



September 6, 2018

PDF VIA EMAIL, [suzanne.staiert@sos.state.co.us](mailto:suzanne.staiert@sos.state.co.us)

Honorable Wayne Williams  
Colorado Secretary of State  
1600 Broadway  
Suite 200  
Denver, Colorado 80203

Re: Request for Declaratory Order and Advisory Opinion

Dear Secretary Williams,

Please accept this request for a declaratory order or request for advisory opinion, under C.R.S. § 24-4-105, 8 CCR 1505-3 Rule 1, and 8 CCR 1505-6 Rule 18.2.10. As discussed below, this request asks you to declare whether a committee that advocates retention or non-retention of a judge (1) must file as an independent expenditure committee or political committee, and (2) and if it must file as a political committee, whether it is subject to contributions limits under Colo. Const. Art. XXVIII, section 3(5).

#### **Name and Address of Petitioner**

Great Judges for a Great Colorado  
1624 Market Street  
Suite 202  
Denver, Colorado 80202

#### **Questions presented**

1. The committee “Great Judges for a Great Colorado” is a non-profit organization that seeks to make independent expenditures to advocate for the retention or non-retention of judges standing for retention in 2018. It will not coordinate its efforts with any judicial candidate committee, nor will it contribute to any judicial candidate committee. Must it register and file as an independent expenditure committee under C.R.S. §1-45-103(11.5), must the committee register and file as a political committee under Colo. Const. Art. XXVIII, § 3(5), or must it register and file as some other committee?

2. If the committee must register and file as a political committee as defined by Colo. Const. Art. XXVIII, § 2(12), must it abide by the limits on the amount that can be contributed to political committees, as set forth in Colo. Const. Art. XXVIII, § 3(5) and adjusted for inflation by 8 CCR 1505-6, Rule 10.16.1(f)?

## **Constitutional provisions and statutes to which this petition relates:**

U.S. Const. amend 1.  
Colo. Const. Art. XXVIII, §§ 2(12) and 3(5).  
C.R.S. § 1-45-103(11.5)  
8 CCR 1505-6, Rule 1.7

## **Factual Background**

Great Judges for a Great Colorado (the “Committee”) is a recently-formed Colorado limited liability company registered with the IRS as a political organization. The Committee’s purpose is to receive contributions and make independent expenditures to advocate for the retention or non-retention of judges or justices standing for electoral retention. The Committee will not make contributions to any judicial candidate’s retention committee, nor will it coordinate its expenditures with any judicial candidate’s retention committee. Rather, it will limit its efforts to independent expenditures that advocate for the retention or non-retention of judges or justices.

As a non-profit organization, the Committee seeks contributions from a wide swath of individuals and organizations that have an interest in the retention of worthy judges, and the non-retention of unfit judges. But in order to amass adequate funds to meaningfully communicate with the public, it must be able to raise contributions from individuals or entities greater than \$575 every two years. Indeed, the cost to communicate with voters, through media such as network and cable television, mail, internet advertising, radio, or face-to-face personal communication, makes it impossible to amass adequate funds without receiving contributions larger than the contribution limits to political committees of \$575 every two years.

Upon receiving guidance from the Colorado Secretary of State, the Committee will promptly register with the Secretary of State as the appropriate type of committee, and it will follow all applicable filing and disclosure requirements set forth in Colorado law.

## **Discussion**

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

### **The Committee should be regulated as an Independent Expenditure Committee.**

Colorado defines an “independent expenditure committee” to “mean one or more persons that make an independent expenditure in an aggregate amount in excess of one thousand dollars or that collect in excess of one thousand dollars from one or more persons for the purpose of making

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<sup>1</sup> Colo. Const. Art. 28, Section 2(2).

an independent expenditure.”<sup>2</sup> As discussed above, the Committee expects to make independent expenditures, by advocating for or against the retention of judicial candidates.

At the same time, the Committee will not coordinate its expenditures with any judicial candidate, nor will it contribute to a judicial candidate. Under Colorado law this makes it an independent expenditure committee, not a political committee. Specifically, “an independent expenditure committee differs from a political committee in that an independent expenditure committee does not coordinate its activities with a candidate or political party.”<sup>3</sup> For this reason, “an independent expenditure committee shall not be treated as a political committee and, therefore, is not subject to the requirements of section 3(5) of article XXVIII of the state constitution.”<sup>4</sup>

In *Colorado Republican Party v. Williams*, the Colorado Court of Appeals addressed both the validity of the independent expenditure committee statute and the distinction between political committees and independent expenditure committees.<sup>5</sup> Additionally, it recognized that independent expenditure committees were not subject to contribution limits. “[S]o long as the expenditure is independent – ‘not controlled by or coordinated with any candidate or agent of such candidate’ – its source will not be subject to any contribution limits.”<sup>6</sup>

This approach faithfully adheres to the Colorado General Assembly’s decision to create independent expenditure committees for the express purpose of ensuring that contributions limits do *not* apply to organizations making independent expenditures only. In January, 2010, the United States Supreme Court decided *Citizens United v. Federal Election Commission*, ruling that organizations making independent expenditures could receive contributions from corporations and labor unions.<sup>7</sup> Two months after that decision, in March, 2010, the D.C. Circuit ruled that committees making independent expenditures could not be subject to contribution limits.<sup>8</sup> (Thus giving rise to federal “superpacs”). In response to these decisions, the Colorado General Assembly enacted Senate Bill 10-203, which forthrightly recognized that “in the case of *Citizens United v. Federal Election Comm’n*, 558 U.S. \_\_\_\_ (2010), the United States supreme court held that corporations are authorized to use their resources to influence candidate elections by means of independent campaign expenditures that employ express advocacy in support of or in opposition to candidates running in such

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<sup>2</sup> C.R.S. § 1-45-103(11.5).

<sup>3</sup> C.R.S. § 1-45-103.7(2.5)(a).

<sup>4</sup> C.R.S. § 1-45-103.7(2.5)(b).

<sup>5</sup> *Colorado Republican Party v. Williams*, 370 P.3d 650, 656 (Colo. App. 2016).

<sup>6</sup> *Id.* at 658.

<sup>7</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 357 (2010).

<sup>8</sup> *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686, 694 (D.C. Cir. 2010).

elections.”<sup>9</sup> Accordingly, Colorado created “independent expenditure committees” to ensure that Colorado’s campaign finance laws did not run afoul of controlling First Amendment principles.

Finally, because the Committee will make independent expenditures, and because it will not coordinate with or contribute to candidates, it *must* register as an independent expenditure committee, as mandated by the Secretary’s campaign finance rules:

Where there is no coordination as described in Rule 3.3, and the aggregate amount of the expenditures is in excess of one thousand dollars, the entity is an independent expenditure committee rather than a political committee. If the person or group meets the registration requirements of an independent expenditure committee, it must register as an independent expenditure committee.<sup>10</sup>

For these reasons, the Committee should be treated as an independent expenditure committee.

**If the Committee is subject to regulation as a political committee, contributions to the committee cannot be limited to \$575 every two years.**

Alternatively, while not well-supported by Colorado law, the Committee could be treated as a political committee. But if Colorado were to regulate the Committee as a political committee, then contribution limits for political committees (no more than \$575 from any one person every election cycle) could not constitutionally be applied to the Committee based on the *Citizens United* holding and other controlling case law.

The argument that the Committee is a political committee rests upon a Colorado Court of Appeals case decided four years before *Colorado Republican Party v. Williams*. In *Colorado Ethics Watch v. Clear the Bench Colorado*,<sup>11</sup> the court was asked to decide whether a judicial retention committee should be regulated as a political committee or issue committee. Relying upon Colorado statute, it found that “a committee that supports or opposes the retention of a judicial officer is a political committee because (1) it supports or opposes the election of a candidate; and (2) it is recognized as such by section 1–45–109(1)(a)(I).”<sup>12</sup>

Importantly, *Clear the Bench* does not control for three reasons. First, the court did not consider whether the judicial retention organization could be an independent expenditure committee. Indeed, *Colorado Ethics Watch* reviewed an administrative case that was instituted before

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<sup>9</sup> Colo. Sess. Laws, Chapter 269, S.B. 10–203, § 1(a) (2010) (An Act Concerning Independent Expenditures in Colorado Elections After the United States Supreme Court Case of *Citizens United v Federal Election Comm’n*, and Making and Appropriation Therefore).

<sup>10</sup> 8 CCR §1505-6, Rule 3.4.

<sup>11</sup> *Colorado Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931 (2012).

<sup>12</sup> *Id.* at 935-936.

Section 1-45-103(11.5) (defining an independent expenditure committee) became effective.<sup>13</sup> Accordingly, neither the administrative court nor the court of appeals even considered whether Clear the Bench Colorado was an independent expenditure committee.

Second, the court's statutory analysis predates *Colorado Republican Party* by four years. By enacting Sections 103(11.5) and 103.7(2), the Colorado General Assembly unambiguously created independent expenditure committees and distinguished them from political committees, which the Colorado Court of Appeals recognized in 2016. To the extent *Colorado Republican Party* conflicts with *Clear the Bench*, *Colorado Republican Party* controls, because it is more recent and because it squarely analyzes the independent expenditure committee statute, compared to the political committee definition.

Third, *Clear the Bench* did not consider whether the committee at issue in that case only made independent expenditures, which under Colorado law would qualify it as an independent expenditure committee rather than a political committee. Factually, the committee at issue in *Clear the Bench* could have been a political committee, if it contributed to judicial retention candidates. But the court did not consider whether the committee made independent expenditures only. Here, the Committee will not coordinate its independent expenditures with -- or contribute to -- any candidate, thus placing it squarely within the independent expenditure committee definition.

Even if Colorado were to regulate the Committee as a political committee, the limit on contributions to the Committee cannot be enforced. As noted above, the D.C. Circuit in *SpeechNow.org* held that the First Amendment prohibited government from imposing limits on contributions to committees that only made independent expenditures and did not contribute to or coordinate with candidates.<sup>14</sup> The Tenth Circuit has adopted this reasoning, finding that:

[b]ecause there is no corruption interest in limiting independent expenditures, there can also be no interest in limiting contributions to non-party entities that make independent expenditures. If an entity can fund unlimited political speech on its own without raising the threat of corruption, no threat arises from contributions that create the fund.<sup>15</sup>

Five other circuits have also taken this approach: The Second Circuit,<sup>16</sup> the Fourth Circuit,<sup>17</sup> the Fifth Circuit,<sup>18</sup> the Seventh Circuit,<sup>19</sup> and even the Ninth Circuit.<sup>20</sup> In short, controlling federal case

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<sup>13</sup> *Complaint Filed by Colorado Ethics Watch Regarding Alleged Campaign and Political Finance Violations by Clear the Bench Colorado*, Case No. OS 2010-009 (Colo. Office of Administrative Courts, 2010).

<sup>14</sup> *SpeechNow.org*, 599 F.3d at 694.

<sup>15</sup> *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1096-1097 (10th Cir. 2013).

<sup>16</sup> *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013).

<sup>17</sup> *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008).

law uniformly holds that a committee making independent expenditures only cannot be limited in the funds that it receives.

Accordingly, controlling federal law prohibits Colorado from placing contribution limits on the Committee, even if the state determines to regulate the Committee as a political committee, rather than an independent expenditure committee. This approach comports with the few instances in which Colorado’s administrative courts have relied upon the political committee definition for independent committees. In those instances where administrative courts have ruled that an organization making independent expenditures was a political committee, the courts have been careful to also recognize that Colorado’s political committee contribution limits cannot apply to that type of political committee.<sup>21</sup>

### Conclusion

For these reasons, the Great Judges for a Great Colorado requests that the Secretary of State determine that the Committee is properly regulated as an independent expenditure committee. Alternatively, the Committee requests that if it is subject to regulation as a political committee, then the Secretary declare that the contribution limits to political committees do not apply to the Committee.

Very truly yours,  
KLEND A GESSLER & BLUE, LLC



By: \_\_\_\_\_  
Scott E. Gessler

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<sup>18</sup> *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 538 (5th Cir. 2013)

<sup>19</sup> *Wisconsin Right to Life State Political Action Committee v. Barland*, 664 F.3d 139, 155 (7th Cir. 2011).

<sup>20</sup> *Farris v. Seabrook*, 677 F.3d 858, 867 (9th Cir. 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 698–99 (9th Cir. 2010).

<sup>21</sup> See, e.g., *Campaign Integrity Watchdog v. Colorado Pioneer Action*, Case No. OS 2016-0014 (Colo. Office of Administrative Courts, 2016).