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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80203

On Certiorari to the
Colorado Court of Appeals, Case No. 2014CA2073
Judges Taubman, Jones, and Harris

Office of Administrative Courts,
Case No. OS2014-0008
Administrative Law Judge Robert N. Spencer

COLORADANS FOR A BETTER FUTURE,

Petitioner,

v.

CAMPAIGN INTEGRITY WATCHDOG, LLC,

Respondent.

▲ COURT USE ONLY ▲

Case No. 2016SC637

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***AMICUS CURIAE* BRIEF FOR THE CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONER**

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 3,797 words (does not exceed 4,750 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.

s/ Tyler Martinez

Dated: October 20, 2016 Signature of attorney or party

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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. The Center focuses on defending the political rights of speech, petition, and assembly secured by the First and Fourteenth Amendments to the United States Constitution. Toward that end, CCP engages in research, outreach, 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[1] and the Independence Institute,[2] which sought to conduct activity that would have necessitated registration with and reporting to the State under its campaign finance laws. Because the Center's activities are impacted

[1] *Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176 (D. Colo. 2014) *aff'd som. nom. Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016) *cert. denied* 580 U.S. ___, No. 16-28, 2016 U.S. LEXIS 5472 (U.S. Oct. 3, 2016). This Court heard argument on certified questions of law from the federal district court, but ultimately dismissed the questions. Order, *Coal. for Secular Gov't v. Gessler*, 2012SA312 (Colo. July 2, 2012).

[2] *Independence Inst. v. Gessler*, 71 F. Supp. 3d 1194 (D. Colo. 2014) *aff'd som. nom. Independence Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016).

by the Court of Appeals' decision to categorize *pro bono* legal services as political contributions, it provides specific insight into the need to reverse that ruling. An appropriate motion is being concurrently filed with the Court. Both here and below, the Respondent-Appellant objected to the Center's appearing as *Amicus Curiae*.

Summary of the Argument

The Center regularly provides *pro bono* representation to clients challenging the constitutionality of campaign finance laws and regulations. But the Colorado Court of Appeals held—in a published opinion—that uncompensated legal services provided to a political organization qualify as a "contribution" under Colorado campaign finance law. The holding of the court below created unintended consequences for groups defending against private complaints brought by ideological adversaries, for attorneys applying Colorado's Rules of Professional Conduct, and for non-profit organizations operating *pro bono* legal centers.

Colorado's Constitution authorizes private citizens to bring campaign finance enforcement actions. COLO. CONST. art. XXVIII § 9(2)(a). The time, expense, and expertise needed to fight those complaints creates opportunities for harassment and a concrete need for attorneys willing to represent political actors. Given that many political organizations in Colorado are small and poorly resourced, reliance upon reduced-cost or *pro bono* legal counsel may be essential to a group's defense.

By categorizing *pro bono* legal work as political contributions, the ruling assumes that *pro bono* work suggests an attorney's support for a client's political message. But Colorado Rule of Professional Conduct 1.2(b), and historical experience, are to the contrary. By counting *pro bono* representation as a "contribution," the ruling impedes both the legal defense of politically-motivated claims and litigation vindicating constitutional rights.

Furthermore, the lower court's ruling that *pro bono* legal services are "contributions" creates serious ethical problems for Colorado attorneys. Given the cost of legal representation in Colorado, few—if any—legal disputes can be resolved in the minimal billable time allowed by Colorado's low contribution limits. Likewise, once an attorney enters a case, she is not permitted to withdraw merely for nominal nonpayment of fees, and may be required to continue to work pursuant to court orders, such as briefing schedules. The ruling creates a dilemma: violate the campaign finance laws by making too large a contribution, or impermissibly end representation of a client.

Finally, the ruling has strong implications for § 501(c)(3) nonprofit organizations providing *pro bono* legal representation, such as the Center. Under the Court of Appeals ruling, *pro bono* legal services would be reported in Colorado as supporting the committee in an apparent—but not actual—violation of the federal

tax law, which prohibits "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). Violating this prohibition carries severe penalties for the organization and its managers and employees. As importantly, even perceived violations of these laws is likely to draw legal complaints and other ill-informed attacks, while misleading the public as to the nonprofit organization's true position.

Fortunately, this result is not commanded by Colorado's Constitution or statutes. Article XXVIII, § 2(5)(b) specifically exempts "services provided without compensation by individuals volunteering their time" from the definition of "contribution." The Fair Campaign Practices Act incorporates this exemption by adopting the constitutional definition of "contribution." C.R.S. § 1-45-103(6)(a). Therefore, this Court may correct the erroneous ruling below, and forestall these grave harms.

Argument

I. Converting *pro bono* legal services into political "contributions" will harm grassroots organizations, candidates for office, Colorado attorneys, and civil society.

The Court of Appeals below held that the definition of "contribution" in C.R.S. § 1-45-103(6) includes *pro bono* legal representation. *Campaign Integrity Watchdog, LLC v. Coloradans for a Better Future*, 2016 COA 51 ¶ 38 ("CIW argues

that CBF failed to report the 'in-kind' contribution of legal services and that the ALJ erred when he relied on one part of the constitutional definition of contribution, while ignoring the FCPA definition. We agree."). The practical effect of that opinion is to convert *pro bono* or reduced costs legal services into political contributions, as they are defined in the Colorado Revised Statutes. C.R.S. § 1-45-103(6).

a. Colorado's private right of action heightens the need for *pro bono* legal representation.

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) ("Any person who believes that a violation… of this article, or of section 1-45-108 [C.R.S.]… has occurred may file a written complaint with the secretary of state…. The secretary of state shall refer the complaint to an

administrative law judge within three days of the filing of the complaint."). The Secretary must enforce the ultimate decision of the ALJ, for if he refuses to do so, the complainant has "a private cause of action" in district court. *Id*.

Thus, simply by filing a complaint, anyone—a political opponent, a well-meaning but woefully misinformed citizen, or 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, *Coal. for Secular Gov't*, 815 F.3d at 1270 (describing process). Indeed, this case arises under precisely that procedure. *Campaign Integrity Watchdog*, 2016 COA 51 ¶ 1 ("After the election, Arnold, and later CIW with Arnold as its principal officer, filed a series of complaints with the Colorado Secretary of State (Secretary) alleging violations of the Fair Campaign Practices Act….").

This provision 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 few resources, reliance upon reduced-cost or *pro bono* legal counsel may be essential to 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.

b. The Court of Appeals' ruling creates serious legal ethics concerns.

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." Comment 5 to that rule clarifies that the rule exists because "[l]egal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval." Comment 5, Colo. R.P.C. 1.2. Therefore, it is a bedrock principle that "representing a client does not constitute approval of the client's views or activities." *Id*.

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. *See, e.g.*, *Nat'l Socialist Party v. City of Skokie*, 432 U.S. 43 (1978); *see also* Americans Civil Liberties Union, ACLU History: Taking a Stand for Free Speech in Skokie, https://www.aclu.org/aclu-history-taking-stand-free-speech-skokie (Discussing *National Socialist Party* and noting not all of the ACLU's

membership agreed with taking the case, but nonetheless it demonstrated "ACLU's unwavering commitment to principle"). 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.

Lawyers should not be misleadingly reported as supporters in part because doing so undermines the point of disclosure rules: to show the financial constituencies of candidates or ballot measures. In *Buckley v. Valeo*, 424 U.S. 1, 81 (1976), the U.S. Supreme Court held that "disclosure helps voters to define more of the candidates' constituencies." In similar fashion, the Tenth Circuit held "[i]ssue-committee disclosures serve the public's informational interest by allowing voters to 'identify those who (presumably) have a financial interest in the outcome of the election.'" *Coal. for Secular Gov't*, 815 F.3d at 1277 (quoting *Sampson v. Buescher*, 625 F.3d 1247, 1259 (10th Cir. 2010)). But a lawyer is not necessarily a political supporter and her work does not necessarily show a financial interest in the outcome of the election. Reporting legal work as a "contribution" will merely confuse voters, cluttering the campaign finance reports with misleading references to legal work instead of information concerning the true financial supporters of a candidate or ballot measure. This undermines the very purpose of political disclosure.

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." Colo. R.P.C. 6.1. 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, as a function of the Constitution, at $400 for the primary and general elections, combined. 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 the Court of Appeals' reasoning, once the $400 limit has been hit, the client must either pay counsel using scarce 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.[3]

Small organizations, like those represented by the Center,[4] simply do not have much money on hand to wage legal battles without the assistance of *pro bono* counsel. For instance, the Coalition for Secular Government successfully sought relief from Colorado issue committee reporting and disclosure requirements infringing upon the First Amendment, prevailing 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*, 625 F.3d at 1260 ("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

[3] In its opposition to the Center's brief at the petition stage before this Court, Campaign Integrity Watch noted that issue committees are not subject to campaign contribution limits. Response in Opp. to Mot. of Center for Competitive Politics to File Brief as *Amicus Curiae* at 3. The Court of Appeals ruling is not limited to the facts of this case or to issue committees, but extends to any attorney working for any group in the state that may be reached by Colorado's campaign finance regime. The contribution limits are only one subpart of the overall problem: the conflation of the attorney's role with that of a political supporter.

[4] *See, e.g.*, footnote 1, *supra* at 1.

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) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.").

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.

c. The ruling will deter the provision of *pro bono* legal services by § 501(c)(3) organizations.

The damage of the Court of Appeals ruling goes beyond considerations of contribution limits and legal ethics, for merely naming an activity a "contribution" carries grave implications. 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 State calling *pro bono* legal work a "contribution" in the context of a political campaign creates the strong impression that the organization has run afoul of § 501(c)(3)'s political intervention prohibition.[5] Even though the work of the organization does

[5] To determine if a § 501(c)(3) organization has tread into impermissible political waters, the IRS employs an eleven factor "facts and circumstances" test. *See*, *e.g.*, Rev. Rul. 2004-6, 2004-4 I.R.B. 328, 330; Rev. Rul. 2007-41, 2007-25 I.R.B. 1421. A state regulating the organization's activity as a political "contribution" will undoubtedly indicate *apparent*—but not actual—violation of § 501(c)(3).

not *actually* violate federal tax law, the likelihood that others—ideological opponents, low-level regulators, or the press—may not understand these complexities will be enough to stop many § 501(c)(3) organizations from continuing work on behalf of political actors in Colorado.

Violating the political activity prohibition carries heavy penalties. The politically-active § 501(c)(3) faces an initial 10 percent tax on the amount of the political expenditure, 26 U.S.C. § 4955(a)(1), with a further penalty of up to *100 percent* available if the violation is not corrected during the tax year. 26 U.S.C. § 4955(b)(1). Likewise, the § 501(c)(3) cannot simply convert to a § 501(c)(4) if it violates the anti-campaign rule. 26 U.S.C. § 504(a).

Illegal campaign intervention also triggers monetary penalties, levied as a tax, on the managers and employees[6] of the § 501(c)(3). For the initial penalty, the managers are taxed at 2.5% of the amount of the political expenditure. 26 U.S.C. § 4955(a)(2). If the manager "refused to agree to part or all of the correction," then she is subject to "a tax equal to 50 percent of the amount of the political expenditure." 26 U.S.C. § 4955(b)(2). Managers are jointly and severally liable, 26 U.S.C.

[6] The political activity penalty can be applied to "any officer, director, or trustee of the organization" or "any employee of the organization having authority or responsibility with respect to [a political] expenditure." 26 U.S.C. § 4955(f)(2)(A)-(B).

§ 4955(c)(1), for up to $5,000 per initial violation and $10,000 for the failure to correct. 26 U.S.C. § 4955(c)(2). Thus, the individuals involved with impermissible political activity face personal consequences.

These penalties are not mere threats. Under 26 U.S.C. § 6852(a), the IRS may immediately assess these "taxes" (that is, the Service need not wait until the end of the taxable year). Congress also allows the IRS to seek an injunction to stop further violations of the § 501(c)(3) prohibition on political activity. 26 U.S.C. § 7409(a). The Treasury Regulations provide for a quick resolution of flagrant political activity by a § 501(c)(3) organization. Under 26 C.F.R. § 301.7409-1(b), the violating organization has only ten calendar days to reply to the IRS's letter notifying it of the violations. Thereafter, the Commissioner of the IRS may "personally determine whether to forward to the Department of Justice a recommendation that it immediately bring an action to enjoin the organization from making further political expenditures." *Id*. The U.S. District Courts are empowered to issue the injunctions in such matters. 26 U.S.C. § 7409(b).

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 would also prevent a group's donors from taking a

federal income tax deduction, likely limiting an organization's fundraising. Likewise, few employees themselves will risk personal liability for violating the strict prohibition of § 501(c)(3), even if they are seeking to vindicate constitutional rights by representing a political actor seeking to enforce ballot access laws, challenge voter ID requirements, or ensure a recount is done in full accord with Colorado law.

Organizations use campaign finance disclosure reports to bring legal actions against ideological rivals and jeopardize their opponent's tax status. For example, Citizens for Responsibility and Ethics in Washington ("CREW") recently filed—with the FBI, Department of Justice, and IRS simultaneously—complaints against ten organizations alleging violations of the campaign finance laws. One complaint seeks *felony* charges for an asserted failure to report "political activity" (as defined and alleged by CREW) on Schedule C of IRS Form 990. CREW, Complaints Against American Dream Initiative, Arizona Future Fund, Jobs and Progress Fund, Inc., Michigan Citizens for Fiscal Responsibility, Mid America Fund, Inc., and Rule of Law Project, at 4 (June 15, 2016).[7] The complaints are gathered on CREW's

[7] *Available at* http://www.citizensforethics.org/file/PDFs/Omnibus%20DOJ%20complaint%206-15-16.pdf.

website[8] and all seek to harm the tax status of varying organizations under the theory that impermissible "political activity" went unreported by the organizations.

CREW has also used information in independent expenditure reports as the basis for bringing administrative complaints and civil actions in the federal courts. *See, e.g.*, *CREW et al. v. FEC*, No. 16-259, Compl. at 12 ¶ 45 (D.D.C. Feb. 16, 2016) (ECF 1) (bringing an action where an organization "filed ten reports disclosing [some] independent expenditures. The reports did not, however, disclose the donor who… pledged to give $3 million in contributions for the Ohio Senate race, or the names of any of the donors who contributed the 'matching' contributions."). The basis of *CREW et al. v. FEC* is the claim that the Federal Election Commission abused its discretion in dismissing CREW's administrative complaint. *Id*. at 22 ¶ 111; *id*. at 27, Request for Relief 1. Groups seeking to impose similar costs upon their ideological opponents will need only to point to a Colorado report reflecting a contribution, leaving their civically-minded victims to demonstrate their innocence by disproving the *prima facie* validity of a formal State form.

The Court of Appeals' ruling will inevitably harm political participation and the quality of governance in this state. Undoubtedly, many groups will withdraw

[8] CREW, Press: "CREW Files Criminal, IRS Complaints Against 10 Dark Money Groups." http://www.citizensforethics.org/press-release/crew-files-criminal-irs-complaints-10-dark-money-groups/.

open offers of legal representation. 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) ("'Contribution' shall have the same meaning as set forth in section 2 (5) of article XXVIII of the state constitution."). This Court may correct the erroneous ruling below, and preserve the ability for political actors to receive *pro bono* legal representation.

Conclusion

For the foregoing reasons, this Court should reverse the ruling below.

Respectfully submitted,

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Dated: October 20, 2016

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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 20th day of October, 2016, addressed as follows:

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