STATE OF COLORADO
Department of State
1700 Broadway, Suite 550
Denver, CO 80290

Jena M. Griswold
Secretary of State
Christopher P. Beall
Deputy Secretary of State

BEFORE THE
COLORADO DEPUTY SECRETARY OF STATE

AHO Case No. **2024-032**
Election Division Case Nos: **2024-055**, **-056**

In the Matter of

ELECTIONS DIVISION of the SECRETARY OF STATE,
Complainant,
v.

ARVIDSON FOR SENATE, candidate committee,
Respondent.

PROCEDURAL ORDER REGARDING AHO'S INITIAL DECISION
(with attached copy of same)

Pursuant to section 24-4-105(16)(a), C.R.S., of the Colorado Administrative Procedures Act, section 1-45-111.7(6)(b), C.R.S., of the Colorado Fair Campaign Practices Act, and Rule 24.18 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6, service is hereby effected of the attached copy the Administrative Hearing Officer's ("AHO") initial decision issued on today's date in the above-referenced matter: Initial Decision, dated Jan. 7, 2025 (attached).

The Colorado Deputy Secretary ("Deputy Secretary") hereby serves this Procedural Order Regarding AHO's Initial Decision upon the parties to notify all concerned of their rights, responsibilities, and deadlines should any party seek review by the Deputy Secretary of this Initial Decision.

This case remains open through the period of potential appeal and review by the Deputy Secretary. The Deputy Secretary is not bound by the AHO's initial rulings in this matter other than as controlled by applicable case law. As indicated below, the Deputy Secretary has initiated review on his own motion, and as a result, the Deputy Secretary has discretion to issue a Final Agency Order with a different result than that recommended in the Initial Decision.

To challenge the Initial Decision, a party must file exceptions with the Deputy Secretary pursuant to the procedures outlined in subsections 24-4-105(14), (15) and (16), C.R.S. and in this Procedural Order.

I. Initiation of Review on Deputy Secretary's Own Motion

The Deputy Secretary hereby initiates review of the Initial Decision upon his own motion pursuant to sections 1-45-111.7(6)(b) and 24-4-105(14)(a)(II) with regard to arguments raised by Respondent's counsel concerning his allegation of that Division staff have engaged in unauthorized practice of law in violation of various Rules of Professional Conduct.

II. General Filing Requirements

All requests and pleadings pertaining to any party's Exceptions or any responses must be in writing, filed electronically with the Deputy Secretary and **not** with the AHO. The email address for filing exceptions in this matter is: OACAppeals@ColoradoSoS.gov.

Any party that files a pleading, response, or any other related document with the Deputy Secretary must also serve a copy of such document upon the opposing party at the email addresses for those parties that were provided during the prior litigation.

III. Exceptions

Pursuant to section 24-4-105, a party may appeal the Initial Decision entered by the AHO by means of the exceptions review process ("Exceptions"). In such an appeal, a party must file what it denominates as its "Exceptions to the Initial Decision" according to the deadlines and procedures outlined below in this Procedural Order:

A. Designation of Record

Any party who seeks to reverse or modify the Initial Decision must file a Designation of Record within twenty (20) days from the date of this Procedural Order. Any party that wishes to challenge factual findings in the Initial Decision must also designate relevant transcript(s), or parts thereof, of the proceedings before the AHO in their Designation of Record. A transcript is not necessary if the requested review is limited to a pure question of law.

Within ten (10) days after service of the Designation of Record, any other party, including the Deputy Secretary, may file a "Supplemental Designation of Record" including any additional transcripts, or parts thereof, of the proceedings before the AHO. The Supplemental Designation of Record must specify all or part of the Record to be additionally included in the appeal.

A party ordering transcript(s) is responsible for ordering and filing such transcripts with the Deputy Secretary. It is recommended that a party contact the AHO and a certified court reporter for information on how to order a transcript.

B. 30-Day Deadline for filing Exceptions

Exceptions are due within thirty (30) days after the date of this Procedural Order. A party may request an extension of time to file Exceptions prior to thirty (30) days after the date of this Procedural Order. An extension of time will be granted for good cause.

The parties should be aware that delays in receiving an ordered transcript will **not** result in an automatic extension of the deadline for filing Exceptions. Rather, a proper motion for such relief must be filed.

C. Deadlines for Responses, Replies, and Proposed Orders

Responses: Either party may file a response to the other party's Exceptions within fourteen (14) days from the date of the Exceptions filing.

Replies: Either party may file a reply to the other party's response to Exceptions within seven (7) days from the date of the responsive filing.

Proposed Orders: Either party may file a proposed final agency order. Such proposed order may be filed together with the party's Exceptions, response, or reply.

D. Computation and Modification of Time

All time periods are calculated pursuant to Rule 6 of the Colorado Rules of Civil Procedure.

IV. Oral Arguments

The Deputy Secretary may permit oral argument upon request from either party. Such request must be filed with the exceptions, response, or reply. If permitted, each party will be allotted a defined time limit for oral argument. The requesting party will present first and may reserve time for rebuttal. The Deputy Secretary will be permitted to ask questions. Oral argument must be confined to the arguments and evidence presented during the hearing or in the exceptions and responses thereto. Evidence or arguments outside the record may not be presented during oral argument.

V. Final Order

The Deputy Secretary may affirm, set aside, or modify any, all, some, or no parts of the Initial Decision, including any findings of fact, conclusions of law, and recommended dismissal, sanction or other penalty within the Deputy Secretary's authority. Under most circumstances, the Deputy Secretary will issue a Final Agency Order at the conclusion of his review. On occasion, however, the Deputy Secretary may conclude that either the factual basis or legal analysis, or both, in the AHO's initial decision are insufficient to complete an appropriate review of the case. In such instance, the Deputy Secretary will remand the case back to the AHO with directions to issue a revised initial decision. The AHO will subsequently issue a Revised Initial Decision upon remand. The parties will have the same appeal rights with respect to the Revised Initial Decision as they had with the original Initial Decision.

The ultimate Final Agency Order is subject to judicial review under section 24-4-106. However, if a party fails to timely appeal the Initial decision through Exceptions,

such failure operates as a matter of law as a waiver of the right to judicial review of the Final Agency Order except to the extent it differs from the Initial Decision. *See* § 24-4-105(14)(c), C.R.S.

IT IS SO ORDERED.

DONE and **ORDERED** this 7th day of January 2025.

CHRISTOPHER P. BEALL
Deputy Secretary of State

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this **PROCEDURAL ORDER REGARDING AHO'S INITIAL DECISION** along with the accompanying **INITIAL DECISION** by Administrative Hearing Officer Macon Cowles was served on the following parties via electronic mail on January 7, 2025:

Complainant –
Peter Baumann, Senior Assistant Attorney General
Colorado Department of Law
Peter.Baumann@CoAG.gov

Respondent –
Arvidson for Senate
c/o Registered Agent Tim Arvidson
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Matthew Arnold, Esq.
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Underlying Citizen Complainant
David DiFolco
dcdifolco@msn.com

Administrative Hearing Officer Macon Cowles –
AdministrativeHearingOfficer@ColoradoSOS.gov

Elections Division –
Colorado Secretary of State, Elections Division
cpfcomplaints@coloradosos.gov

/s/ Christopher P. Beall
Deputy Secretary of State

STATE OF COLORADO
SECRETARY OF STATE
Administrative Hearing Office
1700 Broadway, Suite 550
Denver, CO 80290

Attachment to
Procedural Order Regarding
AHO's Initial Decision

Case Number: 2023 AHO 32
(*in re* ED 2024-55 and 2024-56)

ELECTIONS DIVISION OF THE SECRETARY OF STATE,

Complainant,

v.

ARVIDSON FOR SENATE,

Respondent.

INITIAL DECISION

Table of Contents

I. BACKGROUND AND CONTEXT

1. The Elections Division of the Colorado Secretary of State filed a Hearing Officer Complaint against Respondent, Arvidson for Senate, alleging two counts of violating the Fair Campaign Practices Act, § 1-45-101, et seq., C.R.S. (2024). The counts concerned electioneering communications within

   a. **Count 1. Failure to include the "paid for" disclaimer** on yard signs in violation of § 1-45-108.3(3), and;

   b. **Count 2. Failure to report electioneering communication expenses** for the yard signs and for mailers, in violation of Colo. Const. art. xxviii, § 6). The expenses that Complainant says should have been reported include at least $3,370.85 for mailed campaign flyers paid for on May 25, 2024, and $647.50 for yard signs purchased May 28, 2024.

2. Respondent filed an answer asserting these defenses:

   a. Count 1 must be dismissed because the Colorado Court of Appeals declared the disclaimer requirement in § 1-45-108.3(3) to be facially unconstitutional in *No on EE v. Beall*.

   b. Count 2 should be dismissed because the failure to report payments for the campaign flyers and yard signs in the committee report June 3, 2024

was cured by amended reports filed July 27 as to the yard signs and August12 as to the flyers.

3. Respondent filed a Motion to Dismiss that was denied in an Amended Order Denying Motion to Dismiss dated December 16, 2024. A hearing on the merits was held December 17, 2024.

II. EXHIBITS

4. During the hearing, the following exhibits were received without objection.

Exhibit No.	Item
1	Report of Contributions and Expenditures, June 3, 2024
2	Amended Arvidson for Senate Report of Contributions and Expenditures (yard signs), July 27, 2024
3	Amended Arvidson for Senate Report of Contributions and Expenditures (mailers), August 12, 2024
4	Arvidson for Senate yard sign
5	Arvidson for Senate mailer
6	June 6, 2024 Invoice to Arvidson for Senate for mailer
7	Campaign finance complaint (re yard signs), No. 2024-55
8	Campaign finance complaint (re reporting), No. 2024-56
9	Notice [to Committee] of Initial Review and Opportunity for Cure
10	Notice [from Committee] of Intent to Cure

III. APPLICABLE LAW

5. Colorado's campaign finance laws are found in Colo. Const. art. xxviii, in the Fair Campaign Practices Act (FCPA), § 1-45-101, et seq. and in Campaign & Political Finance [CPF] Rules, 8 Code Colo. Regs. 1505-6.

6. An electioneering communication is defined by Colo. Const. art. xxviii, §2(7)(a).

> (a) "Electioneering communication" means any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:
>
> (I) Unambiguously refers to any candidate; and
>
> (II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and
>
> (III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

7. For purposes of Colorado campaign finance laws, "An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined." Colo. Const. art. xxviii, §2(8)(a).

> "Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

8. § 1-45-108.3 of the FCPA requires that once a candidate committee has spent more than $1,000 per on electioneering communications, the communications must include a disclaimer.

> (1) A candidate committee, political committee, issue committee, small donor committee, political organization, political party, or other person making an expenditure in excess of or spending more than one thousand dollars per calendar year on a communication that must be disclosed under article XXVIII of the state constitution or under this article 45 or supports or opposes a ballot issue or ballot question, and that is broadcast, printed, mailed, delivered; placed on a website, streaming media service, or online forum for a fee; or that is otherwise distributed shall include in the communication a disclaimer statement in accordance with subsection (2) of this section.
>
> (2) The disclaimer statement required by subsection (1) of this section must conform to the requirements specified in section 1-45-107.5 (5) for content, size, duration, and placement.

> (3) In addition to any other applicable requirements provided by law, any person who expends one thousand dollars or more per calendar year on electioneering communications … shall, in accordance with the requirements specified in section 1-45-107.5 (5), state in the communication the name of the person making the communication.

9. § 1-45-107.5 (5)(a)(I) and (II) requires the disclaimer to include:

> (I) The communication has been "paid for by (full name of the person paying for the communication)"; and
>
> (II) Identifies a natural person who is the registered agent *if the person identified in subsection (5)(a)(I) of this section is not a natural person*.
>
> [Emphasis supplied.]

10. Moreover, money spent on electioneering communications must be publicly and timely disclosed by reporting the expenditures to the Colorado Secretary of State using the purpose built TRACER system.

> Any person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state in accordance with the schedule currently set forth in 1-45-108 (2), C.R.S., or any successor section. Such reports shall include spending on such electioneering communications….
>
> Colo. Const. art. xxviii, §6.

11. The schedule pertinent to the two counts of the Complaint required the Arvidson for Senate Committee to file a report on June 3, 2024 accurately and completely disclosing expenditures during the prior two weeks. § 1-45-108(2)(a)(I)(B).

12. "[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'—until the election." Order [of the Deputy

Secretary] Denying Motion for Reconsideration of Denial of Motion to Dismiss, *In re Patti Shank*, pp.2-3.[1]

IV. SUMMARY OF TESTIMONY

A. David DiFolco

David DiFolco, after being first duly sworn, gave the following testimony:

13. David DiFolco's wife, Lisa Frisell, was Mr. Arvidson's opponent in the June 25, 2024, Republican primary for Colorado's Senate District 2. Mr. DiFolco served as Ms. Frisell's registered agent.

14. He closely monitors the campaigns of his wife's opponents like Mr. Arvidson, also running in the primary. As early as April 2024, he saw social media posts by Mr. Arvidson that he found concerning. The posts were asking for $100 campaign contributions but did not request the donor's name, address or employer, which he believed to be unusual. On May 17 and May 31, 2024, Arvidson's social media posts specifically asked for money for campaign yard signs.

15. **Yard Sign Complaint.** Mr. DiFolco's first complaint to the Secretary of State, Ex. 7, concerned yard signs. He began seeing yard signs for the Arvidson for Senate campaign around Castle Rock, Colorado, in early June 2024. He learned about the signs from neighbors who supported his wife's campaign and he also saw them in other parts of Senate District 2, in unincorporated Douglas County and in the town of Parker.

[1] The Deputy Secretary's Order dated January 10, 2024 Denying Motion for Reconsideration was attached as Ex. B to the Division's Response to Respondent's Motion to Dismiss. The Order can be downloaded here.

16. On June 10, 2024, while driving to an event at 105 West Brewing Company in Castle Rock, Mr. DiFolco saw an Arvidson yard sign in front of a local business. The yard sign did not include a "paid for by" disclaimer, which Mr. DiFolco believed was required under Colorado law. He submitted a complaint to the Secretary of State, with a photo of the yard sign he observed on June 10, 2024. The photo appears on the third page of Exhibit 7.

17. **Mailer Complaint.** Ex. 8 is his complaint about reporting errors. It includes the campaign mailer from the Arvidson campaign he received on June 7, 2024, with his handwriting as to the date. He regularly checks campaign finance reports on the Secretary of State's TRACER system, and he reviewed the Arvidson campaign's reports filed on June 3, 2024, and June 17, 2024. He could not find any record of the mailer expenditure on those reports. Ex. 1 is the June 3, 2024 TRACER filing of the Arvidson campaign.

18. Knowing how much the Arvidson campaign spent on the mailers would have been helpful in informing his wife's campaign strategy. He stated that he and his wife were familiar with the costs associated with campaign mailers, as they had previously sent mailers during her prior campaigns. He testified that knowing how widely the mailers were distributed would have been useful information for the Frisell campaign.

19. During cross-examination, by Mr. Arnold, counsel for the Arvidson for Senate campaign, Mr. DiFolco said that he closely tracks the tracer filings of his wife's opponents and their expenditures. He asserted in Ex. 7 that Arvidson's expenditures for Facebook advertising and other expenses totaling $1,219.23 qualified as electioneering communications. He believed at the time that they did constitute electioneering Communications. He listed expenditures from May 2, 2024 to May 9, 2024—neither of

which dates are within 30 days of the primary. He concedes that he falsely asserted in the complaint that they were electioneering communications. At the time he filed the complaint, he thought they were. He came to find out that he was wrong. Neither May 2 nor May 9 is within 30 days of the election, so expenditures on those days are not for electioneering communications. This could be viewed as a lack of due diligence on his part.

20. He concedes that he did not do his due diligence in filing this complaint under penalty of perjury, alleging a violation by the Arvidson Committee with regard to the disclaimer on the yard signs. 0:37:00[2] But he thought that he did understand the regulations. As his wife's registered agent, he is required to sign a statement that he understands the regulations, to the best of his ability. And he understood the electioneering window to be 30 days.

21. He doesn't think it is possible for a threshold to be triggered retrospectively.

B. Timothy Gebhardt

Timothy Gebhardt was called by Respondent. After being first duly sworn, 0:44:22, Mr. Gebhardt gave the following testimony:

22. He is the Campaign and Political Finance Enforcement Manager for the Colorado Secretary of State's office. He is not a licensed attorney in Colorado.

[2] From time to time in this Initial Decision, time markers are inserted in the format h:mm:ss. This indicates where in the hearing recording the testimony or statement appears.

23. Mr. Gebhardt drafted the Notice of Initial Review, Consolidation and Opportunity to Cure, Ex. 9. It notifies Respondent that the Division has made a determination that the alleged violations potentially can be cured. He makes the determination based on three things. First, was the complaint timely filed? Second, does it specify a violation of Colorado campaign finance laws? Third does it allege sufficient facts to support the allegations of a campaign finance violation? They review the facts alleged in the complaint and attachments.

24. [At this point, counsel for the division objected to any testimony regarding a claim of unauthorized practice of law. The hearing officer pointed out that unauthorized practice would not be a defense to the administrative complaint in this case, but determined that counsel for respondent would be permitted to make a record on "a very limited basis with Mr. Gebhard… so you can make a record there on this particular exhibit 9… to explore Mr. Gebhardt's thinking behind Exhibit 9." 0:53:33

25. They use the statute to determine whether the complaint is timely, and whether violations of Colorado campaign finance laws have been alleged in the complaint. He has to take into account the Colorado Constitution and the FCPA section 1-45-108.3(3) and decisions of the Colorado Court of Appeal narrowing the scope of electioneering communications. 0:58:52 In Ex. 9, he cites to the statute, and applies the facts and circumstances and does an analysis to determine whether there must be a disclaimer on the communication. 0:59:45

26. On page 7 of Ex. 9 under the section entitled, "Respondent has the opportunity to cure the alleged violations," he gives Respondent a deadline of August 16, 2024 to cure. Respondent did notify the Division of its intent to cure before the deadline.

27. Responding to Mr. Baumann's questions, Mr. Gebhardt said he did not file Ex. 9 before a tribunal.

28. The campaign finance enforcement team is responsible upon receipt of a campaign finance complaint to make an initial review to determine the three prongs. As previously stated: whether a complaint was timely filed, whether it specifically alleges a violation of Colorado, Colorado, campaign finance law, and whether a complaint has alleged sufficient facts to support the allegations in the complaint. If the Division determines that one of the three prongs is not satisfied, it files a motion to dismiss. But the final decision maker is the Secretary of State.

29. On redirect, he says that his team does not make the final decision. He is a signatory on settlement agreements, but those are submitted to the Deputy Secretary who is the final decision maker.

30. When he files a motion to dismiss within an administrative proceeding, prior to the filing of a hearing officer complaint, he does so on behalf of the Elections Division—which is a division of the Secretary of State.

31. Any settlement agreement that the Division signs needs approval by the final agency decision maker, the Deputy Secretary of State. There are no settlement agreements he has signed where no other signature is required.

V. FINDINGS OF FACT

32. The administrative court has jurisdiction of this case to determine the issues raised by the Administrative Complaint dated October 9, 2024 pursuant to the Fair Campaign Practices Act (FCPA), § 1-45-111.7., C.R.S.

33. A hearing was conducted December 17, 2024 in accordance with section 24-4-105 and section 1-45-111.7 6(a) and (b) of the Colorado Revised Statutes.

34. Pursuant to § 1-45-111.7(6)(a), C.R.S., this initial determination is subject to review by the Deputy Secretary of State for issuance of a final agency decision.

35. The Division called two witnesses, David DiFolco and Tim Arvidson. Mr. DiFolco's testimony appears above. Mr. Arvidson was not present at the hearing and his counsel said he "no longer resides in the area." 0:42:41 Respondent Committee called a single witness: Tim Gebhardt whose testimony appears above.

36. Tim Arvidson was a candidate in the Republican primary election for Colorado Senate District 2, which includes Castle Rock and Parker. The primary election occurred June 25, 2024.

A. "Electioneering communications"

37. The facts in the chart below are established by the exhibits and unrebutted testimony. They are not in dispute.

Date	Event	Source
May 25, 2024	The committee paid $3500 to 5411, LLC in Dover Delaware	Ex. 3
May 26, 2024	30 day electioneering window opens, ending with the primary on June 25, 2024	Respondent's counsel at 0:12:26

Date	Event	Source
May 28, 2024	The committee paid $647.50 expenditure for yard signs	Ex. 3
May 28-June 25, 2024	The yard signs were "distributed during the June Republican primary election electioneering window."	Answer, ¶ 38
June 3, 2024	The Committee TRACER report includes the $3,500 and the $647.50 payments, but does not disclose that they were incurred for "electioneering communications"	Ex. 1
June 6-12	The mailers were disseminated to electors	Answer, ¶13
June 7, 2024	The mailer is received by David DiFolco, an elector in Colorado Senate District 2.	Ex. 5
June 17, 2024	Committee files a report that does not amend the June 3 report	Tracer report
June 25, 2024	30 day electioneering window closes on this, the date of the primary election	Secretary of State's Election Calendar
July 1, 2024	Committee files a report that does not amend the June 3 report	Tracer Report
July 25, 2024	David DiFolco files two complaints against the Committee, one alleging a yard sign disclaimer violation, the other alleges reporting violations	Exs. 7-8
July 27, 2024	The Committee amends the June 3 Report of Contributions and Expenditures to state that the $647.50 payment for yard signs on May 28, 2024 was for "electioneering communications."	Ex. 2
August 1, 2024	Committee files a report that does not amend the June 3 report that incorrectly characterized the $3,500 mailer payment as NOT in payment for "electioneering communications"	Tracer report
August 12, 2024	The Committee amends the June 3 Report of Contributions and Expenditures to state that $3,370.85 of the $3,5000 payment on May 28, 2024 was for "electioneering communications"—the mailer	Ex. 3

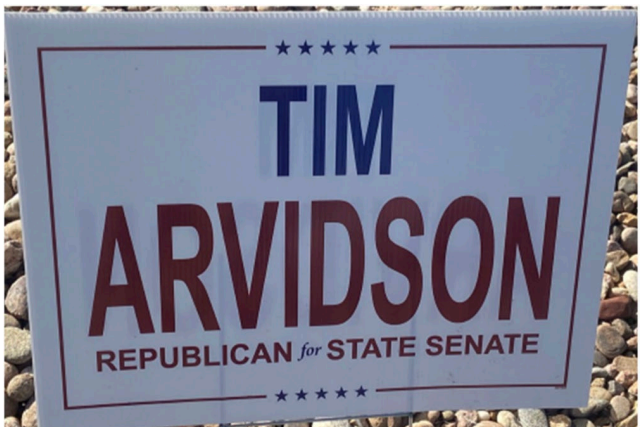
38. From this sequence, it is clear that both the yard signs and the distribution of mailers were electioneering communications. They refer unambiguously to Tim Arvidson as a candidate in the primary election and they were both distributed during the 30 day

window leading to the primary election on June 25, 2024. The Committee admitted that they were electioneering communications in the amended reports of the Committee on July 27, Ex. 2, and August 12, Ex. 3.

B. Disclaimer violation under § 1-45-108.3(3) and § 1-45-107.5 (5)(a)(I), C.R.S.

39. The unrefuted testimony of David DiFolco is that the yard signs were seen in various parts of Senate District 2, including Parker and Castle Rock, from early June until sometime after the primary on June 25. In its Answer at ¶ 38, Respondent admits that they were distributed during the 30 day electioneering window.

40. Mr. DiFolco took a photograph of the Arvidson yard sign at the location where it was displayed on June 10, while he and his wife were on their way to an event at 105 West Brewing Company in Castle Rock. There is no disclaimer telling the audience who paid for the yard sign.



Ex. 4

By the time Mr. DiFolco took this photograph, the Arvidson for Senate Committee had

spent more than $4,000 on electioneering communications.[3] Under the FCPA, expenditures are made “when the actual spending occurs." Colo. Const. art. xxviii, §2(8)(a). The Committee paid for the mailers on May 25 and for the yard signs on May 28.

41. Not to have a disclaimer on the yard signs is a clear violation of § 1-45-108.3(1) of the FCPA. The Committee was required to put the disclaimer "paid for by (full name of the person paying for the communication)" on the yard signs. § 1-45-107.5 (5)(a)(I), C.R.S. Moreover, the yard signs are “continuing communications,” *In re Patti Shank*, and a disclaimer was required to be placed on them until the election—even if as originally printed the signs had no disclaimer.

C. Reasonable inferences from the evidence

42. Respondent’s counsel argues that at the time the Committee paid for the yard signs on May 28, it had not yet crossed the $1,000 threshold which thereafter would require placement of a disclaimer on the signs. But the payment of $3,500 on May 25 belies that assertion. Respondent’s counsel claims that Mr. Arvidson and the Committee did not know that the $3,500 was for electioneering mailers until much later. But the Committee put on no evidence about what it knew at the time of the two payments in May and what the Committee thought it was buying on May 25. Mr. Arvidson, who might have provided information on this subject, was conspicuously absent from the hearing. Without direct evidence, an inference can be drawn from surrounding circumstances. “[A]n actor's

[3] *See,* Ex. 2 (acknowledging the $647.50 payment for yard signs on May 28, 2024 was for “electioneering communications”), Ex. 3 (acknowledging that $3,370.85 on May 28, 2024 was for “electioneering communications”, and Ex. 6 (June 6 $3,370.85 invoice for the mailers).

state of mind is normally not subject to direct proof and must be inferred from his or her actions and the circumstances surrounding the occurrence." *People v. Kessler*, 2018 COA 60, ¶ 12. The job of the factfinder is "to appraise credibility, draw inferences, determine the weight to be given testimony and to resolve conflicts in the facts." *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1468 (10th Cir. 1992) (quoting Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1430 (10th Cir. 1990)).

D. Reporting violation under Colo. Const. art. xxviii, §6

43. Counsel for Respondent argued that the Committee and Mr. Arvidson had no reason to know the cost of the mailer until late in July, "belatedly," when the consultant to whom the $3,500 was paid provided them with an invoice.

> "The committee was not in possession of any information that reflected the expenditure on the mailers. They had to contact the vendor…[who] then provided them that invoice belatedly." 0:16:39 Counsel asserted that the proper Respondent to the Division's complaint is not "the Committee, but the vendor who failed to provide that information." Counsel's opening statement at 0:16:50
>
> "Their [the Committee's and Mr. Arvidson's] consultant did not get that notice to them, so they could not possibly have provided it any sooner."
>
> Counsel's closing argument at 1:44:04

44. Neither of the arguments in ¶ 43 is supported by any evidence. "The arguments of counsel, of course, are not evidence." *City of Fountain v. Gast*, 904 P.2d 478, 482 n.5 (Colo. 1995). *Ortivez v. Davis*, 902 P.2d 905, 908 (Colo. App. 1995). *See*, also, Colo. Jury Instr., Civil 3:8. ("Statements, remarks and arguments…by counsel are not evidence.")

45. When the Committee paid $3,500 to 5411 LLC on May 25, 2024—31 days before the primary election—it was a commitment of 65% of the total amount spent by the

Committee *for the entire campaign*.[4] A reasonable inference from this fact is that the Committee knew that the payment was for a mailer to likely voters in the Republican primary in which Mr. Arvidson was a candidate. A further reasonable inference is that on June 3, the date the next Committee report was due, the exact amount spent on the mailers could have been determined by the Committee with a phone call to the payee. That would have enabled it to have correctly reported electioneering expenses on June 3.

46. "An inference is a conclusion that follows, as a matter of reason and common sense, from the evidence." Colo. Jury Instr., Civil 3:8. It is not credible to think that the Committee would pay $3,500 to a Delaware LLC without knowing that it was going to be spent on mailers to likely voters in the Republican primary, and that those mailers would be received by voters during the 30 day electioneering window. It is common sense that the very object of the Committee's payment was to get those mailers in the hands of likely voters who would be receiving their ballots in June, returning them to the county election officials on or before June 25, 2024.

47. The suggestion by counsel (NOT evidence) that "they could not possibly have provided it—[an accurate report that they had spent $3,500 on electioneering communications]—any sooner" 1:44:04 lacks credibility due to the common sense conclusion reflected in our caselaw. "Willful ignorance is equivalent, in law, to actual knowledge. A man who abstains from inquiry when inquiry ought to be made, cannot be

[4] $3,500 ÷ $5,419.51 = 65% of the total amount spent on the entire campaign. That $5,419.51 is the total amount spent in the Arvidson for Senate campaign can be seen on line 4, p.1 of the TRACER reports, Exs. 1, 2 and 3.

heard to say so, and to rely upon his ignorance." *Mackey v. Fullerton*, 7 Colo. 556, 560, 4 P. 1198, 1200 (1884) ("It does not avail the defendant to say, as he did in his testimony, that he did not look at the bill…and did not know that it contained the item of the barn.")

48. After the payment for the mailers and the purchase of the yard signs, the next report of the Committee required by the FCPA was due Monday, June 3, only three days before the mailers started landing in people's mailboxes. Where the Committee reported $3,500 paid to the Delaware LLC, there is a box to be answered: Is this an electioneering communication, Yes or No? The Committee answered, "No."

Full Name of Committee/Person: ARVIDSON FOR SENATE

1. Date Expended 05/25/2024	4. Name	5411 LLC
2. Amount $3,500.00	5. Address	3500 S. DUPONT HWY
	6. City/State/Zip	DOVER DE 19901
Electioneering Comm? No	7.Purpose	CAMPAIGN CONSULTING SERVICES
	8. Type	Consultant & Professional Services

Ex. 1, Schedule B, p. 6

Putting a fine point on it, it is not credible to suppose, as Respondent's counsel argues, that the Committee did not know at the time this report was filed that nearly all of the $3,500 paid to 5411, LLC in Dover, Delaware was spent to get mailers to primary voters *that would be arriving the very week the report was filed*.

49. What is abundantly clear is that the Committee had in fact spent more than $1,000 on electioneering communications by June 3, 2024. And therefore, the Committee was required to describe as "electioneering communications" both the $3,370.85 spent on

the mailers May 25 and the $647.50 spent on the yard signs May 28 in reports that it filed on June 3 and thereafter until the expenses were accurately reported.

50. An aggravating factor to be considered in assessing a fine for the reporting violation is that the Committee filed not just one or two, but five TRACER reports that misrepresented electioneering expenditures that Colo. Const. art. xxviii, §6 requires to be publicly and accurately reported.

a. The Committee's June 3, 2024 TRACER report, Ex. 1, incorrectly stated that the yard sign and mailers payments were not for "election communications."

b. The Committee's June 17, 2024 TRACER report failed to correct the June 3 misrepresentations as to "election communications."

c. The Committee's July 1, 2024 TRACER report failed to correct the June 3 misrepresentations as to "election communications."

d. The Committee's July 27, 2024 TRACER report, Ex. 2, amended the June 3 report to acknowledge that the $647.50 payment for yard signs on May 28, 2024 was for "electioneering communications." But the report did not correct the June 3 misrepresentation that the $3,500 payment to 5411, LLC for mailers was not for "election communications."

e. The Committee's August 1, 2024 TRACER report still failed to correct the June 3 report's misrepresentation that the $3,500 payment for mailers was not for "election communications."

VI. CONCLUSIONS OF LAW

A. The import of *No on EE v. Beall*, 2024 COA 79, to this case

51. Administrative agencies lack jurisdiction to rule on facial challenges to the constitutionality of a statute. *Arapahoe Roofing and Sheet Metal, Inc. v. City and Cty. of Denver*, 831 P.2d 451, 454 (Colo. 1992); see also *Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1198-99 (Colo. 1993). If, however, a Colorado appellate court or a federal court has

determined that a statute is unconstitutional, administrative courts are bound to apply that holding.

52. Respondent argues that Count 1 should be dismissed because the Colorado Court of Appeals in *No on EE v. Beall*, 2024 COA 79, ¶ 34, held that the "registered agent disclosure requirement imposed on issue committees" in § 1-45-108.3 is unconstitutional. However, the Court of Appeals' finding of unconstitutionality applies only to that part of the statute requiring *disclosure of a registered agent by an issue committee*. Therefore, it does not remove the statutory requirement of a "paid for by" disclaimer on electioneering communications by a candidate committee that is required by § 1-45-108.3(1) and (2) and § 1-45-107.5 (5)(a)(I). Furthermore, the *No on EE* case has been appealed, and the Colorado Supreme Court on October 22, 2024 stayed the mandate of the Court of Appeals.[5]

53. Accordingly, Respondent's argument that Count 1 should be dismissed because of the holding in *No on EE v. Beall* is without merit.

B. Substantial compliance during the cure period is not a defense to Count 2

54. Respondent argues that the July 27 and August 12 amended reports "substantially cured" the misrepresentations in the June 3 report and that therefore Count 2 should be dismissed. Respondent is conflating the "cure" that may be effected during the processing of the DiFolco informal complaints, Exs. 7 and 8, with the violations of the

[5] The October 22, 2024 stay order in *No on EE, Supreme Court Case No.* 2024SC540 is not available on Lexis or Westlaw, accessed January 1, 2025. It is, however, available in the Colorado Court's e-filing system. A copy will be attached to this Initial Decision.

FCPA that are at issue in this court proceeding once the Division, represented by the Attorney General's Office, files an administrative complaint. The Elections Division must—and did—notify Respondent under § 1-45-111.7(4)(a) that there was a curable violation. Ex. 9. Respondent then notified the Division of its intent to cure. Ex. 10. The Division then is authorized to determine whether Respondent "substantially complied with its legal obligations." § 1-45-111.7(4)(e)(II), using the criteria in § 1-45-111.7(4)(f). If so, the Division moves to dismiss the informal complaints. *Id.* If not, the FCPA authorizes filing an Administrative Complaint in this court. § 1-45-111.7(5)(a). Once that step is taken, as it was here, "substantial compliance" is no longer an issue. Rather "substantial compliance "was a permitted determination that the Division is authorized to make during and after the cure period. It is not an issue for this court's decision—much less a complete defense to Count 2.

55. The issue for this court as to each count is a) was there a violation of the FCPA, and if so, b) what is the appropriate fine. While substantial compliance is not a complete defense to Count 2 of the Complaint, the actions of the Committee taken during the cure period can be considered in connection with determining the appropriate fine. Counsel for the Division even argued that the Committee's amended reports are regarded as mitigation in connection with the fine that it seeks. 0:07:48 and 1:25:25

C. Other legal issues argued by Respondent's counsel

1. Jarkesy and Loper Bright.

56. Counsel argued that the entire framework of the Colorado Secretary of State enforcing and adjudicating campaign finance law is unconstitutional, violating the

separation of powers doctrine by combining legislative, executive, and judicial functions within a single agency. He cited recent Supreme Court cases *SEC v. Jarkesy*, 144 S. Ct. 2117, 219 L.Ed.2d 650 (2024) and *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 219 L.Ed.2d 832 (2024) in support of this argument. 0:09:11 These cases have nothing to do with the matters at issue here.[6]

57. If counsel wanted to assert serious—as opposed to a spurious—defenses, he was obligated to include those in the Answer or in the Motion to Dismiss. Defenses and objections not presented as required by the rules of civil procedure are deemed waived. *Maxly v. Jefferson County Sch. Dist. No. R-1*, 158 Colo. 583, 408 P.2d 970 (1965). Further, the November 30 Scheduling Order required Respondent to include legal points on which he intended to rely at trial in a prehearing statement.[7] But Respondent filed no prehearing statement at all.

2. Unauthorized practice of law

58. Respondent's counsel claimed that the Secretary of State's campaign and political finance enforcement manager, Tim Gebhardt, had engaged in the unauthorized practice of law by conducting legal analysis, exemplified by Ex. 9, regarding the initial complaints and violations of the FCPA. He raised this in passing in the Motion to Dismiss, p. 7, but confusingly cited C.R.C.P. Rule 201 (a bar admission rule that was repealed

[6] Where the Securities and Exchange Commission levied a $300,000 fine for securities fraud in an administrative proceeding under the authority of Dodd-Frank, *Jarkesy* held that that respondents were entitled to a jury trial under the Seventh Amendment to the US Constitution. 144 S. Ct. at 2121, 219 L.Ed.2d at 658. *Loper Bright* overruled *Chevron* deference that federal courts had accorded to administrative agencies for decades in cases arising under the Administrative Procedure Act (APA), 5 U.S.C.S. § 551 et seq.

[7] Prehearing statements require a "concise statement of all points of law that are to be relied upon or that may be in controversy, citing pertinent statutes, regulations, cases and other authority." CPF Rule 24.11.1 and Appendix A.

effective September 1, 2014) as well as Rule 232.2(b) and (c). At the hearing, however, he argued that Mr. Gebhardt was engaged in the unauthorized practice of law, and therefore the administrative complaint is a nullity and should be stricken. 0:50:23

> "That would nullify this entire complaint, because this entire complaint is predicated upon the pleadings drafted and filed and disseminated by Mr. Gebhardt, who, by his own admission is a non attorney."
>
> 0:50:36

59. Counsel's statement is not true. Mr. Gebhardt did not file the administrative complaint. Rather it was signed and filed by Assistant Attorney General Baumann, Attorney Reg. No. 51620. It was disseminated by Mr. Baumann as well—a fact apparent from the Certificate of Service.

60. C.R.C.P. Rule 232.2(b) and (c) state the following on the unauthorized practice of law:

> **(b) Prohibition on the Unauthorized Practice of Law.** Unless authorized by supreme court case law, federal law, tribal law, or other valid law, a nonlawyer may not engage in the practice of law. "Practice of law" includes the following:
>
> (1) Protecting, defending, or enforcing the legal rights or duties of another person;
>
> (2) Representing another person before any tribunal or, on behalf of another person, drafting pleadings or other papers for any proceeding before any tribunal;
>
> (3) Counseling, advising, or assisting another person in connection with that person's legal rights or duties;
>
> (4) Exercising legal judgment in preparing legal documents for another person; and
>
> (5) Any other activity the supreme court determines to constitute the practice of law.
>
> **(c) Prohibited Activities.** The unauthorized practice of law by a nonlawyer includes the following:
>
> **(1)** Exercising legal judgment to advise another person about the legal effect of a proposed action or decision;
>
> **(2)** Exercising legal judgment to advise another person about legal remedies or possible courses of legal action available to that person;
>
> **(3)** Exercising legal judgment to select a legal document for another person or to prepare a legal document for another person, other than solely as a typist or scrivener;

> **(4)** Exercising legal judgment to represent or advocate for another person in a negotiation, settlement conference, mediation, or alternative dispute resolution proceeding; legal judgment in preparing legal documents for another person; and
>
> **(5)** Exercising legal judgment to represent or advocate for another person in a hearing, trial, or other legal proceeding before a tribunal;
>
> **(6)** Advertising or holding oneself out, either directly or impliedly, as an attorney, a lawyer, "Esquire," a legal consultant, or a legal advocate, or in any other manner that conveys capability or authorization to provide unsupervised services involving the exercise of legal judgment;
>
> **(7)** Owning or controlling a for-profit entity that is not authorized under C.R.C.P. 265 and that provides services involving the exercise of legal judgment;
>
> **(8)** Soliciting any fees for services involving the exercise of legal judgment;
>
> **(9)** Owning or controlling a website, application, software, bot, or other technology that interactively offers or provides services involving the exercise of legal judgment; and
>
> **(10)** Performing any other activity that constitutes the practice of law as set forth in subsection (b) above.

61. Mr. Gebhardt was doing none of these things. Here is what he did do, as part of his job.

62. Making decisions and judgments is one of the responsibilities of the "Campaign and Political Finance Enforcement Manager" for the Colorado Secretary of State's office. Lawyers do not have a lock on interpreting statutes and rules. Agency employees must and do interpret the law with which they are entrusted by the people and by the legislature. Agencies' employees do this day in and day out. Department of Revenue employees make decisions about whether taxes are owed; Department of Labor (DOLE) employees determine whether a worker's injuries occurred on the job; Liquor Enforcement Division employees determine whether an applicant qualifies for a liquor license; DOLE employees determine whether a person has been discriminated against in hiring; state university officials determine whether a college applicant qualifies for in-state tuition; Colorado Public Department of Public Health & Environment employees decide whether to

issue discharge permits; local police decide whether to arrest a suspect. The list is long, and it is the way government is designed to function, with skilled agency employees interpreting the law to facts presented to them in the course of their work.

63. Agencies act through skilled workers, trained and experienced in the matters entrusted to them by statutes, regulations and rules. Agency department heads—like the Secretary of State in enforcing campaign finance laws—are ultimately responsible for the actions of the Department. But the Secretary of State acts with and through agency employees in order to accomplish the "strong enforcement of campaign finance requirements" that is the very purpose of Colo. Const. art. xxviii and the FCPA. Elections Division personnel take deliberate steps to process campaign finance complaints—steps that are laid out in the FCPA and that were the subject of Mr. Gebhardt's testimony. Mr. Gebhardt is not operating on his own. As he explained in his testimony, he was following the process, criteria and requirements in the statute and applying the law to the facts that became apparent during the investigation. His job requires him to exercise judgment and making decisions in order to implement the work entrusted to the Division by Colo. Const. art. xxviii and the FCPA. He exercises legal judgment, but not "for another" as emphasized by the description of what lawyers cannot do in Rule 232.2(c). His exercise of legal judgment is not for another; it is rather legal judgement for the very department of which he is an integral part. Importantly, he is not representing the Division "in a hearing, trial, or other legal proceeding before a tribunal." When the court proceeding is commenced by filing an administrative complaint in this court, as in this case, a lawyer from the Colorado Attorney General's office represents the Secretary and the Division.

64. Respondent's counsel argued that any legal proceedings initiated by someone not licensed to practice law should be dismissed, citing *Unauthorized Practice of Law Committee of Supreme Court v. Grimes***,** 654 P.2d 822 (Colo. 1982), *Estate of Nagel* 950 P.2d 693 (Colo.App.1997) and *People v. Dunson* 316 Ill.App.3rd 760, 764, 737 N.E.2d 699 (2000).

65. In *Grimes*, the Supreme Court held that accepting fees and preparing legal motions, notices, and other memoranda for various individuals who were involved in court proceedings constituted the unauthorized practice of law. In *Estate of Nagel*, the court held that an unlicensed person could not file a petition in a district court case on behalf of a corporation seeking to have a claim recognized in probate. In *Dunson*, a new trial was ordered for a criminal defendant convicted at the hands of a prosecutor who was not licensed in Illinois. "[H]e thereby deceived the court." 737 NE2d at 702. These cases have no precedential value and no relevance to what occurred here.

66. There was no unauthorized practice of law. Respondent's request during the hearing that the administrative complaint be dismissed because of the unauthorized practice of law is DENIED.

3. Judicial notice

67. At 1:09:43 and again during closing argument at 1:40:00, Respondent's counsel asked the court to take judicial notice of "of the fact that…there have been more than one settlement agreement [sic] entered into by the division signed off by Mr. Gebhart and his other non attorneys in that office." 1:09:42 I declined to take judicial notice of that, though Mr. Gebhardt had testified that he does sign settlement agreements that are not

final until the Deputy Secretary adds his signature. Gebhardt, ¶ 30. As stated to counsel, Respondent could have introduced other settlement agreements as exhibits if they are otherwise relevant and authenticated, 1:10:14 but Respondent identified no exhibits of its own, electing not even to file a prehearing statement as required by the Amended Scheduling Order.

68. Judicial notice is always approached cautiously, in keeping with its purpose to bypass the usual fact-finding process only when the facts are of such common knowledge that they cannot reasonably be disputed. *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983). Facts subject to the judicial notice rule are those "not subject to reasonable dispute" and must be either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." C.R.E. 201(b). Id. at 853. This includes taking judicial notice of the contents of court records in a related proceeding. *People v. Sa'ra*, 117 P.3d 51 (Colo. App. 2004). Respondent's request to take judicial notice of facts neither stated nor defined and whose location or citation (i.e., where it could be found) was not disclosed. The request was clearly unsupported and improper.

69. Again during closing at 1:40:00, counsel asked the court to take judicial notice of "multiple cases where a committee has come in well after election, some cases, years after—you remember the alliance case...." It was not clear at all what counsel sought to introduce through "judicial notice," but the time for introducing evidence had passed. Respondent concluded its case and "rested" at 1:15:41.

VII. FINES FOR VIOLATIONS IN COUNTS 1 AND 2

70. **CPF Rule 23.3.3.** The fines for violations of the FCPA are drawn from Campaign & Political Finance [CPF] Rule 23.3.3, 8 Code Colo. Regs. 1505-6. CPF Rule 23.3.3(d) applies to disclaimer and electioneering communications.

> (d) If noncompliant communication is not mitigated prior to the election: a fine of at least 10 percent of the cost of the communication including cost to broadcast.

71. **Fine for the disclaimer violation.** There was no mitigation of the failure to disclose who paid for the yard signs prior to the election. No attempt of any kind was made, such as applying printed corrective stickers at the bottom of the signs to state who paid for them. Counsel argued—but provided no evidence—that to do this they would have had to trespass on private property against the wishes of people demonstrating their support for Mr. Arvidson by displaying one of his yard signs. The suggestion is based on no evidence, is counter-intuitive, and based on neither reason nor common sense.

72. For the violation of § 1-45-108.3(3), I impose a fine of $64.75—exactly the minimum fine that is authorized in Rule 23.3.3(d).

73. **Fine for the reporting violations.** The fine for reporting violations is set forth in Rule 23.3.3(b)(1).

> (1) Failure to file complete and accurate reports is a $100 fine per report plus 5 percent of the activity not accurately or completely reported.

74. The authorized fine in Rule 23.3.3(b)(1) for Respondent's misrepresentations in the June 3 report, repeated in the four reports thereafter and not completely accurately reported until the August 12 report, is $100 for each inaccurate report plus 5% of the amounts that were inaccurately reported. The inaccurate reports are listed in the chart below. The fine authorized for each of the inaccurate reports is in the column on the right.

Report date	Signs not reported	Mailers not reported	Totals not reported	5%	per Report	Authorized fine
6/3/24	$647.50	$3,370.85	$4,018.35	$200.92	$100.00	$300.92
6/17/24	$647.50	$3,370.85	$4,018.35	$200.92	$100.00	$300.92
7/1/24	$647.50	$3,370.85	$4,018.35	$200.92	$100.00	$300.92
7/27/24		$3,370.85	$3,370.85	$168.54	$100.00	$268.54
8/1/24		$3,370.85	$3,370.85	$168.54	$100.00	$268.54
					Total authorized fine:	$1,439.84

75. While a fine of $1,439.84 is authorized by Rule 23.3.3(b)(1), Division counsel offered two points in mitigation.

a. Respondent attempted to cure the reporting violations—though not until after the June 25 primary election. 1:25:32

b. The yard signs were reported on June 3 as an expenditure for "yard signs;" they were just incorrectly misrepresented as NOT electioneering communications. 1:25:58

76. Consistent with Prayer for Relief in the Complaint, the Division counsel seeks a fine of $200 for Count 2 (failure to report). For the violation of Colo. Const. art. xxviii, §6, I impose a fine of $200.00—the amount requested in the Prayer for Relief.

77. Accordingly, I hereby enter judgment against Respondent Committee Arvidson for Senate in the amount of $264.75.

SO ORDERED this 7th day of January 2025.

Macon Cowles, Hearing Officer

Copy attached: October 22, 2024 stay order in *No on EE, Supreme Court Case No.* 2024SC540.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED October 22, 2024 CASE NUMBER: 2024SC540
Certiorari to the Court of Appeals, 2022CA2245 District Court, Denver County, 2021CV33166	
Petitioners: Christopher Beall in his official capacity as Colorado Deputy Secretary of State and Jena Griswold in her official capacity as Colorado Secretary of State, **v.** **Respondent:** No on EE A Bad Deal for Colorado, Issue Committee.	Supreme Court Case No: 2024SC540
ORDER OF COURT	

Upon consideration of the "Petitioners' Motion to Stay" filed in the above cause, having received no response, and now being sufficiently advised in the premises,

IT IS ORDERED that said Motion shall be, and the same hereby is, GRANTED.

BY THE COURT, OCTOBER 22, 2024.