

**DISTRICT COURT, CITY AND COUNTY OF DENVER  
COLORADO**

**Address: City and County Building  
1437 Bannock Street  
Denver, CO 80202**

**COURT USE ONLY**

**DEVELOPMENTAL PATHWAYS, a Colorado Not-For-Profit corporation; EDWARD H. STAMMEL, an individual; NORMA ANDERSON, an individual; VIRGINIA BUCZEK, an individual; DOUGLAS ABRAHAM, an individual; ADAMS COUNTY ECONOMIC DEVELOPMENT, INC., a Colorado Not-For-Profit corporation; SUSAN K. RUSCH, an individual; ANN L. McGIHON, an individual; and DANIEL E. WILLIAMS, an individual;**

**Case No. 07CV1353**

**Courtroom: 1**

**Plaintiffs,**

**vs.**

**BILL RITTER, as Governor of the State of Colorado,**

**Defendant.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction. Prior to the hearing on this Motion, the Court ruled on Defendant's Motion to Dismiss. The Court has reviewed the Motion seeking Preliminary Injunction, as well as the Defendant's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, heard three days of testimony in support of the injunction, reviewed all exhibits received at that hearing, heard arguments of counsel, reviewed the Court's file and relevant authority, and is fully advised in the premises. The Court makes the following findings of fact and conclusions of law:

## **INTRODUCTION**

This case was commenced by several individuals and not-for-profit corporations, challenging the constitutionality of Amendment 41, which was passed by the voters of the State of Colorado in the election on November 7, 2006. The Amendment was entitled “Ethics in Government”. The Amendment is now codified as Colo. Const. art. XXIX. By operation of Colo. Const. art. V, § 1(4), C.R.S. § 1-40-123, and the Governor’s proclamation, this provision took effect on December 31, 2006.

Plaintiffs do not challenge the creation of an independent Ethics Commission, nor do Plaintiffs challenge the imposition of the provisions that prevents statewide elected office holders or members of the General Assembly after they leave office from engaging in representation of other persons or entities before certain public bodies for a period of two years. Instead, Plaintiffs challenge the gift bans in Amendment 41 as overbroad and vague on the grounds that the bans chill their First Amendment rights to free speech, to free association, and to petition the government. Defendant argues that the measure is not unconstitutional as it is written, and alternatively argues that the passage of Senate Bill 210 cures any potential chilling effect by directing any complaint that does not contain an allegation that there is a violation of the public trust be dismissed as frivolous. Plaintiffs dispute that SB 07-210 cures any defects.

## **SUMMARY OF LAW BEFORE PASSAGE OF AMENDMENT 41**

In order to determine whether Defendant’s arguments as to the purpose of Amendment 41 are sufficient to overcome Plaintiffs’ challenge, it is important to set out what regulations and laws governing acceptance of gifts by public officials were in existence before Amendment 41. Under sections 24-18-101, C.R.S., *et seq.*, a state or

local official or employee<sup>1</sup> shall not accept a gift of substantial value that would “tend improperly to influence” a reasonable person in his position to depart from the “faithful and impartial discharge of his public duties” or which a reasonable person would know is “primarily for the purpose of rewarding him for official action he has taken.” § 24-18-104(1), C.R.S. Exceptions to the gift ban in section 24-18-104, C.R.S., include “[p]ayment or reimbursement for actual and necessary expenditures for travel and subsistence for attendance at a convention or other meeting” and “[r]eimbursement for or acceptance of an opportunity to participate in a social function or meeting” that is “not extraordinary when viewed in light of the position held” by the state or local official or employee. § 24-18-104(3), C.R.S. Section 24-18-104(3) also includes exceptions for meals, lodging, travel expenses, and tickets to sporting or cultural events, as well as payment for speeches and publications. *See also*, §§ 25-1-114 and 25-1-514, C.R.S. (ban on improper gifts with respect to state and county departments of public health). In addition, Colorado has a common law conflict of interest doctrine. *See generally, Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983) (quasi-judicial proceedings must be conducted in accordance with procedural due process.).

Pre-existing Colorado law also prohibits elected high-ranking state officials from accepting any money or any equipment, supplies or services, a gift of any money or an in-kind gift valued at more than \$50 in connection with the person’s public service. § 24-6-203 (3.5), C.R.S; *see also*, § 24-6-203(3.7) (no statewide officer shall accept a gift of

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<sup>1</sup> Under section 24-18-102, “employee” is defined as “any temporary or permanent employee of a state agency or any local government, except a member of the general assembly and an employee under contract to the state,” “local government” includes “the government of any county, city and county, city, town, special district, or school district,” and “state agency” includes “the state; the general assembly and its committees; every executive department, board, commission, committee, bureau, and office; every state institution of higher education, whether established by the state constitution or by law, and every governing board thereof; and every independent commission and other political subdivision of the state government except the courts.”

any money from professional or volunteer lobbyist or from a corporation or labor organization); § 24-6-203(2) and (3) (reporting of gifts received in connection with one's public service from "any person"). Other gifts are allowed but a statewide officer must report these gifts quarterly to the secretary of state. § 24-6-202 (annual disclosure of sources of income and connections with lobbyist or company that does business with state).

There are also extensive requirements for lobbyist disclosure and registration. §§ 24-6-301, C.R.S., *et seq.* (disclosure must be made monthly when lobbyist spends more than \$50 for gift or entertainment for member of general assembly, governor or lieutenant governor, members of rule-making board or commission, and rule-making official of state agency). Lobbyists' disclosure statements must include the name of the covered official for whom the expenditure of more than \$50 was made, the expenditures made in connection with lobbying, the amount that the lobbyist has spent on advertising, and the legislation for which the lobbyist has received contributions or made expenditures. § 24-6-301(1.9), C.R.S. Under the law, "lobbying" includes communicating with a "covered official" for the purpose of "aiding in or influencing" the passage or defeat of any bill before the general assembly or rule or rate before a state agency. § 24-6-301(3.5), C.R.S.

Ethics complaints against statewide elected officeholders, governor appointees, and employees of state departments are reviewed by a board of ethics upon request of the governor. § 24-18-112, C.R.S. Complaints filed against legislators are heard by a committee made up of legislators at the discretion of legislative leadership. § 24-18-113, C.R.S. Under the constitution, each house of the general assembly has the authority to adopt rules for punishment of its members. Colo. Const. art. V, § 12; *see* House Rule 49;

Senate Rules 41 and 43. Many local governments also have procedures to handle ethics complaints.

In addition, the following criminal statutes apply to state and local officials and employees: § 18-8-302 (criminal bribery); § 18-8-304 (soliciting unlawful compensation); § 18-8-303 (compensation for past official behavior); § 18-8-305 (trading in public office); § 18-8-308 (failure to disclose a conflict of interest). The Colorado constitution also prohibits receiving bribes and corrupt solicitation. *See* Colo. Const. art. IV, § 19; art. 5, § 40; art. XII, §§ 6 and 7; *see also* § 37-41-109 (criminal penalties for water conservation district officers for taking bribes).

#### **SUMMARY OF AMENDMENT 41 (COLO. CONST. ART. XXIX)**

This Article has nine sections. The first section contains the purposes of the Amendment. It states that “the conduct of public officers, members of the General Assembly, local government officials, and government employees must hold the respect and confidence of the people” Colo. Const. art. XXIX, § 1(1) (a) and that government officials and employees must “carry out their duties for the benefit of the people of the State.” *Id.*, § 1(1) (b). To achieve these goals, government officials and employees must “avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated.” *Id.*, § 1(1) (c). “Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust.” *Id.*, § 1(1) (d). The measure also states that costs associated with holding public office should be borne by the government. *Id.*, § 1(1) (e). The measure directs that Government officials and employees must be afforded specific standards to guide their conduct and must be subject to specific penalties to ensure compliance with the standards. *Id.*, § 1(1) (d).

Section 2 defines the terms used throughout the article, including “government employee”, “local government”, “local government employee”, “person”, “professional lobbyist”, and “public officer.” Colo. Const. art. XXIX, § 2. “Person” is defined as “any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.” *Id.*, § 2(4).

Section 3 (the “gift ban” provision) provides standards and limits on the acceptance of gifts. Covered government officials and employees cannot accept or receive “money, forbearance, or forgiveness of indebtedness” without providing “lawful consideration of equal or greater value.” Colo. Const. art. XXIX, § 3(1). Likewise, covered government officials and employees may not, “either directly or indirectly as the beneficiary of a gift or thing of value given to such person’s spouse or dependent child...solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year” without providing “lawful consideration of equal or greater value.” *Id.*, § 3(2).

Section 3(3) lists a number of exceptions to the gift ban. The exceptions include campaign contributions; unsolicited items worth less than \$50; unsolicited awards of appreciation in the form of a plaque or desk item; “unsolicited informational material, publications or subscriptions related to the recipient’s performance of official duties”; admission to and meals at an event if the recipient appears to speak; expenses paid by a non-profit organization for attendance at a convention or fact-finding mission if the person delivers a speech or represents the state or local government provided that the non-profit organization receives less than five percent of its funding from for-profit

organizations; a gift from a relative or personal friend on a “special occasion”; and compensation or other incentive received in the normal course of employment.

*Id.*, § 3(3). The amendment does not define “special occasion.” Section 3(3)(f) prohibits government officials and employees (including university professors) from being reimbursed by a nonprofit organization for the reasonable expenses of attending a meeting or a fact-finding mission if a for-profit entity pays 5% or more of the funding of a sponsoring non-profit organization, or reimbursed by the federal government for the reasonable expenses of testifying before a congressional committee or attending a meeting with federal government officials. *Id.*, § 3(3)(f).

Section 3(4) sets limits on lobbyists. Professional lobbyists, “personally or on behalf of any other person or entity”, cannot “knowingly offer, give, or arrange to give,” to covered persons “any gift or thing of value of any kind or nature”, including meals and informational material (with no monetary floor), nor knowingly pay for any meal, beverage, or other item to be consumed by” covered officials or the official’s family members. *Id.*, § 3(4). The ban includes items to be consumed “in the course of such lobbyist’s business or in connection with a personal or social event.” *Ibid.* The exception to this ban on all things of value is campaign contributions. This prohibition does not apply to covered persons who are members of the lobbyist’s immediate family. *Ibid.*

Amendment 41 extends the gift ban to apply to the employees of public institutions of higher education, as well as independent contractors at any level of government, and their families, as well as to the families of all state, county and local employees. *Id.*, §§ 2 and 3(2). The amendment does not define “independent contractor.”

Section 4 (the “revolving door” provision) prevents statewide elected office holders or members of the General Assembly after they leave office from engaging in representation of other persons or entities before certain public bodies. These persons cannot “personally represent another person or entity for compensation before any other statewide elected officeholder or member of the General Assembly for a period of two years following vacation of office.” Colo. Const. art. XXIX, § 4.

Section 5 creates an ethics commission independent of any branch of government. The members are appointed in the following order: (1) one member by the Colorado Senate; (2) one member by the Colorado House of Representatives; (3) one member by the Governor; (4) one member by the Chief Justice of the Colorado Supreme Court; and (5) one member who shall be either a local government official or a local government employee appointed by the affirmative vote of at least three of the first four members. Colo. Const. art. XXIX, § 5(2). This section also sets out the procedure for filing a complaint with, and investigation by this Commission. Any person may file a complaint with the Commission alleging a violation of Amendment 41 or any other standard of conduct or reporting requirement specified in law within the preceding twelve months. *Id.*, § 5(3)(a). The Commission must investigate the complaint, hold a public hearing and issue findings, unless the Commission finds that the complaint is frivolous. *Id.*, § 5(3)(b) and (c). Members of the Commission may issue subpoenas. *Id.*, § 5(4). The Commission is empowered to issue advisory opinions to any covered persons requesting such an opinion. *Id.*, § 5(5). Members of the commission have the power to subpoena documents and witnesses. *Id.*, § 5(4).

Section 6 establishes sanctions. It states that a covered person “who breaches the public trust for private gain and any person or entity inducing such breach shall be liable

to the State or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions.” Colo. Const. art. XXIX, § 6.

Section 7 permits counties and municipalities to enact ethics laws that are more stringent than those set forth in the measure. Colo. Const. art. XXIX, § 7. Home rule counties and municipalities that have adopted charters, ordinances or resolutions are exempt from the provisions of the amendment. Section 8 states that conflicting statutory provisions are preempted by the amendment. Colo. Const. art. XXIX, § 8.

Finally, section 9 authorizes the General Assembly to enact legislation that facilitates the operation of the measure. “Legislation may be enacted to facilitate the operation of this article, but in no way shall such legislation limit or restrict the provisions of this article or the powers herein granted.” (Emphasis supplied) Const. art. XXIX, § 9.

#### **SENATE BILL 07-210**

Senate Bill 210 (“Concerning the establishment of the independent ethics commission as required by article XXIX of the state constitution, and making an appropriation therefor”), adopted in April 2007, purports to modify several provisions of the measure. Senate Bill 210 implements and provides funding for the independent Ethics Commission. The legislation requires the Commission to “dismiss as frivolous” any complaint seeking a sanction under section 6 that “fails to allege” that a government official or employee “has accepted or received any gift or other thing of value for private gain or personal financial gain.” Sec. (5)(a). The legislation defines “private gain” or “personal financial gain” as meaning “any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence an official act that is performed in the course and scope of the public duties of a

public officer, member of the general assembly, local government official, or government employee,” and takes the definition of “official act” from section 24-18-102(7), C.R.S. (“the pre-existing gift ban”). Sec. (5)(b). Section 24-18-102(7) defines “official act” as “any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.”

Senate Bill 210 also modifies the Commission’s subpoena power: if four of the five Commission members approve, the Commission may issue subpoenas to obtain the attendance of a witness or the production of documents. § 24-18.5-101(8), C.R.S.

Senate Bill 210 also provides the process for seeking advisory opinions or letter rulings from the ethics commission and requires that “each advisory opinion or letter ruling … shall be a public document and shall be promptly posted on a website that shall be maintained by the commission.” Sec. (4)(b)(IV). The commission is to redact the name of the person requesting a letter ruling. *Id.* Neither advisory opinions nor letter rulings under Amendment 41 are subject to the “frivolous complaint” restriction in Senate Bill 210 on complaints seeking sanctions.

Finally, Senate Bill 210 does not amend any of the definitions included in the gift ban provisions, nor does it limit the scope of the amendment to apply only to those gifts that would violate the public trust. The penalty provision, section 6 of Amendment 41, remains unchanged by Senate Bill 210.

## **STANDARD OF REVIEW**

### **PRELIMINARY INJUNCTION STANDARDS**

A preliminary injunction can be granted only where the Court finds that the movant has demonstrated (1) a reasonable probability of success on the merits; (2) a danger of real, immediate and irreparable injury; (3) the unavailability of an adequate

remedy at law; (4) the public interest favors granting the relief; (5) the balance of equities favors granting the preliminary injunction; and (6) the remedy will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982). “If each criterion is not met, injunctive relief is not available.” *Id.* at 654.

### **SUMMARY OF RELEVANT TESTIMONY AND EXHIBITS**

The Court enters the following Findings of Fact based upon credible testimony and exhibits presented at the hearing. The findings are connected to specific testimony or exhibits as noted:

1. The Government concedes, and I find, that the wording of Amendment 41 is ambiguous. These ambiguities have created confusion among those affected by Amendment 41, including legislators, lobbyists, those who contract with the State, and government employees.

2. Under Amendment 41, Colorado’s gift bans are the strictest in the nation.<sup>2</sup> The gift ban is broader than that of any other state, because it extends to all government employees and their family members. No other state has placed its gift restrictions in its constitution, nor has any other state has included “independent contractors,” banned solicited information, or included “promises or negotiations of future employment” within the definition of a banned gift. Finally, no other state has language exempting non-profits who receive less than 5% of its funding from for-profit organizations or entities. Previous to the passage of Amendment 41, the general assembly used its ethics rules which governed the activities of its members, including rules on the receipt of honoraria. These rules were enforced by House and Senate ethics committees.

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<sup>2</sup> Testimony comparing Amendment 41 to other similar laws in the United States came from Peggy Kerns, a former Aurora City Council Member, and State Representative. Currently, Ms. Kerns is Director of the National Conference of State Legislators Center for Ethics in Government.

Honoraria given to legislators included payment for travel and lodging at various events where legislators would speak about events in Colorado and to attend NCSL events.

Because Amendment 41 would require a legislator to pay their own expenses to these events, legislators no longer attend them. A further effect of Amendment 41 has been to limit access to legislators—for lobbyists and individual citizens, alike. (Norma Anderson<sup>3</sup>; Peggy Kerns)

3. Because of the relatively short period of time the legislature is in session, and the amount of work required during the day, lobbyists are often required to meet with legislators at social events, meetings out of the Capitol, over coffee, lunches, and receptions. (Peggy Kerns)

4. The Office of Legislative Legal Services issued a Memorandum to all members of the legislature and staff of the General Assembly after passage of Amendment 41. This Memorandum advised legislators and staff to take the most prudent course of action to comply with the amendment, and, when in doubt, to be vigilant about maintaining an appearance of propriety. The Office of Legislative Legal Services concluded that Amendment 41 contained vague terms, broad definitions and ambiguous provisions. Finally, The Office of Legislative Legal Services has advised legislators not to attend certain conferences. (Anne McGihon<sup>4</sup>; Exh. 9)

5. Legislators share offices with one another, and that space is also shared with staff, interns and volunteers. Each legislator is entitled to one legislative staff

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<sup>3</sup> Norma Anderson served as a member of the Colorado General Assembly from 1987 until 2005. She chaired the Education Committee, the Audit Committee, and an intersession ethics committee, which promulgated new ethics rules and proposed ethics legislation (which were ultimately enacted). Currently, Anderson serves on the boards of a number of non-profits.

<sup>4</sup> Anne McGihon serves as a legislator and attorney in private practice. McGihon characterized her legislative position as a full-time occupation throughout the year. In addition to serving on the Legal Services and Appropriations committees, McGihon chairs the House Health and Human Services Committee.

member for seventeen hours a week. These staff members, volunteers and interns assist in responding to letters, e-mails and telephone calls, and scheduling meetings with constituents. (Anne McGihon)

6. Because of the lack of staff and other resources, legislators are dependent upon receiving information from other sources, including professional lobbyists. The general assembly's full-time staff—the Legislative Counsel and the Office of Legislative Legal Services—provides limited research to the members. The full-time staff responds to a large volume of requests. Neither the offices of Legislative Legal Services nor Legislative Council can provide political history and contextual information to legislators, nor do they have the resources to do so. The role of the lobbyist is to educate members of the general assembly. This historical information is especially important, given the impact of term limits. Lobbyists provide written and verbal information regarding both sides of an issue. Upon occasion they organize fact-finding or educational tours. Because legislators consider approximately 650 pieces of legislation during the 120 day legislative session, time is at a premium. Legislators frequently request lobbyists to research issues, because unlike the non-partisan legal services and legislative council, lobbyists are able to ferret out the political realities of issues. (Anne McGihon; Daniel Williams<sup>5</sup>; Norma Anderson)

7. The trust developed between lobbyists and legislators is an integral part of this process. If a lobbyist provides inaccurate information, this greatly impacts their ability to provide information to legislators. Moreover, the mere filing of a complaint

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<sup>5</sup> Prior to becoming a professional lobbyist, Daniel Williams served as an Eagle County Commissioner and as a State Representative. Colorado legislators selected Williams, as a lobbyist, chair an ethics committee.

alleging ethical violations would be extremely detrimental to a lobbyist's ability to provide information to legislators. (Daniel Williams)

8. In today's world, information is a commodity that has intrinsic value. Its value is derived both from the value of the process to generate and disseminate it, as well as from the information itself. Accordingly, any information provided to legislators by professional lobbyists is subject to the \$0 gift ban as a "thing of value of any kind or nature"; and information from volunteer lobbyists is subject to the \$50.00 limit on gifts. (Peggy Kerns; Daniel Williams; Section 3(4) of Amendment 41) As a result of Amendment 41, it is much more difficult for lobbyists to contact legislators. Legislators are reluctant to meet with lobbyists -- particularly over a meal or coffee, even where the legislator pays for their own meal – not because any violation of Amendment 41 would occur, but because it might appear to be a violation, creating the possibility that a complaint would be filed. Further, because the legislative breakfasts, lunches and receptions have been cancelled as violations of Amendment 41, it has made it more difficult for both lobbyists and citizens to communicate with legislators. If professional lobbyists wish to speak with a legislator, they must either call the legislator off the floor or out of committee, or catch them as they walk in the hallways of the Capitol, neither of which provides privacy. Because of the lack of time available during the legislative session, these opportunities are infrequent and meaningful contact is difficult. (Daniel Williams)

9. Before passage of Amendment 41, legislators met their colleagues from the other house of the general assembly by attending events outside of the Capitol. Legislative leadership cancelled breakfasts routinely held at the Capitol, as well as many social events and, therefore, many legislators have not met their colleagues. The

significance of these events is more important due to the fact that there is frequent turnover due to term limits. (Anne McGihon)

10. Representative McGihon testified that she is concerned with several aspects of Amendment 41:

- a. That the assistance she receives from volunteers, who are lawyers, violates the \$50 gift ban because their time is more valuable than the \$50 per year limitation;
- b. That a complaint could be filed by someone who disagrees with the activities of these volunteers when they are working outside of the Capitol;
- c. That her ability to obtain information by attending conferences, events and information-gathering tours has been limited;
- d. That her personal social life has been impacted, because of the gift ban, and lack of definition of “special occasion” or “friend”;
- e. That her ability to serve on boards and committees has been affected based upon the limits on paying for meals and travel reimbursements; and
- f. That the Amendment’s \$50 gift ban hampers her ability to practice law and negotiate for business because the ban applies to “promises or negotiations of future employment”.

11. As a County Commissioner, Frank Weddig<sup>6</sup> earns \$63,000 annually, with an annual expense account of \$7,000, \$1,700 of which is earmarked for dues and meetings. Since passage of Amendment 41, Mr. Weddig had already used most of his earmarked funds at the time of the hearing. He will not be able to attend meetings in the future. (Frank Weddig)

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<sup>6</sup> Frank Weddig was elected as an Arapahoe County Commissioner in 2005. Before that, he served as an Aurora City Councilman, state senator and state representative.

12. As part of his duties, Mr. Weddig is required to serve as a board member or liaison with various groups. Amendment 41 has limited Mr. Weddig's ability to meet these responsibilities, or to attend retreats and conferences. (Frank Weddig)

13. Mr. Weddig testified to the following effects of Amendment 41:

- a. His ability to obtain information from various groups, including lobbyists, neighborhood groups, and developers, has been chilled;
- b. His ability to attend and receive information at various events, retreats, and conferences has been chilled;
- c. His ability to obtain information from neighborhood groups, developers and other interested outside parties is limited by both the amount and type of information they can provide to him in response to a request by him for information.

14. Non-profit organizations that are not represented by professional lobbyists are subject to the \$50 annual gift ban limit as to any responses to requests for information from persons covered by the Amendment. (Charles Shimanski<sup>7</sup>)

15. Amendment 41 limits non-profits, which receive 5% or more of their funding from for-profit organizations, from paying expenses of covered persons to attend meetings unless the covered person is scheduled to participate in the program. Colo. Const. art. XXIX, § 3(3)(f). The national average amount that for-profit organizations contribute to non-profit organizations is 5.3%. (Charles Shimanski)

16. Non-profit organizations that have contracts with the State of Colorado are "independent contractors" subject to Amendment 41 restrictions. These organizations include: Alliance, Family Resource Center Association, Denver Options, The Legal Center for People with Disabilities, and The Children's Hospital. Some of these non-

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<sup>7</sup> Charles Shimanski is the President and CEO of the Colorado Nonprofit Association, which has about 1,200 non-profit members.

profit organizations address controversial topics (*e.g.* Focus on the Family and Planned Parenthood). The controversial nature of these organizations would make it more likely that a complaint would be filed under Amendment 41 by someone who disagrees with the purpose of the organization. (Charles Shimanski)

17. In response to Amendment 41, events have been cancelled (events sponsored by Children's Hospital or the Colorado Nonprofit Association's annual legislative lunch) and other events have experienced a dramatic decline in participation (events sponsored by Alliance and Volunteers of America). Amendment 41 has changed the way that non-profits raise money and whom they invite to fundraising events such as annual galas. (Charles Shimanski. Norma Anderson)

18. Amendment 41 potentially impacts professional lobbyist's personal lives by restricting the ability of a professional lobbyist to socialize with a personal friend, who also happens to be an employee of government. This would include independent contractors and family members of employees and independent contractors. Daniel Williams has ceased inviting anyone to dinner at his home because of concern that the person invited might have a contract with the State (and therefore be an "independent contractor), or because they may be related to a government employee. This would violate Amendment 41. (Daniel Williams)

19. Certain non-profit organizations have contracts with the State of Colorado, and are therefore impacted by Amendment 41 as "independent contractors". (John Meeker<sup>8</sup>)

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<sup>8</sup> John Meeker is the executive director of Developmental Pathways. He has worked for Developmental Pathways for twenty-four years. Developmental Pathways is a statutory creation under C.R.S. § 27-10.5-105, and is a public/private partnership under § 501(c)(3) of the Internal Revenue Code. Developmental Pathways assists those with developmental disabilities and their families, commencing with pre-natal counseling in cases where birth defects are likely and continuing through death counseling.

20. Developmental Pathways acts as agent for State Department of Health Care Policy and Financing and State Department of Human Services, Division for Developmental Disabilities, and therefore is likely an “independent contractor” under Amendment 41. Developmental Pathways acts as a liaison among caregivers, those in need of care (both those with developmental disabilities and their families), and the State of Colorado. Developmental Pathways generally promotes good relations with the state (and its subdivisions) for persons with disabilities. (John Meeker)

21. Developmental Pathways receives money from the state and from private donors. Like most organizations that receive money from the state, Developmental Pathways tries to make a good impression with the state policy makers and educate them in order to increase the funds it receives from the state. Some of these efforts to increase the funds and educate policy makers involve the expenditure of money. (John Meeker)

22. Developmental Pathways utilizes education to assist local officials regarding issues involving people with developmental disabilities. Developmental Pathways representatives provide this educational information while meeting with county or other local officials, often during a one-on-one meal or a group breakfast or dinner. Based upon this education, Developmental Pathways has been able to obtain the unanimous support of the Arapahoe County Commissioners, which directly led to the approval of a mill levy to assist in generating millions of dollars to help those who have developmental disabilities. These events are problematic under Amendment 41. The concerns over sponsoring these types of events does not apply only to high-ranking officials, but also to any government employee, such a Case Manager, who may be impacted by Amendment 41. (John Meeker)

23. Developmental Pathways holds an annual fund-raising dinner, sponsoring various public officials' meals. Language has been contained in Developmental Pathways' contract for decades requiring it to avoid even the appearance of a conflict of interest. Despite this language, it has never been suggested that these complimentary meals violate that provision. In 2006, thirteen or fourteen public officials attended, including six mayors of communities served by Developmental Pathways. Amendment 41 prohibits providing complimentary meals for public officials at these functions. In 2007, only three public officials, including one mayor, attended. (John Meeker)

24. Because Developmental Pathways' continued existence depends upon the public perception that it is a "good cause" and a "worthy charity", the mere filing of a complaint alleging violation of Amendment 41 could damage its reputation. Accordingly, Developmental Pathways has ceased engaging in activities that might potentially violate the Amendment's gift ban. This impacts their ability to get information to those who require it to provide service to the people they seek to serve, such as Case Managers. (John Meeker)

25. Employees of various higher education institutions are also affected by the Amendment. Full-time faculty members at the University of Colorado Law School are entitled to have a private practice in addition to their teaching duties, comprising up to one-sixth of their time. The Dean of the Law School and other faculty members regularly attend conferences and seminars where they are not formal speakers. Their transportation and lodging is typically paid by the conference or other organizations. Attendance at these conferences raises the professional stature of the faculty. Additionally, participation in these conferences allows these faculty members to influence future laws, regulations, and policy. Unless the faculty member is scheduled to speak at the event,

Amendment 41 prohibits attendance at such conferences unless the faculty member pays his or her own way. Because of limited resources, faculty will not participate in these conferences. (David Getches<sup>9</sup>)

26. Dean Getches has been invited to testify before Congress regarding the environment, Indian law, and water rights. Before passage of Amendment 41, the United States government paid his travel expenses. Under Amendment 41, Dean Getches cannot accept such an invitation because Amendment 41 provides no exception for reimbursement by the United States government, although it does contain an exception for reimbursement by state or local governments. Dean Getches has limited funds to pay for such trips himself. Testifying before Congress on such matters is important both personally and professionally to faculty members. Invitations to provide testimony raises the faculty member's profile both academically, and in private practice. A faculty member who is well-known in an academic field is more likely to gain private clients in that area. Conversely, high-profile private-practice clients in a particular area may raise the faculty member's stature in that area. Amendment 41 will inhibit the ability of the law school to attract good faculty in the future because of this impact. (David Getches)

27. Because Section 3(2) of Amendment 41 prohibits "negotiations of future employment" while employed by the state, a faculty member cannot be retained by any client who is newly acquired after passage of the Amendment. (David Getches)

28. The impact of Amendment 41 extends even further than full-time faculty members. The provisions of the Amendment also extend to family members of faculty members and to independent contractors. The latter group includes adjunct faculty to the

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<sup>9</sup> David Getches is the Dean of the University of Colorado School of Law. Getches' particular areas of academic interest mirror his personal areas of interest, including the environment, Indian law, and water rights.

law school who may teach a single course every two years. In addition, students who work on a part-time basis at the law school are impacted by the gift ban and prohibition on negotiating future employment contained in Amendment 41. (David Getches)

29. Faculty members at both the University of Colorado and Metropolitan State College receive both solicited and unsolicited examination copies of instructional materials from publishers. This allows the faculty to review books in order to decide which texts to require for a given course. Under Amendment 41, a faculty member cannot accept these copies, because of the \$50 gift limitation. Neither institution has an adequate budget to buy multiple books for this purpose. (David Getches; Patricia Yarrow<sup>10</sup>)

30. Dean Getches and other faculty members sometimes sit on the boards of non-profit groups. Dean Getches sits on the boards of several such organizations, based upon his personal beliefs of the importance of these organizations. Participation on these boards allows the faculty to help shape the policies of these organizations. In turn, these organizations have influence on the laws, regulations, and policies of Colorado and the United States. Membership on such a board provides far more influence than an individual might have on their own. Unless the non-profit receives less than 5% from for-profits (a rare event), the non-profit can neither reimburse a member for board service nor reimburse for out-of-pocket expenses. By way of example, in April 2007, Dean Getches gave notice to the Defenders of Wildlife that, because of Amendment 41, he may have to resign from its Board. Given the limited salaries academics make, Amendment 41 is a significant disincentive to sitting on such boards.

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<sup>10</sup> Patricia Yarrow works for Metro State College as a Program Assistant in the Art Department.

31. William Becker is the president of Adams County Economic Development (“ACED”), a job he has had for six years. ACED’s mission is the attraction and retention of primary employers who put tax dollars back into the government. ACED is a I.R.S. § 501(c)(6) public/private nonprofit partnership. ACED has ten government members (Adams County and the nine cities therein) and about 115 private members. The public and private members each contribute about half of its funds. ACED has six employees who analyze information, including county demographics and trends, business surveys, and other data. (William Becker<sup>11</sup>)

32. ACED has had an unwritten contract with Adams County for over two decades. Under this contract, ACED has negotiated incentives with existing and prospective primary source employers. Amendment 41 contains no express definition of “independent contractor”, and accordingly, ACED is unsure whether this unwritten contract makes it an “independent contractor” subject to Amendment 41.

33. Education of government officials or employees by ACED may involve the expenditure of money to gather information, draft reports, create printed materials, and offer meals, and/or pay for travel expenses. Amendment 41 would limit or eliminate the ability of ACED to provide education and information by way of offering the information during fact-gathering trips. These trips include a bus trip regarding the proposed Northwest Parkway, a trip to Canada sponsored by an oil company to view cutting edge technology, and a trip to Dallas/Ft. Worth to see the new Alliance transportation hub.

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<sup>11</sup> William Becker is the president of Adams County Economic Development (“ACED”), a job he has had for six years.

34. Amendment 41 also reaches beyond legislators and other government employees acting in their official capacities, into their personal, family lives. By way of example, Norma Anderson's daughter-in-law is the Jefferson County Clerk and Recorder. She is an elected county official and therefore governed by Amendment 41. Ms. Anderson is unable to spend more than \$50.00 per calendar year on each of her two grandchildren, her son, and her daughter-in-law except on "special occasions" under the provisions of the Amendment. Since the passage of Amendment 41, Anderson has hesitated to give gifts to her family members. (Norma Anderson)

35. Amendment 41 has also impacted lower level government employees. These include members of the University of Colorado Health Sciences Police Department. This is a small Department, with twenty-eight officers and thirty-two support staff. The members of the Department treat one another like "family". (Douglas Abraham<sup>12</sup>)

36. University of Colorado employees were advised that, as "government employees", they were impacted by Amendment 41. They learned of this by way of a letter sent to employees by President Hank Brown. (Douglas Abraham; Exh. 40)

37. After receiving this letter, Chief Abraham conferred with the Office of University Counsel about the effect of the Amendment on the police officers and staff. Chief Abraham provided particularly compelling testimony about the broad reach of Amendment 41 when he gave the example of one of his officers losing a son to suicide. Chief Abraham raised funds through voluntary contributions from his employees to assist with funeral expenses, but Amendment 41 limited the contributions to \$50 per person.

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<sup>12</sup> Douglas Abraham is Captain of the University of Colorado Health Sciences Center Police Department.

(Douglas Abraham; Exh. 43) Chief Abraham provided another example of the impact of Amendment 41 when he related that officers and staff who wished to donate portions of their vacation time as sick leave for a fellow officer who had been injured in an accident. Before Amendment 41, donation of vacation time was permissible under both Colorado statutes and University Regulations, and there was no \$50 limit placed on the value of the donated time. Amendment 41 changed that dramatically. (Douglas Abraham)

38. Because of the high ethical standards placed on law enforcement officials, the mere filing of a complaint against a law enforcement official under Amendment 41 would have a devastating effect on Chief Abraham's career, most likely leading to the loss of his position, and great difficulty in obtaining another position in law enforcement. (Douglas Abraham)

39. Amendment 41 has also directly impacted people in government service who have family members who are receiving, or who will potentially receive, scholarships or other financial aid to attend college. Virginia Buczek served on the Town of Firestone Town Board from 1993–1998 and as an unpaid, appointed planning commissioner for the Town of Firestone from 1992–2006, with an eighteen-month hiatus. In January 2007, prior to the first commission meeting of the year, Ms. Buczek resigned her position on the Planning Commission, upon the advice of the Firestone town attorney. He advised her to resign because she was a “covered person” under Amendment 41, because she was an appointed local official under section 2(3) of Amendment 41, and her children are scholarship recipients. Whether the attorney’s advice to her was correct or not, Ms. Buczek was faced with the Hobson’s choice of either engaging in public service, or allowing her children to receive financial aid. While Ms. Buczek would have preferred to remain a planning commissioner, she did not wish to jeopardize her

children's applications for, and receipt of, scholarships. In her case, both of her daughters attend the Colorado School of Mines on merit-based scholarships, the value of which exceeds \$35,000.00 per year. These scholarships do not require any future consideration or action on the part of the students and are therefore not exempt from the gift ban provisions of the Amendment. In addition, Ms. Buczak's son, a recent high school graduate, has received a scholarship to attend the preparatory school for the Military Academy at West Point. Ms. Buczak's ability to participate in her local government was directly chilled because of her desire not to penalize her children for her involvement in community service. (Virginia Buczak)

40. Marcia Ivarson is a Water Quality Technician-Storm Water for Douglas County and is subject to Amendment 41. Ms. Ivarson is a single mother of a seventeen year old girl. Her daughter has been accepted to Johnson and Wales University to study culinary arts. The \$20,000 annual tuition is too high for Ms. Ivarson to pay without assistance. Ms. Ivarson's daughter has been offered a scholarship from the school but she has not accepted it yet because Ms. Ivarson is unsure whether Amendment 41 allows her to accept the money. (Marcia Ivarson)

41. Patricia Yarrow works for Metro State College as a Program Assistant in the Art Department. Her duties include assisting with part-time faculty contracts, website maintenance, class schedule rotation, EEOC paperwork, addressing faculty complaints, advising students, and hiring work study students for the department. Ms. Yarrow received a letter from the Governor of the State of Colorado and the Attorney General, urging employees not to leave their positions because of concerns over Amendment 41. (Patricia Yarrow; Exh. 29)

42. Ms. Yarrow is considering early retirement to avoid potential problems that Amendment 41 may present for her and her partner. She is concerned that she and her partner would not be allowed to inherit from one another, as they do not come within the exceptions noted in the Amendment. (Patricia Yarrow)

43. The uncertainty caused by the imprecise wording of the Amendment was underscored by several Exhibits received during the hearing. Exhibits 10 and 11 are correspondence between Hank Brown, President of the University of Colorado and the State of Colorado, Jason Dunn, Deputy Attorney General. The Attorney General noted in Exhibit 11:

[S]ignificant portions of [Amendment 41] are unclear and, in fact, internally inconsistent, making concrete legal interpretations difficult. Moreover, it appears that portions of the measure, while unambiguous, are not consistent with the intent of the drafters of the measure or, more importantly, even the voters.

Exhibit 11 goes on to state that faculty members cannot accept academic awards or prizes of over \$50, including the Nobel Prize, that the children of government workers may not receive scholarships based on past performance, and that family members of a government worker may not accept gifts from foundations connected to severe illnesses (such as the Make a Wish Foundation) or disaster relief (such as the Red Cross). Exhibit 11 also references the “vague” and “poorly drafted” language that makes it “very difficult” to define a “special occasion” that would allow even a family member to give a gift of over \$50.

Exhibit 12 is a message from the Attorney General and the Governor to all employees of the State of Colorado. Exhibit 40 is a printout of the web page from the University of Colorado, Office of the President with a message to the University employees regarding Amendment 41. These four Exhibits exemplify the confusion and

uncertainty surrounding Amendment 41, and the likelihood that the concerns expressed by many of the Plaintiffs herein are not speculative.

44. Email communications among the proponents of Amendment 41 similarly show confusion and uncertainty about the impact of the Amendment. (*See generally*, Exhs. 49, 50, 51, 52, 53, 54, 55, 56, 60, 63, 65, 67 and 70)

### **CONSTITUTIONAL STANDARDS**

When reviewing the constitutionality of voter-initiated amendments to the state constitution under the federal constitution, this Court must apply the same standards that it uses to assess the constitutionality of state statutes. *See Morrissey v. State*, 951 P.2d 911 (Colo. 1998); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994). The Court must consider every part of the subject matter under consideration and construe the amendment as a whole. *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004). Each sentence and clause within a constitutional provision is presumed to have meaning. *In re Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 538 (Colo. 1996). The Court will give effect to each word. *City of Aurora v. Acosta*, 892 P.2d 261, 267 (Colo. 1995).

Words in constitutional provisions must be given their ordinary and plain meaning. *Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005). Constitutional provisions will be declared and enforced as written if the language of the provision is clear and unambiguous. *People v. Rodriguez*, 112 P.3d 693, 696 (Colo. 2005). The Government here concedes, and I find, that Amendment 41 is ambiguous.

If Amendment 41 is found to interfere with the free discussion of governmental affairs and chills core political speech, its provisions are subject to strict scrutiny. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Infringements of the right to associate for

expressive purposes “may be justified by regulations adopted to serve compelling state interest, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Where communication, association and participation in the political process are the essence of self-government, and free speech and free association are fundamental rights, Amendment 41’s restrictions on speech and association must be narrowly tailored to serve a compelling governmental interest. *Buckley v. Valeo*, 414 U.S. 1, 25 (1976).

The Court will not declare an amendment unconstitutional unless the conflict between the amendment and the United States Constitution is clear and unmistakable. *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004). The First Amendment’s guarantee of free speech protects the right to speak as well as the right to receive information and ideas. *Kleindienst v. Mandel*, 408 U.S. 753, 760-62 (1972); *Cole v. State*, 673 P.2d 345, 350 (Colo. 1984). The right of the people to petition their government for redress of grievances and the protection of freedom of association safeguards a citizen’s exercise of their right to free speech. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000).

Public employees are not entitled to the extent of First Amendment protection that is afforded to private citizens. *Broadrick v. Oklahoma*, 413 U.S. 601, 616–17 (1973). The government must justify restrictions that impose a “significant burden on expressive activity” of public employees (including lawmakers) and that chill potential speech by showing that “the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression’s ‘necessary impact on the actual operation’ of government.” *United*

*States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995); *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983). The same balancing test that applies to a public employee's rights to freedom of speech and association applies to a public employee's right to petition the government. *Kemp v. State Bd of Agric.*, 803 P.2d 498, 505 (Colo. 1990).

A law will be struck down as overbroad if "it does not aim specifically at evils within the allowable area of [governmental] control . . . but sweeps within its ambit other activities that constitute an exercise of freedom of speech." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). An enactment is vague "if persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Zwickler v. Koota*, 389 U.S. 241, 249 (1967). The First Amendment requires that a statute be specific "so individuals may assess the burden on their rights to free speech and free association." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 756 (Colo. 2000). Only a "reasonable degree of clarity" by the government permits meaningful judicial review, and allows individuals to conform their conduct to the requirements of the law. See, *Roberts, supra.* at 629; *Board of Educ. of Jefferson County School Dist. R-I v. Wilder*, 960 P.2d 695 (Colo. 1988). The doctrine of vagueness is based upon the rationale that individuals should not be chilled in their exercise of constitutional rights because they fear sanctions. *Comm'n on Independent Colleges and Universities v. New York Temporary State Comm'n on Regulation of Lobbying*, 534 F.Supp. 489, 502 (N.D.N.Y. 1982).

## **CONCLUSIONS OF LAW**

Lobbyists provide an indispensable element of the legislative process – communication of people's needs and wishes to their legislators. *See generally, Eastern R.R. Presidents Conference v. Noerr Freight, Inc.*, 365 U.S. 127 (1961). All persons have free speech rights, including corporations, associations, unions and individuals. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). These principles prohibit a legislature from dictating the subjects about which persons may speak, and the speakers who may address a public issue. *Id.* at 786. Restrictions may be placed on the time, place and manner of speech so long as they are content-neutral and serve a significant governmental interest. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

The importance of lobbyists in communicating information to legislators is apparent from the testimony presented. Legislators serve part-time, and the sessions are limited by law to 120 days. Term limits have also made it difficult for legislators to have an historical context in their work. Limited resources mean that legislators share offices, and have limited staff available that also must be shared. The non-partisan staff (Legislative Council and Office of Legislative Legal Services) cannot provide significant assistance because of the sheer amount of information required. Many legislators rely on volunteers to assist them in their duties. Opportunities for private discussions are rare. This gap in resources has been filled with lobbyists, who provide specific information about various proposals. This information includes the political context of any given proposal, including who supports or opposes a measure, and why.

Because legislators rely heavily on information obtained from lobbyists, the accuracy of the information provided is paramount. A lobbyist who provides information

that is inaccurate or incomplete does not keep the trust of legislators, and is therefore ineffective in their lobbying efforts. The mere fact that a lobbyist may be effective at persuasion does not provide a basis for restricting the lobbyist's speech unnecessarily.

*See, Bellotti, supra.* at 790.

In this day and age, information itself is a commodity that can be bought and sold. The process to gather information, the preparation of the information in a usable form, and the costs associated with disseminating information all have "value" and accordingly, information itself is subject to the gift ban and limitation provisions contained in Amendment 41.

The realities of the time demands placed upon legislators dictate that often they must meet with lobbyists during mealtimes. Even though Amendment 41 on its face does not prohibit a legislator from sharing a meal, or a cup of coffee, with a lobbyist, so long as the legislator pays his own way, it has the impact of making legislators reluctant to meet during those times because of the reasonable fear that it may appear as though they are violating Amendment 41. Regardless of whether a complaint is grounded in fact or not, the mere filing of the complaint has a great capacity to damage both the legislator and the lobbyist. Senate Bill 210 does nothing to curb this impact – so long as the original complaint contains an allegation that the conduct was a violation of the public trust, the subjects of the complaint must undergo the investigation and notoriety that comes from the filing of the complaint – by the time the complaint is determined to be without foundation, the damage has already occurred.

These restrictions on lobbyists have another consequence – they restrict organizations from hiring lobbyists to convey their views to lawmakers and government officials alike – something that is extremely valuable to both non-profit and for-profit

organizations. Often, the only time members of these organizations are able to meet with lawmakers are at annual fundraisers or meetings at mealtimes, which is the best time to ensure attendance by volunteers and members. Those organizations with professional lobbyists on staff are precluded from these types of events, and other organizations are limited by the \$50.00 gift ban, unless the lawmaker is also a speaker at the event. This significantly impacts the ability of these organizations to provide access to lawmakers to their members. Strikingly, many of these organizations are also the most likely targets of complaints under Amendment 41, because many of them are associated with controversial topics (for example, Focus on the Family or Planned Parenthood). Complaints that are intended to damage the reputation of a lawmaker or lobbyist or group constitute a real danger. Some of these organizations (such as Developmental Pathways) have long waiting lists for citizens to receive assistance, and the potential for a complaint to be filed by a citizen who is dissatisfied with the wait is also a real danger.

Finally, Amendment 41 restricts a lobbyist from socializing with anyone in their personal lives, if those people happen to hold office, are employed by the government, have contracts with the State of Colorado, or are family members of these individuals and groups. This interference violates the fundamental right of association that safeguards the ability to independently define one's identity. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984).

While Amendment 41 is content-neutral, it restricts political speech by prohibiting the dissemination of information by a professional lobbyist to a legislator or public employee. It prohibits the provision of information by professional lobbyists because it is a “thing of value of any kind or nature”, and to the degree that the information is “solicited” by the lawmaker or government employee. It also limits the

time and place for lobbyists to contact legislators, eliminating the potential of meetings over meals, during receptions or other events. These situations illustrate how Amendment 41 abridges political speech without leaving any alternative channels for communication of the information. *Bellotti, supra.* at 785, n. 21.

These difficulties are not limited to lobbyists. Legislators themselves enjoy a right under the First Amendment to receive or request information, so long as it does not violate their oath to support the Colorado and United States Constitutions. Colo. Const. art. V § 2(2); *Bond v Floyd*, 385 U.S. 116 (1966). Legislators also are free to discuss governmental affairs and to communicate with their constituents. *Bellotti, supra.* at 776-77.

The First Amendment does not only protect the giving of information, it protects the right to receive information. Amendment 41's impact chills both sides of this equation: I find that Amendment 41 chills the ability of lobbyists and legislators to communicate with one another, as well as the right of organizations to hire lobbyists to convey their views to legislators and government employees.

The Findings of Fact above are replete with how Amendment 41 chills a legislator's First Amendment rights. Amendment 41 interferes with a legislator's right to receive information from professional lobbyists about issues before the legislature; it restricts the right of certain legislators from negotiating to represent or work with potential clients in their non-legislative jobs when they are not in legislative session; it restricts the ability of legislators to attend fact-finding trips or conferences to gain information. It also impacts a government official's ability to receive important information to perform their duties by restricting an official's ability to attend board meetings that are held at mealtimes or which require travel, because the funding for such

events is limited. Furthermore, it restricts the ability of an official to attend a site visit, and thus to inform themselves of important information relating to proposed development projects. This is often the best way for an official to inform themselves before voting on any given proposal. *See, D'Alemberte v. Anderson*, 349 So.2d 164 (Fla. 1977).

The chilling effect of Amendment 41 reaches both high-ranking officials and employees of institutions of higher learning. Faculty members who are considered experts in their fields are unable to testify before Congress, because Amendment 41 does not provide an exception for reimbursement for such purposes by the federal government. Faculty and employees cannot receive travel reimbursement from non-profit organizations, and cannot receive more than \$50.00 annually for reimbursement for their service, or expenses, if they serve on a board for non-profit organizations receiving more than 5% of their funding from for-profit organizations – by far the rule for such organizations. This impacts the ability of these officials and employees to attend meetings to express ideas and develop professional contacts, and to leverage political influence by associating with others who hold their same interests. Such an interest is protected by the First Amendment. *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (the First Amendment protects “the right to associate with others in pursuit of political, social, economic, educational, religious and cultural ends.”) Faculty frequently receive texts for purposes of examining them to determine their suitability for use in the faculty member’s classes – Amendment 41 would prohibit this, since in most cases, the texts are worth more than the \$50.00 limit imposed.

Amendment 41 reaches to other employees of the government in unexpected ways. In particularly compelling testimony, Chief Abraham of the University of Colorado Health Sciences Center Police Department testified how, based upon advice

from University Counsel, his staff could not contribute more than \$50.00 for funeral expenses to assist a co-employee whose son had died. It also severely restricted the ability of his staff to donate unused sick leave for the benefit of a co-employee who had been injured in an accident. These restrictions violate the fundamental right of association that safeguards the ability to independently define one's identity and the fundamental right to intimate relationships with family and friends. *Roberts, supra.* at 618-19.

Amendment 41 reaches into the personal lives of those who are covered by its terms, again likely in unexpected ways. Both appointed officials and low-level governmental employees are forced to choose between continuing employment or service with the government, and their children's ability to receive financial aid. In some situations, employees are not allowed to spend more than \$50.00 on family members (such as grandchildren) who are dependents of an elected or appointed official. These restrictions violate those same fundamental rights of association as noted in the immediately preceding paragraph.

The ambiguity of the language of Amendment 41 has caused significant confusion. Legal advice given to the witnesses who testified at the hearing is based upon a conservative reading of Amendment 41, and reflects that the wording of the Amendment is vague at best. Confusion about who is an "independent contractor" within the meaning of the Amendment, about whether a given occasion is a "special occasion" within the meaning of the Amendment, or about whether information is "solicited" or "unsolicited" results in advice to simply refrain from engaging in conduct or speech that might be covered by the Amendment. For example, in Ms. Buczek's case, the only means available to her to avoid any impact of Amendment 41 was to resign her

government position. Amendment 41 has therefore curtailed those employees' ability to participate in their government and their expressive activities. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 469 (1995).

Defendant claims that Amendment 41 is justified by imposing limitations that avoid the appearance of impropriety in government. The purposes of the Amendment say as much in Section 1(c), stating that officials and employees "must avoid conduct that is in violation of the public trust or that creates a justifiable impression among members of the public that such trust is being violated." Even so, Defendant does not argue that the Amendment withstands judicial scrutiny as it was originally drafted – instead, Defendant argues that this Court should read into the Amendment a "nexus" between the sanction provision and the gift ban – in short, requesting that this Court read Amendment 41 in such a way that prohibits only those gifts that are given with the intent of improperly influencing decisions by government officials or employees. In support of this argument, Defendant argues that Senate Bill 210 has created this "nexus". Initially, it should be noted that Senate Bill 210 does not refer to the \$0 ban on professional lobbyists. Section 3(4). Moreover, the bill does not contain any direct link or "nexus" between what a person filing a complaint under Amendment 41 must allege under section 5(a) and the gift ban provisions. Section 9's prohibition against limiting or restricting the provisions of Amendment 41 is likely the reason for this. Regardless of the reason no such link was included by the legislature, Senate Bill 210 does not cure the problems associated with Amendment 41 as outlined above.

Defendant also urges this Court to supply this missing nexus. The United States Supreme Court condemned as "judicial legislation" an attempt by the courts to rewrite legislation that violates the First Amendment by rewriting the legislation to include a

“nexus” between a government employee’s job and the subject of the employee’s expression that might make the legislation constitutional:

Our obligation to avoid judicial legislation also persuades us to reject the Government’s second suggestion—that we modify the remedy by crafting a nexus requirement for the honoraria ban. We cannot be sure that our attempt to redraft the statute to limit its coverage to cases involving an undesirable nexus between the speaker’s official duties and either the subject matter of the speaker’s expression or the identity of the payor would correctly identify the nexus Congress would have adopted in a more limited honoraria ban. \* \* \* The process of drawing a proper nexus, even more than the defense of the statute’s application to senior employees, would likely raise independent constitutional concerns whose adjudication is unnecessary to decide this case. \* \* \*

*Nat’l Treas. Employees Union, supra.* at 479.

This Court will not engage in judicial legislation. Rather, the Amendment must survive or fail this judicial review based upon its originally drafted language, however unintended are the consequences of the imprecision of that language. Amendment 41, as originally drafted, does little to address the laudable purpose of avoiding government corruption beyond those statutes and laws that pre-existed Amendment 41. Rather, it creates far more confusion and uncertainty, which in turn has caused a significant chill on the exercise of the Plaintiffs’ rights to political expression, association and rights to petition their government.

The reach of Amendment 41 is well beyond the legitimate purpose of the preservation of citizen confidence in its government. It is over-inclusive in that it includes all state, county, statutory city and institution of higher education employees, and independent contractors of those levels of government, regardless of whether they have any ability to take official action. It includes family members of these employees and independent contractors, even though those family members have no authority to take official action.

Despite its application to faculty and employees of institutions of higher learning, it does not apply to their counter-parts in certain Special Districts, such as the Regional Transportation District, to the Regents of the University of Colorado, or to other school districts. Although Amendment 41 is aimed at protecting the public trust in governmental functions, it does not impact those same policy makers. There is no legitimate reason to exclude these policy makers from the reach of Amendment 41.

Finally, the Government argues that the gift ban contained in Amendment 41 “levels the playing field” – giving the same ability to wealthy interests to provide information to lawmakers and officials as that held by average citizens. This does not automatically follow from these gift ban provisions. In fact, the types of events that were held previous to passage of Amendment 41, such as legislative breakfasts or receptions, were sometimes the only times that average citizens could count on meeting their elected lawmakers during a legislative session. The expansive reach of Amendment 41 significantly limits the access both groups have to their elected officials. Even so, the government may not restrict the speech of one group in society in order to enhance the voice of a different group. *See, e.g., Bellotti, supra.* at 790-91.

Ultimately, I conclude that the Government has not articulated a sufficient justification for the challenged portions of Amendment 41. As tempting as it may be to rewrite the language of this Amendment in the hopes that the will of the electorate of the State of Colorado would be served, that function is not an appropriate function of the judicial branch – it is a task best left to the voters of the State of Colorado.

### **1. Likelihood of Prevailing on the Merits**

The Government did not present any testimony directly rebutting the testimony of the witnesses called by the Plaintiffs, and although the Government attempted to establish

that the Plaintiffs' rationale for testifying that their various rights were chilled were either speculative or unfounded, I find that the Plaintiffs' fears are well-founded, and that their speech, association and petitioning rights have been chilled. It is important to note that it is not the fear of sanction under Amendment 41 that is directly responsible for this chilling – rather it is the reasonable likelihood that a complaint would be filed simply based upon a potential appearance of a violation of Amendment 41.

Based on all of the above, I find that the Plaintiffs have demonstrated that sections 2 and 3 of Amendment 41 are overbroad and vague as applied to these Plaintiffs, and that Amendment 41 abridges their core political speech, as well as their rights to association and to petition the government. Therefore, I find that the Plaintiffs have a high likelihood of succeeding on the merits of their case.

## **2. Danger of Immediate and Irreparable Injury**

The loss of First Amendment rights, even for a minimal period of time, constitutes irreparable injury. *Free Speech Coal. v. Gonzales*, 406 F.Supp.2d 1196, 1210 (D.Colo. 2005). The Plaintiffs have established a likelihood of success on the merits of their claims under the First Amendment, and accordingly, they have also established the second *Rathke* factor. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6<sup>th</sup> Cir. 1998).

## **3. Inadequate Remedy at Law**

Plaintiffs are not seeking monetary damages in this case, only injunctive relief. Because section 9 of Amendment 41 prohibits the legislature from enacting any law that limits or restricts Amendment 41, the Plaintiffs have no other available remedy to redress their claimed violation of civil rights.

#### **4. Public Interest**

Over 62% of the electorate of this State voted in favor of Amendment 41. On its own, however, this does not provide a compelling or sufficient governmental purpose that justifies the abridgement of First Amendment rights. A thorough and detailed review of the language of Amendment 41 shows the largely unexpected and unintended consequences of the Amendment – and best serves the public interest in upholding the constitutional guarantees under the First Amendment, and ensuring that elected officials and governmental employees are well-informed, and able to freely communicate with all of their constituents.

#### **5. Balance of Equities**

Ample, existing legislation protects the public's interests in governmental ethics. Those pre-existing laws will now be enforced by the Ethics Commission envisioned by Amendment 41 – a Commission that is independent of the legislature, or other branches of government. An injunction of these two provisions will alleviate the chilling of core political speech without sacrificing the ability of the Ethics Commission to act where required under current ethics laws.

#### **6. Preservation of the Status Quo**

By issuing this injunction, the pre-existing regulations and laws cited above will continue in full force and effect, preserving the Status Quo.

### **CONCLUSION**

The passage of Amendment 41 reflected a desire of the electorate to provide a mechanism to independently ensure ethics in government. The laudable goals of the Amendment must be weighed against the preservation of the very core of our Democracy – something dependent upon a “well-informed electorate, not a citizenry legislatively

limited in its ability to discuss and debate" issues. *Buckley v. Valeo*, 424 U.S. 1, 49 (1976). There is little doubt that the reach of Amendment 41 went well beyond what was anticipated or intended, based upon what even the Government concedes to be the ambiguous language of the Amendment. For these reasons, I find that Plaintiffs have met their substantial burden justifying injunctive relief, and therefore issue a Preliminary Injunction enjoining the enforcement of the gift bans contained in sections 2 and 3 of Amendment 41.

DATED: Thursday, May 31, 2007.

BY THE COURT:



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Christina M. Habas  
District Court Judge