

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 20050020

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY RICHARD EVANS REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE
INDEPENDENCE INSTITUTE AND VOTE NO; IT'S YOUR DOUGH**

This matter is before the Office of Administrative Courts ("OAC") on the complaint of Richard Evans ("Complainant") against the Independence Institute ("Institute") and Vote No; It's Your Dough ("Vote No" or "Committee"). The complaint was filed with the Colorado Secretary of State ("Secretary") on August 4, 2005. On August 5, 2005, the Secretary referred the complaint to OAC as required by Colo. Const. art. XXVIII, § 9(2)(a). Complainant is represented by Mark G. Grueskin, Esq. and Edward T. Ramey, Esq.. The Institute is represented by Richard C. Kaufman, Esq. and Shayne M. Madsen, Esq. The Committee is represented by Shawn Mitchell, Esq. Hearing on the complaint was conducted in Denver, Colorado, on October 12, 2005, before Administrative Law Judge ("ALJ") Michelle A. Norcross. The hearing was digitally recorded in Courtroom 1. At hearing, the ALJ admitted Complainant's exhibits 1 through 32, 34 through 45, and the Institute's exhibits R-1 through R-9 and R-11 through R-20 into evidence¹. The record was held open until October 19, 2005 for receipt of closing briefs.

Parties' Positions

Complainant: Complainant alleges that the Institute became an "issue committee" as defined in the Colorado Constitution by engaging in efforts to oppose ballot measures C and D ("Referenda C and D") including paying for and airing three radio advertisements ("ads") concerning Referenda C and D. And, as such, the Institute is subject to the disclosure requirements of the Fair Campaign Practices Act ("FCPA") and must disclose the name of the donor(s) who paid for the ads and/or made contributions to the Institute. Complainant argues that the Institute has violated the Colorado Constitution and the FCPA by failing to register as an issue committee, by

¹ On October 21, 2005, Complainant's counsel submitted the following supplemental exhibits addressed at hearing: exhibits used at the deposition of Mr. Jon Caldara that were not appended to the deposition submitted at hearing (Mr. Caldara's deposition is admitted as exhibit 45); a copy of Judge Egelhoff's decision denying the Institute's request for preliminary injunction (Judge Egelhoff's decision is admitted as exhibit R- 20); and a Word compatible version of exhibit 36 that includes three radio advertisements and one television advertisement.

failing to disclose contributions and expenditures for its activities, and by failing to open a separate bank account for its C and D activities.

With respect to Vote No, Complainant alleges that the Committee violated the Colorado Constitution and the FCPA by failing to report all the contributions it received from the Institute.

The Institute: The Institute admits that it ran three radio ads and published materials on its website concerning Referenda C and D. The Institute denies that it has a major purpose of opposing Referenda C and D and further denies that its radio ads and/or website sponsorship constitute express advocacy. Therefore, it contends that it is not an issue committee and is not subject to the disclosure requirements of the FCPA. The Institute has also raised constitutional challenges to Article XXVIII of the Colorado Constitution and the FCPA that are the subject of a complaint filed in Denver District Court.

Vote No: The Committee denies that it received any non-reported contributions from the Institute. It argues that it has fully complied with Colorado's campaign laws by properly registering as an issue committee and accurately reporting its contributions and expenditures, including all contributions it received from the Institute.

Pre-hearing Motions

Complainant's Motion to Continue. This case was originally set for hearing on August 15, 2005. Complainant filed a motion to continue the August 15 hearing on the basis of a medical emergency on the part of counsel. The motion was unopposed and based upon a thirty-day extension of time requested by the Institute the case was reset for hearing on October 5, 2005.

Complainant's Motion to Accept First Amended Complaint. On September 26, 2005, Complainant filed a motion to amend his complaint along with his First Amended Complaint. The only change from the original complaint is the addition of Complainant's mailing address and the addition of Vote No in the caption and in the introductory paragraph of the complaint. In all other respects, the First Amended Complaint is identical to the original complaint and no additional claim of relief is requested as a result of the amendments. Neither the Institute nor Vote No objected to the motion. Accordingly, on September 30, 2005, the ALJ granted Complainant's motion and accepted Complainant's First Amended Complaint.

Institute's Motion to Stay. On September 27, 2005, the Institute filed a Motion to Stay Administrative Proceedings, which was joined by Vote No. The Institute requested a stay of the administrative proceedings for the following reason: On September 26, 2005, the Institute filed a complaint in Denver District Court raising facial constitutional challenges to Article XXVIII of the Colorado Constitution and statutory provisions of the FCPA, specifically, the Institute challenges the definition of an "issue committee" and portions of the FCPA's disclosure requirements. The Institute argued that absent a stay

of the administrative proceedings it could not obtain complete and adequate remedies since the matters in controversy are matters of law that the agency lacks the jurisdiction to determine.

On September 28, 2005, Complainant filed a response opposing the request for a stay. The Institute filed its reply on September 30, 2005. The ALJ convened a telephone hearing on September 30, 2005, to take argument on the motion. Following oral argument, the ALJ denied the Institute's motion to stay the administrative proceeding for the following reasons: (a) OAC has jurisdiction to hear and rule on the merits of complaint; (b) OAC is charged with holding a hearing and rendering a decision in these cases on an expeditious basis; and (c) the ALJ has the authority and discretion to fashion a remedy, including a protective order, to protect the Institute from disclosure of its members and/or donors during the administrative process, as well as the authority and discretion to stay enforcement of any order requiring disclosure pending any appeal of an adverse order.

Complainant's Motion to Compel and for Sanctions. On September 29, 2005, Complainant filed a motion to compel Ethan Eilon, a part-time volunteer for the Vote No committee, and the custodian of the records for Vote No, to provide testimony and produce documents pursuant to subpoenas served on September 22, 2005. During the telephone hearing on September 30, 2005, Complainant's counsel, Mr. Grueskin, informed the ALJ that the parties had come to an agreement regarding the deposition of Mr. Eilon as well as the production of documents referenced in the motion to compel, rendering the motion to compel moot. Mr. Grueskin requested that he be allowed to renew his request for sanctions at the merits hearing and that the ALJ consider his motion at that time. The ALJ granted the request to delay a ruling on the motion for sanctions. Complainant did not renew his request for sanctions at the October 12 hearing. Accordingly, the ALJ denies Complainant's motion for sanctions as moot.

Institute's Motion to Vacate October 12, 2005 Hearing. On October 5, 2005, the Institute filed a motion to vacate the October 12, 2005 hearing and requested a status conference to be held on October 12, 2005. Complainant filed an opposition to the motion on October 6, 2005. The basis for the motion to vacate was two-fold: (a) Jon Caldara, President of the Institute, and the primary witness in the case was unavailable to appear on October 12, 2005; and (b) the earliest date available in Denver District Court for a hearing on the Institute's motion for preliminary injunction was October 11, 2005. On October 11, 2005, the ALJ set up a telephone hearing with the parties to discuss the pending motion. However, the ALJ was unable to proceed with the hearing because the parties were unavailable; they were in Denver District Court presenting argument on the motion for preliminary injunction. On the morning of October 12, 2005, the parties appeared before the ALJ and informed her that Denver District Court Judge Martin Egelhoff denied the motion for preliminary injunction. The Institute withdrew its motion to vacate and the case proceeded to hearing on the merits.

Motions made at Hearing

Complainant's Request for Disclosure of Donor(s) for Radio Ads. Complainant requested that the ALJ allow him to inquire of Mr. Caldara the specific identity of the donor(s) who paid for and/or contributed money to the Institute for the radio ads that are the subject of this complaint. The Institute objected. The ALJ denied the request on the basis that, prior to requiring disclosure of any contributors, Complainant must first establish that the Institute is an issue committee. If Complainant met that burden, the ALJ, in her decision, would order the Institute to fully comply with the FCPA's disclosure requirements. The ALJ further ruled that, prior to such a determination, disclosure of the Institute's donors and/or contributors would be premature and could result in irreparable harm to the Institute and its members.

Motion for Directed Verdict. At the close of Complainant's case-in-chief, Vote No moved for dismissal of the complaint on the basis that Complainant failed to prove, by a preponderance of the evidence, that either the Institute or Vote No violated Colorado's campaign laws. The ALJ denied the motion, but agreed to accept counsel's legal arguments for purposes of rendering the Agency Decision.

Post-hearing Motion

Vote No's Motion for One-Night Extension of Time to File Closing Brief. On October 19, 2005, Vote No requested a one-night extension to file its closing brief. Along with the motion, it filed its closing brief on the morning of October 20, 2005. In its motion, Vote No represents that Complainant objects to the one-night extension; however, the ALJ did not receive Complainant's response. On October 20, 2005, the ALJ granted Vote No's motion and accepted its written closing argument as part of the record.

FINDINGS OF FACT

Based upon the evidentiary record, the ALJ makes the following Findings of Fact:

The Institute

1. The Institute was founded in 1985. It is registered with the Internal Revenue Service as a 501(c)(3), non-partisan, non-profit policy research organization. It is located in Golden, Colorado and its current President is Jon Caldara.

2. As a non-profit organization, the Institute receives its funding from individual monetary donations. The donations are tax deductible. A gift of \$100 allows an individual to become a member of the Institute and receive free weekly e-mails, newsletters, copies of policy papers and invitations to special events. Members who contribute \$1,000 or more become members of the "Circle of Independence" and receive invitations to special and exclusive events with state and national policy leaders. Aside from a small monetary donation, there are no formal membership requirements.

The Institute also accepts charitable and anonymous donations. The Institute's budget for the prior year was \$1 million. Mr. Caldara estimates that the Institute's current-year budget will be between \$1.3 and \$1.4 million.

3. Since 1985, it has been the mission of the Institute to help promote the ideals of limited government in free markets and to promote personal and economic liberty. In furtherance of this mission, the Institute provides policy makers, legislators and citizens of Colorado with educational materials addressing a broad spectrum of policy issues, including public education, transportation, and taxation.

4. Since its inception, the Institute has used all available media to further its educational mission, including, but not limited to, disseminating "issue papers" and "issue backgrounders," publishing weekly opinion-editorials ("op-eds"), establishing a website, and hosting a weekly television interview program on Colorado Public Television, KBDI Channel 12, called *Independent Thinking*.

5. The vast majority of the Institute's material is available on its website, www.i2i.org. The Institute also hosts other websites including www.taxincrease.org. Taxincrease.org was created several years ago by the Institute to provide information to the public about issues specifically related to taxation and government spending.

6. In addition to its publications, the Institute also presents speeches, publishes reviews, hosts symposia, produces advertising, holds public debates, hosts monthly member events, presents legislative briefings, and presents public forums. The Institute focuses on several core policy areas through its six "policy centers." The Institute's policy centers include: (a) the Education Policy Center; (b) the Health Care Policy Center; (c) the Second Amendment Project; (d) the Center for the American Dream; (e) the Campus Accountability Project, and (f) the Fiscal Policy Center. Each policy center is headed by its own director and supported by one or more policy analysts and research associates. These six policy centers have been in existence for many years.

7. The Education Policy Center focuses on school choice, school accountability and teachers' rights. The Health Care Policy Center focuses on free-market alternatives to problems with the current health care system. The Second Amendment Project addresses legal precedents, news, and opinions providing a constitutional prospective on gun control and gun rights. The Center for the American Dream addresses planning efforts that attempt to engineer lifestyles through subsidies, regulation and limits on personal and economic freedom. The Campus Accountability Project serves as a watchdog to ensure universities observe and protect the individual rights of faculty, staff and students. And, the Fiscal Policy Center works to find a balance between taxation and liberty and, since 1992, to defend the Taxpayer's Bill of Rights ("TABOR").

8. Including Mr. Caldara, the Institute has fourteen senior staff involved in its six policy centers. Much of the material used by the Institute comes from its research

fellows, staff, and contributing professors. In the last several years, the Institute has published over twenty issue papers dealing with topics such as public school reform, improving transportation, balancing Colorado's budget, improving the state's prison system, promoting privatization of government functions, and implementing taxing and spending limits.

Referenda C and D

9. In the spring of 2005, the General Assembly referred two measures to be included on the ballot for the November 2005 election. These measures are known as Referenda C and D. Referenda C and D impact TABOR; if passed, they permit the state to retain funds that would otherwise be returned to the citizens of Colorado through tax refunds and permit the state to issue bonds for specified projects.

10. The Institute, through its Fiscal Policy Center, has a twenty-one year history of involvement in various taxation issues, which, for the past five months, have included C and D. As far as the Institute is concerned, C and D have no positive impacts on the citizens of Colorado. Some of the activities undertaken by the Institute concerning C and D include, issuing op-ed pieces, posting polling results, analyzing the state's budget proposals, and hosting debates. Through these activities, the Institute has attempted to educate the public about C and D and encouraged voters to learn more about the measures.

11. For the past five months, on its website www.taxincrease.org, the Institute has published documents relating to Referenda C and D and has included reports and information from other sources regarding C and D, including links to other policy think tanks (Americans for Tax Reform, Colorado Club for Growth, Freedom Works, and the Heritage Foundation) as well as groups supporting C and D (the Bell Policy Center and Proponents of C and D).

12. Mr. Caldara serves as the spokesman for the Institute on C and D and has participated in the writing of press releases for the Institute as well as the drafting of three radio ads relating to Referenda C and D. Since C and D were referred, Mr. Caldara has spent one-third of his time as President of the Institute on activities related to C and D. And for the past several months, the Institute's Fiscal Policy Center has been focused on C and D.

Radio Ads

13. In the summer of 2005, the Institute was involved in the preparation and airing of three radio ads concerning Referenda C and D. The first radio ad is called, "The Sky is Falling." The second radio ad is called, "Hi Ho, it's off to Tax we go." And the third radio ad is called, "Whoops there Goes Another One."

14. "The Sky is Falling" aired as follows:

Background Crowd	(Muted screams of terror)
1 st Male Voice	Aagh, the State's out of money. Government is starving. We gotta pass Referendum C this fall or we're doomed. It's a crisis!
Female Voice	Crisis? Hardly. Colorado's budget has never been larger.
1 st Male Voice	Huh?
Female Voice	The Chicken Littles claim the state's sky high budget is falling. But the fact is, Colorado's budget is at a record high. They have so much money, they just gave across-the-board pay increases to all government employees. You call that a budget crisis?
1 st Male Voice	But they say C isn't a tax increase.
Female Voice	Not a tax increase? It takes away not most, but all of our tax refunds for the next 5 years. That's billions from us taxpayers. That, my friend, is what we call a tax increase. And Ref C ratchets up government spending forever.
1 st Male Voice	Forever?
Female Voice	It's not just a five-year tax increase, it's a forever tax increase.
1 st Male Voice	Oh, now I am scared.
2 nd Male Voice	Learn more about the Taxpayers Bill of Rights and this Fall's Referendum C at www.taxincrease.org . Paid for by the Independence Institute.

15. The Institute paid for the production and airing of "The Sky is Falling" with funds from its corporate account. The production and airtime costs totaled \$35,000.

16. The second ad, "Hi-Ho, it's off to Tax we go", aired as follows:

Chorus	(Sung to the tune of Disney's 7 dwarves Hi-Ho song) Hi-ho, hi-ho, it's off to tax we go, more for government, less for families (sound of cash register ka-ching) Hi-ho, it's off to tax we go...
1 st Male Voice	Stop that. Do you want the voters to learn the truth about Referendum C?
2 nd Male Voice	The truth about what's really inside Referendum C? The tax and spenders want billions more of your tax dollars to grow a state government that refuses to show spending restraint and common sense. For example, the <i>Rocky Mountain News</i> reports, the state spent over \$600 per truck for an oil change. We've all been told C is more than \$3 billion tax increase over 5 years, but it's even worse. C is a Trojan horse concealing the forever tax increase, forever raising how much of your money the state can spend. Colorado's budget increased over 7% from last year, twice as fast as the cost of

	living.
Chorus	(Singing) It's off to tax we go.
2 nd Male Voice	Learn more about Referendum C, the forever tax increase, at taxincrease.org . Paid for by the Independence Institute.

17. The third ad, "Whoops there Goes Another One", aired as follows:

1 st Male Voice	First, the politicians tried to tell us, Ref C is not a tax increase.
2 nd Male Voice	(Sung to tune of Oops there goes another Rubber Tree Plant) Oops there goes another one.
1 st Male Voice	But the indisputable truth, C is more than a three and half billion dollar tax increase in just the first five years, permanently raising job-killing taxes. Now the politicians say C is required, or school, roads and children will face spending cuts.
2 nd Male Voice	(Singing) Whoops there goes another one.
1 st Male Voice	But even their own Budget Office proves that statement false. And how C's permanent tax increase would be spent is completely up to the whim of the politicians. If the past is a guide, that means more thousand dollar office chairs and half a million dollar state-paid bar tabs.
2 nd Male Voice	(Singing) Whoops there goes another one.
1 st Male Voice	But C would increase taxes more than \$3,200 per family of four. It's basic economics. If you want to create jobs, you cut taxes. If you want to kill jobs, you raise taxes. Learn more about C at taxincrease.org . Paid for by the Independence Institute.

18. The second and third radio ads ("Hi Ho, it's off to Tax we go" and "Whoops there Goes Another One") were paid for, on behalf of the Institute, by an undisclosed not-for-profit agency. These two ads were in-kind contributions made to the Institute by a single donor. Mr. Caldara assisted in the writing of the scripts for radio ads two and three. The Institute accepted an in-kind contribution of \$100,000 from the unnamed donor for the production and airtime costs associated with the second radio ad. At the time of hearing, Mr. Caldara had not yet determined the exact value of the in-kind contribution associated with the production and airtime costs of the third radio ad, but believed it would be similar to the cost of the second ad (\$100,000).

19. These three radio ads are available on the Institute's website. The Institute produced and aired the radio ads as part of its education campaign. These ads were produced for the benefit of the Institute and are publicly available on its website.

20. The Institute does not charge anyone or receive compensation from any persons, agencies, groups who access the Institute's website.

Focus of the Institute

21. The Institute, through these ads and other means, continued to be involved in C and D; however, Referenda C and D were not the sole or main focus of the Institute and not the only concern of its members. Referenda C and D are only a recent focus of the Institute.

22. Since the referral of C and D, the Institute's five other policy centers have continued to work on topics and issues not involving C and D or TABOR. And prior to the referral of C and D, the Institute was actively engaged in efforts to educate the public about Colorado's budget, government spending, and the effect TABOR has had on both.

23. Since May 16, 2005, the Institute has produced thirty op-ed pieces on various topics including: school funding, government spending as affected by Referendum C, state projected budget shortfalls, the appointment of school officials, and state's rights as affected by recent Supreme Court decisions. Only two of the thirty op-ed articles posted on the Institute's website since May 16, 2005, discuss Referendum C.

24. For twenty-one years, the Institute has provided educational research and analysis of topics of public concern from a free-market, pro-freedom perspective through its six core policy centers. There is no evidence that the primary mission of the Institute will change following the November 2005 election. There is also no evidence that it will alter its fundamental policies regardless of the fate of C and D. Finally, there is no evidence that the Institute will dissolve or in any other way cease to continue after the voters have cast their votes for C and D.

25. Over the years, different issues have taken on varying priorities at the Institute. For the past five months, Referenda C and D have taken priority over other issues, but they are not a major purpose or focus of the Institute.

Vote No Issue Committee

26. In the spring of 2005, the Institute established a committee called Vote No, it's Your Dough. Vote No is registered with the Secretary as an issue committee. Because it is the policy of the Institute to educate, not advocate, Mr. Caldara formed the Committee as a vehicle to expressly advocate the defeat of C and D. Mr. Caldara serves as the chairman and spokesman for Vote No.

27. In his capacity as chairman of Vote No, Mr. Caldara has met with representatives of other issue committees and organizations that oppose C and D. He has appeared publicly to oppose these ballot issues, helped raise money for the Committee, assisted in preparing press releases, and performed other types of grass-root campaign efforts for the Committee.

28. Elizabeth Clark is the Committee's register agent; she is a volunteer. The Committee has only one paid staff member, John Reynolds. Mr. Reynolds receives compensation from the Committee for his fieldwork in Northern Colorado. The remainder of the work done on behalf of the Committee is performed by volunteers. Several Committee volunteers are employees of the Institute. Other than Mr. Reynolds, the volunteers are not paid by the Committee or the Institute for their time spent on Committee activities.

29. One of the Committee's key volunteers is Ethan Eilon. Mr. Eilon has helped set up debates, delivered "No Refund For You!" bumper stickers, and been in contact with people to help the Committee make its presentations. Mr. Eilon has also, on occasion, been the press contact and accepted contributions for and on behalf of the Committee.

30. As Committee chairman, Mr. Caldara has fielded occasional calls about Referenda C and D from his office at the Institute. He has also used the Institute's office equipment (i.e., fax machine, copier, and computers) on occasion for the benefit of Vote No for such activities as responding to e-mails and making copies of Vote No materials. Mr. Caldara is not compensated by the Institute or the Committee for his efforts as chairman of Vote No. Mr. Caldara's services as chairman of the Committee are provided on a volunteer basis. For the past several months, he has spent about 2 hours a day assisting the Committee.

31. The Committee accepted its first monetary contribution on June 3, 2005. It has filed Reports of Contributions and Expenditures with the Secretary for the following periods: May 27, 2005 – June 25, 2005; June 26, 2005 – July 26, 2005; July 27, 2005 – August 31, 2005; September 1, 2005 – September 14, 2005; and September 15 – September 28, 2005. These were the only reports available at the time of hearing.

32. In its report for the reporting period July 27, 2005 - August 31, 2005, Vote No disclosed a \$250 non-monetary contribution from the Institute. This non-monetary contribution represents the occasional use of the Institute's facilities and office equipment for the benefit of the Committee.

33. The Committee maintains a website. The website address is www.defeatc.com. On its website, the Committee has links to the websites of other groups and organizations opposing Referenda C and D. The Committee also has links to the Institute's website and the three radio ads paid for by the Institute.

34. The Committee did not compensate the Institute for the use of the radio ads nor did the Institute charge the Committee for its use of them. There is no evidence that the Institute donated or gifted the ads to the Committee for its use or created the ads for the Committee's benefit. The ads are publicly available.

DISCUSSION

I. Is the Institute an issue committee, as defined in Article XXVIII, § 2(10)(a).

Complainant alleges that the Institute has become an “issue committee” as defined in the Colorado Constitution. Article XXVIII, § 2(10)(a) defines issue committee as:

[A]ny person, other than a natural person, or any group of two or more persons, including natural persons:

(I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or

(II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

The Colorado Secretary of State has enacted Rule 1.6(b), 8 CCR 1505-6, which specifies that both conditions listed in subparagraphs (I) and (II) above must be met in order for an entity to be an “issue committee”.

A person or group of persons is an issue committee only if it meets both of the conditions in Article XXVIII, Section 2(10)(a)(I) and 2(10)(a)(II).

8 CCR 1505-6, § 1.6 (emphasis in original).

The Secretary’s Rule 1.6 (b) was extended by Senate Bill 05-183 and is presently in effect. See Continuation of 2004 Rules of Executive Agencies, S.B. 05-183 § 1(p), 65th Gen. Assem., Reg. Sess. (Colo. 2005). A rule of the Secretary of State must be construed as presumptively valid. *Colo. Ground Water Comm’n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (Colo. 1996). And since the Secretary is the government official responsible for the administration of campaign finance laws, her construction is entitled to great weight. *Mile High Greyhound Park, Inc. v. Colo. Racing Comm’n*, 12 P.3d 351 (Colo.App. 2000) See also, *Davis v. Conour*, 178 Colo. 376, 497 P.2d 1015 (1972) (in interpreting a statute one should look to the contemporaneous construction of the act by the public officials charged with its administration.) Additionally, Colorado law permits “or” to be construed as “and” when necessary to implement the plain meaning or intent of a law. *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993); *Thomas v. City of Grand Junction*, 56 P. 665 (1899).

Counsel for the Institute, in his closing brief, quotes from a memorandum prepared by William A. Hobbs, Deputy Secretary of State, for the Committee on Legal Services 5, dated December 14, 2004, supporting the Secretary’s construction of Rule 1.6 (b). In his December 14 memo, Mr. Hobbs states that the Secretary adopted Rule 1.6 (b) to avoid the absurd result and the unconstitutional infringement on constitutional

rights of association and free expression if a disjunctive reading of subsections (I) and (II) is required. This memorandum was not submitted at the hearing and is not part of the evidentiary record in this case. However, for the purpose of determining the intent of the law and harmonizing the Secretary's rules with Article XXVIII, the ALJ finds the argument persuasive and adopts the Secretary's construction. See, *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo.App. 1987) (statutes should be interpreted, if possible, to harmonize and give meaning to other potentially conflicting laws.)

Defining an Issue Committee

At least three of the elements in the definition of an "issue committee" are not in dispute in this case. First, the Institute, as a non-profit corporation, satisfies the definition of "person" in Colo. Const. art. XXVIII, § 2(11). Second, the Institute spent more than \$200 on the radio ads at issue in this case. And third, Referenda C and D are ballot issues or ballot questions. Therefore, the remaining issues that must be resolved by the ALJ are: (1) does the Institute have a "major purpose" of supporting or opposing Referenda C and D; and, if so, (2) are the Institute's actions to "support or oppose" Referenda C and D.

Does the Institute have a major purpose of supporting or opposing Referenda C and D?

Article XXVIII of the Colorado Constitution does not define the term "major purpose" and the United States Supreme Court's cases concerning campaign finance laws are not instructive when determining this phrase. The Supreme Court cases interpret the phrase "the major purpose" in the context of the defining "political committees." See *Buckely v. Valeo*, 424 U.S. 1 (1976) and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). In this case, the ALJ must interpret the phrase "major purpose" in the context of an "issue committee."

In order to determine the meaning of "major purpose," the court must look to ascertain and give effect to the intent of the voters and interpret the words in light of their plain meaning. *Coffman v. Colorado Common Cause*, 102 P.2d 999, 107 (Colo. 2004); *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)). Furthermore, it is a well-established principle in the area of statutory construction that words and phrases are to be construed according to their familiar and generally accepted meaning, *Allstate Ins. Co., v. Smith*, 902 P.2d 1386 (Colo. 1995), while reaching a just and reasonable result. See, § 2-4-201(1)(b), C.R.S. (2005).

A plain reading of the definition of an issue committee in Article XXVIII, § 2(10)(a)(I) reveals that the "major purpose" provision does not require that the only purpose or even the primary purpose of an entity be to support or oppose a ballot question. Rather, the definition requires only a determination that the entity has "a" major purpose of supporting or opposing a ballot measure. As such, the use of the word "a" does not restrict the number of major purposes an entity may have. Any analysis to determine a major purpose of the Institute must begin with a discussion about the history of the organization and its founding mission.

The Institute was founded in 1985 as a non-partisan, non-profit public policy research organization. Its mission is to provide policy makers, legislators, and the citizens of Colorado with educational and analytical materials on a broad spectrum of issues from a free-market perspective. It does this by producing and publishing educational materials from each of its six core policy centers. In the last several years, the Institute has published over twenty issue papers dealing with topics such as public school reform, improving transportation, balancing Colorado's budget, improving the state's prison system, promoting privatization of government functions, and implementing taxing and spending limits. Only one of the Institute's six policy centers (the Fiscal Policy Center) focuses on taxation issues.

The Fiscal Policy Center has been in existence for many years. Since 1992, its focus has included issues related to TABOR. During the past five months, Referenda C and D have taken on significance for this center. However, arguably, even within the Fiscal Policy Center, C and D have not been the major focus; they are only of recent importance. The Institute, through this policy center, has been involved in taxation issues long before the enactment of TABOR and the referral of Referenda C and D. And, all reasonable inferences suggest that the Institute's Fiscal Policy Center will remain involved in matters of general taxation and TABOR long after the fate of C and D are determined. There is no evidence that after the election, the mission or purpose of the Fiscal Policy Center or the Institute will be fundamentally altered or that it will cease to exist, as might be expected if its major purpose were linked to the outcome of an election. The fact that Referenda C and D are issues that align with one of the Institute's policy centers does not make Referenda C and D a major purpose of the Institute. This is further supported by the fact that, during the past five months, Mr. Caldara, as President of the institute, has spent two-thirds of his time on issues not related to C and D. And, during the past several months, the Institute's remaining senior staff members have continued to work on issues not related to C and D.

In the spring of 2005, the Institute paid directly for and received in-kind contributions for three radio ads costing a total amount of \$235,000. Complainant argues that the sheer amount of money spent by the Institute indicates what its "major" purposes are. In support of this argument, Complainant cites to a recent federal court decision dealing with Colorado's regulation of political committees. *Colorado Right to Life Committee, Inc. v. Davidson*, Civ. Action No. 03-CV-145 (slip op.).²

In *Colorado Right to Life Committee*, Judge Walker Miller struck down the application of the political committee definition to a 501(c)(3) organization because no "major purpose" test could be applied to that definition. The definition of "political committee" renders a person or entity a political committee if he or it contributes or expends more than \$200 to support or oppose a candidate. See Colo. Const. art XXVIII, § 2(12)(a). In his opinion, Judge Miller found that the \$200 threshold in the definition of a political committee was incompatible with a major purpose test.

² *Colorado Right to Life Committee* decision was admitted as exhibit R-15 in this case.

Consequently, an entity that spends \$200,000 on various non-political activities and donates \$200 (1/10 of 1% of its budget) to a candidate is deemed a political committee. Furthermore, the amount of money an organization must accept or spend - \$200 - is not substantial and would, as a matter of common sense, operate to encompass a variety of entities based on expenditure that is substantial in relation to their overall budgets.

Id. at 30.

In this case, Complainant argues that the amount spent by the Institute on the three radio ads is substantial (1/16 of this year's budget - \$235,000/\$1.4 million) and reflects how important C and D's defeat is to the Institute. "Using Judge Miller's quantitative analysis as the touchstone, the purpose associated with this activity must be considered to be 'major'." (Complainant's Closing Brief, page 8). For the following reasons, the ALJ does not find this argument persuasive.

The issues raised in the *Colorado Right to Life Committee* case concern the definition of a political committee, not an issue committee. The Court, in *Colorado Right to Life Committee*, looked to the \$200 trigger as a way of determining whether it could construe § 2(12) as including a major purpose test.³ In this case, the relevant section of Article XXVIII is § 2(10), which expressly incorporates a major purpose test; therefore, the analysis undertaken by Judge Miller, while thoughtful, does not have direct application to this case. The amount of money spent by the Institute for radio ads is only one of many factors to be considered when ascertaining a major purpose.

In his closing brief, Complainant suggests that little weight should be given to Mr. Caldara's description of the Institute's activities in determining the Institute's major purpose because, "[t]o rely on such representations from the party subject to regulation would permit conduct that is intended to be covered 'to escape regulation merely because the stated purposes were misleading, ambiguous, fraudulent, or all three'." (Complainant's Closing Brief, page 7, citing *League of Women Voters v. Davidson*, 23 P.3d 1266, 1275 (Colo.App. 2001)). Yet, Complainant introduced no evidence refuting Mr. Caldara's testimony regarding the primary mission of the Institute, the objectives of the Institute or the various activities it has been involved in over the past twenty-one years. The ALJ finds no reason to discount the testimony of Mr. Caldara, particularly as to the Institute's activities as those activities are well supported by the documents introduced at hearing.

The Institute was established twenty-one years ago with the purpose of promoting free-market based ideas in several areas, only one of which includes taxation and spending. The Institute's purposes of opposing taxation and government spending long predate Referenda C and D.

³ This argument was raised by the Secretary of State to provide justification for the state's regulation of political committees. *Colorado Right to Life Committee*, page 29.

In determining the issues raised in Complainant's complaint, it is the role of the ALJ to weigh the evidence and from the evidence reach conclusions. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative proceeding is "by a preponderance." This standard has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985).

In the instant case, the facts do not support the argument that opposition to Referenda C and D was a major purpose of the Institute. Having considered the length of time the Institute has been in existence, the purpose for which it was established, the various issues it has been involved in and is presently involved with, and its multi-faceted organizational structure (i.e. the six policy centers), the ALJ concludes that Complainant has failed to establish, by a preponderance of the evidence, that the Institute had a "major purpose" of opposing Referenda C and D.

Common Sense Alliance v. Davidson

Even if the ALJ were to find that the Institute had a major purpose of opposing C and D, consistent with the Colorado Supreme Court's holding in *Common Sense Alliance*, 995 P.2d 748, 753 (Colo. 2000), the ALJ would not so broadly construe the definition of issue committee to include the Institute. In *Common Sense Alliance*, the Court was required to determine whether an organization formed for other purposes may later become an issue committee as defined by the FCPA. At that time, the FCPA defined "issue committee" as two or more persons who have associated themselves for the purpose of supporting or opposing a ballot initiative. Although the definition of issue committee that currently appears in Article XXVIII, § 2(10)(a) has changed from the former section in the FCPA, the policy and constitutional concerns raised by the Court have not.

First, in *Common Sense Alliance*, the Court concluded that the statute was insufficiently clear to include CS Alliance within the reach of the issue committee definition. In doing so, the Court held that: the statute contained no guidance as to when a committee formed for another purpose would be deemed to become an issue committee; when its contributors would become subject to the disclosure requirements; or even which of its contributors would need to be disclosed. *Id.* at 749.

Were we to interpret the statute broadly, any political or special interest organization could become an issue committee through a decision of its leadership to support or oppose a ballot initiative without the assent or perhaps even the knowledge of its members. Such a decision would then trigger the reporting and financial contributions of the members of the organization. Because constitutional rights concerning freedom of association and freedom of speech are implicated, we decline to give the statute that broad reading and decline to provide judicial answers to the questions left unanswered in the statute.

Id.

Second, in applying a narrow interpretation to the definition of an issue committee, the Court looked to the larger purpose behind the campaign laws and in so doing held:

As currently written, the FCPA assures disclosure of information regarding large contributions to candidate campaigns. The purposes served by disclosure of that information do not propel a conclusion that CS Alliance should also be subject to the same disclosure provisions. The identity of supporters and opponents of a ballot initiative would be potentially helpful to the electorate, but the information is not nearly as critical as the identity of candidate supporters. As the Supreme Court has stated: “The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.” *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 790 (1978). . . This is because “ballot initiatives do not involve the risk of ‘quid pro quo’ corruption present when money is paid to, or for, candidates.” *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999).

Common Sense Alliance, at 755.

Finally, with respect to the requirement that CS Alliance would have to disclose the identity of its members if it were found to be an issue committee, the Court held:

[T]he members of CS Alliance should have advance notice of the consequences of their political activities and be able to anticipate the extent to which their political associations and activities will become a matter of public knowledge. If we construe the FCPA to permit CS Alliance to evolve into an

issue committee, the supporters of the CS Alliance will not have had the benefit of choosing whether they wish to contribute to an organization required to make public disclosures. . . [T]he right of the electorate to be informed on how public issue campaigns are financed, and by whom, must be balanced against the rights of free association and free speech of an organization's members.

Id. at 756, 757.

The parallels between the instant case and *Common Sense Alliance* are striking. If the Institute were deemed to be an issue committee, its members would not have advance notice that their political associations and activities will become matters of public knowledge. Further, the definition of an issue committee in Article XXVIII contains no guidance as to when a committee formed for another purpose would be deemed to become an issue committee; when its contributors would become subject to the disclosure requirements; or even which of its contributors would need to be disclosed. For these reasons, the ALJ adopts, in its entirety, the Court's analysis in *Common Sense Alliance* and declines to expand the definition of issue committee to include the Institute, even if it had a major purpose of opposing Referenda C and D.

Secretary of State's Rules

The position that a non-profit membership organization, with a major purpose other than the support or opposition of a ballot issue, or one with multiple major purposes, should not be deemed an issue committee is further supported by the definition of an issue committee and the Secretary's rules. Pursuant to § 2(10)(c), Article XXVIII, "[a]n issue committee shall be considered open and active until affirmatively closed by such committee or by action of the appropriate authority." The Secretary's rules permit the closing of an issue committee only after it is completely defunded and when it no longer intends to receive contributions or make expenditures. See, Rule 3.4, 8 CCR 1505-6.

If a non-profit organization, formed for a purpose other than supporting or opposing a ballot issue or one with multiple purposes, evolved into an issue committee, under the Secretary's rules, it would be forced to dispose of its assets, pay any outstanding debt and eliminate its members. Such broad interpretation of the definition of an issue committee culminates in an absurd result, and one that cannot have been intended. In fact, if the actions of the Institute are found to be within the definition of an issue committee, the same standard could be applied to a myriad of other similarly situated groups, ranging from the Children's Campaign, to Bell Policy Institute, to the Red Cross, simply by undertaking efforts to support or oppose ballot issues or questions.

Did the Institute accept or make contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question?

In light of the ALJ's conclusions, that the Institute does not have a major purpose of opposing Referenda C and D and that, under *Common Sense Alliance*, the definition of issue committee cannot be expanded to include the Institute even if it has a major purpose of opposing these ballot measures, the ALJ does not need to address whether the Institute accepted or made contributions or expenditures in excess of \$200 to support or oppose a ballot issue or ballot question.

II. Did Vote No fail to report the contributions it received from the Institute?

In his First Amended Complaint, Complainant asserts that Vote No violated § 1-45-108(1), C.R.S. by failing to disclose its receipt of the Institute's below-market value of its contributions of goods, services, and participation at campaign events. (First Amended Complaint, page 3, ¶ 16). In his closing brief, Complainant narrows his argument and more specifically alleges that the three radio ads became non-monetary contributions to the Committee by the Institute that were never disclosed. Complainant contends that these ads were a gift of property (i.e., the amount of money that would have been required to be spent by Vote No to produce and air these ads) made to Vote No. Accordingly, Complainant asserts that Vote No violated the FCPA by failing to disclose the Institute as the non-monetary contributor of \$35,000 worth of radio ads and the name of the in-kind non-profit agency as the non-monetary contributor of the \$200,000 worth of radio ads.

Article XXVIII, § 2(5)(a) defines "contribution" as:

- (I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any . . . issue committee. . . ;
- (II) Any payment made to a third party for the benefit of any. . . issue committee. . . ;
- (III) The fair market value of any gift or loan of property made to any . . . issue committee. . . ;

The three radio ads in question were posted on the Institute's website and made available to other groups, including Vote No. Vote No included a link to these ads on its website, along with links to the websites of other groups and organizations opposing Referenda C and D. In order to determine if the three ads constitute a contribution to Vote No, the ALJ must determine the following three questions: When the Institute paid for the first ad was it done for the benefit of Vote No? Did the unnamed non-profit agency, on behalf of the Institute, pay for the second and third ads for the benefit of Vote No? Were the ads a gift from the Institute to the Committee?

There is no credible evidence in the record supporting Complainant's argument that the Institute and/or the unnamed non-profit agency produced or paid for the radio ads for the benefit of Vote No. All three ads were produced and aired by the Institute. The Institute produced, paid for (directly or through in-kind contributions), and aired these ads as part of its educational efforts to inform Colorado voters about the dangers of Referenda C and D. The Institute made the radio ads for the benefit of its members, not the Committee. The fact that the Institute's ads are publicly available on its website does not change this fact.

The Institute posts much of its material on its website. It does not charge anyone or receive compensation from any persons, agencies, or groups who download information or create links to its website. Vote No created links on its website to the Institute, which include links to the radio ads. Complainant contends that this activity renders the ads a gift and therefore a reportable contribution. The ALJ disagrees.

There is no evidence that the Institute donated or gifted its ads to the Committee or to any other group for that matter. The Institute's website is available for others to access. Under common law, it is well established that in order to constitute a gift there must be evidence of a volitional act and donative intent. *Bunnell v. Iverson*, 147 Colo. 552, 364 P.2d 385 (Colo. 1961). (It is fundamental that in order to constitute a valid gift, there must be: First, a clear and unequivocal intent on the part of the donor to make a gift and, Secondly, delivery of the subject matter or other action on the part of the donor and donee which effectively divests the former and invests the latter with title or property.) This common law definition comports with the definition of a "contribution" in Article XXXV III. The definition of a "contribution" in Article XXVIII includes the specific phrase, "**made to**," whether in the context of a gift, loan, pledge, payment, advance of money, or guarantee of a loan. See, Article XXVIII, § 2(5)(a)(I) and (III). The phrase "made to" clearly contemplates the notion of a volitional act or donative intent on the part of the gifting or contributing party.

The mere fact that others, including the Committee, can access the Institute's website and create links to its radio ads does not make the ads a gift or the Institute a contributor for reporting purposes under the FCPA. To conclude any other way would create an absurd result, in that, a party could be forced to report a contribution when the "contributing" party had no intention of making a contribution and may not have even known they did. In order for there to be a reportable event under the FCPA, there must be some evidence that the Institute's ads were gifts to the Committee and there is no such record of that in this case.

CONCLUSIONS OF LAW

1. Pursuant to Colo. Const, art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.
2. The issues in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through

7 or 9(1)(e) of Article XXVIII, or Sections 1-45-108, 114, 115, or 117, C.R.S., Colo. Const. art. XXVIII, § 9(2)(a). If an ALJ determines that a violation of one of these provisions has occurred, the ALJ's decision must include the appropriate order, sanction or relief authorized by Article XXVIII. Colo. Const. art. XXVIII, § 9(2)(a).

3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)⁴. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against Respondents for violations of the FCPA. Accordingly, Complainant has the burden of proof. The applicable standard of proof in this case is by a preponderance of the evidence.

4. Complainant has failed to establish, by a preponderance of the evidence, that the Institute is an issue committee as defined in § 2(10)(a), Article XXVIII of the Colorado Constitution. Accordingly, the Institute did not violate the law by failing to register as an issue committee, by failing to file disclosure reports of contributions and expenditures, or by failing to set up a separate account for its activities related to Referenda C and D.

5. Complainant has failed to establish, by a preponderance of the evidence, that Vote No violated the FCPA by failing to disclose contributions it received from the Institute.

AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that neither the Institute nor Vote No violated the FCPA or Article XXVIII of the Colorado Constitution in any respect alleged in Complainant's First Amended Complaint. The complaint is dismissed. Each party is responsible for paying their own costs and attorneys' fees associated with the filing of this complaint.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE AND SIGNED

November 4, 2005

MICHELLE A. NORCROSS
Administrative Law Judge

⁴ Section 24-4-101, *et seq.*, C.R.S.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by faxing and placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

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on this ____ day of November 2005.
