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January 26, 2011

The Honorable Scott Gessler
Secretary of State
1700 Broadway, Suite 200
Denver, CO

Dear Mr. Secretary:

As you may know, I wrote to former Secretary of State Buescher, asking him to withdraw Proposed Rule 4.27 dealing with dollar thresholds for issue committee registration and disclosure. The issue raised was not a matter of opposition to the rule but simply an acknowledgement of the limitations on the Secretary's office to decide a policy issue such as this one. Former Secretary Buescher evidently declined to withdraw this proposed rule and left the matter open for your consideration. I am attaching my letter of January 7, 2011 for your review and ask that you take into account the arguments made there, as well as the following.

The authority of the Secretary to adopt rules that "are necessary to administer and enforce" constitutional campaign finance provisions is not unlimited. Colo. Const., art. XXVIII, § 9(1)(b); C.R.S. § 1-45-111.5(1). Replacing the voter-adopted dollar threshold for issue committees is not a matter of enforcing or administering Article XXVIII. "'[E]nforce' is commonly understood to mean 'to compel observance of (a law, etc.).'" *Delta Sales Yard v. Patten*, 892 P.2d 297, 299 (Colo. 1995) (citations omitted). Public officials whose responsibilities are "administrative" in nature "do not make the law, but are themselves wholly subject to the constitution and the statutes, and are concerned only in the administration" of their units of government. *Sheely v. People*, 129 P. 201, 203 (Colo. 1912). Administration reflects the "management of governmental or institutional affairs." *Colo. Dep't of Revenue v. Cray Computer Corp.*, 18 P.3d 1277, 1282 (Colo. 2001) (citations omitted). In contrast, Proposed Rule 4.27 determines the entire scope and nature of campaign finance accountability in connection with ballot issues, and as such, is policy-making beyond the Secretary's rule making purview.

Moreover, the Secretary's authority to revise dollar figures specified in Article XXVIII is limited by the text of the Constitution. Your office is restricted to adjusting contribution limits and voluntary spending limits to reflect changes in the Denver-Boulder consumer price index, and even then, changes may only be made every fourth year. Colo. Const., art. XXVIII, § 3(13), 4(7). In this regard, you are currently considering modifications to the constitutionally specified amounts of contribution and spending limits in a rule making proceeding that is scheduled for next month. Proposed Rule 4.27, though, falls well outside those specific scenarios.

Finally, the as-applied nature of the Tenth Circuit's *Sampson* decision is pivotal to the issue of the Secretary's authority on this issue. The fact that a portion of Article XXVIII has been held to be unconstitutional, based upon specific facts, does not necessitate the adoption of this proposed regulation. In fact, Article XXVIII specifically provides that an application that is held invalid as "to any person or circumstance... shall not affect other... applications of the article which can be given effect without the invalid... application." Colo. Const., art. XXVIII, § 14. *Sampson v. Buescher* dealt with: (a) a small, local neighborhood group; (b) that addressed an annexation election; (c) weighing in only as to one ballot issue; and (d) benefiting from "slight" contributions. 625 F.3d 1247, 1251, 1259 (10th Cir. Colo. 2010). In fact, the *Sampson* panel specifically acknowledged that some applications of the issue committee definition **are** constitutional. *Id.* at 1261. Clearly, the facts in that case are very different from, say, a statewide campaign that addresses multiple initiatives. The as-applied unconstitutionality of the "issue committee" definition under *Sampson*-like facts does not control or even affect the constitutionality of that definition under distinct facts. A rule change in response to *Sampson* that applies to all ballot measure elections across Colorado simply is not warranted.

Accordingly, please withdraw your office's proposed Rule 4.27 at or after your hearing on January 26, 2011. Thank you for your consideration of these comments.

Very truly yours,

ROTHGERBER JOHNSON & LYONS LLP

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