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ELECTIONS
SECRETARY OF STATE
December 23, 2013



Honorable Scott Gessler
Secretary of State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290

Re: Petition for Rulemaking Regarding Political Party Independent Expenditures

Dear Secretary Gessler:

Pursuant to C.R.S. § 24-4-103(7), Colorado Ethics Watch respectfully petitions the Secretary of State to start a rulemaking proceeding to issue and amend rules as necessary to clarify that any independent expenditures made by political parties must be funded with contributions compliant with the Colorado Constitution's limitations and source prohibitions.

The Secretary has noticed a public hearing to consider a Petition for Declaratory Order filed by the Colorado Republican Party for January 7, 2014 at 1:30pm. Ethics Watch requests the Secretary consider this Petition for Rulemaking, with appropriate notice and public comment, at that same January 7, 2014 hearing. See C.R.S. § 24-4-103(7) ("all related petitions for the issuance, amendment, or repeal of rules on such matter shall be considered and acted upon in the same proceeding"). In the alternative, Ethics Watch requests the Secretary postpone consideration of the Petition for Declaratory Order until this Petition for Rulemaking has been made open for public inspection and decided.

The Issue of Political Party Independent Expenditures Must be Addressed, If At All, in a Public Rulemaking Proceeding not a Personal Declaratory Order

The Petition for Declaratory Order, filed November 8, 2013 by the Colorado Republican Party ("CRP Petition"), raises important issues regarding political parties in Colorado, which operate under the rules created by citizens in Article XXVIII of the Colorado Constitution. See art. XXVIII, § 3(3). Specifically, the CRP Petition asks the Secretary to create binding rules regarding how political parties may make, and fund, independent expenditures consistent with Article XXVIII and the Fair Campaign Practices Act, C.R.S. § 24-4-101, *et seq.* Any decision on this issue will have far-reaching consequences to political parties, candidates, contributors, and citizens in Colorado. It is simply not appropriate to use the declaratory order procedure to decide this matter, both because the CRP petition does not itself satisfy the requirements of the declaratory order rule and because the public rulemaking procedure under Colorado's



Administrative Procedure Act is the only appropriate method for the Secretary to address the issues presented in the CRP Petition.

1. The CRP Petition does not fall within the requirements of the declaratory order rule

Under 8 CCR 1505-3, Rule 1.1, declaratory orders are limited to circumstances where an individual petitioner seeks clarification of rules or statutory provisions to that petitioner's conduct. *See also Colorado Office of Consumer Council v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 284-85 (Colo. 1991) (*Mountain States*) (explaining agency adjudicatory proceedings resulting in orders). The Secretary's rules state that a declaratory order is not proper if the petition is a "hypothetical question or will result in advisory opinion." *See* 8 CCR 1505-3, Rule 1.2(B)(4). The petitioner has the burden to prove facts necessary to show the nature of the controversy and that the circumstances support application of the declaratory order rule. *See* 8 CCR 1505-3, Rule 1.4(B). The CRP Petition fails to meet these requirements.

The CRP Petition does not address a controversy as to how rules apply to past behavior by the political party – it explicitly seeks a proactive advisory opinion regarding *future conduct* that it might take. The party notes that it has only used "hard money" (*i.e.* contributions that comply with the limitations and source prohibitions of Art. XXVIII) to fund its independent expenditures since 2012. *See* CRP Petition at 5. As the petition notes, and Ethics Watch agrees, "[t]here can be no legitimate question concerning the propriety of such expenditure." *Id.* Thus, there is no "controversy or uncertainty" regarding the conduct of the party to this point that permits a declaratory order under Rule. 1.1. *See Mountain States*, 816 P.2d at 285 (declaratory order procedure is appropriate for "to resolve disputes over historic facts). Instead, the party is seeking to use this procedure to obtain the Secretary's approval regarding prospective conduct – funding independent expenditures in violation of the contribution limitations and source prohibitions in Article XXVIII, § 3(3). This is the very definition of an "advisory opinion" that is prohibited under the Secretary's own declaratory order rules.

The CRP Petition offers only vague allegations in an attempt to show that there is a genuine controversy authorizing a declaratory order. The party is concerned that a campaign finance complaint could be filed if the party does use funds that violate Article XXVIII, § 3(3) to make independent expenditures. *See* CRP Petition at 6. Possible concern that future actions might cross the line and generate a campaign finance complaint is not an active "controversy" that supports a declaratory order. If such a complaint were filed, the party would have the opportunity to defend itself with its lengthy legal arguments as to why such conduct is legal before any penalty might be imposed. Moreover, it is unclear what legal import receiving a declaratory order would have in such a proceeding. The only parties to such an order would be the Secretary and the Colorado Republican Party. Because Colorado campaign finance law is

enforced not by the Secretary, but through private party complaints resolved by an Administrative Law Judge, a declaratory order could not prohibit campaign finance complaints from being filed. *See Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47-48 (Colo. 2001) (doctrine of issue preclusion applies to parties in an administrative adjudication); *Colorado Ethics Watch v. Senate Majority Fund*, 2012 CO 12, ¶ 10 n.8 (“In Colorado, the enforcement of campaign finance laws is left primarily to private parties.”).

Nor is the basis for this “concern” so imminent that a declaratory order is required rather than a public rulemaking proceeding. The party explains that during a meeting of the Secretary’s campaign finance advisory committee, the issue of political party independent expenditures was “significantly criticized by some in attendance.” *See* CRP Petition at 6. The party points to these comments as a credible basis for fear of having to defend a campaign finance complaint if it takes its proposed course of action because some of the organizations represented in that meeting have previously filed complaints. *See id.* Yet, a public records request revealed that the Secretary’s campaign finance advisory committee has not met since before January 2, 2012. Critiques voiced almost two years ago cannot alone form the basis of an active controversy under the declaratory order rules.

2. Independent expenditures by political parties is an issue of general application that requires an APA rulemaking proceeding

Even if the CRP Petition had technically satisfied the requirements of the declaratory order rules, the issue reaches conduct of many other than the petitioner and is not a simple application of current rules and statutes. What the CRP Petition really seeks is a new rule regarding political party independent expenditures where none exists – an act that the Secretary is only authorized to take pursuant to a rulemaking proceeding under C.R.S. § 24-4-103. *See Mountain States*, 816 P.2d at 286. The rulemaking procedures include protections for public notice, participation, judicial review and legislative review that simply do not exist in the declaratory order process. A declaratory order only binds the petitioner (and anyone else who joins as a party under limited circumstances) and may only be subject to judicial review by a party. *See* 8 CCR 1505-3, Rules 1.5 and 1.6. This process is not appropriate where, as here, the petition raises a question of general application to multiple actors that would require new and/or revised rules to address the prospective conduct.

As the notice of hearing acknowledges, there are many “interested individuals” when it comes to the issue of political party independent expenditures. Although the Secretary has chosen to allow some of those individuals to speak at the January 7 hearing and present their “views and arguments,” none of these individuals will be bound by the declaratory order or able to exercise the procedural safeguards of a § 24-4-103 rulemaking. Perhaps the clearest example of why this matter is not appropriate for a personal declaratory order is that fact that there are at

least four other active registered political parties in Colorado at this time. None of these political parties would be bound by, or have standing to challenge, any declaratory order the Secretary issued to the Colorado Republican Party.

In addition, candidates in Colorado state and local races are directly affected both because of the possible harm to their campaigns committees if they coordinate with a part of their political party that is supposed to be “independent,”¹ and because they have an interest in whether or not political parties can raise and spend money that does not conform to constitutional limits and prohibitions in their elections. Legislators who created independent expenditure committees as a creature of statute have an interest in how that statute is interpreted and applied to political parties. Finally, citizens who enacted these limitations and prohibitions – and who are responsible for enforcing the law under Colorado’s complaint-based system – have a vital interest in whether broad exceptions are created to constitutional provisions. Any decision by the Secretary regarding this issue is not properly done in a declaratory order because it is not “primarily for resolution of particular issues affecting only [the petitioner].” *Mountain States*, 816 P.2d at 284. Instead, any decisions regarding independent expenditures by political parties falls under the Secretary’s “exercise of responsibility to develop general policies for implementation” of Colorado campaign finance law. *Id.* at 285. Thus, a rulemaking of general application under CRS § 24-4-103 is required.

Nor can a declaratory order on the CRP Petition be issued without effectively amending or adding new rules to those that exist regarding independent expenditures, political parties, and coordination. In addition to creating a new rule about political party independent expenditures, a declaratory order in this matter would (in affect) amend at least the following rules duly enacted:

- Rule 1.3.4 – Contribution in support of the candidacy
- Rule 1.4 – Coordination
- Rule 3.3 – Political Committee and Independent Expenditures
- Rule 6 – Political Parties
- Rule 13.1 – Corporations and Labor Independent Expenditures.

The Secretary does not have the authority to amend any rules outside the § 24-4-103 rulemaking process. *See Mountain States*, 816 P.2d at 286 (reversing Commission declaratory order because “inescapable that in substance and effect the Commission engaged in rule-making conduct”).

¹ In addition to addressing the general question of what funds may be used for political parties to make independent expenditures, the CRP Petition requires clarification of issues surrounding coordination with a political party and candidates which requires a prospective interpretation and amendment of those rules. These coordination issues matter to all political parties and candidates at both the state and local level, since coordinated expenditures count towards contribution limits to candidate committees and political parties. The voices of those parties and candidates must be heard, if at all, in a rulemaking proceeding.

Any New or Amended Rules Regarding Political Party Independent Expenditures Must Conform to Colorado's Constitutional Limitations and Source Prohibitions on Contributions to Political Parties

In a rulemaking proceeding, the Secretary would be required to propose rules for public notice and comment, including public hearing. *See* C.R.S. § 24-4-103(2)-(4). At that time, Ethics Watch – as well as the numerous other interested persons and organizations described above – can provide the Secretary with detailed legal arguments and factual information supporting or opposing the proposed rules. Ethics Watch urges the Secretary to propose rules that require any independent expenditures made by political parties be funded only in compliance with the Colorado Constitution's limitations and source prohibitions on contributions to political parties.

While the CRP Petition is correct that under federal constitutional law a political party may not be prohibited from making independent expenditures that do not count towards candidate contribution limitations, case law does not support a right for political parties to fund such expenditures with unlimited and unregulated money. *See Colorado Republican Fed. Campaign Comm. v. F.E.C.*, 518 U.S. 604, 617-18 (1996) (*Colorado Republicans I*). Longstanding U.S. Supreme Court precedent treats restrictions on spending with a higher level of scrutiny than restrictions on contributions to candidates and political parties. *See Citizens United v. F.E.C.*, 558 U.S. 310, 356-57 (2010). This distinction was applied to the Colorado Republican Party itself in the follow-up case to *Colorado Republicans I* relied upon in the CRP Petition. *See F.E.C. v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) (*Colorado Republicans II*) (upholding limits on political party coordinated spending treated as contributions). In *Colorado Republicans II*, there was no question or challenge to the fact that the political party must continue to comply with the \$20,000 per year limit on contributions from individuals even if that money was used for independent expenditures. *See id.* at 458-61. Even *Colorado Republicans I* noted the potential for corruption linked to “the ability of donors to give sums up to \$20,000 to a party which may be used for independent party expenditures for the benefit of a particular candidate.” *Colorado Republicans I*, 518 U.S. at 617. Indeed, additional contribution limitations to political parties have been upheld by the U.S. Supreme Court since *Colorado Republicans II*. *See McConnell v. F.E.C.*, 540 U.S. 93 (2003) (holding prohibition on national political parties from raising or spending any funds not subject to contribution limitations and prohibitions does not violate First Amendment). Under this governing law, “independent expenditures must be paid for with federally permissible funds” by federal political parties – and *Citizens United* has not changed that requirement. *See [FEC Campaign Guide for Political Party Committees](#)* at 62 (August 2013).

Colorado citizens have spoken and decided that the potential for corruption warrants limitations on contributions to political parties. *See* Colo. Const. art. XXVIII § 3(3) (setting

dollar limits on contributions to political parties from individuals and committees) and § 3(4) (prohibiting corporation and labor organization contributions to political parties). In Colorado, as in federal law and elsewhere, political parties are simply differently situated and appropriately treated differently than corporations, labor organizations, or other associations. *See Republican Party of New Mexico v. King*, No.12-2015 at *21-*22 (10th Cir. December 18, 2013) (citing Supreme Court precedent upholding contribution limits to parties and distinguishing political parties from other committees that might make independent expenditures) *see also McConnell*, 540 U.S. at 144 (“The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholder is neither novel nor implausible.”). The CRP Petition admits these contribution limits and prohibitions bind the political parties when it states that such constitutional provisions have “not yet been successfully challenged” in court. *See* CRP Petition at 15. Thus, any rule regarding independent expenditures by political parties must comply with the Colorado Constitution which the Secretary is bound to administer and enforce. Colo. Const. art. XXVIII, § 9(1); *see also, e.g., Colorado Ethics Watch v. Gessler*, 2013 COA 172.

Moreover, “independent expenditure committees” (“IECs”) are a creature of statute in Colorado – a statute that does not authorize political party sponsoring of such committees without regard to constitutional contribution limitations. It is simply nonsensical for the CRP Petition to base its argument that political parties are permitted to operate funds not governed by constitutional limits and prohibitions based on the lack of reference to “independent expenditure committees” in Article XXVIII. There was no deliberate exclusion of IECs from corporate and labor contribution or any other provision when the Article was enacted - such committees simply didn’t exist at that time. However, when IECs were created in statute, deliberate choices were made and reflected in the statutory language. Nothing in these statutes relieves an IEC from complying with the political party contribution limitations in Article XXVIII § 3(3) and contribution prohibitions in Article XXVIII § 3(4). First, C.R.S. § 1-45-107.5(2) explicitly authorizes corporations and labor organizations to set up IECs – not political parties. Even if one could interpret this section to allow a political party to establish an IEC, the sections cited by the CRP Petition that supposedly authorize political parties to use unrestricted funds instead prove the opposite. *See* CRP Petition at 12. CRS § 1-45-103.7(1) states that nothing prohibits corporations and labor organizations from contributing to political committees – not political parties (which are excluded from the definition of political committee). Moreover, CRS § 1-45-103.7(2.5) simply states that IECs are not subject to the constitutional limitations in Article XXVIII, § 3(5) – the contribution limits for political committees. Nothing in the statute allows IECs to be exempted from the constitutional limits in Article XXVIII, § 3(3) – the limitations on political party contributions.

There are many more reasons why any rule promulgated regarding political party independent expenditures must not contradict constitutional limitations and prohibitions. A

rulemaking proceeding is required to properly create an administrative record to support the Secretary's rule and to hear all such arguments in favor of, and those against, such a rule. But it is clear that such important decisions broadly affecting the political landscape of Colorado in an election year cannot be made in a declaratory order that by its own terms would apply only to the Petitioner. Ethics Watch therefore urges the Secretary to decline the CRP Petition and instead start a § 24-4-103 rulemaking on these issues.

Sincerely,



Luis Toro
Director
Colorado Ethics Watch