

<p>COURT OF APPEALS, STATE OF COLORADO 2 East 14th Ave. Denver, Colorado 80203</p>	
<p>Appeal from Secretary of State Agency Decision Honorable Judge Robert N. Spencer Office of Administrative Courts Case No. OS 2008-0028</p> <p>Appellant-Cross-Appellee: COLORADO ETHICS WATCH</p> <p>v.</p> <p>Appellee-Cross-Appellant: SENATE MAJORITY FUND, LLC and</p> <p>Appellees: COLORADO LEADERSHIP FUND, LLC and OFFICE OF ADMINISTRATIVE COURTS</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">ANSWER-REPLY BRIEF AND REQUEST FOR SANCTIONS AGAINST CROSS-APPELLANT</p>	

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p. __), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

By: S/Luis Toro
Luis Toro, #22093

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Appellant-Cross-Appellee Colorado Ethics Watch (“Ethics Watch”), by its undersigned attorneys, respectfully submits its answer-reply brief and request for sanctions:

I. REPLY TO APPELLEES’ ANSWER BRIEFS

A. When Amendment 27 Was Passed “Expressly Advocating” Was Defined Using A Functional Test.

The centerpiece of both Senate Majority Fund’s (“SMF”) and Colorado Leadership Fund’s (“CLF”) answer briefs is that Amendment 27 was intended to lock into the constitution a narrow interpretation of the term “expenditure” found in case law interpreting an outdated version of the Fair Campaign Practices Act (“FCPA”). There are several fatal problems with this argument.

First, the statutory construction principle that voters and legislators are presumed to know existing law cannot bear the weight Appellees place on it. Neither SMF nor CLF can cite a single case applying this principle to freeze into the Colorado Constitution case law that is later overruled, shown to be based on faulty premises or that interprets different statutory language. Indeed, this Court has already looked to *McConnell v. FEC*, 540 U.S. 93 (2003) in a case interpreting the term “electioneering communication” in Amendment 27, even though that case was decided *after* Amendment 27

was passed. *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 966 (Colo. App. 2006).

More importantly, “existing law” at the time Amendment 27 was passed included the Federal Election Commission’s (“FEC”) definition of “expressly advocating,” which included any ad that could be reasonably interpreted only as an appeal to vote for or against a candidate, regardless of the presence or absence of so-called “magic words.” 11 C.F.R. § 100.22. While Appellees attempt to minimize the significance of the FEC’s rule, the truth is that at the time Amendment 27 was passed it was already established that the FEC, as the agency charged with enforcing federal campaign finance law, was entitled to judicial deference when it interpreted ambiguous statutory terms. *Republican Nat’l Committee v. FEC*, 76 F.3d 400, 404-05 (D.C. Cir. 1996). In truth, Appellees are asking the Court to presume that Colorado voters agreed with Appellees’ contested interpretation of the state of the law in 2002, and intended to reject the FEC’s definition of “expressly advocating,” even though they incorporated the words “expressly advocating” into Amendment 27’s definition of expenditure. Colo. Const. art. XXVIII, § 2(8). Their argument bears no resemblance to any recognized application of the rule that voters are presumed to know existing law when they adopt constitutional amendments.

Properly applied, that principle actually requires reversal of the ALJ's ruling. Amendment 27 replaced the old FCPA's definition of "expenditure" with a new definition that used the phrase "expressly advocating," a phrase that had been specifically defined by the FEC in 1996 using a functional test. Subsequent cases establish that the FEC's definition does not offend the First Amendment or raise due process concerns.

Appellees nevertheless argue that in 2002 it was settled that the FEC's definition of "expressly advocated" was unconstitutionally overbroad. To the contrary, the Fourth Circuit decision relied upon by Appellees reversed the district court's entry of a nationwide injunction, specifically to "allow the FEC, if it chooses, to press its position in those circuits that have not yet ruled on the constitutionality of 11 C.F.R. § 100.22(b)." *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 394 (4th Cir. 2001). Far from settling the issue, *Va. Soc'y for Human Life* expressly contemplated further development of the law on this point.

Ethics Watch explained in its Opening Brief (at pp. 13-14) that the result in *Va. Soc'y for Human Life*, like *League of Women Voters v. Davidson*, 23 P.3d 1266 (Colo. App. 2001), was based on the false premise that the "magic words" test was constitutionally required. Just last month the Fourth Circuit rejected a fresh constitutional challenge to the FEC's

definition of “expressly advocating,” and in so holding adopted a rationale that matches Ethics Watch’s argument in this case. *The Real Truth About Obama, Inc. v. FEC*, ___ F.3d ___, 2009 U.S. App. LEXIS 17437 (Aug. 5, 2009). The plaintiff in *The Real Truth About Obama* was, like appellees, a 527 that wished to avoid regulation as a Political Action Committee (“PAC”), the federal law analogue to a “political committee” under Colorado law. *See id.* at *4. It sought an injunction barring the FEC from, among other things, using the definition of “expressly advocating” contained in 11 CFR § 100.22(b) in connection with the plaintiff’s intended activity of running ads regarding then-candidate Barack Obama’s position on abortion, on the ground that the definition was overbroad and vague in violation of the First and Fifth Amendments. *Id.* The Fourth Circuit ruled that the plaintiff was not likely to prevail on the merits of its challenge to 11 C.F.R. § 100.22 because the FEC’s definition “corresponds to the definition of the functional equivalent of express advocacy given in *Wisconsin Right to Life*.” *Id.* at *16 (citing *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469-70, 127 S. Ct. 2652, 2667 (2007)). In so holding, the Fourth Circuit not only agreed with Ethics Watch’s reading of *Wisconsin Right to Life*, it also implicitly recognized that its prior ruling in *Va Soc’y for Human Life* is no longer controlling authority.

Thus, the Fourth Circuit authority relied upon by Appellees as proof of the supposedly settled state of the law regarding the definition of “expressly advocate” actually modified the district court ruling in order to allow the FEC to continue litigating the constitutionality of its definition. Now, the Fourth Circuit itself has abandoned the reasoning of *Va. Soc’y for Human Life* and applies Ethics Watch’s view that the FEC’s definition of “expressly advocating” basically tracks what *Wisconsin Right to Life* described as the “functional equivalent of express advocacy.”

SMF and CLF spend many pages of their briefs attacking the Ninth Circuit’s decision in *FEC v. Furgatch*, 807 F.2d 864 (9th Cir. 1987), a case not cited in Ethics Watch’s opening brief. Appellees are threatened by *Furgatch* because the Ninth Circuit’s decision in that case is just more proof that the definition of express advocacy was not settled in 2002. Appellees’ claim that 11 C.F.R. § 100.22 was some sort of improper attempt to codify *Furgatch* is simply wrong. The Federal Register notice of rulemaking that SMF cites in support of its argument that 11 C.F.R. § 100.22 “stems directly” from *Furgatch* shows that *Furgatch* was only one of many authorities considered by the agency. In its discussion of comments on its proposed rule, the FEC said the following:

[T]o alleviate the commenters’ concerns, the definition of express advocacy in new section 100.22(b) has been revised to

incorporate more of the *Furgatch* interpretation by emphasizing that the electoral portion of the communication must be unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages election or defeat of candidates or some other type of non-election action.

60 Fed. Reg. 35292, 35295 (July 6, 1995). The FEC went on to state that “final rules in section 100.22 retain the requirement that the communication be read ‘as a whole and with limited reference to external events’ because *MCFL* makes clear that isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy.” *Id.* (citing *F.E.C. v. Massachusetts Citizens for Life*, 479 U.S. 238, 249-50 (1986)). Thus, the FEC’s rule was based on a reading of *Furgatch* tempered by *Massachusetts Citizens for Life*. Notably, the FEC embraced the same reading of *Massachusetts Citizens for Life* that Appellees try to portray as an aberration invented by Ethics Watch.

In *Wisconsin Right to Life*, the Supreme Court cautioned that in determining whether an ad functions to expressly advocate for a candidate, “(1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech.” *FEC v.*

Wisconsin Right to Life, Inc., 551 U.S. 449, 474 n.7, 129 S. Ct. 2652, 2669 n.7 (2007). This, and not some free-ranging inquiry into context, is exactly what Ethics Watch advocates in this case. As the Fourth Circuit held, “[b]y limiting its application to communications that yield no other interpretation but express advocacy as described by *Wisconsin Right to Life*, § 100.22(b) is likely constitutional.” *The Real Truth About Obama, Inc.*, ___ F.3d ___, 2009 U.S. App. LEXIS 17437 at *17.

In summary, in 2002 the term “expressly advocating” had been defined by the federal agency charged with enforcing campaign finance laws as applying to all advertisements that, read as a whole, could reasonably be read only as encouraging a vote for or against a candidate. The voters, who are presumed to know existing law, chose to replace the definition of “expenditure” that was construed in *League of Women Voters* with one that used the term “expressly advocating” that had a specific definition established by the FEC.

B. Amendment 27 Was Intended To Change The Definition Of Expenditure.

Appellees also argue that because the language of Amendment 27’s definition of “expenditure” is different from the definition in the previous version of the FCPA that was interpreted in *League of Women Voters*, 23 P.3d 1266, the voters intended to adopt the narrowing construction of the old

FCPA definition. As a matter of statutory construction, this is exactly backwards. A well-established corollary of the principle that voters and legislators are presumed to know existing law is that “[w]hen the legislature reenacts or amends a statute and **does not change** a section previously interpreted by settled judicial construction, it is presumed that it agrees with judicial construction of the statute.” *People v. Cross*, 127 P.3d 71, 76 (Colo. 2006) (emphasis added); *citing People v. Swain*, 959 P.2d 426, 431 (Colo. 1998). Thus, if the voters intended to adopt *League of Women Voters*’ narrowed construction of the term “expenditure,” the way to accomplish that would have been to import the old FCPA’s definition into Amendment 27 unchanged.

Instead of merely copying the judicially construed language of the old FCPA, which would have indicated agreement with the preexisting judicial construction, the authors of Amendment 27 looked to the FEC for the phrase “expressly advocating,” which had been specifically defined as including ads that unmistakably advocated for the election of a candidate regardless of whether they used so-called “magic words.” *Compare* Colo. Const. art. XXVIII, § 2(8) *with* 11 C.F.R. § 100.22. The principle that voters are presumed aware of existing law thus requires the conclusion that Amendment 27 was intended to replace the interpretation of the FCPA’s

definition of “expenditure” as construed in *League of Women Voters* and import into the new definition the FEC-defined phrase “expressly advocating.” There is no reason for the Court to depart from the general rule that “[i]n the absence of any clear indication to the contrary, statutory enactments are presumed to be intended to change the law.” *Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 188 (Colo. 2009).

C. There Is No “Constitutional Rule” Limiting Application Of The Functional Test To The Federal Electioneering Communication Time Frame.

CLF makes much of the fact that the Chief Justice’s opinion in *Wisconsin Right to Life* reminded readers to “keep in mind this test is only triggered if the speech meets the brightline requirements of BCRA § 203 in the first place.” 551 U.S. at 474 n.7, 129 S. Ct. at 2669 n.7. CLF attempts to elevate this statement into a “constitutional rule” barring regulation of advertisements as express advocacy unless they fall within the time period during which an ad can be regulated as an electioneering communication under federal law. To the contrary, the Chief Justice’s comment merely recognizes that the issue in *Wisconsin Right to Life* was a challenge to Section 203 of the Bipartisan Campaign Reform Act (“BCRA”), and therefore, the issue whether an ad could be regulated under that provision would not arise unless the ad fell within the terms of Section 203. *See id.*

CLF also relies on dicta from *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), but when it was directly confronted with the question in 2009, the same Fourth Circuit found the FEC’s “expressly advocating” regulation to be likely constitutional under *Wisconsin Right to Life*, without any suggestion that the definition could only be applied during the BCRA electioneering communications time frame. *The Real Truth About Obama, Inc.*, ___ F.3d ___, 2009 U.S. App. LEXIS 17437 at *17.

Appellees’ assertion that courts uniformly agree that the functional test cannot be applied outside of the BCRA electioneering communications window is wrong. One year after *Wisconsin Right to Life*, the District of Columbia Circuit rejected a proposed FEC regulation on “coordinated communications” because that regulation would have applied the “magic words” test to ads run more than 90 days before a congressional election or 120 days before a presidential election. *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The D.C. Circuit held that because *McConnell* had pronounced the “magic words” test to be “functionally meaningless,” and because ads coordinated with candidates “are often intended to influence federal elections” even outside of the 90 and 120 day windows and regardless of whether “magic words” were used, the FEC’s proposed use of the “magic words” standard had to be rejected. *Id.* at 926 (citing *McConnell*, 540 U.S.

at 19). Far from forbidding the use of the functional test outside of the electioneering communication window, *Shays* effectively mandated it.

Shays underscores the obvious point that nothing in *McConnell* or *Wisconsin Right to Life* suggests that the Constitution bars regulation of candidate-related ads that run outside of the BCRA electioneering communications period unless those ads use “magic words.”

D. The Language, Purpose and Structure Of Amendment 27 Require Use Of The Functional Test.

Appellees focus their arguments on the principle that voters are presumed to know existing law when they amend the Constitution, and for the reasons explained above, that principle supports Ethics Watch’s position in this case. It must be noted, however, that this principle is not the starting point of statutory interpretation. Rather, it is a species of legislative history, to be used alongside other indicators of legislative intent such as “the object that the legislature sought to obtain by its enactment, the circumstances under which it was adopted, and the consequences of a particular construction.” *State Engineer v. Castle Meadows, Inc.*, 856 P.2d 496, 504 (Colo. 1993); *see also Pulsifer v. Pueblo Professional Contractors, Inc.*, 161 P.3d 656, 658, 662 (Colo. 2007) Moreover, courts “presume that legislation is intended to have just and reasonable effects, we must construe statutes accordingly and apply them so as to ensure such results.” *Castle Meadows*,

856 P.2d at 504. This Court applies the rule that a statute must be interpreted so as to fulfill its purposes to cases involving the interpretation of Amendment 27. *Colo. Citizens for Ethics in Gov't v. Comm. for the American Dream*, 187 P.3d 1207, 1216 (Colo. App. 2008). Indeed, the Court recently rejected a strict interpretation of Amendment 27's statute of limitations when such an interpretation would "significantly undermine the contribution limits stated in the state Constitution." *Lambert v. Ritter Inaugural Committee, Inc.*, ___ P.3d ___, 2009 Colo. App. LEXIS 1568, slip op. at p. 16 (Colo. App., Sept. 3, 2009).

Appellees make little effort to dispute Ethics Watch's contention that acceptance of their interpretation of the word "expenditure" would permit corporations, labor unions and wealthy individuals to contribute unlimited sums of money to 527s for the purpose of affecting election results, so long as the purchased ads avoid using magic words. Indeed, they argue that the Constitution requires no less. Nevertheless, SMF and CLF do make some effort to muddy the waters by arguing that Amendment 27's regulatory scheme recognizes a third category of speech, electioneering communications, and the fact that electioneering communications may continue to be regulated means that their interpretation of "expenditure" is somehow not contrary to the purposes of Amendment 27.

Appellees’ argument regarding electioneering communications is a *non sequitur* response to Ethics Watch’s argument that Amendment 27’s statement of intent (Colo. Const. art. XXVIII, § 1) shows the electorate’s intent to treat all political ads as falling into one of two categories – “issue speech” and “express electoral advocacy.” The term “electioneering communication” has already been judicially interpreted as applying only to communications that have the effect of advocating for the election or defeat of a candidate, in other words, as a subset of express electoral advocacy. *Harwood*, 141 P.3d at 965. In *Harwood*, this Court looked to the definition of “expenditure” to assist in its interpretation of the term “electioneering communication,” and interpreted the two terms to be harmonious with each other. *Id.* In response to *Harwood*, the secretary of state promulgated a rule that defined electioneering communication” using the criteria set forth in footnote 7 of *Wisconsin Right to Life*. Campaign and Political Finance Rule 9.4, 8 C.C.R. § 1505-6. Thus “electioneering communications” are a subset of ads run for the purpose of expressly advocating the election or defeat of a candidate, not a third category.¹

¹ An alternative view is that by defining “electioneering communications” as including all ads that “[u]nambiguously refers to any candidate,” voters intended to reach issue advertisements during the window that mentioned candidates. Colo. Const. Art. XXVIII, § 2. *Harwood*, of course, reached a different conclusion.

The voters who enacted Amendment 27 expressly found “that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process.” Colo. Const. art. XXVIII, § 1, *cited in Harwood*, 141 P.3d at 965. This finding, unlike some others in Section 1, makes no specific reference to electioneering communications. Nothing in Amendment 27 or the Bluebook² limits the concerns about the potentially corrupting effects of large contributions to only contributions used to pay for ads during the electioneering communications window.

To apply a “functionally meaningless” test to determine whether an ad counts as an expenditure for purposes of Amendment 27’s political committee registration and independent expenditure reporting requirements would defeat the purpose of those requirements just as surely the use of that test would have defeated the purpose of BCRA’s prohibition of coordinated expenditures. *See Shays*, 528 F.3d at 926. The Court should reject the use

² SMF argues that the Bluebook’s reference to ads that “specifically urge” the election or defeat of a candidate should be interpreted as adopting the “magic words” test. To the contrary, that result easily could have been accomplished by saying that the amendment would apply to ads that used words such as “vote for” or “reject.” Of course, under the test advocated by Ethics Watch, an ad would not be subject to regulation unless it could only be reasonably interpreted as an exhortation to vote for or against a candidate, in other words, specifically urging a vote.

of the “magic words” test because, like the interpretation of the statute of limitations at issue in *Lambert*, it “would significantly undermine the contribution limits stated in the state constitution.” *Lambert*, ___ P.3d at ___, slip op. at p. 16. The fact that electioneering communications are subject to additional regulation does not justify adopting an interpretation of the term “expenditure” that would effectively repeal Amendment 27’s contribution limits for ads outside of the electioneering communications window. *See id.*

E. The Challenged Ads Can Be Reasonably Interpreted Only As A Call To Vote For The Named Candidates.

Perhaps the most illuminating discussion in either of Appellee’s briefs may be found at pp. 38-39 of CLF’s brief. CLF argues that even the use of the phrase “vote for” -- which is specifically listed as one of the “magic” phrases in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) -- might not constitute express advocacy depending on the context in which the phrase appears. Ethics Watch agrees and submits that CLF’s argument demonstrates why the Supreme Court held that “*Buckley*’s magic-words requirement is functionally meaningless.” *McConnell*, 540 U.S. at 193; *see also Shays*, 528 F.3d at 924 (FEC acted unreasonably in applying “functionally meaningless” test to determine whether coordinated ads

outside of electioneering communications period expressly advocated for or against candidates).

CLF cannot have it both ways. Either the “magic words” test is a bright line test where words such as “vote for” connote express advocacy, or it is not and a court must look at the entirety of an ad to determine whether it communicates a message advocating for or against the election of a candidate. Despite their repeated protestations that the “magic words” test is clear, easily understood, a bright line test, and the like, neither SMF nor CLF is able to articulate a principle that would enable the Court to distinguish between words that are similar to “vote for” or “reject” and words that are not similar. To the contrary, by arguing that “vote for” or “endorse” may or may not be “magic words,” depending on context, CLF has effectively abandoned Appellees’ position that the “magic words” test is a constitutionally required bright line rule and that all other possible tests are “context-based” and impermissibly vague or overbroad.

At the moment of truth, CLF could not explain why “endorse,” a word that indicates support for a candidacy, should not be considered one of the “magic words” described in *Buckley*’s footnote 52, without embracing the same type of context-based approach Appellees criticize Ethics Watch for advocating. CLF went so far as to say that “endorse” could sometimes be

used to expressly advocate and sometimes not, and asked the Court to read all of the language of the ad to determine whether or not, read as a whole, it advocates for Dave Kerber's election. CLF's Brief at pp. 38-39. Nothing could speak more powerfully to the strength of Ethics Watch's position that the Court should read or watch the entirety of an ad to determine its message, and not focus on the presence or absence of so-called "magic words."

Unfortunately for CLF, under any standard it is undisputable that the Dave Kerber endorsement expressly advocates for his election. One side of the ad says "Local leaders endorse Dave Kerber," with the word "endorse" not only underlined but in a larger font than the rest of the ad. In case there is any confusion regarding what Dave Kerber is being endorsed for, the answer is on the other side of the mailer, which reads in large letters "Dave Kerber is running for State House." (R:43.) The remainder of the mailer consists of a large print statement that Kerber is "one of us, working for us," favorable biographical information about the candidate, and this conclusion: "As our next State Representative, he will lower gas prices and get our economy back on track. Dave Kerber will fight to make Colorado a great place to live, work and raise a family." (R:44, emphasis in original.) Unlike the ads regarding the use of the filibuster to block judicial appointees that

were at issue in *Wisconsin Right to Life*, there is no plausible interpretation of the Dave Kerber ad as conveying information and educating the public about some issue. 551 U.S. at 470. Rather, it bears all of the indicia of express advocacy: it mentions an election, Kerber’s candidacy, and touts his qualifications for that office – going so far as to say what Kerber “will” do in office -- along with the fact that “local leaders” are endorsing him. *See id.*; see also *McConnell*, 540 U.S. at 194 n.77 (discussing ad run against Montana congressional candidate Bill Yellowtail that could not credibly be interpreted as issue speech).

Appellees’ argument that none of their ads can be considered “express advocacy” because they studiously avoid using any verbs that might be considered a call to action is untenable. The original list of “magic words” found in *Buckley*, 424 U.S. at 44 n.52, includes as an example of “express words of advocacy of election or defeat” the words “Smith for Congress.” Under Appellees’ analysis, the phrase “Smith for Congress” should be interpreted as issue speech that merely educates the public about the fact that Smith is a candidate for Congress. However, even under the most restrictive possible interpretation of *Buckley*, an ad can expressly advocate for a candidate without using any verbs. Indeed, the fact that the ads favorably discuss candidates for office and identify the office for which they are

running is sufficient to make the ads “express advocacy” even under Appellees’ test. “Smith for Congress” is nothing more than a shorthand variation of statements such as “Lauri Clapp is running for State Senate” that are featured in Appellees’ ads. (R:15.)

In all of SMF’s and CLF’s ads attached to the complaint, the only “issue” being discussed is the qualifications of identified candidates for office and what those candidates “will” do if elected. Such advertising is not issue speech; rather it is plainly express electoral advocacy. *See Wisconsin Right to Life*, 551 U.S. at 469-470, 127 S. Ct. at 2667. This Court should conclude that all of the challenged ads were made “for the purpose of expressly advocating” under the functional test.³ Therefore, CLF and SMF made “expenditures” that triggered the registration and reporting requirements cited in Ethics Watch’s complaint, which should be permitted to proceed to a hearing.

³ CLF’s argument at p. 7 of its brief that the Court should ignore the exhibits attached to Ethics Watch’s complaint if the Court rejects Ethics Watch’s interpretation of the definition of “expenditure” is wrong. A motion to dismiss should be denied if the pleader states a claim for relief under “any theory of law.” *Dotson v. Bernstein*, 207 P.3d 911, 912 (Colo. App. 2009). SMF and CLF cannot be heard to complain if the Court determines that the case can proceed even under a “magic words” interpretation of the term “expressly advocating” in Amendment 27’s definition of “expenditure.”

II. ANSWER TO CROSS-APPEAL

A. ISSUES PRESENTED FOR REVIEW

1. Is the definition of “expenditure” in Colo. Const. art. XXVIII § 2(8)(a) so well-established that Ethics Watch’s filing of a complaint based on a different interpretation of that term than that of Appellees deserves sanctions?
2. Was SMF’s cross-appeal frivolous as filed?

B. COURSE OF PROCEEDINGS

On December 11, 2008, after the ALJ entered his order granting Appellees’ motion to dismiss, SMF and CLF jointly filed a request for sanctions against Ethics Watch. (R:252-390). Appellees argued that Ethics Watch should be sanctioned for purportedly having an improper motive for filing the complaint and on the ground that Ethics Watch’s interpretation of the term “expenditure” was contrary to purportedly controlling law in the form of League of Women Voters. (R:252-65). Ethics Watch filed its response to the request on December 23, 2008. (R:391-452.) The next day, CLF filed an unopposed motion to withdraw from the request for attorneys’ fees. (R:453.) SMF refused to withdraw its request.

By order dated January 7, 2009, the ALJ denied SMF’s request. (R:468-73). On the issue of the purported frivolousness of Ethics Watch’s

complaint, the ALJ noted that (1) *League of Women Voters* did not interpret the phrase “expressly advocating,” which is used in Colo. Const. art. XXVIII, § 2(8)(a); *League of Women Voters* was not reviewed by the Colorado Supreme Court, and no Supreme Court authority addresses the issue; and (3) Ethics Watch’s argument regarding the effect of Supreme Court cases after *Buckley* was a good-faith attempt to modify or extend Colorado law. (R:470-71.) The Court also found that “SMF clearly views [Ethics Watch] as a political gadfly to be suppressed; this is not the proper forum for that effort.” (R:471.)

C. ARGUMENT

1. Standard of Review and Preservation of Issue.

SMF is wrong to state that the Court’s review of this issue is *de novo*. “Whether to award attorney fees under § 13-17-102 or as a sanction under C.R.C.P. 11 is a decision committed to the discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse of discretion.” *E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798, 805 (Colo. App. 2001). Ethics Watch does not contest that the issue has been preserved for appeal.

2. SMF’s cross-appeal is frivolous on its face.

SMF’s own efforts to explain away *Furgatch* and the FEC’s definition of “expressly advocating” in 11 C.F.R. § 100.22 prove that SMF itself

knows that there was no single, settled definition of express advocacy in 2002 or at any other point in history. Moreover, as the ALJ pointed out in his order, Colorado case law actually says that “[t]he law relating to campaign finance reform is in a state of flux as courts attempt to balance the desire of Congress and the states to enact legislation that will reduce the potential for corruption and the appearance of corruption in political campaigns, against contributors’ First and Fourteenth Amendments’ guarantees of freedom of speech and political association.” *Alliance for Colorado Families v. Gilbert*, 172 P.2d 964, 969 (Colo. App. 2007). The Court should reverse the ALJ’s order dismissing the complaint and remand the case for further proceedings, which would of course moot any request for fees against Ethics Watch. *See Lambert*, ___ P.3d ___, slip op. at 20.

D. REQUEST FOR ATTORNEYS’ FEES ON CROSS-APPEAL

SMF has continued to maintain that Ethics Watch’s argument regarding the interpretation of the term “expenditure” contradicts established law -- even though CLF withdrew from the motion at the ALJ level, even though Ethics Watch has marshaled decisive support for its position, and even though the ALJ correctly pointed out both that *League of Women Voters* does not control the result and that *Alliance for Colorado's Families*, 172 P.3d at 969, described Colorado campaign finance law as being “in a

state of flux.” (R:470.)⁴ The fact that SMF felt it had to devote five pages of its opening brief to an attack on *Furgatch* – a case not even cited in Ethics Watch’s opening brief – shows that SMF has at all times been keenly aware that it is simply not true that as of 2002 every court agreed on a narrow interpretation of the term “express advocacy.” Moreover, in its argument in favor of its cross-appeal, SMF simply ignored *Alliance for Colorado’s Families’* holding that campaign finance law is “in a state of flux.”

SMF’s cross-appeal is a textbook example of an appeal where “the judgment by the tribunal below was so plainly correct and the legal authority contrary to appellant’s position so clear that there is really no appealable issue.” *Castillo v. Koppes-Conway*, 148 P.3d 289, 292 (Colo. App. 2006). SMF made no attempt in its cross-appeal even to address the authority cited by the ALJ in support of his conclusions that *League of Women Voters* does not foreclose inquiry into Amendment 27’s definition of “expenditure” or that Colorado campaign finance law is in a “state of flux.” This means that SMF’s cross-appeal as filed is sanctionable as frivolous. *See id.* Ethics Watch was forced to spend time and effort responding to a cross-appeal that never should have been filed. The Court should award Ethics Watch its

⁴ *Alliance for Colorado’s Families* also established that a committee registered under one provision of law may subject itself to regulation as a different kind of committee depending on the substance of its ads, the fundamental premise of Ethics Watch’s complaint. *See id.* at 972-73.

attorneys fees and costs incurred in responding to the cross-appeal pursuant to C.A.R. 38(d) and C.R.S. § 13-17-102.

III. CONCLUSION

WHEREFORE, Appellant/Cross-Appellee Colorado Ethics Watch respectfully requests that the Court enter an order reversing the Agency Decision Dismissing Complaint and remanding this matter to the ALJ for further proceedings, affirming the ALJ's order denying SMF's motion for attorneys' fees, and ordering SMF to pay Ethics Watch the reasonable attorneys' fees and costs incurred by Ethics Watch in connection with SMF's frivolous cross-appeal.

DATED: September 10, 2009.

By: S/Luis Toro
Luis Toro, #22093
Chantell Taylor, #33059

Original Signature on File Pursuant to
C.A.R. 30

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2009 a true and correct copy of the foregoing ANSWER-REPLY BRIEF AND REQUEST FOR SANCTIONS AGAINST CROSS-APPELLANT was served via LexisNexis File and Serve as follows:

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C.A.R. 30