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The Honorable Scott Gessler
Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Re: Rules Concerning Campaign and Political Finance, 8 CCR 1505-6

Mr. Secretary,

Clear The Bench Colorado is a non-partisan, non-profit organization established to provide an alternative source of substantive information on judicial performance in order to provide greater transparency and encourage accountability of sitting judges as part of the constitutional process.

In addition to providing substantive evaluations of judicial performance on the appellate level – an effort recognized on a national level (based on analysis of appellate court opinions for constitutionality, instead of merely providing a "review" of survey returns provided by a selected subset of respondents), ***CTBC*** provides general background on the judicial selection and retention process, analysis and links to full text of Colorado Supreme Court and appellate court written opinions, links to constitutional and statutory language for reference, and links to other evaluations or reviews of judicial performance (including the "reviews" by the Colorado Office of Judicial Performance Evaluation),as well as general commentary and background on issues related to the judiciary.

Based on Advice from the Secretary of State, ***CTBC*** registered as an issue committee on its formation, and consistently made all required disclosures about its activities, including reports on contributions and expenditures.

As a result of public disclosure of contributions, CTBC was subjected to a series of politically-motivated harassing attacks (filed as "campaign finance complaints") in administrative court, despite complying with all relevant regulations and requirements and operating in accordance with guidance issued by the office of Secretary of State.

Added to the considerable administrative burden of recording and reporting numerous small individual contributions, the impact of campaign and political finance regulations on the ability of a citizen activist to participate in the civic arena was significantly negative, even severe.

According, ***Clear The Bench Colorado*** urges the Secretary to adopt proposed Rule 4 in order to reduce the burden of civic participation by the citizens of our state. ***Clear The Bench Colorado*** further urges the Secretary to ***raise the dollar amount threshold for reporting of individual contributions*** to a level more consistent with the clearly expressed intent of the Colorado constitutional amendment governing campaign finance to counter "*a disproportionate level of influence over the political process*" by "*special interest groups*" via "*large campaign contributions*." (Colorado Constitution, Art. XXVIII Section 1)

Discussion:

I. Constitutional and Legal Considerations

Following the ruling by the 10th Circuit Court in ***Sampson v. Buescher***, Nos. 08-1389, 08-1415 (10th Cir. 2010), certain sections of Colorado Constitution Article XXVIII were held to violate the United States Constitution, thus requiring review and revision. Specifically, provisions of Article XXVIII were held to unduly burden the rights of free association and free speech protected under the 1st Amendment, among our most cherished rights.

The rationale for adopting Article XXVIII (as Amendment 27) was to reduce "disproportionate influence" over the political process by "large campaign contributions." The logic behind the argument in favor of regulating contributions and requiring disclosure is that "large contributions facilitate disproportionate influence."

Although the court in Sampson v. Buescher declines (appropriately) to ***itself*** "*attempt to draw a bright line below which a ballot-issue committee cannot be required to report contributions and expenditures*" it clearly indicated that setting the "bright line" at $200 was unduly burdensome and unconstitutional. The office of Secretary of State is acting appropriately to initiate, via proposed Rule 4, an attempt to bring Colorado's requirements in line with First Amendment constitutional protections.

Another rationale in support of the Article XXVIII disclosure and reporting requirements is to inform opinion on ballot issues by providing information on supporters or opponents – essentially, "guilt by association" rather than discussion on the merits of what is up for a vote. Although the relevance of this contextual information is debatable, it is clearly NOT debatable that the disclosure of small, individual

contributions does not rise to the level of "disproportionate level of influence" by "wealthy individuals, corporations, or special interest groups" specified in the language of Article XXVIII, and therefore lacks justification or "compelling state interest" to violate individual rights of free speech and free association guaranteed under the 1st Amendment to the United States Constitution.

II. Practical Considerations

A. Disclosure Requirements Exert a Chilling Effect on Civic/Political Participation

Many individuals are less willing to contribute – even towards a cause in which they strongly believe – for fear of personal or professional retribution should their disclosure become known. Aside from a general concern about privacy –indeed, the sanctity of the private vote is a well-established principle of American law and political tradition – individuals have good reason for concern. The example of threats and attacks on individuals supporting California's Prop 8 is well known; similarly, individuals owning a business or serving clients fear alienating customers (and thus endangering their livelihood) should their support of or opposition to an electoral issue become public knowledge.

In the particular instance of the ***Clear The Bench Colorado*** judicial accountability movement, attorneys feared retribution not only from clients, but from the judges before whom they must practice, despite agreement that particular justices have serially violated their oath of office and put their personal political preferences before the clear language of the Colorado Constitution.

For that reason, ***Clear The Bench Colorado*** strongly supports proposed ***Rule 20, Redaction of Sensitive Information***, with the recommendation that *risk to income and livelihood* be added to risk to personal (physical) safety as acceptable grounds for requesting redaction of personal information in the online reports displayed on the campaign finance website. There is no compelling state or public interest in forcing the public disclosure of personal information of people wishing to participate in the political or civic process; indeed, such public disclosure exerts a chilling effect on free speech.

In the words of another observer,
"What is forced disclosure but a state-maintained database on citizen political activity?"

B. Reporting Requirements Impose Undue Financial Burden on Civic/Political Participation

Particularly for organizations relying on small individual contributions, the data collection and reporting requirements under campaign finance regulations impose an undue financial burden. Groups are forced to make a choice between investing the time and energy to become experts on the tools, processes, and requirements for reporting campaign finances, or to hire another organization to do the work for them. Although providing employment for a variety of campaign finance consulting and service organizations, these requirements essentially constitute a "**poll tax**" on political participation and erect undue barriers to entry for newly-formed groups of individuals wishing to express an opinion on ballot issues.

C. Disclosure and Reporting Requirements Tend to Restrict Civic/Political Activity to Established and Well-Funded Special Interests (exact opposite of intended effect)

The aggregate effect of Colorado's disclosure and reporting requirements for issue-oriented groups is to reinforce the trend to restrict civic and political activity to established and well-funded ***special interests*** (which is the exact opposite of the intended effect). The complex nature of the requirements impose a "knowledge barrier to entry" – indeed, despite the 100-page "campaign finance manual" provided to interested parties, would-be participants are enjoined to "seek legal advice" before exercising their fundamental rights of free speech and free association. Adding to the "knowledge barrier to entry" are the filing fees, legal incorporation fees, attorney fees, and other administrative fees – in the aggregate, imposing a "financial barrier to entry" as well. Adding further to the costs, participants must invest significant time and/or money simply to meet the reporting and disclosure requirements – "overhead" that distracts and diverts resources from the principal purpose of exercising political free speech.

D. Disclosure and Reporting Requirements Do Not Apply To All Politically Active Groups

Many of the groups most actively participating in civic and political discourse – including many of those most fervently in favor of "open, transparent, and accountable" practices including full disclosure and reporting of all contributions and expenditures, hypocritically do NOT make their finances available for public view. Since some of the most consistently politically active special-interest groups are freed from the requirements of tracking, disclosing, and reporting the sources of their income and other support, they are afforded a significant and unfair advantage in influencing public discourse on political issues.

E. Lack of Clear and Consistently-applied Rules and Guidance Put People at Legal Risk

Due to the "conundrum" created by the 10th Circuit decision in Sampson v. Buescher (striking down the previous $200 threshold as unconstitutional and "well below the line" at which the state might have a compelling regulatory interest, without providing an alternative threshold or standard), in the absence of rules establishing a clear and consistent standard, ***every*** group wishing to speak out on ballot issues in Colorado is put at legal and financial risk (or conversely, putting the state at legal and financial risk). Continuing such a situation is clearly untenable; establishing a new $5,000 reporting threshold, based on both empirical research and public testimony, is not only logical but practically mandated.

F. Existing Colorado Campaign Finance Disclosure/Reporting laws Would Have Shut Down the Civil Rights Movement

Colorado's campaign finance regulations – particularly the disclosure and reporting requirements – are more often used as the means to inhibit participation in the civic/political sphere, even as tools of outright intimidation and suppression of protected political speech, than the intended purpose of informing political discourse.

Faced with a complex web of regulations and requirements, many otherwise interested parties are deterred from publicly expressing their views in association with like-minded neighbors and fellow citizens in the first place.

Should citizens brave the waters, establish an organization in compliance with the rules, and speak out effectively, they must spend a disproportionate amount of time and effort (and money) ensuring that they have properly dotted their "i's" and crossed their "t's" or be subject to politically-motivated attacks with the risk of substantial fines and penalties.

Even if they **DO** follow the rules to the letter, committees may STILL be forced to defend their right of civic participation in court, thanks to the proliferation of legal attack groups that exist solely for the purpose of harassing and diverting resources from ideologically opposed organizations.

In summary: the attack dogs, firehoses and truncheons previously used to harass and intimidate citizens wishing to exercise their rights of free speech and association have been replaced as tools by the more "civilized and sophisticated" use of lawyers and bureaucrats with the power to impose fines & penalties – even imprisonment - instead of mere physical beatings.

The overall effect – intimidation and abuse of power – remains remarkably similar.

Respectfully Submitted,

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