

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

Attorneys for Appellee/ Cross-Appellant:
Scott E. Gessler, Reg. No. 28944
Mario D. Nicolais, II, Reg. No. 38589
Hackstaff Gessler LLC
1601 Blake Street, Suite 310
Denver, Colorado 80202
Telephone: (303) 534-4317
Fax: (303) 534-4309
E-mail: sgressler@hackstaffgessler.com
mnicolais@hackstaffgessler.com

COURT USE ONLY

Case Number: 08CA2689

OPENING-ANSWER BRIEF

Table of Contents

I. Issue Presented for Review..... 1

 A. Answer Brief Issues. 1

 B. Opening Brief Issues. 1

II. Statement of the Case. 2

 A. Nature of the Case. 2

 B. Proceedings and Disposition Below..... 3

 C. Statement of the Facts. 4

III. Summary of Argument. 6

IV. Answer Brief Argument. 10

 A. Standard of Review. 10

 B. Colorado defines “expressly advocate” to require words or phrases that Specifically urge the election or defeat of a candidate..... 10

 1. Colorado voters adopted a well-established definition of “expressly advocate.”..... 11

 a. Colorado voters adopted Colorado and federal court definitions that require words specifically urging the election or defect of a candidate. 12

 b. The “blue book” shows that Colorado voters adopted the League of Women Voters standard. 16

 2. Colorado and all but one federal circuit have rejected a context Based approach. 17

 3. CEW’s approach creates due process violations..... 23

 a. CEW cannot identify a single, consistent standard for “expressly advocate.”. 24

b.	CEW asks this Court to create and apply an unworkable Framework involving “issue speech.”	15
c.	This court should not be swayed by claims of disaster..	29
C.	WRTL’s definition of the “functional equivalent of express advocacy” is irrelevant.	32
1.	The functional equivalency test applies to electioneering communications, not express advocacy.	32
2.	“Express advocacy” is not the same as the “functional equivalent” of express advocacy.	36
D.	The Senate Majority Fund’s communications did not expressly advocate.	39
1.	CEW did not allege that the ads expressly advocated the election or defeat of a candidate.	39
2.	The communications did not expressly advocate under the <i>League of Women Voters</i> standard.	40
3.	The communications did not expressly advocate under the <i>Furgatch</i> standard.	42
4.	CEW improperly relies on an intent-and-effect test.	43
V.	Opening Brief Argument.	44
A.	Standard of Review.	44
B.	No authority supports changing Colorado’s definition of “expressly advocate.”	46
C.	Colorado Ethics Watch ignores or misstates campaign finance law..	47
D.	There is no good faith argument to change the statutory definition of “expressly advocate.”	48
VI.	Conclusion.	49
VII.	Request for Attorney Fees.	49

Table of Authorities

Cases

<i>Adamson v. Bowen</i> , 855 F.2d 668, 673 (10 th Cir. 1988)	46
<i>Alliance for Colo.'s Families v. Gilbert</i> , 172 P.3d 964 (Colo. App. 2007).....	12,49
<i>Anderson v. Spear</i> , 356 F.3d 651 (6th Cir. 2004).....	21
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	13,23,47
<i>Cal. Pro-Life Council, Inc. v. Getman</i> , 328 F.3d 1088 (9th Cir. 2003).....	22
<i>Chamber of Commerce v. Moore</i> , 191 F. Supp. 2d 747 (Miss. 2000).....	21
<i>Citizens for Responsible Gov't State Political Action Comm. v. Davidson</i> , 236 F.3d. 1174 (10 th Cir. 2000).....	14,21,23,28
<i>Citizens United v. Fed. Election Comm'n</i> , 530 F.Supp.2d 274 (D.D.C. 2008).	27
<i>Common Sense Alliance v. Davidson</i> , 995 P.2d 748(Colo. 2000).....	12
<i>Davidson v. Sandstrom</i> , 83 P.3d 648 (Colo. 2004).....	12
<i>Faucher v. Fed. Election Comm'n</i> , 928 F.2d 468 (1st Cir. 1991)..	21,28
<i>Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.</i> , 616 F.2d 45 (2nd Cir. 1980)..	21
<i>Fed. Election Comm'n v. Christian Action Network, Inc.</i> , 110 F.3d 1049 (4th Cir. 1997)..	21
<i>Fed. Election Comm'n v. Furgatch</i> , 807 F.2d 857 (9th Cir. 1987)..	19,42,43
<i>Fed. Election Comm'n v. Mass. Citizens for Life, Inc.</i> , 479 U.S. 238 (1986)..	28

<i>Fed. Election Comm’n v. Wis. Right to Life, Inc.</i> , 551 U.S. 449 (2007).....	22,23,26,27,33,34,38,39,43,44
<i>Governor Gray Davis Comm. v. American Taxpayers Alliance</i> , 102 Cal. App. 4th 449 (Cal. App. 2002)..	22
<i>Harwood v. Senate Majority Fund, LLC</i> , 141 P.3d 962 (Colo. App. 2006).....	11
<i>Hernandez v. People</i> , 176 P.3d 746 (Colo. 2008)..	45
<i>In the Matter of the Complaint Filed by Lennard Simpson Regarding Alleged Campaign and Political Finance Violations by Colo. League of Taxpayers</i> , Case No. OS 2008-0019, Agency Decision at 9, (Aug. 2008)..	48
<i>Iowa Right to Life Comm., Inc. v. Williams</i> , 187 F.3d 963 (8 th Cir. 1999)..	21
<i>League of Women Voters of Colo. v. Davidson</i> , 23 P.3d 1266 (Colo. App. 2001)....	3,15,21,23,41,42
<i>Maul v. Shaw</i> , 843 P.2d 139, 141-42 (Colo. App. 1992).....	46
<i>McConnell v. Fed. Election Comm’n</i> , 540 U.S. 93, 127 (2003).....	28,33,38
<i>Nat’l Right to Work Legal Defense and Educ. Found., Inc. v. Herbert</i> , 581 F.Supp.2d 1132 (D.Utah 2008).....	34
<i>Nixon v. Shrink Mo. Gov’t PAC</i> , 528 U.S. 377 (2000).....	28
<i>People v. Trupp</i> , 51 P.3d 985 (Colo. 2002).	46
<i>Remote Switch Systems, Inc. v. Delangis</i> , 126 P.3d 269, 275 (Colo. App. 2005), cert. denied, 2006 WL 380434	45
<i>Schmidt Const. Co. v. Becker-Johnson Corp.</i> , 817 P.2d 625 (Colo. App. 1991)..	45

<i>Stearns Mgmt. Co. v. Missouri River Servs., Inc.</i> , 70 P.3d 629 (Colo. App. 2003).....	46
<i>Stepanek v. Delta County</i> , 940 P.2d 364 (Colo. 1997)..	46
<i>Wagner v. Grange Ins. Ass'n</i> , 166 P.3d 304 (Colo. App. 2007).....	10
<i>Wash. State Republican Party v. Wash. State Public Disclosure Comm'n</i> , 4 P.3d 808 (Wash. 2000).....	22

Statutes

C.R.S. § 1-45-103.7(1).....	31
C.R.S. § 1-45-111.5(2)(2008).....	45
2 U.S.C. § 434(f)(3).....	33

Constitution

Colo. Const. art. XXVIII, § 2(5)(a).....	10
Colo. Const. art. XXVIII, § 2(7)(a).....	33
Colo. Const. art. XXVIII, § 2(8)(a).....	11,15,31
Colo. Const. art. XXVIII, § 2(9).....	31
Colo. Const. art. XXVIII, § 2(12)(a).....	10
Colo. Const. art. XXVIII, § 3.....	32
Colo. Const. art. XXVIII, § 3(5).....	31
Colo. Const. art. XXVIII, § 5.....	31

Colo. Const. art. XXVIII, § 5(1).....	17
Colo. Const. art. XXVIII, § 6.....	31
Colo. Const. art. XXVIII, § 6(1).....	32
Colo. Const. art. XXVIII, § 6(2).....	32
Colo. Const. art. XXVIII, § 7.....	31
Colo. Const. art. XXVIII, § 7(a).....	32

Regulations

11 C.F.R. § 100.22(b)(1).....	29
11 C.F.R. § 100.22(b)(2).....	29

Other Materials

<i>Electioneering Communications</i> , 72 Fed. Reg. 72902 (Dec 26, 2007).	39
<i>Express Advocacy</i> , 60 Red. Reg. 35292, 35295 (Jul 6, 1995).	18
<i>Res. Pub. No. 502-1, 2002 Ballot Info. Booklet at 3-4 (2002)</i>	16,17

I. ISSUES PRESENTED FOR REVIEW

A. Answer Brief Issues

1. In 2002 Colorado voters enacted Article XXVIII of the Colorado Constitution, which regulates certain types of political speech that “expressly advocates” the election or defeat of a candidate. At the time voters passed Article XXVIII, Colorado, the Tenth Circuit, and nearly every other federal circuit defined “expressly advocate” to require the use of specific words or phrases of express advocacy, or their synonyms or substantially similar words. Should this Court continue to apply the same standard?

2. The communications sent by Senate Majority Fund do not expressly advocate the election or defeat of a candidate under the standard that has been used in Colorado for the past eight years – a point that Colorado Ethics Watch does not dispute. Are the communications sent by Senate Majority Fund regulated as express advocacy?

B. Opening Brief Issue

Colorado Ethics Watch argues for a definition of “expressly advocate” that was explicitly rejected in Colorado and the Tenth Circuit, and that reasoning was later adopted by Colorado voters. Colorado Ethics Watch provides no authority

showing that Colorado’s definition has changed, and its argument ignores or misrepresents campaign finance law. Did Colorado Ethics Watch bring a frivolous complaint?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case is a matter of statutory interpretation involving one question: what does the phrase “expressly advocate the election or defeat of a candidate” mean, as used in Colorado Constitution Article XXVIII, § 2(8)(a). If the Senate Majority Fund (“SMF”) expressly advocated, then it was required to meet political committee regulations, including reporting requirements and contribution limits. If the SMF did not expressly advocate, then it was *not* regulated as an political committee – although its communications may have nonetheless been regulated as electioneering communications, which trigger reporting requirements and restrictions on corporate and labor organization funding. (Whether the SMF made electioneering communications is not an issue in this case.)

Colorado Ethics Watch (“CEW”) filed a campaign finance complaint alleging that the SMF (and the Colorado Leadership Fund) paid for public communications that expressly advocated the election or defeat of a candidate. CEW included copies

of advertisements that it alleged were paid for by SMF, and it cited language within the communications themselves.

The SMF moved to dismiss CEW’s complaint under the standard for “expressly advocate” articulated by this Court in *League of Women Voters of Colorado v. Davidson*¹ (“*LOWV*”) in 2001, arguing that the complaint failed to allege that the communications contained words that specifically urged the election or defeat of a candidate. The lower court applied the test for “expressly advocate” in *LOWV*, found that the communications at issue did not meet this definition, and dismissed the complaint.

CEW argues that this Court should define the term “expressly advocate” in Article XXVIII as something different than the test articulated in *LOWV*. Specifically, CEW argues that the term “expressly advocate” should include all speech that is not “issue speech.” The SMF maintains that the standard in *LOWV* was and remains the definition for “expressly advocate” as used in Article XXVIII.

The SMF also requests attorney fees in this case, arguing that CEW filed a frivolous complaint and has pursued a frivolous appeal.

B. Proceedings and Disposition Below

¹ *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266 (Colo. App. 2001).

The SMF agrees with CEW's description, with the following addition. Following dismissal of CEW's complaint, on December 11, 2008 the SMF requested attorney fees, arguing that CEW filed a frivolous and vexatious complaint.² The lower court denied the request on January 7, 2009,³ and on February 23, 2009 the SMF appealed. That appeal was consolidated with this case on May 5, 2009 and serves as the basis for SMF's *Opening Argument*.

C. Statement of the Facts

The Senate Majority Fund (the "SMF") is dually registered as a "political organization" under section 527 of the federal Internal Revenue Code and as a "political organization" under state campaign finance laws.⁴ The SMF was not and is not registered as a "political committee" under state campaign finance laws.⁵ Between 2007 and 2008, SMF filed regular reports detailing both its contributions and spending as a political organization.⁶

² R. 252.

³ R. 468.

⁴ R. 2, ¶ 3; R: 8.

⁵ R. 4, ¶ 18.

⁶ R. 53-80 (CEW's exhibits include a partial 527 Political Organization Report from the SOS's website. The full report also includes all spending, loans, loan payments, returned contributions, and returned spending.).

The SMF paid for and distributed multiple direct mail pieces during 2008 (individually a “Mailer;” collectively the “Mailers”).⁷ The Mailers varied in content, topics, and format, but shared several characteristics, according to CEW. In CEW’s analysis, each of the Mailers:

1. Identified a specific candidate for state office;
2. Stated that the candidate was running for elective office;
3. Described the candidate’s public positions on topics; and
4. Stated what the candidate would do once elected to that office.⁸

Most of the Mailers also urged citizens to contact the candidates and thank them for taking the positions described in those individual Mailers.⁹

As alleged by CEW, SMF spent over two hundred dollars (\$200.00) on each Mailer¹⁰ and an additional one hundred fourteen thousand dollars (\$114,000.00) to purchase television time (the “TV Commercial”).¹¹

⁷ R. 2, ¶ 5.

⁸ R. 2-3, ¶ 5.

⁹ *See, e.g.*, R. 12.

¹⁰ R. 3.

¹¹ *Id.*

CEW filed its *Complaint* against SMF on September 10, 2009,¹² claiming that SMF failed to file as a “political committee,” file independent expenditure reports, or follow the contribution limitations imposed on “political committees.”¹³ In its complaint, CEW averred that to qualify as an expenditure, a communication must “expressly advocate” the election or defeat of a candidate.¹⁴ But CEW did not allege that any Mailer or the TV Commercial used specific words associated with “expressly advocating” such as: “vote for,” “vote against”, “elect”, “defeat”, or “cast your ballot for.”¹⁵ Additionally, CEW failed to allege that SMF distributed the Mailers.¹⁶

III. SUMMARY OF ARGUMENT

The case is reviewed *de novo*.

This case hinges on the definition of “expressly advocating.” Colorado has long held that the definition of “expressly advocating” requires language that specifically urges a voter to elect or defeat a clearly identified candidate. This Court

¹² R. 6.

¹³ R. 2-4.

¹⁴ R. 3-4, ¶ 13.

¹⁵ R. 2-6.

¹⁶ *Id.*

established that standard in *LOWV of Colorado v. Davidson* in 2001, bringing Colorado in line with the Tenth Circuit and nearly every other federal circuit in the country. Colorado voters then adopted the *LOWV* standard as part of the Colorado Constitution through voter initiative in 2002. Voters are presumed to know existing Colorado law when they pass initiated measures, and the *LOWV* set forth a well-reasoned and well-established definition of “expressly advocate.” Further, the bluebook explaining the 2002 ballot initiatives also referred to the *LOWV* standard.

Accordingly, the *LOWV* standard remains Colorado’s test for “expressly advocating.” This test explicitly rejected a context-based approach seemingly advocated by CEW.

CEW asks this Court to adopt a new standard for “expressly advocate,” but this Court would create due process problems if it followed CEW’s recommendation. First, CEW’s standard is vague and overbroad, in large part because CEW itself cannot articulate a clear standard for “expressly advocating,” as seen by the wild shifts in its argument from the lower court to this Court. Second, CEW’s current approach is unworkable. It relies on the term “issue speech” which creates an overbroad standard that did not exist at the time Colorado’s voters enacted the current definition of “expressly advocate.” And even today no court has

ever articulated or applied the term “issue speech.” Further, no current standard in use remotely matches CEW’s new term. Finally, CEW’s reasoning is backwards. Rather than define and apply the term “expressly advocate,” CEW instead wishes to treat the “express advocacy” standard as everything that is *not* “issue speech.” Rather than advocate a standard, CEW advocates for the absence of a standard.

CEW argues that Colorado’s campaign finance laws will be “eviscerated” if the Court rejects its arguments. These claims of disaster are without merit, because current law regulates political communications that do not rise to the level of express advocacy, such as electioneering communications.

CEW also argues that this Court should rely upon the test for the “functional equivalent of express advocacy” articulated by the U.S. Supreme Court in *Wisconsin Right to Life v. Federal Election Commission*. But that standard is irrelevant. First, it only applies to communications that already constitute electioneering communications and does not stand as an independent test. Second, the term “express advocacy” is not the same as the “functional equivalent of express advocacy.” The first is an endpoint of statutory construction, while the second is a first principle of constitutional law. Indeed, even the articulated standards and usage differ greatly.

Finally, under the *LOWV* test, CEW failed to allege that the ads contained words that expressly advocated the election or defeat of a candidate, and examples and analysis in that case refute CEW's allegations. CEW's claims even fail under a more liberal context-based approach, and CEW is ultimately reduced to relying on an intent-and-effect test explicitly rejected in *Wisconsin Right to Life*.

In the Opening Argument, the denial of attorney fees is subject to *de novo* review. SMF relies on many of the substantive arguments made earlier, but it adds three points. First, CEW provided no authority to support changing Colorado's definition of "expressly advocating." Instead it has created two standards (one in this appeal and one in the lower court) that find no support whatsoever in any statute, rule, or court opinion. Second, CEW ignored the entire electioneering communications framework, which is essential to understanding both CEW's claims of disaster as well as the "functional equivalent of express advocacy" test. Finally, CEW did not make any good faith argument to change the statutory definition of "expressly advocating." Contrary to its claims, it did not rely in good faith on *Alliance for Colorado's Families v. Gilbert* or any other case.

Accordingly, the lower court’s dismissal of CEW’s complaint should be upheld, and SMF should be awarded attorney fees for defending CEW’s frivolous complaint.

IV. ANSWER BRIEF ARGUMENT

A. Standard of Review

The SMF agrees that an order dismissing a complaint is reviewed *de novo*.¹⁷

B. Colorado defines “expressly advocate” to require words or phrases that specifically urge the election or defeat of a candidate.

This is a case of statutory interpretation. Specifically, the case hinges on the meaning of “expressly advocate” as used in Colorado Constitution Article XXVIII, Section § 2(8)(a). To orient the Court, CEW accuses the SMF of failing to follow the restrictions placed on political committees. To be regulated as a political committee, however, an organization such as the SMF must either accept contributions or make expenditures.¹⁸

A contribution includes a payment made to a candidate committee.¹⁹ Of critical importance here, “expenditure” means a “payment . . . for the purpose of

¹⁷ *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 307 (Colo. App. 2007).

¹⁸ Colo. Const. art. XXVIII, § 2(12)(a).

¹⁹ Colo. Const. art. XXVIII, § 2(5)(a).

expressly advocating the election or defeat of a candidate.”²⁰ In order to determine whether the SMF made an expenditure, therefore, this Court must apply the phrase “expressly advocating the election or defeat of a candidate.” On this point there is no dispute.

1. Colorado voters adopted a well-established definition of “expressly advocate.”

At the outset CEW argues that this Court’s decision in *LOWV* does not apply, and it argues that the definition of “expressly advocate” in that case was not adopted by Colorado voters when they passed Article XXVIII. But a careful analysis of the history and case law surrounding the adoption of Article XXVIII shows that Colorado voters unambiguously incorporated the definition of “expressly advocate” as articulated in *LOWV*.

Colorado voters adopted Article XXVIII of the Colorado Constitution in 2002. Courts have regularly interpreted initiated measures. “[I]n construing a constitutional provision, [courts must] give effect to the intent of the electorate that adopted it.”²¹ In doing so, Colorado’s courts rely on two methods. First, “[t]he electorate, as well as the legislature, must be presumed to know the existing law at

²⁰ Colo. Const. art. XXVIII, § 2(8)(a).

²¹ *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 964 (Colo. App. 2006).

the time they amend or clarify that law.”²² Accordingly, courts must presume that the electorate knew the definition of “expressly advocate ” at the time it adopted Article XXVIII in 2002.

Second, when interpreting citizen initiated measures courts also consider “relevant materials such as the ballot title and submission clause and the biennial ‘Bluebook,’ which is the analysis of ballot proposals prepared by the legislature.”²³ And here, the Bluebook provides unambiguous guidance as to the meaning of “expressly advocate.”

a. Colorado voters adopted existing Colorado and federal court standards for “expressly advocate.”

When Colorado voters adopted Article XXVIII in 2002, the term “expressly advocate” had a long, 26 year history, and both Colorado and federal courts had established a very precise meaning for the term “expressly advocate” and its related noun “express advocacy.”

²² *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000); *Alliance for Colo.'s Families v. Gilbert*, 172 P.3d 964, 968 (Colo. App. 2007).

²³ *Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004); *Harwood*, 141 P.3d at 965.

The terms “expressly advocate” and “express advocacy” stem from the U.S. Supreme Court’s 1976 ruling in *Buckley v. Valeo*.²⁴ In that case, the Court established an “exacting interpretation of the statutory language” for expenditure, in order to “avoid constitutional vagueness.”²⁵ Accordingly, the Court limited the term “expenditure.” Thus, to “preserve the provision against invalidation on vagueness grounds, [the law was] construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”²⁶ Thus, the court interpreted federal statutes to only regulate “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”²⁷ These words, and their synonyms, have come to be known as “express advocacy.”

In 2000, approximately two years before the adoption of Article XXVIII by the Colorado electorate, the Tenth Circuit used the *Buckley* framework to strike

²⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁵ *Id.* at 45.

²⁶ *Id.* at 44.

²⁷ *Id.* at 44, n. 52.

down part of Colorado’s campaign finance laws. At that time, Colorado law defined a political committee as organizations making “independent expenditures,” which included messages that “unambiguously refer[red] to [a] candidate.”²⁸ In striking down this definition as unconstitutionally vague, the Court ruled that *Buckley’s* “[d]istinction between permissible restrictions on “express advocacy” and impermissible restrictions on “issue advocacy” remain[ed] viable, and provide[d] the constitutional framework for our analysis.” The Court adopted *Buckley’s* narrow interpretation of express advocacy, stating that “communications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy”²⁹

One year later in 2001, the Colorado Court of Appeals also struck down Colorado’s campaign finance laws, which defined independent expenditure to include communications that “unambiguously refer[red] to any specific public office or candidate for such office.” Specifically, the Court only allowed regulation of “those expenditures that are used for communications that “expressly advocate the election or defeat of a clearly identified candidate. . . in other words, this

²⁸ *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1188 (10th Cir. 2000).

²⁹ *Id.* at 1187.

standard includes the use of the words and phrases listed in *Buckley* and other substantially similar or synonymous words.”³⁰

The decision in *LOWV* controls this case. It is Colorado’s test for express advocacy.

LOWV articulated the standard for “expressly advocate” that Colorado voters adopted in 2002. As of that year both the Tenth Circuit and the Colorado Court of Appeals had adopted a very precise, well-established and well-considered definition of “expressly advocate.” Colorado’s voters subsequently adopted this standard. Indeed, Article XXVIII of the Colorado Constitution specifically uses the phrase “expressly advocate the election or defeat of a candidate,”³¹ words almost identical to the phrase “expressly advocate the election or defeat of a clearly identified candidate” used in *LOWV* approximately 18 months before. Colorado voters are presumed to know the law when they adopt it, and both federal and state law were clear and consistent in their definition of “expressly advocate.”

Thus in 2001 – one year prior to Colorado’s constitutional adoption of the term “expressly advocate” – Colorado’s courts extensively analyzed and carefully

³⁰ *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001) (quotations and citations omitted).

³¹ Colo. Const. art. XXVIII, § 2(8)(a).

defined the term “expressly advocate” to only include words of express advocacy. This approach followed the test laid down by the U.S. Supreme Court, the Tenth Circuit, and the vast majority of federal circuits that had considered the matter.

b. The “blue book” shows that Colorado voters adopted the League of Women Voters standard.

The language in the 2002 Bluebook also reflected the court’s narrow definition of “expressly advocate.” Specifically, Article XXVIII was intended to

regulate[] two types of political advertisements. The first are those that are made outside the control of a candidate and that *specifically urge* the election or defeat of a candidate. . . .

The second type of political advertisement is one that clearly refers to a candidate *without specifically urging* the election or defeat of the candidate. . . .³²

The first type of communication referred to by the Bluebook is an independent expenditure, for which Article XXVIII requires reports for expenditures greater than \$1,000.³³ According to the Bluebook, this type of communication must “*specifically urge* the election or defeat of a candidate” (emphasis in original).³⁴ As explained and demonstrated in *LOWV*, this requires

³² *Res. Pub. No. 502-1, 2002 Ballot Info. Booklet* at 3-4 (2002).

³³ Colo. Const. art. XXVIII, § 5(1).

³⁴ *Res. Pub. No. 502-1, 2002 Ballot Info. Booklet* at 2 (2002).

more than merely identifying a candidate, lauding (or criticizing) a candidate's characteristics or qualifications, or explaining a candidate's plans upon election – the very factors cited in CEW's complaint. Rather, an advertisement must contain specific words of advocacy in order to “expressly advocate.”

The second type of communication referred to by the Bluebook is an “electioneering communication,” which refers to a candidate “*without specifically urging* the election or defeat of a candidate” (emphasis in original).³⁵ Thus, assuming the SMF's mail communications met the timeframe and targeting criteria for electioneering communications, voters intended to regulate those communications. This language shows that voters did not treat such communications as “express advocacy.” As a matter of statutory interpretation, therefore, the term “expressly advocate” must be construed to only reach communications that contain specific words urging the election or defeat of a candidate.

2. Colorado and all but one federal circuit have rejected a context-based approach.

CEW does not dispute that voters must be presumed to adopt existing law, but rather it argues that the definition of “expressly advocate” was not limited to

³⁵ *Id.*

LOWV, but also included 11 C.F.R. § 100.22(b), which also existed at the time voters adopted Article XXVIII. This position has no merit. First, CEW does not give any valid reason to believe that Colorado voters intended to adopt § 100.22(b). It cites no case law, bluebook language, or other drafting language.

Second, the opposite is true. *LOWV* explicitly rejected the context-based approach in § 100.22(b), as did every federal circuit reviewing that standard. Accordingly, Colorado voters did not adopt the § 100.22 standard because it had been thoroughly rejected and discredited.

The definition of “express advocacy” in § 100.22(b) stems directly from the Ninth Circuit’s decision in *Federal Election Commission v. Furgatch*,³⁶ where that court was asked to determine whether the phrase “[d]on’t let him do it” was express advocacy.³⁷ The court recognized that those words “[a]re simple and direct. ‘Don’t let him’ is a command. The words ‘expressly advocate’ action of some kind. . . . we are presented with an express call to action, but no express indication of what action is appropriate.”³⁸

³⁶ *Express Advocacy*, 60 Fed. Reg. 35292, 35295 (Jul. 6, 1995).

³⁷ *Fed. Election Comm’n v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

³⁸ *Id.*

After establishing that the language exhorted action, the court went on to determine the type of action based on the context of the communication, including the time of publication and the audience. That court treated the communication as express advocacy because “when read as a whole, and with limited reference to external events, [it was] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”³⁹ Accordingly, *Furgatch* created a three-part test:

- First, even if it is not presented in the clearest, most explicit language, speech is “express” for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning.
- Second, speech may only be termed “advocacy” if it presents a clear plea for action;
- Third, it must be clear what action is advocated. Speech cannot be “express advocacy of the election or defeat of a clearly identified candidate” when reasonable minds could differ as to whether it

³⁹ *Id.* at 864.

encourages a vote for or against a candidate or encourages the reader to take some other kind of action.⁴⁰

But *Furgatch*'s approach had been soundly rejected at the time Colorado voters adopted Article XXVIII, and this Court should not now revive it. First and foremost, *LOWV* explicitly rejected the *Furgatch* test because: (1) it raised “vagueness and overbreadth problems;” (2) the analysis was “extremely difficult to apply, requiring courts to engage in a semiotic analysis of intent and interpretation, and, if the communication is visual, it requires courts to engage in an iconographic analysis of imagery;” (3) the mere timing of a communication could convert it into “express advocacy,” thus requiring the speaker to “continually re-evaluate his or her words as the election approaches;” (4) the analysis was “not supported by the plain language in *Buckley*, which focuses on express words of advocacy, not express images, symbols, or contexts of advocacy;” and (5) it was at odds with the “narrow and cautious approach” of the Colorado Supreme Court. Thus, the Court of Appeals rejected *Furgatch*'s “context-based standard . . . or *any comparable approach*.”⁴¹ By

⁴⁰ *Id.*

⁴¹ *League of Women Voters of Colo.*, 23 P.3d at 1276. (emphasis added).

using the phrase “any comparable approach,” *LOWV* extended its analysis to § 100.22(b).

In rejecting *Furgatch*, the Colorado Court of Appeals sided with *every* federal circuit court that had reviewed either the *Furgatch* formulation or its offspring, § 100.22(b). This included the First, Second, Fourth, Fifth, Eighth and Tenth Circuits.⁴² In 2002, no federal court had accepted the “expressly advocate” test contained either in *Furgatch* or § 100.22(b). And shortly after Colorado voters adopted Article XXVIII, the Sixth Circuit joined its sister circuits in rejecting a context-based approach and defining “express advocacy” as “speech which expressly advocates the election or defeat of a clearly identified candidate.”⁴³

⁴² See *Faucher v. Fed. Election Comm’n*, 928 F.2d 468, 470-471 (1st Cir. 1991); *Fed. Election Comm’n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2nd Cir. 1980) (en banc); *Fed. Election Comm’n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Chamber of Commerce v. Moore*, 191 F. Supp. 2d 747 (Miss. 2000); *Iowa Right to Life Comm., Inc., v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); see also

⁴³ *Anderson v. Spear*, 356 F.3d 651, 665 (6th Cir. 2004).

Even within the Ninth Circuit support for *Furgatch* has withered. Both the Washington State Supreme Court⁴⁴ and the California Court of Appeals⁴⁵ have rejected the *Furgatch* test. And the Ninth Circuit itself retreated from its *Furgatch* formulation, emphasizing that “context” considerations remained “ancillary, peripheral to the words themselves.”⁴⁶ Indeed, the circuit court judges themselves seemed relieved to avoid “the difficult question of whether *Furgatch* saves the California statute.”⁴⁷

Finally, the recent decision in *Federal Election Commission v. Wisconsin Right to Life* (“*WRTL*”)⁴⁸ further undermines any reliance on *Furgatch* or § 100.22(b). Under *Furgatch* and § 100.22(b), the “express advocacy” standard “focuses the inquiry on the audience’s reasonable interpretation of the message.”⁴⁹ By contrast, in *WRTL* the Court stated that the standard must be “objective,

⁴⁴ *Wash. State Republican Party v. Wash. State Public Disclosure Comm’n*, 4 P.3d 808, 820-821 (Wash. 2000).

⁴⁵ *Governor Gray Davis Comm. v. American Taxpayers Alliance*, 102 Cal. App. 4th 449, 471 (Cal. App. 2002).

⁴⁶ *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003).

⁴⁷ *Id.*

⁴⁸ *Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).

⁴⁹ *Express Advocacy*, 60 Fed. Reg. 35292, 35295 (Jul. 6, 1995).

focusing on the substance of the communication rather than amorphous considerations of intent and effect.”⁵⁰ Accordingly, although § 100.22(b) existed at the time Colorado adopted Article XXVIII, it could not serve as the basis for the definition of “expressly advocate.” Colorado had expressly rejected the identical *Furgatch* test, the standard in the Tenth Circuit matched Colorado’s interpretation, and every federal circuit court that reviewed § 100.22(b). It is difficult to conceive of a more discredited standard.

3. CEW’s approach creates due process violations

CEW’s *Complaint* and current *Opening Brief* raises troubling due process concerns. The express advocacy test was developed by the U.S. Supreme Court to remedy an unconstitutionally vague definition of expenditure,⁵¹ and both this Court and the Tenth Circuit have echoed those concerns.⁵² These concerns remain. CEW, however, has presented this Court with multiple, shifting tests. And its proposed standards have no basis in federal or state law.

⁵⁰ *Wis. Right to Life*, 551 U.S. 449, 469 (2007).

⁵¹ *See Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

⁵² *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *League of Women Voters v. Davidson*, 23 P.3d 1266, 1268-1269 (Colo. App. 2001).

a. *CEW cannot identify a single, consistent standard for “expressly advocate.”*

CEW’s definitions vary wildly, which itself is evidence of a vague, overbroad and shifting standard. Before the lower court, CEW argued that the term “expressly advocate” in the Colorado Constitution was meant to change over time, and thus in CEW’s view Colorado voters used the term “express advocacy” merely as a “signal” to include all communications that could be regulated “up to the limit permitted by the First Amendment as described in United States Supreme Court case law.”⁵³ Further, CEW argued that the United States Supreme Court had changed its definition of expressly advocate, and therefore Colorado’s definition of “expressly advocate” changed as well.⁵⁴

On its face CEW’s standard was vague, overbroad, and unworkable. On appeal, it now makes a new argument. Buried on page 21 of its *Opening Brief*, CEW states that “the definition of ‘expenditure’ – spending on ads ‘for the purpose of expressly advocating the election or defeat of a candidate’ – should be read as applying to spending on ads that cannot be classified as issue speech.”⁵⁵ CEW

⁵³ R. 181.

⁵⁴ *Id.*

⁵⁵ *Opening Brief* at 21.

defines “issue speech” as speech that “focuses on a legislative issue and urges voters to adopt a position on that issue and to contact public officials regarding that issue.”⁵⁶ CEW’s shifting standards merely spotlight its inability to present this Court with a meaningful, workable definition of “expressly advocate.” CEW demands that the SMF understand, interpret, and apply its definition of “expressly advocate,” and it asks this Court to establish a new standard that meets vagueness, overbreadth, and other First Amendment concerns. Yet CEW itself cannot consistently or forthrightly articulate its own test.

b. CEW asks this Court to create and apply an unworkable framework involving “issue speech.”

CEW clearly does not approve of the “expressly advocate” standard articulated in *LOWV*, the Tenth Circuit, or most courts. But CEW must do something more than disapprove of the current standard in Colorado. It must present a new, workable standard. This it cannot do.

By defining the term “issue speech” narrowly, CEW asks this Court to regulate *all* political speech unless it (1) focuses on a legislative issue, and (2) urges voters to adopt a position and contact public officials. As an initial matter, this standard is unconstitutionally overbroad. It is limited to speech that discusses

⁵⁶ *Opening Brief* at 15-16.

existing officeholders. It is limited to advocacy of legislative matters, yet excludes advocacy of executive or judicial matters. It has no time limit, but rather applies one day before an election, or five years before an election.

Second, CEW's efforts to define "express advocacy" as any speech that falls outside of "issue speech" fails for the simple reason that the term "issue speech" simply did not exist at the time Colorado voters enacted Article XXVIII. One searches in vain to find the term "issue speech" even appearing in *Buckley*, *LOWV*, *Citizens for Responsible Government*, *Furgatch*, § 100.22(b) or any other case defining the term "express advocacy." The term "issue speech" was not a concept or standard used by courts in 2002, when Colorado voters adopted Article XXVIII. Accordingly, it is impossible to argue that today "issue speech" is the foundation of the term "expressly advocate" as used in Article XXVIII.

Third, the term "issue speech" is a meaningless concept even today. No court has ever used that term in the campaign finance context, let alone used that term to serve as the foundation of "express advocacy." In his concurrence in *WRTL*, Justice Scalia used the term in passing to distinguish it from "election-speech,"⁵⁷ and the term appears in *Citizens United v. Federal Election Commission*, where the

⁵⁷ *Wis Right to Life*, 551 U.S. at 484 (Scalia, J. dissenting).

defendants used “issue speech” to mean “any speech that does not expressly say how a viewer should vote.”⁵⁸ This may be where CEW found the term. But these two passing references – one by a dissenting Justice, one by a litigant – did not create a meaningful standard upon which any court can rely.

To fully understand how devoid of meaning the term “issue speech” is, one must compare it to the linguistically-related term “issue advocacy,” which *has* been used in campaign finance decisions. At most, the term “issue advocacy” as used in campaign-finance law merely has meant political speech that does not include express advocacy. Even then, courts only slowly developed this simple definition. Despite seemingly widespread usage of the term “issue advocacy,” not until 1991 did a federal appellate court use the term “issue advocacy,”⁵⁹ and the Tenth Circuit first used the term only in 2000, when it defined “issue advocacy” as speech falling outside of “express advocacy.”⁶⁰ No Supreme Court Justice used the term to describe speech until 2000, when Justice Kennedy first used the term “issue

⁵⁸ *Citizens United v. Fed. Election Comm’n*, 530 F.Supp.2d 274, 279 (D.D.C. 2008).

⁵⁹ *Faucher v. Fed. Election Comm’n*, 928 F.2d 468, 471 (1st Cir. 1991).

⁶⁰ *Citizens for Responsible Gov’t State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000).

advocacy,” to mean “advertisements that promote or attack a candidate’s positions without specifically urging his or her election or defeat.”⁶¹ And not until the 2003 opinion in *McConnell v. Federal Election Commission* did a Supreme Court majority opinion use the term “issue advocacy” to describe political communications. There, it treated “issue advocacy” as a communication that did not constitute “express advocacy.”⁶²

Thus, the term “issue advocacy” describes communications that fall outside of “express advocacy” *after* applying the “express advocacy” test. The term “issue advocacy” does not have any meaning independent from “express advocacy.”

Fourth, CEW does not ask this Court to adopt any accepted standard as the test for “expressly advocate.” Under CEW’s formulation, “issue speech” does not rely on § 100.22(b), because CEW’s use of “issue speech” speech differs greatly from § 100.22(b). Under CEW’s “issue speech” standard, “express advocacy” cannot focus on a legislative issue,⁶³ while § 100.22(b), the speech can suggest only

⁶¹ *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 406 (2000)(Kennedy, J. dissenting); *see also Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n. 6 (1986)(describing a group’s central organizational purpose as “issue advocacy” without defining that term.)

⁶² *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 127 (2003).

⁶³ *Opening Brief* at 15-16.

one meaning – to advocate the election or defeat of a candidate.⁶⁴ Under CEW’s test, “express advocacy” may encourage action other than urging voters to adopt a position and then contact public officials,⁶⁵ whereas under § 100.22 the test more narrowly states that reasonable minds could not differ as to whether the communication urges the election or defeat of a candidate on one hand, or “encourages some other kind of action” on the other.⁶⁶

Finally, even these comparisons are difficult, because CEW articulates its test for “expressly advocate” in the negative – as communications that do *not* constitute “issue speech.” In doing so, CEW turns traditional standards on their head. Rather than define the term “expressly advocate” and then determine what constitutes “express advocacy,” CEW instead identifies a broad category of “issue speech” and from that attempts to derive the meaning of “expressly advocate.” As demonstrated above, this approach creates a vague, overbroad, and extremely confusing standard.

c. This court should not be swayed by claims of disaster.

⁶⁴ 11 C.F.R. § 100.22(b)(1).

⁶⁵ *Opening Brief* at 15-16.

⁶⁶ 11 C.F.R. § 100.22(b)(2).

There is no merit to CEW’s melodramatic claims that SMF’s argument “would permit corporations and unions to eviscerate Colorado’s system of campaign finance laws,”⁶⁷ or that “wealthy donors who bankrolled SMF and CLF would make a mockery of Amendment 27's purpose.”⁶⁸ CEW’s melodrama fails because even if a communication does not expressly advocate, it may still be regulated as an electioneering communication.

Under Colorado law, independent political communications such as those made by the SMF may be regulated either as independent expenditures⁶⁹ or as electioneering communications.⁷⁰ If a communication expressly advocates, it is an independent expenditure,⁷¹ and the organization: (1) may only accept contributions up to \$500 per election cycle;⁷² (2) may accept corporate or labor organization

⁶⁷ *Opening Brief* at 20.

⁶⁸ *Id.* at 21.

⁶⁹ Colo. Const. art. XXVIII, § 5.

⁷⁰ Colo. Const. art. XXVIII, § 6.

⁷¹ Colo. Const. art. XXVIII, § 2(8)(a) and 2(9).

⁷² Colo. Const. art. XXVIII, § 3(5).

contributions;⁷³ (3) must independently report expenditures;⁷⁴ and (4) must file contribution and expenditure reports.⁷⁵ Furthermore, a corporation or labor organization may not make independent expenditures.

A communication may also be an electioneering communication, which is a communication broadcasted, printed, mailed, hand-delivered or otherwise distributed, that: (1) unambiguously refers to a candidate; (2) is distributed 30 days before a primary election or 60 days before a general election; and (3) is distributed to an audience that includes members of the electorate for such public office.⁷⁶ An organization making an electioneering communication: (1) may accept unlimited contributions;⁷⁷ (2) may not receive funding from a corporation or labor organization;⁷⁸ and (3) must report contributions and spending on electioneering

⁷³ C.R.S. § 1-45-103.7(1).

⁷⁴ Colo. Const. art. XXVIII, § 5.

⁷⁵ Colo. Const. art. XXVIII, § 7.

⁷⁶ Colo. Const. art. XXVIII, § 2(7)(a).

⁷⁷ *See* Colo. Const. art. XXVIII, § 3 (Colorado law does not limit contributions for electioneering communications).

⁷⁸ Colo. Const. art. XXVIII, § 6(2).

communications.⁷⁹ As with independent expenditures, a corporation or labor organization may *not* make electioneering communications.⁸⁰

Accordingly, CEW ignores the substantial limitations placed on electioneering communications – particularly the prohibition on corporate and labor organization funding for electioneering communications.

C. *WRTL*'s definition of the “functional equivalent of express advocacy” is irrelevant.

1. The functional equivalency test applies to electioneering communications, not express advocacy.

CEW places heavy emphasis on *WRTL* to argue that this Court should loosen Colorado's definition of “expressly advocate,” but it takes great pains to avoid discussing critical aspects of Colorado's campaign finance framework or discussing the framework in which *WRTL* was decided.

The “functional equivalent of express advocacy” test articulated in *WRTL* did not replace the well-established test for “expressly advocate,” but rather established an exception to the corporate and labor organization ban on electioneering communications. In *WRTL*, the Court decided an as-applied challenge to the term

⁷⁹ Colo. Const. art. XXVIII, § 6(1).

⁸⁰ Colo. Const. art. XXVIII, § 6(2).

“electioneering communication,”⁸¹ starting from the premise that the Court had previously ruled that the federal definition for “electioneering communication” was not unconstitutionally vague.⁸² Thus, the Court developed the test for the “functional equivalent of express advocacy” to determine the constitutionality of communications that already met a clear electioneering communication standard. It did not attempt to apply a “functional equivalent” test to communications that already qualified as “express advocacy.”

Indeed, Justice Roberts was careful to state that the Court’s new, four-part test for the functional equivalent of express advocacy “*is only triggered if the speech meets the brightline requirements of BCRA § 203 [the federal electioneering communication standards] in the first place.*”⁸³ This critical sentence reinforces the Court’s limited use of the new test. And it makes logical sense, too. The Court would have no need to develop a test for the “functional equivalent” of express advocacy, if the communication was already “express advocacy.” Finally, this

⁸¹ *Wis. Right to Life, Inc.*, 551 U.S. at 464 (2007).

⁸² *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 194 (2003). The federal definition of electioneering communication only includes broadcast communications, 2 U.S.C. § 434(f)(3), whereas Colorado’s definition is more expansive. Colo. Const. art. XXVIII, § 2(7)(a).

⁸³ *Wis. Right to Life*, 551 U.S. at 474 n. 7 (emphasis added).

sentence underscores the Court’s emphasis that the pre-existing brightline requirements contained in the electioneering communication definition were necessary to address vagueness concerns.

The federal district court in Utah recently adopted the Court’s framework limiting the test for “functional equivalent of express advocacy” to electioneering communications. In *National Right to Work Legal Defense and Educ. Foundation, Inc. v. Herbert* the court struck down a state law as unconstitutionally vague because (1) it did not fall within the category of express advocacy, and (2) it was not the “functional equivalent of express advocacy.”⁸⁴ It further held that in order to be the functional equivalent of express advocacy, a communication must meet two requirements. First, it must be an electioneering communication. Second, it must be susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or ballot measure.⁸⁵ In doing so, that court recognized that “*Buckley’s* express advocacy standard is still viable,” and courts may only

⁸⁴ *Nat’l Right to Work Legal Defense and Educ. Found., Inc. v. Herbert*, 581 F.Supp.2d 1132, 1149 (D.Utah 2008).

⁸⁵ *Id.* at 1150.

apply a “functional equivalent” test to communications that already meet a the narrow definition of electioneering communications.⁸⁶

But CEW attempts to ignore the critical limitation on *WRTL*’s four-part test by relegating it to a footnote.⁸⁷ Indeed, Colorado law contains an explicit definition of “electioneering communication” nearly identical to the federal requirement, but CEW avoids this obvious and controlling parallel – indeed, CEW avoids use of the term “electioneering communication” at all. This approach misconstrues *WRTL*.

In its footnote, CEW claims that the functional equivalent test is not triggered unless SMF meets the brightline test by failing to report contributions and expenditures as a political committee. First, the legal obligation to report contributions and expenditures cannot substitute for a brightline test that precisely describes regulated speech. Reporting obligations and descriptions of speech are not even comparable. Instead, reporting obligations are merely legal obligations that apply to certain, defined categories of speech.

⁸⁶ *Id.* at 1151.

⁸⁷ *Opening Brief* at 16, n. 2.

Second, to the extent undersigned counsel understands CEW's arguments⁸⁸ CEW makes a "heads-I-win, tails-you-lose," circular argument. On one hand, CEW demands reporting by SMF as a political committee that expressly advocates the election or defeat of a candidate. On the other hand, if SMF does not report as a political committee, CEW claims that this failure to report triggers the "functional equivalent" test, which it claims is the same as Colorado's definition of "expenditure," which . . . requires SMF to report expenditures and contributions as a political committee that expressly advocates! Under CEW's analysis, the SMF must report as a political committee if it triggers the functional equivalent text by *not* reporting.

2. "Express advocacy" is not the same as the "functional equivalent of express advocacy."

On multiple occasions, CEW asks this court to equate the term "express advocacy" with the term "the functional equivalent of express advocacy." For example, CEW claims that "the ultimate question is whether the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific

⁸⁸ Undersigned counsel has attempted to accurately recite CEW's arguments in its *Opening Brief* at 16-17, n. 2.

candidate; if it is not, then the ad can be regulated as express advocacy.⁸⁹ And again, CEW claims that “ads that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate . . . should be deemed to be for the purpose of expressly advocating the election or defeat of a candidate.”⁹⁰ This argument misrepresents applicable law.

First and foremost, the term “expressly advocate” is a matter of statutory interpretation. The court must interpret the term “expressly advocate” as it is used in the Colorado Constitution, and this requires it to rely upon traditional tools of statutory construction – review of the applicable law at the time an initiative was passed, review of the “bluebook” and comparison of the defined term with other provisions of the regulatory framework. As the Supreme Court in *McConnell* stated, “the express advocacy restriction [is] an endpoint of statutory interpretation, not a first principle of constitutional law.”⁹¹

By contrast, the standard for the “functional equivalent of express advocacy” is a court-made standard designed to *limit* the state’s ability to define and regulate

⁸⁹ *Opening Brief* at 15-16.

⁹⁰ *Opening Brief* at 20-21 (quotations omitted).

⁹¹ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 190 (2003); *see also Wis. Right to Life*, 449 U.S. at 474 n. 7.

political speech, based on strict scrutiny under the First Amendment. Accordingly, in *WRTL* the Court held that the government did not have a “sufficiently compelling interest to justify burdening” speech that fell outside the “functional equivalent” standard.⁹² Whereas “express advocacy” is an endpoint of statutory construction, the “functional equivalent of express advocacy” is first principle of constitutional law.

Second, as noted above, *WRTL* carefully limited the “functional equivalent” test to communications that already qualified as electioneering communications, an interpretation explicitly endorsed within the Tenth Circuit. Indeed, the Federal Election Commission affirmed the limited scope of the “functional equivalent” test by promulgating 11 C.F.R. § 114.15. That rule codified the “functional equivalent” test in *WRTL*, but it treated the new standard as an exemption to prohibitions on corporate spending for electioneering communications.⁹³ It did not alter § 100.22, which remains the FEC’s standard for “expressly advocating.”

Third, the tests themselves are fundamentally different. Colorado’s test for “expressly advocate” requires specific words of express advocacy. Even under *Furgatch*, and § 100.22(b), however, the communication must contain advocacy of

⁹² *Wis. Right to Life*, 551 U.S. at 481.

⁹³ *Electioneering Communications*, 72 Fed. Reg. 72902 (Dec. 26, 2007).

some sort. By contrast, the “functional equivalent” text relies upon a three-part test that considers: (1) focus on a legislative issue; (2) reference to an election, candidacy or political party; and (3) a candidate’s characteristics, qualifications or fitness for office.⁹⁴ Indeed, none of these standards appears in either the *LOWV* test, or in § 100.22(b). Furthermore, the “functional equivalent” test differs from § 100.22(b) in other important ways, too. Whereas § 100.22(b) relies on contextual factors, the “functional equivalent” test de-emphasizes them. And while *Furgatch* – which formed the basis for § 100.22(b) – required some plea for action, the “functional equivalent” test does not require it (although it can be one factor to consider).

D. The Senate Majority Fund’s communications did not expressly advocate.

1. CEW did not allege that the ads expressly advocated the election or defeat of a candidate.

In its *Complaint*, CEW did not allege that any mail pieces by the SMF contained words that expressly advocated the election or defeat of a candidate. At most, *CEW* alleged that the SMF’s mail pieces “expressly” identified a candidate or

⁹⁴ *Wis. Right to Life*, 551 U.S. at 470.

“expressly” stated the name of a candidate.⁹⁵ But this is a far cry from “expressly *advocating*.” Mere recitation of the word “expressly” does not convert unambiguous language identifying a candidate into “express advocacy” as it has been defined in Colorado. A review of the complaint shows that it does not allege any language urging voters to vote for or against a candidate.

2. The communications did not expressly advocate under the *League of Women Voters* standard.

LOWV provided eight concrete examples of advertisements that did *not* expressly advocate. Seven advertisements did not even “come close to being express advocacy,” because they did not “explicitly urge a vote for the identified candidate. Rather, they favorably present[ed] the candidate's position on issues and experience, or unfavorably present[ed] the positions and experience of the other candidate, or both.”⁹⁶ Only one ad came “close,” but even that ad did not constitute express advocacy, because it did not expressly ask voters to vote for the identified

⁹⁵ *Compl.* ¶ 5.

⁹⁶ *League of Women Voters of Colo. v. Davidson*, 23 P.3d 1266, 1277 (Colo. App. 2001).

candidates or ask the voter to support the stated political positions or philosophies and vote accordingly.⁹⁷

Under *LOWV* none of the factors cited by CEW expressly advocate the election or defeat of a candidate. The ads in *LOWV*:

- Expressly identified individuals as candidates. Several identified gubernatorial candidates, several identified candidates for attorney general, and one identified an entire slate of Republican candidates;
- Stated that a named candidate was running for office. For example, the final advertisement identified numerous candidates, with the office for which they were running;
- Took positions on candidates' characteristics, qualifications and fitness for office. In particular, several ads described candidate John Suthers as "qualified," "dedicated," "a respected former prosecutor," and it discussed Suthers' "courage" and "courtroom experience," while criticizing candidate Ken Salazar's alleged failure to prevent mine pollution; and

⁹⁷ *Id.* at 1269.

- Described candidates’ policy plans if they were elected to office. For example, the ads described candidate Bill Owens’ plans for highway construction and educational improvement, favorably contrasting that with candidate Gail Schoettler’s plan for “study and delay.”
 - Did not urge the voter to take action on a legislative, executive, or judicial matter, but rather asked voters to vote or choose in the upcoming election, such as “PLEASE make sure to Vote.”⁹⁸
3. The communications did not expressly advocate under the *Furgatch* standard.

CEW’s complaint fails even under the *Furgatch* standard as codified in § 100.22(b). Under *Furgatch*, the Ninth Circuit included as express advocacy communications that “when read as a whole, and with limited reference to external events, are susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”⁹⁹ But CEW’s *Complaint* does not even meet this lax (and discredited) standard. CEW does not allege that the advertisements sent by the SMF were “susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”

⁹⁸ *League of Women Voters*, 23 P.3d at 1268-1269.

⁹⁹ *Furgatch*, 807 F.2d at 864.

CEW does not make “limited reference to external events.” CEW does not suggest that SMF’s advertisements are “unmistakable and unambiguous, suggestive of only one plausible meaning.” CEW does not identify a “clear plea for action,” and CEW does not argue that “reasonable minds could not differ” as to whether SMF’s advertisements “encourage a vote for or against a candidate.”¹⁰⁰

In short, CEW has not alleged *any* facts that meet *any* test for express advocacy articulated by *any* federal court. Rather, CEW invites this Court to create yet a new test for “expressly advocating.”

4. CEW improperly relies on an intent-and-effect test.

Finally, *WRTL* rejected any test that relied on the intent of the speaker or the effect on the audience. as the Court made clear, “an intent-based test would chill core political speech by opening the door to a trial on every ad.”¹⁰¹ Likewise, a test based on a communication’s effect would impermissibly “put the speaker wholly at the mercy of the varied understanding of his hearers.”¹⁰²

¹⁰⁰ See *Furgatch*, 807 F.2d at 864.

¹⁰¹ *Wis. Right to Life*, 551 U.S. at 468.

¹⁰² *Id.* at 469 (quotation and citation omitted).

Nonetheless, CEW attempts to use an intent and effect test. It argues that one of SMF's mailers has "the obvious purpose of expressly advocating" and likewise argues that "the obvious conclusion to any reader is that . . ." ¹⁰³ This Court must reject CEW's focus on SMF's intent and the purported effects of SMF's mail pieces.

V. OPENING BRIEF ARGUMENT

Much of SMF's argument is already contained in the SMF's Answer Brief Argument. Accordingly this Opening Brief Argument highlights and summarizes points particularly relevant to SMF's request for attorney fees.

A. Standard of Review

The SMF appeals the lower court's ruling that CEW did not file a frivolous complaint. The court made this determination as a matter of law, without hearing evidence. Because this ruling was based on statutory interpretation, it is subject to *de novo* review. ¹⁰⁴

Under C.R.S. § 1-45-111.5(2) ("Section 111.5(2)") a respondent in an administrative action shall recover attorney fees for defending any claim that is

¹⁰³ *Opening Brief* at 25.

¹⁰⁴ *Hernandez v. People*, 176 P.3d 746, 751 (Colo. 2008) (citations omitted).

“substantially frivolous, substantially groundless, or substantially vexatious.”¹⁰⁵ “A claim is frivolous if the proponent can present no rational argument based on the evidence or law in support of the claim. A claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence.”¹⁰⁶

The standards for C.R.C.P. 11 (“Rule 11”) are similar. Rule 11 imposes four independent duties upon an attorney who signs a pleading:

(1) before a pleading is filed there must be a reasonable inquiry into the facts and the law; (2) based on this investigation, the signer must reasonably believe that the pleading is well grounded in fact; (3) the legal theory asserted in the pleading must be based on existing legal principles or a good faith argument for the modification of existing law; and (4) the pleading must not be filed for the purpose of causing delay, harassment, or an increase in the cost of litigation.¹⁰⁷

¹⁰⁵ C.R.S. 1-45-111.5(2) (2008).

¹⁰⁶ *Remote Switch Systems, Inc. v. Delangis*, 126 P.3d 269, 275 (Colo. App. 2005), cert. denied, 2006 WL 380434; see also *Schmidt Const. Co. v. Becker-Johnson Corp.*, 817 P.2d 625, 627 (Colo. App. 1991).

¹⁰⁷ *Stearns Mgmt. Co. v. Missouri River Servs., Inc.*, 70 P.3d 629, 632 (Colo. App. 2003) (citing *Maul v. Shaw*, 843 P.2d 139, 141-42 (Colo. App. 1992)).

In other words, an attorney must “stop, look, and listen” before signing a paper subject to Rule 11.¹⁰⁸ The standard applied is that of objective reasonableness – whether a reasonable attorney would file such a document.¹⁰⁹

B. No authority supports changing Colorado’s definition of “expressly advocate.”

As noted above, CEW’s standard for “expressly advocate” has changed radically from its arguments below, where CEW claimed that the term “expenditure” was a “signal” that “voters intended to to regulate expenditures up to the limit permitted by the First Amendment.”¹¹⁰ No court, anywhere, has ever taken this approach. CEW’s standard is radically at odds with *LOWV* and other courts, at odds with *Furgatch*, and at odds with § 100.22(b). No authority has ever defined “expressly advocate” to mean whatever the courts will allow. Just the opposite. This elasticity and vagueness gave rise to the express advocacy standard in the first place.¹¹¹

¹⁰⁸ *Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988) (interpreting Fed. R. Civ. P. 11).

¹⁰⁹ *See, e.g. People v. Trupp*, 51 P.3d 985, 991 (Colo. 2002); *Stepanek v. Delta County*, 940 P.2d 364 (Colo. 1997)

¹¹⁰ R. 181.

¹¹¹ *Buckley*, 424 U.S. at 40-44.

CEW’s argument in its Opening Brief is no better. It asks the court to define “expressly advocate” to mean everything that falls outside of “issue speech.” But again, this standard exists *nowhere* in any court or statute. No court or legislature has ever embraced the term “issue speech,” let alone used it as the basis for the term “expressly advocate” – a term that has been litigated for more than 30 years before scores of courts throughout the country. Indeed, a Westlaw search among all state and federal cases for “express! advoca!” (designed to obtain results for both “expressly advocate” and “express advocacy” returned 330 court opinions. Yet CEW could not cite one case that used the term “issue speech.”

From the start of this case, CEW has been making up legal standards as it goes, none of which have any grounding in law.

C. Colorado Ethics Watch ignores or misstates campaign finance law.

Throughout the case below and continuing into this appeal, CEW has made public policy arguments that contain false statements. Specifically, CEW has argued that if courts do not regulate SMF’s communications as “expenditures,” Colorado campaign finance law will be “eviscerated” by corporations and labor organizations “bankrolling” campaigns and making a “mockery” of election laws.¹¹² This are

¹¹² *Opening Brief* at 21.

misleading, because many political communications are regulated as electioneering communications.¹¹³

But CEW avoids entirely any mention of the term “electioneering communications” even though that precedent directly impacts its public policy arguments. But in order to make its absurd claims of massive, unregulated behavior, CEW must ignore vast swaths of Colorado campaign finance law. And CEW has knowingly concealed these areas of law from the Court’s attention. Weeks before filing the complaint in this case, CEW filed another complaint claiming that SMF had not properly reported electioneering communications.¹¹⁴ Thus, CEW knew that SMF was subject to regulation under the electioneering communication laws, because CEW itself had sought to enforce those very laws.

D. There is no good faith argument to change the statutory definition of “expressly advocate.”

¹¹³ Colo. Const. art. XXVIII, § 5.

¹¹⁴ *See In re: Compl. Filed by Colo. Ethics Watch Regarding Alleged Campaign & Political Fin. Violations by Senate Majority Fund, LLC*, Case No. OS 2008-0025, Agency Decision (October 7, 2008), available at <http://www.elections.colorado.gov/DDefault.aspx?tid=178&vmid=1038>.

CEW claims that it relied on *Alliance for Colorado Families v. Gilbert*¹¹⁵ in bringing its complaint.¹¹⁶ But CEW has never used *Gilbert* to argue the central issue in this case – the definition of “expressly advocate.” Rather, CEW used *Gilbert* in a footnote in the case below merely to justify its allegation that the SMF had a major purpose of electing candidates¹¹⁷ -- an issue not remotely relevant to this appeal. CEW’s “reliance” claim is a self-serving attempt to avoid attorney fees for bringing a case without legal support.

VI. CONCLUSION

The SMF requests that this Court (1) affirm the lower court’s dismissal of the complaint, and (2) order CEW to pay the Senate Majority Fund’s legal fees.

VII. REQUEST FOR ATTORNEY FEES

The SMF seeks attorney fees for the complaint filed by CEW and for the appeal brought by CEW.

¹¹⁵ *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964 (Colo. App. 2007).

¹¹⁶ *Opening Brief* a 2.

¹¹⁷ R. 174.

Respectfully submitted this 11th day of August, 2009.

HACKSTAFF GESSLER, LLC

s/ Scott E. Gessler

Scott E. Gessler, Esq. #28944

Mario D. Nicolais, II. Esq. #38589

1601 Blake Street, Suite 310

Denver, CO 80202

(303) 534-4317 tel.

(303) 534-4309 fax

sgessler@hackstaffgessler.com

mnicolais@hackstaffgessler.com

Attorneys for Senate Majority Fund, LLC

CERTIFICATE OF SERVICE

I certify that on this 11th day of August, 2009, the foregoing **OPENING-ANSWER BRIEF** was E-filed and served via LexisNexis or by US Mail/ facsimile to all parties and other interested persons as following:

Colorado Ethics Watch
Luis Toro
Chantell Taylor
1630 Welton Street, Suite 415
Denver, CO 80202

Jason R. Dunn, #33011
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Suite 2200
Denver, CO 80202

and was filed by US Mail/facsimile with the following:

Office of Administrative Courts
633 17th Street, Suite 1300
Denver, CO 80202
Fax No.: (303) 866-5909

s/ Pui Ki Wong
Pui Ki Wong