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July 17, 2009

William Hobbs
Deputy Secretary of State
Colorado Department of State
1700 Broadway, Suite 250
Denver CO 80290

Re: July 22, 2009 Rulemaking Concerning Proposed Amendments to Campaign and Political Finance Rules, 8 CCR 1505-6

Dear Mr. Hobbs,

This firm represents the Colorado Medical Society. We write to request that the Department use the above referenced rulemaking to clarify that the definition of a "sole source contract" as used in Colorado Const., Art. XXVIII, §2(14.4), does not include contracts for disaster preparedness with statewide professional organizations.

The Colorado Medical Society is a not-for-profit organization whose nearly 7,000 members include the majority of physicians practicing in Colorado. As the largest organization of physicians, residents, and medical students in Colorado, the Society's mission is to promote the science and art of medicine, the betterment of public health, and the welfare of the medical profession and the patients it serves.

In December 2006, consistent with its mission of promoting public health and patient welfare, the Colorado Medical Society entered a contract with the Department of Public Health and Environment for disaster preparedness. The contract, which is in excess of $100,000, is funded completely by federal dollars. The contract was extended by amendment and is set to end August 8, 2009. The Medical Society is considering whether to renew the contract for another term. Unfortunately, confusion about the applicability of Amendment 54 to the Medical Society and its leadership has called into question the propriety of extending the contract.

Under the contract, the Medical Society is tasked with educating Colorado physicians on protocols in case of a pandemic and implementing plans for themselves, their families, and their patients. The contract contemplates physicians to be part of the community response and surge capacity preparedness, including volunteering, in response to an event. As part of its performance under its contract, the Medical Society has established local, regional, and statewide partnerships and coalitions; conducted education; and disaster drills.

Plainly, the work of the Medical Society and other organizations in disaster preparedness is essential to the continued security and health of Coloradans. Nonetheless, the implications of the Agreement in light of Amendment 54 cause concern for the organization, its leadership, and their immediate family members.

We are aware of the June 23, 2009 Denver District Court ruling by Judge Lemon in *Dallman et. al v. Ritter and Gonzales* (09CV1188)(consolidated with *Ritchie et. al. v. Ritter and Gonzales* (09CV1200)) granting a preliminary injunction and suspending enforcement of Amendment 54. Absent a permanent injunction, however, uncertainty for the future remains. Accordingly, the Medical Society requests that the Department clarify that disaster preparedness contracts with statewide professional organizations are not "sole source contracts." To effect this clarification, we propose the following addition to the proposed rule contained in 8 CCR 1505-6:

1.16 A "SOLE SOURCE GOVERNMENT CONTRACT", AS DEFINED IN ARTICLE XXVIII, SECTION 2(14.4), DOES NOT INCLUDE A CONTRACT FOR WHICH THERE IS NO LEGAL REQUIREMENT OR AUTHORITY FOR A COMPETITIVE BIDDING PROCESS, SUCH AS (BUT NOT BY WAY OF LIMITATION) THE FOLLOWING:

1.16.1 A CONTRACT AWARDED TO A UTILITY THAT HAS BEEN GRANTED AN EXCLUSIVE RETAIL SERVICE TERRITORY BY THE COLORADO PUBLIC UTILITIES COMMISSION THROUGH A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

1.16.2 A PROVIDER PARTICIPATION AGREEMENT ENTERED INTO BY AND BETWEEN A PROVIDER WITH A CURRENT COLORADO MEDICAL ASSISTANCE PROGRAM PROVIDER ID NUMBER AND THE COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING.

1.16.3 A DISATER PREPAREDNESS AGREEMENT ENTERED INTO BY AND BETWEEN A STATEWIDE PROFESSIONAL ORGANIZATION AND THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT.

Because statewide disaster preparedness planning requires involvement of statewide organizations, competitive bidding by three entities is not always feasible. This is because there is typically only one or two statewide organization for the majority of health care professions and facility types. Although the state may solicit competitive bids, if fewer than three organizations qualify, application of Amendment 54 prohibitions is unclear. Additionally, the implications of federal funding are also unclear. Such ambiguity is

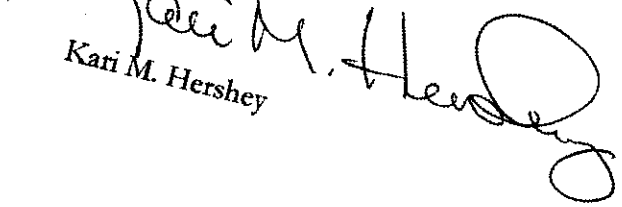
concerning in light of Amendment 54 provisions for civil lawsuits and administrative sanctions.

While the recent District Court ruling by Judge Lemon temporarily enjoining enforcement of Amendment 54 offers the Medical Society and its leadership some comfort, the long term outcome of the case may not be known for years. Accordingly, clarifying this issue as part of the upcoming rulemaking is vital.

Please let me know if I can provide any additional information that may be helpful to the Department's evaluation of this issue.

Sincerely,

BUDMAN & HERSHEY



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VIA FIRST CLASS MAIL
AND EMAIL [bernie.buescher.house@state.co.us]

July 21, 2009

The Honorable Bernie Buescher
Secretary of State
State of Colorado
Department of State
1700 Broadway, Suite 250
Denver, CO 80290

RE: Comments on Notice of Proposed Rulemaking Issued May 29, 2009

Dear Secretary Buescher:

The law firm of Brownstein Hyatt Farber Schreck, LLP represents Public Service Company of Colorado, doing business under the name Xcel Energy ("Xcel Energy"), in connection with the Notice of Proposed Rulemaking ("Notice") issued by your office on May 29, 2009. On July 6, 2009 we submitted Comments in support of the Preliminary Draft of Proposed Rules. At that time, the Denver District Court had not yet issued its decision in the matter of *Dallman, et al v. Ritter*, Case Number 09CV1188.

In anticipation of the Court's written Order, you had asked that I opine upon the Secretary of State's jurisdiction to promulgate rules with respect to definition of "Sole Source Government Contract" as that term is defined in Article XVIII, Section 14.4 of the Colorado Constitution, based upon a working assumption that the Court would enjoin Section 15 of Amendment 54 but not enjoin Section 16. Section 16 creates a database of Sole Source Government Contracts and imposes reporting requirements on holders of Sole Source Government Contracts. On Friday, July 17, 2008, Judge Lemon issued her written Order which was largely consistent with the working assumption.

Amendment 54 provided a definition of Sole Source Government Contract that is now set forth in Article XXVIII, Section 2(14.4) of the Colorado Constitution. Clarification of that definition as set forth in the Proposed Rule is consistent with the proper role of the Secretary of State's constitutional and statutory role and jurisdiction.

The Court's written Order is helpful in understanding the continuing jurisdiction of the Secretary of State to promulgate a rule clarifying the definition of Sole Source Government Contract. As discussed below, we believe that your office continues to have jurisdiction based upon, (1) the explicit constitutional grant of authority, (2) the Secretary of State's statutory authority to promulgate rules with respect to election laws, and (3) the inherent and practical considerations of Amendment 54.

THE COURT'S WRITTEN ORDER

In *Dallman,* the Court concluded that the Plaintiff had met the burden of proving beyond a reasonable doubt that Amendment 54 is unconstitutional. The Court granted the Plaintiff's request for a preliminary injunction, as follows:

> THEREFORE, the Court enjoins the enforcement of Amendment 54 (except section 16 thereof) because, on its face, it violates the rights of free speech and association guaranteed by the First Amendment to the Constitution of the United States.

The Court's written Order addressed Section 16 of Amendment 54 on page 26 of the written Order. The Court noted:

> The court has struggled with whether section 16 of the amendment, which creates a state list of all sole source government contracts with detailed information about each, should be severed and allowed to stand on its own. On the one hand, the only overbreadth it suffers from is the very broad definition of sole source government contract, transparency is a listed purpose in the Blue Book and section 16 does not burden free speech interests. On the other hand, by its own language, it is included in Amendment 54 only "to aid in enforcement of this measure...." Thus, it was not intended to have any life of its own and the court's ruling regarding the rest of the amendment leaves nothing to enforce. Balancing these considerations, and giving deference to the fact that transparency is a listed purpose of Amendment 54 in the Blue Book, upon which the electorate relied in passing the amendment, the court determines that section 16 is closely drawn to serve the important state interest of transparency in government contracting and excepts it from the operation of this preliminary injunction.

In its Order, the Court also addressed the definition of Sole Source Government Contract on page 23 of the written Order. The Court held that:

> Amendment 54 is overbroad in the following major respects, among others...
>
> 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 contracts could not be competitively bid.

THE SECRETARY OF STATE HAS RULEMAKING JURISDICTION

1. The Secretary of State has specific constitutional jurisdiction to address any matter set forth in Article XXVIII of the Colorado Constitution.

Article XXVIII, Section 9 (1)(b) of the Colorado Constitution gives the Secretary of State authority to promulgate rules "as may be necessary to administer and enforce any provision of [Article XXVIII of the Colorado State Constitution]." As noted above, Amendment 54's definition of Sole Source Government Contract is set forth in Article XXVIII, specifically at Section 2(14.4).

In the last sentence of Section 16, the Executive Director of the Department of Personnel is given authority to promulgate rules to facilitate the provisions of Section 16. Presumably that authority is granted to address the technical aspects of the database the Department is required to maintain. However that grant of authority does not give exclusive rulemaking jurisdiction to the Department of Personnel. Section 16 does not invalidate Article XXVIII, Section 9 (1)(b) and does not preclude the Secretary's jurisdiction with respect to the entirety of Article XXVIII. That grant of authority does not extend beyond Section 16 to the definitional provisions set forth in Article XXVIII, Section 2(14.4).

The Secretary of State's constitutional jurisdiction specifically covers all of Article XXVIII, including the definition of Sole Source Government Contract set forth in Section 2(14.4). The constitutional jurisdiction of the Secretary of State to clarify matters within Article XXVIII is clear and explicit.

2. The Secretary of State has statutory jurisdiction to address the proper administration of election laws.

C.R.S. 1-1-107(2) authorizes the Secretary of State to promulgate rules necessary for the proper administration and enforcement of the election laws. This statutory authority is designed to achieve uniform and proper administration of campaign and political finance laws.

In that context, the Court's consideration of Section 16 is instructive. In analyzing Section 16, the Court notes that, "the only overbreadth [Section 16] suffers from is the very broad definition of sole source government contract...." The Court singled out that the "overbreadth" of Section 16 is the Section 2(14.4) definition of Sole Source Government Contract. Implicit is the Court's recognition that the definition of Sole Source Government Contract needs clarification.

The Court also notes that, "[B]y its own language, it is included in Amendment 54 only 'to aid in enforcement of this measure....' Thus, it was not intended to have any life of its own...." The primary purpose of Amendment 54 presented to the voters is set forth in the Ballot Title. The Ballot Title makes no reference whatsoever to the database or any other requirement set forth in Section 16.[1]

The definition of Sole Source Government Contract must be viewed in the context of the scope and purpose of Amendment 54. Amendment 54 is an election law. Its clear purpose is to govern certain contributions made during the election process. Amendment 54 , while preliminarily enjoined, is an election law for which the Secretary of State is given specific statutory jurisdiction to promulgate rules in accordance with C.R.S. Section 1-1-107(2)(a).

3. The Secretary of State is the proper authority to clarify the definition of Sole Source Government Contract.

The Proposed Rule issued on May 29th specifically addresses the definition of Sole Source Government Contract as that term is defined in Article XXVIII, Section 2(14.4). With due respect to the Department of Personnel, clarification of that term is best addressed by the Secretary of State.

Without repeating the Comments set forth in our July 6, 2009 letter to you, the analysis of the definition is best addressed in the context of the election laws and Article XXVIII concerning campaign and political finance. Rulemaking jurisdiction over those matters has always been in the Secretary of State's office. The Secretary of State's office has the experience and the expertise to address such matter. It's your job and you're good at it.

CONCLUSION

It goes without saying that the Court's written order is a preliminary injunction and the Court has not conducted a full trial on the merits. Whether the next procedural step is a trial on the merits or an appeal of the Court's Order, the constitutionality and enforceability of Amendment 54 has not been finally determined.

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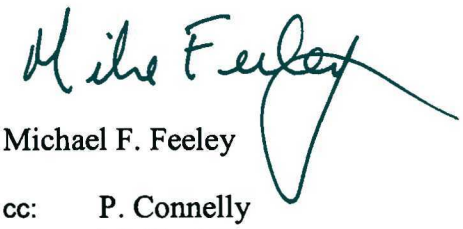
[1] The Ballot Title presented to the Voters was, "Shall there be an amendment to the Colorado constitution concerning restrictions on campaign contributions, and, in connection therewith, prohibiting the holder of contracts totaling $100,000 or more, as indexed for inflation, awarded by state or local governments without competitive bidding ("sole source government contracts"), including certain collective bargaining agreements, from making a contribution for the benefit of a political party or candidate for elective office during the term of the contracts and for 2 years thereafter; disqualifying a person who makes a contribution in a ballot issue election from entering into a sole source government contract related to the ballot issue; and imposing liability and penalties on contract holders, certain of their owners, officers and directors, and government officials for violations of the amendment."

The purpose of the May 29th Notice of Proposed Rulemaking was well stated by your office:

> The proposed revisions to these rules are necessary to answer questions arising under the implementations of amendments to Article XXVIII of the Colorado Constitution made by Amendment 54, as adopted by the people at the November 2008 general election. In particular, the amendments to these rules are proposed to clarify the definition of "sole source government contract" as used in Article XXVIII of the Colorado Constitution.
>
> See, Proposed Statement of Basis, Purpose , and Specific Authority, Page 1, Issued May 29, 2009.

The need to "answer questions" remains. Your office is the appropriate agency to answer those questions and your jurisdiction to do so is clear. Thank you for your attention to this issue and if I can answer any question, please do not hesitate to call.

Sincerely,



Michael F. Feeley

cc: P. Connelly
M. Knaizer
A. Gyger

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COLORADO CABLE TELECOMMUNICATIONS ASSOCIATION

INVESTMENT • INNOVATION • COMPETITION

Comments of

Jeff Weist
Executive Director, Colorado Cable Telecommunications Association

Rules Concerning Campaign and Political Finance, 8 CCR 1505-6
July 22, 2009

I am here today to suggest additional language to the proposed rules defining "sole-source contracts" under Amendment 54. That language is as follows (amending Preliminary Draft of Proposed Rules, May 29, 2009):

1.16.3 A NON-EXCLUSIVE CABLE TELEVISION FRANCHISE GRANTED OR RENEWED UNDER THE TERMS OF THE FEDERAL CABLE ACT.

RATIONALE

Cable TV companies must, under Federal law, secure a franchise from local governments to operate. Those franchises – which by law are non-exclusive – give cable operators the permission to operate in the rights-of-way of the local government. Nearly all franchises require cable operators to pay to the city up to 5% of its gross revenues.

For reasons I will review, it is clear that cable TV franchises are not "sole-source contracts" – under either the letter or the spirit of Amendment 54. Nevertheless, some local governments have taken the position that Amendment 54 does apply to cable franchises. Given the extreme limitations on the First Amendment rights of political participation for any company deemed to be a "sole-source contractor" under Amendment 54, we ask you amend the proposed rules to explicitly exempt "A non-exclusive cable television franchise granted or renewed under the terms of the federal Cable Act."

1410 Grant Street, Suite A-101 • Denver, Colorado 80203
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www.cocabletv.com

Specifically, cable television franchises clearly are – to quote from the proposed rules – "a contract for which there is no legal requirement or authority for a competitive bidding process."

- The original grant of cable TV franchises by local governments – which took place in the 1970's and 1980's – were actually very competitive. Many companies aggressively bid to secure franchises from local governments. Those original franchises lasted for terms ranging from 10 to 20 years, at which time they were renewed. Most existing franchises in Colorado have been renewed at least once.

- Federal law controls the terms of the renewal of cable franchises. A local government must renew a cable franchise unless one of three specific tests are met – which essentially boil down to the inability of a cable company to fulfill the terms of the contract. Therefore, no "bidding" is done during a cable franchise renewal because federal law in fact prohibits it.

- Maybe more importantly, the plain language of Amendment 54 makes clear that it was never intended to apply to cable franchises.

    - Amendment 54 was sold to voters as a way to limit corruption in the acquisition of goods and services by a governmental entity. The Blue Book's Summary and Analysis is clear that the amendment addresses only the situation where "[g]overnment entities purchase goods and services from private-sector vendors." The plain and ordinary meaning of a "sole-source contract" invariably refers to a contract for the purchase of goods or services by a government entity.

    - Cable franchises, on the other hand, exist to regulate the cable TV system and the government's rights-of-way – not to provide any good or service to the government.

    - To further illustrate this point, the flow of money in a cable franchise is the exact opposite of that contemplated by Amendment 54. Whereas the government pays the contractor in a "sole-source" situation, the cable TV company actually pays the government under a franchise agreement. That payment represents many things, including the use of the government's rights-of-way and compensation to the city for the expense of administering a cable regulatory regime.

    - Cable franchises are, by federal law, non-exclusive. Any entity can apply for a cable franchise at any time and federal law prohibits the unreasonable denial of a franchise by a local government. There is no "solicitation" process – competitive or otherwise.

I have included with these comments a memo from our outside counsel that analyzes in more detail the reason why cable TV franchises are not sole source contracts.

For the foregoing reasons, we respectfully ask you to specifically include cable TV franchises in the list of items excluded from the definition of “sole source government contract” under Amendment 54.

Thank you.

HALE · FRIESEN LLP
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March 20, 2009

VIA EMAIL & U.S. MAIL

John J. Aragon
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Denver, CO 80231
John_J_Aragon@cable.comcast.com

Dear John:

You have asked for our opinion on whether Amendment 54, the ballot measure adopted by the voters in 2008 that prohibits certain campaign contributions by holders of "sole source contracts," applies to franchise agreements between cable operators and local governments. The issue has arisen in the context of a demand by counsel for the City of Castle Pines North to include Amendment 54 language in the new franchise agreement with the City. Amendment 54 is presently in litigation. The outcome of that litigation may affect this analysis, so our views are subject to further clarification of Amendment 54 by the courts.

I. Overview

Amendment 54 is a citizens initiative adopted by the voters of Colorado in November of 2008. By its terms, it applies to all "sole source government contracts." *See* Colo. Const. art. XXVIII, § 15. Amendment 54 amends the campaign finance constitutional amendment initiated by Common Cause, and it is ostensibly a campaign finance measure.

Amendment 54 imposes a "contractual agreement" on "contract holders" of "sole source government contracts" prohibiting certain political contributions. "Sole source government contracts" can be either with the State or "any of its political subdivisions." The City of Castle Pines North, a municipality, comes within the definition of a "political subdivision." Colo. Const. art. XXVIII, § 2(14.6).

As concerns Comcast, if the franchise agreement were deemed to be a "sole source government contract" and otherwise subject to the regulation of Amendment 54, Comcast itself would be barred from "making, causing to be made, or inducing by any means, a contribution, directly or indirectly, on behalf of the contract holder or on behalf of his or her immediate family member and for the benefit of any political party or for the benefit of any candidate for any

elected office of the state or any of its political subdivisions." Colo. Const. art. XXVIII, § 15. This prohibition would extend for the duration of the franchise agreement and two years hence.

If the franchise extension agreement were deemed a "sole source government contract," then Comcast would also be obligated to prepare a "Government Contract Summary." Colo. Const. art. XXVIII, § 16. This summary would require certain details of the contract, and Comcast would have to file it with the Executive Director of the Department of Personnel and Administration. *Id.*

It is important to note that the prohibition on political contributions does not appear limited to political contributions involving the particular jurisdiction involved, that is, in this case, the City. Such an expansive reading of Amendment 54 may or may not be appropriate. Nevertheless, we do not endeavor here to address the scope of Amendment 54 and its prohibitions if it were in fact applicable to the franchise agreement extension. Rather, our opinion is limited to our assessment of whether Amendment 54 is applicable in the first instance.

II. The Plain Language of Amendment 54 Suggests That it Is Not Applicable to Franchise Agreements

The starting point for interpreting an initiated constitutional amendment is the text of the measure itself, looking to determine voter intent in its adoption. "In assessing the intent of the voters, we look to the language of the text and accord words their plain and ordinary meaning." *Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006). Before turning to the Blue Book, discussed below, in our view, the Cable Television Franchise Agreement ("Franchise Agreement") is not a "sole source government contract" under the plain and ordinary meaning of those terms.

As defined in Amendment 54, a "sole source government contract" is "any government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract." Because cable franchises are, by definition, non-exclusive, they should not be considered "sole source" for purposes of Amendment 54 – even if the franchise in fact only involves one cable company. A non-exclusive agreement likely would not be deemed to lack a "public" or "competitive" process as these terms are used in Amendment 54. *See* 10 McQuillin Mun. Corp. § 37:107 (3rd ed.) ("Competitive bidding requirements are . . . . designed to prevent fraud, collusion, favoritism and improvidence in the administration of public businesses as well as to insure that the public receives the best work or supplies at the most reasonable price practicable"). While the government entity at issue here did not necessarily "solicit" for cable franchisees as ostensibly required by Amendment 54, the non-exclusive nature of cable franchises would appear to render such solicitation unnecessary as franchise agreements are non-exclusive.

In addition, the Franchise Agreement is arguably not a "government contract" within the meaning of the Amendment. The existence and structure of any franchise agreement is mandated by law and exists to regulate and promote the growth of the cable system. 47 U.S.C. § 521. It is not a method by which the government buys or sells goods and services. It thus appears to fall outside of the scope of the term "government contract" as used in the

Amendment. *See* 2008 State Ballot Information Booklet (the "Blue Book") at 17 (discussing Amendment 54 in the context of the "purchase of goods and services" by state and local governments).

Furthermore, as discussed more expansively below while the agreement certainly is one between Comcast and the City, and while this particular franchise renewal did not arise out of a competitive bidding process per se, the Agreement is not a "sole source contract" under the plain and ordinary meaning of those terms. While this term does not appear to have been defined in any Colorado case, the term is used repeatedly in hundreds of federal cases in the government contract context. *See, e.g., Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 436 (5th Cir. 2008)(referencing an "award" of "non-competitive sole-source contracts"). The plain and ordinary meaning of a "sole source contract" is a contract for the sale of a good or service to a government entity through non-competitive means.

This analysis comports with the definition of "sole source procurement" in the Colorado Procurement Code, specifically C.R.S. § 24-103-205. "Sole source procurements" involve the "award" of a contract "for a supply, service, or construction item without competition." *Id.*

By contrast, the Franchise Agreement is not "selling" a good or service to the City. Indeed, it is the cable company that is paying the local government for access to public thoroughfares. By its terms, the Franchise Agreement authorizes Comcast to access public rights-of-way to construct cable television facilities and provide service to the City's residents. Given that the Franchise Agreement represents a situation diametrically different from what is commonly understood to b a "sole source contract," the plain and ordinary meaning of those terms does not include the Franchise Agreement.

This interpretation is further underscored by the provision of Amendment 54 that provides that: "[t]his provision [defining 'sole source contracts'] applies only to government contracts ***awarded*** by the state or any of its political subdivisions ***for amounts greater than one hundred thousand dollars*** indexed for inflation . . . ." Colo. Const. art. XXVIII, § 2(14.4) (emphasis added). The plain and ordinary meaning of these terms is that a "sole source contract" involves a government entity "awarding" a contract to a "contract holder" that will ***receive*** $100,000.00 or more as a result of having been "awarded" the "sole source contract." Not only do these terms ***not*** suggest that a "sole source contract" would involve a situation where the "contract holder" would be paying the government entity, such an interpretation would lead to an absurd result. *See Richmond American Homes of Colorado, Inc. v. Steel Floors, LLC*, 187 P.3d 1199, 1204 (Colo. 2008) ("We presume that the General Assembly intends a just and reasonable result when it enacts a statute, and we will not follow a statutory construction that leads to an unreasonable or absurd result.")

Moreover, by its terms, the Franchise Agreement is "nonexclusive." It is noteworthy that Amendment 54 itself speaks to an "award" of a "sole source government contract." Colo. Const. art. XXVIII, § 2(14.4). The "grant" of a nonexclusive franchise (per the terms of the Franchise Agreement) is not an "award" of a "sole source contract" under the plain and ordinary meaning of those terms. In this regard, it should be noted that the history of the cable industry involves

intense competition for the right to serve particular communities, a fact which further weighs against the Franchise Agreement being deemed "sole source."

III. The Language of the Blue Book Strongly Indicates That Franchise Agreements Are Not Regulated by Amendment 54

Setting aside the plain language of Amendment 54, there is no evidence that the voters intended that Amendment 54 apply to the Franchise Agreement between the City and Comcast.

> When interpreting a constitutional amendment, we should ascertain and give effect to the intent of those who adopted it. When, as here, the provision was adopted by popular vote, we must determine what the voters believed the language of the amendment meant when they approved it, by giving the language the natural and popular meaning usually understood by the voters.
> . . .
>
> When interpreting a constitutional amendment, we may look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book. While not binding, the Blue Book provides important insight into the electorate's understanding of the amendment when it was passed and also shows the public's intention in adopting the amendment.

Dean v. Grossman, 80 P.3d 952, 962 (Colo. App. 2003). We believe the Blue Book is unequivocal that the scope of Amendment 54 does not address the Franchise Agreement at issue here.

First, the Summary and Analysis is clear that the amendment addresses only the situation where "[g]overnment entities ***purchase*** goods and services from private-sector vendors." Blue Book at 17 (emphasis added). The Blue Book provides definition to Amendment 54's use of the word "award" and makes it clear that it is a term of art limiting the types of "sole source contracts" at issue to ones involving a government entity "purchasing" a good or service from a vendor:

> **How are state government contracts awarded?** State law requires, with few exceptions, that vendors for state contracts be selected through a competitive bidding process. Separate rules govern small and emergency purchases. In some cases, a state agency may determine that only one good or service can reasonably meet the agency's need, and only one vendor can provide the particular good or service.

Id (underscoring added). The Blue Book thus tracks our analysis of the plain language of Amendment 54 discussed above; "sole source government contracts" are ones that involve the sale of a good or service to a government entity.

Second, the most apposite provision of the Blue Book that we believe offers compelling evidence that Amendment 54 does not apply to the Franchise Agreement appears in the list of

examples following the discussion of "how are state government contracts awarded" quoted above. There, an example is included that relates to "utility services" that may need to be purchased without competitive bidding, however, the example makes it very clear that the types of "utility services" that relate to a "sole source government contract" are ones that are "purchased" by the government entity. *Id.* ("where public utility services are to be purchased").[1] Applying the well established rule of *expressio unius exclusio alterius* (the inclusion of certain items implies the exclusion of others, *see Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001)), "sole source government contracts" would not include "utility services" that were not going to be "purchased" by the government entity.

In sum, the Blue Book is very clear that the types of "sole source government contracts" that are at issue under Amendment 54 are those that involve the "purchase" of a "good or service" by the government entity. The Franchise Agreement is not such an agreement.

IV. Constitutional Problems With Applying Amendment 54 to the Franchise Agreement

The constitutional problems with applying Amendment 54 to the Franchise Agreement at issue are beyond the scope of this opinion letter, however, a brief mention of those problems is called for. The Cable Act prohibits a cable operator from providing service without a franchise. 47 U.S.C. § 541(b)(1); *see* McQuillan Mun. Corp. 34:34 (3d ed). Such franchises are granted by governmental "franchising authorit[ies]" (47 U.S.C. § 522(10)). Because the Cable Act requires cable operators to enter into franchise agreements with governmental entities, if Amendment 54 were by its terms applicable to cable franchise agreements, it might be deemed to violate the First Amendment of the United States Constitution. *See* 51 Am. Jur. 2d Lobbying § 14 (noting that state regulations on lobbying must be "narrowly drawn so as to serve the state's compelling interests" to survive First Amendment scrutiny). In addition, because cable operators are ***required*** to enter into franchise agreements with franchising authorities, the effect of deeming such contracts "sole source" contracts would be to bar all cable operators from lobbying. At the very least, this was not the intention of the drafters. *See* Blue Book at 18 (identifying arguments in favor of Amendment 54 as promoting "civic trust and government transparency" and furthering "the efficient use of taxpayer dollars by promoting competitive bidding for government contracts").

V. If Language Is to be Added to Franchise Agreement with the City of Castle Pines North, The Language Should be Amended

The language proposed by the City's attorneys is far too suggestive that Amendment 54 "may" apply to the Franchise Agreement. For the reasons discussed, we believe there are strong arguments that it does not apply. Moreover, Amendment 54 is presently being litigated.

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[1] The Colorado Procurement Regulations track this analysis and identify as an example of a "sole source procurement" a situation where "public utility services are to be procured." Colorado Procurement Rule R-24-103-205-01(a)(iii).

If some language is deemed to be needed in the Franchise Agreement, we propose the following:

> Based upon a legal opinion by lawyers for Grantee, the parties do not believe that Amendment 54 is applicable to this Agreement. If, after litigation over the Amendment is concluded, the parties believe that additional language should be added to this Agreement to address Amendment 54, the parties agree to negotiate such language in good faith and amend the Agreement accordingly.

We believe that such language would satisfy any concerns about ignoring Amendment 54 at this time.

# # # # #

We would be happy to answer any further questions you may have in this regard. This opinion is based upon our initial analysis of Amendment 54 and its applicability to the Franchise Agreement. It is for the sole use of Comcast and cannot be shared or used for any purpose not contemplated by the situation here: the application of Amendment 54 to franchise agreements similar to the one provided us.

Sincerely,

Richard Westfall

Richard A. Westfall
For Hale Friesen LLP

PhRMA

Paul J. Larsen
Assistant General Counsel
Deputy Compliance Officer

July 22, 2009

Office of Secretary of State
State of Colorado
1700 Broadway
Suite 250
Denver, CO 80290
Attn: William A. Hobbs

Re: Notice of Proposed Rulemaking; Office of Secretary of State; Campaign and Political Finance Rules; 8 CCR 1505-6 (May 29, 2009)

Dear Mr. Hobbs:

Please find enclosed comments of the Pharmaceutical Research and Manufacturers of America (PhRMA) regarding the above-referenced Proposed Rulemaking. PhRMA is a voluntary, non-profit association that represents the country's leading pharmaceutical research and biotechnology companies, which are devoted to inventing medicines that allow patients to live longer, healthier and more productive lives. Member companies are leading the way in the search for new cures. In 2008, PhRMA members invested approximately $50.3 billion to develop new medicines.

If you have any questions regarding these comments, please feel free to contact me or Melanie Reed, Esq., Covington & Burling, (202) 662-5581 or mreed@cov.com.

Thank you for your consideration of these comments.

Best regards,

Paul J. Larsen

Enclosure: PhRMA comments

PhRMA

Comments to the Colorado Secretary of State
Regarding Campaign and Political Finance Rules

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading pharmaceutical research and biotechnology companies.

The Colorado Secretary of State, in a July 21, 2009 notice, requested comments on three questions related to whether the rulemaking should proceed, in light of the preliminary injunction issued by the District Court on July 17, 2009.[1] Recognizing that the Colorado Secretary of State may proceed with the rulemaking and with the creation of a list of sole source government contracts as required by section 16, PhRMA offers these comments.

PhRMA understands that the Colorado Secretary of State's Draft Proposed Rule 1.16.2 (Proposed Rule) would exempt certain contracts, including pharmaceutical rebate contracts (i.e., provider participation agreements) with Colorado, from the definition of a "sole source government contract," as that term is used in Article XXVII, Section 2(14.4) of the Colorado Constitution. PhRMA supports the Proposed Rule and urges the Colorado Secretary of State to finalize the exclusion of these agreements from the definition of sole source government contract.

Rebate and discount agreements between pharmaceutical companies and government bodies are structurally dissimilar from what would traditionally be considered sole source government contracts. These agreements do not involve discretionary spending decisions by state officials, but instead, set price discounts for payments by the state resulting from decisions made by individual doctors and their individual patients. In addition, these agreements often involve patented products in drug classes in which there are other patented products and the agreements are not generally awarded through a competitive bidding process where only one company's medicines can be prescribed. Furthermore, in the context of rebate agreements, the state itself does not make the decision to select and use, and is not the recipient of, any product.

In New Jersey, the state agency responsible for interpreting a similar set of restrictions on political contributions by state contractors also concluded that agreements between pharmaceutical companies and the government that provide for pricing discounts for the state's Medicaid program were not "contracts" in the sense intended by the law. New Jersey Public Law 2005, Chapter 51 (codified at N.J. Stat. Ann. §§ 19:44A-20.3) (New Jersey law bars companies that have agreements worth more than $17,500 with the state, its purchasing agents or independent authorities to procure goods or services, from making certain political contributions to candidates for state office or current office holders). In implementing those restrictions, the State of New Jersey, Department of the Treasury, Division of Purchase and Property concluded that agreements with the Centers for Medicare and Medicaid Services (CMS) to provide rebates

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[1] *Dallman et al. v. Ritter and Gonzales*, case #09cv1188 (consolidated with *Ritchie et al. v. Ritter and Gonzales*, case #09cv1200).

for drugs that are paid for by Medicaid were not "contract awards" covered by the state law regarding political contributions by state contractors. *See* State of New Jersey, Department of the Treasury, Division of Purchase and Property: *State Contractor Political Contributions Compliance*, *Chapter 51 Q & A.*, Question 109.[2]

Similarly, the Department of Treasury concluded that Medicaid rebate agreements were not "contracts" as defined in New Jersey's law. Using a series of questions and answers as a form for its advice, the Department of Treasury, Division of Purchase and Property's Question 110 asked:

> The State has a similar form agreement to the Medicaid rebate agreement concerning the [Pharmaceutical Assistance to the Aged and Disabled] PAAD and Senior Gold programs. Signature of the New Jersey drug rebate agreement is mandated in order for the drugs produced by a manufacturer to be eligible for State funding when dispensed to PAAD or Senior Gold beneficiaries. The provision of drugs in these two programs are not subject to the public bidding provisions. Is it correct to assume that the pharmaceutical manufacturers that enter into rebate agreements with the Department of Health and Senior Services are not prohibited from making political contributions under E.O. 134 (Chapter 51)?
>
> Answer: The State rebate agreements under the referenced programs do not constitute contract awards, and therefore (1) are not subject to Chapter 51 (EO 134), and (2) do not trigger the restrictions of Chapter 51.

Id.

That conclusion is equally warranted here. While provider participation agreements can take several forms, most frequently the contracts between pharmaceutical companies and a state provide no more than a discounted pricing structure, which is available to the state for as long as the state makes the manufacturer's drug available without disadvantaging it vis-à-vis other drugs in the same therapeutic class. Unlike a traditional contract, these agreements do not guarantee the pharmaceutical company that any particular amount of products will be selected by physicians and patients and therefore sold by the manufacturer, they do not preclude the state from reaching similar agreements with other pharmaceutical companies providing other products in the same drug class or to treat the same disease or condition, and the state is not the actual decision-maker about whether to use the manufacturer's products. Instead, individual physicians and their patients decide whether to use the products and if so, in what quantity. Thus, the rebate contracts do not serve as a contract for the sale of goods but rather as

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[2] http://www.state.nj.us/treasury/purchase/execorder134Q&A.htm (last viewed on July 20, 2009).

an agreement on an amount of a rebate that will be paid to the state for products that program beneficiaries and their physicians have chosen to use.

Pharmaceutical companies also often enter into discount contracts that allow state-supported healthcare facilities to pay for medicines at a negotiated price or rebate amount. Under these types of agreements, which are also not generally competitively bid, the state obtains a right to pay a discounted price in exchange for not restricting access to agreed-upon drugs. Similar to rebate agreements, discount contracts also merely establish a pricing structure and leave the decision over what, if any, products will be purchased to the discretion of the individual treating physician.

Rebate and discount agreements help ensure that important therapies are available at an affordable rate to beneficiaries of Colorado's health care services while leaving decisions over the demand for a pharmaceutical company's drugs in the hands of physicians and beneficiaries and not state officials. For this reason, PhRMA believes that these forms of agreements are appropriately excluded from the definition of a sole source government contract, and PhRMA urges the Secretary of State to finalize the exclusion of these agreements from the definition of sole source government contract.

For these reasons, PhRMA supports the Colorado Secretary of State's Proposed Rule.

Colorado
COMMON CAUSE
Holding Power Accountable

July 23, 2009

The Honorable Bernie Buescher, Secretary of State
Department of State
1700 Broadway
Denver, CO 80290

Re: Comments Solicited for Consideration at the July 22 Rulemaking Hearing

Colorado Common Cause is a nonpartisan, nonprofit organization that works for open, honest, and accountable government and seeks to strengthen public participation.

For the record, we have no position on the proposed campaign finance rule 1.16, which seeks to clarify the definition of sole source government contracts after the adoption of Amendment 54 in the 2008 election. We would, however, like to comment on the question posed by the Secretary on July 21st regarding the role of the Blue Book: "Whether, as indicated by Judge Lemon, the interpretation made by the proposed rule concerning public utility contracts is precluded by examples of sole source government contracts included in the Blue Book."

We believe that the Blue Book is useful in guiding the interpretation of a ballot measure, but do not agree that any analysis or interpretation provided by the Blue Book precludes the Secretary of State from promulgating rules to administer and enforce election laws such as Amendment 54 where appropriate.

Historically, the courts have treated the Blue Book as a non-binding form of legislative history, providing insight into the electorate's understanding and intention in adopting the measure. *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003); *see also Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 209 n.8 (Colo. 1991) ("[C]ourts may rely on [legislative council's interpretation] to help explain the voters' understanding of the amendment when it was passed."); *MacRavey v. Hamilton*, 898 P.2d 1076, 1079 n. 5 (Colo. 1995) ("In the past, we have found the Legislative Council's publication to be a helpful source equivalent to the legislative history of a proposed amendment.").

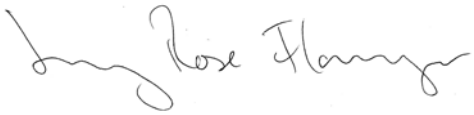
Legislative history is just one of several factors that a court should look at when interpreting a statute. *See Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009) ("If the statute is ambiguous, the court looks to the statute's legislative history, the consequences of a given construction, and the overall goal of the statutory scheme to determine the proper interpretation of the statute.").

Although the text of the Blue Book is initially drafted by nonpartisan legislative staff, the Blue Book is ultimately a political document. The Colorado General Assembly's Legislative Council has the authority to change the arguments and analysis presented in the Blue Book with a two-thirds vote.

While the Blue Book provides a useful analysis for voters and is a part of an amendment's legislative history, it is important to consider other factors in addition to the Blue Book when deciding how to interpret an amendment.

Thank you for the opportunity to comment. Please contact us if you would like additional information.

Sincerely,



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Greenberg Traurig

Douglas J. Friednash
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July 24, 2009

VIA FIRST-CLASS MAIL AND EMAIL

The Honorable Bernie Buescher
The Colorado Secretary of State
1700 Broadway Street, Suite 250
Denver, Colorado 80290
Email: Bernie.Buescher@sos.state.co.us
Email: Andrea.Gyger@sos.state.co.us

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).

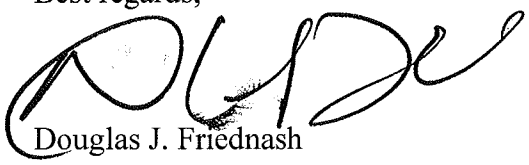
Even if the Secretary of State were not judicially estopped under Judge Lemon's decision, *which it is*, a review of the relevant authority from her decision and other evidence, prohibits the enforcement of this rule. In *Sanger v. Dennis*, 148 P.3d 404 (Colo. 2006), labor unions, union members and political 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,



Douglas J. Friednash

ISAACSON ROSENBAUM P.C.
THE BUSINESS OF SOLUTIONS®

Mark G. Grueskin
mgrueskin@ir-law.com

Direct Dial
303.256.3941

July 24, 2009

Via email

The Honorable Bernie Buescher, Secretary of State
Bill Hobbs, Deputy Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Supplement to comments made at rulemaking hearing dealing with Amendment 54 definitions (Proposed Rule 1.16)

Dear Secretary Buescher and Mr. Hobbs:

At the rulemaking hearing held on Wednesday, the Secretary held open the record until the close of business today. Please consider this letter to be a supplement to my remarks made at Wednesday's hearing.

You may recall that I posed this hypothetical question: "What would happen if the Department of Personnel & Administration adopted a standard that is different than the one adopted by the Secretary of State?" That question, as a hypothetical, is no longer relevant. The Department actually adopted such a standard months ago.

On January 1, 2009, the Department of Personnel & Administration specifically set forth its operative definition of a "sole source government contract." The **only** elements set forth in that definition are: (1) the "contract does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract;"; (2) the contract is [a]warded by the State or any of its subdivisions;" and (3) the cumulative amounts of all contracts is "greater than $100,000..., indexed for inflation." Sec. 2.5, DPA Technical Guidance (attached hereto). This definition contains no precondition, like that in your Proposed Rule 1.16, that there be a "legal requirement or authority for competitive bidding."

If Section 2.5 of the DPA Technical Guidance were not clear enough, Section 3.4 of that document makes it plain that every single contract that meets the above tests is covered by Amendment 54. Sole source government contracts "include **any contracts** that satisfy the requirements of Section 2.5, including:... **All contracts**, including purchase orders." Sec. 3.4.1.1 (emphasis added); *see also* Colo. Const., art. XXVIII, sec. 2(14.4) (Amendment 54 applies to "any government contract..."). "Any" and "all" permit no implied exception. *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 75 (Colo. 2008) (use of "any" in campaign finance provisions of the

Constitution means "we are not free to imply limitations or qualifications that are not found in article XXVIII"); *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 91 (Colo. 1995) ("The dictionary definition and common usage of the word 'all' do not provide for an exception or exclusion that is not expressly specified"). Because the definitions in Amendment 54 and in the DPA Technical Guidance are plainly all-encompassing, no exceptions may be imputed to Amendment 54's application by means of this rulemaking. *See* Sec. 3.4.1.2 (Amendment 54 even applies to procurements that are not considered sole source procurements under the State Procurement Code).

Given the Department's broad definition and the narrower definition you have proposed, I have a somewhat different question than I posed to you earlier in the week. "Upon what authority should utilities and Medicaid providers (among others) rely when filing information with the Department of Personnel & Administration – the Department's rules that have been in place since the day Amendment 54 became effective or a different standard adopted by your office?" If the goal of this proceeding is to provide certainty to affected parties, the knowing creation of an inconsistent standard will achieve just the opposite result. I urge you not to create an obstacle to clarity and compliance by adopting this regulation.[1]

Sincerely,

Mark G. Grueskin

MGG/aak

cc: Andrea Gyger

[1] The suggestion was made at the rulemaking hearing that your authority is triggered because Amendment 54 is a campaign finance provision. Yet, Judge Lemon found that the Section 16 of Amendment 54 – the sole surviving provision – is justified on a non-campaign finance rationale. "[T]ransparency is a listed purpose of Amendment 54 in the Blue Book.... [T]he court determines that Section 16 is closely drawn to serve the important state's interest of transparency in government contracting and excepts it from the operation of this preliminary injunction." Order at 26. The Secretary of State does not oversee government contracting; the Department of Personnel & Administration does. As such, there cannot be much question about which department has the legal authority to define the phrase in question.

Department of Personnel & Administration
TECHNICAL GUIDANCE
SOLE SOURCE CONTRACTS AND CAMPAIGN CONTRIBUTIONS

1. AUTHORITIES

Article XXVIII, Sections 2, 13, 15, 16, and 17, Constitution of Colorado (Campaign and Political Finance)

CRS §24-103-204 (Small purchases)

Procurement Code R 24-103-204-02 (Competition not required)

CRS §24-103-205 (Sole source procurement)

2. DEFINITIONS

2.1 Award of a sole source government contract – Notice by the State or any of the State's political subdivisions to award a contract with a contract holder. The amount of the award is equal to the final award amount. Awards also include amendments and any modifications to the original award.

2.2 Contract Holder

- **2.2.1** Non-governmental party to a sole source government contract,
- **2.2.2** Persons that control 10 percent or more shares or interest in a non-governmental party to a sole source government contract,
- **2.2.3** The officers, directors or trustees of a non-governmental party to a sole source government contract,
- **2.2.4** In the case of collective bargaining agreements, the labor organization and political committees created or controlled by the labor organization.

2.3 Immediate family member - Spouse, child, spouse's child, son-in-law, daughter-in-law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian or domestic partner.

2.4 Contractor – For purposes of the Technical Guidance and for Article XXVIII, "Contractor" as used in contracts shall have the same meaning as "Contract Holder" defined in Section 2.2.

2.5 Sole source government contract for Article XXVIII

2.5.1 Elements

2.5.1.1 Government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract,

2.5.1.2 Awarded by the State or any of its political subdivisions,

2.5.1.3 For cumulative amounts greater than $100,000 (one hundred thousand dollars), indexed for inflation (See Section 6), including all sole source government contracts with any and all governmental entities involving the non-governmental party during a calendar year.

2.5.2 Collective bargaining agreements

2.5.2.1 Sole source contracts also include collective bargaining agreements if the contract confers an exclusive representative status to bind all employees to accept the terms and conditions of the contract.

2.5.2.2 Employment contracts with individual employees are not sole source government contracts.

2.5.2.3 There is no dollar threshold for collective bargaining agreements.

2.6 State or any of its political subdivision - the State of Colorado and its agencies or departments and institutions of higher education, as well as the political subdivisions within the State including counties, municipalities, school districts, special districts, and any public or quasi-public body that receives a majority of its funding from the taxpayers of the state of Colorado.

3. SOLE SOURCE CONTRACTS

3.1 Sole Source Government Contracts and Campaign Contributions - Contract holders of a sole source government contract as defined by section 2.2 above, shall contractually agree, for the duration of the contract and for two years thereafter, to cease making, causing to be made, or inducing by any means, a contribution, directly or indirectly, on behalf of the contract holder or on behalf of his or her immediate family member and for the benefit of any political party or for the benefit of any candidate for any elected office of the State or any of its political subdivisions.

3.2 Sole Source Language - Every sole source government contract by any political subdivision of the State shall incorporate Article XXVIII, section 15, into the contract. See Section 9, paragraph 1 of this Technical Guidance.

3.3 Contribution to Influence Ballot Issue – Any person who makes or causes to be made any contribution intended to promote or influence the result of an election on a ballot issue shall not be qualified to enter into a sole source government contract relating to that particular ballot issue. This language is included under Article XXVIII section 17 (2). See Section 9, paragraph 2 of this Technical Guidance.

3.4 Sole Source Government Contract for Article XXVIII and Sole Source Procurement in the State of Colorado

3.4.1 Sole source government contracts for Article XXVIII include any contracts that satisfy the requirements of Section 2.5, including:

3.4.1.1 All contracts, including purchase orders.

3.4.1.2 Procurements that are not considered sole source procurements under the State of Colorado Procurement Code, such as for discretionary purchases. See CRS §24-103-204 (small purchases) and Procurement Code R 24-103-204-02. For State agencies and other entities that follow the State of Colorado Procurement Code and Rules these include:

3.4.1.2.1 Non-delegated agencies may purchase supplies or services up to a limit of $1,000 without benefit of competition.

3.4.1.2.2 Group I and II agencies may purchase supplies up to a limit of $10,000 and services up to $25,000 without benefit of competition.

3.4.1.3 Procurements under procurement codes for the State's political subdivisions that may not be considered sole source, such as procurements for small purchases that are not competitively bid.

3.4.2 Based on Colorado statutes and the State of Colorado Procurement Code and Rules, sole source procurements may be awarded in certain circumstances. The resulting contract will constitute a sole source government contract under Article XXVIII when the cumulative amount of awards of these contracts exceeds $100,000 (one hundred thousand) indexed for inflation during a calendar year. See CRS §24-103-205 (sole source procurement).

4. PENALTIES

4.1 Corrupt Misconduct and Restitution - Any person who intentionally accepts contributions on behalf of a candidate committee, political committee, small donor committee, political party, or other entity, in violation of Article XXVIII, section 15 has engaged in corrupt misconduct and shall pay restitution to the general treasury of the contracting governmental entity to compensate the governmental entity for all costs and expenses associated with the breach, including costs and losses involved in securing a new contract if that becomes necessary.

4.2 Bookkeeper Restitution - If a person responsible for the bookkeeping for a contract holder, or if a person acting on behalf of the governmental entity, obtains knowledge of a contribution made or accepted in violation of Article XXVIII section 15, and that person intentionally fails to notify the secretary of state or appropriate government officer about the violation within ten business days of learning of such

contribution, then that person may be contractually liable in an amount up to the above restitution.

4.3 Intentional Violation by Contract Holder - The parties to a sole source government contract shall agree that if a contract holder intentionally violates Article XXVIII, section 15 or section 17 (2), as contractual damages that contract holder shall be ineligible to hold any sole source government contract, or public employment with the State or any of its political subdivisions, for three years. The Governor may temporarily suspend any remedy under this section during a declared state of emergency.

4.4 Knowing Violation by an Elected or Appointed Official - Knowing violation of Article XXVIII, section 15 or section 17 (2) by an elected or appointed official is grounds for removal from office and disqualification to hold any office of honor, trust or profit in the state, and shall constitute misconduct or malfeasance.

5. REPORTING PROCESS

5.1 Contract holder - Each contract holder of a sole source government contract with any State agency or any of the State's political subdivisions shall promptly report the following information to the Department of Personnel & Administration when the cumulative amount of awards of these contracts exceeds $100,000 (one hundred thousand) indexed for inflation during a calendar year:

- **5.1.1 Government Contract Summary** – The contract holder shall submit the information in Section 10 for government contract summary.
- **5.1.2 Contract Holder Information** – The contract holder shall submit the information in Section 11. In addition, the contract holder shall submit this information when there are changes in the information.
- **5.1.3 Method of Reporting** – Each contract holder with a sole source government contract with any State agency or any of the State's political subdivisions shall promptly report the information in Section 10 and 11 using an internet-based reporting system.

5.2 Department of Personnel & Administration - The Department of Personnel & Administration shall promptly publish and maintain a summary of each sole source government contract submitted by non-governmental contract holders in which the cumulative amount of any and all sole source government contracts during a calendar year exceeds $100,000 indexed for inflation.

6. DOLLAR THRESHOLD ADJUSTMENT PROCESS

6.1 Overall – The initial dollar threshold of $100,000 shall be indexed for inflation per the United States Bureau of Labor Statistics consumer price index (CPI) for Denver-Boulder-Greeley after the year 2012, adjusted every four years beginning January 1, 2012 to the nearest lowest $25.

6.2 The United States Bureau of Labor Statistics CPI for Denver-Boulder-Greeley shall be measured for the year 2008.

6.3 For January 1, 2009 to December 31, 2012, the dollar threshold shall be $100,000.

6.4 The United States Bureau of Labor Statistics CPI for Denver-Boulder-Greeley shall be measured for the year 2012.

6.5 The adjustment to the dollar threshold shall be calculated as follows:

6.5.1 United States Bureau of Labor Statistics CPI for Denver-Boulder-Greeley in 2012 less the CPI for Denver-Boulder Greely in 2008. The difference in these two CPI amounts shall be divided by the CPI for Denver-Boulder Greely for 2008, and this percentage shall be the amount of the adjustment to the dollar threshold.

6.5.2 The adjusted dollar threshold will be in effect for each subsequent four year period.

6.5.3 The adjustment process will occur every four years following the year 2012, as described in this Section for the year 2012.

7. ENFORCEMENT

A registered voter of the state may enforce Article XXVIII, section 15 or section 17 (2) by filing a complaint for injunctive or declaratory relief or for civil damages and remedies, if appropriate, in the district court.

8. EFFECTIVE DATE AND APPLICABILITY

8.1 Effective Date – Amendment 54 amending Sections 2 and 13 and adding sections 15, 16, and 17 to Article XXVIII of the Colorado constitution shall take effect on December 31, 2008.

8.2 Applicability – This amendment shall be applicable to all sole source government contracts, including any modifications to existing sole source government contracts, entered into on and after December 31, 2008.

9. PROVISION FOR SOLE SOURCE GOVERNMENT CONTRACTS

State agencies and institutions of higher education shall add the provision for sole source government contracts on the next page for all sole source government contracts as defined under Article XXVIII.

SOLE SOURCE GOVERNMENT CONTRACTS AS DEFINED IN COLORADO CONSTITUTION ARTICLE XXVIII

This provision applies only to sole source government contracts and does not apply to any contract which used a public and competitive bidding process in which the State agency or institution of higher education solicited at least three bids prior to awarding the contract. Contractor certifies, warrants, and agrees that it has complied and will comply with Colorado Constitution Article XXVIII, including but not necessarily limited to the following prohibitions and obligations:

1. If during the term of the contract, contractor holds sole source government contracts with the State of Colorado and any of its political subdivisions cumulatively totaling more than $100,000 in a calendar year, then for the duration of this contract and for two years after, contractor will not make, cause to be made, or induce by any means a contribution, directly or indirectly, on behalf of contractor or contractor's immediate family member(s) for the benefit of any political party or for the benefit of any candidate any elected office of the State or any of its political subdivisions; and

2. Contractor represents that contractor has not previously made or caused to be made, and will not in the future make or cause to be made, any contribution intended to promote or influence the result of a ballot issue election related to the subject matter of this contract; and

3. Contractor will satisfy contractor's obligations to promptly report to the Colorado Department of Personnel & Administration information included in the Government Contract Summary and the Contract Holder Information, regarding this contract and any other sole source government contracts to which contractor is a party; and

4. Contractor understands that any breach of this section or of Contractor's responsibilities under Colorado Constitution Article XXVIII may result in either contractual or constitutionally mandated penalties and remedies; and

5. A Contractor that intentionally violates Colorado Constitution Article XXVIII, Section 15 or 17(2), shall be ineligible to hold any sole source government contract, or public employment with the state or any of its political subdivisions for three years; and

6. By execution of this contract, Contractor hereby confirms it is qualified and eligible under such provisions to enter into this contract.

For purposes of this clause, the term "contractor" shall include persons that control ten percent or more shares or interest in contractor, as well as contractor's officers, directors, and trustees. The term "immediate family member" shall include a spouse, child, spouse's child, son-in-law, daughter-in-law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian, or domestic partner.

10. SOLE SOURCE GOVERNMENT CONTRACT SUMMARY – The following is a sample form. To complete the actual form, go to: https://ids-online.colorado.gov/DPA/DFP/SCO/Amendment54/

Sole Source Government Contract Summary

To be completed by contract holder for each sole source government contract when the cumulative amount of these awards of these contracts exceeds $100,000 (indexed for inflation every fourth year) during a calendar year

Name of non-governmental party	
Taxpayer Identification Number for non-governmental party	
Address of non-governmental party - Street	
Address of non-governmental party - City	
Address of non-governmental party- State	
Address of non-governmental party - Zip	
If outside US, where outside US	
Brief description of nature of contract and goods and services performed	
Contract start date	
Contract end date	
Estimate amount of payment (Award amount)	
Rate of payment (e.g. average rate per hour)	
Sources of payment (Name of State agency or political subdivision that awarded sole source contract)	

Describe renewal options if any	
Complete and submit this form and then complete Contract Holder Information	
Contract holder represents that the information provided on this form is accurate.	
Contract holder will re-submit this form when this information changes	

11. CONTRACT HOLDER INFORMATION – The following is a sample form. To complete the actual form, go to:

https://ids-online.colorado.gov/DPA/DFP/SCO/Amendment54/

Contract Holder Information

To be completed by contract holder for each sole source government contract when the cumulative amount of these awards of these contracts exceeds $100,000 (indexed for inflation every fourth year) during a calendar year

Name of non-governmental party	
Taxpayer Identification Number for non-governmental party	
Names of persons and addresses who control 10% or more share or interest in the non-governmental party	
Names of persons and addresses who are the non-governmental party's officers, directors, or trustees	
For collective bargaining agreements	
Name of the labor organization	
Political committees created or controlled by the labor organization	
Contract holder represents that the information provided on this form is accurate.	
Contract holder will re-submit this form when this information changes	

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(303) 217-2018 *phone*, (303) 217-2019 *fax*

July 24, 2009

William Hobbs
Deputy Secretary of State
Colorado Department of State
1700 Broadway, Suite 250
Denver CO 80290

Re: July 22, 2009 Rulemaking Concerning Proposed Amendments to Campaign and Political Finance Rules, 8 CCR 1505-6

Dear Mr. Hobbs,

This supplements our letter dated July 17, 2009, a copy of which is attached for your convenient reference. At the Department's above referenced rulemaking, a question was raised about whether the proposed rulemaking remained necessary in light of the *Findings of Fact, Conclusions of Law, and Order Entering Preliminary Injunction* issued in *Dallman et al. v. Ritter and Gonzales*, case #09cv1188 (consolidated with *Ritchie et al. v. Ritter and Gonzales*, case #09cv1200) (the "Preliminary Injunction") concerning enforcement of certain provisions of Amendment 54.

Consistent with testimony offered at the hearing, the Colorado Medical Society supports rulemaking and believes such rulemaking remains necessary despite the Preliminary Injunction. Specifically, the Medical Society supports clarification that the definition of a "sole source contract" as used in Colorado Const., Art. XXVIII does not include contracts for which there is no legal requirement or authority for a competitive bidding process, including provider participation agreements for publically funded health care services and contracts for disaster preparedness with statewide professional organizations.

Although the Preliminary Injunction prohibits enforcement of some provisions of Colorado Const., Art. XXVIII; section 16 was not enjoined. Accordingly, contractors with sole source contracts must still comply with requirements related to the state-administered, public database listing sole source government contracts and the parties to each contract.[1]

[1] Colorado Const., Art. XXVIII, §16.

This database was created and is maintained by the Colorado Department of Personnel and Administration.[2]

The Department of Personnel and Administration has issued technical guidance related to the database, which requires, among other things, holders of sole source government contracts to report information for publication.[3] Consequently, health care providers and the Medical Society continue to neesd clarity regarding the status of provider and disaster preparedness contracts. Accordingly, the Colorado Medical Society supports the proposed rule, and the additional language submitted in our July 17, 2009 letter.

Please let me know if I can provide any additional information that may be helpful to the Department's evaluation of this issue.

Sincerely,

BUDMAN & HERSHEY

Kari M. Hershey

Kari M. Hershey

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2 http://www.colorado.gov/dpa/dfp/sco/contracts.htm

3 Id.

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July 24, 2009

The Honorable Bernie Buescher
Colorado Secretary of State
1700 Broadway, Suite 250
Denver, CO 80290

Re: Comments Submitted Pursuant to Notice of Rulemaking
Dated July 21, 2009

Dear Secretary Buescher:

Please consider these written comments concerning the previously announced proposed rule by the Secretary of State regarding the definition of "sole source government contract" for the purposes of Amendment 54.

1. The Secretary of State has the duty and obligation to promulgate rules pursuant to Art. XXVIII, Sec. 9 "as may be necessary to administer and enforce any provision of this article," including the provisions included in what is now known as Amendment 54. This rule-making authority includes the right and authority to define terms. Evans v. Independence Institute, OS 20050020 (Agency Decision Nov. 4, 2005) (enclosed). In sharp contrast to the broad delegation of authority granted to the Secretary of State, the authority granted to the Executive Director of the Department of Personnel and Administration is permissive, not mandatory, and is limited to the authority to "promulgate rules to ***facilitate*** this section," referring to Section 16 of Amendment 54 concerning the development of a listing of the summaries of sole source government contracts. (emphasis added) "Facilitate" is not defined in either Amendment 54 or in the State Administrative Procedure Act. The Black's Law Dictionary definition of "facilitate" is "to make easy or less difficult, or free from difficulty or impediment." On its face the plain and ordinary meaning of "facilitate" does not include the power and authority to define a term, such as sole source government contract. The Executive Director of the Department of Personnel clearly has the authority to interpret provisions and define terms with respect to government purchases of goods and services pursuant to the Colorado Procurement Code, C.R.S. § 24-102-101, *et seq.*, but the gravamen of the issue of determining which contracts are subject to Amendment 54 includes contracts that are not subject to the State Procurement Rules. The Executive Director's authority with respect to these contracts is limited to rules to "facilitate."

Accordingly, I would conclude that the Secretary of State has the jurisdiction and authority to conduct rule-making as it is the only entity with clear authority to define "sole source government contract" outside the Procurement Code. This is not a situation where there is full concurrent jurisdiction with the Executive Director of the Department of Personnel and Administration.

2. Any rule-making should be consistent with the preliminary injunction opinion.

3. Case law is clear that the Ballot Information Book ("Blue Book") from the Legislative Council of the Colorado General Assembly is certainly evidence of the intent of the electors. However, the Supreme Court has stated that the Blue Book is not binding. Tivolion Teller House, Inc. v. Fagan, 926 P.2d 1208, 122 (Colo. 1996). (emphasis added)

Thank you for the opportunity to submit these written comments and to provide oral testimony on the 22nd of July. Please do not hesitate to contact me if you have any questions.

Sincerely,

Shayne M. Madsen

SMM/sak

Enclosure

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 evidence[1]. 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

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[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)
1st 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.
1st 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?
1st 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.
1st Male Voice	Forever?
Female Voice	It's not just a five-year tax increase, it's a forever tax increase.
1st Male Voice	Oh, now I am scared.
2nd 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…
1st Male Voice	Stop that. Do you want the voters to learn the truth about Referendum C?
2nd 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 *Rocky Mountain News* 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.
2nd 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:

1st Male Voice	First, the politicians tried to tell us, Ref C is not a tax increase.
2nd Male Voice	(Sung to tune of Oops there goes another Rubber Tree Plant) Oops there goes another one.
1st 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.
2nd Male Voice	(Singing) Whoops there goes another one.
1st 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.
2nd Male Voice	(Singing) Whoops there goes another one.
1st 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.

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[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 is 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 de-funded 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). It 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.