

<p>SUPREME COURT STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: August 16, 2016 10:46 AM FILING ID: 586DB163668BA CASE NUMBER: 2016SC637</p>
<p>On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2014CA2073 Judges Taubman, Jones, and Harris</p> <p>Office of Administrative Courts, Case No. OS2014-0008 Hon. Robert N. Spencer, Administrative Law Judge</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No. 2016SC000637</p>
<p>COLORADANS FOR A BETTER FUTURE, Petitioner, v. CAMPAIGN INTEGRITY WATCHDOG, LLC, Respondent.</p>	
<p>Attorneys for <i>Amicus Curiae</i>:</p> <p>Allen Dickerson* Tyler Martinez (Colo. Att’y No. 42305)</p> <p>Center for Competitive Politics 124 S. West Street, Suite 201 Alexandria, Virginia 22314 Telephone: 703.894.6800 Facsimile: 703.894.6811 adickerson@campaignfreedom.org tmartinez@campaignfreedom.org</p> <p>*Admission <i>pro hac vice</i> pending</p>	
<p align="center">AMICUS CURIAE BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITION FOR WRIT OF <i>CERTIORARI</i></p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 1,645 words (does not exceed 1,900 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

Dated: August 16, 2016

s/ Tyler Martinez

Signature of attorney or party

Table of Contents

Certificate of Compliance	i
Table of Contents	ii
Table of Authorities	iii
Argument.....	1
I. Interest of <i>Amicus Curiae</i>	1
II. Converting <i>Pro Bono</i> Legal Services Into Political “Contributions” Will Harm Grassroots Organizations, Candidates For Office, Colorado Attorneys, And Civil Society.	2
Conclusion	8
Certificate of Service	9

Table of Authorities

Cases

<i>Coal. for Secular Gov't v. Williams</i> , 815 F.3d 1267 (10th Cir. 2016)	2, 5
<i>National Socialist Party v. Skokie</i> , 432 U.S. 43 (1978).....	3
<i>Sampson v. Buescher</i> , 625 F.3d 1247 (10th Cir. 2010)	5

Constitutions

U.S. CONST. amend. VI.....	5
COLO. CONST. art. XXVIII, § 2(5)(a).....	2
COLO. CONST. art. XXVIII, § 2(5)(b).....	8
COLO. CONST. art. XXVIII, § 3(1)(b)	4
COLO. CONST. art. XXXVIII, § 9(2)(a).....	2

Statutes

26 U.S.C. § 501(c)(3).....	1, 7
26 U.S.C. § 504(a)	7
26 U.S.C. § 4955(a)-(b)	7
C.R.S. § 1-45-103(6)(a)	8

Rules

Colo. R.P.C. 1.2(b).....	3
--------------------------	---

Colo. R.P.C. 1.16(b)(5).....	6
Colo. R.P.C. 1.16(c).....	6
Colo. R.P.C. 6.1	4

Argument

I. Interest of *Amicus Curiae*.

The Center for Competitive Politics (“CCP” or “Center”) is a Virginia-based nonprofit corporation organized under 26 U.S.C. § 501(c)(3). It was founded in 2005 to educate the public concerning the benefits of increased freedom and competition in the electoral process. In particular, the Center focuses on defending the political rights of speech, petition, and assembly, which are protected by the First and Fourteenth Amendments to the United States Constitution. Toward that end, CCP engages in research, outreach, and education, and provides *pro bono* legal counsel to individuals and associations threatened by state and federal laws unconstitutionally burdening the exercise of those freedoms. In Colorado alone, the Center has represented two organizations, the Coalition for Secular Government and the Independence Institute, which sought to conduct activity that would have necessitated registration with and reporting to the State under its campaign finance laws.

Both here and below, the Respondent-Appellant has objected to the Center’s filing as *amicus curiae*. An appropriate motion is being concurrently filed with the Court.

II. Converting *Pro Bono* Legal Services Into Political “Contributions” Will Harm Grassroots Organizations, Candidates For Office, Colorado Attorneys, And Civil Society.

The practical effect of the opinion below is to convert *pro bono* or reduced costs legal services into contributions, as they are defined in the Colorado Constitution. COLO. CONST. art. XXVIII, § 2(5)(a). Although the Secretary of State has indicated that he does not interpret Colorado law in the same fashion as the Court of Appeals, he will be bound by the decision below unless it is reversed. And while the Secretary typically would retain discretion to decline enforcement against committees obtaining legal services for purposes unanticipated by campaign finance laws (such as defense against frivolous complaints), or more generally for incidental violators or minor violations, Colorado law constructively prohibits this.

State law authorizes private citizens and other third parties to bring campaign finance enforcement actions, and the Secretary of State *must* forward those complaints to an administrative law judge for review and decision. COLO. CONST. art. XXVIII, § 9(2)(a). Thus, anyone—a political opponent, a well-meaning but woefully misinformed citizen, ideological activists—can force a speaker into a quasi-judicial administrative proceeding—with all of the time, effort, and expense that accompanies defending oneself against prosecution—simply by filing a complaint. *Coal. for Secular Gov’t v. Williams*, 815 F.3d 1267, 1270 (10th Cir. 2016)

(describing process). This procedure presents obvious opportunities for gamesmanship and harassment, as well as a concrete need for political actors, especially groups too small or unsophisticated to have in-house counsel, to acquire legal representation. Given that many organizations in Colorado have precious little resources, reliance upon reduced-cost or *pro bono* legal counsel may be essential for a group's defense. And because many cases of this nature raise important questions at the heart of political participation and self-government, the public is served by permitting *pro-bono* efforts vital to a fair hearing.

Moreover, counting *pro bono* work as a political contribution suggests that attorneys support their clients' political message. This contravenes Colorado Rule of Professional Conduct 1.2(b), which provides that “[a] lawyer’s representation of a client...does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” In the context of representing political actors, a *pro bono* lawyer’s basis for representation may be (and often is) an interest in the rule of law or the vindication of constitutional liberties. *Cf. Nat’l Socialist Party v. City of Skokie*, 432 U.S. 43 (1978). The Center’s attorneys, for instance, have represented political organizations across the political spectrum, including Delaware Strong Families, a group dedicated specifically to promoting Christian values in the public arena, and the Coalition for Secular Government, which opposes such efforts.

Suggesting that lawyers are active supporters of a group or candidate—in many cases by public distribution of donor lists that would name the individual lawyer as a contributor rather than an advocate—will inevitably cause attorneys to shy away from representing unpalatable or unpopular groups and candidates. This is unfortunate, given that the Rules of Professional Conduct specifically state that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” Colo. R.P.C. 6.1.

The decision below also affects Rule 6.1 in another fashion. Colorado lawyers are encouraged to “render at least fifty hours of pro bono public legal services per year.” *Id.* But, in Colorado, contribution limits kick in at very low rates for candidate committees. In this specific case, campaigns for University of Colorado regent are capped at \$400 for the primary and general elections, as a function of the Constitution. COLO. CONST. XXVIII, § 3(1)(b). That limit buys, at most, a few hours of a lawyer’s time. Few, if any, legal disputes can be resolved so quickly—especially when entities have been hauled by a third party before an administrative proceeding, are waging a constitutional challenge to a relevant law, or are fighting a legal battle over a recount. But, under Colorado law, once the \$400 limit has been hit, the client must either pay counsel using scare campaign resources or do without. Denying these groups their choice of attorney on the basis that the State has capped the

amount of *pro bono* counsel that may be offered at \$400 raises, in and of itself, serious constitutional concerns. U.S. CONST. amend. VI.

Small organizations, such as the Coalition for Secular Government, simply do not have much money on hand to wage legal battles without the assistance of *pro bono* counsel. The Coalition successfully sought relief from Colorado issue committee reporting and disclosure requirements infringing upon the First Amendment—and prevailed in part on the ground that it raised too little money—\$3,500—to be regulated. Given that holding, it was necessarily also too small to pay attorneys (at market rates) to bring a complex constitutional challenge while also carrying out its organizational mission. *Coal. for Secular Gov't*, 815 F.3d at 1280; *see also Sampson v. Buescher*, 625 F.3d 1247, 1260 (10th Cir. 2010) (“It is no surprise that Plaintiffs felt the need to hire counsel upon receiving the complaint against them filed with the Secretary of State. One 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”).

Even clients that *can* afford to pay will be harmed, beyond the obvious injury imposed by diverting funds from advocacy, projects, or payroll to pay legal counsel. Political committees, perhaps even more than other clients, can run into unanticipated cash-flow problems. So, while an arrangement may originally have

been for *paid* legal representation, a lawyer's work can—because of the Rules of Professional Conduct—become functionally “free.” Once an attorney enters a case, she is not permitted to withdraw merely for nominal nonpayment of fees. Colo. R.P.C. 1.16(b)(5) (requiring representation until “the client fails *substantially* to fulfill an obligation to the lawyer”) (emphasis added). Additionally, attorneys are subject to briefing schedules and other court orders, regardless of fee status. Colo. R.P.C. 1.16(c).

This places the attorney on the horns of a serious dilemma. If she is not being paid, but fulfills her professional and ethical responsibility to continue to represent her client, she may end up making an unlawful “contribution” in excess of the applicable limits, and certainly one that will be misleadingly reported. The Court of Appeals has forced her to either risk violation of the campaign finance laws, or impermissibly end representation of a client. State statutes should not be construed in a way that does such violence to the canons of legal ethics.

Finally, the ruling below will risk limiting the ability, and right, of a number of § 501(c)(3) organizations, such as *Amicus*, Common Cause, or the American Civil Liberties Union, to represent clients in Colorado, for fear of losing their tax status. Federal law on this question is plain: § 501(c)(3) non-profit organizations are prohibited from “interven[tion] in...any political campaign on behalf of (or in

opposition to) any candidate for public office.” 26 U.S.C. § 501(c)(3). The penalties for violation of § 501(c)(3) status are punitive, including direct taxes levied as a percentage of the value of the “political” expenditure in amounts between 10 and 100 percent, 26 U.S.C. § 4955(a)-(b), additional taxes on the § 501(c)(3)’s individual managers, *id.*, and absolute prohibition from ever converting to § 501(c)(4) status—which would permit the group to engage in campaign activity. 26 U.S.C. § 504(a).

Since attorneys working for such § 501(c)(3) groups are operating on behalf of that entity, such representation will inevitably be seen as a political contribution, either by the Secretary of State or a third-party actor. Threatening such organizations with a loss of their tax status—which would, *inter alia*, also prevent a group’s donors from taking a federal income tax deduction, likely limiting an organization’s fundraising—merely for seeking to help a political actor wage a constitutional challenge, enforce ballot access laws, challenge voter ID requirements, or ensure a recount is done in full accord with Colorado law, will inevitably harm political participation and the quality of governance in this state. Undoubtedly, many groups will withdraw open offers of legal representation, and those that choose to stay and fight may be hauled before an administrative law judge on the basis of a citizen complaint, simply for having brought a civil rights claim on behalf of a political actor.

Fortunately, this result is not what Colorado’s Constitution or statutes require. COLO. CONST. art. XXVIII, § 2(5)(b) (exempting “services provided without compensation by individuals volunteering their time” from the definition of “contribution”); C.R.S. § 1-45-103(6)(a). Granting *certiorari* will allow this Court to correct the erroneous ruling below, and prevent the manifold harms inadvertently imposed by the Court of Appeals.

Conclusion

For the foregoing reasons, this Court should grant the petition for *certiorari*.

Respectfully submitted,

s/ Allen Dickerson

Allen Dickerson*

Tyler Martinez (Colo. Att’y No. 42305)

Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: 703.894.6800
Facsimile: 703.894.6811
adickerson@campaignfreedom.org
tmartinez@campaignfreedom.org

Dated: August 16, 2016

* Admission *pro hac vice* pending

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing upon all parties herein by depositing copies of the same via ICCES or by United States mail, first-class postage prepaid, at Alexandria, Virginia, this 16th day of August, 2016, addressed as follows:

For Petitioner:

Paul Sherman
Samuel B. Gedge
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203

Mario Nicolais
KBN Law, LLC
7830 W. Alameda Ave.
Suite 103-301
Lakewood, CO 80226

(via ICCES)

For Respondent:

Matthew Arnold
Campaign Integrity Watchdog, LLC
P.O. Box 372464
Denver, CO 80237

(via U.S. Mail)

For *Amicus Curiae*:

Cynthia H. Coffman,
Attorney General
Frederick R. Yarger,
Solicitor General,
Matthew D. Grove,
Assistant Solicitor General
Grant T. Sullivan,
Assistant Solicitor General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203

(via ICCES)

s/ Tyler Martinez

Tyler Martinez