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Colorado Court of Appeals, Case No. 2014CA2073 Judges Taubman, Jones, and Harris Office of Administrative Courts, Case No. OS2014-0008 Hon. Robert N. Spencer, Administrative Law Judge	
Petitioner: COLORADANS FOR A BETTER FUTURE, v. **Respondents:** CAMPAIGN INTEGRITY WATCHDOG, and OFFICE OF ADMINISTRATIVE COURTS.	▲ **COURT USE ONLY** ▲
Attorneys: Paul M. Sherman* Samuel B. Gedge* Address: INSTITUTE FOR JUSTICE 901 N. Glebe Rd., Ste. 900 Arlington, VA 22203 Telephone: (703) 682-9320 Fax: (703) 682-9321 E-mail: psherman@ij.org sgedge@ij.org * admitted *pro hac vice* Attorney: Mario Nicolais, CO Bar No. 38589 Address: KBN LAW, LLC 7830 W. Alameda Ave., Ste. 103-301 Lakewood, CO 80226 Telephone: (720) 773-1526 E-mail marionicolaisesq@gmail.com	Case Number: 2016SC637

OPENING BRIEF FOR THE PETITIONER

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opening Brief for the Petitioner complies with all applicable requirements of C.A.R. 28, 32, and 53, including all formatting requirements set forth in these rules. I also certify that this brief contains 5,827 words, excluding material not counted under C.A.R. 28(g)(1).

s/ Paul M. Sherman
Paul M. Sherman

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INTRODUCTION

The Court of Appeals has misconstrued the Fair Campaign Practices Act in a way that renders it unconstitutional and creates serious difficulties for political speakers throughout Colorado. Under the ruling below, if political speakers rely on pro bono legal assistance in navigating Colorado's complex campaign-finance laws, their political opponents can sue them for that. If speakers rely on pro bono legal assistance to defend themselves in these lawsuits, their political opponents can sue them for that. And if speakers simply give up speaking and rely on pro bono legal assistance to shut down, their political opponents can sue them for that, too.

The facts of this case illustrate the reality of this threat. This is the fourth in a series of campaign-finance lawsuits brought by Respondent Campaign Integrity Watchdog (CIW) or its founder, Matthew Arnold, against Petitioner Coloradans for a Better Future (CBF), a group that in 2012 ran a radio ad criticizing Arnold's fitness for public office. After years of being sued, CBF—through volunteer counsel—filed a "termination report" with the Secretary of State's office. Yet that only prompted this fourth lawsuit, in which CIW alleged that the value of the attorney time spent filing the termination report should have been reported as a political "contribution" under Colorado campaign-finance law.

Unfortunately for CBF and for hundreds of political speakers in this State, the Court of Appeals agreed with CIW. In a published opinion, the court held that Colorado's definition of "contribution" captures all pro bono or reduced-cost legal services rendered to speakers regulated under Colorado's campaign-finance laws. For political speakers like CBF, this means they can be hauled into court based on the mere allegation that they failed to report the correct value for any legal services they've received. For other speakers—many of whom are subject to contribution limits—the Court of Appeals' interpretation would prevent them from relying on any pro bono or reduced-cost legal aid at all.

The Court of Appeals' interpretation was wrong. It conflicts with the plain language of both of the provisions of Colorado's campaign-finance law upon which it relied. Further, it puts that law in a square conflict with both the First Amendment and the Supremacy Clause of the U.S. Constitution. This Court should reverse the Court of Appeals' ruling and make clear that political speakers in Colorado have the right to rely on pro bono legal services in navigating Colorado's campaign-finance system, without fear that seeking out this legal aid will expose them to further liability.

STATEMENT OF THE ISSUE

Whether the court of appeals erred in concluding that pro bono and reduced-cost legal services are "contributions" within the meaning of Colorado's campaign-finance laws.

STATEMENT OF THE CASE

This case has its origins in the 2012 election, in which Respondent Campaign Integrity Watchdog's principal officer, Matthew Arnold, unsuccessfully ran for the Colorado Board of Regents. In June 2012, Petitioner Coloradans for a Better Future (CBF)—at the time a registered "political organization"—ran a radio ad that spoke unfavorably about Arnold's fitness for office. CBF also ran an ad praising Arnold's Republican primary opponent. Ultimately, Arnold lost the primary election; his primary opponent went on to represent the Republican party in the general election. *See* Pet. for Cert. App. (Pet. App.) 2; *see also* Mot. to Stay App. (Mot. App.) 4-5 (quoting ads).

Arnold then turned to the courts. In the years since the 2012 election, Arnold—either personally or through his company, Campaign Integrity Watchdog (CIW)—has prosecuted one campaign-finance complaint against his primary opponent, four campaign-finance complaints against CBF, three appeals from

dismissals of those complaints, two collateral district-court proceedings, and two bar grievances against CBF's counsel.

The first complaint against CBF was filed in December 2012, well after both the primary and general elections had passed. In it, Arnold alleged that CBF had violated various provisions of Colorado's campaign-finance laws. Although the Office of Administrative Courts rejected Arnold's main claims, the court held that CBF incorrectly reported its ads only as "expenditures" and not also as "electioneering communications." Mot. App. 1-17. Due to that error, CBF's July campaign-finance report had not identified the medium of its speech as radio and had not identified Arnold and his opponent by name. *Id.* 7. Accordingly, CBF was assessed a penalty of $4,525. *Id.* 16.

Months later, Arnold sued CBF a second time, claiming that the value of attorney time spent defending against his first complaint should have been reported. He lost. *Id.* 18-22. He appealed, and lost on appeal. *Arnold v. Coloradans for a Better Future*, No. 2014CA0122, 2015 WL 494622 (Colo. App. Feb. 5, 2015) (unpublished).

Through his company CIW, Arnold then sued CBF a third time, claiming that it misreported the penalty paid following his first suit. He lost again, and the administrative court awarded CBF more than $3,000 in attorney's fees. Mot. App.

23-28. CIW appealed and again lost on appeal. *Campaign Integrity Watchdog v. Coloradans for a Better Future*, 378 P.3d 852 (Colo. App. 2016).

In an effort to avoid further legal harassment, and with the help of a volunteer lawyer, CBF filed a "termination report" with the Secretary of State's office in January 2014. Yet that simply triggered a fourth lawsuit. In April 2014—years after CBF had engaged in any electoral activity—Arnold, via CIW, filed the complaint giving rise to this appeal. As relevant here, CIW claimed that CBF had failed to report as a campaign "contribution" the time its volunteer lawyer spent helping file its termination report.[1]

The administrative court dismissed the case. Mot. App. 29-34. CIW appealed, arguing that any pro bono or discounted legal aid provided to a political organization is a political "contribution." CBF—insolvent and defunct—did not file an appellee's brief. Even so, the Colorado Secretary of State twice sought to intervene. The Court of Appeals denied intervention. Limited to an amicus brief,

[1] The lower courts construed this fourth complaint as separately alleging that CBF failed to report certain "spending" in late 2012 or early 2013 for legal costs associated with defending against Arnold's first complaint. *See* Mot. App. 30, 32; Pet. App. 10. This claim was identical to the one dismissed in Arnold's second complaint. Like the administrative court, the Court of Appeals rejected the claim for a second time, because "[t]he funds were not 'expended influencing or attempting to influence'" any election. Pet. App. 14. CIW did not cross-petition this Court for review of that judgment.

the Secretary explained that pro bono legal aid does not qualify as a contribution under Colorado campaign-finance law. Br. of *Amicus Curiae* Colo. Sec'y of State 5-9, No. 2014CA2073 (Colo. App. filed May 8, 2015).

The Court of Appeals agreed with CIW that the time spent by CBF's former attorney in filing the termination report amounted to a reportable political contribution. Pet. App. 15. The court accepted that legal services related to campaign-finance compliance have nothing to do with "influencing or attempting to influence" any election. *Id.* 14. The court nonetheless held that legal aid qualifies as a political contribution whenever it is either pro bono or "billed but not paid." *Id.* 20.

The court based its decision on two parts of the Fair Campaign Practices Act. First, the Act defines "contribution" to include "[a]ny payment, loan, pledge, gift, advance of money, or guarantee of a loan made to any political organization." C.R.S. § 1-45-103(6)(c)(I). The Court of Appeals held that pro bono or discounted legal aid is a "gift" under this provision. Pet. App. 19-20.

Second, the Court of Appeals cited a provision that CIW itself did not rely on. Colorado law separately defines a "contribution" to candidate committees to include certain services offered at less than full cost. C.R.S. § 1-45-103(6)(b). The value of such contributions is to be "determined by the *candidate committee*,"

based on the candidate committee's assessment of the difference between the value of the services received and any amount paid for those services. *Id.* (emphasis added). "Candidate committee" is a defined term that refers exclusively to groups "under the authority of a candidate." *See* Colo. Const. art. XXVIII, § 2(3); C.R.S. § 1-45-103(3). But the Court of Appeals held that this provision also covers services—including pro bono or reduced-cost legal services—rendered to any other group regulated under Colorado's campaign-finance laws, including "political organizations," which are independent of candidates. Pet. App. 19-20.[2]

CBF sought rehearing before the Court of Appeals and asked the court to stay the effect of its decision. CBF then timely petitioned this Court for certiorari and requested that the judgment of the Court of Appeals be stayed. On September 8, this Court granted certiorari and granted the requested stay.

[2] Colorado campaign-finance law recognizes a variety of separately regulated groups, including candidate committees, issue committees, small-donor committees, and political organizations. *See generally* C.R.S. § 1-45-103. A "political organization" is defined as any group covered by section 527(e)(1) of the Internal Revenue Code (commonly referred to as a "527 group") that "is engaged in influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office in the state." *Id.* § 1-45-103(14.5); *see generally* Gregg D. Polsky, *A Tax Lawyer's Perspective on Section 527 Organizations*, 28 Cardozo L. Rev. 1773 (2007).

SUMMARY OF THE ARGUMENT

The Court of Appeals misinterpreted Colorado law and, in doing so, created a host of constitutional violations for political speakers throughout the State. The plain text of both statutory provisions upon which the court below relied shows that pro bono or reduced-cost legal services to political organizations like CBF are not reportable political contributions. In holding otherwise, the Court of Appeals' interpretation not only ignored that plain text, it violated basic rules of statutory interpretation, including the rule against surplusage and the canon *noscitur a sociis*.

If there were any doubt on this matter, it would be resolved conclusively in CBF's favor by the canon of constitutional avoidance. Burdening the right of political speakers to rely on pro bono legal aid violates the First Amendment and, in many cases, violates the Supremacy Clause as well. The only other court to consider a similar law, in fact, invalidated it just last year for precisely these reasons. *Inst. for Justice v. State*, No. 132101527, 2015 WL 1331982 (Wash. Super. Ct. Feb. 20, 2015) ("Defendants' treatment of free legal assistance to a political committee in a federal civil rights lawsuit as a 'contribution' . . . is unconstitutional under the U.S. Constitution."). All of these constitutional problems can and should be avoided, however, by adopting CBF's—and the Secretary of State's—more natural interpretation of Colorado law.

STANDARD OF REVIEW

This appeal presents a question of statutory interpretation, which this Court reviews de novo. *Pulte Home Corp., Inc. v. Countryside Cmty. Ass'n, Inc.*, --- P.3d ----, 2016 CO 64, ¶ 22, 2016 WL 5375715, at *4 (Colo. Sept. 26, 2016). The Court also "reserve[s] to itself the discretion to notice any error appearing of record, whether or not a party preserved its right to raise or discuss the error on appeal." *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 550 (Colo. 2006); *see also id.* (exercising discretion to decide "a matter of law as to which no deference is to be shown by reviewing courts").

The issue presented in this appeal was decided by the Court of Appeals. *See* Pet. App. 15-20. Argument against the interpretation adopted by the Court of Appeals was presented by the Secretary of State—both as amicus curiae and via a motion to intervene and a request for rehearing—and by Petitioner CBF, in its petition for rehearing and motion for stay. Mot. for Stay Pending Pet. for Cert., No. 2014CA2073 (Colo. App. filed July 27, 2016); C.A.R. 40 Pet. for Reh'g of Coloradans for a Better Future, No. 2014CA2073 (Colo. App. filed May 19, 2016); Colo. Sec'y of State Mot. to Intervene, No. 2014CA2073 (Colo. App. filed Apr. 21, 2016); Sec'y of State's Pet. for Reh'g, No. 2014CA2073 (Colo. App. filed Apr.

21, 2016); Br. of *Amicus Curiae* Colo. Sec'y of State 5-9, No. 2014CA2073 (Colo. App. filed May 8, 2015).

ARGUMENT

I. The Plain Language of Colorado's Campaign-Finance Laws Excludes Pro Bono or Discounted Legal Aid from the Definition of "Contribution."

The Court of Appeals relied on two separate statutory provisions to conclude that the legal services rendered to CBF were reportable political contributions: Colorado Revised Statutes sections 1-45-103(6)(c)(I) and 1-45-103(6)(b). But plain text—combined with interpretive canons like *noscitur a sociis* and the rule against surplusage—makes clear that neither provision covers pro bono or discounted legal services to political organizations.

A. Section 1-45-103(6)(c)(I) does not include pro bono or discounted legal services.

The first provision on which the Court of Appeals relied, Section 1-45-103(6)(c)(I), is inapplicable to the legal services in this case. This section defines "contribution" to include "[a]ny payment, loan, pledge, gift, advance of money, or guarantee of a loan made to any political organization," such as CBF. The court below concluded that unpaid legal services qualify as a "gift" under this provision and are thus contributions. That reading cannot be squared with the law's plain text or broader structure.

When interpreting statutes, "[w]ords and phrases should be given effect according to their plain and ordinary meaning." *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1233 (Colo. 2011). In this case, the term "gift" is ordinarily understood as "a voluntary transfer of property to another without consideration." *City of Aurora v. Pub. Utilities Comm'n*, 785 P.2d 1280, 1288 (Colo. 1990) (citing *Black's Law Dictionary* (5th ed. 1979)). Thus—and as the Secretary has explained—the reference to "gift" in Section 1-45-103(6)(c)(I) is plainly "concerned with monetary donations" and "do[es] not apply" to pro bono or reduced-cost legal aid. Br. of *Amicus Curiae* Colo. Sec'y of State 8, No. 2014CA2073 (Colo. App. filed May 8, 2015). At minimum, the term does not unambiguously convey the broader meaning the Court of Appeals ascribed to it, which would extend it to all forms of services, including legal services.

The words immediately surrounding "gift" also provide strong evidence that legal services do not qualify as contributions. "Under the well-worn canon of statutory construction *noscitur a sociis*, 'a word may be known by the company it keeps.'" *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 325 P.3d 1014, 1021-22 (Colo. 2014) (citation omitted). As the Court has noted, this interpretive principle is especially useful "where a word is capable of many meanings in order to avoid the giving of unintended breadth to [a statute]." *Young v. Brighton Sch. Dist. 27J*, 325

P.3d 571, 581 (Colo. 2014) (quoting *Gutierrez v. Ada*, 528 U.S. 250, 255 (2000) (alteration in original)).

Here, all of the statutory terms surrounding "gift"—payments, loans, pledges, advances of money, guarantees of loans—commonly denote transfers of money. One cannot make a "loan" or "payment" of services. The phrases "advance of money" and "guarantee of a loan" obviously exclude services. And, as relevant here, the term "pledge" means "a promise to give money." *Pledge*, Merriam-Webster, http://www.merriam-webster.com/dictionary/pledge (last visited Oct. 20, 2016). Given its placement at the center of a long list of terms denoting financial support, the term "gift" should be harmonized with those terms and read similarly. *See Young*, 325 P.3d at 579 ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." (citation omitted)).

The rule against surplusage favors the same result. That interpretive canon holds that, "[i]f possible, every word and every provision [of a statute] is to be given effect." Antonin Scalia & Bryan Garner, *Reading Law* 174 (2012). Thus, "interpretations that render statutory provisions superfluous should be avoided." *Welby Gardens v. Adams Cty. Bd. of Equalization*, 71 P.3d 992, 995 (Colo. 2003). This canon is embodied in the Colorado Revised Statutes themselves, which state:

"In enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective." C.R.S. § 2-4-201(1)(b).

Reading "gift" in Section 1-45-103(6)(c)(I) to include gifts other than monetary ones conflicts directly with this principle by rendering another provision of the law entirely "superfluous, serving no purpose whatsoever." *Carson v. Reiner*, 370 P.3d 1137, 1142 (Colo. 2016). Specifically, a neighboring provision separately defines "contribution" to include "[t]he fair market value of any *gift* or loan *of property* made to any political organization." C.R.S. § 1-45-103(6)(c)(III) (emphasis added). That provision would be redundant if, as the Court of Appeals held, the reference to "gift" in Section 1-45-103(6)(c)(I) extended beyond money to include aid of any kind. Only by limiting the term "gift" in Section 1-45-103(6)(c)(I) to monetary gifts can the Court "accord consistent, harmonious, and sensible effect to all the[] parts" of Section 1-45-103(6)(c). *Colo. Med. Bd. v. Office of Admin. Courts*, 333 P.3d 70, 72 (Colo. 2014).

B. Even if Section 1-45-103(6)(b) encompassed pro bono legal services, it does not apply to political organizations.

The second provision on which the Court of Appeals relied, Section 1-45-103(6)(b), also does not support treating the legal aid CBF received as a reportable contribution. That is because the provision does not apply to "political organizations" like CBF at all. Rather, the provision's text and structure, along

with the history of its enactment, show that it applies only to "candidate committees" and that it excludes other political speakers such as CBF.

Beginning with the plain text, Section 1-45-103(6)(b) clearly contemplates that some services may qualify as contributions if they are offered below cost. But it is equally plain that this definition of contribution applies only to services rendered to candidate committees. Specifically, the law states that the value of those contributions is set in an amount "as determined by the *candidate committee*." C.R.S. § 1-45-103(6)(b) (emphasis added).[3] "Candidate committee" is a term of art under Colorado campaign-finance law, Colo. Const. art. XXVIII, § 2(3); C.R.S. § 1-45-103(3), and it must be presumed that the General Assembly used that term deliberately, with the intent of excluding other groups. *See Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597-98 (Colo. 2005) ("[W]hen the legislature defines a term . . . that definition governs. Except where the General Assembly plainly evidenced a

[3] Section 1-45-103(6)(b) reads in full:

> "Contribution" includes, with regard to a contribution for which the contributor receives compensation or consideration of less than equivalent value to such contribution, including, but not limited to, items of perishable or nonpermanent value, goods, supplies, services, or participation in a campaign-related event, an amount equal to the value in excess of such compensation or consideration as determined by the candidate committee.

contrary intent, such a definition controls wherever the term is used throughout the statute." (internal quotation marks and citations omitted)).

By ignoring the words "candidate committee," the Court of Appeals expanded the definition of "contribution" not just for political organizations like CBF, but for all of the other groups regulated under Colorado's campaign-finance laws: ballot-issue committees, political committees, small-donor committees, and others. And like the court's construction of Section 1-45-103(6)(c)(I), this reading not only breaks with plain text, it once again violates the well-established rule against surplusage by reading words out of the statute. *See supra* Section I.A.

Reading Section 1-45-103(6)(b) to exclude groups other than "candidate committees" is not only more textually sound in isolation, it is also consistent with the history of Colorado's evolving campaign-finance system. Like its predecessor statute, the Colorado Constitution defines "contribution" more broadly for candidates than for other political speakers. *Compare* Colo. Const. art. XXVIII, § 2(5)(a)(I)-(IV), *with* C.R.S. § 1-45-103(4)(a)(I)-(V) (2000). This distinction has existed since well before the General Assembly chose to regulate "political organizations" like CBF. And when the General Assembly added "political organizations" to the regulatory framework, in 2007, it did not broaden Section 1-45-103(6)(b) to reach this new type of regulated entity. Instead, it created a

separate definition of "contribution" that applies specifically to groups like CBF and that does not mention services in any way. Ch. 289, sec. 2, C.R.S. § 1-45-103(6)(c), 2007 Colo. Sess. Laws 1225.

History thus confirms what text makes clear. The Colorado General Assembly has made a deliberate choice to regulate political organizations like CBF differently from candidate committees. The decision below conflicts with that legislative choice and therefore should be reversed.

II. The Court of Appeals' Interpretation of "Contribution" Violates the First Amendment and the Supremacy Clause, and Should Be Rejected.

As shown above, the plain text of Colorado's campaign-finance laws excludes pro bono or reduced-cost legal services to political organizations from the definition of "contribution." That is reason enough to reverse the Court of Appeals' ruling. But if there were any doubt as to the best interpretation of Colorado's definitions of "contribution," principles of constitutional avoidance strongly favor CBF's more natural reading. Interpreting "contribution" to include pro bono or reduced-cost legal services would violate both the First Amendment and the Supremacy Clause of the U.S. Constitution—as the Washington courts ruled just last year when a state agency claimed that pro bono legal aid to a recall committee was a "contribution." *See Inst. for Justice v. State*, No. 132101527, 2015 WL 1331982 (Wash. Super. Ct. Feb. 20, 2015). Because the "courts have a duty to

interpret a statute in a constitutional manner where the statute" is susceptible to such a reading, this Court should construe Colorado's campaign-finance laws to avoid these constitutional infirmities. *See People v. Montour*, 157 P.3d 489, 503 (Colo. 2007).

A. Classifying pro bono legal aid as a contribution violates the First Amendment.

Categorizing pro bono aid as a "contribution" violates the First Amendment rights not only of the speakers receiving the aid, but also of the lawyers providing it. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *In re Primus*, 436 U.S. 412, 426 (1978) (citation omitted). Speakers rely on pro bono legal aid to protect and vindicate their rights, and lawyers routinely provide such aid to promote broader societal goals. Equating pro bono legal aid with political contributions would severely burden these activities, and the State would have no compelling reason to justify doing so.

Foremost, groups like CBF that wish to speak out on political issues in Colorado and that rely on legal aid to comply with Colorado's campaign-finance laws will be exposed to the threat of litigation whenever they do so, regardless of whether the aid is offered pro bono, at reduced cost, or at full cost. This is because Colorado's unique system of campaign-finance enforcement permits "[a]ny

person" to file a private lawsuit to enforce the state's campaign-finance laws. Colo. Const. art. XXVIII, § 9(2)(a). As the series of lawsuits against CBF illustrates, these cases are routinely prosecuted by complainants against their political opponents, often over minor or technical reporting errors. *See, e.g.*, Decision 2, *Campaign Integrity Watchdog v. Colo. Republican Party PAC*, OS2016-0002 (Office of Admin. Cts. Apr. 12, 2016) (noting that complaint demanded $36,000 penalty for reporting errors involving two $3 contributions), *available at* http://goo.gl/2jKTl5. As a result, any group that receives legal advice on how to comply with Colorado's campaign-finance laws—even if they attempt in good faith to report that aid as a contribution—can be hauled into court based on the mere allegation that the services they received were worth more than they reported. And because lawyers routinely charge different clients higher or lower rates based on the amount of business they provide or their ability to pay, it will always be possible for a complainant to make such an allegation.

This threat alone is a serious First Amendment harm. "The misuse of litigation as a weapon to baselessly harass, vex, or spite an opponent offends the First Amendment . . . ." *In re Foster*, 253 P.3d 1244, 1251 (Colo. 2011). And *whenever* the coercive power of the government is used to target political viewpoints, 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); *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer, J., dissenting from dismissal) ("The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums.").

The Court of Appeals' interpretation creates even bigger problems for groups subject to contribution limits—including candidate committees, political committees, and small-donor committees—who will be effectively prohibited from receiving pro bono legal services altogether. "Political committees," for instance, are limited to entity contributions of $575 per election cycle. 8 Colo. Code Regs. 1505-6:10.16(g). "Small donor committees" cannot accept such contributions at all. *Id.* At the billing rates that are common for election-law practitioners, any more than a trivial amount of legal aid would exceed Colorado's contribution limits. *See* Exs. A-G to Mot. for Stay Pending Appeal, No. 2014CA2073 (Colo. App. filed July 28, 2016). People who are merely *accused* of being subject to a contribution cap—such as a group accused of failing to register as a political committee—could

find it impossible to secure a pro bono or discounted defense, since the legality of that representation would turn on the outcome of the case against them.

Here again, the First Amendment stakes could not be higher. The U.S. Supreme Court has repeatedly stressed the chilling effect of "[p]rolix" campaign-finance regimes, holding that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney." *Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 324 (2010). If that is true, then the First Amendment certainly cannot countenance a law that *prohibits* speakers from retaining a campaign-finance attorney to help them navigate these laws or to defend them when they find themselves faced with abusive, politically motivated litigation.

These First Amendment problems extend beyond political speakers to their lawyers as well, who would be forced under the decision below to misleadingly associate themselves with political causes or candidates that they may not support. In Colorado, as in most states, "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." Colo. RPC 1.2(b). The ACLU, for example, did not represent the National Socialist Party of America in order to "contribute" to the Nazis; their interest began and ended with defending the First Amendment. *See Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977); *see generally* Aryeh Neier,

Defending My Enemy: American Nazis, The Skokie Case, and the Risks of Freedom (E.P. Dutton 1979). The decision below breaks with this foundational principle. If the Court of Appeals' interpretation were affirmed, Colorado lawyers would be compelled to involuntarily endorse their political clients' views by making a "contribution" every time they offer pro bono aid, or reduce a bill, or even opt not to sue over an outstanding invoice.

This consequence is especially acute for nonprofit public-interest law firms, an important source of pro bono representation in Colorado. Under the decision below, these firms would place their tax status at risk any time they represented a group regulated by Colorado's campaign-finance system. Federal law prohibits these organizations from intervening in partisan political campaigns. *See* 26 U.S.C. § 501(c)(3). Yet, again, the decision below would force their clients to inaccurately report their legal aid as political contributions.

The practical effect of such a ruling is obvious: If affirmed, the Court of Appeals' interpretation would prevent many Coloradans from accessing important sources of legal representation to aid them in exercising and defending their most fundamental constitutional rights. This burden will fall hardest on speakers and groups of modest means, who lack the resources to keep a campaign-finance specialist on retainer. For them, "hiring an attorney to help comply with disclosure

laws and to answer any complaints would often cost more than the total amount of contributions" they receive. *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1277 (10th Cir. 2016), *cert. denied*, 580 U.S. __, __ (Oct. 3, 2016). The decision below would price these speakers out of Colorado's electoral debate. Under any standard of First Amendment scrutiny, that is unconstitutional.

B. Classifying pro bono legal aid as a contribution renders many applications of the Colorado statute unconstitutional under the Supremacy Clause.

Treating pro bono legal services as contributions also violates the Supremacy Clause when applied to civil-rights lawsuits under 42 U.S.C. § 1983. The laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the doctrine of federal preemption, any state law that conflicts with federal law is thus "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

As construed by the Court of Appeals, Colorado's regulation of contributions would be preempted by Section 1983 under conflict-preemption principles. "Conflict preemption" displaces a state law whenever that law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev.*

Comm'n, 461 U.S. 190, 220 (1983) (citation omitted). And here, "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citation omitted). The entire purpose of the Civil Rights Act is to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (discussing 42 U.S.C. § 1988) (citation omitted).

The decision below frustrates that purpose, particularly because civil-rights violations disproportionately affect people who "cannot afford to purchase legal services at the rates set by the private market." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality opinion). "'In many cases arising under [the] civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer.'" *Id.* (quoting Sen. Rep. No. 94-1011at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910). Without pro bono or discounted aid, therefore, many Section 1983 cases—including First Amendment cases—simply will not be brought.

Colorado's experience illustrates the point. Because much of this State's campaign-finance code is enshrined in its Constitution—and thus cannot be

changed through ordinary legislative processes—almost every constitutional infirmity must await a civil-rights lawsuit to be addressed. And, often, these cases are brought on behalf of Coloradans of limited means who have been unjustly dragged into the campaign-finance system. In *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), for example, the Tenth Circuit invalidated Colorado's regulation of "issue committees" as applied to a small group of neighbors. Throughout four years of litigation, those neighbors were represented pro bono by a nonprofit law firm. More recently, in *Coalition for Secular Government*, 815 F.3d 1267, a small nonprofit organization won a similar civil-rights victory, again represented pro bono by a nonprofit law firm. And earlier this year, a Colorado citizen filed a Section 1983 challenge to the private-enforcement system; in that case, too, the plaintiff partnered with pro bono counsel to vindicate her First Amendment rights after she was sued—twice—by complainants who wanted her to "apologiz[e]" for talking about public affairs. *See* Compl. ¶ 51, *Holland v. Williams*, No. 1:16-cv-00138, 2016 WL 278027 (D. Colo. Jan. 20, 2016); *see generally* Br. of *Amicae Curiae* Diana Brickell, Tammy Holland, & Karen Sampson (Colo. filed Oct. 20, 2016).

If the Court of Appeals were correct—and if the term "contribution" were to cover pro bono aid—these civil-rights cases could not have been brought without

exposing the groups litigating them to serious legal jeopardy. And it is likely that at least some of these cases would *not* have been brought, meaning that speakers throughout Colorado would continue to be subject to laws that have now been held unconstitutional. That could not be further from Congress's intent, which was to ensure that citizens have the means to challenge unconstitutional government actions in court—not just for their own benefit, but for the benefit of the citizenry as a whole. *See City of Riverside*, 477 U.S. at 575 ("If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." (citation omitted)). To prevent this unconstitutional conflict between Colorado law and the federal Civil Rights Act, the judgment below should be reversed.

C. This Court can avoid these constitutional violations by reading Sections 1-45-103(6)(c)(I) and 1-45-103(6)(b) not to cover legal aid to political organizations.

As demonstrated above, the Court of Appeals' interpretation of Sections 1-45-103(6)(c)(I) and 1-45-103(6)(b) conflicts with both the First Amendment and the Supremacy Clause of the U.S. Constitution. Yet the statute need not be read in a way that creates these constitutional infirmities. As already discussed, both provisions are reasonably interpreted—indeed, far more naturally interpreted—not

to cover pro bono legal services to political organizations, thereby avoiding all these problems.

Under the canon of constitutional avoidance, that tips the scale decidedly in favor of CBF's interpretation. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). And "[i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81; *see also Montour*, 157 P.3d at 503-04 (citing federal avoidance principles). Put differently, when "a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation *must* be adopted." *People v. Zapotocky*, 869 P.2d 1234, 1240 (Colo. 1994) (emphasis added); *see also* C.R.S. § 2-4-201(1)(a) ("In enacting a statute, it is presumed that . . . [c]ompliance with the constitutions of the state of Colorado and the United States is intended.").

Nothing in the text or structure of Colorado's law commands the unconstitutional results brought about by the Court of Appeals' interpretation. That interpretation conflicts with well-established principles of statutory construction, and it reaches a result that the text of the statutes does not support. That the

Secretary of State—Colorado's chief campaign-finance administrator—agrees with CBF's interpretation only drives the point home. *See* Br. of *Amicus Curiae* Colo. Sec'y of State in Supp. of Pet'r 15-22 (Colo. filed Oct. 20, 2016). In light of statutory text and structure, the General Assembly cannot be held to have intended the unjust and unconstitutional results that the decision below will cause.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

s/ Mario Nicolais
Mario Nicolais, CO Bar No. 38589
KBN LAW, LLC
7830 W. Alameda Ave.
Suite 103-301
Lakewood, CO 80226
Tel: (720) 773-1526
E-mail: marionicolaisesq@gmail.com

Local Counsel for Petitioner CBF

s/ Paul M. Sherman
Paul M. Sherman*
Samuel B. Gedge*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
E-mail: psherman@ij.org
sgedge@ij.org

Attorneys for Petitioner CBF

* admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that I have served this Opening Brief for the Petitioner on all parties herein by depositing copies of the same via ICCES or by United States mail, first-class postage prepaid (via ICCES), this 20th day of October, 2016, addressed as follows:

Campaign Integrity Watchdog LLC (via U.S. Mail)
Matthew Arnold
P.O. Box 372464
Denver, CO 80237

Matthew D. Grove (via ICCES)
Ralph L. Carr Colorado Judicial Ctr.
1300 Broadway, 6th Floor
Denver, CO 80203

Allen Dickerson
Tyler Martinez (via ICCES)
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314

Clifford L. Beem
A. Mark Isley (via ICCES)
Beem & Isley
730 Seventeenth Street, Suite 850
Denver, CO 80202

Office of Administrative Courts (via ICCES)
1525 Sherman Street, 4th Floor
Denver, CO 80203

/s Paul M. Sherman
Paul M. Sherman