DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80208	
Plaintiffs: Colorado Common Cause and Colorado Ethics Watch v. **Defendants:** Scott Gessler, in his capacity as Colorado Secretary of State	**▲COURT USE ONLY▲** Case Number: 2011CV4164 Courtroom: 414

ORDER

This matter is before the Court on Plaintiffs' Complaint for Judicial Review of Agency Action. Plaintiffs contest Defendant's adoption of Secretary of State Rule 4.27 ("Rule 4.27" or "the Rule"), and ask this Court to hold unlawful and set aside the Secretary's action adopting Rule 4.27, and/or declare the Rule unlawful and void under C.R.C.P. 57. In addition to reviewing the pleadings, the agency record, and legal authorities, the Court held oral arguments on November 8, 2011, and it now enters the following Order.

I. Standard of Review

In reviewing a determination made by an administrative body, the reviewing court may reverse an administrative agency's determination only if the court finds that (1) the agency acted in an arbitrary and capricious manner, (2) made a determination that is unsupported by the evidence in the record, (3) erroneously interpreted the law, or (4) exceeded its constitutional or statutory authority. C.R.S. § 24-4-106(7); *Ohlson v. Weil*, 953 P.2d 939, 941 (Colo. App. 1997).

II. Analysis

Plaintiffs bring several challenges to Rule 4.27. The threshold issue, however, is whether the Secretary of State exceeded his authority in promulgating Rule 4.27. The Court only will consider the challenges to the substance of Rule 4.27 in conjunction with whether the promulgation of the Rule was within the Secretary's authority.

A. Whether Rule 4.27 exceeds the Secretary of State's authority.

Article XXVIII, § 9(1)(b) of the Colorado Constitution, authorizes the Secretary to promulgate rules "as may be necessary to *administer* and *enforce* any provision of this [campaign and political finance] article". (Emphasis added.) The Secretary contends that Rule 4.27 was promulgated so as to administer the campaign finance laws in compliance with *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). The Secretary asserts that *Sampson* "abrogated the reporting requirements in [§ 1-45-108(1)-(3)] as applied to issue committees because the reporting thresholds were too low, thereby imposing a significant [and unconstitutional] burden on issue committees . . . ." (Def.'s Answer Br. 4.) In addressing these assertions, the Court will examine several components of the Rule's promulgation.

Amendment 27 and § 1-45-108.

The Court begins by analyzing the plain language of the constitutional provision Rule 4.27 purports to administer. Passed by Colorado voters in 2002, Amendment 27 – now Article XXVIII of the Colorado Constitution – created a comprehensive campaign and political finance system applicable to state elections. It is true that, as noted by *Sampson,* the Amendment was presented to, and adopted by, the electorate out of a concern that "large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; [and] that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process." Art. XXVIII, § 1. The Amendment, however, did more than focus only on large dollar amounts.

In general, Article XXVIII sets forth specific disclosure requirements for election participants, including "issue committees," which are defined as:

> any person, other than a natural person, or any group of two or more persons, including natural persons: (i) [t]hat has a major purpose of supporting any ballot issue or ballot questions; [and] (II) [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

Art. XXVIII, § 2(10)(a). This constitutional amendment also requires that issue committees deposit monetary contributions into a separate account. Art. XXVIII, § (3)(9). Additionally, pursuant to the Colorado Fair Campaign Practices Act (the "Campaign Act"), issue committees must register with the appropriate officer (*i.e.*, the Secretary) and report the name and address of any person who contributes twenty dollars or more, as well as expenditures made and obligations incurred. Section 1-45-108.

Article XXVIII contains a private enforcement provision, permitting "any person who believes that a violation of [certain enumerated sections of Article XXVIII or of the Campaign Act] . . . [to] file a written complaint with the secretary of state." Art. XXVIII, § 9(2)(a). Meanwhile, the Campaign Act directs the Secretary to "promulgate such rules . . . as may be necessary to enforce and administer any provision of [the Campaign Act]." § 1-45-111.5.

Sampson

In November of 2010, the 10th Circuit Court of Appeals issued its decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), which involved a constitutional challenge to Colorado's reporting requirements for issue committees. In *Sampson*, the plaintiffs opposed the annexation to the town of Parker of their small neighborhood in unincorporated Douglas County. *Id.* at 1249. In support of their cause, the plaintiffs received monetary contributions and in-kind donations totaling more than $200.00 (but well under $1,000.00). *Id.* Although having met the constitutional definition of an issue committee, plaintiffs failed to register as required by § 1-45-108(1). Supporters of the annexation then filed a written complaint with the Secretary under the private enforcement provision of Article XXVIII, § 9(2)(a). *Id.* at 1251. The plaintiffs later filed suit in the U.S. District Court for Colorado, alleging that the law regulating ballot-issue committees violated the First Amendment because "(1) the private-enforcement provision unconstitutionally chills free speech; (2) the registration and disclosure requirements unconstitutionally burden the constitutional rights to free speech and association; and (3) the disclosure requirements violate the right to anonymous speech and association." *Id.* at 1253.

The court subjected Colorado's reporting requirements to "exacting scrutiny," *id.* at 1261, in holding that "the Colorado registration and reporting requirements have unconstitutionally burdened [the plaintiffs'] First Amendment right of association." *Id.* at 1254. The court partially based its decision on Article XXVIII's purpose, stating, "[i]t would take a mighty effort to characterize the No Annexation committee's expenditure of $782.02 for signs, a banner, postcards, and postage as an exercise of a 'disproportionate level of influence over the political process' by a wealthy group that could 'unfairly influence the outcome' of an election." *Id.* (quoting Art. XXVIII, § 1). The court further reasoned, "the financial burden of state regulation on [p]laintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions." *Id.* at 1261. Thus, the court concluded, "[t]here is virtually no proper governmental interest in imposing disclosure requirements on ballot-initiative committees that raise and expend so little money, and that limited interest cannot justify the burden that those requirements impose on such a committee." *Id.* at 1249. However, the court further

stated, "[w]e do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures. . . . We say only that [p]laintiffs' contributions and expenditures are well below the line." *Id.* at 1261.

Obviously, the holding in *Sampson* presented the Secretary with a conundrum, which he attempted to address through the rulemaking at issue here. It is the Secretary's contention that *Sampson* "effectively abrogated the reporting and disclosure requirements in circumstances where the burden of reporting and disclosure approaches or exceeds the value of the financial contributions to their political effort." (Def.'s Answer Br. 14.) Furthermore, he asserts, "*Sampson* applies to reporting and disclosure requirements for all issue committees in ballot issue or ballot question elections. Without Rule 4.27, Colorado would not have any constitutionally-acceptable reporting and disclosure standards for issue committees." (Def.'s Answer Br. 15.)

The Court disagrees with Defendant's interpretation of *Sampson*'s intent and impact. As noted throughout the opinion, *Sampson* is an as-applied decision. 625 F.3d at 1249, 1254, 1259, and 1261. It therefore does not invalidate either Article XXVIII, § 2(10)(a)(2) or § 1-45-108(1)(a)(i), *except in like situations*. *See Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006) ("If a statute is held unconstitutional 'as applied,' the statute may not be applied in the future *in a similar context*, but the statute is not rendered completely inoperative.") (emphasis added). Thus, even without Rule 4.27, Colorado's reporting and disclosure standards for issue committees presumptively remain applicable, other than in "similar context[s]" to *Sampson*.

The Secretary appears to concede that, if the Court disagrees with his interpretation of *Sampson*, the Rule is invalid. (Def.'s Answer Br. at 5.) The Court, however, believes further explanation is needed.

Rulemaking Process

In response to the Tenth Circuit's decision in *Sampson*, the Secretary (then Bernie Buescher, Defendant Gessler's predecessor and the named-defendant in that case) commenced a rule-making to "increase[] the contribution and expenditure threshold that triggers the requirement for an issue committee to register and file disclosure reports." Proposed Statement of Basis, Purpose, and Specific Statutory Authority for Proposed Rule 4.27 (issued December 10, 2010). The Preliminary Draft of Proposed Rule 4.27 stated, "In accordance with the decision of the Tenth Circuit Court of Appeals in *Sampson v. Buescher*, Nos. 08-1389, 08-1415 (10th Cir. 2010), the $200 amount specified in Article XXVIII, section 2(10)(a) of the Colorado Constitution and section 1-45-108, C.R.S., is increased to [$2,500]." (Brackets in original.) An initial hearing was held on January 26, 2011 (by which time, Defendant Gessler had taken office), at which representatives for both plaintiffs were present and provided testimony. At the conclusion of the hearing, the Secretary took the matter under advisement.

On March 30, 2011, the Secretary released a Notice of Second Rulemaking Hearing; a Revised Draft of Proposed Rules; and a Revised Proposed Statement of Basis, Purpose, and Specific Statutory Authority (the "Revised Proposed Statement"). Among other changes, the revised draft of the rule increased the dollar amount to $5,000.00, and exempted issue committees from any of the requirements of Article XXVIII and the Campaign Act until the issue committee has accepted $5,000.00 or more in contributions or made expenditures of $5,000.00 or more during an election cycle. In support of this revision, the Secretary stated, "new Rule 4.27 *changes the contribution and expenditure threshold* that triggers enforcement of the requirement for an issue committee to register and file disclosure reports, in order to provide guidance in light of the ruling of the Tenth Circuit Court of Appeals in *Sampson*." Revised Proposed Statement at 1 (emphasis added). In support of the new $5,000.00 amount, the Secretary further stated, "it appears from the Court's opinion that the minimum threshold must be 'well above' the $2,239.55 in contributions and $1,992.37 in expenditures of the Plaintiffs in the *Sampson* case." Revised Proposed Statement at 2. For his rulemaking authority, the Secretary cited to Article XXVIII, § 9(1)(b) and sections 1-1-107(2)(a) and 1-45-111.5(1), each of which authorize the Secretary to promulgate rules necessary to "enforce and administer" specified election laws.

Another hearing was held on May 3, 2011, at which Plaintiff Common Cause again presented testimony. Plaintiff Ethics Watch did not attend the hearing, but did timely-submit a letter in opposition to the rule.

On May 13, 2011, the Secretary released a Notice of Adoption of an amended version of Rule 4.27. The adopted Rule was somewhat different from the Revised Proposed Rule, but retained the $5,000.00 thresholds and the language exempting issue committees from constitutional and statutory reporting requirements prior to reaching that amount. The Secretary provided no new basis or authority for the rulemaking. Thereafter, on June 6, 2011, Plaintiffs instituted the present action.

Plaintiffs' challenge

In asking this Court to set aside Rule 4.27, Plaintiffs argue, "Rule 4.27 goes far beyond simple enforcement and administration of the campaign finance laws by *reinterpreting* both constitutional and statutory provisions." (Pl.s' Opening Br. 12) (emphasis added). Plaintiffs contend that the Secretary lacks the authority to adopt Rule 4.27 because it is inconsistent with Article XXVIII and the reporting requirements of the Campaign Act. The Court agrees on both points, although "reinterpreting" does not fairly describe the Rule; the Rule actually rewrites and thereby amends Article XXVIII.

The Secretary's powers deserve emphasis here. The Secretary's authority to commence rulemaking is limited to promulgating rules to *enforce and administer* the election laws. Art. XXVIII, § 9(1)(b); §§ 1-1-107(2)(a) and 1-45-111.5(1). Generally, reviewing courts

defer to the views of administrative agencies that are authorized to administer and enforce particular laws, unless they are arbitrary or capricious, unsupported by the evidence, or contrary to law. *Williams v. Teck*, 113 P.3d 1255, 1257 (Colo. App. 2005). However, an agency's legal interpretations are not binding, and are persuasive only if they are a reasonable construction consistent with public policy. *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004).

In determining the limit of the Secretary's powers to enforce and administer the election laws, the Court finds *Sanger v. Dennis*, 148 P.3d 404 (Colo. App. 2006), instructive. *Sanger* involved a labor union and others challenging the Secretary's promulgation of a rule that would force unions to get written permission from their members before using dues or contributions to fund political campaigns. The rule at issue in *Sanger* purported to define "the term 'member' in the context of Article XXVIII, § 2(5)(b) as a person who pays dues to a membership organization and who gives written permission for his or her dues to be used for political purposes." *Id.* at 408. The plaintiffs sought injunctive relief from the district court, arguing among other things, that the Secretary exceeded her rulemaking authority in enacting the rule. *Id.* at 407. Since the term "member" was then undefined in Article XXVIII, the Secretary asserted that she properly adopted the rule defining the term pursuant to Article XXVIII, § 9, which requires her to promulgate rules necessary to administer and enforce any provision of that Article. *Id.* at 408-09. The trial court granted the preliminary injunction, finding that the plaintiffs had shown a reasonable probability of success on their claim that the Secretary's definition of "member" was an unreasonable interpretation of the language in Article XXVIII, was inconsistent with its purposes, and was not in accord with the intent of those who adopted it. *Id.* at 413.

In affirming the preliminary injunction, the Court of Appeals agreed with the trial court's reasoning that the rule imposed a restriction unsupported by the text of Article XXVIII. *Sanger*, 148 P.3d at 412. "[T]he Secretary's 'definition' is much more than an effort to define the term. It can be read to effectively *add, to modify, and to conflict* with the constitutional provision by imposing a new condition." *Sanger*, 148 P.3d at 413 (emphasis added). The court further stated that "the Secretary's stated purpose in enacting the rule . . . is not furthered by the 'definition'" and "the rule does not further the Secretary's stated goal." *Sanger*, 148 P.3d at 413. Thus, the court concluded, "[the] plaintiffs have demonstrated a reasonable probability of success in challenging the Secretary's authority to enact th[e] rule." *Sanger*, 148 P.3d at 413.

Likewise, this Court concludes that the Secretary's promulgation of Rule 4.27 exceeded his authority. First, like the rule at issue in *Sanger*, Rule 4.27 adds to, modifies, and conflicts with the constitutional provision it purports to enforce and administer. The plain language of Article XXVIII, § 2(10)(a)(II), defines an issue committee as "any person, other than a natural person, or any group of two or more persons, including

natural persons . . . [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Thus, the constitutional definition of issue committee is based, in part, on a dollar amount. In turn, § 1-45-108 mandates specific requirements for *all* constitutionally-defined issue committees (*i.e.*, all entities and groups that have raised or spent more than $200 to support or oppose a ballot measure). Changing the dollar amount necessarily changes the constitutional definition.

Rule 4.27 redefines which issue committees are subject to constitutional and statutory requirements: "an issue committee shall not be subject to any of the requirements of Article XXVIII of the Colorado Constitution or Article 45 of Title 1, C.R.S., until the issue committee has accepted $5,000 or more in contributions or made expenditures of $5,000 or more during an election cycle." In so doing, the Rule not only conflicts with, but abrogates, existing constitutional and statutory requirements. While the Secretary's desire to provide guidance in light of *Sampson* is understandable, perhaps even admirable given that First Amendment rights are at stake, it is simply not allowable given his authority. Because the Secretary is not empowered to promulgate rules that add to, modify, or conflict with constitutional provisions, the promulgation and adoption of Rule 4.27 exceeded his authority.

Further support for the Court's conclusion is found in the constitutional and statutory provisions at issue. In bestowing upon the Secretary the right and obligation to enforce and administer campaign finance provisions, both the constitution and statutes delineate various examples of the Secretary's authority. *See, e.g.*, Art. XXVIII, § 9 (listing enforcement duties of the Secretary); § 10 (defining various sanctions available under Art. XXVIII, and the Secretary's role regarding same); § 1-45-111.5 (listing both enforcement and sanction duties of the Secretary). These provisions do not include allowing the Secretary to amend the definitions contained in the constitution.

The Court notes that, from the outset, the Secretary had reason to know he potentially was exceeding his powers. Several of the letters submitted in response to the notices of rulemaking directly questioned the Secretary's authority to promulgate the rule as proposed. For example, the Secretary received a letter from an attorney requesting the Secretary to explain in the rule or accompanying notice how the Secretary may "exceed the specified, quite limited authority for changing of contribution limits as set forth in Article XXVIII, sec. 3(13), 4(7) of the Colorado Constitution" and "'leapfrog' Article XXVIII, sec. 14 of the Colorado Constitution, which expressly provides that a successful, as-applied challenge does not invalidate any other application of these provisions of the Constitution." Letter from Mark G. Grueskin to the Honorable Scott Gessler (May 6, 2011). Nothing in the record demonstrates that the Secretary addressed these concerns prior to adopting the rule.

Further, enactment of the Rule disregards other aspects of Article XXVIII that specifically address the effect of as-applied challenges: "[i]f any provision of this article or the applications thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application." Art. XXVIII, § 14. *Sampson* held that the portion of Article XXVIII requiring issue committees to register after raising or spending $200 was invalid as applied to plaintiffs therein. Had the Tenth Circuit intended its ruling in *Sampson* to have a broader application, it presumably would have analyzed the severability of the offending provision. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1194-96 (10th Cir. 2000) (analyzing the Campaign Act's severability clause after determining that the unconstitutional provision could not be narrowly applied). Such an analysis likely would have led the court to further consider the need for a "bright line," which it ultimately and expressly chose not to draw. *Sampson*, 625 F.3d at 1261. Here, the Secretary could not do what the Tenth Circuit declined to do, *i.e.,* draw a bright line, while ignoring the severability clause. Otherwise, he has broadly invalidated a provision of the Article without giving consideration to its "other applications," as required by Section 14.

Additionally, Rule 4.27 does not achieve the Secretary's stated purpose of "resolv[ing] uncertainty about registration and disclosure requirements in light of the ruling of the Tenth Circuit Court of Appeals in *Sampson v. Buescher*." Instead, the Secretary's re-writing of the constitutional thresholds fails to resolve a number of issues raised by *Sampson*. For example, for an issue committee to know when it has reached the new $5,000.00 thresholds, it must keep track of all contributions and expenditures occurring prior to that point. Yet doing so, by the Secretary's reasoning, would be unconstitutionally burdensome. Similarly, why should the first $4,999.99 be exempt from reporting requirements as unconstitutionally burdensome, but reporting the next $1.00, $500, or $5,000.00, is not? At the other end of the spectrum, the *Sampson* court made clear that the $200 threshold did not present an unconstitutional burden in all circumstances. Specifically, the court stated, "[t]he case before us is quite unlike ones involving the expenditure of tens of millions of dollars on ballot issues presenting 'complex policy proposals.'" *Sampson*, 625 F.3d at 1261 (citing *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th cir. 2003)). Presumably then, the Tenth Circuit would have upheld the issue committee provision in such an instance, *i.e.,* when the first $200 contributed or expended is part of a much greater amount. In contrast, the Secretary's Rule excludes reporting of the first $5,000, even if it is part of a multi-million dollar campaign. Yet, who spends the first dollars on an issue campaign could be extremely important to the electorate.

Finally, the *Sampson* court was concerned with more than just the limited amount of contributions and expenditures involved in that case. For instance, the *Sampson* court expressed concern for the cost of defending against sanctions when a small dollar

amount was involved. The court stated, "[m]oreover, failure to comply with the rules can be expensive; failure to meet a recording deadline can cost $50 a day." *Id*. at 1260. And, "[o]ne would expect, as was the case here, that an attorney's fee would be comparable to, if not exceed, the $782.02 that had been contributed by that time to the anti-annexation effort. This is a substantial burden." *Id*. at 1260. The Secretary, being empowered to impose sanctions for violations and to streamline the registration process, might have implemented rules that addressed these concerns. Or, he might have promulgated a rule that allowed for waivers, on an *as-applied basis*, consistent with *Sampson*. This Court, of course, is not abstractly endorsing any such rules. Rather, the Court finds determinative that Rule 4.27 focuses on changing the contribution and expenditure amounts contained in the constitution. In doing so, the Secretary went beyond his authority.

Again, the Court recognizes the difficult situation faced by the Secretary, and attributes nothing but well-intentioned motivations to his actions. Nevertheless, the Rule is hereby set aside.

B. The Secretary's Counterclaim

The Secretary has asserted a counterclaim seeking a declaration from this Court that "consistent with the holding in *Sampson v. Buescher*, the definition of issue committee is unenforceable unless and until the General Assembly enacts a statute, or the Secretary promulgates a rule, that establishes a minimum level of contributions or expenditures that triggers the formation of an issue committee." As reflected above, the Court's interpretation of *Sampson* is fundamentally at odds with the Secretary's claim.

As previously mentioned, "if a statute is held unconstitutional 'as applied,' the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative." *Sanger*, 148 P.3d at 410. Here, the *Sampson* court's holding was an as-applied decision: "in light of the small size of the contributions . . . it was unconstitutional to impose [the financial burden of state elections regulations] on [p]laintiffs." 625 F.3d at 1261. *See also* Art. XXVIII, § 14 ("If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other . . . applications of the article which can be given effect without the invalid provision or application . . . ."). Thus, the definition of issue committee is enforceable, except in similar contexts to *Sampson,* without the Secretary's promulgation of a rule establishing new minimum levels of contributions.

The Court also questions the Secretary's authority to bring this counterclaim against these defendants. It is generally the Secretary's duty to defend the laws, not have them declared unenforceable. And, such actions are properly brought against the state (usually against the Secretary, or alternatively, the Governor), and not against private

parties such as Plaintiffs. However, given the Court's interpretation of *Sampson*, these issues need not be decided.

The Secretary's counterclaim is dismissed.

III. Conclusion

The Court sets aside Rule 4.27, as an unauthorized exercise of the Secretary's power, and dismisses the Secretary's counterclaim.

Dated this 17th day of November, 2011.

BY THE COURT

A. Bruce Jones
District Court Judge