COLORADO SUPREME COURT Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203	
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
REPLY BRIEF FOR THE PETITIONER	

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief for the Petitioner complies with all applicable requirements of C.A.R. 32 and 53, including all formatting requirements set forth in these rules. I also certify that this Petition contains 3,147 words, excluding material not counted under C.A.R. 28(g)(1).

s/ Paul M. Sherman
Paul M. Sherman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional, Statutory, and Regulatory Provisions

Other Authorities

The Court of Appeals has misconstrued the Fair Campaign Practices Act in a way that renders it unconstitutional and creates serious difficulties for people who want to talk about politics in Colorado. By interpreting the term "contribution" to cover pro bono legal aid, the Court of Appeals has made it immeasurably harder—even impossible—for individuals and groups who cannot afford an attorney to participate in this State's democratic process and to protect their own constitutional rights. Respondent Campaign Integrity Watchdog's (CIW) efforts to minimize the effects of the Court of Appeals' decision, to ignore the errors in that decision, and to deny Petitioner Coloradans for a Better Future (CBF) the right to defend itself all lack merit. This Court should grant certiorari so that it can address the pressing issues raised in this case.

I. The Court of Appeals' Ruling Harms Political Speakers Throughout Colorado.

The decision below creates immediate problems for a host of political speakers throughout Colorado. Under that ruling, political organizations like CBF will be exposed to the threat of litigation whenever they rely on legal assistance. Attorneys routinely charge different rates for different clients, or reduce their fees in the exercise of billing discretion. No matter what a political organization like CBF reports as the value of those legal services, a group like CIW will always be able to file a private complaint contesting it.

For groups that are subject to contribution limits—including candidate committees, political committees, and small-donor committees—the decision below will effectively prohibit them from receiving pro bono legal services at all. 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, 2014CA2073 (Colo. App. July 28, 2016); Pet. 8-9.

Indeed, under the decision below, individuals and groups that are merely *accused* of being political committees may find it impossible to secure pro bono representation. To give just one example, consider the case of Tammy Holland, a small-town mom who faced two campaign-finance lawsuits last fall alleging that she was a political committee. *Thompson v. Holland*, OS2015-0024 (Office of Admin. Cts.); *Turrell v. Holland*, OS2015-0016 (Office of Admin. Cts.). Mrs. Holland was defended by pro bono counsel and—after eight months—she was exonerated. But if the decision below had been in force, Mrs. Holland would have been taking an enormous risk in relying on pro bono counsel: If she had lost her case, all of the legal services she received would suddenly have become illegal excess "contributions."

These problems extend beyond political speakers to their lawyers as well. Beyond just campaign-finance laws, lawyers now risk running afoul of the

Colorado Rules of Professional Conduct by being forced to abandon representation whenever the value of their unpaid services exceeds applicable contribution limits—whatever prejudice their clients may suffer. *See* Colo. RPC 1.16; *see also* Ctr. for Competitive Politics *Amicus* Br. 5-6. And even being forced to classify pro bono or discounted representation as a partisan "contribution" raises questions under the Rules of Professional Conduct. 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); *see also id.* cmt. [5]. Under the decision below, however, Colorado lawyers will have to involuntarily endorse their political clients' views by making a "contribution" every time they offer pro bono aid, or reduce a bill, or opt not to sue over an outstanding invoice.

Finally, nonprofit public-interest law firms—which are an important source of pro bono legal representation in Colorado—will now be placing their tax status at risk whenever they represent a group regulated under Colorado campaign-finance law. These firms are prohibited under federal law from intervening in partisan political campaigns. *See* 26 U.S.C. § 501(c)(3). Yet, again, the decision below will force their clients to misleadingly report their legal aid as political contributions.

Faced with these real problems, Respondent CIW's only answer is to deny that legal aid is necessary to comply with Colorado's campaign-finance laws. Opp. to Pet. 13. Yet CIW's own website acknowledges that the system is "arcane" and "frequently used . . . as a tool to suppress political speech."[1] The Tenth Circuit has likewise characterized these laws as "complex." *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267, 1277 (10th Cir. 2016), *cert. pending*; *Sampson v. Buescher*, 625 F.3d 1247, 1260 (10th Cir. 2010). Even the Secretary of State—Colorado's chief campaign-finance administrator—has voiced concern that the decision below "further increas[es]" the "complexity" of the campaign-finance system. Mot. of Sec'y of State for Leave to File *Amicus* Br. 3. Now, speakers can find themselves violating the law simply for seeking legal aid to navigate this complex regime.

Colorado's system for enforcing its campaign-finance laws only makes this bad situation worse. Like CBF, many speakers are involuntarily dragged into the courts by complainants using the power of government enforcement to target political speech they dislike. *See* Order Denying Def.'s Mot. for Att'y Fees 4, *Colo. Ethics Watch v. Senate Majority Fund, LLC*, OS2008-0028 (Office of

[1] Campaign Integrity Watchdog, *Colorado's campaign finance laws—a blunt instrument suppressing free speech?*, http://campaignintegritywatchdog.org/?page_id=4 (last visited Sept. 2, 2016) (*also available at* archive.org/web).

Admin. Cts. Jan. 7, 2009) ("[I]f political partisans were barred from filing complaints, very few complaints would ever be filed."), *aff'd* 275 P.3d 674 (Colo. App. 2010). Many of these lawsuits are filed over trivial errors and are designed primarily to harass political rivals. Pet. 9-10. Under the Court of Appeals' decision, many such involuntary litigants will no longer have the option of affordable legal counsel. And many will find their campaigns bankrupted simply through trying to follow the law or defend against their opponents' litigation tactics. Sec'y of State *Amicus* Br. 7-9.

In short, by denying political speakers the means for complying with the law—or defending themselves when sued—the decision below destabilizes Colorado's campaign-finance system and jeopardizes the First Amendment rights of Colorado's citizens. These consequences surely qualify as "special and important reasons" justifying this Court's review. C.A.R. 49(a).

II. The Court of Appeals' Ruling Raises Serious Problems Under the U.S. Constitution, All of Which Can Be Avoided by a More Natural Interpretation of the Law.

A. In its certiorari petition, CBF explains that the decision below creates grave constitutional problems. By classifying pro bono legal aid as "contributions"—which are subject to reporting requirements and in some cases even capped—the Court of Appeals' decision burdens the "fundamental" right of

citizens and groups "to obtain meaningful access to the courts" by associating with counsel. *In re Primus*, 436 U.S. 412, 426 (1978) (citation omitted); Pet. 11-12. As applied to civil-rights litigation, the decision below also places Colorado law in conflict with the federal Civil Rights Act, in violation of the Supremacy Clause. Pet. 12-13.

CIW offers no response to these constitutional concerns, instead raising two arguments for why they should be ignored. First, CIW argues that the decision below is consistent with the way federal campaign-finance law treats legal services. Opp. to Pet. 15. Second, CIW argues that, because CBF was not subject to contribution limits and the legal services it received were not in the course of federal civil-rights litigation, this Court need not consider the effect the ruling below will have on groups that are subject to limits or are involved in such litigation. Both of these arguments are meritless.

First, and contrary to CIW's view, the Federal Election Campaign Act does not reinforce the decision below but rather shows how far afield the Court of Appeals has strayed. Federal campaign-finance law exempts a wide range of legal services—including services like those at issue in this case—from regulation as "contributions." For federal candidates, legal services are excluded when they are provided "for the purpose of ensuring compliance with" the Federal Election

Campaign Act. 52 U.S.C. § 30101(8)(B)(viii)(II). For decades, the Federal Election Commission has also ruled that candidates may operate separate, unregulated "legal defense funds" to defend their committees against a range of lawsuits. Fed. Election Comm'n, Advisory Op. 2011-01, 2011 WL 7629546, at *2 (Feb. 17, 2011). And for federal political committees, *all* legal services are excluded unless they "directly further" a specific candidate's campaign. 52 U.S.C. § 30101(8)(B)(viii)(I).

Second, CIW's attempt to dismiss the First Amendment and Supremacy Clause problems created by the decision below also fails. CIW argues that because groups like CBF are not subject to contribution limits, their First Amendment rights are not threatened by the decision below. Opp. to Pet. 14. But this argument ignores the fact that the decision will subject groups like CBF to the threat of litigation *whenever* they rely on pro bono or discounted legal assistance. Even if they make a good-faith effort to disclose the value of those legal services, groups like CIW will always be able to allege that some different value should have been assigned. That threat of litigation is itself a serious First Amendment injury. *See Coal. for Secular Gov't v. Gessler*, 71 F. Supp. 3d 1176, 1183 n.9 (D. Colo. 2014), ("The sheer expense and delay of unnecessary litigation chills, if not freezes

entirely, prospective speakers' resolve to exercise their First Amendment rights."), *aff'd sub nom. Coal. for Secular Gov't*, 815 F.3d 1267.

Moreover, CIW does not deny that the decision below, in the words of the Secretary of State, is "broadly applicable to many other types of groups," including ones that operate under strict contribution caps. Sec'y of State *Amicus* Br. 5-7; *see also* Pet. 8-9; Pet. for Reh'g 3, 2014CA2073 (Colo. App. May 19, 2015). Nor does CIW engage with the argument that, even for political participants who are not subject to such limits, regulating legal services as partisan contributions infringes their "fundamental" First Amendment right to associate with counsel. *See In re Primus*, 436 U.S. at 426-28; *see also Inst. for Justice v. State*, No. 132101527, 2015 WL 1331982 (Wash. Super. Ct. Feb. 20, 2015) (invalidating law that regulated as "contribution" legal aid to a committee that was subject to no contribution limits).

Similarly unavailing is CIW's response to the Supremacy Clause problems caused by the decision below. Again, CIW argues that these problems should be ignored because the decision does not raise Supremacy Clause issues for CBF specifically. Opp. to Pet. 15. But, again, the precedential effect of the decision is not so limited. Across the State, citizens and groups make use of pro bono legal services in civil-rights actions related to campaign-finance laws. *E.g.*, *Coal. for*

Secular Gov't, 815 F.3d 1267. For them—and for firms like the Institute for Justice, which provide such services—the decision below creates obvious Supremacy Clause problems, which this Court should address.

B. There was no need for the Court of Appeals to construe the Fair Campaign Practices Act to reach legal services and invite the constitutional infirmities described above. As CBF explained in its petition (at 13-15), the court relied on two provisions of Colorado law, both of which are better read as excluding pro bono legal services to groups like CBF. Section 1-45-103(6)(b) governs only contributions to "candidate committee[s]," not "political organizations" like CBF.[2] And the reference to "gift[s]" in Section 1-45-103(6)(c)(I) plainly refers to gifts of money, not services.[3]

CIW's arguments to the contrary lack merit. Even though Section 1-45-103(6)(b) refers exclusively to "candidate committee[s]," CIW asserts that it would be "absurd" to apply the provision as written. Opp. to Pet. 16. In support of this

[2] Section 1-45-103(6)(b) defines "contribution" to include "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 . . . services . . . , an amount equal to the value in excess of such compensation or consideration *as determined by the candidate committee*." (Emphasis added).

[3] Section 1-45-103(6)(c)(I) defines "contribution" to include "[a]ny payment, loan, pledge, gift, advance of money, or guarantee of a loan made to any political organization."

argument, CIW cites "the well-established rule of statutory construction that the entire statute is intended to be effective." Opp. to Pet. 16 (citation and emphasis omitted). But that canon cuts directly against CIW's interpretation, which reads the words "candidate committee" out of the statute entirely.

Not only is CBF's reading more textually sound when Section 1-45-103(6)(b) is read in isolation, it is also more consistent with Colorado's broader campaign-finance scheme. The Colorado Constitution defines "contribution" more broadly for candidates than it does for other political actors. Colo. Const. art. XXVIII, § 2(5)(a)(IV). And when the General Assembly amended the Fair Campaign Practices Act to create a separate definition of "contribution" for "political organizations," it did not alter Section 1-45-103(6)(b). H.B. 07-1074 (2007). That is strong evidence that the provision does not apply here, because courts "presume that the General Assembly knows the pre-existing law when it adopts new legislation or makes amendments to prior acts." *Leonard v. McMorris*, 63 P.3d 323, 331 (Colo. 2003).

CIW's construction of the second provision, Section 1-45-103(6)(c)(I), is likewise without merit. CIW asserts that the terms surrounding "gift" "indisputabl[y]" denote the provision of services as well as monetary support. Opp. to Pet. 17. But this argument has no support in the text of the statute. 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 Sept. 2, 2016).

Interpreting "gift" in Section 1-45-103(6)(c)(I) to include gifts other than monetary ones also creates surplusage elsewhere in the statute. That is because a neighboring subsection 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 wholly superfluous if, as CIW argues, "gift" in Section 1-45-103(6)(c)(I) extends beyond money to include both "tangible things and services." Opp. to Pet. 17.

Simply put, CBF's (and the Secretary's) interpretations are the most reasonable ones by any measure. And if there were any doubt, the canon of constitutional avoidance puts the thumb even more firmly on CBF's side of the scale. "When 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; *People v. Montour*, 157 P.3d 489, 503-04 (Colo. 2007). CBF's interpretation is, at minimum, a plausible one, and CIW has not refuted the "multitude of constitutional problems" that would follow from the Court of Appeals' alternative interpretation.

III. This Case Is a Suitable Vehicle in Which to Resolve These Issues.

As the foregoing demonstrates, this case presents a question of statutory interpretation that will have major consequences for people exercising their First Amendment rights in this State. The case is a fitting vehicle for resolving this question, and CIW's two objections are meritless.

First, having prosecuted this case against CBF for more than two years and won a precedential Court of Appeals decision, CIW now asserts that CBF lacked capacity all along because it filed a campaign-finance "termination" report before the case began. Opp. to Pet. 12, 18. But this Court has disallowed this type of gamesmanship for more than a century. *See Eaches v. Johnston*, 46 Colo. 457, 458 (1909) (holding that a plaintiff cannot assert that a defendant lacks capacity when "[s]he brought the company into court to defend"). As this Court has more recently explained, "a party may not complain on appeal of an error that he has invited or injected into the case." *Horton v. Suthers*, 43 P.3d 611, 618-19 (Colo. 2002) (citation omitted). Moreover, CIW argued explicitly below that CBF was properly

before the courts. CIW Resp. to Order of the Ct. 2, 2014CA2073 (Colo. App. Dec. 10, 2015); App. 5-6 (Court of Appeals opinion). In short, CBF is not in this litigation by choice; CBF is here because CIW repeatedly chose to sue it, and it has the right to a full and fair opportunity to defend itself, including before this Court.[4]

CIW's alternative argument, that CBF "waived right of appeal," is also unsound. Opp. to Pet. 11. This Court has always "reserved 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). CIW concedes that this case presents a "straightforward" issue, Opp. to Pet. 6, which was considered by the court below and can be addressed on the existing record. Moreover, as CBF explained in its petition, CBF's delay in appearing in this case was a direct result of CIW's serial, retaliatory lawsuits against it. Pet. 16-17. After CIW's third complaint, even the administrative court remarked that CIW's mission "is clearly not a good faith effort to further the legitimate purposes of the [Fair Campaign Practices Act], but is nothing more than a game of 'Gotcha.'" Mot. to Stay, App. 25. It is thus to be expected that CBF would struggle to mount a defense against this fourth lawsuit.

[4] CIW's reference to "assignation[s] of rights" is similarly misplaced. Opp. to Pet. 12. The party seeking this Court's review, CBF, is the same party that CIW named as a defendant and has been suing for the past two and a half years.

Indeed, this Court has enjoined pro se litigants—for abuses far less constitutionally fraught than CIW's—precisely because such harassment degrades the integrity of the adversarial process. *People v. Dunlap*, 623 P.2d 408, 410-11 (Colo. 1981); *see also Karr v. Williams*, 50 P.3d 910, 913-14 (Colo. 2002) (per curiam).

If anything, CIW's campaign of "lawfare" against CBF and dozens of other political speakers drives home the need for this Court's review. Pet. 2-3, 9-10. Abuse of Colorado's private-enforcement system does more than merely sow confusion in a constitutionally sensitive area; *any* time the State's enforcement 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). In Colorado, however, not only do speakers of all political persuasions face being targeted for enforcement by their campaign opponents; under the decision below, many are now required by law to shoulder the full cost of their defense unaided.

*****

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Dated: September 2, 2016.

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 Reply 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 2nd day of September, 2016, addressed as follows:

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

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

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

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

s/ Paul M. Sherman
Paul M. Sherman