Andrea Gyger

From: Ari Armstrong [redacted]
Sent: Thursday, December 15, 2011 1:06 AM
To: Andrea Gyger
Subject: Testimony re. Dec. 15 Meeting

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Comments by Ari Armstrong, re. the Secretary of State's Dec. 15, 2011 Meeting

Dear Secretary of State Gessler,

Thank you for holding a public hearing regarding the Secretary of State's rules pertaining to Colorado's campaign finance laws. Before examining some of the particular proposed rule changes, I want to briefly discuss the nature of the campaign laws and their impacts on me as a political activist.

Censorship means the use of government force to prohibit or restrict speech in any of its varied forms. A governmental agent employs direct censorship by banning a particular work or speaker, as by prohibiting the printing and distribution of a specific book or pamphlet, or by threatening a given individual with sanctions for speaking to others.
Other sorts of restrictions and controls may not directly prohibit some manifestation of speech, yet, by imposing onerous burdens on the act of speaking, they constitute an indirect form of censorship. For example, if an onerous tax were placed on books or some particular book or type of book, that would constitute indirect censorship.

Colorado's campaign finance laws constitute a form of censorship, albeit an indirect form. No, the laws do not outright ban certain types of speech (as the federal McCain-Feingold law attempted to do).
Yet they burden the political activist with onerous restrictions and requirements, effectively curtailing the political speech of many individuals. The campaign laws censor political speech no less than if the government taxed individuals who spoke out many hundreds or thousands of dollars. The result is precisely the same.

Before an activist can even begin to speak out for or against any ballot measure or candidate with the intention of spending even small amounts of resources, the activist must learn the rules (broadly defined). The assorted Constitutional provisions, statutes, bureaucratic rules, and surrounding court cases constitute many scores of pages of dense legalese. Even learning whether certain forms of speech fall under these rules requires substantial effort (indeed, people may violate the rules without even knowing they exist); figuring out how to obey those rules requires far greater effort.

I myself have spent many hours reading about the rules, and yet I feel totally incapable of obeying them. To say that the rules are Byzantine frankly insults Byzantium. To invoke Churchill's words, the campaign laws are "a riddle, wrapped in a mystery, inside an enigma." To the average busy activist who is not prepared to spend many hours in intense academic-style study of these rules, the campaign rules are practically unintelligible.

For a small-scale project, a political activist easily could spend far more hours navigating the assorted campaign finance rules than the activist actually spends speaking out. By way of comparison, imagine if the government imposed a $40 tax on a $15 book: in both cases, the result is censorship.

True, the Secretary of State's office holds classes to train people in how to obey the rules, a practice endorsed by Colorado Common Cause.
Yet there are serious problems with this.

First, commuting to a class, sitting through the class, and then reviewing one's notes itself imposes a severe cost in terms of time on political activism.

Second, the mere fact that citizens are asked to sit through a government-run class to retain their ability to speak on political matters itself violates free speech. In many cases, people speak out for or against particular governmental policies enacted by particular politicians or bureaucrats. Asking the citizen activist to sit through a class organized, perhaps, by the activist's political opponents inherently clashes with that activist's free speech rights. To illustrate the absurdity of the laws, consider that advocacy for or against candidates for Secretary of State can itself fall under the campaign rules. If an activist opposed the sitting Secretary of State and advocated the election of the opposing candidate, the sitting Secretary of State would be responsible for instructing the activist on how to speak out -- and for enforcing the rules against the activist.

Third, even if the Secretary of State's office makes a good-faith effort to instruct the citizen activist on how to obey the campaign laws, that hardly guarantees that the activist will remain free from vindictive legal actions lodged by opponents. If the Secretary of State's office offers one interpretation of the law, a judge may offer quite another -- as Matt Arnold discovered after getting sued for daring to participate in the political process.

Once the activist learns all the rules, then he or she must register with the government. That fact independently and severely violates the right of free speech. The mere fact of registering with the government to practice free speech, especially given America's long tradition of First Amendment protections, weights heavily on many citizen activists (myself included).

Then come the reporting requirements and threats of legal suits. The activist must track in great detail contributions and expenses, meeting the complex requirements of the campaign finance laws. An activist who makes even a trivial paperwork error may be subjected to fines and lawsuits lodged by political opponents. Again this imposes a severe cost in terms of time and risk. Notably, these requirements weigh especially heavily on the small-scale, independent activist. Large groups able to hire their own accountants and lawyers can more easily comply with the requirements and absorb possible fines and legal fees.

These burdens of learning the rules, registering with the government, complying with the intricate reporting requirements, and then facing the constant threat of vindictive legal actions lodged by one's political opponents certainly chill political speech. The number of victims of this sort of censorship can never be precisely calculated, because in many cases the victims simply shut up and say nothing, and we never know what they might have said otherwise.

Colorado's campaign finance laws have discouraged me from speaking out in certain ways. During the last election cycle, it briefly occurred to me to make up my own flyer regarding candidates and ballot measures, and hand out copies of the flyer in my neighborhood. But, fearing the onerous burdens of the campaign laws, I quickly gave up on this idea; I did not want to become ensnared in the reporting burdens or the threats of legal actions against me by my political opponents.

I did speak out against one ballot measure in my capacity as an activist: Amendment 62. However, I agreed to do this only because Diana Hsieh, who joined me in the effort, agreed to meet all the campaign finance burdens. Absent her efforts, I would not have undertaken the task.

I am already thinking about the possibility of speaking out during the 2012 election cycle. My idea, similar to my previous idea, is to print up a flyer explaining my views on various candidates and ballot measures. But I have no idea whether this sort of speech would even fall under the campaign rules, what "magic words" I might have to avoid, or how I might possibly comply with the campaign rules to make this happen. (Moreover, I have a particular aversion to complying with intricate bureaucratic rules; for the same reason, I pay somebody else to prepare my taxes. Yet I shouldn't have to pay somebody else to help me comply with bureaucratic rules merely to speak out on political

matters.) Notably, I would meet the original $200 reporting threshold merely by printing out 2,000 flyers at the local copy shop. Thus, the fact that I would have to spend many hours investigating the campaign rules, perhaps complying with their intricate burdens, and then facing the risk of getting sued by my political opponents, may well shut me up again in that respect. And that is a violation of my First Amendment right -- and it is a right, not a privilege -- of free speech.

Now I wish to address some of the details of the Secretary of State's proposed rule changes. On the whole, I believe the Secretary of State is making a good-faith effort to make the campaign rules as objective, fair, and manageable as possible given the constraints of the overall system. For this Secretary of State Scott Gessler and the employees of his office are to be applauded. (I have no doubt that the enemies of free speech on the left will continue to smear him instead, as they have done relentlessly now for many months.)

The general point is that the state's constitution requires -- not permits, but requires -- the Secretary of State to make rules "necessary to administer and enforce" the campaign laws. (Of course, the fact that the Secretary of State needs to issue such rules only further illustrates the inherent ambiguousness of the constitutional provisions on this matter.)

The Reporting Threshold

A December 9 document from the Secretary of State's Office ("Revised Draft of Proposed Rules Office of the Colorado Secretary of State:
Rules Concerning Campaign and Political Finance 8 CCR 1505-6") proposes (Rule 4): "An issue committee shall not be subject to any of the requirements of Article XXVIII or Article 45 of Title 1, C.R.S., until the issue committee has accepted $5,000 or more in contributions or made expenditures of $5,000 or more during an election cycle."

This proposed rule is an eminently reasonable response to a federal court ruling on the matter (despite a subsequent nonresponsive and frankly politicized lower court ruling to the contrary).

Article XXVIII, Section 2(10)(a)(II) states that an issue committee is a group that "has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question."

However, in the case Sampson v. Buescher (December 9, 2010), the Tenth Circuit Court of Appeals reasonably ruled that the $200 threshold is unconstitutionally low based on the First Amendment protections of the federal Constitution. (As modern courts are wont to do, the court issued an unfortunately limited ruling that left in place most of the serious free-speech violations of Colorado's campaign finance rules.)

The Court noted in footnote 5 that the group in question lodged
"$782.02 in inkind contributions reported on July 13, 2006." Moreover, "cash contributions (made between September 2006 and April 2007) totaled $1,426, of which $1,178.82 went for attorney fees and $247.18 remained in the committee bank account."

The Court concluded, "[T]he 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. ... We say only that Plaintiffs' contributions and expenditures are well below the line."

In other words, the amount of $2,208.02 ($782.02 plus $1,426) is "well below the line" that would be constitutional. Thus, the Secretary of State, to meet his legal obligations, must set a threshold "well above" that amount. The amount of $5,000 fits the bill adequately.

Note that, absent a clear rule from the Secretary of State's office, activists are left to twist in the political winds. If they spend the wrong amount without reporting, as determined by their political opponents, then they will get sued. The Secretary of State's office is attempting to prevent precisely the sort of after-the-fact rule-making that constitutes a serious violation of people's basic rights.

Aggregate Contributions of $20

The Secretary of State's proposed tenth rule states, "If a contributer gives $20 or more in the aggregate during the reporting period, the contributer must be listed individually on the report, regardless of the amount of each contribution." The document cites statute 1-45-108(1), which states, "All candidate committees, political committees, issue committees, small donor committees, and political parties shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more..." By my reading, the Secretary of State's proposed rule follows the cited statute. Unfortunately, this creates an important problem: if somebody donates a few dollars to a cause, then forgets and later donates a few more dollars, the total of which surpasses $20, the issue committee could be in violation of the law without even knowing it.

Other Proposed Rules

In the proposed definitions, the Secretary of State seeks to tighten up the meaning of "electioneering communication," citing the case Federal Election Commission v. Wisconsin Right to Life, Inc. Imposing onerous burdens on the mere mention of a candidate severely violates the right of free speech. The Secretary of State seeks to restrict to "electioneering communications" speech that "is subject to no reasonable interpretation other than an appeal to vote for or against a specific candidate." That is, unfortunately, still far too vague, but it may be the best the Secretary of State can accomplish within the given framework.

Regarding penalties and wavers, I support the Secretary of State's efforts to make the waiver rules more objective and to set reasonable limits on the accrual of fines.

Regarding privacy for contributers, I support the Secretary of State's efforts to allow people who fear for their safety to withhold their personal information from the public record. It's absolutely ludicrous to publish the names and home addresses of those who contribute funds regarding controversial issues such as abortion, immigration, firearms, gay marriage, etc.

Summary: Colorado's campaign finance laws inherently and severely violate the right of free speech of citizen activists. While the Secretary of State must issue rules within that framework (taking into account the relevant court rulings), wherever possible the Secretary of State should issue rules that best comport with the First Amendment and the right of free speech. The Secretary of State's proposed rules do just that.