From: Kent Lund [mailto:lund@gkbaum.com]
Sent: Friday, August 07, 2009 3:06 PM
To: Leslie Carey
Cc: Bob Dalton
Subject: MSRB Notice 2009-35 (June 22, 2009)
Importance: High

August 7, 2009

Leslie Carey, Esq.
Associate General Counsel
MSRB
1900 Duke Street, Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2009-35 (June 22, 2009)

Dear Ms. Carey:

This supplements George K. Baum & Company's July 30, 2009, letter to you regarding this matter. As you requested during our telephone conversation earlier today, I will cause to be sent to you via overnight mail (for delivery to your office on Monday) a copy of this E mail and the attached court decision.

Enclosed is a copy of the Findings of Fact, Conclusions of Law and Order Entering Preliminary Injunction that was entered on July 17, 2009, by the District Court, City and County of Denver, CO, in Dallman et al. v. Ritter et al., Case No 09CV1188. In our view, this court decision is material and relevant to the MSRB as it considers proposed amendments to MSRB Rule G-37 as described in MSRB Notice 2009-35 (June 22, 2009).

Especially important, this court decision ruled emphatically (based on the facts and established legal precedent) that contributions to bond election campaigns are materially different, in an alleged "pay-to-play" and/or public corruption context, than contributions to issuer officials or candidates. On page 19 of its order, Judge Lemon of the Denver District Court stated: "Contributions to ballot measures are treated differently than contributions to candidates because **the 'risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue**'". (case citations omitted, emphasis added).

We believe that this court order rejects dispositively any arguments or concerns that contributions to bond ballot campaign committees may "have the potential to result in actual pay-to-play practices or the perception of pay-to-play practices" in the municipal market. Seethe "Request for Comment" section of MSRB Notice 2009-35.

Thanks for your consideration.

Sincerely,

Kent J. Lund
Executive Vice President, Chief Compliance Officer
George K. Baum & Company
lund@gkbaum.com

DISTRICT COURT, COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street, Room 256 Denver, Colorado 80202	
Plaintiffs: KERRIE DALLMAN; LAURENCE BOTNICK; SCHOOL DISTRICT 14 CLASSROOM TEACHERS ASSOCIATION POLITICAL ACTION COMMITTEE, a Colorado political committee; SCHOOL DISTRICT 14 CLASSROOM TEACHERS ASSOCIATION, a Colorado labor organization; AURORA FIRE FIGHTERS PROTECTIVE ASSOCIATION, a Colorado labor organization; and DOUGLAS COUNTY FEDERATION, a Colorado labor organization **Defendants:** WILLIAM RITTER, in his official capacity as the Governor of Colorado; and RICH L. GONZALES, in his official capacity as the Executive Director of Colorado's Department of Personnel and Administration	
Plaintiffs: DANIEL RITCHIE, an individual; PATRICK HAMILL, an individual; CHARLES V. BROWN, JR., an individual; THE CHILDREN'S HOSPITAL ASSOCIATION, a 501(c)(3) nonprofit organization; and THE COLORADO SEMINARY, a 501(c)(3) nonprofit organization, which owns and operates THE UNIVERSITY OF DENVER; and MATTHEW R. DALTON, an individual **Defendants:** BILL RITTER, as Governor of the State of Colorado; and RICH GONZALES, as Executive Director of the Colorado Department of Personnel & Administration	**COURT USE ONLY**
	Case No. 09CV1188 Div./Courtroom 8 Consolidated with: 09CV1200

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ENTERING PRELIMINARY INJUNCTION

This matter comes before the Court on the Dallman plaintiffs' and the Ritchie plaintiffs' motions for preliminary injunction. The motions have been briefed and were the subject of an evidentiary hearing and lengthy arguments before the Court on June 22 and 23, 2009. Being fully advised, the Court makes the following findings of fact and conclusions of law and issues a preliminary injunction enjoining the enforcement of Amendment 54, except for section 16, which requires public disclosure of sole source government contracts.

INTRODUCTION

In November 2008, Colorado voter passed by a narrow margin an initiated constitutional amendment known as Amendment 54, which became effective on December 31, 2008. Predicated on "a presumption of impropriety between contributions to any campaign and sole source government contracts," Colo. Const., art. XXVIII, sec. 15, Amendment 54 prohibits contributions to any candidate for any elected office of the state, the counties, municipalities and special districts and to any political party made by the holder of "sole source government contracts" valued in the aggregate at more than $100,000. The amendment also prohibits contributions to promote or influence a ballot issue election by a person who wants to qualify for a sole source government contract relating to the ballot issue. Sec. 17(2).

The amendment defines "sole source government contract" as "any government contract that does not use a public and competitive bidding process soliciting at least three bids" and includes within the definition public-sector collective bargaining agreements. The definition of "contract holder" includes certain investors in for-profit corporations; officers, directors, and trustees of both for-profit and nonprofit corporations; and labor organizations and their "political committees."

Both sets of plaintiffs claim that Amendment 54 violates their First Amendment rights to free speech and association. The Dallman plaintiffs claim in addition that the amendment violates their rights to equal protection and that Amendment 54 violates the Colorado constitutional single subject requirement and is being applied without regard to the $100,000 threshold as to collective bargaining agreements.

PROCEDURAL POSTURE OF THE CASE

The Ritchie plaintiffs filed a motion for preliminary injunction and supporting brief on February 19, 2009. The Dallman plaintiffs filed a motion for preliminary injunction and supporting brief on March 10, 2009. The state defendants filed briefs in opposition to both of the motions for preliminary injunction. The proponent of Amendment 54, Clean Government Colorado, filed an Amicus Response to Ritchie Motion for Preliminary Injunction. Both sets of plaintiffs filed reply briefs, and the Ritchie plaintiffs filed a supplemental reply brief.

The court inquired whether the materials submitted and the evidence and arguments heard at the hearing should be considered the trial on the merits. Counsel for the state defendants objected, stating that the defendants wanted at a later date to put on expert testimony about "capture theory." For that reason, the court considered only the motions for preliminary injunction.

SUMMARY OF AMENDMENT 54's PROVISIONS

Amendment 54 provides that

> contract holders shall contractually agree, for the duration of the contract and for two years thereafter, to cease making, causing to be made, or inducing by any means, a contribution, directly or indirectly, on behalf of the contract holder or on behalf of his or her immediate family member and for the benefit of any political party or for the benefit of any candidate for any elected office of the state or any of its political subdivisions. Sec. 15.

A "contract holder" is

> any non-government party to a sole source government contract, including persons that control ten percent or more shares or interest in that party; or that party's officers, directors or trustees; or in the case of collective bargaining agreements, the labor organization and any political committees created or controlled by the labor organization. Sec. 4.5.

An "immediate family member" includes "any spouse, child, spouse's child, son-in-law, daughter-in law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian, or domestic partner." Sec. 18.5.

A "[s]ole source government contract" is "any government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract." Sec. 14.4. The amendment applies to contracts between a contract holder and all government entities with a cumulative annual value of more than $100,000. *Id*. A sole source government contract "includes collective bargaining agreements with a labor organization representing employees" if the contract "confers an exclusive representative status to bind all employees to accept the terms and conditions of the contract." *Id.*

The amendment applies to

> the State of Colorado and its agencies or departments, as well as all political subdivisions within the state including counties, municipalities, school districts, special districts, and any public or quasi-public body that receives a majority of its funding from the taxpayers of the State of Colorado. Sec. 14.6.

Amendment 54 provides that any person who makes "any contribution intended to promote or influence the result of an election on a ballot issue shall not be qualified to enter into a sole source government contract relating to that particular ballot issue." Sec. (17(2).

Amendment 54 provides sanctions against candidates, campaign and issue committees, and political parties:

> [a]ny person who intentionally accepts contributions on behalf of a candidate committee, political committee, small donor committee, political party, or other entity, in violation of section 15 has engaged in corrupt misconduct and shall pay restitution to the general treasury of the contracting governmental entity to compensate the governmental entity for all costs and expenses associated with the breach, including costs and losses involved in securing a new contract if that becomes necessary. Sec. 17(1).

Elected or appointed officials may be removed from office and disqualified to hold "any office of honor, trust or profit in the state" for knowing violations of sections 15 and 17(2) of the amendment. Sec. 17(4).

The amendment sanctions contract holders by disqualifying any person who makes an improper ballot issue contribution from entering into a contract relating to the issue. Sec. 17(2). The amendment requires the parties to agree that "if a contract holder intentionally violates" sections 15 and 17(2), the "contractual damages" must include the contract holder's three-year disqualification from holding any sole source government contract "or public employment" with the state or "any of its political subdivisions." Sec. 17(3). To aid in its enforcement, Amendment 54 creates a state database that lists sole source government contracts and the parties to each contract. Sec. 16.

FINDINGS OF FACT

A. Based on testimony at the preliminary injunction hearing.

The court makes the following findings based on the testimony of Plaintiff Daniel Ritchie, Aurora City Council member Robert FitzGerald, and School District 14 Classroom Teachers' Association President, David Clark, and on the exhibits filed by the parties, including the affidavits and exhibits attached to pleadings, which were all stipulated into evidence.

1. Mr. Ritchie is the unpaid chief executive officer and chair of the board of trustees for the Denver Center for the Performing Arts ("DCPA"). He is a member of several other boards for large non-profits. The DCPA has six officers and a 27-member board of trustees who serve without any compensation. Board members are committed to what the DCPA does, make financial contributions to support the DCPA and are otherwise involved in the community. All of the board members have made campaign contributions in the past. One board member resigned after Amendment 54 became effective; the board member wanted to continue to make campaign contributions.

2. The DCPA has several types of sole source contracts with the City and County of Denver: they include leases for the use of the arts and humanities building, the theater complex, and the auditorium for touring Broadway plays; user agreements governing DCPA events; an agreement that exchanged land for the "free" use of 72 parking places owned by the City; a lease

of the first floor of the arts and humanities building; and an agreement for the DCPA to provide security services for the complex. The aggregate value of the contracts is more than $100,000. These contracts are not the product of a public bidding process. With the exception of one officer, DCPA's president, staff members of the DCPA negotiate the contracts, and neither Mr. Ritchie nor the board members are aware of the details of the contracts.

3. Since passage of Amendment 54, Mr. Ritchie regularly cautions the DCPA officers and members of the DCPA board that the DCPA could lose its contracts with Denver and be out of business if officers, board members or their immediate family members contribute, directly or indirectly, to any political campaigns. He advises them not to persuade friends to contribute, not to volunteer, not to put up yard signs and not to contribute to ballot measures. He has no ability, however, to control or police whether they or their extended family members make campaign contributions.

4. Mr. Ritchie was also the chancellor of the University of Denver for 16 years, beginning in 1989, and later served as chair of its board of trustees, all unpaid. At the time, neither Mr. Ritchie nor his board members were aware of the sole source contracts that members of the faculty in the graduate school of social work had with governmental entities to address welfare and child care. The contracts were not the product of a public bidding process.

5. Before Amendment 54 became effective, Mr. Ritchie made numerous campaign contributions to both Republicans and Democrats running for state-wide office, legislative seats, local office, and the Denver School Board, to political parties and political committees, and to campaigns for and against ballot measures. He contributed because he wanted to support good governance in Colorado, to allow candidates to have their ideas heard, and to respond to requests from friends. Mr. Ritchie has received campaign solicitations since Amendment 54 became effective, but he has made no contributions, except on the federal level, because of his status as a sole source contract holder by virtue of his nonprofit board service. He has never sought a sole source contract from anyone to whom he contributed.

6. Robert FitzGerald is an Aurora City Council member-at-large who is currently seeking re-election to and campaigning for to his nonpartisan position. Aurora has mail-in ballots that will be sent out in early October 2009. He and five others are competing for two at-large council seats. Mr. FitzGerald anticipates that he will need to raise about $50,000 in campaign contributions to be competitive. Aurora has a population of more than 300,000, and campaign contributions are needed to pay for cable TV time, yard signs, brochures and robo calls to get his message out. In his 2005 campaign, Mr. FitzGerald raised $29,000 from friends, family members, businesses and unions.

7. Amendment 54 has impaired Mr. FitzGerald's ability to raise funds. Several people who made contributions to Mr. FitzGerald's campaign in 2005 have told him that they cannot contribute this year because of Amendment 54. They are unsure of the scope of Amendment 54 and do not want to get into trouble. Mr. FitzGerald would like to accept contributions from political action committees ("PACs"), as he has in the past, but Amendment

54 prohibits teacher union PACs and firefighter union PACs from making contributions. Also, he needs volunteers to make calls and stand on street corners with signs, and he believes that Amendment 54 can be read to prohibit contributions of time by volunteers who are sole source contract holders.

8. Mr. FitzGerald regularly checks the list of sole source contracts published and maintained by the defendant director of the state department of personnel and Aurora's list of sole source contracts. The Aurora city attorney has told him not to rely on the completeness of Aurora's list. As of June 8, 2009, Mr. FitzGerald counted 229 individuals and 39 firms that had listed sole source contracts on the state's list; he does not believe that the list is complete, and it does not inform him of when a contract holder's aggregate contracts have exceeded $100,000 or the names of family members of a contract holder.

9. Mr. FitzGerald is serving as his own campaign treasurer. He did not want his friend, who was his campaign treasurer in 2005, to risk the sanctions for bookkeepers in Amendment 54. He is concerned about erroneous acceptance of a check forbidden by Amendment 54, including a "planted" check, because a lawsuit filed by any registered voter in the state could ruin his reputation. He would have to pay to defend himself, he could be removed from office, and a finding of "corrupt misconduct" could jeopardize, among other things, his license to practice law.

10. The Aurora city charter prohibits the mayor and council members from administering or interfering with city contracts. No one has ever asked him for assistance in obtaining a sole source contract. No Aurora council member or the mayor has the ability to award sole source contracts.

11. In his previous campaign for city council, FitzGerald took contributions from political committees, including at least one that is affiliated with a public employees union (police) in Aurora. Political committee contributions comprised 8-15% of his $29,000 campaign budget and were important to FitzGerald's ability to campaign and communicate effectively because of the number of candidates running, the relatively low profile of a city council race, and the fact that FitzGerald had been appointed to office and thus had not yet won an election. In the city council election in October/November, 2009, FitzGerald anticipates that five candidates will run for that office, and he would again need to accept such political committee contributions in order to be competitive.

12. FitzGerald is uncertain about the legality of a campaign contribution to his city council campaign if it comes from a small donor committee, such as JCEA PAC/SDC, and would likely not deposit it until he received additional clarity about the reach of Amendment 54. Given the reach of Amendment 54, he is also uncertain about contributions from individuals he does not know or who live outside of Aurora (including Plaintiff Kerrie Dallman who lives in Commerce City), and he would be reluctant to accept those contributions as well.

13. David Clark, president of School District 14 Classroom Teachers Association ("Classroom Teachers Association"), testified that the Association is a labor organization representing the certified employees of the district in collective bargaining with the district. In negotiating for employees, Classroom Teachers Association is particularly attentive to three issues: wages, benefits, and working conditions. The Collective Bargaining Agreement ("CBA") lists the members of the District and union negotiation teams; no member of the Board of Education sits on the team that negotiates the CBA. After it is negotiated, the CBA is presented to the Association for ratification. Upon a favorable vote by the Association, the Board of Education considers the CBA for ratification.

14. School District 14 Political Action Committee ("District 14 Political Committee") is the entity through which candidate contributions are made on behalf of Association members. It has a specific process for considering candidates for the Adams County School District 14 Board of Education ("Board of Education" or "School Board") for endorsement and financial support. Candidates generally file their petitions to be placed on the ballot by mid-August. The Political Committee's interview committee then sends out questionnaires to candidates and reviews the completed forms. The Committee interviews each candidate and makes recommendations to the Executive Board of the Classroom Teachers Association. The Executive Board considers these recommendations and then makes its own suggestions to Association Representatives. Association Representatives are individuals chosen to represent Classroom Teachers Association members in each school building. There are 25 Association Representatives that represent employee groups in 13 school buildings in District 14. This group decides whether to endorse and contribute to a school board candidate committee. Endorsed candidates may, but do not necessarily, receive contributions from the District 14 Political Committee. If the Association Representatives accept the recommended candidates and agree to fund one or more of them, checks would be solicited from individual Association members and placed in the bank account of the District 14 Political Committee. Checks for candidate contributions then would be written on that account.

15. Prior to the November 2005 election, Classroom Teachers Association endorsed two candidates running for Board of Education, a political subdivision of the state. Those candidates were Angela Kreutzer and Kevin Phillips. Based on a vote of the Association Representatives, District 14 Political Committee wrote checks for $1,000 to Kreutzer and $1,000 to Phillips from funds the Political Committee owned and controlled. This contribution was based upon the assessment that the endorsed candidates held significantly different positions from the non-endorsed candidates on two key issues: support of public education, as opposed to support of charter schools and education vouchers; and the right of employees to engage in a meaningful collective bargaining process.

16. The funds expended to candidates in 2005 were voluntarily contributed to the Political Committee by members of the School District 14 Classroom Teachers Association through individuals' checks that had been written directly to the Political Committee. District 14 Political Committee does not have a system for deducting contributions for the Committee, either directly from their paychecks or from member dues paid to the Classroom Teachers Association.

17. The most recent CBA was negotiated consistent with procedures specified in Article 4 of the CBA. Kreutzer still sat on the Board of Education when that CBA was negotiated. There is no evidence that District 14 Political Committee's candidate contributions affected negotiations of the CBA or that the public perceived they did so.

18. In the November 2007 election, District 14 Political Committee endorsed candidates for the Board of Education, but the Association Representatives decided not to make any contributions to any candidate for this office. Unlike the 2005 election, the distinction among all of the candidates was not so great as to merit a financial contribution to one candidate over any other candidate.

19. District 14 Political Committee has never made contributions to candidates for statewide or legislative office and does not plan to make any such contributions during the 2010 election cycle.

20. In the November, 2009 election, Classroom Teachers Association seeks to endorse, and District 14 Political Committee seeks to contribute to, candidates for the Board of Education. Based on candidates who are known to be considering seeking a position on the School Board, District 14 Political Committee anticipates choices among candidates that will be extremely clear on issues that are of importance to Association members, much like the 2005 election. Given the application of Amendment 54, District 14 Political Committee cannot collect funds from Classroom Teacher Association members and then use those funds to make contributions to School Board candidates.

21. District 14 Political Committee currently has about $39.15 in its bank account and would have to raise additional funds in a timely manner in order to make contributions to School Board candidates in 2009.

22. Certified employees, defined in Article 3 of the CBA, become members of Classroom Teachers Association by completing a form and paying the appropriate monthly dues ($57.60 for full-time teachers and half that amount for half-time teachers). Classroom Teachers Association has approximately 377 members out of approximately 450 certified employees who could qualify for Association membership.

23. Classroom Teachers Association contributed to an issue committee, "Kids First," to affect the outcome of local ballot issues that relate to the Association. Specifically, Classroom Teachers Association supports ballot issues that would fund improvements in the District's schools where the members of the Association work. In 2006, Classroom Teachers Association expended $1,295.00 for campaign banners that advocated the passage of a local bond issue to: build a new high school to replace an aging one; update all science classrooms in the District; provide classrooms that would accommodate full-day kindergarten; and install air conditioning to provide a better learning and working environment given the mid-August starting date of the school year. The banners included Classroom Teachers Association's name and a slogan supporting the bond issue campaign. After members of the Classroom Teachers Association marched with the banners in a parade in Commerce City, the Association donated them to Kids

First. Kids First used the banners at subsequent campaign events to promote awareness and support of the ballot issue. That committee reported the banners as an in-kind contribution received from Classroom Teachers Association. The funds expended on the banners were taken from dues paid by members of the Association, after a vote of the Association Representatives.

24. There is no evidence that the Classroom Teachers Association's contribution to Kids First affected the negotiations of the CBA or that the public perceived that it did.

25. Classroom Teachers Association seeks to contribute to committees supporting such ballot issues in the future and anticipates that there will be an upcoming election to increase the district mill levy to provide additional operating revenue for the District. Given the application of Amendment 54, the Association will be prohibited from doing so.

26. The CBA between Classroom Teachers Association and School District 14 specifically addresses a number of issues relating to teacher working conditions that could be affected by future statewide ballot measures, including but not limited to: the basic equipment provided for a teacher in each classroom; leave policies for teachers who serve in the military or in the General Assembly; remedies for teachers assaulted on school grounds; and the ability of the Association to use facilities, mailboxes, electronic equipment, and bulletin boards with the schools to post Association-related information. If such ballot issues were to be placed on the statewide ballot, the Association would want to contribute in order to promote or influence the result of these elections. Given the application of Amendment 54, the Association will be prohibited from doing so.

B. Stipulated facts.

Most of the facts are the subject of formal, signed documents entitled “Stipulated Facts” (for the Ritchie case), which include summaries of some of the exhibits, and “Stipulation of Facts Regarding Dallman Claims.” The stipulations of facts were presented to the court at the beginning of the hearing. The parties stipulated to the following pertinent facts as true.

1. Plaintiff Matthew Dalton is a director and shareholder with the law firm of Grimshaw & Harring, P.C. Grimshaw & Harring has multiple sole source government contracts to provide legal services for numerous political subdivisions and special districts. The aggregate value of the contracts is more than $100,000. The firm assists in organizing special districts that shoulder the burden of financing, and subsequently constructing and maintaining, necessary infrastructure for property being developed or that is underserved. After the development is complete, the firm usually continues to represent the district. Grimshaw & Harring has complied with the disclosure requirements of Amendment 54.

2. In 1981, the General Assembly passed the Special District Act. Special districts are local governments that may provide services to promote the health, safety, prosperity, security and general welfare of the residents of the district. Special districts have the authority to issue debt and to levy and collect property taxes. Metropolitan districts are a type of special

district. They provide two or more services, including fire protection, mosquito control, parks and recreation, safety protection, sanitation, solid waste disposal facilities or collection and disposal of solid waste, street improvement, television relay and translation, transportation and water services. Metropolitan districts are often formed for the purpose of providing infrastructure in order to promote development. The funding for the infrastructure comes from issuance of general obligation bonds.

3. The Department of Local Affairs website lists 78 types of local governments that include 62 counties, 269 cities and towns, 178 school districts and more than 3000 active special districts of various types.

4. Elections are held to approve the creation of special districts and to elect board of directors' members for the district.

5. Except for the large special districts, most special districts operate without staff. Typically, all of the contracts entered into by special districts are sole source government contracts as defined by Amendment 54.

6. Mr. Dalton made contributions to candidates for elective office before the effective date of Amendment 54, but he has never made a contribution to a special district board director and has never sought to obtain a sole source contract from anyone to whom he has made a political contribution. He believes that the firm's sole source government contracts prevent him and his family members from making any campaign contributions within the state.

7. Plaintiff Charles V. Brown, Jr., is a member of Denver's City Council. He also serves as a board member of Visit Denver, a nonprofit trade association that is responsible for marketing Denver as a convention and leisure destination. The Visit Denver bylaws reserve two seats on the Visit Denver board for Denver City Council members; the president of the City Council appoints the members.

8. Visit Denver has a sole source government contract with Denver that commenced on January 1, 2004, and is subject to options for additional one-year periods through December 13, 2013. The annual contract is in excess of $100,000.

9. As a board member of Visit Denver, Mr. Brown believes that he is subject to Amendment 54's ban on campaign contributions. He made campaign contributions to candidates and to campaigns for ballot issues before the effective date of Amendment 54. Given the ban on campaign contributions, Mr. Brown believes that he cannot make direct or indirect contributions to candidates for elective office, including contributions to his own campaign for re-election in May 2011, and that he will not be able to request campaign contributions from his family members. He does not understand the scope of "indirect" contributions. He has never assisted anyone, including Visit Denver, in obtaining a sole source contract. The state agreed that Amendment 54 prohibits Mr. Brown and his family members from making contributions to his campaign; the state conceded that this application of Amendment 54 is unconstitutional. *See*

Buckley v. Valeo, 424 U.S. 1, 53 (1976) (provisions limiting expenditures by candidate on his or her own behalf and from the candidate's immediate family violated candidate's rights to freedom of speech).

10. Plaintiff Patrick Hamill is the chair and chief executive officer of Oakwood Homes, a private contractor for construction projects in Denver and in Green Valley Ranch, a planned community that Mr. Hamill developed. Mr. Hamill is also the president and CEO of HC Development, the developer for Oakwood Homes. Oakwood Homes and HC Development have sole source contracts with a number of metropolitan districts that they helped to create, and with the Denver Public Schools, aggregating in excess of $100,000 annually. The Foundation for Educational Excellence, a nonprofit corporation that Mr. Hamill co-founded, has received over $3.0 million from Oakwood Homes to improve the public schools, particularly in Green Valley Ranch.

11. Among the nonprofit and special district boards of which Mr. Hamill is a member are the University of Denver and the Boys and Girls Club of Metro Denver. Both have sole source government contracts in excess of $100,000 annually.

12. Mr. Hamill believes that he is a sole source government contract holder because he is an officer of his for-profit corporations and a board member of two non-profit corporations. Before the effective date of Amendment 54, Mr. Hamill made contributions to candidates for state-wide elective office, to legislative races, to candidates in local elections, to political parties and to influence the result of ballot election issues. He believes that Amendment 54 prevents him from making contributions to campaigns of candidates for elective office and to political parties. He also believes that "indirect" contributions banned by the amendment include volunteering for a campaign, serving on a finance committee and helping raise funds for a candidate. Mr. Hamill has never made a contribution in order to obtain a government contract.

13. Plaintiff Children's Hospital is a 501(c)(3) nonprofit corporation. It is considered one of the best children's hospitals in the country. The hospital has 3,000 full-time employees, an active medical staff of more than 1,000, and more than 2,000 volunteers. Its employees and volunteers often support ballot issues that relate to children's health and welfare.

14. Children's Hospital is a sole source government contract holder because it has many Medicaid contracts, numerous contracts to provide nursing services and occupational therapy to various school districts and other political subdivisions, and contracts with the City and County of Denver for health care services. The aggregate amount of the contracts is more than $100,000 per year.

15. Children's Hospital has 43 board members who are involved in the community and donate substantial sums of money to the hospital; many of the board members have a child who was treated at the hospital. Some of the board members are required to serve because of an affiliation with the University of Colorado Medical Center. The board members are not involved in the negotiations for single source contracts, and they are not aware of the individual contracts.

The hospital's officers and board members believe that they are sole source government contract holders, subject to the ban on campaign contributions.

16. Children's Hospital believes that its board members are precluded from making contributions to candidates for elective office, to political parties and to influence the result of ballot issue elections relating to children's health and welfare. All of the hospital's board members contributed to candidates for elective office before the effective date of Amendment 54. Because they do not want to jeopardize the contracts with the state, Denver and school districts, board members are unlikely to make any campaign contributions.

17. Plaintiff University of Denver ("DU") is owned by a 501(c)(3) nonprofit organization. DU has sole source government contracts with the state and various political subdivisions, including school districts, Denver and Jefferson County, in the aggregate exceeding $100,000 per year. The contracts primarily are for early childhood education, mental health services and instruction program materials, and they relate to the expertise of faculty members. None of the sole source contracts were presented to the board for consideration. None of the board members assist DU in obtaining or negotiating sole source contracts.

18. DU has 28 members of its board of trustees. DU believes that its board members, as sole source government contract holders, are precluded from making contributions to the campaigns of candidates for elected office and to political parties. All of its board members contributed to political candidates before the effective date of Amendment 54. DU's chancellor believes that Amendment 54 will make it more difficult to attract and retain community leaders to serve on its board.

19. Tamara Door is the president and chief executive officer of the Downtown Denver Partnership, Inc. ("DDP"). DDP is a nonprofit business organization that plans, manages and develops areas of downtown Denver. DDP has a management agreement with the Business Improvement District ("BID") for DDP to manage BID's programs. BID is a quasi-municipal corporation and political subdivision of the state funded by private commercial property owners. The mayor of Denver appoints the members of BID's board of directors. The management agreement is a sole source government contract in excess of $100,000.

20. Ms. Door believes that DDP, its affiliate organizations and their respective board members are all sole source government contract holders under Amendment 54. The board members believe that they are precluded from making direct or indirect contributions to the campaign of candidates for elective office, to political parties and to promote or oppose ballot issues. One of the board members resigned because of Amendment 54.

21. DDP has worked for several years as a public/private partnership with Denver and the BID to create a special improvement district for improvements on 14th Street in downtown Denver, known as the 14th Street Initiative. An election for approval of the special improvement district is set for the fall of 2009. Because DDP has contributed time and money to planning for

the election, DDP may be prohibited from entering into a contract with BID to manage and/or provide services for the 14th Street Special District.

22. Patricia Waak, the chair of the Colorado Democratic Party, and Dick Wadhams, the chair of the Colorado Republican Party, have learned from regular communications with elected leaders, potential and actual candidates for elective office, political fundraisers and political donors that Amendment 54 is making it more difficult to raise money to pay for party needs and for candidates' campaigns to promote their political message. The candidates and potential donors are confused as to the reach of Amendment 54 and are uncertain about whether they can make, and accept, political contributions to favored candidates or causes.

23. Ms. Waak and Mr. Wadhams have never assisted or promised to assist a contributor with securing a sole source government contract, and have never had communications with any government official to influence the award of a sole source government contract to a contributor.

24. A letter from Cary Kennedy, state treasurer, and a memo from the director of the state House Majority Project to Democratic members, Ritchie exs. 144 and 145, are examples of warnings that candidates for election are giving to potential donors about Amendment 54.

25. In Colorado, public-sector unions gain recognition as the exclusive representative of a unit of employees through the following process. First, the union must demonstrate that a majority of employees in the bargaining unit have chosen the union to be their representative for the purpose of collective bargaining. This demonstration of employee support is usually accomplished by holding an election. The employer may then recognize and bargain with the union concerning the appropriate subjects of collective bargaining. A public-sector employer's recognition of a union for the purposes of collective bargaining may be formalized by: (a) a CBA; (b) a provision of law, such as a municipal charter; (c) a resolution adopted by a governing body, such as a fire protection district board of directors; or (d) a side-agreement with an authorized public official, such as a city manager. When a union is recognized as the exclusive representative of a unit of employees, such recognition may be withdrawn upon a showing by the employees that a majority of individuals in the unit no longer desire to have the union act as their exclusive representative.

26. Plaintiff Kerrie Dallman is a taxpayer and a registered elector, residing in the state of Colorado. Dallman is President of the JCEA and serves on the JCEA Political Action Committee/Small Donor Committee. JCEA-PAC/SDC was created by JCEA, is registered with the Secretary of State, and operates as a small donor committee under Colorado law. The JCEA-PAC/SDC expends funds for political action that have been collected voluntarily from members, and it contributes to candidates even if their districts are not located in Jefferson County. Dallman has contributed directly to one or more candidates for public office in Colorado, including Jane Goff, a candidate for the State Board of Education, and desires to make contributions to candidates for public office in Colorado in the future.

27. Plaintiff District 14 Political Committee is a political committee formed under Colorado law and created by the Classroom Teachers Association. District 14 Political Committee was formed in 1997. It does not receive $100,000 or more of government funds.

28. Classroom Teacher Association's members alone decide that the Association is their representative for purposes of contract negotiations with School District 14; the School District has no voice in determining the identity of the members' representative. The District recognized the Classroom Teachers Association as the teachers' bargaining unit after an election was conducted in the 1970s among certain professional staff in the District. The current CBA recognizes the Classroom Teachers Association as the exclusive representative of district certified employees.

29. Any tentative CBA must be accepted by a vote of the Association membership and by the Board of Education in order to become effective. Classroom Teachers' Association executed a CBA with School District 14 for the period July 1, 2008 through June 30, 2011. Classroom Teachers Association has not received $100,000.

30. Plaintiff Aurora Fire Fighters Protective Association ("AFFPA"), doing business as Local 1290 of the International Association of Fire Fighters, is a labor organization. It is a non-governmental party to a CBA with the City of Aurora, which is a "municipality" and thus a political subdivision of the state for purposes of Amendment 54. The CBA recognizes Local 1290 as the exclusive bargaining agent for the covered employees.

31. Since the late 1960s, the Aurora city charter has provided for the certification of an employee organization "as the sole and exclusive agent for all members of the bargaining unit" of fire fighters. AFFPA has been so certified for that period of time and remains so today.

32. A majority of AFFPA members voted to have AFFPA, through Local 1290, act in this fashion. At no time has the City of Aurora chosen the fire fighters' bargaining agent. The City of Aurora and Local 1290 executed CBAs for the periods January 1, 2007 through December 31, 2008 and January 1, 2009 through December 31, 2010. AFFPA has never received $100,000 or more of government funds.

33. In 2006, AFFPA contributed funds from dues collected from its members to the Committee to Save Aurora, which was organized as an issue committee to oppose certain changes to the Aurora civil service system that would have affected the way in which AFFPA could represent its members under a CBA. Specifically, the measures would have altered the hiring, promotions, and disciplinary review processes under Aurora law. Two of these measures were adopted, and two of them were defeated. In 2004, AFFPA contributed funds from dues collected from its members to an issue committee that supported a proposed ballot issue to impose a public safety tax. That tax would have added funding to Aurora's police and fire departments for purposes of improving the delivery of public safety services in the city. That ballot issue was defeated. In 2005, AFFPA contributed $10,000 of its funds to a statewide issue committee that supported Referenda C & D.

34. AFFPA seeks to make future contributions to issue committees that promote or seek to influence the result of ballot issue elections that relate to the interests of AFFPA. Because of Amendment 54, AFFPA believes it can no longer contribute to any issue committee regarding ballot issues that relate to its interests, including ballot issues like the local measures considered by voters in 2004 and the statewide measure considered by voters in 2005.

35. AFFPA has contributed to candidates for municipal office from its dues collections, as it is permitted to do by local ordinance and charter. Decisions about whom to endorse and fund are based upon candidates' positions on the adequacy of funding of the fire department, the funding of key infrastructure that affects fire department operations, and other public safety issues. AFFPA believes it will be unable to make such contributions in the future, given the provisions of Amendment 54.

36. AFFPA does not have a political committee or a small donor committee, although it was planning prior to the passage of Amendment 54 to form a political committee. After the enactment of Amendment 54, however, AFFPA terminated these plans because it believed that it was prohibited by Amendment 54 from using a political committee to make political contributions.

37. Plaintiff Douglas County Federation ("DCF") is a labor organization and operates as Local Union 2265, affiliated with the American Federation of Teachers. DCF is a non-governmental party to two CBAs with the Douglas County School District that establish the terms and conditions of employment for the District's teachers, as well as its classified employees (non-teachers, including educational assistants, custodians, and clerical employees but excluding bus drivers). These two CBAs are independently negotiated and function separately. In all other regards, the approximately 3,300 members (2,500 teachers and 800 classified employees) combine their efforts, and the two employee groups act jointly through DCF. Each DCF member pays dues to DCF. The CBAs recognize DCF as the exclusive bargaining agent for all covered employees.

38. The certified teachers formed a bargaining unit on March 1, 1978. The U.S. Department of Labor conducted an election at the request of the School District in which the teachers selected, by majority vote, DCF as their exclusive bargaining agent. At no time has the District chosen the teachers' bargaining agent. The classified employees formed a second bargaining unit in 2005. At that time, the employees selected, by majority vote, DCF as their exclusive bargaining agent. At no time has the District chosen the classified employees' bargaining agent.

39. DCF executed CBAs with the School District for the period 2006-2009 (classified employees) and 2008-2011 (certified teachers).

40. DCF has made contributions to attempt to affect the outcome of local ballot issues and desires to do so in the future. For example, in 2008, DCF contributed $1,000 to Citizens 4 DC Schools, a ballot issue committee that was formed for the purpose of supporting measures such as the proposed 2008 mill levy increase to fund operational expenses (Measure 3A) and the

2008 bond issue for new capital construction in facilities in which DCF employees work (Measure 3B). The voters rejected both ballot measures. DCF also contributed $10,000 to Citizens 4 DC Schools in December, 2008, to support its advocacy of measures like 3A and 3B. Because of Amendment 54, DCF can no longer contribute to Citizens 4 DC Schools or any other issue committee that promotes or seeks to influence the outcome of ballot issues that relate to it, including ballot issues like Measure 3A and Measure 3B.

41. In addition to its collective bargaining agreement with the Douglas County School District, DCF has an independent agreement with the District whereby DCF is paid by the District to develop and provide teacher training programs. This contract has been in place for several years and has been renewed annually.

42. On January 1, 2009, the Colorado Department of Personnel and Administration issued a Technical Guidance to assist in the implementation of Amendment 54 and proposed contract language to comply with the requirements of the amendment.

43. On May 29, 2009, Secretary of State Bernie Buescher proposed a rule regarding Amendment 54. Specifically, Buescher's proposed rule would define "sole source government contract" to exclude "any contract for which there is no legal requirement or authority for a competitive bidding process." It states that such contracts include but are not limited to: (a) a contract awarded to "a utility that has been granted exclusive retail service territory by the Public Utilities Commission through a certificate of public necessity and convenience; and (b) a provider participation agreement entered into and between a provider with a current Colorado medical assistance program provider ID number and the Colorado Department of Health Care Policy and Financing." (Exhibit 13-Dallman.) A problem with the proposed rule is that it excludes from the operation of Amendment 54 one of the specific examples of sole source government contracts included in the Blue Book, public utility contracts. While it might have been reasonable for the authors of Amendment 54 to limit it to contracts for which a competitive bidding process would be appropriate, or at least possible, the Blue Book examples preclude such an interpretation.

44. The defendants are Bill Ritter, the governor of Colorado, and Rich L. Gonzales, the executive director of the Colorado Department of Personnel and Administration, who is responsible for implementing the state database that lists sole source contracts; both are sued in their official capacities only.

CONCLUSIONS OF LAW

PRELIMINARY INJUNCTION STANDARD

The plaintiffs must demonstrate the following six elements in order to warrant the granting of a preliminary injunction under Rule 65(a) of the Colorado Rules of Civil Procedure: 1) a reasonable probability of success on the merits; 2) a danger of real, immediate, and irreparable injury, which may be prevented by injunctive relief; 3) that there is no plain, speedy,

and adequate remedy at law; 4) that the granting of a preliminary injunction will not disserve the public interest; 5) that the balance of equities favors the injunction; and 6) that the injunction will preserve the status quo pending a trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982). The decision to issue a preliminary injunction lies within the sound discretion of the court. *Id*. at 652.

Reasonable Probability of Success on the Merits

Single Subject Requirement

The Colorado Constitution limits citizen initiatives to a single subject, which must be clearly expressed in the title of the initiative. Colo. Const., Art. V, Sec. 1(5.5). Titles are set by the Title Board, after public hearings. C.R.S. § 1-40-106. Any person not satisfied with the Title Board's decision with respect to whether a petition contains more than a single subject must file a motion for a rehearing within seven days after the decision is made or the titles and submission clause are set. C.R.S. §1-40-107(1). An objector may appeal the Board's decision to the Colorado Supreme Court. *Id*. Accordingly, jurisdiction to review a single subject challenge to Amendment 54 is limited to the process at the Title Board and the Colorado Supreme Court; this Court lacks jurisdiction over the instant challenge.

The Dallman Plaintiffs, therefore, have not demonstrated a reasonable probability of success on their claim that Amendment 54 violates the single subject requirement.

First Amendment Standards of Review

Campaign finance restrictions, such as limitations on the amount of contributions, burden core political speech and association freedoms protected by the First Amendment. *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 75 (Colo. 2008) (citing *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)). The constitutional right of association is linked with the right of free speech and "originates from the Supreme Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Id.* The freedom to associate encompasses the freedom to "contribute financially to an organization for the purpose of spreading a political message." *Sanger v. Dennis*, 148 P.3d 404, 414 (Colo. App. 2006) (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981)).

Generally, a limitation on campaign contributions must be "closely drawn to match a sufficiently important [governmental] interest." *Colo. Educ. Ass'n*, 184 P.3d at 79 (quoting *McConnell*, 540 U.S. at 136). This is an intermediate level of scrutiny, applied in recognition of the fact that, although campaign contributions implicate core political speech and association, they are a "less pure form of political speech" and, thus, require "less compelling justification than restrictions on independent spending…" *Id.* "Despite this more relaxed constitutional standard, contribution limitations affect core political speech. As such, they … operate in an area where we 'give the benefit of the doubt to speech, not censorship.'" *Id. (citation omitted.)*

The government must demonstrate that the challenged restrictions further an interest of sufficient importance to outweigh the countervailing interest in protecting free speech on political matters, and that there is a sufficiently close fit between the ends the government seeks to achieve and the means it has chosen to achieve those ends. *See, e.g.*, *Buckley*, 424 U.S. at 26-28, 45-48; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-88 (2000).

The question of whether a particular enactment is closely drawn to match a sufficiently important governmental interest is one of "proportionality." *Randall v. Sorrell*, 548 U.S. 230, 249 (2006). In *Randall*, the Court struck down Vermont's campaign contribution limits because the dollar limits were too low. Justice Breyer stated in his plurality opinion, "[t]he contribution limits are unconstitutional because … they fail to satisfy the First Amendment's requirement of careful tailoring. (Citation omitted.) That is to say, they impose burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe." *Id. at 236-37.*

Amendment 54 does not merely limit the dollar amounts of campaign contributions, as do most federal and state campaign finance reform laws, including Colorado's before Amendment 54. Rather, Amendment 54 bans those who are subject to it from making any campaign contributions at all to any candidate at any level of government anywhere in the state, as well as to political parties and ballot issues. This distinction is an important one because a ban on contributions eliminates the symbolic expression of support that political contributions represent, which is left intact by mere limitations on the amount of contributions. *See Randall v. Sorrell*, 548 U.S. at 246-47. While the U.S. Supreme Court has ruled that a ban on contributions is not *per se* unconstitutional or subject to the strict scrutiny standard of having to be "narrowly tailored" to match a "compelling state interest," the fact that a challenged enactment involves a ban rather a mere limitation on the amount of contributions is to be taken into account in weighing the proportionality of the ban relative to the state interest it is supposed to serve. *See Fe.l Election Com'n v. Beaumont*, 539 U.S. 146, 162 (2003).

The state argues that Amendment 54's ban is constitutionally valid because it has long been recognized that laws prohibiting direct corporate and union campaign contributions, such as Colorado's 2002 measure, are valid. But those enactments permit corporations and unions to make contributions through regulated political committees. Moreover, the historic ban on direct corporate and union campaign contributions "has always done further duty in protecting 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'" *Beaumont*, 539 U.S. at 154. Amendment 54 does the opposite: it penalizes individuals who serve an organization as officers or board members by not allowing them to make campaign contributions because of their association with the corporation. It turns these longstanding principles on their head.

The state also asserted that the state-wide, all levels of government ban in Amendment 54 is no different than the bans on campaign contributions under 2 U.S.C. § 441c(a) and in the Hatch Act. Section 441c(a) prohibits contributions by "any person" who enters into any personal

services or supply contract with the U.S. government to "any political party, committee, or candidate for public office or to any person for any political purpose or use." *Id.* "Any person" includes "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." 2 U.S.C. § 431(11).

However, section 441c(a) can be easily distinguished from the bans in Amendment 54. First, 2 U.S.C. § 441c(b) – the next paragraph in the statute – allows "any corporation, labor organization, membership organization, cooperative, or corporation without capital stock" to contribute to "any separate segregated fund" for "the purpose of influencing the nomination for election, or election, of any person to Federal office." Second, the statute addresses only government procurement, land and construction contracts. And third, the statute applies only to campaign contributions to members of Congress, which controls appropriations and has oversight responsibility for federal contracts.

The Hatch Act can also be distinguished. In general, under the Hatch Act, an employee of the federal government may not engage in political activity while the employee is on duty, use his official authority to affect the result of an election, solicit political contributions or run as a candidate for election to a partisan political office. 5 U.S.C. §§ 7323-24. But an employee retains the right to make political contributions. *Id.*

In addition, the Fair Campaign Practices Act, which applies to the political activities of employees of the state and higher education institutions that have programs financed by federal funds, allows them – on their own time – to contribute to political organizations and candidates, attend political fundraising functions, and campaign for or against referendum questions. 5 U.S.C. §§ 1501-02. *See also*, C.R.S. § 24-50-132 ("Employees in the state personnel system … shall not use any state facility or resource or the authority of any state office in support of any candidate, and shall not campaign actively for any candidate on state time or in any manner calculated to exert the influence of state employment.").

The part of Amendment 54 that bans those subject to it from contributing to ballot measure campaigns is subject to strict scrutiny. A vote for or against a ballot measure is an exercise of free speech, and "an economic contribution to a committee designed to support or oppose a ballot measure is similarly of constitutional magnitude." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 756 (2000) (citing *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981)). Contributions to ballot measures are treated differently than contributions to candidates because the "risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Common Sense Alliance*, 995 P.2d at 755 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978)). There is "no significant state or public interest in curtailing debate and discussion of a ballot measure." *Elam Constr. v. Reg'l Transp. Dist.*, 129 F.3d 1343 (10th Cir. 1997). A limit or ban on contributions in support of or in opposition to a ballot measure must be "narrowly tailored" to advance a "compelling state interest." *Independence Inst. v. Coffman*, 2008 WL 5006531, at *10 (Colo. App. Nov. 26, 2008) (citing cases).

The Asserted State Interests

The first step in determining whether Amendment 54's burdens upon First Amendment interests are disproportionately severe in light of its legitimate objectives is understanding the state interests that are claimed to be sufficiently important to justify those burdens.

The only governmental interest identified in Amendment 54, itself, is "a presumption of impropriety between contributions to any campaign and sole source government contracts…." Section (15). A presumption, of course, is not evidence, Black's Law Dictionary 1185 (6th ed. 1990), and the State did not offer any evidence to support such a presumption. Instead, it argued that the presumption is established by the fact that it is contained in Amendment 54, which was passed by the voters. This reasoning is circular and it is too much of a stretch to interpret the passage of the amendment as a popular endorsement of the existence of a presumption of impropriety. Even if the court were to accept such reasoning, however, a presumption of impropriety is not a governmental interest of sufficient importance to justify any burdens on First Amendment freedoms, much less the substantial burdens embodied in Amendment 54. As far as the court has been able to determine, no case has ever held that a presumption of anything constitutes adequate justification for burdens on free speech and association. As the United States Supreme Court held in *Nixon v. Shrink Missouri Gov't*, 528 U.S. 377, 392 (2000), "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden…."

To understand the inadequacy of a presumption of impropriety as a justification for Amendment 54's burdens, it is helpful to compare justifications that courts have found to be sufficient in other cases. The prevention of "corruption" or the "appearance or perception of corruption" has been found to be a sufficiently important state interest to support some limitations on campaign contributions. *See Randall*, 548 U.S. at 261; *McConnell*, 540 U.S. at 143-44; *Buckley*, 424 U.S. at 26-27. Reasonable limitations on the amount of contributions and requiring corporations and unions to make campaign contributions through regulated political committees have been upheld with relatively little evidentiary showing of a particular problem with corruption, although all of the cases involved real evidentiary showings that such problems did exist in the jurisdiction at issue. More stringent restrictions have been upheld upon stronger evidentiary showings of particular problems with corruption in the affected jurisdiction. *See, e.g., Green Party v. Garfield*, 590 F. Supp.2d 288 (D.Conn. 2008)(substantial evidence of "a string of corruption scandals involving state officials," including criminal convictions of the governor and state treasurer, supported ban of contributions by state contractors to candidates for state office). As with other aspects of the analysis, balancing and proportionality are key. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon*, 528 U.S. at 391. Presumption of impropriety is an entirely novel justification for a burden on free speech and association and no evidence at all was offered to support it.

Amendment 54's reliance on a "presumption of impropriety" compares unfavorably with the "Purpose and Findings" section of Colorado's 2002 campaign finance amendment: "The people of the state of Colorado hereby find and declare that *large* campaign contributions to political candidates create the *potential for corruption* and the *appearance of corruption*…." *Colo. Const. Art. XXVIII §1 (emphasis added).* Happily, the 2002 and 2008 enactments appear to confirm what the parties agreed upon: Colorado does not suffer from any actual corruption problem.

The 2008 State Ballot Information Booklet ("the Blue Book"), while not listing the prevention of "corruption" or the "perception of corruption" as interests to be served by the amendment, does state under the heading, "Arguments For," that "Amendment 54 promotes civic trust and government transparency." In its *Amicus Response to Ritchie Motion for Preliminary Injunction, at 1,* Clean Government Colorado stated, "[t]he intent of the Amendment is to assure the voters of Colorado that no-bid contract holders are not influencing elections in order to secure their own contracts with governmental entities. The problem addressed is the perception that there is a club of insiders consisting of businessmen and politicians they support, otherwise known as 'pay-to-play' – to play in the game of governmental contracts, one must ante up for a seat at the table."

At the hearing, all parties agreed that preventing the corrupt influence of decision makers with authority over sole source government contract awards was the core state interest that Amendment 54 was intended to serve. The court agrees that this is the fair and reasonable conclusion to draw from the amendment as a whole, although it is not expressly stated and no evidence was presented showing that there is any perceived or actual corruption problem in Colorado, concerning government contracts or otherwise. The question then becomes whether Amendment 54 is closely drawn to match this interest, or whether the burdens it imposes upon First Amendment interests are disproportionately severe in light of this legitimate objective.

In examining the asserted state interest served by Amendment 54 and determining whether it justifies the amendment's burdens on First Amendment interests, it is important to consider the state of the law in this area before its passage. The size of campaign contributions in Colorado is already restricted to relatively modest amounts to prevent undue influence by those able to make large contributions. *See* Colo. Const. Art. XXVIII, §§ 1 and 3. Contributions through "conduits" or with the expectation of reimbursement by another are also forbidden. In addition, Colorado's rules of conduct for all public officers, members of the general assembly, local government officials and employees forbid the acceptance of 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 that he knows or a reasonable person in his position should know "is primarily for the purpose of rewarding him for official action he has taken." C.R.S. § 24-18-104(1)(b)(I) and (II). A public officer or state employee shall not "[a]ssist any person for a fee or other compensation in obtaining any contract … from his agency." C.R.S. § 24-18-108; *see also* C.R.S. § 24-18-201, and the bribery and corrupt influences statutes. C.R.S. §§ 18-8-301 and -302.

Legal Standard Applicable to a Facial Constitutional Challenge

Because the court is deciding a facial challenge to the constitutionality of Amendment 54, the substantive First Amendment principles, set forth above, must be viewed through the lens of the principles applicable to facial challenges. The parties agree, correctly, that Amendment 54 is facially unconstitutional if a substantial number of its applications are overbroad in relation to its plainly legitimate sweep. *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1190 (2008). Amendment 54's plainly legitimate sweep is preventing the corrupt influence of officials who make decisions about sole source government contract awards. The court concludes that a substantial number of Amendment 54's applications are overbroad in relation to the amendment's plainly legitimate sweep. Indeed, Amendment 54 is so overbroad that it has substantially slipped the moorings of its justification.

Amendment 54's Provision Concerning Contributions to Ballot Measures is Unconstitutional.

Amendment 54 provides that any person who makes "any contribution intended to promote or influence the result of an election on a ballot issue shall not be qualified to enter into a sole source government contract relating to that particular ballot issue." Section (17(2). A ban on contributions to ballot measures must be narrowly tailored to advance a compelling state interest. *Common Sense Alliance*, 995 P.2d at 755.

The United States Court of Appeals for the Tenth Circuit upheld a preliminary injunction in a case similar to the instant one. *Elam Constr. v. Reg'l Transp. Dist.*, 129 F.3d 1343 (10th Cir. 1997). The case involved a Regional Transportation District ("RTD") board resolution not to enter into contracts with entities that had contributed more than $100 to a campaign seeking to affect the outcome of a "Guide the Ride" referendum to increase the district's sales tax. The Tenth Circuit ruled that the plaintiffs, construction companies that might lose contracts with RTD, were likely to succeed on the merits and that allowing the resolution to stay in effect would chill their First Amendment rights of political speech and association. *Id.* at 1347.

In *Elam*, the court relied on *Citizens Against Rent Control*, 454 U.S. at 293, where the Supreme Court ruled unconstitutional a municipal ordinance that placed a $250 limitation on contributions to committees formed to support or oppose ballot referenda because "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Id.* The Tenth Circuit observed that the outcome of the referendum will not directly affect the composition of the RTD board, or the compensation of its members, which is fixed by statute. *Id*. Therefore, the court concluded that "RTD's asserted interest in preventing corruption, in light of its use of an impermissible restriction on speech, does not outweigh the harm asserted by plaintiffs." *Id.*

Amendment 54's Ban on Contributions to Candidates and Political Parties is Unconstitutional.

The provisions of Amendment 54 fail in several different dimensions to closely match a sufficiently important state interest. In determining whether its provisions are overbroad, important considerations include its use of contribution bans, rather than dollar limitations (which already exist in Colorado law), the absence of any evidence of a corruption problem in Colorado that might justify greater burdens on free speech, and the very severe sanctions imposed for violations of Amendment 54. The "match" between its legitimate objective and most of its provisions is far from "closely drawn."

Amendment 54 is overbroad in the following major respects, among others.

It bars those subject to it from contributing, not only to candidates for offices with decision making authority over their contracts, but to *any* candidate for *any* office at *any* level of government *anywhere* in Colorado, and to political parties. This means that a lawyer, for example, with a no-bid contract for legal services with a special district in Durango could not contribute to candidates for a school board election in Grand Junction, or to candidates for the state legislature, or governor, or attorney general, or to any political party. The connection between the breadth of this ban and its legitimate objective is not merely insufficiently close, it is indiscernible. The state attempted to justify this sweeping ban by arguing that there are interlocking relationships between and among different levels of government and the *amicus* argued it is meant to prevent a contribution to one candidate or party from being funneled, or "wheeled," to another candidate. There was no evidence presented of any such problem in Colorado and direct questioning at oral argument failed to yield a single example of how such a problem might present itself. Moreover, Article XXVIII already forbids earmarking contributions to political parties for pass through to particular candidates and forbids one candidate committee from making any contribution to, or accepting any contribution from, another candidate committee. Section 3(c) and (6).

It defines sole source contract far more broadly than the normal meaning of that term and in such a way that it subjects to its sweeping ban on campaign contributions those who have government contracts that are not appropriate for competitive bidding, and even those whose contracts could not be competitively bid. The state argued that the court could interpret Amendment 54 as not applying to contracts that cannot be competitively bid. The problem with this suggestion is that the Blue Book makes it clear that such contracts are intended to be covered by Amendment 54: it lists as examples of no-bid contracts, cases "where equipment, accessories, or replacement parts must be compatible; where a sole supplier's item is needed for trial use or testing; and where public utility services are to be purchased." Holders of contracts like this cannot make any campaign or party contributions, though they pose no risk of corrupt influence of public officials.

Moreover, its scope is far reaching. It includes all no-bid contracts entered into by the State of Colorado, Colorado's 62 counties, 269 cities and towns, 178 school districts, political

subdivisions of the state, more than 3000 special districts and "any public and quasi-public body that receives a majority of its funding from the taxpayers of the state of Colorado."

It subjects to its sweeping contribution ban not only persons or entities that have a no-bid contract with the government, but also the contracting party's officers, directors, trustees and anyone who owns or controls ten percent or more of the contracting party. It applies equally to individuals associated with profit-motivated businesses and those associated with charitable entities. Thus, a board member of the DCPA or Children's Hospital, or any number of charitable organizations which have no-bid contracts with local governments to provide specialty facilities or services must choose between the exercise of his or her First Amendment rights and continuing to perform the important community service of serving on nonprofit boards. If s/he remains on the charity board, s/he cannot contribute to any political campaign at any level of government anywhere in the state. The application of Amendment 54's broad ban on contributions to individuals associated with a contractor imposes burdens on those individuals' First Amendment freedoms that are disproportionately severe and cannot fairly be said to closely match the objective of preventing corrupt influence of public officials.

It burdens the First Amendment interests of "immediate family members" of contract holders, under a truly Orwellian definition of "immediate family members": "any spouse, child, spouse's child, son-in-law, daughter-in-law, parent, sibling, grandparent, grandchild, stepbrother, stepsister, stepparent, parent-in-law, brother-in-law, sister-in-law, aunt, niece, nephew, guardian or domestic partner." The U.S. Supreme Court has rejected the extension of a ban on campaign contributions to family members other than the spouse of a would-be contributor. *McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 124 S.Ct. 619, 711 (2003) (government justification for ban on campaign contributions from children younger than 18 years as preventing "corruption by conduit" was "simply too attenuated for [the ban] to withstand heightened scrutiny"). The court noted "that the Government offers scant evidence of this form of evasion," and suggested that the slim evidence is a result of the deterrence in 2 U.S.C. § 441f, "which prohibits any person from 'mak[ing] a contribution in the name of another person' or 'knowingly accept[ing] a contribution made by one person in the name of another.'" *Id*.

The state argues that family members are not subject to the ban on contributions unless they make contributions "on behalf of" the contract holder, acting as conduits to circumvent the direct ban on contributions by the contract holder. If all that was intended was a ban on contributions "by or on behalf of" contract holders, it would have been easy to say so in clearly limiting language. The court cannot discern such limited intent in the extraordinarily broadly worded operative language: "contract holders shall contractually agree…to cease making, causing to be made, or inducing *by any means,* a contribution, *directly or indirectly, on behalf of* the contract holder *or on behalf of his or her immediate family member* and *for the benefit of* any political party or *for the benefit of* any candidate for any elected office of the state or any of its political subdivisions." (Emphasis added.) A contribution "by" a family member would be a contribution "on behalf of" that family member. Inducing by any means, directly or indirectly, would include soliciting or even encouraging a family member to make a contribution. The severe penalties for violating Amendment 54 (discussed below), coupled with this vague and

comprehensive language of prohibition, will chill the First Amendment freedoms of the extended family members of the broadly defined contract holders. Indeed, the evidence presented to the court shows that it has already had this chilling effect. Even the state admits that if a contract holder, such as Mr. Brown, runs for office, Amendment 54 renders illegal any contributions to his own campaign by himself or by his family members. As Mr. Fitzgerald testified, contributions from family members are very important to candidates in local races, such as his race for city council. The provision of Amendment 54 concerning extended family members cannot fairly be said to closely match its legitimate objective; the burden on the First Amendment interests of the many family members of contract holders, officers, board members and shareholders, is plainly disproportionately severe.

The penalties for violations of Amendment 54 are disproportionately harsh in comparison to penalties in other campaign contribution limitation measures, which greatly exacerbates its chilling effect. For example, if an extended family member of a board member of a contract holder were to make a forbidden contribution, they would be barred from holding any sole source government contract *or public employment* with any level of government for three years. Violators, including bookkeepers who fail to report violations within ten days, are liable for restitution, including the cost of replacing the offending contract holder's contract with another. Those who accept prohibited contributions are declared by Amendment 54 to have "engaged in corrupt misconduct," a serious blow to the reputation of anyone, let alone anyone running for public office. If the violation is "knowing," it is grounds for removing the official from office and disqualifying him/her from ever holding "any office of honor, trust or profit in the state, and shall constitute misconduct or malfeasance." The enforcement mechanism is a lawsuit in district court by any registered voter in the state.

In sharp contrast, Article XXVIII before Amendment 54 penalized forbidden campaign contributions and expenditures with proportionate fines of two to five times the amount of the offending contribution or expenditure, and provided for enforcement through the Secretary of State's office. It also provided that "[f]ailure to comply with the provision of this article shall have no effect on the validity of any election." Also in contrast, the so-called "pay-to-play" statutes in other states enforce their provisions, which do not approach the harshness of Amendment 54's penalties, through ethics commissions. *See* Conn. Gen. Stat. §9-333n(g); HI Rev. Stat. §11-205.5; KRS §121.056, §121.330; N.J. Perm. Stat. §19.44A-20.13; ORC Ann. 3517.093, 3517.13, and 3517.992; S.C. Code Ann. §8-13-1342; W.Va. Code §3-8-12. The federal campaign finance laws are enforced through the Federal Ethics Commission.

Amendment 54's scheme of harsh penalties and freewheeling enforcement mechanism appears designed to maximize its chilling effect on the exercise of free speech and association through political contributions by anyone even remotely connected to a government contractor. This is the opposite of what the First Amendment requires of it.

Because these overbroad applications permeate the amendment, the entire amendment is unconstitutional on its face. At oral argument, the court explored with able counsel for all parties the possibility of curing the constitutional infirmities of Amendment 54 by a narrowing judicial

construction. However, a court has an obligation to avoid judicial legislation, *U.S. v. Nat'l Treas. Employees Union*, 513 U.S. 454, 479 (1995), and the court is satisfied that narrowing Amendment 54 to a constitutional scope would require an impermissible wholesale judicial rewrite.

The court determines that the plaintiffs have a high likelihood of succeeding on the merits of their claim that Amendment 54 is facially overbroad.

The court has struggled with whether section 16 of the amendment, which creates a state list of all sole source government contracts with detailed information about each, should be severed and allowed to stand on its own. On the one hand, the only overbreadth it suffers from is the very broad definition of sole source government contract, transparency is a listed purpose in the Blue Book and section 16 does not burden free speech interests. On the other hand, by its own language, it is included in Amendment 54 only "to aid in enforcement of this measure…." Thus, it was not intended to have any life of its own and the court's ruling regarding the rest of the amendment leaves nothing to enforce. Balancing these considerations, and giving deference to the fact that transparency is a listed purpose of Amendment 54 in the Blue Book, upon which the electorate relied in passing the amendment, the court determines that section 16 is closely drawn to serve the important state interest of transparency in government contracting and excepts it from the operation of this preliminary injunction.

Amendment 54 is Unconstitutionally Vague.

The First Amendment demands "specificity in a law so that individuals may assess the burden on their rights to free speech and free association and make informed decisions before acting." *Id*. (citing *Common Sense Alliance*, 995 P.2d at 756). A vagueness analysis under the First Amendment is, therefore, stricter than a vagueness analysis under the Due Process Clause. *Independence Inst.*, 2008 WL 5006531, at *4 (citing *Parrish v. Lamm*, 758 P.2d 1356, 1366 (Colo. 1988)).

The language, "to cease making, causing to be made, or inducing by any means, a contribution, directly or indirectly, on behalf of the contract holder or on behalf of his or her immediate family member and for the benefit of any political party or for the benefit of any candidate for any elected office of the state or any of its political subdivisions" in section 15 is impermissibly vague.

One cannot assess whether "contribution" is limited to financial contributions or whether it includes in-kind contributions and volunteer activities. It is also unclear whether contribution includes an "independent expenditure." The state asserts that the exclusion of volunteer time from the definition of campaign contribution in Art. XXVIII, § 5(b), means that a contract holder may volunteer for a campaign; and the failure to exclude independent expenditures from that definition means that independent expenditures are covered. The state, however, is not consistent in its use of Article XXVIII's definition of campaign contribution. The state asserts

that even though the definition of contribution includes "[a]nything of value given," the reference to "amounts" in section 14.4 limits Amendment 54's definition of contributions to financial contributions. The number of inconsistencies between the language in Amendment 54 and the earlier-adopted definition of "contribution" does not contribute to clarity.

Moreover, one cannot assess whether "causing to be made, or inducing by any means" an "indirect" contribution includes solicitation of financial contributions in support of a candidate or a ballot measure. A ban on solicitation of contributions of contributions is a direct restraint on speech. *Green Party v. Garfield, 590 F. Supp. 288 (D.Conn. 2008).*

If the language "on behalf of the contract holder" and "on behalf of his or her immediate family member" in section 15 means anything more than the common sense meaning "by or for the contract holder" and "by or for his or her immediate family member," the phrase is not defined. Similarly, if the language "for the benefit of any political party" and "for the benefit of any candidate" in section 15 means anything more than the common sense meaning "to any political party" and "to any candidate," the phrase is not defined.

Section 17(2) also penalizes any person who accepts a contribution "on behalf of a candidate committee, political committee, small donor committee, political party or other entity." "Other entity" is not defined, and its inclusion in the list of prohibited contributors is impermissibly vague. Moreover, the list of entities to be penalized includes entities that are not listed in section 15, which specifies that the contract holder is not to make contributions "for the benefit of any political party or for the benefit of any candidate." This expanded list of prohibited recipients in the penalty section highlights the vagueness of the prohibition language in section 15. In order to be clear, they should match. In addition, "intentionally" and "knowing" in sections 17(3) and (4) appear to refer to violation of the statute rather than to discrete acts, making the operation of the statute vague.

The vagueness of Amendment 54 does not allow those subject to it to assess the burden on their rights to free speech and free association and make informed decisions before acting. Therefore, the amendment is unconstitutionally vague.

Accordingly, the plaintiffs have demonstrated a reasonable likelihood of success on their claim that Amendment 54 is vague, thus violating the First Amendment.

Constitutional Claims of the Dallman Plaintiffs

This section addresses issues that relate only to the claims of the Dallman Group of Plaintiffs, who are all related to public sector unions. Most of the constitutional infirmities identified above also apply to Amendment 54 as it relates to public sector unions, and will not be repeated. The exceptions are that officers, directors and trustees of unions are not included in the definition of "contract holder," and because individuals associated with unions are not contract holders, family members of individuals are not affected.

The $100,000 Threshold is not Applicable to Public Sector Unions' Collective Bargaining Agreements.

Amendment 54 defines the term "sole source government contract" as:

> [A]ny government contract that does not use a public and competitive bidding process soliciting at least three bids prior to awarding the contract. This provision applies only to government contracts awarded by the state or any of its political subdivisions for amounts greater than one hundred thousand dollars . . . . A sole source government contract includes collective bargaining agreements with a labor organization representing employees, but not employment contracts with individual employees. Collective bargaining agreements qualify as sole source government contracts if the contract confers an exclusive representative status to bind all employees to accept the terms and conditions of the contract.

Under the Amendment, any collective bargaining agreement with a state or local government entity constitutes a "sole source government contract" for purposes of the Amendment. The designation is not contingent upon a contract amount that exceeds $100,000, as is the case with all other sole source government contracts. Therefore, the $100,000 threshold does not apply to collective bargaining agreements. Because the language is clear, there is no need to "resort to rules of construction to construe its meaning." *Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1211 (Colo. 1996).

Accordingly, the Dallman Plaintiffs have not demonstrated a reasonable probability of success on the merits of their claim for a declaratory judgment that the $100,000 threshold applies to collective bargaining agreements.

Amendment 54's Ban on Contributions by Public Sector Unions and their Political Committees is Unconstitutional.

"The First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas," in recognition of the fact that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citations omitted).

With regard to unions in particular, the Colorado Supreme Court has recognized that "[r]estrictions on contributions and expenditures by labor organizations" impinge on the First Amendment rights of unions and their members to free speech and free association "because they impose burdens on individuals acting together to amplify their speech." *Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 76 (Colo. 2007). Inasmuch as "[t]he guarantee of freedom of association in the political context protects the right of union members both to express their point of view and to support their position financially," it follows that "[l]aws banning union contributions and

expenditures impinge upon union members' associational freedom by preventing them from supporting candidates collectively through the union." *Id.* (citation omitted).

The inclusion of public sector collective bargaining agreements within the definition of sole source government contracts is curious and problematic; they simply do not fit formally or functionally with the rest of the amendment or its asserted state interests. There is no evidence of any real or perceived threat of corrupt influence of public officials with authority over the award of collective bargaining agreements. Collective bargaining agreements are fundamentally different from sole source government contracts for goods or services. Unlike the typical procurement context—in which a government entity is free to contract with any number of competing companies, and a putative contractor therefore might offer campaign contributions to ensure that it, rather than one of its competitors, will be selected—in the collective bargaining setting, it is the *employees*, not the employer, who select the union with which the governmental entity will deal. *See Littleton Educ. Ass'n v. Arapahoe County School District, No. 6*, 533 P.2d 793, 796 (1976). Before a union can even begin to engage in collective bargaining with a public employer, it must demonstrate, usually through an election, that a majority of employees in a designated bargaining unit have chosen the union as their collective bargaining representative. Thus, collective bargaining agreements, unlike sole source procurement contracts, are not "awarded" to a union through a choice made by government officials, and any candidate contributions by a union cannot affect whether or not a particular union is chosen as the representative of the employees.

When a public employer negotiates a collective bargaining agreement with a union that is recognized as the exclusive representative of its employees, there is no departure from any norm of competitive bidding. Public employers do not solicit "bids" from competing unions for the "award" of a collective bargaining agreement, because the employer deals exclusively with the employee representative chosen by its employees. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-21 (1977). In addition, whereas the benefits of a sole source procurement contract flow to the contract holder itself, the beneficiaries of a collective bargaining agreement are the represented employees, not the union that negotiated the agreement, or even just the members of the union. In negotiating a collective bargaining agreement, a union is under a duty to represent all unit employees fairly, regardless of whether they are members of the union.

Finally, unlike a business, which can avoid the prohibitions of Amendment 54 by refraining from sole source contracting, a public employee union cannot escape Amendment 54's contribution ban, except by refraining from fulfilling its basic mission: the exclusive representation of public employees. Amendment 54 forces affected unions to choose between the two main reasons that its members associate (collective bargaining and collective political voice) and to fulfill only one of those purposes. As the state admitted at oral argument, unlike all other affected contract holders, public sector unions and their political committees are banned from making any political contributions in the state because of what they are rather than because of what they do. There is *no* legitimate state interest to support this application of Amendment 54. Even if one could be found, the burdens of this application upon the union members' First Amendment interests are clearly disproportionately severe. Because of the incongruence

between the mischief Amendment 54 is supposed to address and the means it employs, the prohibition against contributions by public sector unions and their political committees is not closely drawn to match an important government interest.

Where the United States Supreme Court has upheld statutes prohibiting particular types of organizations from making direct political contributions, the Court has emphasized that the organization in question remained free to participate in the political process by making contributions through its political action committee. *See Beaumont*, 539 U.S. at 163; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990). The government's asserted interests cannot justify the amendment's coverage of union-sponsored political committees. The state argues that union members can still contribute through their small donor committees. The court does not agree. A small donor committee is a type of political committee, and Amendment 54's definition of "contract holder" includes, "the labor organization and *any political committees* created or controlled by the labor organization…." (Emphasis added.) Political committees of corporate contract holders are not included in the definition of contract holder.

Amendment 54 violates the First Amendment's guarantee of free speech and the Fourteenth Amendment's guarantee of equal protection by prohibiting political contributions by "any political committee created or controlled by" a covered union, while not prohibiting political contributions by political committees that are created or controlled by businesses and other persons or non-union entities that enter into "sole source government contracts."

Amendment 54's discriminatory treatment of public sector unions is reviewed under strict scrutiny. *Austin*, 494 U.S. at 666 ("Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest"); *Carey v. Brown*, 447 U.S. 455, 465 (1980) ("When government regulation discriminates among speech-related activities …, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized"). This part of Amendment 54 would also fail equal protection analysis even if it is reviewed under the more relaxed "exacting scrutiny" standard.

There is simply no legitimate reason for the government to impose greater restrictions on the first amendment interests of public sector unions than it imposes upon other entities that qualify as holders of "sole source government contracts." The inclusion of public sector unions in Amendment 54 in a way that leaves them no way out, exempting them from the $100,000 threshold applicable to all others, and banning contributions from their political committees compels the conclusion that the treatment of public sector unions by Amendment 54 is not content neutral. The Amendment's treatment of public sector unions fails under either strict or intermediate scrutiny.

Accordingly, the Dallman Plaintiffs have demonstrated a strong likelihood of success on their claim that Amendment 54 violates the First and Fourteenth Amendments of the United States Constitution.

Danger of real, immediate, and irreparable harm.

The plaintiffs must demonstrate a danger of real, immediate, and irreparable harm, if the Court does not grant the preliminary injunction. *Sanger*, 148 P.3d at 409. "Irreparable harm" means "certain and imminent harm for which a monetary award does not adequately compensate." *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007). "[W]here monetary damages are difficult to ascertain or where there exists no certain pecuniary standard for the measurement of damages," Colorado courts will find irreparable harm. *Id.*

Even a temporary deprivation of First Amendment rights constitutes irreparable harm. *See Free Speech Coal. v. Gonzales*, 406 F.Supp.2d 1196, 1210 (D.Colo. 2005), citing *Elrod v. Burns*, 427 U.S. 347 (1969) (the loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury). The infringement of the plaintiffs' rights (as well as those of thousands of other Coloradans) to free speech and association is on-going and will continue if an injunction is not entered.

No adequate remedy at law.

For the court to issue a preliminary injunction, the plaintiffs must demonstrate that they have "no plain, speedy, and adequate remedy at law." *Sanger*, 148 P.3d at 409. Injunctive relief is the sole remedy to protect the plaintiffs' freedom of speech and association. Plaintiffs have no choice other than to comply with the ban on political contributions or to give up, or induce their organizations to give up, what Amendment 54 broadly defines as "sole source governmental contracts," or, as to public sector unions, cease performing their central function of representing employees in negotiations with their employers. Consequently, the issuance of a preliminary injunction is the plaintiffs' only adequate remedy.

Public interest favors granting the relief.

The plaintiffs must demonstrate that it is in the public interest for the Court to grant the preliminary injunction. *Sanger*, 148 P.3d at 409. Here, a narrow majority voted for Amendment 54, and there have been wide-spread, apparently unintended, consequences. An injunction will protect the free speech and association rights of thousands of Coloradans. Such protection of First Amendment rights is plainly in the public interest, particularly since the November, 2009 elections are rapidly approaching and the public interest is served by more debate about the issues of the day, not less. An injunction will also protect the public's interest in the ability of nonprofit organizations, such as the DCPA, Children's Hospital and the University of Denver, to attract and retain community leaders to serve as board members.

Balance of equities favors the relief sought.

The plaintiffs must demonstrate that the balance of equities favors the Court's issuance of a preliminary injunction. *Sanger*, 148 P.3d at 409. If the operation of Amendment 54 is not

enjoined, the First Amendment rights of thousands of Coloradans will be infringed. If the operation of Amendment 54 is enjoined, pre-existing Colorado law, including the rest of Article XXVIII, will continue to protect the public from any corrupt influence of campaign contributions on government contracting, bearing in mind that there is no evidence of such actual or perceived corruption. Further, "since plaintiffs' fundamental First Amendment rights are at stake, it is clear that their threatened injury outweighs whatever speculative damage the proposed injunction may cause defendants." *Million Man March*, 922 F.Supp. at 1500-01; *accord*, *Elam Construction*, 980 F.Supp. at 1423. The balance of equities favors granting a preliminary injunction.

An Injunction will preserve the status quo.

Finally, the plaintiffs must demonstrate that the Court's issuance of a preliminary injunction will preserve the status quo. *Sanger*, 148 P.3d at 409. Individuals, corporate entities and unions in Colorado have been able to contribute to political campaigns at all levels of government, subject to existing restrictions on the size of contributions, to the requirement that contributions by corporations and unions be made through political committees, and other reasonable regulations. Additionally, "[t]he appropriate status quo in a situation like this" – the imposition of new restrictions impacting participation in the political process – "is the status quo *ante*, that is the status quo before the rule was enacted." *Sanger v. Dennis*, 148 P.3d 408, 419 (Colo. App. 2006). An injunction will preserve the status quo.

ORDER

The Court determines that the plaintiffs have met their burden of proving beyond a reasonable doubt that Amendment 54 is unconstitutional and of justifying the issuance of a preliminary injunction.

THEREFORE, the Court enjoins the enforcement of Amendment 54 (except section 16 thereof) because, on its face, it violates the rights of free speech and association guaranteed by the First Amendment to the Constitution of the United States.

Done this 17th day of July, 2009, *nunc pro tunc* June 23, 2009.

BY THE COURT

Catherine A. Lemon
District Court Judge