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January 7, 2011

The Honorable Bernie Buescher
Colorado Secretary of State
1700 Broadway, Suite 200
Denver, CO 80202

Dear Secretary Buescher:

You have issued a notice of rulemaking to address the recent Tenth Circuit decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), wherein the panel found the $200 element of the definition of "issue committee" to be unconstitutional in an as-applied challenge. You have proposed a regulation to change the constitutional definition and increase that dollar trigger to $2,500. This letter requests that you withdraw the proposed rule.

I understand that there are questions about how the issue committee definition will apply to other cases in the future. However, the $200 figure has not been invalidated on a facial basis. "On appeal, Plaintiffs' raise the arguments that they presented to the district court. We agree with their as-applied First Amendment argument.... Because of that ruling, we need not address their other contentions," which included a facial challenge. *Id.* Thus, the courts have not created a gap in regulation of issue committees; they have only decided that there were constitutional issues as applied to Sampson. "As-applied constitutional challenges attempt to invalidate a law only in the circumstances in which a party has acted or proposes to act; thus, a law that is held invalid as applied is not rendered completely inoperative." *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo. Ct. App. 2008). The Secretary's attempt to establish another dollar figure for all issue committees is thus unwarranted.

Further, the proposed regulation raises the specter of rulemaking that exceeds the Secretary's constitutional authority. It is similar to the facts in *Sanger v. Dennis,* 148 P.3d 404 (Colo. Ct. App. 2006), where the Secretary adopted rules that defined a "member" of an organization by requiring that a person annually commit in writing to have a portion of his or her dues used for political purposes. The rule had been enjoined by the district court, and the Court of Appeals agreed that the rule imposed a restriction "that is not supported by the text of Article XXVIII." *Id.* at 412. In fact, the rule in that case could "be read to effectively add, to modify, and to conflict with the constitutional provision by imposing a new condition.... That condition is found nowhere in Article XXVIII." *Id.* at 414. Notwithstanding your laudable motives, this

rule suffers from the very same infirmity, as there is no basis for a dollar figure other than the one enacted by the people acting through the right of initiative.

I thus respectfully request that you withdraw the proposed rule.

Sincerely,

Mark G. Grueskin

MGG

cc: Bill Hobbs, Deputy Secretary of State (via email)