

Colorado Supreme Court Invalidates Secretary of State's Rule Increasing Contribution and Expenditure Reporting Threshold for Issue Committees

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On June 16, 2014, the Colorado Supreme Court held in *Gessler v. Colorado Common Cause* that Colorado Secretary of State Scott Gessler exceeded his rulemaking authority by promulgating a regulation that raised the contribution and expenditure threshold for an "issue committee" from \$200 per election cycle to \$5,000 per cycle and exempted such committees from retrospective reporting requirements. The decision affirmed the holdings of two lower courts that had previously struck down the regulation.

The Colorado Constitution defines an issue committee as "any person, other than a natural person, or any group of two or more persons, including natural persons: (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or (II) That has accepted or made contributions or expenditures in excess of \$200 to support or oppose any ballot issue or ballot question." Issue committees are subject to the same retrospective reporting requirements as other candidates and political committees, including mandatory reporting of the name and address of any person who has contributed \$20 or more.

In 2010, the 10th Circuit held in *Sampson v. Buescher* that Colorado's registration and reporting requirements violated the freedom of association of a small-scale issue committee that had contributions of less than \$2,500 and expenditures of less than \$2,000. In light of this decision, Secretary Gessler implemented a rule exempting from reporting and registration requirements any issue committee that did not either accept \$5,000 or more in contributions or make more than \$5,000 in expenditures in an election cycle. The rule further ordered that contributions received and expenditures made before reaching the \$5,000 threshold were not required to be reported.

The Colorado Supreme Court struck down this rule, affirming two lower courts' holdings that it contravened both the state constitution and state law. The Court agreed with the lower courts' assessment that *Sampson's* narrow, as-applied holding did not facially invalidate either the state constitution's \$200 threshold for an issue committee or the statutory retrospective reporting requirements for contributions and expenditures. Thus, Secretary Gessler lacked the authority to create a regulatory exemption that directly conflicted with valid

constitutional and statutory requirements.

Following this ruling, there is no clear "cutoff" for contributions and expenditures that would exempt an issue committee from Colorado's registration and reporting requirements. While *Sampson* indicates the requirements are unconstitutional as applied to some small-scale committees, the court specifically declined to create a bright line contribution and expenditure threshold under which issue committees cannot be required to register and report. In his partial dissent in *Colorado Common Cause*, Justice Eid noted that by denying Secretary Gessler's authority to clarify the current threshold by rulemaking, the court left the determination of which committees are exempt from the \$200 threshold to case-by-case adjudication of whether a committee is sufficiently similar to the one in *Sampson*.