Ethics Watch

December 15, 2011

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

Re: Colorado Ethics Watch Comments on Proposed Revisions to the Rules Regarding Campaign and Political Finance, 8 C.C.R. 1505-6.

Dear Secretary Gessler:

Colorado Ethics Watch ("Ethics Watch") is a nonpartisan, nonprofit watchdog group that holds public officials and organizations legally accountable for unethical activities that undermine the integrity of state and local government. Ethics Watch respectfully submits the following comments on the proposed revisions to the Rules Regarding Campaign and Political Finance, 8 C.C.R. 1505-6 (the "Rules") in anticipation of the rulemaking hearing currently scheduled for December 15, 2011.

Overview – The Proposed Rules Exceed The Secretary of State's Rulemaking Authority

If enacted, the Proposed Rules would amount to a breathtaking revision of substantive Colorado campaign finance, in defiance of repeated court rulings that the Secretary of State only has authority to interpret and administer campaign finance law, not make it. A brief review of these decisions will be instructive.

In 2006, Secretary of State Dennis enacted a rule that would require membership organizations to receive written permission from members before transferring dues to a political committee or small donor committee. A district court injunction against the rule was affirmed by the Court of Appeals. In its decision, the Court of Appeals noted that the Secretary of State lacks authority to enact regulations under Article XXVIII that impose conditions not found in the state constitution. *Sanger v. Dennis*, 148 P.3d 404, 413 (Colo. App. 2006).

Last month, the Denver District Court entered an order declaring void a proposed Rule that would have excused organizations from registering as issue committees until they had raised or spent $5000, in spite of the state constitution's command that such groups register upon raising or spending $200. Order, *Colorado Common Cause v. Gessler*, Denver District Court Case No. 2011CV4164 (Nov. 17, 2011), a copy of which is attached as **Exhibit 1**. The analysis applied by the courts in *Sanger* and *Colorado Common Cause* applies fully to the Proposed Rules and suggests that nothing will come from enactment of the rules other than another costly and losing court battle.

In addition, the nonpartisan Office of Legislative Legal Services (OLLS) recently opined that Campaign Finance Rule 5.13, which purportedly relieves filers of the

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obligation to file biweekly reports before a primary election under C.R.S. § 1-45-108 (2)(a)(I)(B), conflicts with that statute. A copy of the OLLS memo on Rule 5.13 is attached as **Exhibit 2**.

The number of places where the Proposed Rules would amend constitutional or statutory provisions are almost too numerous to mention. Rather that inviting more litigation, the Secretary should work with the General Assembly to see whether those proposals that would require a change to statutory law could be made into acceptable legislation.

Electioneering Communications

In 2007, the Secretary of State enacted Rule 9.4, which provides that an ad is an "electioneering communication" under state law "only if it is susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The rule cited *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449 (2007) and *Harwood v. Senate Majority Fund*, 141 P.3d 962 (Colo. App. 2006). Proposed Rule 1.7 would further narrow the definition. After *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2011), however, it is untenable to read "electioneering communication" any more narrowly than it is defined in Colo. Const. art. XXVIII, § 2(7).

Before *Citizens United*, the definition of "electioneering communication" applied both to disclosure requirements and to a ban on corporate and labor union spending on such communications. Colo. Const. art. XXVIII, § 6. After *Citizens United*, the Colorado Supreme Court declared the ban on direct spending by corporations and labor unions in Section 6(2) of Article XXVIII to be unenforceable. *In re Interrogatories Propounded by Governor Bill Ritter, Jr., Concerning the Effect of Citizens United v. Federal Election Comm'n, 558 U.S. --- (2010), on Certain Provisions of Article XXVIII of the Constitution of the State of Colorado*, 227 P.3d 892 (Colo. 2010). Thus, Colorado's electioneering communication law is now a pure disclosure law.

The court in *Citizens United* also held that there is no constitutional requirement that disclaimer and disclosure requirements apply only to ads that expressly advocate for or against candidates. 130 S. Ct. at 915. The Court affirmed the application of disclosure requirements to ads that mention candidates without advocating for or against their election because "disclosure is a less restrictive alternative to more comprehensive regulations of speech," and therefore, disclosure and disclaimer requirements are justified as a way of vindicating the public's right to know "who is speaking about a candidate shortly before an election." *Id.* at 915-16. Thus, the rationale for limiting the definition of "electioneering communication" no longer applies.

Political Organizations

Proposed Rule 7.2.1 effectively repeals C.R.S. § 1-45-108.5 by restricting to the statutory definition of "political organization" to the point where no groups would report under that statute, because any group that met the very narrow definition of political

organization under the Proposed Rule would already be subject to regulation as a political committee. The very purpose of C.R.S. § 1-45-108.5 and its companion definitional statute, C.R.S. § 1-45-103(14.5), was to require disclosure of election-related spending by 527 groups that didn't meet the definition of "political committee." Moreover, considering the *Citizens United* holding described above, there can be no contention that First Amendment concerns require a more restrictive definition of "political organization" than that contained in statute.

Home Rule County Parties

Proposed Rules 6.1.1, 6.2 and 14.4 would create a large loophole to state contribution and disclosure requirements, particularly in view of your office's August 10, 2011 Advisory Opinion to Janice Vos Caudill, Pitkin County Clerk and Recorder, a copy of which is attached hereto as **Exhibit 3**. In the Advisory Opinion, the Deputy Secretary of State advised the Pitkin Clerk and Recorder that because Pitkin County has enacted its own home rule campaign finance laws on other topics, political parties at the county level in Pitkin County are not subject to regulation by the Secretary of State.

Proposed Rule 14.4 would authorize county parties in home rule jurisdictions to raise funds "for the purpose of supporting the party's county or municipal candidates for offices within the county or municipality" without being subject to reporting requirements or contribution limits established in Article XXVIII or the FCPA. Proposed Rule 6.2 would allow parties to transfer money from one level of the organization to another "without limit" and characterize such transfers as "other income" and not as a contribution to the party. Finally, Proposed Rule 6.1 would codify the Advisory Opinion as it applies to disclosures to be filed by county level parties.

The result of these rules, put together, would be to create an enormous loophole for undisclosed money to flow to state political parties through county parties in Pitkin and Denver Counties. Contributions could be made to county parties in those two counties without limit and without disclosure. Proposed Rule 6.2 would expressly permit county parties to transfer unlimited funds to the state party and have those funds treated as "other income" outside contribution limits.

The premise of these proposed Rules is incorrect. Article XXVIII simply does not contemplate that home rule counties will have any authority over county parties whatsoever. The Colorado Constitution expressly provides that the term "'Political party' includes affiliated party organizations at the state, county, and election district levels, and all such affiliates are considered to be a single entity for the purposes of this article, except as otherwise provided in section 7." Section 7, on disclosure, provides that "For purposes of this section and 1-45-108, C.R.S., or any successor section, a political party shall be treated as separate entities at the state, county, district, and local levels."

County parties do not have a separate existence from state parties as a matter of state constitutional law. Contribution limits apply across the board to parties without exception for county committees in home rule counties. Thus, there is no authority in

your office to enact a rule purporting to authorize county parties to raise money that does not count toward the contribution limits of Colo. Const. art. XXVIII, § 3(3). Moreover, because the disclosure requirements of Colo. Const. art. XXVIII, § 7 and C.R.S. § 1-45-108 as incorporated therein are an integral part of the enforcement mechanism for these contribution limits, the standard home rule analysis does not apply. The home rule rules should be withdrawn.

Committee Termination

Proposed Rule 2.2.5(B) would redefine unpaid obligations as contributions to candidate committees if not paid within six months. In addition to being unsupported by the definition of "contribution" in Colo. Const. art. XXVIII, § 2(5), the Proposed Rule would have at least two distinct harmful effects. First, vendors could be deemed to have made illegal contributions, and become subject to liability, if a committee did not pay its debt within six months. Second, the rule would allow candidate committees to close their books by treating outstanding obligations as having been offset by "contributions" from unpaid vendors under the rule. After termination, funds could be raised to satisfy those outstanding obligations without disclosure and outside of contribution limits – even by elected officials – in clear violation of Article XXVIII disclosure and contribution limit requirements.

Major Purpose Rules

Proposed Rule 1.12 would contradict the definition of "major purpose" for purposes of issue committee regulation contained in C.R.S. § 1-45-103(12)(b) by adding a threshold of 30% a year below which an organization could freely spend on issues without disclosure. The Secretary's rulemaking authority does not permit a rule of this nature that would add, modify or contradict the statute. Moreover, the rule is unworkable because it uses a one-year time period to determine when a committee must register in the first instance.

Proposed Rule 1.18.2 would add a "major purpose" test to the definition of political committee, where none exists in Article XXVIII. Colo. Const. art. XXVIII, § 2(12). The rule would add, modify or contradict the constitutional definition and cannot stand.

Complaints and Penalties

Proposed Rule 18.1.2 would direct administrative law judges to apply the Secretary of State's own guidelines for penalty waiver requests. However, the Constitution clearly expects administrative law judges to apply independent judgment when reviewing waiver requests. Colo. Const. art. XXVIII, § 9(2) and § 10(2). The Secretary of State cannot dictate to an administrative law judge how to decide a case before the Office of Administrative Courts.

Proposed Rule 18.1.8 would stop penalties from accruing for major contributor reports after the contribution is reported elsewhere. While not necessarily objectionable from a transparency perspective, this change would require legislative action to amend C.R.S. § 1-45-108(2.5).

Proposed Rule 18.5, which would cap late filing penalties at $9000, flatly contradicts Colo. Const. art. XXVIII, § 10, which prescribes a $50 per day penalty for each day a report remains unfiled, subject to reduction through the waiver process.

We appreciate this opportunity to comment and urge you to reject the proposed rules in their entirety.

Very truly yours,

Luis Toro
Director

Enclosures

EXHIBIT 1

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80208	
Plaintiffs: Colorado Common Cause and Colorado Ethics Watch v. **Defendants:** Scott Gessler, in his capacity as Colorado Secretary of State	**▲COURT USE ONLY▲** Case Number: 2011CV4164 Courtroom: 414

ORDER

This matter is before the Court on Plaintiffs' Complaint for Judicial Review of Agency Action. Plaintiffs contest Defendant's adoption of Secretary of State Rule 4.27 ("Rule 4.27" or "the Rule"), and ask this Court to hold unlawful and set aside the Secretary's action adopting Rule 4.27, and/or declare the Rule unlawful and void under C.R.C.P. 57. In addition to reviewing the pleadings, the agency record, and legal authorities, the Court held oral arguments on November 8, 2011, and it now enters the following Order.

I. Standard of Review

In reviewing a determination made by an administrative body, the reviewing court may reverse an administrative agency's determination only if the court finds that (1) the agency acted in an arbitrary and capricious manner, (2) made a determination that is unsupported by the evidence in the record, (3) erroneously interpreted the law, or (4) exceeded its constitutional or statutory authority. C.R.S. § 24-4-106(7); *Ohlson v. Weil*, 953 P.2d 939, 941 (Colo. App. 1997).

II. Analysis

Plaintiffs bring several challenges to Rule 4.27. The threshold issue, however, is whether the Secretary of State exceeded his authority in promulgating Rule 4.27. The Court only will consider the challenges to the substance of Rule 4.27 in conjunction with whether the promulgation of the Rule was within the Secretary's authority.

A. Whether Rule 4.27 exceeds the Secretary of State's authority.

Article XXVIII, § 9(1)(b) of the Colorado Constitution, authorizes the Secretary to promulgate rules "as may be necessary to *administer* and *enforce* any provision of this [campaign and political finance] article". (Emphasis added.) The Secretary contends that Rule 4.27 was promulgated so as to administer the campaign finance laws in compliance with *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). The Secretary asserts that *Sampson* "abrogated the reporting requirements in [§ 1-45-108(1)-(3)] as applied to issue committees because the reporting thresholds were too low, thereby imposing a significant [and unconstitutional] burden on issue committees . . . ." (Def.'s Answer Br. 4.) In addressing these assertions, the Court will examine several components of the Rule's promulgation.

Amendment 27 and § 1-45-108.

The Court begins by analyzing the plain language of the constitutional provision Rule 4.27 purports to administer. Passed by Colorado voters in 2002, Amendment 27 – now Article XXVIII of the Colorado Constitution – created a comprehensive campaign and political finance system applicable to state elections. It is true that, as noted by *Sampson,* the Amendment was presented to, and adopted by, the electorate out of a concern that "large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; [and] that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process." Art. XXVIII, § 1. The Amendment, however, did more than focus only on large dollar amounts.

In general, Article XXVIII sets forth specific disclosure requirements for election participants, including "issue committees," which are defined as:

> any person, other than a natural person, or any group of two or more persons, including natural persons: (i) [t]hat has a major purpose of supporting any ballot issue or ballot questions; [and] (II) [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

Art. XXVIII, § 2(10)(a). This constitutional amendment also requires that issue committees deposit monetary contributions into a separate account. Art. XXVIII, § (3)(9). Additionally, pursuant to the Colorado Fair Campaign Practices Act (the "Campaign Act"), issue committees must register with the appropriate officer (*i.e.*, the Secretary) and report the name and address of any person who contributes twenty dollars or more, as well as expenditures made and obligations incurred. Section 1-45-108.

Article XXVIII contains a private enforcement provision, permitting "any person who believes that a violation of [certain enumerated sections of Article XXVIII or of the Campaign Act] . . . [to] file a written complaint with the secretary of state." Art. XXVIII, § 9(2)(a). Meanwhile, the Campaign Act directs the Secretary to "promulgate such rules . . . as may be necessary to enforce and administer any provision of [the Campaign Act]." § 1-45-111.5.

Sampson

In November of 2010, the 10th Circuit Court of Appeals issued its decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), which involved a constitutional challenge to Colorado's reporting requirements for issue committees. In *Sampson*, the plaintiffs opposed the annexation to the town of Parker of their small neighborhood in unincorporated Douglas County. *Id.* at 1249. In support of their cause, the plaintiffs received monetary contributions and in-kind donations totaling more than $200.00 (but well under $1,000.00). *Id.* Although having met the constitutional definition of an issue committee, plaintiffs failed to register as required by § 1-45-108(1). Supporters of the annexation then filed a written complaint with the Secretary under the private enforcement provision of Article XXVIII, § 9(2)(a). *Id.* at 1251. The plaintiffs later filed suit in the U.S. District Court for Colorado, alleging that the law regulating ballot-issue committees violated the First Amendment because "(1) the private-enforcement provision unconstitutionally chills free speech; (2) the registration and disclosure requirements unconstitutionally burden the constitutional rights to free speech and association; and (3) the disclosure requirements violate the right to anonymous speech and association." *Id.* at 1253.

The court subjected Colorado's reporting requirements to "exacting scrutiny," *id.* at 1261, in holding that "the Colorado registration and reporting requirements have unconstitutionally burdened [the plaintiffs'] First Amendment right of association." *Id.* at 1254. The court partially based its decision on Article XXVIII's purpose, stating, "[i]t would take a mighty effort to characterize the No Annexation committee's expenditure of $782.02 for signs, a banner, postcards, and postage as an exercise of a 'disproportionate level of influence over the political process' by a wealthy group that could 'unfairly influence the outcome' of an election." *Id.* (quoting Art. XXVIII, § 1). The court further reasoned, "the financial burden of state regulation on [p]laintiffs' 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." *Id.* at 1261. Thus, the court concluded, "[t]here is virtually no proper governmental interest in imposing disclosure requirements on ballot-initiative committees that raise and expend so little money, and that limited interest cannot justify the burden that those requirements impose on such a committee." *Id.* at 1249. However, the court further

stated, "[w]e 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 [p]laintiffs' contributions and expenditures are well below the line." *Id.* at 1261.

Obviously, the holding in *Sampson* presented the Secretary with a conundrum, which he attempted to address through the rulemaking at issue here. It is the Secretary's contention that *Sampson* "effectively abrogated the reporting and disclosure requirements in circumstances where the burden of reporting and disclosure approaches or exceeds the value of the financial contributions to their political effort." (Def.'s Answer Br. 14.) Furthermore, he asserts, "*Sampson* applies to reporting and disclosure requirements for all issue committees in ballot issue or ballot question elections. Without Rule 4.27, Colorado would not have any constitutionally-acceptable reporting and disclosure standards for issue committees." (Def.'s Answer Br. 15.)

The Court disagrees with Defendant's interpretation of *Sampson*'s intent and impact. As noted throughout the opinion, *Sampson* is an as-applied decision. 625 F.3d at 1249, 1254, 1259, and 1261. It therefore does not invalidate either Article XXVIII, § 2(10)(a)(2) or § 1-45-108(1)(a)(i), *except in like situations*. *See Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006) ("If a statute is held unconstitutional 'as applied,' the statute may not be applied in the future *in a similar context*, but the statute is not rendered completely inoperative.") (emphasis added). Thus, even without Rule 4.27, Colorado's reporting and disclosure standards for issue committees presumptively remain applicable, other than in "similar context[s]" to *Sampson*.

The Secretary appears to concede that, if the Court disagrees with his interpretation of *Sampson*, the Rule is invalid. (Def.'s Answer Br. at 5.) The Court, however, believes further explanation is needed.

Rulemaking Process

In response to the Tenth Circuit's decision in *Sampson*, the Secretary (then Bernie Buescher, Defendant Gessler's predecessor and the named-defendant in that case) commenced a rule-making to "increase[] the contribution and expenditure threshold that triggers the requirement for an issue committee to register and file disclosure reports." Proposed Statement of Basis, Purpose, and Specific Statutory Authority for Proposed Rule 4.27 (issued December 10, 2010). The Preliminary Draft of Proposed Rule 4.27 stated, "In accordance with the decision of the Tenth Circuit Court of Appeals in *Sampson v. Buescher*, Nos. 08-1389, 08-1415 (10th Cir. 2010), the $200 amount specified in Article XXVIII, section 2(10)(a) of the Colorado Constitution and section 1-45-108, C.R.S., is increased to [$2,500]." (Brackets in original.) An initial hearing was held on January 26, 2011 (by which time, Defendant Gessler had taken office), at which representatives for both plaintiffs were present and provided testimony. At the conclusion of the hearing, the Secretary took the matter under advisement.

On March 30, 2011, the Secretary released a Notice of Second Rulemaking Hearing; a Revised Draft of Proposed Rules; and a Revised Proposed Statement of Basis, Purpose, and Specific Statutory Authority (the "Revised Proposed Statement"). Among other changes, the revised draft of the rule increased the dollar amount to $5,000.00, and exempted issue committees from any of the requirements of Article XXVIII and the Campaign Act until the issue committee has accepted $5,000.00 or more in contributions or made expenditures of $5,000.00 or more during an election cycle. In support of this revision, the Secretary stated, "new Rule 4.27 *changes the contribution and expenditure threshold* that triggers enforcement of the requirement for an issue committee to register and file disclosure reports, in order to provide guidance in light of the ruling of the Tenth Circuit Court of Appeals in *Sampson*." Revised Proposed Statement at 1 (emphasis added). In support of the new $5,000.00 amount, the Secretary further stated, "it appears from the Court's opinion that the minimum threshold must be 'well above' the $2,239.55 in contributions and $1,992.37 in expenditures of the Plaintiffs in the *Sampson* case." Revised Proposed Statement at 2. For his rulemaking authority, the Secretary cited to Article XXVIII, § 9(1)(b) and sections 1-1-107(2)(a) and 1-45-111.5(1), each of which authorize the Secretary to promulgate rules necessary to "enforce and administer" specified election laws.

Another hearing was held on May 3, 2011, at which Plaintiff Common Cause again presented testimony. Plaintiff Ethics Watch did not attend the hearing, but did timely-submit a letter in opposition to the rule.

On May 13, 2011, the Secretary released a Notice of Adoption of an amended version of Rule 4.27. The adopted Rule was somewhat different from the Revised Proposed Rule, but retained the $5,000.00 thresholds and the language exempting issue committees from constitutional and statutory reporting requirements prior to reaching that amount. The Secretary provided no new basis or authority for the rulemaking. Thereafter, on June 6, 2011, Plaintiffs instituted the present action.

Plaintiffs' challenge

In asking this Court to set aside Rule 4.27, Plaintiffs argue, "Rule 4.27 goes far beyond simple enforcement and administration of the campaign finance laws by *reinterpreting* both constitutional and statutory provisions." (Pl.s' Opening Br. 12) (emphasis added). Plaintiffs contend that the Secretary lacks the authority to adopt Rule 4.27 because it is inconsistent with Article XXVIII and the reporting requirements of the Campaign Act. The Court agrees on both points, although "reinterpreting" does not fairly describe the Rule; the Rule actually rewrites and thereby amends Article XXVIII.

The Secretary's powers deserve emphasis here. The Secretary's authority to commence rulemaking is limited to promulgating rules to *enforce and administer* the election laws. Art. XXVIII, § 9(1)(b); §§ 1-1-107(2)(a) and 1-45-111.5(1). Generally, reviewing courts

defer to the views of administrative agencies that are authorized to administer and enforce particular laws, unless they are arbitrary or capricious, unsupported by the evidence, or contrary to law. *Williams v. Teck*, 113 P.3d 1255, 1257 (Colo. App. 2005). However, an agency's legal interpretations are not binding, and are persuasive only if they are a reasonable construction consistent with public policy. *Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004).

In determining the limit of the Secretary's powers to enforce and administer the election laws, the Court finds *Sanger v. Dennis*, 148 P.3d 404 (Colo. App. 2006), instructive. *Sanger* involved a labor union and others challenging the Secretary's promulgation of a rule that would force unions to get written permission from their members before using dues or contributions to fund political campaigns. The rule at issue in *Sanger* purported to define "the term 'member' in the context of Article XXVIII, § 2(5)(b) as a person who pays dues to a membership organization and who gives written permission for his or her dues to be used for political purposes." *Id.* at 408. The plaintiffs sought injunctive relief from the district court, arguing among other things, that the Secretary exceeded her rulemaking authority in enacting the rule. *Id.* at 407. Since the term "member" was then undefined in Article XXVIII, the Secretary asserted that she properly adopted the rule defining the term pursuant to Article XXVIII, § 9, which requires her to promulgate rules necessary to administer and enforce any provision of that Article. *Id.* at 408-09. The trial court granted the preliminary injunction, finding that the plaintiffs had shown a reasonable probability of success on their claim that the Secretary's definition of "member" was an unreasonable interpretation of the language in Article XXVIII, was inconsistent with its purposes, and was not in accord with the intent of those who adopted it. *Id.* at 413.

In affirming the preliminary injunction, the Court of Appeals agreed with the trial court's reasoning that the rule imposed a restriction unsupported by the text of Article XXVIII. *Sanger*, 148 P.3d at 412. "[T]he Secretary's 'definition' is much more than an effort to define the term. It can be read to effectively *add, to modify, and to conflict* with the constitutional provision by imposing a new condition." *Sanger*, 148 P.3d at 413 (emphasis added). The court further stated that "the Secretary's stated purpose in enacting the rule . . . is not furthered by the 'definition'" and "the rule does not further the Secretary's stated goal." *Sanger*, 148 P.3d at 413. Thus, the court concluded, "[the] plaintiffs have demonstrated a reasonable probability of success in challenging the Secretary's authority to enact th[e] rule." *Sanger*, 148 P.3d at 413.

Likewise, this Court concludes that the Secretary's promulgation of Rule 4.27 exceeded his authority. First, like the rule at issue in *Sanger*, Rule 4.27 adds to, modifies, and conflicts with the constitutional provision it purports to enforce and administer. The plain language of Article XXVIII, § 2(10)(a)(II), defines an issue committee as "any person, other than a natural person, or any group of two or more persons, including

natural persons . . . [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." Thus, the constitutional definition of issue committee is based, in part, on a dollar amount. In turn, § 1-45-108 mandates specific requirements for *all* constitutionally-defined issue committees (*i.e.*, all entities and groups that have raised or spent more than $200 to support or oppose a ballot measure). Changing the dollar amount necessarily changes the constitutional definition.

Rule 4.27 redefines which issue committees are subject to constitutional and statutory requirements: "an issue committee shall not be subject to any of the requirements of Article XXVIII of the Colorado Constitution 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." In so doing, the Rule not only conflicts with, but abrogates, existing constitutional and statutory requirements. While the Secretary's desire to provide guidance in light of *Sampson* is understandable, perhaps even admirable given that First Amendment rights are at stake, it is simply not allowable given his authority. Because the Secretary is not empowered to promulgate rules that add to, modify, or conflict with constitutional provisions, the promulgation and adoption of Rule 4.27 exceeded his authority.

Further support for the Court's conclusion is found in the constitutional and statutory provisions at issue. In bestowing upon the Secretary the right and obligation to enforce and administer campaign finance provisions, both the constitution and statutes delineate various examples of the Secretary's authority. *See, e.g.*, Art. XXVIII, § 9 (listing enforcement duties of the Secretary); § 10 (defining various sanctions available under Art. XXVIII, and the Secretary's role regarding same); § 1-45-111.5 (listing both enforcement and sanction duties of the Secretary). These provisions do not include allowing the Secretary to amend the definitions contained in the constitution.

The Court notes that, from the outset, the Secretary had reason to know he potentially was exceeding his powers. Several of the letters submitted in response to the notices of rulemaking directly questioned the Secretary's authority to promulgate the rule as proposed. For example, the Secretary received a letter from an attorney requesting the Secretary to explain in the rule or accompanying notice how the Secretary may "exceed the specified, quite limited authority for changing of contribution limits as set forth in Article XXVIII, sec. 3(13), 4(7) of the Colorado Constitution" and "'leapfrog' Article XXVIII, sec. 14 of the Colorado Constitution, which expressly provides that a successful, as-applied challenge does not invalidate any other application of these provisions of the Constitution." Letter from Mark G. Grueskin to the Honorable Scott Gessler (May 6, 2011). Nothing in the record demonstrates that the Secretary addressed these concerns prior to adopting the rule.

Further, enactment of the Rule disregards other aspects of Article XXVIII that specifically address the effect of as-applied challenges: "[i]f any provision of this article or the applications thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application." Art. XXVIII, § 14. *Sampson* held that the portion of Article XXVIII requiring issue committees to register after raising or spending $200 was invalid as applied to plaintiffs therein. Had the Tenth Circuit intended its ruling in *Sampson* to have a broader application, it presumably would have analyzed the severability of the offending provision. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1194-96 (10th Cir. 2000) (analyzing the Campaign Act's severability clause after determining that the unconstitutional provision could not be narrowly applied). Such an analysis likely would have led the court to further consider the need for a "bright line," which it ultimately and expressly chose not to draw. *Sampson*, 625 F.3d at 1261. Here, the Secretary could not do what the Tenth Circuit declined to do, *i.e.,* draw a bright line, while ignoring the severability clause. Otherwise, he has broadly invalidated a provision of the Article without giving consideration to its "other applications," as required by Section 14.

Additionally, Rule 4.27 does not achieve the Secretary's stated purpose of "resolv[ing] uncertainty about registration and disclosure requirements in light of the ruling of the Tenth Circuit Court of Appeals in *Sampson v. Buescher*." Instead, the Secretary's re-writing of the constitutional thresholds fails to resolve a number of issues raised by *Sampson*. For example, for an issue committee to know when it has reached the new $5,000.00 thresholds, it must keep track of all contributions and expenditures occurring prior to that point. Yet doing so, by the Secretary's reasoning, would be unconstitutionally burdensome. Similarly, why should the first $4,999.99 be exempt from reporting requirements as unconstitutionally burdensome, but reporting the next $1.00, $500, or $5,000.00, is not? At the other end of the spectrum, the *Sampson* court made clear that the $200 threshold did not present an unconstitutional burden in all circumstances. Specifically, the court stated, "[t]he case before us is quite unlike ones involving the expenditure of tens of millions of dollars on ballot issues presenting 'complex policy proposals.'" *Sampson*, 625 F.3d at 1261 (citing *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th cir. 2003)). Presumably then, the Tenth Circuit would have upheld the issue committee provision in such an instance, *i.e.,* when the first $200 contributed or expended is part of a much greater amount. In contrast, the Secretary's Rule excludes reporting of the first $5,000, even if it is part of a multi-million dollar campaign. Yet, who spends the first dollars on an issue campaign could be extremely important to the electorate.

Finally, the *Sampson* court was concerned with more than just the limited amount of contributions and expenditures involved in that case. For instance, the *Sampson* court expressed concern for the cost of defending against sanctions when a small dollar

amount was involved. The court stated, "[m]oreover, failure to comply with the rules can be expensive; failure to meet a recording deadline can cost $50 a day." *Id*. at 1260. And, "[o]ne would expect, as was the case here, that an attorney's fee would be comparable to, if not exceed, the $782.02 that had been contributed by that time to the anti-annexation effort. This is a substantial burden." *Id*. at 1260. The Secretary, being empowered to impose sanctions for violations and to streamline the registration process, might have implemented rules that addressed these concerns. Or, he might have promulgated a rule that allowed for waivers, on an *as-applied basis*, consistent with *Sampson*. This Court, of course, is not abstractly endorsing any such rules. Rather, the Court finds determinative that Rule 4.27 focuses on changing the contribution and expenditure amounts contained in the constitution. In doing so, the Secretary went beyond his authority.

Again, the Court recognizes the difficult situation faced by the Secretary, and attributes nothing but well-intentioned motivations to his actions. Nevertheless, the Rule is hereby set aside.

B. The Secretary's Counterclaim

The Secretary has asserted a counterclaim seeking a declaration from this Court that "consistent with the holding in *Sampson v. Buescher*, the definition of issue committee is unenforceable unless and until the General Assembly enacts a statute, or the Secretary promulgates a rule, that establishes a minimum level of contributions or expenditures that triggers the formation of an issue committee." As reflected above, the Court's interpretation of *Sampson* is fundamentally at odds with the Secretary's claim.

As previously mentioned, "if a statute is held unconstitutional 'as applied,' the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative." *Sanger*, 148 P.3d at 410. Here, the *Sampson* court's holding was an as-applied decision: "in light of the small size of the contributions . . . it was unconstitutional to impose [the financial burden of state elections regulations] on [p]laintiffs." 625 F.3d at 1261. *See also* Art. XXVIII, § 14 ("If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other . . . applications of the article which can be given effect without the invalid provision or application . . . ."). Thus, the definition of issue committee is enforceable, except in similar contexts to *Sampson,* without the Secretary's promulgation of a rule establishing new minimum levels of contributions.

The Court also questions the Secretary's authority to bring this counterclaim against these defendants. It is generally the Secretary's duty to defend the laws, not have them declared unenforceable. And, such actions are properly brought against the state (usually against the Secretary, or alternatively, the Governor), and not against private

parties such as Plaintiffs. However, given the Court's interpretation of *Sampson*, these issues need not be decided.

The Secretary's counterclaim is dismissed.

III. Conclusion

The Court sets aside Rule 4.27, as an unauthorized exercise of the Secretary's power, and dismisses the Secretary's counterclaim.

Dated this 17th day of November, 2011.

BY THE COURT

A. Bruce Jones
District Court Judge

EXHIBIT 2

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November 8, 2011

MEMORANDUM

TO: Committee on Legal Services

FROM: Bob Lackner, Office of Legislative Legal Services

RE: Rules of the Secretary of State, Department of State, concerning campaign and political finance, 8 CCR 1505-6 (LLS Docket No. 110370; SOS Tracking No. 2011-00286).

STATUTORY REVIEW:

Pursuant to the provisions of section 24-4-103, C.R.S., the Office of Legislative Legal Services has examined the above-referenced rules to determine whether they are within the rule-making authority of the Secretary of State (hereinafter referred to as the "Secretary"). Under the provisions of section 24-4-103 (8) (c) (I), C.R.S., these rules are scheduled to expire on May 15, 2012, unless the General Assembly acts by bill to postpone such expiration.

RULES EXAMINED:

The rules examined by this office are rules of the Secretary concerning campaign and political finance.

The rules were adopted by the Secretary on a permanent basis on June 29, 2011. The Attorney General issued an opinion on the rules on July 12, 2011, and the rules were submitted to the Office of Legislative Legal Services on July 12, 2011.

CONCLUSIONS:

Currently, section 1-45-108 (2) (a) (I) (B), C.R.S., requires that candidate committees, political committees, issue committees, and political parties ("covered entities") report their campaign contributions and expenditures on the first Monday in July and on each Monday every 2 weeks thereafter before the primary election. Rule 5.13 effectively repeals this statutory requirement. Accordingly, Rule 5.13 conflicts with the statute.

We therefore recommend that Rule 5.13 of the rules of the Secretary of State concerning campaign and political finance governing biweekly reporting of campaign contribution and expenditure information not be extended.

ANALYSIS:

Rule 5.13 conflicts with section 1-45-108 (2) (a) (I) (B), C.R.S.

The text of Rule 5.13 reads as follows:

> 5.13 The requirement of section 1-45-108 (2) (a) (I) (B), C.R.S., to file reports of contributions and expenditures biweekly rather than monthly beginning in July before the primary election, was rendered infeasible by the enactment of Senate Bill 11-189, which moved the date of the primary election from August to June. Therefore, monthly filing as required by section 1-45-108 (2) (a) (I) (C), C.R.S., remains applicable through the primary election and until biweekly reporting begins in September before the November election as required by section 1-45-108 (2) (a) (I) (D), C.R.S.

Section 1-45-108 (2) (a) (I) (B), C.R.S., requires that covered entities report their campaign contributions and expenditures on the first Monday in July and on each Monday every 2 weeks thereafter before the primary election. Section 1-45-108 (2) (a) (I), C.R.S., is attached hereto as Addendum "A". Without explicitly overruling the statutory provision, Rule 5.13 states that this requirement was rendered infeasible by the provisions of Senate Bill 11-189, which moved the primary election from August to June. Section 1 of Senate Bill 11-189 amended the definition of primary election as follows:

> **SECTION 1.** 1-1-104 (32), Colorado Revised Statutes, is amended to read:
>
> **1-1-104. Definitions.** As used in this code, unless the context otherwise requires:
>
> (32) "Primary election" means the election held on the ~~second Tuesday~~

~~of August in~~ LAST TUESDAY IN JUNE OF each even-numbered year.

Rule 5.13 replaces the statutory requirement of biweekly reporting from July through August (in accordance with section 1-45-108 (2) (a) (I) (B), C.R.S.) with a new requirement that covered entities undertake monthly reporting beginning the sixth month before the general election (in accordance with section 1-45-108 (2) (a) (I) (C), C.R.S.) to be supplemented by the biweekly reporting that commences in September before the general election (in accordance with section 1-45-108 (2) (a) (I) (D), C.R.S.). In so doing, Rule 5.13 contravenes section 1-45-108 (2) (a) (I) (B), C.R.S., by effectively repealing it and eliminating biweekly reporting of campaign finance information before the primary election. Moreover, the statute and the Rule may not be read in such a way as to eliminate this conflict. No rule may be adopted that conflicts with other provisions of law. *See* section 24-4-103 (4) (b) (IV), C.R.S.

Statutory changes are within the plenary power of the General Assembly. In this case, the determination as to when campaign finance disclosure should be made in advance of a particular election is a policy decision requiring legislative action.

The Secretary's rulemaking authority is limited to administering and enforcing rules to implement the policy choices made by other constitutionally empowered decision makers in the governmental process. Here, by promulgating Rule 5.13, the Secretary has improperly created new policy on a very controversial issue affecting the disclosure of campaign and political finance reports in the absence of any direction from the General Assembly to do so.

In connection with the enactment of Senate Bill 11-189, the General Assembly elected not to change the statutory biweekly reporting requirement at the time it moved the date of the primary election. Later in the same legislative session, the General Assembly did consider statutory changes to the reporting requirements contained in the Fair Campaign Practices Act to accommodate the change in the date of the primary election enacted in Senate Bill 11-189. On April 21, 2011, Senator Bob Bacon introduced Senate Bill 11-252, "Concerning a modification of deadlines in the 'Fair Campaign Practices Act' governing the reporting of basic campaign finance information." In general, the introduced version of the bill modified certain deadlines in subparagraph 1-45-108 (2) (a) (I), C.R.S., to accommodate the change in the date of the primary election resulting from Senate Bill 11-189. Specifically, the bill repealed sub-subparagraph 1-45-108 (2) (a) (I) (B), C.R.S., the biweekly reporting requirement at issue here, and made other changes to the deadlines

specified in subparagraph (I).

However, the sponsor, the Department of State, and other interested parties were not able to reach agreement on a modified disclosure schedule. On May 2, 2011, the bill was postponed indefinitely at the request of Senator Bacon.

The General Assembly's failure to enact legislation to address a perceived conflict among statutory provisions provides no authorization for the Secretary to unilaterally decide the issue by rule.

Without a specific delegation, the Secretary lacks the authority to assume the legislature's policymaking role and, accordingly, has exceeded his rulemaking authority. The substantive policy decision is the prerogative of the General Assembly. The introduction of, and subsequent discussions concerning, Senate Bill 11-252 make clear the strong interest of the General Assembly in the underlying policy choices governing the frequency of campaign finance disclosure in advance of various elections. By promulgating Rule 5.13 without authority from the General Assembly, the Secretary has improperly assumed the policymaking role that belongs to the legislative branch of our government under our constitutional structure. No authority exists for the Secretary to make this policy decision by rule.

In the Statement of Basis, Purpose, and Specific Statutory Authority that the Secretary provided in support of the promulgation of Rule 5.13, he argues that Rule 5.13 is necessary because the current observance of section 1-45-108 (2) (a) (I) (B), C.R.S., with its biweekly reporting requirements commencing in July and concluding in the middle of the following May resulting from the enactment of Senate Bill 11-189, makes no sense in off-year election years as a result of the change in the date of the primary election.

Nevertheless, the Secretary's rulemaking authority does not lawfully extend to promulgating rules that supersede statutory requirements in order to avoid what the Secretary perceives as a conflict among these statutory provisions. In fact, it is not at all clear that it makes no sense to require biweekly reporting for the 11-month period from July until the subsequent May even in off-year election years as would result from the continued implementation of section 1-45-108 (2) (a) (I) (B), C.R.S. In connection with the pending election cycle, many individuals who become candidates in the primary election to be held in June 2012 will not become candidates until much later than July 2011, and campaign activity is likely to be slow from July through December of the present year. As such, it is not clear that the requirement of biweekly reporting (even in an off-year) imposes any significant regulatory burden on a potential

filer, at least with respect to the period before candidates typically declare for office.[1]

Moreover, events change considerably the closer one gets to the primary election. By eliminating biweekly disclosure during the weeks immediately leading up to the primary election, the Rule eliminates disclosure during the period when it is most critical. In this period, biweekly disclosure is important because candidates are most likely to be raising and spending money during this period and the electorate has an increased interest in timely disclosure of these activities.

Rule 5.13 effectively repeals section 1-45-108 (2) (a) (I) (B), C.R.S. Because the Rule conflicts with the statute, we recommend that the Rule not be extended.

[1] It should be noted that the existing Colorado Secretary of State Rules Concerning Campaign and Political Finance require an applicable committee to file a disclosure report for every reporting period, even if the committee has no activity (donations, expenditures, or contributions) to report during the reporting period. *See* Rule 4.18.

ADDENDUM "A"

1-45-108. Disclosure - definition. (2) (a) (I) Except as provided in subsections (2.5), (2.7), and (6) of this section, such reports that are required to be filed with the secretary of state shall be filed:

(A) Quarterly in off-election years no later than the fifteenth calendar day following the end of the applicable quarter;

(B) On the first Monday in July and on each Monday every two weeks thereafter before the primary election;

(C) On the first day of each month beginning the sixth full month before the major election; except that no monthly report shall be required on the first day of the month in which the major election is held;

(D) On the first Monday in September and on each Monday every two weeks thereafter before the major election;

(E) Thirty days after the major election in election years; and

(F) Fourteen days before and thirty days after a special legislative election held in an off-election year.

EXHIBIT 3

STATE OF COLORADO
Department of State
1700 Broadway
Suite 200
Denver, CO 80290

Scott Gessler
Secretary of State

William A. Hobbs
Deputy Secretary of State

August 10, 2011

ADVISORY OPINION

Janice Vos Caudill
Pitkin County Clerk & Recorder
530 E. Main Street, Suite 101
Aspen, CO 81611

Re: Applicability of state campaign finance law to a home rule county

Dear Ms. Vos Caudill:

This Advisory Opinion concerns the application of state campaign finance law in the home rule jurisdiction of Pitkin County. We have interpreted your requests for guidance and an endorsement of a "hybrid" system of campaign finance law as a request for an Advisory Opinion. This Opinion serves as a reply to your inquiry.

Question Presented

Pitkin County has asked the Secretary of State whether a "hybrid" approach to campaign finance is acceptable in a home rule jurisdiction. Under the proposed hybrid approach, the home rule jurisdiction adopts a limited set of campaign finance laws applicable locally and seeks to have state law, and thus state enforcement, apply in areas not addressed by the local laws. Can a home rule jurisdiction utilize a hybrid approach under Article XXVIII and Title 1, Article 45?

Short Answer

No. When a home rule jurisdiction adopts any form of campaign finance law, then state law no longer applies to local matters.

Analysis

Municipalities and counties in Colorado are free to become home rule.[1] Home rule jurisdictions are vested with significant powers of local control, and campaign finance is one area in which a

[1] Colo. Const. art. XX, § 6 and art. XIV, § 16.

home rule jurisdiction may choose to exercise this right.[2] Although adopting a campaign finance regime is certainly within the power of a home rule city or county, it has consequences.

State campaign finance law, contained in Article XXVIII and Title 1, Article 45 of the Colorado Revised Statutes, does not apply to home rule jurisdictions that adopt any campaign finance laws of their own.[3] The Colorado Attorney General has concluded that in local election matters, "neither Article XXVIII of the Colorado Constitution nor the FCPA applies to home rule counties and municipalities which have charters or ordinances that already address the matters covered by Article XXVIII and the statute."[4]

This is the case if a home rule jurisdiction adopts *any* campaign finance provisions of its own. Therefore, a home rule jurisdiction must be either "all in"—it follows state campaign finance law, or "all-out"—it follows its own provisions, exempting itself from the application of state law. The adoption of even the most limited campaign finance provisions in a home rule jurisdiction exempts the home rule municipality from the application of state law altogether.

A "hybrid" approach—in which a home rule jurisdiction seeks to create special laws enforceable against some filers while adopting state law for the remainder—is inconsistent with Colorado law. Even where a home rule jurisdiction expressly adopts state law to backfill where local provisions are silent, the state is powerless to enforce its campaign finance provisions as they apply to those jurisdictions. Therefore, a home rule jurisdiction attempting a hybrid approach may find itself with no enforcement mechanism at all.[5] For example, Colorado Springs was found to have plenary power over campaign finance matters because the City adopted campaign finance provisions, and therefore the Office of Administrative Courts found that it lacked subject matter jurisdiction over campaign finance complaints arising in the City.

A home rule jurisdiction may adopt state campaign finance law to provide the framework for disclosure, but the state cannot exercise enforcement power in such a regime.[6] Therefore, it is essential that a home rule jurisdiction that adopts campaign finance provisions of any kind, establish a system to enforce those provisions.

Good public policy further supports our conclusion. Mixing state and local campaign finance law is administratively complex and confusing to the public. Reporting and enforcement become unnecessarily complicated, and the public may have a difficult time understanding where, when, and on what terms the various campaign entities report. Bifurcated enforcement might result in disparate penalties for different types of local committees. There is also potential for conflicting interpretations of the interplay between local laws and state law. After examining both existing

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[2] *See, e.g.* § 1-45-116, C.R.S. (2010), Formal Op. Att'y. Gen. Ken Salazar, No. 03–1 -AG Alpha No. ST EL AGBAS (January 13, 2003), available at http://www.sos.state.co.us/pubs/elections/CampaignFinance/files/agopinion.pdf.

[3] *Id., Campaign and Political Finance Rule 7.1, 8 Colo. Code Regs. 1505-06* (2011).

[4] Formal Op. Att'y. Gen. Ken Salazar, No. 03–1 -AG Alpha No. ST EL AGBAS (January 13, 2003).

[5] Case No. OS 2011-0010 (June 8, 2010), available at http://tracer.sos.colorado.gov/PublicSite/SearchPages/ComplaintSearch.aspx). Case is pending on appeal to the Colorado Court of Appeals, Case No. 2011 CA 0892.

[6] *See* Colo. Const. art. XXVIII, § 10(2)(a).

law and public policy, the Secretary of State cannot endorse a hybrid campaign finance system for home rule jurisdictions.

Dated this 10th Day of August, 2011.

William A. Hobbs
Deputy Secretary of State