STATE OF COLORADO SECRETARY OF STATE ADMINISTRATIVE HEARING OFFICER 1700 Broadway #550 Denver, CO 80290	
BEFORE THE SECRETARY OF STATE, COLORADO DEPARTMENT OF STATE, *in re* ED 2024-55; 2024-56 ELECTIONS DIVISION OF THE SECRETARY OF STATE, Complainant, vs. ARVIDSON FOR SENATE, Respondent.	▲COURT USE ONLY▲ CASE NUMBER 2024 AHO 0032

RESPONSE TO MOTION TO DISMISS

During the 2024 Republican primary election in Senate District 2, Respondent Arvidson for Senate distributed yard signs and mailers in support of Tim Arvidson's candidacy. The yard signs did not include a "paid for by" disclaimer, and neither the yard signs nor the mailer were originally reported as electioneering expenditures.

Nonetheless, Respondent moves to dismiss the complaint on various legal grounds, ranging from a now-stayed Court of Appeals case invalidating a different Colorado campaign finance requirement, to allegations that Colorado's campaign finance enforcement scheme is facially unconstitutional. Each of these wide-ranging charges fails, as does Respondent's baseless claim for fees. Respondent's motion should be denied.

FACTUAL BACKGROUND

This action arises out of two campaign finance complaints filed by David DiFolco against Tim Arvidson on July 25, 2024. Compl. ¶ 19. Tim Arvidson was a candidate for Senate District 2 during the 2024 election cycle. He appeared on June 25, 2024, Republican primary ballot, and did not advance to the general election. Compl. ¶¶ 11-12.

In the run-up to the June 25, 2024, primary election, Arvidson's candidate committee, Arvidson for Senate, distributed two electioneering communications: a yard sign and a mailer. Both pieces unambiguously referred to Arvidson, were distributed within 30 days of the June 25, 2024, election, and were distributed to an audience that included members of the Republican primary electorate in Senate District 2. *Id.* ¶¶ 15, 21.

The yard signs: On June 3, 2024, the Committee filed a report of contributions and expenditures. According to that initial report, the yard signs were purchased on May 28, 2024, and cost $647.50. *Id.* ¶ 24. The signs did not include a "paid for by" disclaimer. *Id.* ¶ 22. The Committee did not report the signs as an electioneering communication. *Id.* After the June 25, 2024, Republican primary election, and after the Committee received notice of the DiFolco complaints, the Committee amended its reports to reflect the yard sign as an electioneering communication. *Id.* ¶ 25.[1]

[1] The Division's complaint includes a typo that says this amendment occurred on August 12, 2024. Compl. ¶ 25. Instead, according to TRACER, it occurred on July 27, 2024. Regardless, it occurred after the June 25, 2024, election, and after the

The mailer: Initially, the Committee's June 3, 2024, report of contributions and expenditures did not specifically mention the mailer. It did, however, include a $3,500 expenditure to "5411 LLC" on May 25, 2024, for "campaign consulting services." *Id.* ¶ 17. On August 12, 2024, after the June 25, 2024, Republican primary election, and in an effort to cure the alleged violations in the DiFolco complaints, the Committee amended its June 3, 2024, report of contributions and expenditures to reflect that $3,370.85 of that expenditure was for the "design/printing/mailing" of the mailer. *Id.* ¶ 18.

The Complaint alleges information and belief that at least some of the signs were distributed after the mailer was distributed, *id.* ¶ 29, and indicates that the original complainant, DiFolco, had seen yard signs distributed by the Committee on June 10, 2024. *Id.* ¶ 20. DiFolco also took pictures of the signs—still being displayed—on August 2, 2024. *Id.* ¶ 22.

Date	Event
May 25, 2024	The Committee makes a $3,500 expenditure to 5411 LLC.
May 26, 2024	The Electioneering window opens for the June 25, 2024, primary election. Colo. Const. art. XXVIII, § 7(a)(II).
May 28, 2024	The Committee makes a $647.50 expenditure for yard signs.
June 3, 2024	The Committee files a report, which does not identify the mailer or the yard signs as electioneering communications.
June 7, 2024	David DiFolco receives a copy of the mailer.
June 10, 2024	David DiFolco observes the yard signs in Senate District 2, which do not have a "paid for by" disclaimer.
June 25, 2024	Arvidson appears on the Republican primary ballot.
July 25, 2024	David DiFolco files two campaign finance complaints.
July 27, 2024	Arvidson amends his June 3, 2024, report to reflect that the yard signs were an electioneering communication.

DiFolco complaints were filed on July 25, 2024.

Date	Event
August 2, 2024	David DiFolco takes pictures of yard signs still being displayed in Senate District 2.
August 12, 2024	The Committee amends its June 3, 2024, report of contributions and expenditures to reflect that virtually all of the $3,500 expenditure on May 25, 2024, was for the design, printing, and mailing of the mailer.

ARGUMENT

1. The constitutionality of Colorado's campaign finance scheme cannot be decided in this administrative proceeding.

The Committee mentions in passing that dismissal is appropriate because the existing campaign finance enforcement scheme is "contrary to both the Colorado and U.S. constitution and void ab initio." Mot. at 2.

First, the Motion cites no law, or facts, or otherwise provides grounds for why the statute is void. This alone is grounds to deny the Motion. *See, e.g.*, *People v. Stone*, 2021 COA 104, ¶ 52.

Second, administrative agencies do not have the authority to declare statutes facially unconstitutional. *See, e.g.*, *Arapahoe Roofing & Sheet Metal, Inc. v. City & Cnty. of Denver*, 831 P.2d 451, 454 (Colo. 1992).

Third, the only Colorado court to have addressed this question has rejected Respondent's argument. *See Campaign Integrity Watchdog v. Griswold*, No. 2022CV666, Order at 5 (Den. Dist. Ct. Dec. 13, 2023), *attached as* Exhibit A.

2. Colorado's "paid for by" disclaimer requirement is still good law.

Next, the Committee argues that Colorado's "paid for by" disclaimer requirement was declared unconstitutional prior to the initiation of this action. Mot. at 4. That is incorrect.

The Committee cites *No on EE v. Beall*, 2024 COA 79. But that case dealt with a specific part of the disclaimer requirement: the obligation to identify an issue committee's registered agent in the disclaimer. Its holding was limited to this part of the requirement.[2] *See, e.g.*, *id.* ¶ 34 (holding that the "registered agent disclosure requirement imposed on issue committees" is unconstitutional); *id.* ¶ 17 (noting that the challenge in that case was only to the requirement that an issue committee "disclose the name of its registered agent in covered election-related communications"); *id.* ¶ 21 ("We conclude that the registered agent disclosure requirement does not withstand exacting scrutiny.").

The *No on EE* decision did not address whether Colorado can constitutionally require political organizations to identify the person paying for the communication on an election-related communication. Plainly they can. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (upholding constitutionality of on-advertisement "paid for by" disclaimers). Even the *No on EE* majority recognized the legitimate government interest in on-

[2] The *No on EE* holding has since been stayed by the Colorado Supreme Court. *Beall v. No on EE*, No. 2024SC540, Order (Colo. Oct. 22, 2024).

advertisement disclosure of who is paying for an advertisement. 2024 COA 79, ¶ 27.

Here, where the Committee failed to include *any* disclaimer on its yard signs, *No on EE* is inapplicable.

3. Because the yard signs were distributed after the mailer, they required a disclaimer.

Next, the Committee claims that because yard signs were purchased before the mailer, a disclaimer was not required. Mot. at 4-5. As background, under Colorado law, once a candidate committee spends $1,000 on electioneering communications, all of its electioneering communications must include "paid for by" disclaimers, regardless of whether each subsequent expenditure totals $1,000 alone. § 1-45-108.3(3). Because the yard signs were distributed and displayed to voters 1) within the electioneering window, and 2) after the Committee had exceeded the $1,000 threshold, a disclaimer was required.

As a threshold matter, the Committee's attempt to inject factual disputes on a challenge under C.R.C.P. 12(b)(5) are inappropriate. At the Motion to Dismiss stage, "a court may consider only the facts alleged in the complaint, documents attached as exhibits to or referenced in the complaint, and matters of which the court may take judicial notice." *802 E. Cooper, LLC v. Z-GKids, LLC*, 2023 COA 48, ¶ 12. Here, the allegations in the complaint—drawn from the Committee's own reports, no less—are that the yard signs

were purchased on May 28, 2024, *after* the Committee purchased the mailer on May 25, 2024. Compl. ¶¶ 14, 24.

Notwithstanding its own reports, the Committee now argues that the mailer was not actually purchased and distributed to voters until June 6, 2024. Mot. at 5, 6. But that is a factual dispute, and the Committee makes no effort to argue that the basis for that explanation lies in documents that are subject to judicial notice.

Regardless, even if the Committee is correct that the mailer was distributed on June 6, 2024, Mot. at 6, the Motion still fails as a matter of law. The key date for any electioneering communication is the date of when it is distributed or displayed to voters. Colo. Const. art. XXVIII, § 7(a) (defining electioneering communications based on their date of delivery or distribution).

Here, the dates of distribution are laid out in the Division's Complaint. At least some of the yard signs were distributed on June 10, 2024, *after* the date the Committee admits the mailer was distributed. Compl. ¶¶ 20, 29. Those yard signs needed a disclaimer. They did not have one. That is the basis for Claim 1.

Moreover, the Division's complaint alleges that these yard signs were still being displayed as of August 2, 2024. Compl. ¶ 22. Even if some of the yard signs were originally distributed before June 6, 2024—once the Committee reached the cumulative $1,000 electioneering threshold it needed to either take those yard signs down or add disclaimers to them. It could not

continue to display electioneering communications to members of the electorate in Senate District 2 without valid disclaimers.[3]

4. The Committee's amendment of its reports to reflect electioneering expenditures does not require dismissal of Claim 2.

The Committee's challenge to Claim 2 relies solely on the argument that amending its reports to reflect the two electioneering expenditures qualifies as "cure and substantial compliance" under section 1-45-111.7(4). Mot. at 6-7. But this fails for both legal and factual reasons.

First, legally, the cure determination in section 1-45-111.7(4) is entrusted solely to the Division, and is not subject to review by the hearing officer. "If the division determines that a respondent has substantially complied with its legal obligations," it prepares and files a motion to dismiss with the deputy secretary. § 1-45-111.7(4)(e)(II). "If the division determines that the respondent has failed to substantially comply," it is required to conduct an additional investigation under section 1-45-111.7(5)(a). § 1-45-111.7(4)(e)(III). If that investigation compels it, it must then file a complaint with the hearing officer. § 1-45-111,7(5)(a)(IV).

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[3] *See, e.g.*, Order Denying Motion for Reconsideration of Denial of Motion to Dismiss, *In re Patti Shank*, ED No. 2023-55, at 2-3 (Jan. 10, 2024), *attached as* Exhibit B ("[Y]ard signs are continuing communications because, regardless of when they are first installed, they continue to be perceivable by anyone who views them for as long as they are displayed. Therefore, once Respondent exceeded the $1,000 spending threshold . . . a disclaimer was required on the displayed banners and yard signs for the remainder of the 'electioneering window'[.]").

Perhaps a campaign finance respondent can argue that it has substantially complied with its legal obligations under general principles of Colorado election law apart from. *See, e.g.*, § 1-1-103(3); *but see Griswold v. Ferrigno Warren*, 2020 CO 34, ¶ 20 ("[A] specific statutory command [can]not be ignored in the name of substantial compliance."). Or perhaps it can argue substantial compliance to the Deputy Secretary on exceptions review. But the Division's determination under section 1-45-111.7(4) is subject only to the deputy secretary's review.

Regardless, from a factual perspective it has long been the Division's position that although a respondent may cure after an election, a cure that occurs after an election cannot satisfy the substantial compliance factors found at section 1-45-111.7(4)(f). In considering whether a respondent has substantially complied with its legal obligations, the Division must consider: "(I) the extent of the respondent's noncompliance; (II) the purpose of the provision violated, and whether that purpose was substantially achieved despite the noncompliance; and (III) whether the noncompliance may properly be viewed as an intentional attempt to mislead the electorate of election officials." § 1-45-111.7(4)(f).

Here, the Committee did not amend its reports to identify the expenditures as electioneering expenditures until July 27, 2024, and August 12, 2024, well after the June 25, 2024, election. Under the second substantial compliance factor, a cure that occurs after the election cannot "substantially

achieve[]" the purpose of the disclosure provision, which is to provide the electorate with relevant information about election expenditures prior to them casting their ballot. The cure goes to the penalty the Division ultimately will request if successful at the hearing. But because the electorate voted without information to which they were entitled, the cure does not satisfy the substantial compliance factors.[4]

5. The Committee is not entitled to fees.

For all of the foregoing reasons, the Committee is not entitled to dismissal of the complaint. And for those same reasons, the Committee is not entitled to its costs and fees.

[4] The Committee asserts that a member of the elections division engaged in the "unauthorized practice of law" by concluding that the Committee had failed to cure and substantially comply. Mot. at 6-7. The Committee even goes so far as to ask the Court to refer that individual to the Office of Regulation Counsel. *Id.* at 10. That allegation is absurd. There is nothing "unauthorized" about the Division doing what it is authorized by statute to do. *See* § 1-45-111.7(4)(e)(I) ("The division shall determine whether respondent has cured any violation alleged in the complaint and, if so, whether the respondent has substantially complied with its legal obligations[.]"). An administrative agency's internal processing of an administrative complaint is not the practice of law, let alone the unauthorized practice of law.

Respectfully submitted this 27th day of November, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I will cause the foregoing to be served this 27th day of November, 2024, by email addressed as follows:

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Respondent's counsel