Colorado
COMMON CAUSE
Holding Power Accountable

May 6, 2011

The Honorable Scott Gessler, Secretary of State
Department of State
1700 Broadway
Denver, CO 80290

Re: Revised Rules Concerning Campaign and Political Finance, 8 CCR 1505-6

Common Cause is a non partisan, non profit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.

Colorado Common Cause has a long history working on campaign finance issues, and in 2002 we were one of the proponents of Amendment 27, now Article 28 of the Colorado Constitution, which was supported by more than 66% of Coloradans.

As the proponents of Amendment 27, we must point out that the Secretary of State is misreading Article 28's purpose and findings in his attempt to justify this unconstitutional rule. While the purpose and findings do talk about large campaign contributions, it is in the context of political candidates and is the rationale for the contribution limits set for candidate and political committees. Amendment 27 did not limit the source or amount of contributions to issue committees.

The purposes and findings section of the Article 28 is clear on the need for reporting that is the subject of this rulemaking: "the interests of the public are best served by . . . providing for full and timely disclosure of campaign contributions."

Common Cause opposes increasing the trigger for reporting by issue committees to $5,000. While we recognize that the Court's ruling in *Sampson v Buescher* may create uncertainty about the Court's willingness to uphold the existing disclosure requirements under certain circumstances, we do not believe that the *Sampson* ruling requires or permits the broad and substantial rewrite of the registration and reporting obligations established by the Colorado Constitution as contemplated by Rule 4.27.

We also believe that the Secretary of State is going beyond his rulemaking authority by allowing issue committees to conceal all contributions that are received before reaching the reporting trigger. Current law (C.R.S. § 1-45-108(1)(a)(I)) requires that all contributions be disclosed by issue committees; the $200 disclosure trigger only establishes when an issue committee must be formed. In contrast, the proposed rule would make reporting prospective only and allow the first $5,000 of contributions to remain secret. This is in conflict with the Colorado Constitution and is a policy change that exceeds the Secretary of State's rulemaking authority. There is no justification or basis for this change.

Allowing the first $5,000 of contributions to an issue committee to remain anonymous also creates practical problems with enforcing the law and providing meaningful disclosure to the public. In order to meet the reporting requirements, any committee will still have to track their donations so they know when they reach the $5,000 trigger. Because any person or committee would need to keep a record of this information, it is not more burdensome to disclose.

An alternative reading of this rule as proposed would allow committees to evade reporting altogether and it would be difficult to hold them accountable. It would be hard to show whether undisclosed contributions were part of the permissible $5,000 in anonymous contributions or not. Issue committees wishing to evade Colorado's voter-approved campaign finance laws could choose not to report contributions and then claim that they were part of the $5,000 in allowable anonymous contributions. This is an unacceptable result.

We urge the Secretary to reject this proposed rule in its entirety. To the extent the Secretary feels compelled to take any action, we urge the Secretary to create a rule that is as narrow as the Court ruling in the *Sampson* case.

In *Sampson*, the Court did not broadly reject ballot issue disclosure, but instead narrowed its decision to the facts applicable in the Parker North annexation election. Importantly, broad disclosure in the election context has been consistently upheld by the United States Supreme Court, most recently in *Citizen United v. FEC*, 130 S.Ct. 876 (2010). In *Sampson*, the Court only found the requirements too onerous as applied in this particular case. We don't believe that this ruling provides the grounds to weaken the trigger for disclosure more broadly.

The research prepared by the Secretary of State's office "Issue Committee Thresholds, State by State" demonstrates how overreaching Proposed Rule 4.27 is, not only in the context of the plain language of the Colorado Constitution and the limited nature of the court's ruling in *Sampson*, but also in comparison to other states. Of the 23 states with the initiative and referendum process, only two (Maine and Nebraska) set the trigger as high as is proposed by this rule. Indeed, six states require registration before funds are raised or spent.

Rather than focus solely on the dollar amount that should trigger disclosure, we urge the Secretary's office to improve its guidance for citizens who will be required to comply with disclosure rules going forward. The court in *Sampson* noted that the rules were too difficult to comply with and that the Secretary of State's office often encouraged citizens to seek outside legal advice. We do not believe that the reporting requirements are overly burdensome, but to the extent that there is confusion, this office should focus on providing clarity about the requirements rather than eliminating the requirements for groups that seek to influence elections. In fact, the Colorado legislature recently passed two bills in an effort to make clearer when groups must register and comply with ballot disclosure rules (HB 09-1153 and HB 10-1370). It is the role of the Secretary of State to educate interested persons of the law and how to comply.

During the May 3rd hearing, Secretary Gessler, echoing the comments of Mark Arnold of Clear the Bench, claimed that people cannot rely on the advice of the Secretary of State because even with advice they could still be subject to litigation challenges. The complex issues of the Clear the Bench case, which deals with the unusual activities of a judicial retention campaign, do not

allow the Secretary to take a pass on providing guidance. The Secretary must provide clear guidance on current campaign finance laws, and assist people who want to participate in the political process.

Common Cause is also concerned that Rule 4.27 sets a standard that sends the message that issue committee disclosure should be limited to groups working on well-funded, statewide ballot campaigns. Ballot measures are not limited to large, state-wide issues. Each year municipalities and special districts across Colorado bring numerous ballot issues before their electors. These issues may be as "small" as a simple zoning ordinance, but they sometimes more closely affect the daily lives of residents more than the "bigger" constitutional amendments that get the attention of the press. We would prefer to see the focus of this rulemaking be on ensuring that "small" issue committees have the support and training required to file disclosures and provide transparency for the voters.

Colorado is a ballot initiative state. Activities in recent years call for increased disclosure and accountability, not less. In 2008 there were 14 statewide ballot issues presented to Colorado voters and proponents and opponents of these measures spent a reported $71.1 million in issue advocacy concerning these ballot measures, which was five times the prior highest amount spent on ballot initiatives in Colorado. In 2010 there were 9 statewide measures, and proponents and opponents reported spending nearly $10 million.

Voters regularly act as legislators at both the statewide and local levels. Like lawmakers who have an interest in knowing who is lobbying for their vote, voters of our state have an interest in knowing who is behind the issues that come before them, and importantly, who is attempting to influence their vote. Increasing the threshold for ballot issue disclosure will limit the amount of information voters will receive and also the timeliness of that disclosure. Rule 4.27 compounds this problem by eliminating disclosure altogether for contributions up to the first $5,000.

The *Sampson* ruling does not provides grounds to weaken the trigger for disclosure, nor to allow for secret campaign contributions. Rule 4.27 is out of step with current law, goes beyond *Sampson*, and we urge the Secretary to reconsider and reject this rule.

Thank you for the opportunity to comment. Please contact us if you would like additional information.

Sincerely,

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