for us to assess the weight that should be granted the public interest in disclosure when balancing it against the burden on the First Amendment right of association imposed by a particular statute in a particular circumstance."

The court thereafter anchored its opinion in the "pertinent portions" of the Colorado constitutional amendment governing campaign finance, which assert "...that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process".

In the words of the Tenth Circuit:

"It is unlikely that the Colorado voters who approved the disclosure requirements of Article XXVIII of the state's constitution were thinking of the No Annexation committee...It would take a mighty effort to characterize the No Annexation committee's expenditure of $782.02 for signs, a banner, postcards, and postage as an exercise of a 'disproportionate level of influence over the political process'...The disconnect between the avowed purpose of the constitutional disclosure requirements and their effect in this case should itself provoke doubt about whether the burden on the First Amendment...could be justified. And, as we shall proceed to explain, an examination of First Amendment doctrine confirms that doubt."

By proposing to exempt issue committees from reporting requirements based on a threshold level of total contributions ($5000), the Secretary has apparently inferred a specific remedy from the

Tenth circuit opinion which was not actually stated. In all but a few instances this proposed remedy will perpetuate that disconnect between intent and effect which the court found to be unsatisfactory.

If the concern is that large campaign contributions from wealthy, corporate, or special interest sources may disproportionately influence elections[1], the appropriate remedy which would do the least harm to free speech and association is to exempt committees from reporting the source of individual contributions except those over a threshold limit – regardless of the size of the total contributions or expenditures of a committee. In other words, for the purpose of example, the identity of individual contributors in a local election would be reported if their contributions were $5000 or above. This approach would be more responsive to the concerns of the Tenth Circuit, but perhaps more importantly would allow greater participation in the electoral process than exists under current law.

Background: The undersigned author of this comment is the treasurer of record for several issue committees, including the plaintiff in a Colorado Supreme Court case (Common Sense Alliance v. Davidson, 995 P.2d 748 (Colo. 2000)) which influenced the current state of reporting requirements in the state. Speaking from that experience, I can unequivocally state that current reporting requirements for issue campaigns have a disastrous negative impact on citizen participation.

Significant segments of the population cannot speak out on electoral issues for a variety of financial[2], professional, and personal reasons. Business owners and service providers are very reluctant to risk alienating half of their clientele by taking a position publicly. Government employees are typically mute unless they support a government proposal, and people who work with or must appear before government boards do not feel safe expressing public opposition.

In the particular area where I live, one major corporation is the single largest non-governmental employer. Their corporate interest is to support whatever a majority of public officials want, and their employees refrain from being in conflict with the company.

I have had prospective donors tell me they cannot participate for fear of creating a bad work environment with their colleagues or a bad home environment with their spouse.

Particularly in local elections, a large majority of citizens could only participate in an issue campaign by donating to a committee which represents their viewpoint, but Colorado's campaign disclosure laws take away that opportunity.

Imagine the chilling effect that eliminating the anonymous ballot would have on electoral turnout, and that is the impact we currently have on participation in the public debate leading up to a vote. The dynamics of the situation are identical, and the potential for intimidation and reprisal are greater.

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[1] Had this element of the campaign finance law been the subject of the court challenge, there is a significant possibility that this infringement on the First Amendment doctrine would be found to be similarly unjustified.

1. Can it be shown that higher contributions equal increased success at the polls?
2. If the answer to (1) is yes, could it simply reflect that the best position attracts the most contributions?
3. Is there any reason to assume that wealthy, corporate or special interests aren't found on both sides of most issues?
4. Are the beneficiaries of a particular electoral outcome easily determined without reporting requirements?
5. Is the actual or potential financial benefit to private parties a valid determinant of good public policy?
6. In the absence of large contributions, whatever the source, does the advantage of the media to influence public opinion go unchecked?
7. If an unfair advantage does exist, is it tempered sufficiently by reporting requirements to warrant the chilling effect on the participation of average citizens?

[2] During the period from 2006 – 2009, 42% of contributors to the "Entrance Solution" issue committee reported their employment status as "retired". Another 12% earned their living outside the area. The sample size was small, but the implication was obvious.

Proposal: The Tenth Circuit opinion strongly reiterates that in order to survive the exacting scrutiny necessary to allow infringement on free association and speech, reporting requirements depend upon the strength of the government interest. The pertinent portions of the state constitution (heavily edited by the court to remove contextual material specific to candidate campaigns) which the court accepted as the basis for that government interest is not supportive of a focus on the aggregate total of committee resources. Rather, the concerns expressed in the "Purpose and Findings" of Article XXVIII, as quoted above, only justify a narrowly tailored focus on individual contributions.

There is significant content in the Tenth Circuit opinion which indicates the necessity of such a narrow focus, i.e.:

"One can question the value to the electorate of knowing that the contributors to Plaintiffs' committee might think that they will financially benefit from defeat of the annexation by more than the amount of their contributions."

"Here, the financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions." (Emphasis added.)

And, quoting a Ninth Circuit decision in which the court noted that "[a]s a matter of common sense, the value of this *financial* information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level."

Under the approach I am suggesting here, there would be two triggers which would cause the imposition of reporting requirements. The first would be acceptance of a contribution above a certain amount sufficient to suggest a disproportionate level of influence by a wealthy, corporate, or special interest donor. Committees would need to report total contributions and expenditures, and itemize and identify the source of those contributions above the established threshold.

Second, without setting a dollar amount, any group or individual with sufficient resources to purchase advertising or engage in direct mail campaigns would be required to include the name of a natural person or registered committee so that the public may determine the possible involvement of a wealthy, corporate, or special interest donor. (In the case of advertising this requirement is generally already enforced by media companies, even in the absence of a statutory mandate, due to the need to distinguish content from their own editorial positions and to protect against libel claims.)

Conclusion: I am loath to support any form of governmental reporting requirements for issue campaigns and can assure the Secretary that adversarial pressure to reveal supporters will be an integral part of the political process in the complete absence of such reporting. It is entirely appropriate that the organizer of a campaign make the choice to protect contributors, or use their participation as a form of endorsement, because the best approach is dependent on the issue itself. It is also essential to note that voters possess the ultimate form of protection - any dissatisfaction regarding the transparency of a particular campaign can be answered with a vote in opposition to that campaign. The marketplace of ideas is self regulating with a precision that cannot be matched by government regulation.

Finally, I cannot improve upon the observation by the Tenth Circuit that "Nondisclosure could require the debate to actually be about the merits of the proposition on the ballot," though as noted above it may be a somewhat utopian hope.

Regardless of any misgivings, the solution described here is entirely responsive to both the Tenth Circuit opinion and the "pertinent portions" of the Colorado Constitution which remain intact

in the wake of that decision. Please make these suggestions known to other participants in this process, and consider endorsing them yourself.

Thank you for the invitation to submit a written comment on this matter, and please accept my regrets that I am unable to attend the hearing.

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