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VIA FIRST-CLASS MAIL AND EMAIL

The Honorable Bernie Buescher
The Colorado Secretary of State
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Re: Comments Solicited for Consideration at the July 22, 2009 Rulemaking Hearing

Dear Secretary Buescher:

We represent the Ritchie plaintiffs in *Ritchie v. Ritter*, Case No. 2009CV1200 (consolidated with 2009CV1188), Denver District Court. There are several dispositive reasons which bar the Colorado Secretary of State from moving forward with the Proposed Rules.

First, the plain language of Amendment 54 specifically vests the Department of Personnel with rulemaking authority over section 16. On July 17, 2009, *nunc pro tunc* June 23, 2009, the Denver District Court enjoined the enforcement of Amendment 54 (except Section 16), because, on its face, it violates the rights of free speech and association guaranteed by the First Amendment of the Constitution of the United States. The only surviving section of Amendment 54 is Section 16, which grants authority in two separate references to the executive director of the department of personnel to implement and promulgate rules accordingly.[1] Specifically: (1) "The executive director shall promptly publish and maintain a summary of each sole source government contract issued"; and (2) "The executive director of the department of personnel is hereby given authority to promulgate rules to facilitate this section." This provides specific and exclusive authority to the executive director of the department of personnel, not the Secretary of State, to promulgate rules regarding section 16. Paragraph 43 of Judge Lemon's decision also recognizes that Rich L. Gonzales, the executive director of the Colorado Department of

[1] The Department of Personnel has exercised such authority and, among other things, already defined the relevant terms in its Technical Guidance. *See* Colo. Dept. of Personnel & Admin., Office of the State Controller, Contract, *available at* http://www.colorado.gov/dpa/dfp/sco/contracts.htm (last visited July 24, 2009).

Personnel and Administration, is "responsible for implementing the state database that lists sole source contracts."

Section 16 has no relationship to the campaign and political finance rules that were enjoined by the other provisions of Judge Lemon's order. Such rulemaking by the Secretary of State usurps the Department of Personnel's province, creates conflicting rules, and further creates the impression that the State is attempting to revive election and campaign finance applications.

Second, Judge Lemon's decision specifically made findings that judicially estop the Secretary of State from acting. The court's findings of fact recognize in pertinent part that:

> On May 29, 2009, Secretary of State Bernie Buescher proposed a rule regarding Amendment 54. . . . A problem with the proposed rule is that it excludes from the operation of Amendment 54 one of the specific examples of sole source government contracts listed in the Blue Book, public utility contracts. While it might have been reasonable for the authors of Amendment 54 to limit it to contracts for which a competitive bidding process would be appropriate, or at least possible, the Blue Book examples preclude such an interpretation.

Order, at 16, ¶ 43.

Judge Lemon's conclusions of law also made it clear that there were no exceptions to the definition of sole source government contracts:

> It defines sole source contract far more broadly than the normal meaning of that term and in such a way that it subjects to its sweeping ban on campaign contributions those who have government contracts that are not appropriate for competitive bidding, and even those whose contract could not be competitively bid. The state argued that the court could interpret Amendment 54 as not applying to contracts that cannot be competitively bid. The problem with that suggestion is that the Blue Book makes it clear that such contracts are intended to be covered by Amendment 54; it lists as examples of no-bid contracts, cases "where equipment, accessories, or replacement parts must be compatible, where a sole supplier's item is needed for trial use or testing; and where public utility services are to be purchased." Holders of contracts like this cannot make any

> campaign or party contributions, though they pose no risk of corrupt influence of public officials."

Indeed, the trial court repeatedly indicates that it would not cure the constitutional infirmities of Amendment 54 by a narrowing judicial construction. *See, e.g.*, Order, at 25-26.

This decision is controlling authority for the Colorado Secretary of State. Under article IV, section 2 of the Colorado Constitution, "[t]he supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed." Colorado has long recognized the practice of naming the governor, in his role as the state's chief executive, as the proper defendant in cases where a party seeks to "enjoin or mandate enforcement of a statute, regulation, ordinance, or policy." *Developmental Pathways v. Ritter*, 178 P.3d 524, 529-30 (Colo. 2008); *see also Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004); *see generally Romer v. Evans*, 517 U.S. 620 (1996) (suing the governor to challenge a voter-initiated constitutional amendment); *Morrissey v. State*, 951 P.2d 911 (Colo. 1998) (same).

Here, Governor Ritter was sued in his official capacity as Governor of the State of Colorado. An "'official capacity suit' is 'merely another way of pleading an action against the entity of which an officer is an agent.'" *Developmental Pathways*, 178 P.3d at 529-30 (quoting *Ainscough*, 90 P.3d at 858). When a party sues to enjoin enforcement of a constitutional amendment, it is not only customary, but entirely appropriate for the plaintiff to name to the body ultimately responsible for enforcing the law. *Ainscough*, 90 P.3d at 858. When that body is "an administrative agency, or the executive branch of government, or even the state itself, the Governor, in his official capacity is the proper defendant." *Id.* For "litigation purposes, the Governor is the embodiment of the state." *Developmental Pathways*, 178 P.3d at 30 (quoting *Ainscough*, 90 P.3d at 858).

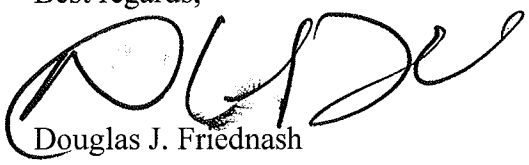
Even if the Secretary of State were not judicially estopped under Judge Lemon's decision, *which it is*, a review of the relevant authority from her decision and other evidence, prohibits the enforcement of this rule. In *Sanger v. Dennis*, 148 P.3d 404 (Colo. 2006), labor unions, union members and political candidate brought a challenge against the Secretary of State challenging an administrative rule that forced unions to get written permission from union members before using dues or contributions to fund political campaigns. Previously, in 2002, Colorado voters passed the Campaign and Political Finance Amendment, Colo. Const. art. XXVII, an initiative regulating campaign financing. Under Article XXVIII, a "membership organization" such as a labor union is permitted to establish a small donor committee for the purpose of pooling member dues and contributions and making political contributions. The term "member" was not defined under Article XXVIII. Article XXVIII excludes from the definition of contribution, the transfer of member dues from a membership organization to a small donor committee sponsored by such membership organization. On August 2, 2006, the Colorado Secretary of State adopted Rule 1.4(b), which defined "member" in the context of Article XXVIII 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. The Denver District Court issued a temporary injunction prohibiting enforcement of the rule, and the Secretary of State appealed.

On appeal, the court affirmed the trial court finding that the new rule imposed a restriction that was not supported by the text of Article XXVIII. Plaintiffs presented evidence that the Secretary's definition is neither a reasonable interpretation nor consistent with the purposes of Article XXVIII. The evidence included the Blue Book, which the Colorado Supreme Court said provided "important insight into the electorate's understanding of the amendment when it was passed and are helpful in the construction of constitutional amendments." *Sanger*, 148 P.3d at 412; *see also Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1214 (Colo. 1994).

In sum, Amendment 54's express provisions, along with Judge Lemon's recent injunction and relevant case law, clearly prohibit the Secretary of State from issuing any rules related to Section 16 of Amendment 54.

Best regards,



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