INSTITUTE FOR JUSTICE

February 22, 2017

BY E-MAIL

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

RE: Comments of the Institute for Justice on House Bill 17-1155

Dear Chair Foote, Vice Chair Lontine, and Members of the House State, Veterans, and Military Affairs Committee:

We write to express the views of the Institute for Justice on House Bill 17-1155. This bill would amend Colorado's campaign-finance statute to create a 15-day grace period during which people sued for disclosure violations could avoid penalties by curing alleged defects in their campaign-finance reports.

Although HB 17-1155 addresses genuine problems with Colorado's campaign-finance laws, the Institute for Justice is concerned that the bill does not address the fundamental problem with Colorado's system of private campaign-finance enforcement—that "[a]ny person" can sue anyone else whose viewpoints they dislike. As explained below, HB 17-1155 will invite satellite litigation and, instead of alleviating abuses of the private-enforcement system, it could simply prompt bad-faith litigants to change tactics and continue prosecuting abusive lawsuits. Finally, because so much of Colorado's campaign-finance law is enshrined in the Colorado Constitution, there are nontrivial concerns that the bill exceeds the authority of the General Assembly by limiting the discretion the Constitution vests in the judges of the Office of Administrative Courts.

A pending federal-court lawsuit, moreover, may well put all these issues to rest in short order. A civil-rights case is currently being litigated that challenges Colorado's system of private campaign-finance enforcement as unconstitutional on its face. And as a federal magistrate judge recently acknowledged in that case, the private-enforcement system as a whole raises profound First Amendment concerns. *See Holland v. Williams*, No. 1:16-cv-00138, 2016 WL 7675315, at *5 (D. Colo. Dec. 29, 2016) ("[T]he court concludes that [the plaintiff] has stated a claim that Colorado's system of private enforcement impermissibly chills political speech in violation of the First Amendment.") (report & rec.).[1] The Institute for Justice anticipates that there will be a final judgment in the *Holland* case before the end of the year.

[1] The Institute for Justice represents the plaintiff in *Holland*.

901 N. Glebe Road, Suite 900 Arlington, VA 22203 (703) 682-9320 (703) 682-9321 Fax
general@ij.org www.ij.org

The prospect of that decision counsels against undertaking legislative half-measures now. For example, if the federal court in *Holland* holds Colorado's private-enforcement system unconstitutional, that ruling would remove entirely the legal foundation for HB 17-1155. It would also eliminate the Colorado Constitution's impediment to more comprehensive reform in this area. For these reasons, we believe the General Assembly would be best served by deferring consideration of this issue until after the federal courts have ruled on the constitutionality of the private-enforcement system more broadly. That ruling will offer guidance on the First Amendment considerations at stake and, in all likelihood, will also afford the General Assembly the liberty to consider more expansive reform.

DISCUSSION

1. Under Colorado's system of campaign-finance enforcement, "[a]ny person" can prosecute a lawsuit alleging that someone else has violated the state's campaign-finance code. *See* Colo. Const. art. XXVIII, § 9(2)(a). These complaints trigger full-blown litigation, complete with discovery, subpoenas, briefing, and hearings before the Office of Administrative Courts. Appeals can linger for years. Even if a respondent ultimately prevails, the process alone is punishment.

Predictably, this system has resulted in widespread abuse. Complaints are routinely filed not to enforce the campaign-finance laws, but to harass and silence unpopular speech. As the leading filer of these complaints has asserted, Colorado's system enables "political guerilla legal warfare (a.k.a. Lawfare)" against disfavored viewpoints.[2] Complaints have demanded tens of thousands of dollars in penalties for reporting errors involving sums as low as $6.[3] Complainants have even used the system to try to extract money for personal gain. Last year, for example, a serial complainant threatened litigation against a political group if it did not pay him a $10,000 "settlement," warning that, otherwise, "'the beatings will continue until morale improves.'"[4] Other complaints have reportedly been filed to strong-arm political concessions.[5] Still others have been filed over simple Facebook posts.[6]

This sort of "lawfare" falls hardest not on seasoned politicians, but on ordinary citizens and grassroots groups. Take Tammy Holland, the plaintiff in the pending First Amendment challenge to Colorado's private-enforcement law. Mrs. Holland is a small-town mom in Strasburg who was sued—twice—because she took out a newspaper ad urging her neighbors to cast informed ballots in an upcoming school-board election. The two complaints were filed by an incumbent school-board candidate and the school

---

[2] *See* Matt Arnold, *Turning the Tables: Fighting Back against the Left's Lawfare in Colorado*, Common Sense News (Feb. 2014), B-7, https://goo.gl/Ux2Aek.
[3] Decision at 2, *Campaign Integrity Watchdog v. Colo. Republican Party PAC*, OS2016-0002 (Office of Admin. Cts. Apr. 12, 2016), https://goo.gl/MuBvFL.
[4] Corey Hutchins, *Watchdog or bully? How a $10,000 fine led to a GOP blowup*, Colo. Indep. (Feb. 25, 2016), https://goo.gl/i8RLuJ.
[5] John Gardner, *Heron Pointe: A tale of dueling lawsuits*, Berthoud Weekly Surveyor (Apr. 16, 2015), https://goo.gl/shr0sB.
[6] Nick Coltrain, *Judge: School's Facebook post a campaign contribution*, USA Today (Oct. 23, 2015), https://goo.gl/CPDyir.

superintendent, who wanted to force Mrs. Holland to apologize for what they perceived as veiled criticism. It took half a year of litigation for the courts to exonerate Mrs. Holland, ruling that she had broken no law.[7]

Nor is Tammy Holland alone. Over the past decade, hundreds of private-enforcement complaints have been filed, and, overwhelmingly, they are brought for viewpoint-discriminatory reasons. As Mrs. Holland's pending civil-rights lawsuit alleges, a system that invites such speech-retaliatory enforcement violates the First Amendment on its face. Whatever the outcome of a particular complaint, *any* time the state's power is used to pursue speakers based on their political views, First Amendment rights are violated. "No citizen—Republican or Democrat, socialist or libertarian—should be targeted or even have to fear being targeted on those grounds." *In re United States*, 817 F.3d 953, 955 (6th Cir. 2016). Yet Colorado's private-enforcement system invites—even depends on—precisely this type of viewpoint-discriminatory enforcement. "[I]f political partisans were barred from filing complaints," one Colorado judge has noted, "very few complaints would ever be filed."[8]

2. Representative Thurlow and Senator Gardner are to be commended for recognizing the burdens that Colorado's private-enforcement system visits on political participation. Unfortunately, however, HB 17-1155 cannot meaningfully address the problem. That is because Colorado's abuse-prone enforcement law is enshrined in the state Constitution itself, meaning that legislative efforts can only tinker at the edges of an irredeemably broken system. So long as the state Constitution empowers Coloradans to police the speech of their neighbors, that power will invite viewpoint-discriminatory abuse.

HB 17-1155 is powerless to address this fundamental problem. At the same time, however, the bill raises concerns of its own:

First, whether a respondent can take advantage of HB 17-1155's cure period would depend on their opponent's litigation tactics. By its terms, HB 17-1155 creates a cure period only when a complaint alleges that a "disclosure . . . contains errors or omissions." But complainants often allege—rightly or wrongly—that their targets violated other aspects of the campaign-finance system as well, such as contribution limits. For respondents in those cases, no cure period would be available under HB 17-1155. Other complainants allege that their targets' failure to register as a committee gives rise to *both* disclosure violations *and* contribution violations.[9] For respondents in those cases, taking advantage of the cure period to register as a committee might shield them from liability for penalties on the alleged disclosure violations; yet doing so would expose them to crippling fines for the alleged contribution violations, for which no cure period would

---

[7] *See* Institute for Justice, *Colorado Private Enforcement*, https://goo.gl/BxBVLH.
[8] Order Denying Def.'s Mot. for Att'y Fees at 4, *Colo. Ethics Watch v. Senate Majority Fund, LLC*, OS2008-0028 (Office of Admin. Cts. Jan. 7, 2009), *aff'd* 275 P.3d 674 (Colo. App. 2010).
[9] *See* Compl., *Campaign Integrity Watchdog v. Colo. Citizens Protecting Our Constitution*, OS2016-0005 (Office of Admin. Cts. filed Apr. 11, 2016) (alleging that nonprofit group wrongly failed to register as a political committee, thus giving rise to both disclosure violations and violations of contribution limits), https://goo.gl/E7Nu2n.

exist. In short, whether a political speaker could avail themselves of HB 17-1155 would depend entirely on how their opponents drafted the complaint. (In addition, because the legislation applies only to "a committee or party treasurer," it does not clearly extend protection to political participants who are neither committees nor parties. *See* Colo. Const. art. XXVIII, § 6 (requiring reports by anyone who makes $1,000 in "electioneering communications"); Colo. Rev. Stat. § 1-45-107.5(9)(a) (requiring certain individual donors to file reports).)

Second, HB 17-1155 would create enormous pressure for targets of campaign-finance complaints to conform to whatever their opponents claim the law requires, simply to minimize exposure to penalties. This presents its own problems, both because Colorado's campaign-finance code is often unclear about what needs to be reported and because campaign-finance complainants are often wrong on the law. Tammy Holland, for example, was sued in part because she failed to put a *federal* disclaimer on her ad, even though federal campaign-finance law did not even arguably apply. In fact, the majority of campaign-finance cases end either in voluntary dismissals by the complainants or in court judgments for the respondents. This signals that most of the violations asserted in these complaints do not require any cure at all; more often than not, it is the complainant—not the target—who is wrong on the law.

Third, instead of curtailing the burdens of private-enforcement litigation, HB 17-1155 would invite a new set of satellite disputes regarding whether the complainant's view of the law is correct and whether the respondent sufficiently cured the alleged deficiencies. Often, these are not simple questions. In a case now before the Colorado Supreme Court, for instance, the Office of Administrative Courts, the Court of Appeals, the complainant, and the Secretary of State all voiced different views on what if anything the respondent was supposed to have disclosed. *Coloradans for a Better Future v. Campaign Integrity Watchdog*, 2016SC637 (Colo. cert. granted Sept. 8, 2016). In other cases, respondents have been sued after relying on explicit guidance from the Secretary of State concerning their reporting duties.[10] In those cases, a court applying HB 17-1155 would be hard-pressed to know what "curing" means. Should the respondent continue following the guidance received from the Secretary? Or should the respondent adopt whatever competing interpretation forms the basis for the complaint against them?

HB 17-1155 would also encourage litigation about respondents' subjective intent. By its terms, the bill's cure period would "only appl[y] in the case of a good faith effort . . . to make a timely disclosure." But there is nothing to stop a retaliation-minded complainant from claiming that their target's alleged errors were committed willfully or in bad faith. Even now, *pro se* complainants regularly assert that their opponents "engaged in 'fraudulent (even perjurious) representations,'" "made 'malicious misrepresentations,' as well as engaged in fraud, violated rules of professional conduct, or committed criminal acts." *Campaign Integrity Watchdog v. Coloradans for a Better Future*, 378 P.3d 852,

[10] *See, e.g., Colo. Ethics Watch v. Clear the Bench Colo.*, 277 P.3d 931, 937 (Colo. App. 2012) (upholding judgment against respondent even though respondent followed Secretary's guidance); *Campaign Integrity Watchdog v. Dan Thurlow/55*, Case Nos. OS 2015-0009 & -0010 (Office of Admin. Cts. June 17, 2015) (noting that respondent's agent received "incorrect" guidance from Secretary but still imposing a penalty), https://goo.gl/QdukNo.

858 (Colo. App. 2016). Complainants—many of whom are subject to none of the ethical constraints that bind attorneys—could easily make similar allegations of bad faith to try to block their targets from using HB 17-1155's cure period. Even if those allegations were baseless, respondents and courts alike would be forced to spend time and resources establishing whether the cure period is available at all.

3. Finally, it is unclear whether the General Assembly even has the power to cabin the administrative courts' discretion in the way HB 17-1155 proposes. The private-enforcement provision—found in Article XXVIII, Section 9(2)(a) of the Constitution—empowers the administrative courts to issue "any appropriate order, sanction, or relief authorized by this article." The courts have held that this constitutional provision grants broad authority to the administrative tribunals to determine what penalty is "appropriate" in a given case. Construing Section 9(2)(a), for example, the Court of Appeals has held that "[t]he word 'appropriate' is defined as 'specially suitable or proper,'" while "[t]he word 'any' means 'without limitation or restriction.'" *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1218, 1219 (Colo. App. 2009). Together, these terms "connote[] a choice among options, without restriction." *Id.* at 1219. Put differently, Article XXVIII directly empowers the administrative courts to "choose from any sanctions contained in the [constitutional] Amendment." *Id.*

HB 17-1155 would limit that discretion by providing that the administrative courts "shall not assess a penalty against [a] committee or treasurer" who corrects their disclosure filings. A plausible case could be made that constraining the courts' power in this way "would be contrary to the intent of the electorate and constitute an unreasonable and disharmonious application of article XXVIII." *See Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 70 (Colo. 2008). To be sure, the Office of Administrative Courts is a creature of statute, meaning the General Assembly has power to define that body's authority. But even so, it is not clear that the General Assembly would have the power to displace the text of Article XXVIII, which "gives an ALJ discretion to impose 'any appropriate order, sanction, or relief authorized by th[e] article.'"[11]

[11] *See* Order Granting Partial Reduction of Penalty at 3, *Campaign Integrity Watchdog v. Comm. to Elect Tony Spurlock for Sheriff*, OS2014-0002 (Office of Admin. Cts. Mar. 12, 2014), https://goo.gl/6pfxxU.

CONCLUSION

The Institute for Justice strongly agrees with Representative Thurlow and Senator Gardner that Colorado's current system of campaign-finance enforcement is unjust and unconstitutional. But we believe that HB 17-1155 does not—and cannot—address the system's underlying constitutional problem. Because the proposed legislation can achieve only piecemeal reform—and may itself violate the Colorado Constitution—it will likely give rise to still more confusion and litigation. And particularly given the federal courts' signal that Colorado's entire system of campaign-finance enforcement may well violate the First Amendment of the U.S. Constitution, we believe it would be judicious to await the federal courts' broader ruling on this issue before taking legislative action.

Awaiting that ruling will have a minimal impact on the public because the volume of private complaints is generally at its lowest during years, like this one, without major state elections. This course will also give the General Assembly the benefit of the federal courts' views on the constitutional questions at stake. And, finally, if the courts invalidate the current enforcement system, the General Assembly will then have the opportunity to enact broader and more fundamental reforms to Colorado's campaign-finance system.

Sincerely,

s/ Paul M. Sherman
Paul M. Sherman
Samuel B. Gedge

cc: Rep. Dan Thurlow
Sen. Bob Gardner