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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 ______________________________ Appeal from Secretary of State Agency Decision Honorable Judge Robert N. Spencer Office of Administrative Courts Case No. OS2008-0028 ______________________________ **Petitioner-Appellant/ Cross-Appellee:** COLORADO ETHICS WATCH v. **Respondent-Appellee/ Cross-Appellant:** SENATE MAJORITY FUND, LLC **Respondents-Appellees:** COLORADO LEADERSHIP FUND, LLC and OFFICE OF ADMINISTRATIVE COURTS	**ΔCOURT USE ONLYΔ**
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I. REPLY ARGUMENT

A. A de novo standard is appropriate when the court merely applies the law to uncontested facts.

When an appellate court reviews a question of law, it should review the trial court's decision under a *de novo* standard.[1] In this matter, the parties have agreed on the facts, leaving only a question of law on the merits to be answered by the court. Because the decision on the merits will be made on a *de novo* basis, it is appropriate that the derivative request for attorney fees should be decided under the same standard.

The issues presented before the trial court in this matter were purely matters of law. In this situation, no controversy existed on the facts or beyond pure matters of statutory interpretation. Review of such statutory interpretation questions by an appellate court applies a *de novo* standard.[2] And because the ALJ did not need to make any factual findings regarding attorney fees, it is appropriate that this Court review the ALJ's decision to deny attorney fees *de novo* as well.

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[1] *E-470 Public Highway v. 455 Co.*, 3 P.d 18, 22 (Colo. 2000) (citing *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (Kourlis, J., dissenting)).

[2] *Sherritt v. Rocky Mountain Fire District*, 205 P.3d 544, 545 (Colo. 2009) (citing *League of Women Voters v. Davidson*, 23 P.3d 1266, 1270 (Colo.App. 2001)).

A panel of this Court recently reviewed the issue of attorney fees *de novo* in a similar campaign finance case. In *Lambert v. Ritter Inaugural Committee, Inc.*[3] the Court reviewed a campaign finance complaint filed against the inaugural committee for Governor Bill Ritter. The ALJ in that case dismissed the case in favor of the inaugural committee and awarded attorney fees against the complainant. The ALJ did not make factual findings because she dismissed the case under C.R.C.P. Rule 12(b)(5), which required she accept all allegations of material fact stated in the complaint as true. The Court of Appeals reviewed the case *de novo*.[4] Although the Court did not specifically state that it reviewed the attorney fee decision *de novo*, it dealt with the attorney fees order without any reference to findings of fact. Specifically, it stated that because "we have determined that dismissal of Lamberts's claims was improper, the attorney fees award cannot stand."[5] By not reviewing any facts related to the attorney fees beyond its own decision to overturn the lower court, it is apparent that the Court simply derived the same standard in overturning the attorney fees order.

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[3] *Lambert v. Ritter Inaugural Committee, Inc.*, ___ P.3d ___, 2009 Colo. App. LEXIS 1568, (Colo. App. Sept. 3, 2009).

[4] *Lambert* at p. 6-8.

[5] *Lambert* at p. 20.

B. CEW's claims of ambiguity do not withstand scrutiny or provide a good faith argument for brining this complaint.

The heart of this matter is public communication that takes place during election season. The campaign finance and election law schemas that have evolved are generally clear, if sometimes complex and filled with specific terms of art. But most of the central tenets supporting campaign finance and election law are well-established and well-settled. That describes the issues at controversy in this case.

The words "expenditure," "express advocacy," and "electioneering communications" each represent a term of art used in campaign finance law. Each has its own distinct meaning and case law history. But those unfamiliar with these developments may easily be led to believe they are relatively interchangeable. Here, CEW attempts to cloak the separate terms under the same shroud of election-related language and claim ambiguity.

1. Colorado's definition of "express advocacy" is settled law.

The central question in this case is whether the SMF communications constituted "express advocacy" of a candidate which would require it to report to the Secretary of State as a political committee. The definition of "express advocacy" is a matter of well-established law in Colorado and has not changed or

evolved at any time since it became an end-point of statutory interpretation in *Buckley v. Valeo*.[6] In fact, the long-standing definition of "express advocacy" embraced by Colorado courts and voters has remained static allowing voters to adopt it in subsequent statutes and reviewing courts to continue to relying on it.

a. The Colorado Court of Appeals and 10th Circuit have both cited the static nature of Buckley's "express advocacy" definition.

Contrary to CEW's assertion, the definition of "express advocacy" has been settled in both Colorado and the 10th Circuit. In *League of Women Voters*, the Colorado Court of Appeals rejected a conclusion that express advocacy goes beyond specific words of express advocacy. Rather, it reaffirmed the then twenty five year-old definition of "express advocacy" found in *Buckley* when it stated "this standard includes the use of words and phrases listed in *Buckley* and other substantially similar or synonymous words."[7] By citing directly to *Buckley*, the Court of Appeals demonstrated the static nature of the definition for "express advocacy."

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[6] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[7] *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001) (quotations and citations omitted).

The 10th Circuit likewise required a communication to "contain express words advocating the election or defeat of a particular candidate" while discussing permissible restrictions on "express advocacy."[8] Notably, the Court cited *Buckley* and stated that "[t]his distinction between permissible restrictions on 'express advocacy' and impermissible restrictions on 'issue advocacy' remains viable and provides the constitutional framework for our analysis."[9] Again, like the *LOWV* Court, the 10th Circuit demonstrated that the definition of "express advocacy" remains a static, viable definition and a central tenet of campaign finance law in Colorado.

b. The basis for CEW's ambiguity claims is not authoritative and has been rejected in Colorado.

CEW claims ambiguity because the Federal Election Commission regulations define "expressly advocate"[10] using a context-based approach that has been rejected in Colorado and discredited in other jurisdictions. Specifically, both the Colorado Court of Appeals and the 10th Circuit have rejected the context-based

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[8] *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1188 (10th Cir. 2000).

[9] *Id* at 1187.

[10] C.F.R. § 100.22(b).

formulation derived from the 9th Circuit's opinion in *Federal Election Commission v. Furgatch*.[11] In its reply, CEW attempts to distance § 100.22(b) from the *Furgatch* opinion for that very reason.[12] But its attempts fall short.

First, while CEW argues that "'existing law' at the time Amendment 27 was passed included the Federal Election commission's definition," that definition applied to federal laws and federal regulations. It did not exist as a matter of state law in Colorado. Additionally, no similar statute, rule, regulation or law existed in Colorado then or exists in Colorado now. Without a comparable state law, CEW's arguments have no basis for expanding the long-standing state definition of "express advocacy."

Second, Colorado rejected the context-based approach used in the federal definition in question.[13] The *Furgatch* Court and the FEC formulate that context-based approach in nearly identical language. Consequently, by specifically rejecting the general context-based approach in *Furgatch*, courts in Colorado have likewise rejected the FEC definition. Indeed, because § 100.22(b) is a federal

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[11] *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

[12] CEW's *Answer-Reply Brief and Request for Sanctions Against Cross-Appellant* (hereafter "*Answer-Reply Brief*"), p. 2.

[13] See SMF's *Opening-Answer Brief*, p. 17-23.

regulation, the Colorado Court of Appeals would not even have the jurisdiction to review it. The court necessarily had to reject the approach by rejecting the *Furgatch* standard, as it did in *LOWV*.

CEW attempts to dismiss SMF's analysis of the context-based approach by stating that it had not brought up *Furgatch* in its *Opening Brief*.[14] But the fact that CEW failed to address *Furgatch* originally shows the weakness of its case. More importantly, CEW failed to address the 10th Circuit's rejection of the context-based approach employed by *Furgatch* and § 100.22(b). Instead, CEW launches into a convoluted discussion of a 4th Circuit decision it claims affirms the constitutionality of § 100.22(b). But without refuting the 10th Circuit's binding authority in Colorado, and its rejections of the context-based approach, CEW failed to demonstrate any real ambiguity in the law within the jurisdiction.

c. Colorado regulates the "functional equivalent of express advocacy" as electioneering communications, not as express advocacy.

CEW's argument that Colorado should regulate the "functional equivalent of express advocacy" as express advocacy fails because it confuses the schema for regulating expenditures with that for regulating electioneering communications. In

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[14] *Answer-Reply Brief*, p. 5.

fact, the circular argument made by CEW demonstrates the weakness of its argument. To be regulated speech under the express advocacy schema, a communication either does or does not use specific words of express advocacy. By defining a separate communication as the functional equivalent of express advocacy, Colorado law recognizes electioneering communications are not express advocacy. It only functions in a similar manner, and so must be regulated under a separate schema.

By its very definition, a regulated expenditure must "expressly advocate."[15] That is, it must include a plea for voters to actually vote for or against a candidate. It is that very specific and narrow plea to vote that saves regulation of expenditures from becoming unconstitutional.[16] In contrast, "electioneering communications" do not include such a plea for votes. Rather than exhorting votes, these communications ask the audience to take some other type of action, such as contacting a congressman or voicing opposition to an issue. While the communications do appear close in time to an election and do identify specific

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[15] Colo. Const. art. XXVIII, § 2(8).

[16] *Buckley* , 424 U.S. at 44.

candidates, they do not use the requisite words of express advocacy to ask for votes.[17]

2. CEW did not make a good faith argument.

a. CEW attempts to create ambiguity where none exists.

As demonstrated above, the regulatory framework for election laws and campaign finance are clear and static in most instances. But CEW attempts to take advantage of some complexities to create its own ambiguities. In addition to arguing for a context-based approach that has been firmly rejected in Colorado, CEW attempts to erase the difference in two separate regulatory campaign finance schemas. Ambiguity does not exist in either instance, except where CEW has attempted to inject it.

b. CEW's ambiguity claims would inject Due Process violations into Colorado's definition of "express advocacy.

CEW's arguments for applying the "functional equivalent of express advocacy" would inject Fourteenth Amendment Due Process violations into Colorado's definition of "express advocacy" if accepted. If allowed, CEW's arguments create a shifting standard and uncertainty among political speakers.

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[17] Colo. Const. art. XXVIII § 2(7).

Some may be prosecuted under a more stringent standard than others. Consequently, free speech may be chilled by the uncertainty created and the specter of prosecution.

C. The basis for CEW's request for attorney fees does not meet applicable standards.

1. Withdrawal from this appeal by CLF is irrelevant

CEW puts great weight on the fact that CLF withdrew from the current appeal. But that argument is irrelevant to its request for attorney fees. CEW failed to cite any authority demonstrating that withdrawal by one party should be considered a factor in sanctioning a co-party with attorney fees. Rather, CEW attempts to discredit SMF by implying that SMF's appeal must be frivolous if its co-defendent, CLF, chose not to pursue an appeal as well. CEW's argument is flawed and without merit and should be ignored by this Court.

2. The lower court's decision to dismiss SMF's request for attorney fees is unpersuasive

CEW asserts that SMF fails to address the authority cited by the lower court when it dismissed SMF's request for attorney fees. But the lower court did not cite any case law authority when it chose to dismiss SMF's request for attorney fees.

Rather, the court merely stated its observations that led to the conclusion. SMF disagrees with the lower court.

The lower court dismissed SMF's request for attorney fees for the following reasons:

a. The case *League of Women Voters* only discussed an earlier version of the FCPA, not the current version;

b. Because *League of Women Voters* has not been reviewed by the Colorado Supreme Court, CEW has a proper platform to argue for modification, extension, or reversal; and

c. U.S. Supreme Court case law has evolved and CEW may argue that Colorado should follow suit.[18]

First, while *LOWV* discussed campaign finance laws as they existed prior to the current iteration of the FCPA, its holding is still authoritative. When voters adopt words and phrases previously defined by courts into new laws, those interpretations are deemed to have been adopted as well. Any other approach would abandon all prior precedents every time voters adopt a new statutory scheme. Courts would be required to rehear the same issues over and over with each new iteration. That is an absurd result and should not be adopted here.

Second, while the Colorado Supreme Court has not reviewed *LOWV*, that

[18] *Order Denying Defendant's Motion for Attorney Fees*, p. 3.

factor alone does not present a proper platform for CEW to argue for a modification, extension, or reversal. In fact, soon after *LOWV*, voters reviewed its definition of "express advocacy" and adopted it into the Colorado Constitution. The reliance placed on *LOWV*'s definition of "express advocacy" by voters should weigh heavily against the reasoning applied by the ALJ. Otherwise voters could only adopt standards that previously appeared before the Supreme Court. Such an outcome would be an unreasonable restraint on the people's rights to self-governance.

Finally, the ALJ misconstrued the development of political advertising regulations when he accepted CEW's argument that federal campaign finance laws have "evolved, moving away from *Buckley's* narrow rule in favor of a broader rule permitting regulation of the 'functional equivalent' of express advocacy."[19] The ALJ cites no authority for that view, which, in fact, is in clear error. As discussed above, the definition for "express advocacy" remains the same today as it was when *Buckley* first declared it. As recently noted by the U.S. Supreme Court: "Over the last 30 years, in considering the constitutionality of a host of different campaign finance statutes, this Court has repeatedly adhered to *Buckley's*

[19] *Order Denying Defendant's Motion for Attorney Fees*, p. 3.

constraints, including those on expenditure limits."[20]

While the ALJ does state that "law relating to campaign finance reform is in a state of flux,"[21] he has applied that concept too broadly. The ALJ is correct in the sense that *some* areas in campaign finance law are in a state of flux. But this is similar to any other area of law. At least some part is under a state of flux, but it should not be generalized to the entire body of law. Some tenets remain static as others around them change. That is the case here. While some of the campaign finance area may be experiencing change, the core issue here, the definition of "express advocacy" is not one of them. It remains static and defined in the same way it has been since first introduced by *Buckley* over three decades ago.

3. CEW's complaint was frivolous when filed, and it is still frivolous now.

As SMF maintained to the lower court, CEW's brought a frivolous complaint against SMF. The complaint has cost SMF time, money, and additional resources to defend. Additionally, CEW forced SMF to defend itself in the court of public opinion by issuing press releases indicting SMF and in conjunction with the complaint. By continuing to defend its complaint, CEW continues to cost SMF

[20] *Randall v. Sorrell*, 548 U.S. 230, 242 (2006)(citations omitted).

[21] *Order Denying Defendant's Motion for Attorney Fees*, p. 3.

resources in each of these areas.

Throughout the proceedings before this Court and the lower court, CEW's only real defense has been its attempts to muddy the waters of complex campaign finance laws and promote positions that have been soundly and repeatedly rejected by authoritative jurisdictions. Failure to sanction CEW will only lead to similar behavior in the future by CEW, and other litigants, as SMF has demonstrated that CEW continues to target SMF through litigation. This Court should therefore award fees for this behavior and sanction CEW for bringing a frivolous complaint.

II. CONCLUSION

The SMF requests that this Court order CEW to pay the Senate Majority Fund's legal fees.

Respectfully submitted this 7th day of October, 2009.

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I certify that on this 7th day of October, 2009, the foregoing **REPLY BRIEF** was E-filed and served via LexisNexis or by US Mail/ facsimile to all parties and other interested persons as following:

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