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, ED 2024-56 ELECTIONS DIVISION OF THE SECRETARY OF STATE, Complainant **v.** ARVIDSON FOR SENATE, Respondent	**▲ COURT USE ONLY ▲**
Counsel for Arvidson for Senate: Matthew T. Arnold, #60401 P.O. Box 372464 Denver, CO 80237 (303) 995-5533 arnoldm@clawllc.org	CASE NUMBER: 2024 AHO 0032
REPLY TO RESPONSE TO MOTION TO DISMISS	

Respondent Arvidson for Senate, by and through counsel, respectfully submits the following *Reply to Response to Motion to Dismiss*.

The Secretary's Response is devoid of legal merit, rising (or falling) to the level of being substantially frivolous, substantially groundless, and vexatious, and affirms the merits of Respondent's *Motion to Dismiss* and request for attorney fees – Respondent's *Motion* should thus be granted, and fees awarded to Respondent, consistent with applicable Colorado law.

FACTUAL BACKGROUND

This action arises out of two campaign finance complaints filed after the June 2024 primary election by David DiFolco, the spouse of Respondent's primary election opponent, Lisa Frizell. Mr. DiFolco is no stranger to filing complaints[1] against Ms. Frizell's political rivals, although none have been found meritorious.

The Yard Signs: There is no dispute that the Arvidson for Senate committee purchased yard signs on 28 May 2024 for $647.50, and that the purchase was timely disclosed on the committee's 3 June 2024 Report of Contributions and Expenditures (RCE).[2] It is also undisputed that the yard signs were not initially marked as electioneering communications, as the committee had not yet exceeded the $1,000/year threshold triggering additional electioneering communications reporting requirements. It is similarly undisputed that once the committee received notice of the complaint, it immediately amended the committee report to label the yard signs electioneering communications, well within the "cure" period pursuant to C.R.S. 1-45-111.7(4). Consequently, the committee was fully in compliance with applicable disclosure and reporting requirements for the yard sign purchase well prior to the Secretary filing this administrative complaint. Therefore, prior to the administrative complaint being filed, there was no longer any factual basis for a failure to report electioneering communications related to the yard signs.

[1] See ED 2022-85 DiFolco v Martinez, ED 2022-108 DiFolco v Martinez; both cases dismissed
[2] See Arvidson Committee's 3 June 2024 Report of Contributions and Expenditures, on TRACER at https://tracer.sos.colorado.gov/PublicSite/SearchPages/FilingAmendmentSelect.aspx?FilingID=398094

The dates of yard sign display are both beyond the committee's control, and legally irrelevant; the legally relevant date is when the expenditure is made, which all parties agree was the timely-reported purchase date of 28 May 2024.

The Mailer: There is no dispute that the Arvidson for Senate committee's initial 3 June 2024 RCE did not specifically mention the mailer – because, as the committee has documented, it had no knowledge at the time that part of its timely reported payment for campaign consulting services to 5411 LLC also included subsequently subcontracted payments for the mailer. The Secretary admits that the committee amended its report to reflect that part of its timely-reported payment for consulting included a later invoice for the mailer, and that the amendment was filed well within the "cure" period pursuant to C.R.S. 1-45-111.7(4) and well prior to the Secretary filing this administrative complaint.

ARGUMENT

1. Administrative Proceedings Can Only Apply Constitutional Laws

An administrative proceeding can only apply laws which are constitutional; any statutory or regulatory scheme repugnant to the Constitution is null and void. "A Law repugnant to the Constitution is void." *Marbury v. Madison*, 5 U.S. 137 (1803). An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 U.S. 425 (1886).

> "The general rule is that an unconstitutional statute, though having the form and the name of law, is in reality no law, but is wholly void and ineffective for any purpose since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it; an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed … An unconstitutional law is void." (16 Am. Jur. 2d, Sec. 178)

First, the committee abjured an exhaustive exposition of the various ways that Colorado's existing campaign finance enforcement scheme is contrary to both the Colorado and U.S. constitution and thus void ab initio. However, the Secretary misrepresents the *Motion* as citing "**no** law, or facts, or otherwise provid[ing] grounds for why the statute is void." [emphasis added] This is demonstrably false. The *Motion* expressly and unambiguously cited Colo. Const. Art. XXVIII §12,[3] which documented the express intent of the electorate **removing** campaign finance law enforcement authority from the Secretary's office, by expressly **repealing** the prior statutory enforcement scheme (which, like the existing scheme, left authority with the Secretary). The electorate's intent was clear: the partisan elected Secretary is not trusted with authority to enforce campaign finance law against fellow elected officials and fellow (or opposing) candidates for elected office.

Second, although administrative agencies lack authority to declare statutes facially unconstitutional, they are bound by higher court rulings invalidating statutes and statutory schemes. Here, no less an authority than the U.S. Supreme

[3] *Motion to Dismiss* at 2

Court has declared administrative enforcement schemes, like Colorado's, which combine rulemaking and unreviewable enforcement authority in the same body, unconstitutional. See *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

Third, the District Court order in *Campaign Integrity Watchdog v. Griswold*, No. 2022CV666 is pending appeal (2024CA0128 *Campaign Integrity Watchdog v. Griswold)* and, as a mere district court ruling, lacks binding authority in any event. The Secretary's citation to a non-final, unpublished ruling as authority is improper, and should be stricken from the record in this case.

2. Colorado's "registered agent" disclaimer requirement was facially invalidated, and the "paid for by" disclaimer requirement not triggered

The Complaint alleged that the committee's yard signs failed to include both "paid for by" and "registered agent" disclaimers.

The Secretary admits that the "registered agent" disclaimer requirement was facially invalidated by the Colorado Court of Appeals, and thus cannot provide the basis for any claim against the Arvidson committee.

The Secretary admits that the additional requirement to include "paid for by" disclaimers on electioneering communications is triggered only after a committee has expended $1,000 or more per year on electioneering communications. Here, because the $647.50 the committee spent for yard signs on 28 May 2024 was both individually and in the aggregate below the $1,000/year threshold, the additional disclosure requirement for the yard signs was not triggered.

3. Only the date of expenditure, not distribution, is legally significant

Expenditures for electioneering communications are reportable when the expenditure is made or obligated, not when the communications are distributed. See *Campaign and Political Finance Manual, Expenditures by Candidates and Candidate Committees*, rev. December 2023, p.15.

Consequently, the only legally significant date with respect to the yard signs was the date of purchase (28 May 2024).

"Distribution" and display of yard signs subsequent to the committee's purchase is beyond the immediate control of the committee, which does not control the yards of individual voters choosing to support the candidate by displaying signs (nor would such be logically possible, much less constitutionally permissible). The Secretary's attempt to impose, post hoc, an additional disclaimer requirement on the committee's yard signs that did not exist at the time the expenditure was made is both logically risible and legally impermissible.

As a threshold matter, the court may take judicial notice of the Secretary's misrepresentation of facts in its Complaint. The Secretary's omission of the committee's *Notice of Intent to Cure*, detailing the actual dates of distribution and purchase for the mailer and provided to the Secretary **before** filing this Complaint, was a material fact improperly concealed from the tribunal in this matter. Such documentation is normally included in a committee's TRACER record; the fact

that in this case, the documents were (contrary to the Secretary's established and consistent practice) not uploaded to the committee record is properly subject to judicial notice and should be considered in adjudicating the *Motion to Dismiss*.

Further, the Secretary's argument that, with regard to electioneering communication reporting requirements, the "key date for any electioneering communication is the date of when it is distributed or displayed to voters" is unsupported by any legitimate citation to constitutional or statutory authority. Citation to a nonexistent constitutional provision (**there is no** Colo. Const. Art. XXVIII §7(a); there is a single §7 describing disclosure requirements, generally; and §6 defining electioneering communications contains no language "defining electioneering communications based on their date of delivery or distribution.") The Secretary makes up authority, and definitions, which do not exist in law to support a legally unsustainable (indeed, frivolous, groundless, vexatious) argument that must be rejected by any competent court or adjudicatory authority.

The Secretary's argument that yard signs purchased for $647.50 on 28 May, before the $1,000/year threshold was reached, "needed a disclaimer" because they were still displayed weeks later, is risibly devoid of legal merit (or even logic). The committee is not capable of time travel, nor does it control how individual voters display the committee's yard signs subsequent to purchase. The Secretary's 1st Claim is thus exposed as lacking factual **or** legal merit, and must be dismissed.

The absurdity of the Secretary's argument – that the committee needed to unlawfully trespass on private property to "either take those yard signs down or add disclaimers to them" – reaches new heights (or depths) of frivolousness.

To the extent that the Secretary relies upon the nonsensical 2023-55 *Order* issued by her Deputy, arguing (absent any basis in any statutory or constitutional provision) that "yard signs are continuing communications because, regardless of when they are first installed" the argument fails as a matter of law, irrespective of a non-precedential order issued by a partisan appointee lacking legitimate authority to adjudicate campaign finance law. The Deputy, in his nonsensical and extralegal Order, fails to cite to any statutory or constitutional provision defining "continuing communications" nor any disclosure requirement related thereto. The Deputy just invented a definition and legal requirement out of whole cloth, in order to convert admittedly lawful activity ("yard signs were initially purchased and initially displayed lawfully, without any disclaimers") into a purported campaign finance law violation, in an apparent attempt to extort a settlement. The Deputy's actions are the very definition of "arbitrary and capricious" conduct which no legitimate court would uphold, and which a court should instead sanction as abuse of power. Notably, Deputy Beall's "Order" is neither binding nor persuasive authority before any court of law, and should be rejected as unpersuasive by this adjudicative body.

4. The Committee's amended reports achieved substantial compliance

The Secretary admits that the committee's amended reports "cured" the deficiencies identified in the *Notice of Initial Review and Opportunity to Cure* issued 2 August 2024, and simultaneously sabotages its subsequent argument.

First, the Secretary admits that the "cure" determination in 1-45-111.7(4) C.R.S. is completely arbitrary and subject to the caprice of Elections Division personnel, who are not even licensed attorneys, much less trained judges. The Secretary admits that this determination is "not subject to review by the hearing officer," rendering it constitutionally deficient and violative of due process, as found by the U.S. Supreme Court in *SEC* v. *Jarkesy* (*supra*). The fact that the "Division's determination under section 1-45-111.7(4) is subject only to the deputy secretary's review" renders the process, and any determination made thereunder, constitutionally deficient and void.

The Secretary's argument that a post-election "cure" cannot satisfy the statutory cure requirements is factually and legally risible. Not only does the record show multiple instances of the Secretary granting post-election "cures" in other proceedings,[4] in *these* proceedings, the Secretary noticed the Committee of "Opportunity to Cure" in the 2 August 2024 *Notice*, which is the law of the case.

[4] See e.g. ED 2019-15 CIW v. ASIWH, in which Respondent political committee ASIWH was noticed and allowed to "cure" deficiencies several months after the election and report was due; ED 2020-85 CIW v. ElectClint.com, in which Respondent candidate committee was noticed and allowed to "cure" deficiencies several months after the election and report was due; ED 2024-43 Allen v. McCracken (Notice and Opportunity to Cure issued post-election, no administrative complaint filed); some examples among many.

Res judicata applies – the Secretary cannot both provide notice and opportunity to cure post-election, then later argue that once the "cure" is effected, it is invalid due to being submitted post-election. The Secretary essentially argues that time travel is the only possible way to comply with its own post-election *Notice*.

Here, the committee amended its report immediately after receiving notice of a potential deficiency on the first complaint, the very next day (27 June 2024); and within ten days of receiving notice and opportunity to cure (issued 2 August) on the second complaint, after receiving (for the first time!) documentation of the mailer invoice from its campaign consultant, on 12 August – both well within the statutory "cure" timeline as set forth in the 2 August *Notice*. The amended report contains all information required by law to be disclosed by the committee, putting it in complete (not merely substantial) compliance with legal requirements.

Any "determination" by non-attorney agency personnel offering legal advice or analysis in this specific case as to whether the committee's "cure" and amended report placed it in substantial compliance with legal requirements and then drafting legal pleadings for the Deputy's use in these judicial proceedings not only fails as a matter of law, but also constitutes the unauthorized practice of law, as defined by the Colorado Supreme Court, rendering this entire proceeding ultra vires.

> "The Supreme Court of Colorado defines the "practice of law" as acting in a representative capacity in protecting, **enforcing**, or defending the **legal rights and duties of another** and in **counselling, advising and assisting him in connection with these rights and duties**. Applying this definition,

> the court holds that an unlicensed person engages in the unauthorized practice of law by **offering legal advice about a specific case**, **drafting or selecting legal pleadings for another's use in a judicial proceeding** without the supervision of an attorney, or holding oneself out as the representative of another in a legal action." *People v. Shell*, 158 P.3d 162 (Colo. 2006) [emphasis added]

Here, the Division personnel issuing and signing the legal pleadings at issue (*Notice of Initial Review and Opportunity to Cure*, *Notice of Investigation*) did so while acting in a representative capacity for the actual party in interest in this case (Office of Secretary of State, Elections Division) in enforcing the legal rights and duties of another (Secretary of State), advising and assisting the Deputy Secretary in connection with those rights and duties. The Notices offer legal advice to parties in these proceedings (Complainant and Respondent); are legal pleadings issued for use in these proceedings; and were issued on behalf of the Secretary. There can be no legitimate dispute that these actions and pleadings constitute the unauthorized practice of law,[5] rendering these proceedings ultra vires.

Per C.R.S. 13-93-108, legal pleadings drafted and signed by non-attorneys constitute contempt of court. Although a hearing officer lacks authority to hold attorneys or parties in contempt of court, *Colo. Citizens for Ethics in Gov't v. Comm. for American Dream*, 187 P.3d 1207, 1221 (Colo. App. 2008), a hearing officer may (and should) refer those engaged in UPL to the appropriate authorities.

[5] See also *Colo. R. Civ. P. 201.3* (defining practice of law); *232.1*; *232.2(b)* "*Practice of law includes*…"; and *232.2(c)* "*Prohibited activities*" (including "exercising legal judgment" regarding legal remedies, in preparing legal documents, or in representing or advocating for another person in negotiation…)

5. The Committee is entitled to costs and fees

For the above reasons, argument, and citations to authority, the Committee is entitled to recover all costs and fees associated with this administrative complaint. The Secretary's actions and arguments were frivolous, groundless, and vexatious, compounded further by the Response's citations to non-existent authority and the Response's multiple misrepresentations of material fact[6] and legal authority.

CONCLUSION

WHEREFORE, for the above reasons, argument, and citations to authority, Respondent Arvidson for Senate respectfully requests the Hearing Officer grant the committee's Motion to Dismiss, for lack of jurisdiction under C.R.C.P. 12(b)(1); failure to state a legally cognizable claim for both CLAIM ONE and CLAIM TWO per C.R.C.P. 12(b)(5); grant the Arvidson committee's request for attorney fees; set a hearing to determine the amount of attorney fees and costs to be awarded; and directing other such further relief as deemed appropriate.

Respectfully submitted this 2nd day of December, 2024.

/signed/ Matthew Arnold
MATTHEW ARNOLD, #60401

[6] In addition to improperly omitting the material fact that Respondent timely submitted its *Intent to Cure* (and timely 'cured' identified disclosure deficiencies), cited to inadmissible or nonexistent legal authority, and misrepresented the record relating to post-election 'cures' accepted by the agency, the Response final footnote misrepresents the distinction between what a statute may authorize an agency to do, vs. which persons within that agency may legally execute those authorized functions. Just as not every employee of a police department may lawfully arrest criminal suspects (only POST-certified law enforcement officers have such authority), so too may only licensed attorneys within a state agency exercise legal judgment to advise, draft pleadings, prepare legal documents, or enforce legal rights or duties under the law.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REPLY TO RESPONSE TO MOTION TO DISMISS** was sent to the following persons via E- mail at the address(es) listed below, on the 2nd day of December 2024 as indicated:

Administrative Hearing Officer Macon Cowles
Administrative Staff
Colorado Secretary of State
AdministrativeHearingOfficer@ColoradoSOS.gov

Peter G. Baumann, Esq.
Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
peter.baumann@coag.gov
Elections Division Counsel

/signed/ *Matthew Arnold*
MATTHEW ARNOLD, #60401