Andrea Gyger

From: Ari Armstrong [redacted]
Sent: Monday, May 02, 2011 7:40 PM
To: Andrea Gyger
Subject: re 8 C.C.R. 1505-6

May 2, 2011

Honorable Scott E. Gessler
Secretary of State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290

Care of Andrea Gyger, andrea.gyger@sos.state.co.us

Re: Ari Armstrong's comments on Proposed Revisions and Amendments to the Secretary of State's 'Rules Concerning Campaign and Political Finance,' 8 C.C.R. 1505-6

Dear Secretary Gessler,

The issue before the Secretary of State is how to "promulgate such rules... as may be necessary to administer and enforce" Article XXVIII of of the Colorado Constitution ("Campaign and Political Finance"), approved as Amendment 27 in 2002 by Colorado voters.

A general evaluation of the broader Constitutional provision lies outside the scope of the Secretary of State's present authority.
However, in order to set the context, I will note that I regard the entire Article as a violation of the free speech rights of Coloradans as protected by the First Amendment to the federal Constitution.
Despite the Tenth Circuit Court's claim, there can be no "governmental interest" that justifies "abridging the freedom of speech" or "the right of the people peaceably to assemble" when it comes to discussing or advocating political campaigns or ballot measures. Moreover, the measure discourages citizen involvement in the political process, the exact opposite of its stated intent.

Regardless of broader evaluations of Article XXVIII, the Secretary of State has a legal obligation under Section 9 to promulgate legally enforceable rules pertaining to campaign finance.

In the case of Sampson v. Buescher (November 9, 2010), the Tenth Circuit Court of Appeals ruled that Article XXVIII as written unduly violates freedoms of speech and association and is therefore in part
(federally) unconstitutional. Therefore, the Colorado Secretary of State must issue legally enforceable rules consistent with the Court's ruling.

The Court reviews that, as written, "Colorado law requires that any group of two or more persons that has accepted or made contributions or expenditures exceeding $200 to support or oppose a ballot issue must register as an issue committee and report the names and addresses of anyone who contributes $20 or more."

The Court ruled on a case involving a group that devoted $782.02 to an "anti-annexation effort" by July 13, 2006, and that spent a total of
$1,992.37 in cash or in-kind contributions by April, 2007, "of which

$1,178.82 went for attorney fees."

The Court finds: "[C]ampaign-disclosure statutes must survive exacting scrutiny. There must be a 'substantial relation' between the requirement and a governmental interest that is sufficiently important to justify the burden on the freedom of association. ... Here, the financial burden of state regulation on Plaintiffs' freedom of association approaches or exceeds the value of their financial contributions to their political effort; and the governmental interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions. We therefore hold that it was unconstitutional to impose that burden on Plaintiffs. We do not attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures. The case before us is quite unlike ones involving the expenditure of tens of millions of dollars on ballot issues presenting 'complex policy proposals.' We say only that Plaintiffs' contributions and expenditures are well below the line."

The implication is clear and straight-forward: the Secretary of State must, by law, promulgate legally enforceable rules setting a "trigger"
amount for mandatory reporting under Amendment XXVIII "well above"
the amount of the case in question. While the Court offers no exact figure, common sense dictates that a figure of $5,000 is the minimum that could reasonably be considered "well above" the amounts of the case under scrutiny. I believe that a figure of many times that amount would be more consistent with the reasoning of the Court.

Unfortunately, the speech-restriction organizations Colorado Common Cause and Colorado Ethics Watch, in their comments to the Secretary of State dated January 26, 2011, offer a distorted (and frankly self-serving) interpretation of the Court's decision.

Elena Nunez of Colorado Common Cause claims, "In its ruling, the Court only found the requirements too onerous as applied in this particular case. We don't believe that this ruling provides the grounds to weaken the trigger for disclosure more broadly." Nunez advises, "Rather than focus solely on the dollar amount that should trigger disclosure, we urge the Secretary's office to improve its guidance for citizens who will be required to comply with disclosure rules going forward."

Luis Toro of Colorado Ethics Watch takes a similar approach, arguing that the Court's ruling "does not purport to require Colorado to change the threshold at which a group becomes an issue committee subject to reporting requirements."

Nunez and Toro simply ignore the Court's language stating that "a ballot-issue committee" generally cannot be subjected to the reporting requirements unless they spend resources at an amount relative to which the reviewed amounts "are well below."

Furthermore, Nunez's claims that "clearer," newer statutes resolve the problems expressed by the Court's decision do not pass the laugh test.
Yet Toro makes a similar claim about C.R.S. 1-40-113(1)(b), which allegedly "is clear and easy to follow and raises none of the concerns expressed in Sampson." (By Toro's own description, the law pertains only to notification of those who get petitions printed, not to anybody else who may want to speak out about the measure.)

As several other comments to the Secretary of State make clear, the campaign rules in fact discourage citizen participation in certain political causes. I add my voice to those who have suffered under the law. In opposing the 2010 "Personhood" measure with Diana Hsieh, I found that our project was significantly hampered by the fact that Diana had to spend many hours complying with the reporting burdens.
And that's a project that actually got accomplished despite the reporting requirements; the citizen efforts that were never even launched because of the burdens cannot be known, nor the magnitude of free speech violations calculated. I frankly would not have undertaken the campaign against the "Personhood" measure had Diana not agreed to deal with the onerous bureaucracy of the reporting requirements. My standard course is to simply cut my mind off from any idea that might lead me into the necessity of complying with the regulatory burdens associated with the targeted forms of

political speech. Generally I do not even try to develop the ideas and strategies for fighting those political battles that might subject me to the reporting requirements.

At issue is not simply the time required to comply with the reporting requirements, though that cost is substantial. The citizen activist must also bear the emotional burden of constantly fearing that some paperwork error will subject one to expensive and exhausting legal proceedings. Nor do I believe I am alone in finding the prospect of jumping through a bunch of bureaucratic hoops, before I can advocate some political cause with others, to be inherently burdensome.

It is abundantly obvious that the campaign reporting requirements "chill" free speech, in that they discourage it. But to describe this as a "chill" hardly captures the injustice of the requirements. The requirements of Article XXVIII constitute censorship, pure and simple.
It is not the censorship of an outright prohibition of some form of speech, but the soft censorship of piling up so many burdens that many simply dare not even try to advocate their views. The results are the
same: the law prevents some people from speaking out about causes dear to them.

The notion that cleaner status and rules can overcome the problems expressed in Sampson v. Buescher is absurd. Article XXVIII itself consists of 17 sections, for a total count approaching 7,000 words of dense legalistic language, not counting annotations. Yet, to be safe, the citizen activist must master not only the Constitutional language but all the additional statutes governing campaign finance, in addition to the Secretary of State's rules. Add to that the burden of properly processing and filing all the often-tiny in-kind and cash contributions. Add to that the emotional burdens of risking legal penalties over paperwork errors and struggling to interact with bureaucratic officials.

Far from being "clear and easy to follow," the campaign reporting requirements better resemble a nightmare from the mind of Franz Kafka.

Thankfully, the decision of Sampson v. Buescher, in conjunction with Section 9 of Article XXVIII of the Colorado Constitution, prompts the Colorado Secretary of State to substantially raise the "trigger"
amount for issue-group reporting, thereby giving citizen activists in Colorado some measure of relief.

Sincerely,

Ari Armstrong