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ANALYSIS OF WASHINGTON STATE INITIATIVE 1464
(2016 November General Election)

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Initiative 1464, which is on the Washington statewide ballot for the upcoming general election, would amend the state's campaign finance and lobbying laws in various respects. In this analysis, the Center for Competitive Politics ("CCP")[2] focuses on two enforcement-related mechanisms in the Initiative because similar mechanisms in other jurisdictions and contexts have proven to be susceptible to abuse, become contrary to the public interest, and placed an undue burden on core First Amendment rights.[3] Thus, CCP suggests that if Initiative 1464 is approved, Washington voters and legislators should carefully monitor the effects of these two provisions and make any amendments that are necessary or prudent by legislation or subsequent initiative.

CCP takes no position on the merits of Initiative 1464 as a whole, and emphasizes that the provisions this analysis focuses on are only two of approximately thirty provisions contained in the measure. Accordingly, this analysis should not be interpreted in any way as an exhortation to either vote for or against the measure, nor should it be construed as otherwise endorsing or opposing the measure.

EXECUTIVE SUMMARY

Initiative 1464 provides that half of any civil penalties collected for state lobbying and campaign finance violations would be awarded to the state Public Disclosure Commission ("PDC") to be used for "preventing and investigating potential violations" of those same laws. CCP has identified several potential issues that may arise from this provision:

- Initiative 1464 does not specify any ratio for which the penalties awarded to the PDC may be used between prevention and investigation/enforcement. Because only the latter will result in additional agency revenue, this may incentivize agency resources to be shifted

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[2] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado. We are also involved in litigation against the state of California.

[3] CCP may address other provisions of Initiative 1464 in subsequent analyses.

away from prevention of violations and promoting compliance with the laws, and this reprioritization may not be socially desirable.
- The PDC may otherwise become incentivized to pursue excessive enforcement in an area involving core constitutionally protected speech that courts have recognized enforcement agencies should tread carefully on.
- The PDC's enforcement priorities may become skewed toward pursuing "low-hanging fruit" from targets that have few resources to fight enforcement efforts, are eager to settle, or are easy to obtain judgments from, while ignoring more serious violations or targets from whom judgments are harder to obtain.
- The incentive for the PDC to pursue monetary penalties may conflict with the preexisting law, which appears to show a legislative intent to give leniency for first-time offenders.

Initiative 1464 would also expedite the process by which private plaintiffs may sue over alleged campaign finance violations "having the potential to affect the outcome" during the last two months before an election. Several potential issues that may arise from this provision include:

- The vague standard by which this mechanism may be invoked may cause it to be applied inconsistently, unfairly, and unconstitutionally with respect to both potential plaintiffs and defendants.
- Courts may have to become experts in campaign analysis, or otherwise call political analysts as expert witnesses, in order to determine whether an alleged violation has "the potential to affect the outcome" of an election.
- If the expedited private right of action is broadly available, complainants may file frivolous complaints to silence or punish political opponents or speakers with whom they disagree.
- Enforcement priorities may become skewed, as frivolous cases in the courts compete with legitimate complaints over serious violations.
- Washington's campaign finance laws, like most campaign finance laws, are so complex that the expanded private right of action may be unsuitable for most complainants, who are not well-versed in the law's nuances, and who may inadvertently file complaints over activities that are legal.

ANALYSIS

I. The Initiative may create incentives for the PDC to engage in excessive or skewed enforcement instead of promoting compliance with campaign finance and lobbying laws.

Initiative 1464 provides that the Public Disclosure Commission would retain half of any penalties that it imposes and collects for violations of the state's campaign finance and lobbying laws, with the other half going to the state treasury.[4] In cases where the PDC does not resolve a matter on its own, but rather refers the matter to the Attorney General for civil enforcement, half of any amounts awarded in litigation would also go to the agency.[5] This type of funding mechanism for government agencies has proven troublesome in other law enforcement contexts, and may

[4] Initiative Measure No. 1464 (filed Feb. 16, 2016) § 24 (to be codified at Rev. Code Wash. § 42.17A.755(8)).
[5] *Id.* § 25 (to be codified at Rev. Code Wash. § 42.17A.765(1)); *see also* Rev. Code Wash. § 42.17A.755(3).

result in skewed enforcement, a violation of constitutional rights through excessive enforcement, and a reprioritization of agency resources away from preventing violations and promoting compliance with the campaign finance and lobbying laws.

As professors Margaret H. Lemos and Max Minzner have posited in the *Harvard Law Review*, "Financially motivated agencies are apt to initiate more enforcement actions [and] reduce their focus on nonmonetary remedies," and tend to "overenforce" and "emphasize financial recoveries in lieu of more meaningful injunctive relief."[6] For example, state and federal environmental regulatory agencies that derive revenues from fines have a tendency to accept penalties from land developers who treat the payments as a cost of doing business, rather than forcing developers to take specific action to mitigate the environmental disruptions caused by their projects.[7] Taken to the extreme, a "focus on generating revenue" by law enforcement officials may also "result in conduct that routinely violates the Constitution," as the U.S. Department of Justice concluded in its investigation of the city of Ferguson, Missouri.[8]

The legislative text of Initiative 1464 illustrates this potential problem of excessive enforcement. Although the measure specifies that the PDC "must use the [penalties that it collects] for the purpose of prevention and investigating potential violations,"[9] the measure does not specify any balance between prevention and investigation (which presumably also includes enforcement or prosecution). Thus, the PDC could conceivably devote 99 percent (or even all) of the revenues that it collects from penalties to enforcement, and only one percent (or nothing) on prevention efforts, such as clarifying the law and assisting the public with compliance. This also would be economically rational, since pursuing enforcement penalties would further augment the PDC's budget, whereas pursuing prevention would not. Washington residents should consider whether it is socially desirable to incentivize an agency to sit back and allow violations of the state campaign finance and lobbying laws to occur, and only penalize violations after-the-fact.

Of course, legal violations may be prevented not only by using the proverbial "carrot," but also by deterrence in the form of the proverbial "stick." That is to say, potential violators may be deterred by the prospect of the PDC's stepped-up enforcement due to the financial incentives Initiative 1464 would provide to the agency for that purpose. However, this is not necessarily true if those financial incentives also skew the agency's enforcement focus "to seek out the same types of targets and emphasize the same types of cases"[10] – to wit, the types of targets and cases that are likely to result in the greatest or most consistent windfall for the agency, but which may not necessarily involve conduct that is most harmful to the public interest.

One could expect an enforcement agency that is funded by the penalties it collects to rationally focus on the "low-hanging fruit" or the targets from which the agency could extract the largest expected payoff. These enforcement targets often may not necessarily align with those that have committed the most serious violations. For example, the ability of law enforcement officials

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[6] Margaret H. Lemos and Max Minzner, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 857 (2014).
[7] *Id.* at 900.
[8] U.S. Dept. of Justice, Press Release: Justice Department Announces Findings of Two Civil Rights Investigations in Ferguson, Missouri, Mar. 4, 2015, *at* https://www.justice.gov/opa/pr/justice-department-announces-findings-two-civil-rights-investigations-ferguson-missouri.
[9] *See supra* notes 4 and 5.
[10] Lemos and Minzner at 895.

to engage in "civil asset forfeiture" has created "perverse incentives . . . to pursue the most valuable assets rather than the most dangerous criminals."[11] In the campaign finance and lobbying law context, one might expect that high-profile individuals and entities with a reputation to protect and a willingness to settle, and who have committed relatively minor technical violations, may be more attractive enforcement targets than others that have committed serious violations that are more difficult to prove, and who are harder to collect from.

In light of these concerns, funding government agencies, whether in part or in whole, through the fines that they collect is broadly disfavored at both the federal and state levels,[12] and also appears to be the exception to the way state agencies are generally funded in Washington.[13] Because Initiative 1464 would provide such an anomalous funding mechanism for the PDC, there ought to be a compelling reason for it.

But the PDC, as courts have recognized of other similar agencies, is:

> "[u]nique among . . . administrative agencies," having "as its sole purpose the regulation of core constitutionally protected activity – the behavior of individuals and groups only insofar as they act, speak and associate for political purposes" . . . Thus, more than other agencies whose primary task may be limited to administering a particular statute, every action the [agency] takes implicates fundamental rights.[14]

Given its unique and constitutionally sensitive regulatory jurisdiction, the PDC actually may be an agency that is particularly unsuited for a funding mechanism that incentivizes excessive enforcement. In fact, the preexisting statute appears to recognize this concern by encouraging the agency to emphasize compliance and leniency over punishment. Specifically, the law gives the PDC discretion "to waive a fine for a first-time violation"; by contrast, fines are mandatory for "[a] second violation of the same rule by the same person or individual," and "succeeding violations of the same rule shall result in successively increased fines."[15] The incentive Initiative 1464 would create for the PDC to collect fines, including from first-time offenders, may be inconsistent with this apparent legislative intent in the preexisting statute to encourage leniency in enforcement.

Initiative 1464 further exacerbates the potential for excessive enforcement by "direct[ing]" the Attorney General and prosecutors "to consider timely enforcement of [the campaign finance and lobbying laws] *to be of the utmost importance*" and "to use *the full extent of their enforcement authority*" on such matters, and also to "liberally construe[]" the Initiative's provisions "to effectuate the [Initiative's] policies and purposes."[16] This appears to suggest that state and local law enforcement officials must place campaign finance and lobbying violations above all other

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[11] *Id.* at 869.

[12] *Id.* at 864; *see also* U.S. Chamber Institute for Legal Reform, Enforcement Slush Funds (Mar. 2015) at 7-8, *available at* http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf.

[13] *See* Rev. Code of Wash. § 43.79.010.

[14] *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003)).

[15] Rev. Code of Wash. § 42.17A.755(5).

[16] Initiative Measure No. 1464 (filed Feb. 16, 2016) §§ 24 (to be codified at Rev. Code Wash. § 42.17A.765(6)) (emphasis added) and 32.

law enforcement priorities. This may be harmful not only to defendants in campaign finance and lobbying cases, where prosecution may not be the most appropriate remedy, but also to victims in other matters unrelated to elections and lobbying who are given short shrift.

II. The enforcement procedure proposed by the Initiative may be unworkable, or otherwise invite frivolous, politically motivated complaints to silence political opponents and skew enforcement priorities.

Initiative 1464 would also substantially expand Washington's private right of action for alleged violations of the state's campaign finance and lobbying laws. This provision sets forth a vague and imprecise standard for invoking the private right of action that may be unworkable and even unconstitutional. Even if the private right of action could be made to work practically, Colorado's experience with a similar provision shows that it may result in frivolous and politically motivated complaints that impose an undue burden on core First Amendment rights and fail to distinguish between trivial and truly egregious violations.

Under existing Washington law, someone who wishes to bring a lawsuit in state court alleging a violation of the state's campaign finance or lobbying laws must first notify the Attorney General and the relevant county prosecutor, who then have 45 days to determine whether prosecution is warranted; only after waiting ten days thereafter may the complainant bring suit.[17] Initiative 1464 would short-circuit this mechanism within the 60 days before an election, and allow any person to bring a civil action within 10 days of notifying the Attorney General and relevant county prosecutor for any violation "having the potential to affect the outcome" of the election.[18]

As a preliminary matter, the "having the potential to affect the outcome" standard for invoking this expedited private right of action is so vague and imprecise that it may be unworkable and grossly unfair and arbitrary to both potential plaintiffs and defendants, thereby violating their constitutional right to due process and equal protection of the laws.[19] As comparisons of election results with campaign finance reports have demonstrated time and time again, campaign contributions and spending typically are not determinative of election outcomes by any means.[20]

The "potential" of campaign finance spending "to affect the outcome" of an election may depend on many complex factors, such as whether the spending is done by or for the benefit of a challenger or incumbent, and how much has been spent on the campaign already.[21] Of course, there are many external factors as well, such as the candidates' inherent abilities as candidates, their qualifications and fitness for office, their policies, and the general mood of the electorate, any or all of which may negate "the potential" by any campaign spending "to affect the outcome" of the election.[22] And if the relationship between campaign spending and violations of campaign

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[17] Rev. Code of Wash. § 42.17A.765(4).

[18] Initiative Measure No. 1464 (filed Feb. 16, 2016) § 24 (to be codified at Rev. Code Wash. § 42.17A.765(4)(b)).

[19] *See* U.S. Const. Amend. XIV.

[20] *See, e.g.*, Jeff Milyo, Campaign Spending and Electoral Competition: Towards More Policy Relevant Research, *available at* http://www.campaignfreedom.org/wp-content/uploads/2013/10/Milyo2013SpendingandCompetition.pdf.

[21] *See id*. at 4.

[22] The Initiative also purports to make the expedited private right of action available for prosecuting alleged lobbying law violations. *See* Initiative Measure No. 1464 (filed Feb. 16, 2016) § 24 (to be codified at Rev. Code Wash. § 42.17A.765(4)(b)) and Rev. Code Wash. Ch. 42.17A and § 42.17A.600 *et seq*. However, it is difficult to imagine any lobbying law violations that "hav[e]

spending laws and "the potential to affect the outcome" of elections is attenuated, the causal effect of misreporting violations surely must be even more attenuated. If a candidate fails to report a few contributions, or reports contributions that she actually did not receive, who can really say if such misreporting "ha[s] the potential to affect the outcome" of the election?

In practice, how will any Washington state judge be able to determine at a threshold level whether the expedited private right of action Initiative 1464 would enact is even being properly invoked? Will judges have to examine polling data to see if the race is close or lopsided such that the alleged violation "has the potential to affect the outcome"? Will political analysts such as Charlie Cook, Stuart Rothenberg, or Larry Sabato have to be called as expert witnesses? Because of this vague standard and the absence of any parameters in Initiative 1464 for applying it, the courts may have to articulate a standard on their own so that the private right of action is available consistently to plaintiffs while not being invoked arbitrarily and unfairly against defendants. This may be no small imposition on the state judiciary.

If Initiative 1464 is approved and the task falls on the courts to flesh out this vague standard, CCP suggests looking at Colorado's private right of action for prosecution of alleged campaign finance violations as an example of pitfalls to avoid.[23] In Colorado, Tammy Holland, the parent of a middle-school student, is currently suing to invalidate the state's private right of action law as an unconstitutional infringement of her First Amendment rights.[24] The case arose after Ms. Holland was sued twice by local school officials under the state's private right of action provision for alleged campaign finance violations in connection with several newspaper ads that she purchased.[25] The ads merely asked voters to give "careful consideration of each candidate's objectives" in a school board election, but did not advocate for or against any of the candidates.[26] Although the complaint against Ms. Holland was frivolous and voluntarily withdrawn after it was filed, Ms. Holland still had to spend more than $3,500 on attorneys' fees to defend herself.[27]

The Colorado Secretary of State has acknowledged that his state's private right of action "allows frivolous and litigious complaints to potentially violate the free speech and due process rights of those seeking to lawfully participate in political discourse," and that the law has been "abused . . . to attack small and unsophisticated individuals and committees for making minor, often times clerical, errors on their disclosure reports."[28] In one particularly egregious case, a complaint was filed under the private right of action demanding a $36,000 penalty for misreporting of two $3 contributions.[29] The group responsible for that complaint has filed more than 50 complaints, most of which have been for similarly trivial violations.[30]

The lesson to be drawn from Colorado's experience with a private right of action for campaign finance complaints is that if such actions are to be substantially expanded in Washington

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the potential to affect the outcome" of an election, and so this provision may be irrelevant in practice with respect to alleged lobbying law violations.

[23] *See* Colo. Const. art. XXVIII, § 9(2)(a); Colo. Rev. Stat. § 1-45-111.5(1.5)(a); 8 Colo. Code of Regs. 1505-6:18.4.1.

[24] *Holland v. Williams*, Case No. 1:16-cv-00138 (D. Colo. filed Jan. 20, 2016), Complaint for Decl. and Inj. Relief.

[25] *Id.* at ¶¶ 1 and 17-19.

[26] *Id.* at ¶¶ 17-18.

[27] *Id.* at ¶¶ 40 and 45-46.

[28] *Id.* at ¶¶ 62 and 64.

[29] Paul Sherman, Colorado's campaign-finance bullies threaten free speech, DENVER POST, Aug. 23, 2016.

[30] *Id.*

by Initiative 1464, the threshold for permitting such complaints should be meaningful, meticulously crafted, and capable of being applied consistently and in a principled manner. Otherwise, the law may be abused by politically motivated actors seeking to suppress and punish speakers with whom they disagree. Additionally, the courts may become clogged by a flurry of complaints that fail to distinguish between an inadvertent misreporting or prohibited contribution violation involving a penny and an intentional violation that involves a million dollars. This ability to rationally distinguish between enforcement priorities is widely recognized for enforcement agencies,[31] and it is why prosecutorial decisions involving laws that protect the public interest are generally entrusted to state agencies and not to private litigants.

Because the private right of action in Washington involves civil litigation, defendants also would have no constitutional guarantee to an attorney even if they cannot afford one,[32] and must bear tremendous expenses in time and money as well to respond to the full panoply of subpoenas for documents and oral testimony, interrogatories, and requests for admissions.[33] Moreover, while defendants who prevail in campaign finance and lobbying cases brought by the Attorney General or local prosecutor would be entitled to reimbursement for trial costs and also may be awarded attorneys' fees, Initiative 1464 appears to suggest that successful defendants in cases brought by private plaintiffs would not be entitled to any litigation costs or fees.[34] On top of that, private plaintiffs who prevail in such cases would be "entitled to be reimbursed by the state" for their costs and attorneys' fees.[35] This one-sided attorney fee-shifting in favor of litigants and at the expense of defendants in cases arising under the private right of action may further exacerbate the potential problems with excessive and frivolous litigation discussed above, and also may violate basic notions of fairness.

It is also worth noting that if Washington's private right of action becomes so overbearing on citizens' First Amendment rights, taxpayers may become liable for costly attorneys' fees to anyone who successfully sues to have the law invalidated or not enforced as applied to the challenger.[36]

Because of the campaign finance laws' sheer complexity, the average citizen also may file legally meritless complaints using the private right of action even in the absence of any pernicious intent. Although the Supreme Court has admonished that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day,"[37] the reality has not yet caught up with the Court's idealistic rhetoric.

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[31] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

[32] *See, e.g., Lassiter v. Dept. of Soc. Svcs*., 452 U.S. 18, 25 (1981) ("The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.").

[33] *See* Wash. Sup. Ct. Civil Rul. R. 26-37.

[34] Initiative Measure No. 1464 (filed Feb. 16, 2016) § 25 (to be codified at Rev. Code Wash. § 42.17A.765(5)).

[35] *Id.* (to be codified at Rev. Code Wash. § 42.17A.765(4)(c)).

[36] *See* 42 U.S.C. §§ 1983 and 1988; *see also, e.g.,* CCP, Utah Agrees to Pay $125,000 in Free Speech Lawsuit, *at* http://www.campaignfreedom.org/2016/08/10/utah-agrees-to-pay-125000-in-free-speech-lawsuit/.

[37] *Citizens United v. FEC*, 558 U.S. 310, 324 (2010).

The fact is, Washington's campaign finance law consists of 76 pages of statute,[38] numerous regulations,[39] and PDC declaratory orders[40] and interpretive statements[41] as well as state and federal court and state Attorney General opinions that have narrowed the scope of state law in ways that are not apparent from the plain statutory and regulatory text.[42] Even the PDC's manual summarizing the campaign finance laws for candidates spans 56 pages when printed out,[43] and the summary manual for PACs is a similarly lengthy 53 pages.[44] Reporting of campaign finance activity also entails multiple forms, a list of which spans three webpages on the PDC's website, and many forms have numerous additional schedules of their own.[45] This complexity may be why the current law permits the private right of action only after a combined 55-day waiting period from the time a complainant notifies the state Attorney General and county prosecutor of an alleged violation, and which Initiative 1464 would short-circuit.

CONCLUSION

Permitting government agencies to collect a portion of the penalties that they impose has incentivized excessive enforcement and skewed agency priorities in other contexts and jurisdictions. Providing a private right of action for anyone to sue directly in court over campaign finance violations has incentivized frivolous and vindictive lawsuits in Colorado. CCP is not suggesting that Initiative 1464 will necessarily result in any of these effects and others discussed above. Indeed, CCP hopes Initiative 1464 will not cause any of these problems. Rather, CCP provides this analysis as an informational resource for Washington residents and policymakers to highlight potential problems to be on the lookout for if Initiative 1464 is approved by voters, based on the experiences with similar enforcement-related mechanisms that have been implemented elsewhere.

[38] Rev. Code of Wash. Ch. 42.17A, *available at* http://app.leg.wa.gov/RCW/default.aspx?cite=42.17A&full=true.
[39] Wash. Admin. Code Tit. 390, *available at* http://app.leg.wa.gov/wac/default.aspx?cite=390.
[40] PDC, Declaratory Order Index, *at* https://www.pdc.wa.gov/learn/declaratory-order-index.
[41] PDC, Interpretations in Effect, *at* https://www.pdc.wa.gov/learn/index-of-interpretations-by-subject.
[42] *See, e.g.*, PDC Interp. No. 07-02 (discussing state Attorney General and court opinions narrowing the statutory definition of a "political committee").
[43] PDC, Candidate Instructions, *at* https://www.pdc.wa.gov/print/book/export/html/3.
[44] PDC, Political Committee Instructions, *at* https://www.pdc.wa.gov/print/book/export/html/7.
[45] PDC, All PDC Forms and Filing options, *at* https://www.pdc.wa.gov/learn/forms.