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Senate State, Veterans, and Military Affairs Committee
Colorado General Assembly
200 E. Colfax Avenue
Denver, CO 80203

To the Honorable Members of the Committee –

Campaign Integrity Watchdog respectfully submits the following written comments and recommendations concerning the proposed legislation, HB18-1047 “Technical Modifications to the Fair Campaign Practices Act” pending before the committee.

Campaign Integrity Watchdog is the state’s premier enforcer of Colorado campaign finance laws, having successfully prosecuted more violators than any other organization in the state’s history – including prosecutions, and successful affirmation of, the state’s laws against the current Secretary and the Secretary’s attempts to shield political allies and re-write the laws and regulations for the benefit of violators.

As such, Campaign Integrity Watchdog is uniquely situated to comment on the proposed legislation, including several proposed statutory changes which violate the state constitution, judicial precedent, and are propounded expressly to benefit lawbreaking entities and influence current cases pending in both trial and appellate courts.

First, it is important to note that many of the witnesses testifying before the House committee on the bill’s initial hearing on 31 January 2018 were less than candid or forthcoming about their interests and prospective benefits from the proposed legislation and amendments.

- 1) Michael Francisco neglected to disclose the salient fact that he is currently representing the Secretary of State in an open criminal investigation into the Secretary’s conduct – specifically, alleged First Degree Official Misconduct, a Class 2 (criminal) misdemeanor (C.R.S. 18-8-404). His testimony on certain aspects of the proposed legislation directly impact the ongoing investigation, a fact he should have been ethically bound to disclose.
- 2) Deputy Secretary Staiert is implicated in the same ongoing criminal investigation into the Secretary’s conduct – specifically, alleged First Degree Official Misconduct, a Class 2 (criminal) misdemeanor (C.R.S. 18-8-404).
- 3) Martha Tierney neglected to disclose the salient fact that among the bill’s proposed legislative changes is a provision that would directly benefit her law firm and exempt it

from certain disclosure and reporting requirements that currently exist under the law. (Specifically, exempting the LLP corporate form – identical in all aspects to the LLC form but specific to law firms – from the LLC disclosure requirements currently existing under C.R.S. 1-45-103.7(5)(d) *et seq*). Ms. Tierney's firm has previously been adjudicated to have violated this provision of the law; modifying the current definition would allow the same conduct currently held to violate the law to be exempted from disclosure.

- 4) Ryan Call neglected to disclose the salient fact that he represents two organizations (one, founded by and still having as its registered agent senate bill sponsor Bob Gardner; the other, the successor organization to that entity) found guilty of multiple violations of state law, including a case affirmed by the Colorado Supreme Court a mere two days prior to the last hearing and introduction of amendments designed to reverse the ruling) and is currently involved in litigation involving the key provisions the pending legislation.
- 5) Chris Murray neglected to disclose the salient fact that his clients were adjudicated to be in violation of the provisions he is now supporting be changed; modifying the current definitions and statutes would allow the same conduct currently held to violate the law to be exempted from disclosure.

Each of the above-listed individuals are pursuing changes in current law, including statutory changes that would conflict with constitutional provisions, in order to further their narrow and financially remunerative interests, and contrary to the public interest and stated purposes of the Constitutional Amendment (Article XXVIII) and statutory Fair Campaign Practices Act.

As such, their testimony in support of certain provisions, and the text of the provisions, bear further and more detailed examination.

Substance of the Proposed Legislation

The title of the bill ("Concerning technical modifications to the 'Fair Campaign Practices Act' to facilitate its administration") is at best misleading, at worst deliberately disingenuous (part). Many of the proposed changes to current statute are anything but "technical" modifications, but would introduce conflict with constitutional language, conflict with judicial precedent, and overturn decades of practical application of the law.

Several of the proposed changes (particularly those contained within Amendment L0002) were introduced specifically and deliberately to counter recent court rulings and/or interfere with current litigation and judicial review addressing the subject matter of the statute(s).

Attempting to overturn established law and/or interfere with pending litigation is the stuff of third world banana republic regimes, and is wholly inconsistent with the rule of law. As such, those provisions should be stricken from the current legislation and the bill should focus on those areas that actually require "technical modifications" to ensure fair application of the law.

Specifically:

SECTION 1:

Campaign Integrity Watchdog **strongly opposes** the proposed changes added to the bill in the belatedly introduced Amendment L.0002. These proposed changes are in direct conflict with (and intended to reverse) a Colorado Supreme Court ruling issued only two days prior to the amendment being offered (ruling issued 29 January 2018; amendment offered/heard 31 Jan) as well as a case currently before the Colorado Court of Appeals in which the Secretary filed a relevant pleading on the same date.

Such attempts to end-run the Colorado Constitution, the Colorado Supreme Court, and the Court of Appeals by attempting to impose such constitutionally dubious legal changes as a *fait accompli* reek of corruption and are grossly violative of due process and the rule of law.

Specifically:

The amended bill's proposed changes to C.R.S. 1-34-103(6), adding a new section (6)(d) and (e) re-defining "Contribution" for the direct benefit of the bill sponsor and aiding the Secretary in committing a criminal violation, directly conflict with the Colorado Supreme Court ruling (2018 CO 7) issued 29 January 2018 which found, based on the plain language of Colorado Constitution Article XXVIII Section 2(5)(a) that "payments to courts and attorneys for Alliance's legal defenses were payments "to a third party for the benefit of" Alliance and **were therefore contributions under Colorado Constitution Article XXVIII, §2(5)(a)(II).**"

Note that the entity guilty of violating the disclosure requirements for failure to report such contributions is the very political committee formed by the bill's state senate sponsor Robert S. ("Bob") Gardner, who remains the committee's registered agent.

The proposed changes to legislative (statutory) language thus directly contradict both the plain language of the Constitution, and the Colorado Supreme Court's ruling on the very topic in relation to the very committee that is seeking to change the law for its own benefit.

Similarly, the proposed changes to C.R.S. 1-45-103(6)(e) that "contribution" does not include an intervention by the Secretary of State is an attempt to re-write the law during the conduct of litigation addressing this very issue, and in which the trial court has already denied an attempt by the Secretary of State, in collusion with the attorney (Ryan Call, also testifying in favor of the legislative change) to dismiss the litigation for failure to state a legal claim.

Note that the Secretary, and the attorney (Ryan Call) representing the committee which received the benefit of the Secretary's illegal coordinated contribution, is attempting to change the law under which a current prosecution is in progress in order to escape accountability and defeat the public interest in disclosure.

Note also that the Secretary has already spent in excess of \$20,000 taxpayer dollars in just the last few months for the benefit of his political cronies and contrary to the public interest in just these two cases alone.

Similarly, the proposed changes to C.R.S. 1-45-103(10)(a) re-defining “expenditure” to exclude payment for legal services to defend a candidate or candidate committee are in direct conflict with controlling case law defining any disbursement by a candidate committee to qualify as “express advocacy” in support of the candidacy (see *New Mexico Youth Organized v. Herrera*, 611 F. 3d 669 (10th Cir. 2010) as well as, contra the misrepresentation by witnesses (including Deputy Secretary Staiert) federal law.

Specifically, Federal Elections Commission Advisory Opinion **AO2006-22** expressly concludes that legal services **are** reportable contributions:

“Because the definition of “contribution” under 2 U.S.C. 431(8)(A)(ii) and 11 CFR 100.54 applies to services provided to a political committee “**for any purpose**” (other than services specifically excepted by the Act and regulations), the Firm’s compensation to you and other Firm employees for the preparation of the amicus brief free of charge to the Wallace Committee would be a “contribution.” (**FEC AO 2006-22 at 4**) [emphasis added]

Finally, the Secretary’s attempt to re-write the law to grant intervention in campaign finance cases as a matter of right (inserting a new paragraph (g) to C.R.S. 1-45-111.5) directly attempts to change the law in the midst of litigation addressing that very issue, and conflict with the express purpose of the constitutional **repeal** of the Secretary having any role in the enforcement of campaign finance law due to concerns of partisan bias (see legislative history on repeal of the former C.R.S. 1-45-111, Duties of the Secretary of State – Enforcement).

Specifically, the adjudication of alleged campaign finance violations is reserved to the “citizen complaint process” (see Colo. Sec’y of State, Campaign and Political Finance Manual at 34 (rev. July 2015); the process “**is carefully designed to keep the Secretary of State out of the litigation process.**” *Colo. Ethics Watch v. Clear the Bench Colo.*, Case No. OS 2010-0009, at 11 (Colo. Office of Admin. Cts. Sept. 22, 2010) (final agency decision), *aff’d Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931 (Colo. App. 2012). Thus, “[n]othing . . . gives the Secretary any ability to control or oversee the conduct of the litigation.” *Id.* at 12

Allowing the Secretary intervention as of right in campaign finance cases would thus reverse the express intent of the electorate in removing the office from any role in enforcement, and reverse years of precedent holding the Secretary at arms length from campaign finance cases, but it would facilitate an egregious violation of due process by changing the law mid-stream in the course of litigation addressing that very issue.

This committee should not allow the Secretary, on behalf of his political cronies (including the state senate bill sponsor) to make a mockery of the rule of law and the constitutional due process rights of Colorado citizens to petition their government for redress of grievances.

The committee should **reject** the proposed additions to C.R.S. 1-45-103 (6)(d) and (e) and (10)(b), and should **strike** the other provisions of the proposed legislation that conflict with constitutional language, precedent, and the public’s informational interest in transparency and accountability in campaign finance law.

SECTION 2:

The proposed revision to C.R.S. 1-45-103.7 (2.5)(a) inappropriately attempts to narrow the differences between the statutory carve-out for an “Independent Expenditure Committee” from the broader definition of “political committee” under the Constitution, Art. XXVIII(2)(5)(a). Differences between the “Independent Expenditure Committee” and “political committee” entity types are more than the mere presence or absence of “coordination” – and is the subject of an appeal currently before the Colorado Court of Appeals (2017CA883).

An IEC is a specific subset of entity which engages **only** in “independent expenditures” that expressly advocate for or against candidates and is barred from direct coordination. Because the individual IEC communications are subject to increased disclosure requirements, the entity is not restricted in the amounts it may receive from individual or organizational donors.

Narrowing the difference between IEC and political committee to only the “coordination” issue destroys other important distinctions that impact broader disclosure requirements.

To the extent that language clarifying the distinction between the “political committee” and “Independent Expenditure Committee” entities is necessary, the following language is both more precise and consistent with existing statute and case law precedents:

(2.5)(a) AN INDEPENDENT EXPENDITURE COMMITTEE ENGAGES IN EXPRESS ADVOCACY TO SUPPORT OR OPPOSE CANDIDATES WITHOUT COORDINATING ACTIVITIES WITH A CANDIDATE, POLITICAL PARTY, OR AGENTS/OFFICERS/EMPLOYEES OF A CANDIDATE OR POLITICAL PARTY.

The bill would create a “Law Firm Loophole”

Similarly, the proposed revision to C.R.S. 1-45-103.7(8) inappropriately attempts to narrow the application of the “LLC” type disclosure requirements – and would specifically exempt the LLP (Limited Liability Practitioner) form from disclosure, despite being identical in all other ways to the LLC but restricted to law firms. Aside from the fact that such exemption would raise serious 14th Amendment equal application concerns, it would be counter to the purpose of the imposition of “LLC” type specific disclosure requirements and thus contrary to the purpose of the FCPA itself.

The reason for “LLC” type entities to disclose and apportion their contributions among the entity’s members is to achieve the important public informational interest (affirmed by the U.S. Supreme Court) of identifying potential violations of the contribution limits. Whereas contributions by **corporations** are forbidden, the usually smaller and more closely held LLC type entities are allowed to contribute directly to candidates but must attribute the contribution amounts among members (to identify potential contribution limit violations by those persons). Consequently, the **purpose** is fulfilled no matter if the LLC type is a general commercial entity, or a specific type (law firm) entity. The proposed amended language would create a carve-out for law firms (LLP) while imposing the burden on all other business types – which would be a clearly unfair and unequal application of the law.

SECTION 3:

Again, the current requirement for disclosure by both Independent Expenditure Donors and Independent Expenditure Committees, which may at first blush appear duplicative, actually serves an important public informational interest. First, not all individual expenditure donations are necessarily made to an independent expenditure committee; some may be made to other "persons" (including individuals, or even business entities) not otherwise subject to the state's disclosure laws. Second, donors and committees sometimes report different things; the juxtaposition of donor reports with IEC reports can serve to identify those discrepancies.

Campaign Integrity Watchdog has "caught" a number of violators due to the discrepancies between donor reports and information reported by "independent expenditure committees." Thus, the proposed changes would eliminate an important informational requirement used to detect and prosecute violators attempting to evade disclosure to the voters.

SECTION 4:

Campaign Integrity Watchdog supports the addition of language to C.R.S. 1-45-108(1)(a)(III) to require inclusion of the names of candidate(s) unambiguously referred to in electioneering communications. Such inclusion is a genuinely "technical modification" in the interest of more transparency and disclosure in the public (informational) interest.

Similarly, CIW supports the addition of language clarifying disclosure requirements for the various committee types and scheduled in proposed C.R.S. 1-45-108(2.5)(b). Again, these changes are truly technical modifications which tie the disclosure requirements to actual public informational interests.

However, the belated addition of a new subsection (V) only reduces clarity and poses more constitutional and precedential conflicts. A better, more constitutionally consistent wording:

(V) ANY DISBURSEMENT NOT OTHERWISE DEFINED AS AN EXPENDITURE ~~MAY~~ **SHALL BE** REPORTED TO THE APPROPRIATE OFFICER.

SECTION 5:

Campaign Integrity Watchdog generally supports the addition of language to C.R.S. 1-45-109 to reflect electronic filing (bringing the process into the 21st Century, only a few years late). However, CIW opposes the extension of time to "cure deficiencies" in C.R.S. 1-45-109(4)(b) to THIRTY CALENDAR days from the current fifteen business days as being contrary to the public interest in "full and timely" disclosure that is the core purpose of Art. XXVIII and the FCPA.

In fact, the "cure" provision is already the subject of a constitutional challenge.

SECTION 6:

Campaign Integrity Watchdog generally supports the amended language in C.R.S. 1-45-110 as providing due process to candidates rather than automatic disqualification from candidacy for failure to timely and accurately file the required candidate affidavit.

SECTION 7:

Campaign Integrity Watchdog **strongly opposes** the imposition of additional conditions and costs on Complainants exercising their constitutional rights pursuant to Art. XXVIII §9(2)(a).

Specifically, imposing a requirement for the Complainant to bear the additional burden and expense of serving a Complaint by registered mail imposes an encumbrance on the exercise of a constitutional right. Additionally, imposing such an additional requirement is inconsistent with (and possibly violates) the constitutional provisions and processes to “file a written complaint with the secretary of state” whereupon the burden for referring the complaint and notifying the respondent rests with the Secretary per unambiguous constitutional language.

The proposed revisions to C.R.S. 1-45-111.5(2) are similarly constitutionally problematic. The Colorado Court of Appeals has ruled that the responding party does not have the right to pursue enforcement of attorney fees; ruling that “the plain language of the Colorado Constitution, Article XXVIII, section 9(2)(a), permits only the secretary of state or the person filing an action to enforce the campaign finance laws to enforce the ALJ’s order awarding fees.” See *McGihon v. Cave*, 2016COA78. Consequently, the proposed statutory changes would put the statute in conflict both with the applicable constitutional provisions and with controlling case law, and would likely be subject to challenge and possible reversal.

Finally, the Secretary’s attempt to re-write the law to grant himself power to intervene in campaign finance cases as a matter of right (inserting a new paragraph (g) to C.R.S. 1-45-111.5) attempts to change the law in the midst of litigation addressing that very issue, and is in conflict with the express purpose of the constitutional **repeal** of the Secretary having any role in the enforcement of campaign finance law due to concerns of partisan bias (see legislative history on repeal of the former C.R.S. 1-45-111, *Duties of the Secretary of State – Enforcement*).

Specifically, the adjudication of alleged campaign finance violations is reserved to the “citizen complaint process” (see Colo. Sec’y of State, Campaign and Political Finance Manual at 34 (rev. July 2015); the process “**is carefully designed to keep the Secretary of State out of the litigation process.**” *Colo. Ethics Watch v. Clear the Bench Colo.*, Case No. OS 2010-0009, at 11 (Colo. Office of Admin. Cts. Sept. 22, 2010) (final agency decision), *aff’d Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931 (Colo. App. 2012). Thus, “[n]othing . . . gives the Secretary any ability to control or oversee the conduct of the litigation.” *Id.* at 12

Granting the Secretary power to intervene in campaign finance cases opens up a Pandora’s Box of partisan political prosecution or protection of a Secretary’s adversaries or allies, and is contrary to the electorate’s clear intent (as affirmed in several appellate rulings) that partisan elected officials **stay out** of the adjudicative process.

SECTION 8:

Campaign Integrity Watchdog takes no position on proposed changes, which appear to be merely technical or typographical modifications to current statute without substantive change.

SECTION 9:

Campaign Integrity Watchdog **strongly opposes** the proposed changes to the constitutionally mandated duties of the Secretary of State to collect penalties due the state.

First, the proposed changes to an entirely different statute under a bill title addressing “technical modifications” to the Fair Campaign Practices Act (Section 45, C.R.S) violates the “single subject” rule and should not be considered in this proposed bill.

Second, changing the **requirement** for the Secretary of State to collect penalties owed the state pursuant to campaign finance adjudications from the current **mandatory** requirement to a discretionary requirement invites corruption and unequal application of the law to exempt the political allies of the Secretary from collection.

Indeed, that is precisely the case. Senate bill sponsor Bob Gardner is the registered agent and representative for a political committee, Alliance for a Safe and Independent Woodmen Hills (ASIW), found guilty of violating multiple state campaign finance laws, and was assessed penalties in the amount of \$9,650.00 in a ruling issued 8 August 2014 (ironically, the proposed legislation would go into effect on the anniversary of that ruling) which have not been paid, and which the current Secretary (contrary to law, and for the benefit of his political ally) has **refused** to send to collections, despite the statutory mandate.

The proposed legislation changes would thus directly benefit the bill co-sponsor (Gardner) in ratifying the Secretary’s decision, contrary to law, to forego collection of the penalties, and would directly benefit the Secretary, who is currently under criminal investigation for failure to carry out the duties of his office to secure a benefit for another (Gardner, and his committee).

This committee should not sanction such a legislative change clearly intended to benefit, with specificity and to a significant financial degree, the bill sponsor and behind-scenes drafter (Gardner and Secretary Williams, respectively).

SECTION 10: Safety Clause

STRIKE in its entirety – since the legislation is clearly NOT “necessary for the immediate preservation of the public peace, health, and safety” but may jeopardize it, instead.

Respectfully submitted this 14th day of March 2018,

/signed/ *Matt Arnold*

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