ARIZONA COURT OF APPEALS

DIVISION ONE

LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, v. CITIZENS CLEAN ELECTIONS COMMISSION, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 19-0773 Maricopa County Superior Court No. CV2018-004532 CV2018-006031 (Consolidated)

DEFENDANT/APPELLEE'S COMBINED ANSWERING BRIEF AND APPENDIX

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INTRODUCTION

Legacy Foundation Action Fund contested allegations against it during administrative proceedings before the Citizens Clean Elections Commission. The Commission decided against LFAF and issued a final administrative decision imposing a civil penalty. When the Commission issued its decision, LFAF had a right to appeal the Commission's decision to the courts. LFAF, however, failed to timely appeal, leading to a dismissal with prejudice that the Supreme Court affirmed. "No timely appeal having been taken, the decision of the [Commission] is conclusively presumed to be just, reasonable and lawful." *Gilbert v. Bd. of Med. Exam'rs of Ariz.*, 155 Ariz. 169, 176 (App. 1987). Despite this, LFAF brought another lawsuit (styled as a special action), raising all the same arguments it has previously raised before the Commission and in its dismissed appeal.

The superior court correctly dismissed LFAF's new collateral attack on the Commission's final administrative decision and entered judgment for the Commission (allowing it to enforce the civil penalty). None of the arguments raised in the Opening Brief compels a different result. A special action is not available as a collateral attack on a final administrative decision when a party did not take advantage of its right to appeal the decision. And

LFAF's claims are barred in any event because the final administrative decision is res judicata, meaning that LFAF is precluded from relitigating not only issues that actually were litigated but also those that could have been litigated below.

These principles, which enforce the finality of decisions, apply to all of LFAF's arguments, whether characterized as "jurisdictional" or not. Thus, although the bulk of the Opening Brief is devoted to arguing the merits of LFAF's issues with the Commission's decision, those issues are not properly before this Court.

Cases do end and, after 5-plus years, this one should too.

STATEMENT OF FACTS AND CASE*

This Court is familiar with the background of this matter from a previous appeal. *See* Case No. 1 CA-CV 15-0455, 2016 WL 6699308 (App. Nov. 15, 2016). That opinion was vacated, but its disposition affirmed in *Legacy Foundation Action Fund v. Citizens Clean Elections Commission*, 243 Ariz.

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* Selected record items cited are included in the Commission's Separate Appendix (CAPP) attached to the end of this brief, cited by page numbers (e.g., CAPP001), which also match the PDF page numbers and function as clickable links. Other record items are cited with "IR-" followed by the record number.

404 (2018) ("*Legacy I*"). Although much paper has been exchanged in this case, the background necessary to resolve this appeal is brief.

I. The Commission.

In 1998, Arizona voters approved the Citizens Clean Elections Act. *See* A.R.S. § 16-940. The Act created the Commission, which is charged with enforcing the Act. A.R.S. § 16-956(A)(7). Among other things, the Commission is authorized to enforce the Act through the imposition of penalties for a failure to comply with reporting and disclosure requirements for campaign-related spending and advertising. *See* A.R.S. § 16-942. The enforcement process can begin with a complaint submitted to the Commission, as it did here.

The Act and the Commission's rules set out a multi-step process for resolution of a complaint alleging violations of the Act. *See* Ariz. Admin. Code §§ R2-20-203 to -208 (Commission rules for processing complaints). The end-product of the process is a "final administrative decision" that is subject to judicial review as provided in the Judicial Review of Administrative Decisions Act. *See* A.R.S. § 16-957(B).

II. The Commission receives a complaint alleging that LFAF violated the Act and commences an enforcement proceeding that results in a final administrative decision.

In 2014, the Commission received a complaint alleging, among other things, that LFAF failed to comply with the Act's requirement that "any person who makes independent expenditures"—spending used to advocate the election or defeat of a candidate—shall file certain reports of those expenditures. CAPP101, IR-50 Ex. A at 3. The Commission therefore commenced an enforcement proceeding to consider the allegations.

After finding reason to believe that LFAF committed the violations alleged, the Commission issued a compliance order requiring LFAF to comply with the requirements of the Act within 14 days. CAPP104, IR-50 Ex. B. LFAF did not comply; at a public meeting, the Commission thus found probable cause to believe that LFAF violated the Act and issued an order on November 28, 2014 concluding that LFAF had violated the Act and assessing civil penalties "in accordance with § 16-942." CAPP119-20, 123, IR-50 Ex. C (11/20/2014 Tr. at 47:16-51:1, 62:22-64:6); CAPP129, IR-50 Ex. D at 3. That order provided that LFAF could "request an administrative hearing to contest [the] Order" within 30 days. *Id.*; *see also* Ariz. Admin. Code § R2-

20-224. LFAF did so, a hearing was conducted by an Administrative Law Judge, and the ALJ issued a recommended decision. IR-50 Exs. E-F.

Under the Commission's rules, the last step to create a final administrative decision—i.e., a decision that "terminates the proceeding before the [] agency," A.R.S. § 12-902(A)(1)—is for the Commission to review the ALJ's decision and "accept, reject, or modify the decision." Ariz. Admin. Code § R2-20-227. "If the Commission accepts, rejects, or modifies the decision, the Commission's decision will be certified as final." Ariz. Admin. Code § R2-20-227(B). The final step occurred on March 27, 2015, when the Commission accepted part and rejected part of the ALJ's decision, adopted the findings in its earlier November 2014 order and affirmed the assessment of civil penalties. CAPP132, IR-50 Ex. G.

LFAF participated throughout the administrative proceedings, actively contesting the merits of the complaint and the Commission's. decision. *See, e.g.*, CAPP113-18, IR-50 Ex. C (11/20/2014 Tr. at 24:18-45:12); CAPP143, IR-57 Ex. 1 (LFAF brief in administrative proceeding).

III. LFAF fails to timely appeal the Commission's final administrative decision, causing the courts to dismiss the appeal.

Following the issuance of the Commission's final administrative decision, LFAF had a right to appeal the decision to the superior court. A.R.S. § 16-957(B). LFAF, however, did not timely file its complaint for judicial review in the superior court and the courts therefore lacked jurisdiction to consider the appeal. Consequently, LFAF's untimely appeal was dismissed. *See Legacy I*, 243 Ariz. at 405, ¶ 4.

LFAF appealed the dismissal; this Court and the Arizona Supreme Court affirmed the dismissal. *Id.* at 408, ¶ 19. The Court held that "[f]ailure to appeal in a timely manner . . . deprives the appellate court (here the superior court) of jurisdiction." *Id.* ¶ 17.

The only issue on appeal was whether the courts lacked jurisdiction over LFAF's appeal—i.e., whether LFAF's failure to timely appeal deprived the courts of jurisdiction to consider LFAF's "challenges [to] the Commission's personal and subject-matter jurisdiction." *Id.* at 405, ¶ 1. The Court held that "the superior court lacked jurisdiction to consider any questions concerning the Commission's jurisdiction or any other substantive matter because the appeal was untimely." *Id.* at 408, ¶ 19. The Court's

opinion did not opine on other matters. It expressed "no view on whether Legacy may pursue alternative procedural means to challenge the Commission's penalty order as void." *Id.*

IV. The proceedings below.

A. Once the Commission's decision was final, the Commission brought an action to reduce the civil penalty to a judgment.

Following the issuance of the mandate in *Legacy I*, LFAF refused to comply with the Commission's final decision and refused to pay the civil penalty. CAPP141, IR-50 Ex. J; *see also* CAPP096, IR-50 at ¶¶ 15-17. Consequently, the Commission filed a lawsuit to obtain an enforceable judgment. *See* Compl. in Case CV2018-006031.

B. LFAF brings its own lawsuit to relitigate its claims against the Commission's final administrative decision.

Despite the dismissed appeal and resulting finality of the administrative decision, LFAF brought its own lawsuit, styled as a complaint for special action relief, seeking to relitigate the validity of the Commission's final administrative decision. IR-1 (4/24/2018 Compl.). The two cases were consolidated. IR-9.

LFAF argued that it remained able to challenge the administrative decision for various reasons, noting that the Supreme Court's opinion had

stated that it "express[es] no view on whether Legacy may pursue alternative procedural means to challenge the Commission's penalty order as void." *Legacy I*, 243 Ariz. at 408, ¶ 19. *See* IR-4 at 3-4.

LFAF asserted the same arguments in its special action complaint (IR-1) and supporting memorandum of law (IR-4) as it had asserted during the administrative proceeding:

Argument	LFAF Admin. Brief and in argument	LFAF Special Action Compl. and Mem.
Commission lacks jurisdiction to enforce independent expenditure reporting requirements	CAPP149-50, IR-57 Ex. 1 at 7-8; CAPP113, IR-50 Ex. C (11/20/2014 Tr. at 25)	CAPP064-65, IR-1 ¶¶ 35-44; CAPP084-87, IR-4 at 15-18
Commission incorrectly concluded the advertisement was "express advocacy"	CAPP154-60, IR-57 Ex. 1 at 12-18; CAPP114, IR-50 Ex. C (11/20/2014 Tr. at 27-28)	CAPP64, 65, IR-1 ¶¶ 33, 43; CAPP088-90, IR-4 at 19-21
Commission lacks authority to impose penalties against LFAF because LFAF is not a candidate or campaign committee	CAPP162-64, IR-57 Ex. 1 at 20-22; CAPP113-14, IR-50 Ex. C (11/20/2014 Tr. at 25-27)	CAPP081-84, IR-4 at 12-15

C. The superior court dismisses LFAF's complaint and enters summary judgment in favor of the Commission.

The parties each moved to dismiss the other's complaint. IR-22, IR-24. The superior court denied LFAF's motion to dismiss and granted the Commission's. CAPP053, IR-32. As to LFAF's complaint, the court reasoned that its "role in [LFAF's] collateral attack . . . is limited." CAPP054, IR-32 at 2. The court concluded LFAF's "failure to take advantage of its appellate rights does not open the special action process to it" and LFAF's failure to timely appeal meant that LFAF could not challenge the "facts and the Commission's conclusions from the facts." *Id*. The court concluded that the Commission's final administrative decision became "the final determination on the merits" and had preclusive effect. *Id*. And in denying LFAF's motion to dismiss, the court concluded that the Commission's enforcement lawsuit "is protected by the same issue preclusion that applies" to LFAF's special action. CAPP056, *id*. at 4.

The parties next cross-moved for summary judgment. IR-48, IR-52. The superior court denied LFAF's motion and granted the Commission's. CAPP057, IR-60. Not long after, the Court entered a final judgment in favor of the Commission and against LFAF as to both of the consolidated cases.

IR-67. The judgment awards the civil penalty amount of $95,460 and includes Rule 54(c) language. *Id*. LFAF's notice of appeal followed. IR-68.

STATEMENT OF THE ISSUES

1. When a party fails to "timely appeal" a final administrative decision, the decision is "conclusively presumed to be just, reasonable and lawful," and it may not be attacked "by means of a separate complaint." *Gilbert*, 155 Ariz. at 176. The Commission entered a final administrative decision in March 2015 and LFAF failed to timely appeal the decision, causing the appeal to be dismissed with prejudice. The superior court then dismissed LFAF's separate complaint attacking the final administrative decision. Did the superior court err?

2. Did the superior court err by granting the Commission summary judgment and entering a judgment on behalf of the Commission?

STANDARD OF REVIEW

On appeal from a superior court's denial of special action jurisdiction, a court "determine[s] whether the court abused its discretion." *Stapert v. Ariz. Bd. of Psychologist Exam'rs*, 210 Ariz. 177, 182, ¶ 22 (App. 2005). But the Court reviews all questions of law, including application of res judicata, de novo. *Pettit v. Pettit*, 218 Ariz. 529, 531, ¶ 4 (App. 2008). The court reviews

the grant of summary judgment to the Commission de novo. *See Alpha, LLC v. Dartt*, 232 Ariz. 303, 305, ¶ 10 (App. 2013).

LFAF contends that the standard of review here requires this Court to "independently examine the record below to determine whether the evidence supports the judgment." OB at 7 (quoting *Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 557, ¶ 7 (App. 2002)). That is not correct. *Webb* is discussing the "review of the superior court's ruling upholding" an administrative decision on appeal under the Judicial Review of Administrative Decisions Act. *Id.* Although LFAF continues to fight this fact, it remains the case that LFAF's appeal was dismissed and the administrative decision is now final. This case does not ask the Court to review an administrative decision under § 12-910, and the standards of review applicable under that statute do not apply.

ARGUMENT SUMMARY

The superior court's dismissal of LFAF's special action complaint should be affirmed. First, a special action is no substitute for an appeal when an adequate appeal is available, even if the party fails to take advantage of the right to appeal. Argument § I.A. Second, LFAF's claims also could not

survive a motion to dismiss because they are precluded by claim and issue preclusion. Argument § I.B.

Furthermore, the Court should affirm the superior court's grant of summary judgment and entry of judgment in favor of the Commission. Argument § II. Given the preclusive effect of the final administrative decision, there is no genuine dispute of material fact and the Commission is entitled to judgment so that it may enforce the civil penalty.

Finally, the merits arguments LFAF raises are not for this Court's consideration. And, in any event, LFAF is incorrect on the merits. Argument § III.

ARGUMENT

I. The superior court correctly dismissed LFAF's claims.

This Court should affirm the superior court's dismissal for multiple reasons.

A. The Court should affirm the dismissal of LFAF's complaint because a special action is not available as a substitute for an untimely appeal.

Special action jurisdiction is available only when there is no adequate remedy available by appeal. Ariz. R. P. Spec. Action 1(a). LFAF had the right to appeal all issues but failed to invoke that right. The failure to take

advantage of a right to appeal does not convert an adequate right to appeal into an inadequate one. *See Rosenberg v. Ariz. Bd. of Regents*, 118 Ariz. 489, 493 (1978) (where appellant "had an appeal under the Administrative Review Act, it cannot be said she did not have an adequate remedy at law" even though she failed to timely file an appeal).

Arizona law is clear that special action jurisdiction is not a substitute for an appeal. A "special action **shall not** be available where there is an equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Action 1(a) (emphasis added). When there is a remedy available by appeal, special action jurisdiction is not available. *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990). This rule reinforces the "strong Arizona policy against using extraordinary writs as a substitution for appeals." *Id.* at 76; *see also* Ariz. R. P. Spec. Action 1, St. B. Comm. Note (a) (noting that special action jurisdiction is limited "due to the strong policy in this state that the writs are subordinate to and are not a substitute for appeal").

There is no question that LFAF had an adequate remedy available by appeal under A.R.S. § 16-957(B), which provides that aggrieved parties may appeal a final Commission order pursuant to the Judicial Review of Administrative Decisions Act, A.R.S. §§ 12-901 to -914. *See also Legacy I*, 243

Ariz. at 405-06, ¶ 7 (describing right of appeal under § 16-957(B)). The right to appeal includes the ability to raise questions of law and fact to challenge the administrative decision. *See* A.R.S. § 12-910 (describing administrative record, supplemental record, and scope of review by superior court). Accordingly, because LFAF had a right to appeal the final administrative decision, special action jurisdiction "shall not" not be available to LFAF as a substitute.

The fact that LFAF failed to timely appeal the final administrative decision does not render the availability of the remedy inadequate or otherwise make special action jurisdiction available. *Neely*, 165 Ariz. at 77 (a special action petitioner cannot show a need for special action relief "when a petitioner fails to seek relief until after its remedy at law has been abandoned through inaction"); *see also Stapert*, 210 Ariz. at 182, ¶ 24 (holding party who failed to take advantage of "adequate remedy by appeal" was "not entitled to present" his arguments "through a special action").

Especially when a party to an administrative proceeding actually litigates at the administrative level yet does not appeal the final administrative decision, "it cannot be said" that the party "did not have an adequate remedy at law." *Rosenberg*, 118 Ariz. at 493; *see also Hurst v. Bisbee*

Unified Sch. Dist. No. Two, 125 Ariz. 72, 75 (App. 1979) (special action "does not lie to correct errors in an appealable judgment and cannot be used as a substitute for the ordinary channels of appeal"). *Cf. United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270-71 (2010) (ability to challenge a judgment as void under Rule 60 is "not a substitute for appeal," and even a claim based on "jurisdictional defect" could only apply in the "exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction") (internal quotation marks omitted).

Accordingly, LFAF's complaint for special action relief fails. LFAF had the opportunity to appeal the Commission's final administrative decision, its appeal was dismissed with prejudice, and now "the special action shall not be available," Ariz. R. P. Spec. Actions 1(a). The Court should affirm the dismissal of LFAF's claims for that reason.

B. The Court should affirm the dismissal of LFAF's complaint because claim and issue preclusion prohibit relitigation of LFAF's claims.

1. When a party fails to appeal a final administrative decision, the decision is conclusively presumed to be lawful and has preclusive effect.

The doctrine of res judicata, also called claim preclusion, bars a party from relitigating claims that have already been decided or could have been

decided in a previous dispute between the parties. Claim preclusion bars an entire claim. "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, 69, ¶ 14 (2006) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

This doctrine applies with as much force to final administrative decisions as to final judgments entered in superior court. A "[f]ailure to appeal a final administrative decision makes that decision final and res judicata." *Gilbert*, 155 Ariz. at 174; *see also Olson v. Morris*, 188 F.3d 1083, 1086 (9th Cir. 1999) (applying Arizona law and holding same). Accordingly, when a party fails to timely appeal an administrative order, Arizona courts "conclusively" presume that the order is "just, reasonable and lawful." *Gilbert*, 155 Ariz. at 176 (quoting *Hurst*, 125 Ariz. at 75).

Claim preclusion bars not only issues that actually were litigated but also those that could have been litigated. Claim preclusion "binds the same party standing in the same capacity in subsequent litigation on the same cause of action, not only upon facts actually litigated but also upon those points which might have been litigated." *Id.* at 174. *See also* Restatement

(Second) of Judgments § 18(2) (1982) ("[T]he defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.").

In addition to claim preclusion, res judicata can also embrace "the related concept of issue preclusion," although it is traditionally "synonymous with claim preclusion." *Pettit*, 218 Ariz. at 530 n.2 (citing Restatement (Second) of Judgment, introductory note to ch. 3 (1982)). Where claim preclusion applies to all issues related to a claim—those that were litigated and those that could have been litigated—issue preclusion "applies only to issues that were actually litigated," *id.* at 533, ¶ 10, and the determination of the issue "is essential" to a "valid and final judgment." *In re Gen. Adjudication*, 212 Ariz. at 69, ¶ 14 n.8 (citation omitted).

2. The Commission's final administrative decision is conclusively presumed to be lawful and precludes LFAF's claims to relitigate its validity.

Under either claim preclusion or the narrower issue preclusion, LFAF's claims here are barred and the Court should affirm dismissal.

All the elements of claim preclusion exist here. First, LFAF's current special action involves the same parties as the administrative appeal, LFAF and the Commission. Second, the dismissal of the administrative appeal and resulting mandate operates as a final judgment on the merits for purposes of

claim preclusion. *Gilbert*, 155 Ariz. at 174 (failure to appeal "makes the decision final and res judicata"); *see also, e.g.*, *Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274 (1971) ("[A] dismissal with prejudice is a judgment on the merits . . . and is therefore res judicata as to every issue reasonably framed by the pleadings."); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (a dismissal with prejudice is a determination on the merits for purposes of res judicata). As a result, the Court should "conclusively" presume that the order is "just, reasonable and lawful." *Gilbert*, 155 Ariz. at 176.

This conclusive presumption extends to all claims that LFAF has or might have litigated previously, including the claims it calls "jurisdictional." Res judicata applies to preclude jurisdictional arguments, and even to subject-matter jurisdiction when the party had an opportunity to litigate it. A "party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). "It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Id.* Indeed, claim preclusion applies "even to

alleged constitutional errors which might have been corrected on proper application to the court which has jurisdiction of the appeal." *Gilbert*, 155 Ariz. at 176. *See also Olson*, 188 F.3d at 1086-87 (barring "constitutional defenses" to agency proceedings that party "had every right to raise" before agency "or on appeal"). LFAF's claims in this litigation are therefore barred.

LFAF's claims are also precluded under issue preclusion. First, LFAF had a full opportunity to litigate the issues it raises here, including the Commission's subject-matter jurisdiction, in the administrative proceeding before the Commission. In fact, it did so vigorously, *see* Fact and Case §§ II, IV.B. LFAF also had a full and fair opportunity to litigate these issues on appeal in the courts, but it failed to appeal.

Second, LFAF "actually litigated" these exact issues previously, culminating in the final administrative decision. All of the arguments in LFAF's claims below rehash precisely the same arguments made in the administrative proceedings.

Here again is the table showing where LFAF pushed each of the arguments at the administrative proceeding:

Argument	LFAF Admin. Brief and in argument	LFAF Special Action Compl. and Mem.
Commission lacks jurisdiction to enforce independent expenditure reporting requirements	CAPP149-50, IR-57 Ex. 1 at 7-8; CAPP113, IR-50 Ex. C (11/20/2014 Tr. at 25)	CAPP064-65, IR-1 ¶¶ 35-44; CAPP084-87, IR-4 at 15-18
Commission incorrectly concluded the advertisement was "express advocacy"	CAPP154-60, IR-57 Ex. 1 at 12-18; CAPP114, IR-50 Ex. C (11/20/2014 Tr. at 27-28)	CAPP064, 65, IR-1 ¶¶ 33, 43; CAPP088-90, IR-4 at 19-21
Commission lacks authority to impose penalties against LFAF because LFAF is not a candidate or campaign committee	CAPP162-64, IR-57 Ex. 1 at 20-22; CAPP113-14, IR-50 Ex. C (11/20/2014 Tr. at 25-27)	CAPP081-84, IR-4 at 12-15

For each argument LFAF attempts to revive in this special action, it "actually litigated" every of them on the way to the final administrative decision.

Third, the Commission's final decision ruled on each of these issues. *See* CAPP132-33, IR-50, Ex. G at 1-2 (adopting ALJ's determination that the Commission has authority to enforce violations of independent expenditure reporting requirement, *see* IR-50, Ex. F at 10-11); CAPP137-38, IR-50, Ex. G at 6-7 (finding Commission may impose civil penalties against non-candidates under § 12-942(b)); CAPP133-37, IR-50, Ex. G at 2-6 (determining that LFAF's

advertisement was an independent expenditure because it contained express advocacy).

That is, the issues LFAF attempts to raise in this case were raised, actually litigated, and were "essential" to the final administrative decision. *In re Gen. Adjudication*, 212 Ariz. at 69, ¶ 14 n.8 (citation omitted). Consequently, even setting claim preclusion aside, each of LFAF's arguments is barred under issue preclusion.

The superior court therefore correctly dismissed LFAF's claims below.

3. LFAF's arguments against claim and issue preclusion are incorrect.

LFAF's arguments against claim and issue preclusion are meritless. *See* OB at 9-11. Its arguments cannot overcome that the elements of claim preclusion are indisputably present here: there was a final adjudication on the merits of LFAF's defenses. The result was the final administrative decision, which LFAF failed to appeal. Given that failure, the decision became final and claim preclusive. The various arguments LFAF raises cannot change that.

First, LFAF states that preclusion cannot apply because, it contends, even the Commission admits "the issues surrounding the [Commission's]

jurisdiction were not actually litigated in Legacy's Administrative Appeal." OB at 9 (arguing that "lack of jurisdiction was not litigated" and quoting the Commission's motion to dismiss, IR-24 at 9). LFAF also later states (at 11) that "the agency's subject-matter jurisdiction was never reached" and therefore "there is no claim to preclude."

This is a sleight of hand, and a sloppy one. The agency's jurisdiction *was* reached. The parties contested the Commission's authority, including all of the issues that LFAF describes as "jurisdictional," throughout the administrative proceeding. *See* Argument § I.B.2. The Commission decided those contested issues in its final administrative decision, which became final and preclusive. *Id*.

The language LFAF quotes is referring to the fact that LFAF's arguments were not litigated *on appeal* in the superior court. Of course not; LFAF did not take advantage of its right to appeal. LFAF cannot sidestep the preclusive effect of the final decision when it chose (either intentionally or through inadvertence) not to appeal.

Moreover, that an issue is "not litigated" is no hurdle to dismissing LFAF's claims. Claim preclusion bars issues that were litigated and those that "might have" been litigated.

Second, LFAF suggests that subject-matter jurisdiction may always "be questioned in a collateral proceeding" because "res judicata is no bar to issues of subject-matter jurisdiction." *See* OB at 10 ("second" and "third" arguments). This is incorrect. LFAF quotes *Insurance Corp. of Ireland* for the proposition that "principles of estoppel do not apply" to subject-matter jurisdiction. *See* OB at 10 (quoting *Ins. Corp. of Ireland*, 456 U.S. at 702). But, as noted above, that same paragraph LFAF quotes includes a footnote that is directly applicable here: "a party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment." *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702 n.9. This is the rule under Arizona law as well. *See Lofts v. Super. Ct. in and for Maricopa Cty.*, 140 Ariz. 407, 410 (1984) ("When the rendering court in a *contested* hearing determines it has jurisdiction, its determination is *res judicata* on the jurisdictional issue and cannot be relitigated in another state.").

Here, LFAF had an opportunity to (and did) litigate each of the issues it is trying to re-raise in this case. It is therefore barred from litigating the issues again.

Moreover, even if a slice of the case survives, LFAF also fails to identify which of its claims would live on as challenges to subject-matter jurisdiction. The only argument LFAF has raised that even hints at being about subject-matter jurisdiction is its claim that the Commission lacks authority to enforce independent expenditure reporting requirements. Its other arguments—concerning whether LFAF is subject to penalties under § 16-942, and whether its advertisement was "express advocacy"—are either not jurisdictional at all, or are not about subject-matter jurisdiction.

Third, LFAF's effort to minimize *Gilbert* is unavailing. *See* OB at 11. For the reasons discussed below in Argument § I.C, *Gilbert* does not preserve any aspect of LFAF's claim. Instead, it confirms that when "[n]o timely appeal [is] taken, the decision of the [agency] is conclusively presumed to be just, reasonable, and lawful." 155. Ariz. at 176.

C. LFAF's other various arguments that it should be allowed to collaterally challenge the final administrative decision fail.

LFAF's brief raises other arguments urging the Court to allow it to maintain a collateral attack against the Commission's final administrative decision. The Court should reject them.

As discussed above, LFAF raised all of what it coins jurisdictional arguments during the administrative process before the Commission. It had the opportunity to litigate the Commission's subject-matter jurisdiction and cannot now "reopen that question in a collateral attack," *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 702 n.9, or any other issue it might have litigated.

LFAF relies on two authorities to support its collateral attack theory: (1) a passage from *Gilbert* noting that an "administrative judgment may be attacked collaterally . . . where the jurisdiction of the administrative agency is questioned," and (2) A.R.S. § 12-902(B). *See* OB at 8 (citing *Gilbert* and § 12-902(B) in OB Argument § I; OB at 11-13 (arguing that § 12-902(B) authorizes a collateral attack in OB Argument § III). LFAF's reliance on these authorities defeat its argument.

First, LFAF's language from *Gilbert* (suggesting collateral attacks on jurisdiction are available) in turn relies on A.R.S. § 12-902(B) and *State ex rel. Dandoy v. Phoenix*, 133 Ariz. 334, 336 (App. 1982), as authority. 155 Ariz. at 175. In *Legacy I*, however, the Supreme Court disavowed the very point LFAF is trying to make: "§ 12-902(B) does not create an exception to the time allotted to take an appeal from a final agency decision. We therefore disavow the language in . . . *Dandoy* that construes § 12-902(B) to provide

limitless entitlement to challenge an administrative agency's jurisdiction[.]" *Legacy I*, 243 Ariz. at 407, ¶ 15.

Second, the reliance on § 12-902(B) is equally unavailing. LFAF already argued that § 12-902(B) authorized it to challenge the Commission's jurisdiction on appeal even though its appeal was untimely and the Supreme Court rejected its argument. In *Legacy I*, the Court held that the terms of § 12-902(B) "do not create the exception [LFAF] asserts." 243 Ariz. at 407, ¶ 15. Instead, that provision restricts certain timely appeals to challenging jurisdiction only, but "does not create an exception to the time allotted to take an appeal from a final agency decision." *Id.*

Here, there is no question that the deadline to appeal the final administrative decision has long since passed, and § 12-902(B) has no application whatsoever to this matter. Moreover, the Court held that § 12-902(B) applies to direct appeals of administrative orders and does not "provide limitless entitlement to challenge an administrative agency's jurisdiction." *Id.* LFAF's argument ignores the text of § 12-902 and the *Legacy I* decision LFAF already litigated and lost.

II. The Court should affirm the judgment entered for the Commission.

LFAF appealed from the judgment in the Commission's favor. IR-68. Other than a cut-and-paste of the arguments LFAF made in the administrative proceeding about why the Commission lacks authority to have issued penalties against LFAF, however, the Opening Brief does not contest the entry of judgment. *See* OB at 13-26.

These merits-based arguments are precluded. Setting them aside, the superior court was plainly correct to enter judgment in the Commission's favor and this Court should affirm the judgment.

Arizona law authorizes a superior court to enter judgments based on administrative decision for an amount "justified by the record." A.R.S. § 12-911(A)(8) (providing that superior court may enter a judgment for an amount "justified by the record . . . on which execution may issue" when reviewing an administrative decision).

Here, the judgment is "justified by the record." The superior court's record contained a final administrative decision finding that LFAF had violated the Clean Elections Act by failing to make disclosures required under A.R.S. § 16-941(D) and § 16-958, provisions that the Commission is

charged with enforcing. *See* A.R.S. § 16-956(A)(7) (providing Commission shall "[e]nforce this article"); *see* CAPP132 (final administrative decision).

Having found a violation, the Commission was authorized to issue a civil penalty. *See* A.R.S. § 16-957(B) (providing that "if the commission finds that the alleged violator remains out of compliance, the commission shall . . . issue an order assessing a civil penalty"). The Commission did so, for $95,460. CAPP138.

The amount of the civil penalty is also justified by the record. The Commission's final administrative decision imposed a penalty as authorized under § 16-942(B). That section sets a penalty for a reporting violation at either $100 or $300 per day, with certain caps not relevant here. During administrative proceedings, the Commission engaged in a lengthy discussion at a public meeting regarding the amount of the penalty. CAPP095, IR-50 ¶¶ 4-7. Counsel for LFAF participated in the meeting and made arguments regarding the assessment of a penalty. *Id*. Although a penalty of more than $200,000 was possible, the Commission used its discretion to assess a lower penalty of $95,460.

For the reasons discussed above, the Commission's final administrative decision imposing a civil penalty against LFAF is

"conclusively" presumed to be "just, reasonable and lawful." *Gilbert*, 155 Ariz. at 175. In other words, the final administrative decision is not subject to reversal for being "contrary to law" or not supported by substantial evidence. *See* A.R.S. § 12-910(E) (stating that a court considering an administrative appeal "shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion"). The superior court therefore had legal authority to enter the judgment here, the amount of the judgment is "justified by the record," A.R.S. § 12-911(A)(8), and this Court should affirm.

III. In the alternative, even if the Court considers LFAF's merits arguments, the judgment below should be affirmed.

LFAF devotes the bulk of the Opening Brief to contesting the merits of the Commission's final administrative decision. As it did during the administrative proceeding, LFAF contends that (1) the Commission lacks authority under § 16-942(B) to impose penalties against LFAF, OB at 13-17; (2) the Commission lacks authority to enforce reporting requirements for independent expenditures, OB at 17-21; and (3) the Commission incorrectly

concluded that LFAF's advertisement expenditure was "express advocacy," OB at 21-26.

If the Court concludes that there is some procedural mechanism to raise a jurisdictional challenge, the judgment should still be affirmed. The Commission plainly had jurisdiction over the complaint alleging that LFAF violated the Act's independent expenditure reporting requirements. Although any such issues—if they could survive—should normally be remanded to be considered in the superior court initially, the Court could also conclude that jurisdiction plainly exists and affirm the judgment on that alternative basis. *See Solimeno v. Yonan*, 224 Ariz. 74, 82 (App. 2010) (applying rule that court "may affirm a trial court on any basis supported by the record").

The Answering Brief will address each briefly, but the application of claim and issue preclusion means that this Court need not concern itself with these merits arguments.

A. The Commission has authority to impose penalties against LFAF under § 16-942(B).

LFAF argues that the Commission's authority to impose penalties to enforce the Act does not extend to LFAF because the Commission's

enforcement authority "does not reach to allegations involving non-participating candidates or entities that are not candidates." *See* OB at 14. This is incorrect.

The Clean Elections Act requires the Commission to enforce the act. A.R.S. § 16-956(A)(7). One of the Act's requirements is that a disclosure report must be filed by "any person who makes an independent expenditure related to a particular office cumulatively exceeding five hundred dollars in an election cycle." A.R.S. § 16-941(D). A "person" is much broader than a candidate; the term includes "an individual, . . . corporation, limited liability company, labor organization, partnership, trust, association, organization, joint venture, cooperative or unincorporated organization or association." A.R.S. § 16-901(39). Consequently, the Commission has a statutory responsibility to enforce violations of these reporting requirements, including reports that "any person" must file. *See Clean Elections Inst. v. Brewer*, 209 Ariz. 241, 245, ¶ 13 (2004) *abrogated on other grounds by Save our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145 (2013) (noting that the Commission is responsible for enforcing "requirements that those making independent expenditures file periodic reports").

Furthermore, in service of its enforcement authority, the Act gives the Commission authority to adjudicate suspected violations of "any provision of this article," and to assess "civil penalt[ies] in accordance with § 16-942[.]". A.R.S. § 16-957(A), (B).

Eliding the other statutory language and the Supreme Court's statement in *Brewer*, LFAF focuses solely on § 16-942(B) and claims that subsection limits the Commission's authority to candidates only. The argument is based on the phrase in § 16-942(B) stating that the Commission may impose a penalty "for a violation by or on behalf of any candidate of any reporting requirements imposed by this chapter[.]" The phrase "by or on behalf of any candidate" does not limit penalties to candidates only—it includes a violation by a candidate or by a non-candidate making an expenditure for the benefit of a candidate. *Id.* Moreover, LFAF's analysis would eliminate any civil penalties for violations of the Act's independent expenditure reporting requirement, which by definition are "independent" of a candidate.

LFAF also points to the last sentence of § 16-942(B) as support for its narrow view of the Commission's authority. That provision states that a "candidate and the candidate's campaign account shall be jointly and

severally responsible for any penalty imposed[.]" The plain meaning of this sentence is that, when a candidate is the violator, then a penalty imposed on a candidate is also imposed on that candidate's account. Nothing in the sentence suggests that § 16-942(B) penalties apply *only* to candidates.

B. The Commission has authority to enforce the requirement to file independent expenditure disclosure reports required by A.R.S. § 16-941(D).

LFAF also argues that the Commission lacks authority to "assert jurisdiction over the independent expenditure reporting requirements." *See* OB at 20. It contends that such reporting requirements are contained in Title 16, Chapter 6, Article 1, and the Commission's authority is limited to Article 2 (the Clean Elections Act). Although the Commission does plainly have the authority to impose penalties for violations of **any** reporting requirement in Title 16, Chapter 6, *see* A.R.S. §§ 16-942(B), 16-956(A)(7), the Court should not reach that issue.

The administrative complaint that started the administrative action alleged, among other things, violations of §§ 16-941 and 958, statutory provisions that are unquestionably part of the Clean Elections Act. *See* CAPP101, IR-50 Ex. A at 3. *See also* CAPP134, IR-50 Ex. G at 3 (final administrative decision stating that the "only issue in this case is whether

the disclosure requirements for independent expenditures prescribed in [§§ 16-941(D) and 958] of the Clean Elections Act apply to the Advertisement at issue in this case.").

LFAF contends that the Commission lacks authority over enforcement of independent expenditure reports because (1) the definition of independent expenditure is found in Article 1 of Title 16, Chapter 6; and (2) Article 1 gave the Secretary of State enforcement authority over that Article. *See* OB at 20-22. But the Act expressly incorporates the definition of independent expenditure into the Act. *See* A.R.S. § 16-961(A). And the Act imposes reporting requirements concerning independent expenditures. A.R.S. § 16-941(D). Moreover, when voters approved the Act, they also approved the definition of "express advocacy" — the key to determining the existence of an independent expenditure. A.R.S. § 16-901.01 (adopted as part of the Clean Elections Act).

LFAF may believe the Commission's application of the law was incorrect but there is no merit to its contention that it lacked authority to enforce independent expenditure reporting requirements.

C. LFAF's arguments about whether its advertisement contained "express advocacy" are challenges to the merits of the Commission's decision, not jurisdictional arguments.

LFAF's argument (at 22-26) regarding whether its advertisement is express advocacy is not a jurisdictional argument. Thus, even assuming that LFAF is not foreclosed from relitigating the Commission's subject-matter jurisdiction, LFAF is precluded from challenging the merits of the Commission's decision via collateral attack.

"The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong." *Ariz. Pub. Serv. Co. v. S. Union Gas Co.*, 76 Ariz. 373, 381 (1954) (internal quotation marks and citation omitted). If the agency has "power to" decide the issue, then a party may not "collaterally attack[]" the decision "for error of law, whether that error be one of misconstruction of a statute or other legal error." *Id.* at 380.

Here, the Commission plainly has jurisdiction—the "power to enter upon the inquiry"—over whether an advertisement is "express advocacy" and therefore constitutes an "independent expenditure" subject to disclosure requirements. Sections 16-941(D) and 16-958 require that persons who make independent expenditures (i.e., expenditures made for the

purpose of express advocacy) to file certain disclosures, and § 16-956(A)(7) charges the Commission with enforcing the Act. If the Commission incorrectly concludes that a particular expenditure qualifies as an "independent expenditure," then it has incorrectly applied the law; it has not exceeded its jurisdiction. Accordingly, LFAF may not "collaterally attack[]" the Commission's decision as a "misconstruction of a statute or other legal error," *Ariz. Pub. Serv. Co.*, 76 Ariz. at 380.

Yet that is what LFAF does. LFAF plainly believes, with fervor, that the Commission was incorrect as a matter of law as to whether the advertisement was express advocacy. That is, LFAF faults ***how*** the Commission exercised its jurisdiction. Even under LFAF's incorrect view of the law that it may perpetually challenge jurisdiction, this argument is precluded.

CONCLUSION

For the reasons stated above, this Court should affirm. In addition, should the Court reverse or remand any aspect of this case to the superior court, the Court should deny LFAF's request for an award of attorneys' fees. *See* A.R.S. § 12-348(C) (court has discretion to "deny" or "reduce" a fee award

if, among other reasons, the "prevailing party" has "unduly and unreasonably protracted the final resolution of the matter").

RESPECTFULLY SUBMITTED this 15th day of May, 2020.

OSBORN MALEDON, P.A.

By /s/ Joseph N. Roth

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APPENDIX
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CONSOLIDATED FROM CV2018-006031

Electronic Index of Record
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No.	Document Name	Filed Date
1.	VERIFIED COMPLAINT FOR SPECIAL ACTION AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF	Apr. 24, 2018
2.	CIVIL COVER SHEET	Apr. 24, 2018
3.	MOTION TO EXCEED PAGE LIMIT	Apr. 24, 2018
4.	MEMORANDUM OF LAW IN SUPPORT OF VERIFIED COMPLAINT FOR SPECIAL ACTION, AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF -AND- APPLICATION FOR PRELIMINARY INJUNCTION	Apr. 24, 2018
5.	APPLICATION FOR ORDER TO SHOW CAUSE	Apr. 24, 2018
6.	**ME: HEARING SET [05/09/2018]**	**May. 10, 2018**
7.	STIPULATION TO VACATE RETURN HEARING	May. 14, 2018
8.	JOINT MOTION TO CONSOLIDATE CV 2018-004532 AND CV 2018-006031	May. 15, 2018
9.	**ME: CASE CONSOLIDATION [05/22/2018]**	**May. 23, 2018**
10.	[PART 1 OF 4] MOTION TO ASSOCIATE COUNSEL PRO HAC VICE	May. 23, 2018
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Electronic Index of Record
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23.	[PART 2 OF 2] DEFENDANT LEGACY FOUNDATION ACTION FUND'S MOTION TO DISMISS FOR WANT OF JURISDICTION	Jul. 11, 2018
24.	[PART 1 OF 2] CITIZENS CLEAN ELECTIONS COMMISSION'S MOTION TO DISMISS	Jul. 11, 2018
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LEGACY FOUNDATION VS CITIZENS CLEAN
CONSOLIDATED FROM CV2018-006031

Electronic Index of Record
MAR Case # CV2018-004532

APPEAL COUNT: 3

RE: CASE: UNKNOWN

DUE DATE: 11/26/2019

CAPTION: LEGACY FOUNDATION VS CITIZENS CLEAN

CAPTION: CONSOLIDATED FROM CV2018-006031

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: patrickj002 on November 26, 2019; [2.5-17026.63]
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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

Chris DeRose, Clerk of Court
*** Electronically Filed ***
09/10/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-004532 08/31/2018

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
T. Cooley
Deputy

LEGACY FOUNDATION ACTION FUND BRIAN M BERGIN

v.

CITIZENS CLEAN ELECTIONS COMMISSION NATHAN T ARROWSMITH

MARY R O'GRADY
JUDGE WHITTEN

MINUTE ENTRY

The Court has considered the parties' competing motions to dismiss in these consolidated cases, both filed on July 11, 2018. The Court benefited from oral argument on the motions on August 30, 2018.

The procedural history of the case is relevant, but too tortured to repeat in full here. Briefly, the Citizens Clean Election Commission ("the Commission") issued an order in November 2014 finding that Legacy Foundation Action Fund ("Legacy") violated the Clean Elections Act and imposed a civil penalty of $95,460. Legacy requested an administrative hearing. After a full hearing, the Administrative Law Judge issued a decision in Legacy's favor. Instead of adopting the ALJ's findings, on March 27, 2015 the Commission entered a final administrative order finding that Legacy violated the Clean Elections Act and imposing a civil penalty of $95,460.

On April 14, 2015, Legacy filed an administrative appeal seeking judicial review of the March 27, 2015 under the Judicial Review of Administrative Decisions Act. That appeal was dismissed because it was untimely. Legacy appealed the dismissal, but it was upheld by both the Court of Appeals and the Arizona Supreme Court.

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MARICOPA COUNTY

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Legacy has not paid the civil penalty. The Commission filed CV2018-006031 to enforce the $95,460 penalty as a judgment. Legacy filed CV2018-004532 to challenge the propriety of the Commission's actions in issuing the March 27, 2015 final administrative order.

The Court's role in this collateral attack on the various court decisions in *Legacy Foundation Action Fund v. Citizens Clean Elections Comm.*, 243 Ariz. 404 (2018), is limited. Legacy, having failed to file a timely direct appeal, is now "barred from obtaining judicial review of the decision." *Id.* at ¶ 15 (2018). Legacy now challenges, as it had in the administrative proceeding, the Commission's subject matter jurisdiction. As Legacy points out, the opinion does not rule out collateral attack on the Commission's subject matter jurisdiction by way of special action pursuant to RPSA 3(b). But this special action is not available as to matters for which direct appeal is an "equally plain, speedy, and adequate remedy." RPSA 1(a).

Legacy's failure to take advantage of its appellate rights does not open the special action process to it. *AEA Federal Credit Union v. Yuma Funding, Inc.*, 237 Ariz. 105, 111 ¶ 21 (App. 2015).

The Commission had authority in the first instance to determine its own jurisdiction. "[A]n administrative agency has the power ... to determine its jurisdiction, and whenever authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of the requisite facts." *Ross v. Arizona State Personnel Bd.*, 185 Ariz. 430, 432 (App. 1995). As will be discussed below, the Commission found to its own satisfaction the requisite facts to establish subject matter jurisdiction. The remedy, as Legacy concedes, was a direct appeal to the Superior Court and so on up the appellate ladder, wherein the facts and the Commission's conclusions from the facts could have been challenged and, if appropriate, its decision reversed. By failing to file a timely appeal, the availability of such relief was lost. The decision of the Commission became the final determination on the merits. The other factors also being present, the decision, upon Legacy Foundation's failure to file a timely appeal, created issue preclusion. *Garcia v. General Motors Corp.*, 195 Ariz. 510, 514 ¶ 9 (App. 1999); *see also Dommisse v. Napolitano*, 474 F.Supp.2d 1121, 1128 (D.Ariz. 2007) ("[U]nder the doctrine of res judicata, an unappealed administrative decision is conclusively presumed to be just, reasonable, and lawful.").

Thus, although the claim for lack of jurisdiction is not precluded, it must be dealt with upon the preclusive factual findings made by the Commission.

Legacy offers three bases for concluding that the Commission lacked subject matter jurisdiction. First, it denies that it is a candidate or a candidate's committee. But A.R.S. § 16-942(B) also gives the Commission jurisdiction over expenditures made "on behalf of" a

candidate. The Commission found that Legacy's expenditures were made on behalf of a candidate. This finding, which the Court in the posture of this case must accept as correct, demonstrates subject matter jurisdiction.

Second, Legacy challenges the Commission's authority to enforce campaign laws outside the four walls of the Clean Elections Act. It does not provide any support for the position that the Commission's enforcement authority is limited to areas in which there was no legislation in existence at the time of its enactment. This seems instead to be a vehicle to inject *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. 721 (2011), and to seek a ruling that this opinion effectively struck down the entire Act and stripped the Commission of jurisdiction by loss of its enforcement power. The Court declines the invitation for two reasons. For one thing, alleged constitutional errors not timely appealed are subject to issue preclusion. *Gorney v. Arizona Bd. of Regents*, 43 F.Supp.3d 946, 961 (D.Ariz. 2014).

Even if the constitutional issue is recognized, the Supreme Court has never held informational reporting requirements to be unconstitutional. Indeed, the availability of donor information had only the previous year been advanced in support of removing regulations; the "transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages" negates the existence of a compelling state interest in government action to insure open and honest government. *Citizens United v. Federal Election Comm.*, 556 U.S. 310, 371 (2010). The Court cannot conclude from this language that *Arizona Free Enterprise Club* strips the Commission of jurisdiction.

Finally, Legacy contests the Commission's finding that its advertisements constituted express advocacy, necessary to its subject matter jurisdiction. It is of course uncontested that the Commission did find them to constitute express advocacy. But Legacy takes the argument a step further: the Commission, acting on a premise so obviously wrong, must have known that it lacked jurisdiction; therefore, it lacked jurisdiction even to take evidence on whether it had jurisdiction. As stated above, it is for the Commission, in the first instance, to determine its own jurisdiction. *Ross, supra.* To do so, it "may take evidence and resolve factual disputes," *Church of Isaiah 58 Project of Arizona, Inc. v. La Paz County*, 233 Ariz. 460, 462-63 ¶ 10 (App. 2013), and infer necessary findings reasonably supported by the evidence. *Swichtenberg v Brimer*, 171 Ariz. 77, 82 (App. 1991). (Although these last two cases discuss the power of a court to determine its own jurisdiction, the same rule applies to administrative agencies. *United Assn. of Journeymen and Apprentices of Plumbing & Pipefitting Industry of U.S. & Canada, Local No. 469 and Local No. 741 v. Marchese*, 81 Ariz. 162, 168 (1956); *Ross, supra* at 432.) The Commission found that the advertisements crossed into express advocacy, and on that basis concluded that it had subject matter jurisdiction. Again, accepting the premise, the Court cannot find otherwise.

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The Commission's enforcement action is a new one and so can be pursued as an ordinary civil case. It is protected by the same issue preclusion that applies to Legacy Foundation's special action. At the motion to dismiss stage, it is inappropriate to form any opinion as to what if any fine is proper. But the Commission's authority, at least in the posture of this case, follows from the same reasons that block Legacy Foundation's case, and for the same reason must be taken as well-founded by the Court.

ACCORDINGLY, IT IS ORDERED that Defendant Legacy Foundation Action Fund's Motion to Dismiss for Want of Jurisdiction (in CV2018-006031) is denied.

IT IS ALSO ORDERED that Citizens Clean Election Commission's Motion to Dismiss CV2018-004532 is granted.

Clerk of the Superior Court
*** Electronically Filed ***
08/21/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-004532 08/19/2019

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

LEGACY FOUNDATION ACTION FUND BRIAN M BERGIN

v.

CITIZENS CLEAN ELECTIONS COMMISSION NATHAN T ARROWSMITH

MARY R O'GRADY

MINUTE ENTRY

The parties' competing motions for summary judgment, filed April 1, 2019 and May 31, 2019, are pending. Oral argument on the motions was set for August 22, 2019. In preparing for the same, the Court has become convinced that oral argument would not be helpful, as the parties' well written briefs have fully explained their positions. The August 22, 2019 oral argument is therefore vacated.

In the posture of this case, the Court must accept as true all factual findings made by the CCEC and the legal consequences deriving from them. The CCEC found that Legacy Foundation was acting on behalf of a candidate. Were the Court to accept Legacy's argument that the CCEC was required to specify which candidate it was acting on behalf of, it would necessarily set aside the factual finding. A.R.S. § 16-942(B) fixes the penalty for "a violation by or on behalf of any candidate." The statutory language requires only that an expenditure be made on behalf of any of the candidates, not a particular candidate. It is possible to envision a situation in which negative advertising against one candidate is made on behalf of two or more other candidates. The statute does not explicitly demand names. The failure to appeal for vagueness, a flaw in the factual findings, prevents the Court from addressing it.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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The Court does not read A.R.S. § 16-941(D) as vesting exclusive enforcement power in the Secretary of State. The purpose of the CCEC is to insure that election laws are enforced without favoritism by partisan officials.

A ruling of the Superior Court has no preclusive effect outside the four walls of that specific litigation. *Comm. for Justice & Fairness v. Arizona Secretary of State*, LC2011-000734-001, was not a class action, so all the court's ruling did was prevent enforcement of any orders issued in that particular situation to that particular plaintiff by that particular defendant. This is a different case.

ACCORDINGLY, Citizens Clean Elections Commission's Motion for Summary Judgment is granted and Legacy Foundation Action Fund's Cross-Motion for Summary Judgment is denied.

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Pro Hac Vice Application pending

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE COUNTY OF MARICOPA

LEGACY FOUNDATION ACTION FUND, an Iowa non-profit corporation, Plaintiff, vs. CITIZENS CLEAN ELECTIONS COMMISSION, Defendant.	No. CV2018-004532 **VERIFIED COMPLAINT FOR SPECIAL ACTION AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, Legacy Foundation Action Fund ("Plaintiff") by and through undersigned counsel for its Verified Complaint for Special Action and Request for Declaratory and Injunctive Relief hereby alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is an Iowa non-profit corporation, operating under Section 501(c)(4) of the Internal Revenue Code.

2. Defendant Citizens Clean Elections Commission ("Commission") is an Arizona governmental entity established by the Citizens Clean Elections Act (the "Act"), A.R.S. §§ 16-940, et seq., to implement the Act.

3. Jurisdiction and venue are appropriate in this Court to hear and determine this Verified Complaint for Special Action and Request for Declaratory and Injunctive Relief (the "Complaint") and to grant the requested relief by virtue of, without limitation, Article 6, §§ 16 and 18 of the Arizona Constitution, A.R.S. §§ 12-1801, 12-2021, and 12-1831, et seq., and the Arizona Rules of Procedure for Special Actions.

4. Since its inception in 2011, Plaintiff has maintained a primary purpose to further the common good and general welfare of the citizens of the United States by educating the public on public policy issues including state fiscal and tax policy, the creation of an entrepreneurial environment, education, labor-management relations, citizenship, civil rights, and government transparency issues.

5. In recent years, Plaintiff has run many issue advocacy advertisements in different mediums. Being familiar with the First Amendment protections afforded to issue advocacy speech, Plaintiff ran a television advertisement in Arizona which aired in late March and early April of 2014, referencing policy positions supported by the U.S. Conference of Mayors and its President, then-Mayor of Mesa, Scott Smith (the "Arizona Advertisement").

6. Plaintiff's Arizona advertisement was a part of a larger campaign regarding the U.S. Conference of Mayors as evidenced by advertisements airing not only in Mesa, Arizona, but also in Baltimore, Maryland and Sacramento, California.

7. The Arizona Advertisement ran between March 31 and April 14, 2014 and discussed the U.S. Conference of Mayors' policy positions regarding the environment, Second Amendment, tax and spending, and federal budget.

8. Consistent with Plaintiff's mission and tax-exempt purpose, the advertisement provided viewers with a call to action to contact Mayor Smith to tell him "The U.S. Conference of Mayors should support policies that are good for Mesa."

9. Several months before Plaintiff aired this advertisement, Arizona's statutory definition of "expressly advocates" had been declared unconstitutional by the Maricopa County Superior Court.

10. On July 1, 2014, a complaint was filed with the Arizona Secretary of State and the Commission claiming that Plaintiff's Arizona Advertisement constitutes "express advocacy" and that Plaintiff failed to file the necessary registration and campaign finance disclosure forms with the Arizona Secretary of State and the Commission (the "Administrative Complaint"). Specifically, the Administrative Complaint alleged that Plaintiff violated A.R.S. §§ 16-914.02, 16-941(D) and 16-958(A)-(B).

11. In response to the Administrative Complaint, Maricopa County Elections (acting for the Secretary of State) dismissed the matter on July 21, 2014.

12. In response to the same Administrative Complaint, the Commission did not follow the Secretary of State's decision but, instead, initiated a separate and independent regulatory process over the identical complaint and commenced proceedings before the Commission (captioned *In re Legacy Foundation Action Fund*, numbered 15F-001-CCE).

13. On July 16, 2014, Plaintiff filed its response to the Administrative Complaint with the Commission, arguing the Commission did not have jurisdiction over the matter and, even if it did, Plaintiff was not subject to registration or reporting requirements because its advertisement did not "expressly advocate" as the then-unconstitutional provision defined the term.

14. On July 18, 2014, Plaintiff commenced a Special Action in this Court challenging the jurisdiction of the Commission (the "2014 Special Action").

15. On July 31, 2014, the Commission declared it had jurisdiction to consider the allegations of the Administrative Complaint.

16. On September 11, 2014, the Commission found "reason to believe" that a violation of the Act occurred and authorized an investigation. The basis for the Commission's "reason to believe" finding was a conclusion the Commission has jurisdiction over Plaintiff, that the Arizona Advertisement was an independent expenditure and that Plaintiff violated A.R.S. §§ 16-941(D) and 16-958 by failing to report those expenditures.

17. On September 26, 2014, Judge Cunanan granted the Commission's motion to dismiss the 2014 Special Action, finding that Plaintiff was required to exhaust its administrative remedies before its claims would be heard.

18. On September 26, 2014, the Commission sent Plaintiff a Compliance Order asking Plaintiff to provide written answers to the following questions under oath:

1. Please provide how much money was expended to create and run the television advertisement identified in the Compliance Order.

2. Please identify any other advertisements pertaining to Scott Smith that ran in Arizona.

3. With regard to any advertisements identified in Legacy's response to question 2, please provide information on the scope of the purchase, including how much money was spent to create and run any such advertisements and where they ran.

19. Plaintiff responded to the Commission's Compliance Order by letter arguing that the Commission's request for additional information was not only irrelevant to the matter at hand because it exceeded the scope of the original complaint but was also outside the scope of the Commission's jurisdiction.

20. Further, Plaintiff provided a detailed request to the Commission in its response, asking the Commission, when assessing civil penalties under A.R.S. § 16-942(B), to identify the candidate the Advertisement was "by or on behalf of" and which candidate or candidate's campaign account shall be "jointly and severally liable" for any civil penalty assessment.

21. On November 20, 2014, the Commission found probable cause to believe Plaintiff had violated the Act and authorized the assessment of $95,460 in penalties.

22. On November 28, 2014, the Commission issued an order assessing civil penalties against Plaintiff (the "Order") and a Notice of Appealable Agency Action.

23. Plaintiff appealed the Order by requesting an administrative hearing, which was conducted by the Office of Administrative Hearings on January 28, 2015.

24. On March 4, 2015, Administrative Law Judge Thomas Shedden entered his Decision (the "ALJ's Decision") and concluded, in part, that: (a) the Arizona Advertisement does not constitute "express advocacy"; and (b) the Commission's assessment of civil penalties did not comply with A.R.S. § 16-942(B). The ALJ's Decision, therefore, ordered that Plaintiff's appeal should be sustained, and the Commission's Order was rescinded.

25. The Commission, however, rejected the ALJ's Decision and rendered a Final Administrative Decision dated March 27, 2015, which declared: (a) the Commission has jurisdiction and authority to enforce violations of the Act; (b) the Arizona Advertisement is "express advocacy" within the definition of A.R.S. §16-901.01(A)(2); and (c) the Commission has authority to impose civil penalties against Plaintiff under A.R.S. § 16-942(B) (the "Final Administrative Decision").

26. In the Final Administrative Decision, the Commission reinstated its civil penalty of $95,460 against Plaintiff.

27. Plaintiff filed a Complaint and Notice of Appeal of the Final Administrative Decision on April 14, 2015, commencing an appeal before the Superior Court as case number LC2015-000172-001 (the "Superior Court Appeal").

28. Within the Superior Court Appeal, Plaintiff restated its position that the Commission has exceeded its Jurisdiction.

29. On June 12, 2015, Judge McClennan entered an order dismissing the Superior Court Appeal, ruling it was not timely filed.

30. Plaintiff pursued an appeal of the dismissal with the Court of Appeals. That appeal process ultimately was resolved by the Arizona Supreme Court, which ruled that "failure to file a timely appeal from an agency decision deprives the Superior Court to hear the appeal, including issues of agency jurisdiction."

31. The Supreme Court was careful to distinguish the Superior Court Appeal from "a challenge to the Commission's Jurisdiction through…special action or as a defense to an enforcement action." and specifically held, "We express no view on whether Legacy may pursue alternative procedural means to challenge the Commissions penalty as void."

32. On April 11, 2018 the Commission sent correspondence to Plaintiff demanding compliance with the final administrative decision and threatening that "if the penalty is not paid, the Commission will pursue all available legal remedies."

33. Plaintiff brings this Special Action as a permissible collateral challenge to the Commission's actions taken in excess of its authority and its improper exercise of jurisdiction over Plaintiff as an entity outside of the jurisdiction of the Act, over the independent expenditure subject matter of the underlying statute, and over the Arizona Advertisement as speech that does not constitute the functional equivalent of express advocacy.

FIRST CLAIM FOR RELIEF
(Declaratory Relief)

34. Plaintiff incorporates the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

35. Pursuant to A.R.S. § 12-1831 et. seq., Rule 57 of the Arizona Rules of Civil Procedure, and Rule 3(b) of the Arizona Rules of Procedure for Special Actions the Commission has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority.

36. The Act, A.R.S. §§ 16-940 to 16-961 proscribes the duties, and further limits the enforcement authority, of the Commission to candidates that participate in the

Citizens Clean Elections Act campaign finance regime.

37. The Commission's enforcement authority is found in A.R.S. §§ 16-956(A)(7) and 16-957(A), which explicitly limit the reach of the Commission to enforcing "this article" (Title 16, Chapter 6, Article 2).

38. Such an explicit limitation requires the Commission to enforce only the statutes in the Act.

39. The CCEC Complaint asserted violations of A.R.S. §§ 16-901, 16-905, 16-16-914.02, statutes which clearly reside in Title 16, Chapter 6, Article 1 and, therefore, fall outside the Act and the Commission's jurisdiction.

40. The Administrative Complaint also alleged that Plaintiff's actions violated provisions of the Act, namely A.R.S. §§ 16-941(B), (C)(2), (D), and 16-958(A), (B).

41. Those statutes also reside outside of the Commission's jurisdiction as applied to entities, such as Plaintiff, that are not candidates.

42. The Commission has further erroneously claimed that the Commission has jurisdiction over Plaintiff under the independent reporting requirements of A.R.S. §§ 16-941(D) and 16-958(A), (B).

43. The Commission has erroneously claimed that the Arizona Advertisement is subject to the jurisdiction of any state actor as the functional equivalent of express advocacy.

44. No Court has issued a merits ruling on whether the Commission possesses jurisdiction over the Plaintiff.

45. This Court possesses jurisdiction and authority under the Arizona Rules of Procedure for Special Actions, and the Uniform Declaratory Judgments Act, A.R.S. §§ 12-1831 et. seq. to enter an order declaring that the Commission has exceeded, and continues to threaten to exceed, its jurisdiction by asserting jurisdiction over Plaintiff.

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SECOND CLAIM FOR RELIEF
(Injunction)

46. Plaintiff incorporates the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

47. Pursuant to A.R.S. § 12-1831 et. seq., Rule 57 of the Arizona Rules of Civil Procedure, and Rule 3(b) of the Arizona Rules of Procedure for Special Actions the Commission has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority.

48. The Act, A.R.S. §§ 16-940 to 16-961 proscribes the duties and further limits the enforcement authority of the Commission to candidates that participate in the Citizens Clean Elections Act campaign finance regime.

49. The Commission's enforcement authority is found in A.R.S. §§ 16-956(A)(7) and 16-957(A), which explicitly limit the reach of the Commission to enforcing "this article" (Title 16, Chapter 6, Article 2).

50. Such an explicit limitation requires the Commission to enforce only the statutes in the Act.

51. The Administrative Complaint asserted violations of A.R.S. §§ 16-901, 16-905, 16- 16-914.02, statutes which clearly reside in Title 16, Chapter 6, Article 1 and, therefore, fall outside the Commission's jurisdiction.

52. The Administrative Complaint also alleged that Plaintiff's actions violated provisions of the Act, namely A.R.S. §§ 16-941(B), (C)(2), (D), 16-958(A), (B).

53. Those statutes also reside outside of the Commission's jurisdiction as applied to entities such as Plaintiff that are not candidates.

54. The Commission has further erroneously claimed that the Commission has jurisdiction over Plaintiff under the independent reporting requirements of A.R.S. §§ 16-941(D) and 16-958(A), (B).

55. The Commission has erroneously claimed that the Arizona Advertisement is subject to the jurisdiction of any state actor as the functional equivalent of express

advocacy.

56. Plaintiff seeks a Preliminary Injunction and a Permanent Injunction prohibiting the Commission from further seeking to assert any regulatory or enforcement jurisdiction against Plaintiff, including any efforts to enforce the administrative penalty or sanction entered against Plaintiff.

57. As further explained in the accompanying Memorandum of Law and Application for Preliminary Injunction, Plaintiff has a strong likelihood of success on the merits and will suffer irreparable harm if it is required to submit to jurisdiction before the Commission and observe any administrative penalty or sanction pursued by the Commission.

58. The threatened irreparable injury to Plaintiff is substantial and granting the requested injunctive relief will not cause the Commission to suffer any harm.

59. Granting the requested injunctive relief will promote the public interest by preserving the status quo until this, Court can declare whether the Commission has sought to exceed its statutory jurisdiction.

THIRD CLAIM FOR RELIEF
(Special Action Relief in the Nature of Prohibition)

60. Plaintiff incorporates the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

61. Given the nature of Plaintiff's claim and the harm that will result, Plaintiff lacks an adequate remedy at law.

62. Plaintiff is entitled to special action relief pursuant to Rule 3(b)-(c), Arizona Rules of Procedure for Special Actions, ordering the Commission to refrain from further asserting any jurisdiction over Plaintiff and/or to take no action on, and to annul the administrative sanction.

63. Pursuant to Rule 3(b), Arizona Rules of Procedure for Special Actions, Plaintiff seeks an order of prohibition against the Commission because it has threatened to, and has exceeded, its jurisdictional authority in asserting jurisdiction over Plaintiff and

seeking to enforce the administrative penalty.

RELIEF REQUESTED

Based upon the foregoing, Plaintiff respectfully requests that this Court grant the following relief:

A. That the Court issue an Order to Show Cause pursuant to Rule 4(c) of the Arizona Rules of Procedure for Special Actions in the form filed contemporaneously herewith setting a time for the Commission to file an Answer to this Special Action Complaint and a time for hearing of this case and directing the Commission to show cause why the relief sought herein should not be granted.

B. That the Court grant special action relief against the Commission and declare that it has proceeded, or is threatening to proceed, without or in excess of its jurisdiction or legal authority.

C. That the Court grant special action relief to annul the Commission's administrative sanction.

D. That the Court enter a Preliminary and Permanent Injunction prohibiting the Commission from taking any further action to enforce its administrative sanction against Plaintiff pending resolution of this matter on the merits.

E. That the Court award Plaintiff its costs and attorneys' fees incurred herein pursuant to A.R.S. §§ 12-348, 12-2030 and Rule 4(g), Arizona Rules of Procedure for Special Actions.

F. That the Court grant Plaintiff such other and further relief as is just and proper.

G. A Memorandum of Law in Support of Verified Complaint for Special Action, Declaratory and Injunctive Relief has been filed contemporaneously herewith.

DATED this 24th day of April, 2018.

Bergin, Frakes, Smalley & Oberholtzer, PLLC

Brian M. Bergin
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Attorneys for Plaintiff

VERIFICATION

I, Christopher Rants, verify under penalty of perjury that I am the President of Legacy Foundation Action Fund, the Plaintiff in the above-captioned matter. I am authorized to make this Verification on behalf of the Plaintiff. I have read the foregoing Verified Complaint for Special Action and Request for Declaratory and Injunctive Relief and know the contents thereof, and that the matters and things therein stated are true, to the best of my knowledge, information, and belief.

LEGACY FOUNDATION ACTION FUND

Christopher Rants

Its: President

Dated: 4-18-2018

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Pro Hac Vice Application forthcoming

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE COUNTY OF MARICOPA

LEGACY FOUNDATION ACTION FUND, an Iowa non-profit corporation,

Plaintiff,

vs.

CITIZENS CLEAN ELECTIONS Commission,

Defendant.

No. CV2018-004532

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED COMPLAINT FOR SPECIAL ACTION, AND REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

-and-

APPLICATION FOR PRELIMINARY INJUNCTION

Plaintiff, Legacy Foundation Action Fund, ("Plaintiff"), by and through counsel undersigned, hereby submits this memorandum of law in support of its Verified Complaint, submitted concurrently herewith, and applies, pursuant to Ariz. R. Civ. P. 65 and Ariz. R. Sp. Act. 5, for a Preliminary Injunction directed to Defendant Citizens Clean Elections Commission (the "Commission") and its attorneys, officers, agents, servants, employees and any and all other persons in active concert or participation with them from taking any further action to enforce the Commission's administrative sanction against Plaintiff or otherwise assert jurisdiction over Plaintiff (collectively, the "Government Actions") until such time that this Court can resolve on the merits, the matters raised by Plaintiff's Verified Complaint for Special Action. This Application is supported by the Verified Complaint for Special Action and Request for Declaratory and Injunctive Relief and the following Supporting Memorandum.

SUPPORTING MEMORANDUM

Preliminary Statement

Plaintiff is a tax-exempt, nonprofit, social welfare organization organized under Section 501(c)(4) of the Internal Revenue Code. Since its inception in 2011, Plaintiff has maintained a primary purpose to further the common good and general welfare of the citizens of the United States by educating the public on public policy issues including state fiscal and tax policy, the creation of an entrepreneurial environment, education, labor-management relations, citizenship, civil rights, and government transparency issues. In March and April of 2014, Plaintiff aired television advertisements in three different markets directed to citizens living in the districts of three mayors who then held leadership roles in the U.S. Conference of Mayors.

Beginning on July 1, 2014, the Commission, acting on a citizen complaint, commenced administrative proceedings against Plaintiff claiming that it possesses jurisdiction, through the Clean Elections Act (the "Act"), over Plaintiff, notwithstanding the fact that the Plaintiff is neither a candidate nor a committee that participates in the Act's campaign finance regime.

Despite its lack of jurisdiction, through the second half of 2014, the Commission relentlessly pursued an investigation and ultimately entered an order imposing civil penalties against Plaintiff concerning that particular advertisement, broadcast in Arizona, that mentioned Mayor Scott Smith, who was then President of the U.S. Conference Mayors (the "Arizona Advertisement").

Plaintiff successfully administratively appealed the Commission's action by, in part, challenging the Commission's jurisdiction and, on March 4, 2015, the Administrative Law Judge ("ALJ") issued an order rescinding the civil penalty.

The Commission, however, rejected the ALJ's findings and conclusions and rendered a Final Administrative Decision, which reasserted: (a) the Commission has jurisdiction and authority to enforce violations of the Act; (b) the Arizona Advertisement is "express advocacy" within the definition of A.R.S. §16-901.01(A)(2); and (c) the Commission has authority to impose civil penalties against Plaintiff under A.R.S. § 16-942(B) (the "Final Administrative Decision").

Plaintiff's appeal of the Final Administrative Decision was dismissed by the Superior Court as untimely. Plaintiff appealed that dismissal to the Arizona Court of Appeals and, thereafter, the Arizona Supreme Court.

The Arizona Supreme Court affirmed the Superior Court's dismissal of the appeal as untimely but acknowledged that "[an] order is void if it exceeds the jurisdiction of the court or agency rendering it." *Legacy Foundation Action Fund v. Citizens Clean Elections Commission*, 246 Ariz. 404, 406, 408 P.3d. 828, 829 (2019). While the Supreme Court ruled that Plaintiff could not challenge the Commission's jurisdiction through the vehicle of its untimely appeal, it did not foreclose a collateral jurisdictional challenge, citing cases allowing a party to contest a void judgment "through Arizona rule of Civil Procedure 60 or special action long after the judgments were issued." *Id.* (citing *Arkules v. Board of Adjustment*, 151 Ariz. 438, 440, 728 P.2d, 657, 659 (App. 1986); *Nat. Inv. Co., v. Estate of Bronner*, 146 Ariz. 138, 140, 704 P.2d 268, 270 (App. 1985). Finally, the Supreme Court stated, "[W]e express no view on whether [Plaintiff] may

pursue alternative procedural means to challenge the Commission's penalty order as void." *Id.* 246 Ariz. at 407, 408 P.3d at 831.

Plaintiff, therefore, brings this Special Action as a permissible collateral challenge to the Commission's actions taken in excess of its authority in improperly exercising jurisdiction over: (a) Plaintiff, an entity not subject to the Act; (b) express advocacy, a subject matter outside the application of the Act; and (c) the Arizona Advertisement itself, which was issue advocacy protected by the First Amendment of the United States Constitution.

Through this Special Action, the Plaintiff seeks an order enjoining the Commission because the Commission has exceeded, and continues to threaten to exceed, its jurisdiction.

As is more thoroughly set forth below, Plaintiff respectfully requests that this Court enter a Preliminary Injunction directing that the Commission take no further action to enforce its administrative sanction against Plaintiff pending resolution of this matter on the merits.

Factual Background

Plaintiff is a social welfare organization organized under Section 501(c)(4) of the Internal Revenue Code. The organization's primary purpose is to further the common good and general welfare of the citizens of the United States by educating the public on public policy issues, including state fiscal and tax policy, the creation of an entrepreneurial environment, education, labor-management relations, citizenship, civil rights, and government transparency issues. Affidavit of Christopher Rants ("Rants Decl.") attached hereto as Exhibit "A", at ¶ 5. As a social welfare organization, Plaintiff is concerned with the policy initiatives that affect its mission. Rants Decl. ¶ 15.

Since Plaintiff's inception, Christopher Rants has served as its President, overseeing the daily business operations of the organization. Rants Decl. ¶¶ 3, 4. Mr. Rants played an active role establishing and carrying out the issue advocacy advertisement with which the Commission's Complaint takes issue. Rants Decl. ¶ 6. In

support of its purpose to facilitate public policy issue education and effectuate policy change, Plaintiff bought airtime and ran advertisements critical of the U.S. Conference of Mayors' policy positions. Rants Decl. ¶ 14.

The policy-based advertisements targeted citizens in the districts of three mayors (Mesa, AZ; Baltimore, MD and Sacramento, CA) who held leadership roles with the U.S. Conference of Mayors. Rants Decl. ¶¶ 8,12. The advertisements aired for roughly two weeks and were aimed in the media markets in and around the cities represented by the three mayors. Rants Decl. ¶¶ 13, 15.

The Commission takes issue with Plaintiff's Arizona Advertisement, a television advertisement mentioning then U.S. Conference of Mayors President Mayor Scott Smith. Plaintiff purchased airtime in the Phoenix, AZ media market critical of the policy positions[1] of the organization for which Mayor Smith served as President. Rants Decl. ¶¶ 9,14. At its conclusion, the Arizona Advertisement makes a call to action asking viewers to tell Mayor Smith that "the U.S. Conference of Mayors should support policies that are good for Mesa." Rants Decl. ¶ 10.

The Arizona Advertisement ran for a period of two weeks, from March 31 to April 14, 2014. Rants Decl. ¶¶ 12, 16. As a practical matter, Plaintiff ceased airing the Arizona Advertisement before Mayor Smith's resignation due to the fact that once out of office, Mayor Smith would no longer function as President of the U.S. Conference of Mayors and, therefore, Plaintiff would no longer be able to address Mayor Smith as a focus of its campaign against the U.S. Conference of Mayors' policy positions. As a social welfare organization, Plaintiff is very aware of the fact that it cannot engage in political activity as a primary function of its organization. Rants Decl. ¶ 3. Therefore, Plaintiff carefully navigates state and federal laws to ensure that it does not unintentionally engage in an improper amount of political activity so it may retain its tax-exempt status. That is a

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[1] The policy positions presented in the advertisement were all federal policy positions including the federal Patient Affordable Care Act, federal energy policy, federal gun control and firearm restrictions, and support for President Obama's budget. *See* YouTube.com URL: http://www.youtube.com/watch?v=NycZZLOA_OQ.

critical reason why Plaintiff is focused on policy initiatives, specifically those of the U.S. Conference of Mayors. Rants Decl. ¶¶ 5, 8, 15.

Consistent with Plaintiff's mission and tax-exempt purpose, the Arizona Advertisement provided viewers with a call to action to contact Mayor Smith to tell him "The U.S. Conference of Mayors should support policies that are good for Mesa."

Several months before Plaintiff aired this advertisement, Arizona's statutory definition of "expressly advocates" had been declared unconstitutional by the Maricopa County Superior Court.

On July 1, 2014 a complaint was filed with the Arizona Secretary of State and the Commission claiming that Plaintiff 's Arizona Advertisement constitutes "express advocacy" and that Plaintiff failed to file the necessary registration and campaign finance disclosure forms with the Arizona Secretary of State and the Commission (the "Administrative Complaint"). Specifically, the Administrative Complaint alleged that Plaintiff violated A.R.S. §§ 16-914.02, 16-941(D) and 16-958(A)-(B).

In response to the Administrative Complaint, the Maricopa County Elections Department (acting for the Secretary of State) dismissed the matter on July 21, 2014.

In response to the same Administrative Complaint, the Commission ***did not*** follow the Secretary of State's lead and, instead, initiated a separate regulatory process and commenced proceedings before the Commission (captioned *In re Legacy Foundation Action Fund*, numbered 15F-001-CCE).

On July 16, 2014, Plaintiff filed its response to the Administrative Complaint with the Commission, arguing the Commission did not have jurisdiction over the matter and, even if it did, Plaintiff was not subject to registration or reporting requirements because its advertisement did not "expressly advocate" as the then-unconstitutional provision defined the term.

On July 18, 2014, Plaintiff commenced a Special Action in this Court challenging the jurisdiction of the Commission the ("2014 Special Action").

On July 31, 2014, the Commission declared that it had jurisdiction to consider the

allegations of the Administrative Complaint.

On September 16, 2014, Judge Cunanan granted the Commission's motion to dismiss the 2014 Special Action, finding that Plaintiff was required to exhaust its administrative remedies before its claims would be heard.

On September 11, 2014, the Commission found "reason to believe" that a violation of the Act occurred and authorized an investigation. The basis for the Commission's "reason to believe" finding was a conclusion that the Subject Advertisement was an independent expenditure and that Plaintiff violated A.R.S. §§ 16-941(D) and 16-958 by failing to report those expenditures.

On September 26, 2014, the Commission sent Plaintiff a Compliance Order asking Plaintiff to provide written answers to the following questions under oath:

1. Please provide how much money was expended to create and run the television advertisement identified in the Compliance Order.

2. Please identify any other advertisements pertaining to Scott Smith that ran in Arizona.

3. With regard to any advertisements identified in [Plaintiff's] response to question 2, please provide information on the scope of the purchase, including how much money was spent to create and run any such advertisements and where they ran.

Plaintiff responded to the Commission's Compliance Order by letter arguing that the Commission's request for additional information was not only irrelevant to the matter at hand because it exceeded the scope of the original complaint but was also outside the scope of the Commission's jurisdiction.

Further, Plaintiff provided a detailed request to the Commission in its response, asking the Commission, when assessing civil penalties under A.R.S. § 16-942(B), to identify the candidate the Arizona Advertisement was "by or on behalf of" and which candidate or candidate's campaign account shall be "jointly and severally liable" for any civil penalty assessment.

On November 20, 2014, the Commission found probable cause to believe Plaintiff had violated the Act and authorized the assessment of $95,460 in penalties.

On November 28, 2014, the Commission issued an order assessing civil penalties against Plaintiff (the "Order") and a Notice of Appealable Agency Action.

Plaintiff appealed the Commission's Order by requesting an administrative hearing, which was conducted by the Office of Administrative Hearings on January 28, 2015.

On March 4, 2015, Administrative Law Judge Thomas Shedden entered his Decision (the "ALJ's Decision") and concluded, in part, that: (a) Plaintiff's Subject Advertisement does not constitute "express advocacy"; and (b) the Commission's assessment of civil penalties did not comply with A.R.S. § 16-942(B). The ALJ's Decision, therefore, ordered that Plaintiff's appeal should be sustained and the Commission's Order was rescinded.

The Commission, however, rejected the ALJ's Decision and rendered a Final Administrative Decision dated March 27, 2015, which declared: (a) the Commission has jurisdiction and authority to enforce violations of the Act; (b) the Subject Advertisement is "express advocacy" within the definition of A.R.S. §16-901.01(A)(2); and (c) the Commission has authority to impose civil penalties against Plaintiff under A.R.S. § 16-942(B) (the "Final Administrative Decision").

In the Final Administrative Decision, the Commission reinstated its civil penalty of $95,460 against Plaintiff.

Plaintiff filed a Complaint and Notice of Appeal of the Final Administrative Decision on April 14, 2015, commencing an appeal before the Superior Court as case number LC2015-000172-001 (the "Superior Court Appeal").

On June 12, 2015, Judge McClennan entered an order dismissing the Superior Court Appeal, ruling it was not timely filed. On June 15, 2015, Plaintiff timely filed a Notice of Appeal of that order.

While that appeal was pending, on June 22, 2015, Plaintiff commenced another

Special Action in this Court as a permissible collateral challenge to the Commission's exercise of jurisdiction over Plaintiff, an entity outside of the application of the Act (the "2015 Special Action").

On September 2, 2015, Judge Whitten entered an order dismissing the 2015 Special Action, without prejudice, pending the outcome of Plaintiff's appeal. As is explained above, the Arizona Supreme Court recently affirmed the dismissal of Plaintiff's appeal but specifically did not extinguish Plaintiff's ability to collaterally challenge the Commission's jurisdiction in this action. *Legacy*, 246 Ariz. at 407, 408 P.3d at 831.

On April 11, 2018, the Commission sent correspondence to Plaintiff demanding payment of its administrative sanction and threatening that "If the penalty is not paid, the Commission will pursue all available legal remedies."

Plaintiff, therefore, has accepted the Supreme Court's apparent invitation and has brought this action in an effort to finally obtain a merits ruling on whether the Commission possesses jurisdiction over Plaintiff under the Act.

Argument

I. THIS SPECIAL ACTION IS A PERMISSIBLE COLLATERAL ATTACK UPON THE COMMISSION'S JURISDICTION

Plaintiff anticipates the Commission may again oppose these proceedings by arguing that they represent an impermissible collateral attack on the Final Administrative Order. The Supreme Court's recent ruling in *Legacy,* and other cases, however, undermines that argument.

While it is correct that Plaintiff would be precluded from pursuing a collateral attack of any order entered by the Commission pursuant to its statutory authorization, this case is not a challenge to the merits of the Final Administrative Order, but rather, it is an effort to judicially restrain the Commission's improper assertion of jurisdiction over Plaintiff.

The Arizona Supreme Court described the distinction between improper collateral proceedings and those collateral attacks that are permissible as follows,

> The complaint [at issue] is a collateral attack upon an order of the Corporation Commission and if it had jurisdiction to set aside the order of revocation, plaintiff must fail for the reason that any order which the Commission has power to make is conclusive unless the statutory procedure for review is followed. ***On the other hand, a decision of the Commission which goes beyond its power as prescribed by the Constitution and statutes is vulnerable for lack of jurisdiction and may be questioned in a collateral proceeding.***

Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc., 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954) (emphasis added) (internal citation omitted); see also *Legacy*, 243 Ariz. at 406, 408 P.3d at 830; *Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65, 216 P.2d 404 (1950).

The law in Arizona is that if a particular administrative action is void for lack of jurisdiction it may be collaterally attacked. *Legacy*, 243 Ariz. at 406, 408 P.3d at 830; *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327, 332, 289 P.2d 406, 411 (1955); *Pacific Greyhound*, 70 Ariz. at 68, 216 P.2d at 406 ("If a given certificate was issued . . . without jurisdiction, . . . then *the rule prohibiting collateral attach has no application*.") (emphasis added).

> It is well-settled that administrative decisions which go beyond an agency's statutory power are vulnerable for lack of jurisdiction and may be questioned in a collateral proceeding. Since a decision made in excess of jurisdiction may be set aside in a collateral attack, the question of whether the decision is in fact in excess of jurisdiction may also be made in that same collateral proceeding.

Arizona Board of Regents v. State of Arizona Public Safety Retirement Fund Manager Administrator, 160 Ariz. 150, 156, 771 P.2d 880, 886 (App. 1989) (internal citations omitted).

Here, Plaintiff is not asking this Court to pass upon the question of whether the Commission reached appropriate conclusions, but rather whether the Commission had jurisdiction to conduct the proceedings. As such, the issue is one of jurisdiction that may be pursued through collateral attack. *See, e.g., Ariz. Pub. Serv. Co. v. S. Union Gas Co.*, 76 Ariz. 373, 381, 265 P.2d 435, 440 (1954) ("The test of jurisdiction is whether or not

the tribunal has the power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong.") (internal citations omitted).

Collateral attacks are well recognized under Arizona law and do not impermissibly offer the Plaintiff "two bites at the same cherry." *Whitfield Transportation Inc. v. Brooks*, 81 Ariz. 136, 139, 302 P.2d 526, 529 (1956); *see also, Arizona Bd. of Regents v. State ex rel. Ariz. Pub. Safety Retirement Fund Manager*, 160 Ariz. 150, 156, 771 P.2d 880, 886 (App. 1989).

"It is fundamental that no . . . board or administrative agency can act without jurisdiction." *State v. Downey*, 102 Ariz. 360, 364, 430 P.2d 122, 125 (1967). The Supreme Court of Arizona, when presented with a case where the petitioner pursued a collateral, jurisdictional, challenge while a parallel superior court proceeding concerning the administrative decision was pending ruled that its review was limited to a determination if the administrative agency "acted in excess of its jurisdiction. If so, the order is void and therefore subject to collateral attack." *Dallas v. Arizona Corporation Commission*, 86 Ariz. 345, 348, 346 P.2d 152, 153 (1959).

Jurisdiction concerns the "competency of the particular court or administrative body to determine the controversies of the general class to which the [case] belongs. *Rural/Metro Corp. v. Arizona Corp. Comm'n* 129 Ariz. 116, 118, 629 P.2d 83, 85 (1981) (quoting *Delaware River Port Auth. v. Pennsylvania Pub. Util. Comm'n*, 182 A.2d 682, 686 (1962)).

This Special Action challenges the Commission's jurisdiction over the Plaintiff and, as such, represents a permissible collateral attack and this Court may use such proceedings to prevent the Commission's "bare usurpation of power." *See George v. Arizona Corporation Commission*, 83 Ariz. 387, 392, 322 P.2d 369, 372 (1958).

II. STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF

Preliminary injunctive relief is properly granted when: (1) plaintiff is "likely to succeed in the trial on the merits"; (2) "there is a real threat of irreparable injury"; (3) "the threatened harm to the plaintiff weighs more heavily in the balance than the actual

injury to the defendant"; and (4) "public policy favors the injunction." *Burton v. Celentano*, 134 Ariz. 594, 595, 658 P.2d 247, 248 (App. 1982); accord *Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 164 Ariz. 54, 58, 790 P.2d 752,756 (App. 1989). Each of these elements exists in this case and justifies issuance of the request for preliminary injunction.

1. PLAINTIFF WILL PREVAIL ON THE MERITS

The Commission's jurisdiction is limited by A.R.S. Title 16, Chapter 6, Article 2, which is delineated in the Act at A.R.S. §§ 16-940 to 16-961. In fact, A.R.S. §§ 16-956(A)(7) and 16-957(A), each explicitly limit the reach of the Commission to enforcing "this article" (Title 16, Chapter 6, Article 2). Such an explicit limitation requires the Commission to exercise jurisdiction only over the statutes in the Act and not over (1) non-candidates, (2) independent expenditures, or (3) protected speech that constitutes issue advocacy.

A. The Commission Lacks the Jurisdiction It Purports to Assert Over Plaintiff As A Non-Candidate

The penalty provisions of Article 2 of the act make clear that the Commission's jurisdiction extends only to expenditures "by or on behalf of any candidate." A.R.S. § 16-942(B). Because Plaintiff is not a candidate, and the Commission dismissed allegations that Plaintiff's speech was made in coordination with a candidate, the Commission has no jurisdiction over Plaintiff's speech.

The Commission may not assess a penalty against Plaintiff because it has failed to identify the candidate the advertisement was "by or on behalf of" and the "candidate or candidate's campaign account" that shall be "jointly and severally liable" for any civil penalty assessment. A.R.S. § 16-942(B). To assess a penalty solely against Plaintiff is inharmonious with the Act's clear and specific language and exceeds the Commission's jurisdiction.

To the extent that the Act grants the Commission enforcement authority, such grant is expressly limited in §§ 16-956 and 16-957 to "any provision of this article" and

does not reach to allegations involving nonparticipating candidates or entities that are not candidates. The Commission is not allowed to manufacture its own jurisdiction, it must adhere to the specific statute that defines its enforcement authority. That grant, as noted above, is found in § 16-942(B). Courts have held that when a specific statute coincides with a general statute, the specific statute must be the controlling statute. *See, e.g.*, *Clouse v. State*, 199 Ariz. 196, 199, 16 P.3d 757, 760 (2001) ("It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.").

The Commission relied on A.R.S. §16-957 as well as A.A.C. R2-20-109(F)(3) as its basis for asserting jurisdiction over, and imposing a civil penalty against, Plaintiff for delinquent independent expenditure reports. Both the statute and the regulation point to A.R.S. § 16-942(B) as the sole means of assessing civil penalties. The Commission, however, lacked the jurisdiction to exact a civil penalty under A.R.S. § 16-942(B) (or any other statute for that matter) because the statute's enforcement provisions are clear in that they apply only to "candidates" or organizations making expenditures "on behalf of any candidate." A plain language reading of the statutory section below clearly illustrates this jurisdictional limitation,

> In addition to any other penalties imposed by law, the civil penalty for a violation *by or on behalf of any candidate* of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. *The candidate and the candidate's campaign account shall be jointly and severally responsible* for any penalty imposed pursuant to this subsection.

A.R.S. § 16-942(B) (emphasis added).

The principles of statutory construction are grounded in the goal of giving effect to

the Legislature's intent, or in the case of the Act, the people's intent. *People's Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, 403 (at ¶7), 46 P.3d 412, 414 (2012). It is only when the language of a statute is ambiguous that principles of statutory construction are applied. *Aros v. Beneficial Ariz., Inc.,* 194 Ariz. 62, 66, 977 P.2d 784, 788 (1999). If a statute is unambiguous, the statute is applied without applying such principles. *Id.*; *see also In the Matter of: Joel Fox dba SCA*, 2009 AZ Admin. Hearings LEXIS 1307, 25-27 (at P32-P34) (holding "The County's position is not consistent with principles of statutory construction" when it interpreted statutory language to be inapplicable in contradiction to legislative intent).

A.R.S. § 16-942(B) is not ambiguous and, therefore, can only be used to sanction a candidate or an organization working "on behalf of" a candidate. Because Plaintiff is certainly not a candidate and was not working "on behalf of" any candidate, the Commission exceeded its jurisdiction in seeking to penalize Plaintiff, an entity not subject to A.R.S. § 16-942(B).

Even if the language were to be deemed ambiguous, application of principles of statutory construction suggest that the statutory language of "candidate" and "on behalf of any candidate" have a meaning and purpose. To allow the Commission to distort the language of its own jurisdictional statute in an effort to expand its regulatory reach over a reporting requirement rendered unenforceable by the U.S. Supreme Court would enable the Commission to assert jurisdiction without authority of statutory language. *See Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P. 2d 1222, 1223, (1991) ("we follow fundamental principles of statuary construction, the cornerstone of which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction."). To further reinforce the Plaintiff's view, the ALJ in the underlying administrative matter concluded that,

> "[u]nder the [Commission's] interpretation, the statute's sentence regarding joint and several responsibility would

> have no effect and would be given no meaning when assessing penalties for violations accruing under [the Commission's regulation] and, in other cases, it would require adding a limitation to the statute that was not included by the voters."

ALJ Ruling 54 at ¶ 20.

The Commission cannot simply conjure a contrary meaning for clear statutory language to make an inapplicable statute magically applicable to organizations having no relation to candidates. The Commission's "interpretation is contrary to the principles of statutory construction and the Order does not meet the requirements of ARIZ. REV. STAT. section 16-042(B)." ALJ Ruling 54 at ¶ 21 (citing *Guzman v. Guzman*, 175 Ariz. 183, 187, 854 P.2d 1169, 1173 (App. 1993); and *Darrah v. McClennen*, 689 Ariz. Adv. Rep. 12, 337 P.3d 550 (App. 2014)).

The absence of any clearly applicable penalty provision also supports Plaintiff's argument, outlined *supra*, that the Commission lacks jurisdiction over this matter.

B. The Commission Lacks The Jurisdiction It Purports To Assert Over Independent Expenditures As A Subject Matter

The underlying Administrative Complaint submitted to the Commission references violations of A.R.S. §§ 16-901, 16-905, and 16-914.02, statutes which clearly reside in Title 16, Chapter 6, Article 1 and fall outside the Commission's jurisdiction.

The Commission does not have jurisdiction to enforce Article 1 of Title 16, Chapter 6. Article 1 includes reporting requirements for independent expenditures that pre-dated the adoption of the Commission. *See, e.g.*, A.R.S. § 16-915(F) (1997) (showing that independent expenditures were reported to the Secretary of State at least as early as 1993). As clearly provided in A.R.S. § 16-924, the provisions in §16-914.02 are subject to interpretation and enforcement by the Arizona Secretary of State (an office and agency independent from the Commission) and by the Arizona Attorney General. When the voters enacted the Act by initiative four years after the enactment of independent expenditure enforcement provisions under the authority of the Secretary of State, they did not make any mention of altering, amending, modifying or supplanting the enforcement

regime already in place. "Because administrative agencies derive their powers from their enabling legislation, their authority cannot exceed that granted by the legislature" (or, in the case of the Act, the people who voted for the law). *Pima County v. Pima County Law Enforcement Merit System Council*, 211 Ariz. 224, 227, 119 P. 3d 1027, 1030, (2005).

The independent expenditure reporting provisions found in A.R.S. Title 16, Chapter 6, Article 2 provide that expenditure filings are made with the Secretary of State and the Secretary is charged with supplying that information to the Commission. These provisions were implemented to provide the Commission a means to track independent expenditure spending so that it would be able to subsidize participating candidates for such expenditures.[2] *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-29 (2011). In 2011, the U.S. Supreme Court struck down as unconstitutional the Act's provision establishing the basis for expenditure reporting to the Commission. *See Bennett*, 131 S. Ct. at 2828-29 (ruling the Clean Elections Act's independent expenditure matching funds provision unconstitutional). In effect, the Supreme Court's ruling abolished the purpose for which the Act imposed the requirement that the Secretary of State provide independent expenditure information to the Commission. *See McComish v. Brewer*, 2010 U.S. Dist. LEXIS 4931 (D. Ariz. Jan. 20, 2010) (describing the operation of the Act, "The participating candidate will also receive matching contributions if there are independent expenditures against the participating candidate or in favor of the non-participating opponent.") (internal quotations omitted). *See also McComish v. Bennett*, 611 F. 3d 510, 516 (9th Cir. 2010) ("If the participating candidate has a nonparticipating opponent . . . whose expenditures combined with the *value of independent expenditures* . . . exceed the amount of her or his initial grant, the

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[2] The Act provided for subsidies to candidates choosing to opt-in to the statute's public financing provisions. As originally adopted, but later declared unconstitutional, such candidates were given subsidies from the state for independent expenditures employed against such candidates. To track these expenditures, the Act provided a registration and reporting mechanism (in addition to the one already existing under Title 16, Chapter 6, Article 1) for the Commission. Because such purpose is no longer constitutional, such a duplicative registration and reporting requirement exceeds Commission's statutory authority.

participating candidate will receive matching funds . . . .") (emphasis added) (internal quotations omitted). As recognized by these courts, the sole reason why the Act provided that the Secretary of State share information about independent expenditures to the Commission was to track the amount of independent expenditure money spent so that participating candidates could be subsidized in accordance with the Act's provisions.

As a result, after *Bennett,* the Commission is without a legal foothold to assert jurisdiction over the independent expenditure reporting requirements. *Bennett*, 131 S. Ct. at 2828-29 ("the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority.").

Article 1 of Title 16, Chapter 6 includes a detailed statutory definition of independent expenditures, which only the Secretary of State is tasked with enforcing. "The Secretary enforces an extensive scheme for campaign finance reporting requirements, in coordination with the Attorney General, County Attorney, or City Attorney, depending on the geographical reach of the candidate at issue." Arizona Secretary of State Michele Reagan's Motion to Intervene, Exhibit A, Opening Brief of Arizona Secretary of State Michele Reagan, at p. 3 (Case No. LC2015-000172-001) (citing A.R.S. § 16-924). As a result, the Secretary of State "is charged with enforcing an interlocking web of statutes under Article 1 that impose an exhaustive regulatory structure over independent expenditures and the groups or individuals who make them." *Id.* at p. 4.

Because independent expenditures already are subject to registration and reporting requirements in Article 1, which are enforced by the Arizona Secretary of State, Article 2's requirements (to the extent they are independent at all from Article 1) are duplicative and any attempt to make such requirements enforceable by the Commission, through rulemaking or otherwise, impermissibly deviates from the statute's original intent and purpose, and is the result of an agency improperly seeking to expand its jurisdiction.[3]

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[3] As evidence of the Commission's attempt to provide itself broader authority, the Commission, in the summer and fall of 2013, and just months before Plaintiff engaged in the challenged speech, implemented new regulations giving

"Because administrative agencies derive their powers from their enabling legislation, their authority cannot exceed that granted by the legislature" (or, in the case of the Clean Elections Act, the people who voted for the law). *Pima County v. Pima County Law Enforcement Merit System Council*, 211 Ariz. 224, 227, 119 P. 3d 1027, 1030, (2005).

It simply cannot be the case that the citizens of Arizona intended for two different governmental agencies each to possess equal ability to reasonably interpret and enforce the same exact law, thereby creating the possibility of inconsistent outcomes in the context of potential civil violations.

Plaintiff is the unfortunate recipient of just such inconsistent determinations. While the Commission used the Administrative Complaint as justification to impose penalties against Plaintiff, the Secretary, analyzing the same facts, found no violation.

The underlying Complaint also alleges that Plaintiff's actions violated provisions of the Act, namely A.R.S. §§ 16-941(B), (C)(2), (D), and 16-958(A), (B). The Commission cannot establish authority to draw Plaintiff under its jurisdiction through A.R.S. § 16-941(B) since the statute defers enforcement to A.R.S. §§ 16-905 (J)-(M), § 16-924. *See* A.R.S. § 16-941(B) ("[a]ny violation of this subsection [reducing non-participating contribution limits by 20%] ***shall be subject to the penalties and procedures set forth in section 16-905, subsections J through M and section 16-924.***" (Emphasis added.)). The Commission has no enforcement authority under A.R.S. § 16-941(C)(2) because the statute's provision is a general proscription provision and does not confer a substantive grant of authority. *See* A.R.S. § 16-941(C)(2) (a nonparticipating candidate "[s]hall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article.").

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the Commission authority beyond that which is contained in the text of the Act. *See* Ariz. Admin Reg./Secretary of State. Vol. 19 Issue 45 (Nov. 8, 2013). This 2013 regulation is the first time in the history of the Commission that it attempted to issue a regulation purporting to grant itself jurisdiction over entities other than candidates, and this set of regulations exceed the Commission's statutory authority.

C. The Commission Lacks The Jurisdiction It Purports To Assert Over Speech That Constitutes Issue Advocacy.

Where speech does not qualify as the functional equivalent of express advocacy, neither the Commission nor any other state actor may assert jurisdiction that chills the First Amendment right to free speech through regulations in the style of registration and reporting requirements. This Court must, therefore, determine whether the Arizona Advertisement is the functional equivalent of express advocacy by applying an objective test to determine whether any state actor has jurisdiction over such speech in the first instance.

The U.S. Supreme Court has held that only express advocacy or its functional equivalent is subject to regulation through campaign finance laws. *See FEC v. Wis. Right to Life, Inc.* ("*WRTL*"), 551 US 449, 456-57 (2007); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). In *Buckley*, the Supreme Court emphasized the unique nature of "explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43 (finding the following words constituted express advocacy: "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, reject").

Buckley's "magic words" test had been upheld in courts throughout the country until recently when the Ninth Circuit expanded the definition to include not only communications containing magic words, but also communications when read in total, and with limited reference to external events, are susceptible of "[n]o other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). A later Ninth Circuit opinion clarified and narrowed *Furgatch* by noting when interpreting express advocacy, the Ninth Circuit presumes express advocacy "must contain some explicit words of advocacy." *California Pro-Life Counsel v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003); *Furgatch*, 807 F.2d. at 864 ("context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words"). While express advocacy may not be limited to "circumstances where an advertisement only uses so-called magic words . . . ," Supreme

Court precedent explicitly confines the contours of express advocacy to protect the speaker's legitimate right to engage in issue advocacy speech. *Getman* and *Furgatch* demonstrate that the most expansive definition of express advocacy requires that speech only qualifies as express advocacy if it "[p]resents a clear plea for action, and thus speech that is merely informative is not covered by the Act." *Furgatch*, 807 F.2d. at 864.

Such an analysis has been followed by this Court as recently as 2014 in *Comm. For Justice & Fairness v. Ariz. Sec. of State* ("*CJF*"), 235 Ariz. 347 (2014). In *CJF*, this Court recognized the plain text definition of "express advocacy" in determining that an advertisement, run by CJF casting a candidate for Arizona Attorney General in an unfavorable light mere days before an election constituted "express advocacy." The Court indicated that, to be express advocacy, an advertisement must either (a) utilize magic words such as "elect," "vote for," "re-elect," "cast your ballot for," or other electioneering communications, or (b) make a general public communication referring to one or more clearly identified candidate(s), "that in context *can have no reasonable meaning other than to advocate for the election or defeat of the candidates*." *CJF*, 235 Ariz. at 353-54.

The U.S. Supreme Court held in *WRTL* (and this Court followed in *CJF*), that speech is only express advocacy if there is no other reasonable interpretation of the speech at issue other than to vote for or against a candidate. In this case, both the Secretary of State and the Administrative Law Judge correctly concluded that the Arizona Advertisement is not express advocacy. As a result, there clearly exists a reasonable interpretation of the Arizona Advertisement other than what the Commission asserts, and the Commission, therefore, has no jurisdiction over this speech. The Commission's judgment in this matter simply exceeds its jurisdiction.

Under the Commission's apparent views, there can be no such thing as a genuine issue advertisement when that ad mentions an individual who happens to be a candidate for public office at any time before an election—even five months before an election (compared to the mere days in *CJF*)—even in cases where that candidate maintains a

public position and the ad articulates a clear policy statement. Chief Justice Roberts dismissed such an attempt outright in saying,

> [t]his "heads I win," "tails you lose" approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads, contrary to our conclusion in WRTL I that as-applied challenges to § 203 are available, and our assumption in McConnell that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."

WRTL, 551 U.S. at 471 (citing *McConnell v. FEC,* 540 U.S. 93 at 206 (2003)). As a result, it is undoubted that Plaintiff's advertisement does not constitute the functional equivalent of express advocacy over which any state actor may assert jurisdiction under the First Amendment.

Consequently, Plaintiff has demonstrated a substantial likelihood of prevailing on the merits on the issue of the Commission's lack of jurisdiction.

2. PLAINTIFF FACES THE RISK OF IRREPARABLE HARM

As other Arizona courts have held, "the court can dispose of the irreparable injury inquiry quite easily. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Krestan v. Deer Valley Unified School District No. 97,* 516 F. Supp. 1078, 1084 (D. Ariz. 2008) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). The Ninth Circuit has stated, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to grant relief by demonstrating the existence of a colorable First Amendment claim." *Sammartano v. First Judicial Dist. Ct.,* 303 F.3d. 959, 973 (9th Cir. 2002).

It is a severe burden on First Amendment rights afforded to issue advocacy speakers in Arizona to have to expend money and resources fighting legal challenges before two separate agencies that may, as they have in this case, render two very different interpretations of the very same statutory provision. These complicated procedures most certainly chill speech by making any attempt to exert one's First Amendment right to air an issue advertisement prohibitively unpredictable and potentially costly, a result the U.S. Supreme Court explicitly cautions against. "The First Amendment does not permit laws

that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010).

Plaintiff could determine that the consequences of continuing to speak are simply too unclear, potentially harmful and irreversible, and not air any further communications in Arizona. Self-censorship "[i]s a harm that can be realized even without actual prosecution." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.")

The deprivation of a plaintiff's First Amendment rights constitutes *per se* irreparable injury. *Krestan*, 561 F. Supp. 21 at 1084; *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Because Plaintiff is likely to succeed on the merits of its claims, irreparable harm is presumed.

3. THE BALANCE OF HARDSHIPS FAVORS THE PLAINTIFF

In *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990), the Court of Appeals held that a party seeking a preliminary injunction can meet its burden of establishing that the balance of hardships weighs in its favor by establishing "either: (1) probable success on the merits and the possibility of irreparable injury; or (2) the presence of serious question and 'the balance of hardships tips sharply' in his favor." *Id.* In this case, the facts fulfill both alternative bases. As explained above, Plaintiff has established its likelihood of success on the merits as well as the possibility of irreparable harm. Additional cause for issuance of the preliminary injunction exists here because Plaintiff stands to suffer the substantial hardship of having its Constitutional rights

compromised, and also will be required to incur the additional expenditure of resources in continuing to defend against the Defendants' efforts to impermissibly expand the Commission's jurisdictional authority. The Commission, however, will suffer no harm if temporarily enjoined until such time this Court can rule on the propriety of the underlying action. Consequently, the balance of hardships analysis also compels the issuance of a preliminary injunction.

4. PUBLIC POLICY FAVORS THE ISSUANCE OF THE REQUESTED INJUNCTION

The "public policy" requirement often carries little weight in preliminary injunction analysis. In this matter, however, even public policy favors staying further action by the Commission. The public clearly has a significant interest in seeking the protection of parties' Constitutional rights and the appropriate exercise of jurisdiction by administrative bodies. A full hearing on the merits of Plaintiff's Special Action complaint would assure that the Commission does not proceed in excess of its jurisdiction or legal authority. Public policy is bolstered when persons are not subjected to duplicitous and conflicting regulatory schemes especially where the one scheme is clearly defined, as is the Secretary of State's enforcement authority, while the other remains nebulous in an attempt to encroach upon statutory bright lines, as the Commission's assertions have repeatedly evidenced.

Thus, public policy favors issuance of the preliminary injunction/interlocutory stay pending resolution of this matter on its merits.

V. CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that this Court enter a preliminary injunction pending resolution of the issues raised in Plaintiff's Special Action Complaint on their merits.

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DATED this 24 day of April, 2018.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Legacy Foundation Action Fund, an Iowa non-profit corporation, Plaintiff, vs. Citizens Clean Elections Commission, Defendant.	No. CV2018-004532 Consolidated with CV2018-006031 **CITIZENS CLEAN ELECTIONS COMMISSION'S STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
Citizens Clean Elections Commission, Plaintiff, vs. Legacy Foundation Action Fund, an Iowa non-profit corporation, Defendant.	(Assigned to the Honorable Christopher Whitten)

The Citizens Clean Elections Commission (the "Commission") submits this separate Statement of Facts in support of its Motion for Summary Judgment.

1. On July 1, 2014, the Commission received a complaint alleging that Legacy Foundation Action Fund ("LFAF"), an Iowa corporation, violated A.R.S. §§ 16-941 and 16-958(A)-(B) by failing to file certain required independent expenditure reports (the "July 1 Complaint"). *See* July 1 Complaint, attached as **Exhibit A**.

2. After reviewing the July 1 Complaint, the Commission found reason to believe that LFAF had committed the violations alleged and on September 26, 2014, issued an Order Requiring Compliance (the "Compliance Order") requiring LFAF to comply with the Act and file the reports required by A.R.S. §§ 16-941(D) and 958 and Ariz. Admin. Code R2-20-109 within 14 days. *See* Compliance Order, attached as **Exhibit B**.

3. Because LFAF did not file the required reports within 14 days, at a subsequent public meeting held on November 20, 2014, the Commission found probable cause to believe that LFAF had violated the Act and authorized the issuance of an order assessing civil penalties. *See* Transcript of November 20, 2014 Meeting, attached as **Exhibit C**.

4. The Commission's Executive Director initially recommended that the Commission assess a penalty in the amount of $201,240. Ex. C at 16:4-8.

5. The Executive Director's penalty recommendation was calculated using the penalty amounts found in A.R.S. § 16-942(B) multiplied by the number of days that had elapsed since April 1, 2014, the date LFAF was first required to file independent expenditure reports under A.R.S. § 16-958. Ex. C at 57.

6. Jason Torchinsky, counsel for LFAF, appeared telephonically at the November 20, 2014 public meeting and made arguments as to the probable cause determination and penalty assessment. Ex. C at 24-45.

7. The Commission ultimately exercised its discretion and decided to assess the penalty against LFAF based on a shorter period of time – from August 1, 2014 through November 20, 2014. Ex. C at 58-63.

8. The Commission issued an order on November 28, 2014 (the "November 28 Order") concluding that LFAF had violated the Act and imposing a civil penalty of $95,460 in accordance with A.R.S. § 16-942. *See* November 28 Order, attached as **Exhibit D**.

9. LFAF requested an administrative hearing and one was held before an Administrative Law Judge ("ALJ"). *See* LFAF Request for Administrative Hearing, attached as **Exhibit E**.

10. On March 4, 2015, the ALJ issued a Decision sustaining LFAF's appeal and rescinding the November 28 Order. *See* ALJ Decision, attached as **Exhibit F**.

11. Pursuant to A.R.S. § 41-1092.08(B), the Commission then accepted part and rejected part of the ALJ's decision and entered a final administrative decision (the "Final Order"), concluding that LFAF's advertisement was an independent expenditure and subject to the reporting requirements in A.R.S. §§ 16-941 and 958 and affirming the civil penalty of $95,460 originally assessed in the November 28 Order. *See* Final Order, attached as **Exhibit G**.

12. LFAF filed a complaint seeking judicial review of the Final Order in superior court on April 14, 2015. *See* LFAF Notice of Appeal and Complaint, attached as **Exhibit H**.

13. The superior court dismissed LFAF's complaint, concluding that it lacked jurisdiction to consider the complaint because it was untimely filed. *See* Minute Entry Dismissing Case, attached as **Exhibit I**.

14. LFAF appealed and the dismissal was upheld by the Court of Appeals and the Arizona Supreme Court. *See Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 243 Ariz. 404 (2018).

15. On April 11, 2018, the Commission's Executive Director sent a letter to counsel for LFAF demanding payment in full of the Final Order. *See* April 11, 2018 Letter, attached as **Exhibit J**.

16. LFAF has never paid any portion of the penalty assessed in the Final Order.

17. LFAF has also never submitted the independent expenditure reports required by the Compliance Order, the Final Order, and the Act.

DATED this 1st day of April, 2019.

OSBORN MALEDON, P.A.

By /s/ Joseph N. Roth
Mary R. O'Grady
Joseph N. Roth
Nathan T. Arrowsmith
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant Citizens Clean Elections Commission

THE FOREGOING has been electronically filed this 1st day of April, 2019.

COPY of the foregoing served via AZTurboCourt this 1st day of April, 2019, to:

Brian M. Bergin
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4343 E. Camelback Rd., Suite 210
Phoenix, AZ 85018
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Jason Torchinsky
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/s/ Brenda Wendt

EXHIBIT A

Brownstein Hyatt Farber Schreck

July 1, 2014

Kory A. Langhofer
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BY E-MAIL

Arizona Secretary of State
c/o Christina Estes-Werther, Elections Director
1700 West Washington Street, 7th Floor
Phoenix, Arizona 85007
cwerther@azsos.gov

Clean Elections Commission
c/o Tom Collins, Executive Director
1616 West Adams Street, Suite 110
Phoenix, Arizona 85007
thomas.collins@azcleanelections.gov

RE: Illegal Coordination and Other Campaign Finance Violations by the Doug Ducey Campaign

Ms. Estes-Werther and Mr. Collins:

I am writing to report serious campaign finance violations by Ducey 2014 – Primary and Ducey 2014 – General (together, the "Ducey Campaign"); Copper State Research and Strategy, LLC ("Copper State"); the Legacy Foundation Action Fund (the "LFAF"); Larry McCarthy; and Gregg Pekau. There is substantial evidence showing that both McCarthy and Pekau are or very recently have been agents of both the Ducey Campaign and organizations making independent expenditures benefitting the Ducey Campaign, including Copper State and the LFAF. Additionally, the LFAF has failed to file the necessary registration and campaign finance disclosure forms and exemption application with the Arizona Secretary of State and the Clean Elections Commission. I therefore respectfully request that the Secretary of State's office refer this matter to the Arizona Solicitor General, and that the Clean Elections Commission investigate the matter.

I. Factual Background

A. Engagement of Gregg Pekau

On information and belief, in February 2013 Gregg Pekau (or a company he controls, Copper State) was hired by a nonprofit organization or a private company to conduct "opposition research" against Scott Smith, who was then the Mayor of the City of Mesa and is now a candidate for Governor of the State of Arizona. Based on the nature of the research conducted, it is apparent that Pekau's research was conducted in anticipation of running attack ads against Mr. Smith during the 2014 gubernatorial election; Pekau submitted numerous public records requests seeking information that could be used to paint Mr. Smith in a negative light with voters in a Republican primary election in Arizona. *See, e.g.*, Exhibit A. The public records requests were in some cases submitted in the name of Copper State, which is owned by Pekau's wife. *See* Exhibits A-B. Pekau's research was not funded by the Ducey Campaign. *See* Exhibit C. On information and belief, the Ducey Campaign has recently retained Pekau as the Director of Research, effectively internalizing the benefit of all the opposition research that Pekau conducted on the payroll of the nonprofit organization or private company—without paying for the research from Ducey Campaign accounts.

B. Advertisements Paid for by Legacy Foundation Action Fund

On April 4, 2014, the out-of-state LFAF purchased television, radio, internet, and mail advertisements painting Mr. Smith in a misleading and negative light.[1] Although the advertisements ostensibly urge voters to call Mr. Smith and ask him to "run [the U.S. Conference of Mayors] more like Mesa," for five reasons the advertisements in context can have no reasonable meaning other than to advocate the defeat of Mr. Smith:

1. The advertisements were targeted at the gubernatorial primary electorate (*i.e.*, through broadcast channels accessible around the state, and to IP addresses and physical mailing addresses outside the City of Mesa), and not Mr. Smith's constituents at the time of the advertisements (*i.e.*, just Mesa voters) or the constituents of the U.S. Conference of Mayors (*i.e.*, voters nationally). *See, e.g.*, Exhibit D. Although approximately 2% of the total advertising buy ($5,000 of $280,000) was spent on advertisements outside Arizona, *see id.*, the extreme disparity between advertising dollars reaching Arizona voters and out-of-state voters, plus the LFAF's decision to purchase cable television advertising space on channels watched disproportionately by Republic primary voters, and to target non-Mesa voters for broadcast, internet, and mailed advertisements, show that the LFAF advertisements were targeting the Arizona primary electorate in the gubernatorial campaign and not Mr. Smith's current constituents.

2. Although the information underlying the advertisement (*i.e.*, the U.S. Conference of Mayors's support for certain policies and its effect on the City of Mesa) has been publicly available for a long time, the advertisements only began shortly after Mr. Smith announced his gubernatorial candidacy and just as polling showed Mr. Smith significantly outperforming Doug Ducey among the Republican primary electorate. *See* Exhibit E.

3. The advertisements began just days before Mr. Smith's last day in office as Mayor of the City of Mesa (*i.e.*, April 15, 2014). *See* Exhibit F. No rational actor would spend more than $275,000 to influence the last two weeks of Mr. Smith's term as mayor, when no major issues were expected to be decided in that time. *See* Exhibit D. This demonstrates that the true purpose of the advertisements is not to influence Mr. Smith's governance of the City of Mesa.

4. The content of the advertisements tracks the content of the public records requests submitted by Pekau when he is believed to have been engaged by a nonprofit organization or private company to conduct "opposition research" against Mr. Smith as a potential gubernatorial candidate. *See* Exhibit A.

5. The LFAF, which is sponsoring the advertisements, has been reported to have very close ties to the Ducey Campaign. *See* Exhibit G; *infra* Section I(C)-(D).

In this context, the advertisements can have no reasonable meaning other than to advocate the defeat of Mr. Smith and, therefore, constitute express advocacy under Arizona law. *See* Ariz. Rev. Stat. § 16-901.01.

C. Engagement of Larry McCarthy

Larry McCarthy, a negative advertising consultant for Republican candidates, is working for both the Ducey Campaign and the LFAF. *See* Exhibits H-J.

[1] The television advertisement can be accessed at http://www.youtube.com/watch?v=NycZZLOA_OQ.

D. Engagement of Direct Response Group

Direct Response Group, a political consulting firm serving primary Republican candidates, is working for or has recently worked for both the Ducey Campaign and the LFAF. *See* Exhibits C, G.

II. Legal Violations

The facts as set forth above give rise to very serious violations of Arizona campaign finance laws.

A. Failure to Register as an Independent Expenditure Committee

Arizona law requires any corporation spending more than $5,000 on express advocacy in a statewide election to register with the Arizona Secretary of State, apply to the Clean Elections Commission for a registration exemption, and to file campaign finance reports within 24 hours after each expenditure. *See* Ariz. Rev. Stat. §§ 16-914.02, -941(D), -958(A)-(B). The LFAF is a corporation, *see* Exhibit K, and because its advertisements constitute express advocacy, *see* Ariz. Rev. Stat. § 16-901.01; *supra* Section I(B), it was subject to the registration, application, and reporting requirements of Sections 16-914.02, -941(D), and 958(A)-(B). Its failure to do so constitutes a violation of Arizona law.

This is not the first time that the LFAF has failed to comply with campaign finance reporting requirements. The LFAF failed to timely file a year-end campaign finance report with the Federal Election Commission for 2013. *See* Exhibit L.

B. Illegal Coordination by the Ducey Campaign

Arizona law provides that an expenditure is not an "independent expenditure," and is instead a campaign contribution, if there is any "cooperation or consultation [by the party paying for the expenditure] with any candidate or committee or agent of the candidate" benefitting from the expenditure. *See* Ariz. Rev. Stat. § 16-901(14). Such cooperation or consultation arises, without limitation, whenever "[i]n the same election the person making the expenditure, including any officer, director, employee or agent of that person, is or has been: (i) Authorized to raise or expend monies on behalf of the candidate or the candidate's authorized committees[; or] (ii) Receiving any form of compensation or reimbursement from the candidate, the candidate's committees or the candidate's agent." *Id.* § 16-901(14)(c).

In this case, coordination between the Ducey Campaign and third parties is evidenced by:

1. the engagement of Pekau by both the Ducey Campaign and the nonprofit organization or private company that funded Pekau's opposition research,

2. the engagement of McCarthy by both the Ducey Campaign and the LFAF, and

3. the engagement of Direct Response Group by both the Ducey Campaign and, at least recently, the LFAF.

Because these facts establish coordination between the Ducey Campaign and third parties, all the third parties' expenditures constitute contributions to the Ducey Campaign. *See id.* § 16-901(5), (14). Such contributions appear to violate the following provisions:

1. the ban on contributions in excess of $2,000 per election, *see id.* §§ 16-905, -941(B);

2. the ban on contributions from corporations, *see id.* §§ 16-919(A), -941(C)(2); and

3. the requirement that all contributions be timely reported in campaign finance reports, *see id.* §§ 16-913(C), -915(A)(4), and -941(C)(2).

III. Conflict of Interests at Maricopa County Elections

I am aware that the Arizona Secretary of State's Office previously referred a campaign finance complaint against the Ducey Campaign to Maricopa County Elections for processing. If the Arizona Secretary of State's Office wishes to refer this complaint to a third party, a referral to Maricopa County Elections would not be appropriate. It is my understanding that, in reviewing campaign finance matters, Maricopa County Elections relies on legal advice provided by the Maricopa County Attorney's Office. Because the Maricopa County Attorney has publicly endorsed and continues to publicly support the Ducey Campaign, *see* Exhibit N, Maricopa County Elections would not be an impartial arbiter of the issues raised in this complaint. In fact, the ethical rules governing attorneys in Arizona likely prevent the Maricopa County Attorney's Office from providing legal advice to Maricopa County Elections in this context. *See* Ariz. Ethical R. 1.7(a)(2). I therefore respectfully request that, if the Arizona Secretary of State's Office must refer this matter to a third party for review, the matter be referred to an elections office that would not be impeded by a legal advisor with a conflict of interests.

IV. Conclusion

In sum, there is reasonable cause to believe the Ducey Campaign has coordinated with outside organizations including Copper State and the LFAF in connection with the 2014 gubernatorial election, and that the LFAF has failed to register and file campaign finance reports as required by Arizona law. Thus, referral of this matter to the Arizona Solicitor General's office, and investigation and enforcement by the Clean Elections Commission, are required pursuant to Sections 16-924(A), -941(B), and -941(C)(2) of the Arizona Revised Statutes.

If I can provide any additional information regarding this matter, please do not hesitate to contact me.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Respectfully,

Kory A. Langhofer
305 West Lynwood Street
Phoenix, Arizona 85003

Subscribed and sworn to before me on July 1, 2014 by Kory A. Langhofer.

Janice E. Pond
Notary Public

11-19-2014
My commission expires

OFFICIAL SEAL
JANICE E. POND
Notary Public - State of Arizona
MARICOPA COUNTY
My Comm. Expires Nov. 19, 2014

EXHIBIT B

State of Arizona
Citizens Clean Elections Commission
1616 W. Adams - Suite 110 - Phoenix, Arizona 85007 - Tel (602) 364-3477 - Fax (602) 364-3487 - www.azcleanelections.gov

ORDER REQUIRING COMPLIANCE
A.R.S. § 16-957 & A.A.C. R2-20-208(A)

VIA FEDERAL EXPRESS

September 26, 2014

Legacy Foundation Action Fund
C/O Jason Torchinsky
Holtzman Vogel Josefiak PLLC
1010 Wisconsin Ave, NW
Suite 530
Washington, DC 20007

RE: CCEC File No.: #14-007 – Legacy Foundation Action Fund

Dear Mr. Torchinsky:

On September 11, 2014, the Citizens Clean Elections Commission ("Commission") found **reason to believe** that the Legacy Foundation Action Fund (LFAF) violated the Citizens Clean Elections Act and Rules.

Violation & Factual Basis Supporting The Finding

Failure to Report Independent Expenditures
Section 16-941(D) of the Arizona Revised Statutes and Arizona Administrative Code Section R2-20-109 provide that all persons shall file reports of independent expenditures above a threshold set forth in the Act. The Commission has reason to believe that between March 31 and April 14, 2014 LFAF made independent expenditures of at least $260,000 that expressly advocated the defeat of Candidate Scott Smith in the Republican gubernatorial primary. A.R.S. §§ 16-941(D); -958; -901.01; 961(A). It filed no reports of any kind of the expenditure.
The advertisement is available here: http://www.youtube.com/watch?v=NycZZLOA_OQ.

14 Day Period to Comply

You are hereby ordered to comply with A.R.S. §§ 16-941(D); -958 and A.A.C. R2-20-109 within **14 days** of the date of this order. During that period, you may provide any explanation to the Commission, comply with the order, or enter into a public administrative settlement with the Commission. A.R.S. § 16-957(A) and A.A.C. R2-20-208(A).

After the 14 days, if the Commission finds that you remain out of compliance, the Commission shall make a public finding to that effect and issue an order assessing a civil penalty, unless the Commission publishes findings of fact and conclusions of law expressing good cause for reducing or excusing the penalty. A.R.S. § 16-957(B).

If you have any questions, please call (602) 364-3477 or toll free (877) 631-8891.

Issued this 26th day of September, 2014
Citizens Clean Elections Commission

EXHIBIT C

THE STATE OF ARIZONA

CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona

November 20, 2014

9:37 a.m.

Reported By:

Angela Furniss Miller, RPR
Certified Reporter (AZ 50127)

Miller Certified Reporting, LLC

A PUBLIC MEETING, BEFORE THE CITIZENS CLEAN ELECTIONS COMMISSION, convened at 9:37 a.m. on November 20, 2014, at the State of Arizona, Clean Elections Commission, 1616 W. Adams, Conference Room, Phoenix, Arizona, in the presence of the following Board members:

Mr. Timothy Reckart, Chairperson
Mr. Louis Hoffman
Mr. Thomas J. Koester
Mr. Mitchell C. Laird

OTHERS PRESENT:

Thomas M. Collins, Executive Director
Paula Thomas, Executive Assistant
Sara Larsen, Financial Affairs Officer
Gina Roberts, Voter Education Manager
Steve Clawson, Moses Anshell
Joseph Kanefield, Ballard Spahr, LLP
Saman Golestan, Torres Law Group
Julia Shamway, The Arizona Republic
Jason Torchinsky, Legacy Foundation Action Fund (Telephonic)
Brian Bergin, Legacy Foundation Action Fund
Paul Rubin, Self
Jeremy Duda, Capitol Times
Michael Becker, Governor's Office
Mary O'Grady, Osborn Maledon

P R O C E E D I N G

CHAIRPERSON RECKART: All righty. The November 20th meeting -- public meeting of the Arizona Citizens Clean Elections Commission is called to order.

The Commission may vote to go into executive session, which will not be open to the public, for purposes of obtaining legal advice on any item listed on the agenda. This is pursuant to A.R.S. Section 38-431.03(A)(3). And we also reserve the right to address agenda matters in a different order than that outlined in the agenda that was circulated to the public.

Possible action on any matter under review identified in this agenda may include authorizing or entering into a conciliation agreement, in addition to any other actions such as: Finding reason to believe a violation has occurred, finding probable cause to believe a violation has occurred, applying penalties, ordering repayment of monies to the Clean Elections fund, or terminating the proceeding.

All right. With that, I'll invite the Commission to direct its attention to the minutes, which Angela did quite a job of transcribing a small book. It was interesting reading. Are there any comments with regard to the minutes?

COMMISSIONER KOESTER: Mr. Chairman.

CHAIRPERSON RECKART: Yes, sir.

COMMISSIONER KOESTER: I just have one word correction. It's on page 124 and it starts off by saying, which I said: "I think there has been, I'll say an" -- the word I used was "allegation," spelled A-L-L-E-G-A-T-I-O-N.

CHAIRPERSON RECKART: Okay.

COMMISSIONER KOESTER: I think it came across as "allocation."

CHAIRPERSON RECKART: Okay.

COMMISSIONER KOESTER: Small matter.

CHAIRPERSON RECKART: All righty. With that correction, I'll take a motion to approve the minutes.

COMMISSIONER KOESTER: I move to approve.

CHAIRPERSON RECKART: All right. So moved. Is there a second?

COMMISSIONER LAIRD: Second.

CHAIRPERSON RECKART: All right. Seconded. Thank you, Commissioners. All in favor, please indicate by saying "aye."

(Chorus of ayes.)

CHAIRPERSON RECKART: Any opposed? None. It passes unanimously.

I note for the record also that Commissioner Titla is not here. Is he going to participate by phone?

MS. THOMAS: He doesn't think so.

CHAIRPERSON RECKART: He doesn't. Okay. That's fine.

I also note that Mr. Torchinsky, who is counsel for the LFAF, will -- is participating by phone, and I think he's there presently. So, when we get to that matter, we'll -- we'll invite you to participate, Mr. Torchinsky.

MR. TORCHINSKY: Thank you.

CHAIRPERSON RECKART: You're welcome, sir.

The next item on the agenda is the Executive Director's report. Mr. Collins, please.

MR. COLLINS: Yes. Mr. Chairman, Commissioners, just to -- briefly, the -- you'll see the announcements there. We highlight there, you know, that the -- the -- the -- the voter turnout from -- from November, which was 47 point -- 47 percent of voters, 48 percent of voters, which is -- which is off from 2012, obviously the presidential year in 2010. We will be taking that into account, and then other data we -- we're able to gather, as well as our -- looking at what we did this year in terms of putting together a public voter education plan for -- for 2015, which Gina is already working on.

You see the final candidate information for this -- this year is there; both public financing, debate participation, and other participation that is available for Clean Elections.

COMMISSIONER HOFFMAN: Tom, can you speak up?

MR. COLLINS: Sure. All the -- all the various ways in which candidates participated in Clean Elections this -- this year.

Where we are with the enforcement.

There's some legal stuff. The miscellaneous, the Supreme Court matter, the petition for special action, that does relate to a later agenda item, you know, so that may not -- assuming that agenda item is fulfilled, that won't actually happen, the December 2nd consideration of that special action petition.

CHAIRPERSON RECKART: So, if we -- if we approve the conciliation report and it gets signed --

MR. COLLINS: Correct. Correct.

CHAIRPERSON RECKART: -- that will -- okay. Thank you.

MR. COLLINS: But we can talk about that when we get to that agenda item.

That's really it. I don't -- unless you have questions about these items, they're -- I guess they're pretty self-explanatory.

CHAIRPERSON RECKART: I -- I have a couple but I'll -- I'll invite the other Commissioners. Any?

With regard to -- let me back up. I seem to recall that we had some effort to enhance voting machines and that kind of thing in various counties around the State. Is that --

MR. COLLINS: Sure.

CHAIRPERSON RECKART: Okay. Being from Tucson, we had considerable delay in certain things because of issues at Cochise County and in --

MR. COLLINS: Sure.

CHAIRPERSON RECKART: -- with the CD2 race, which is still, I guess, in the process of being recounted.

MR. COLLINS: Apparently, yeah. So, you know, we've done two things this -- in terms of voter education this year and then we have some legislation we worked on for last -- last session. The -- what we did with respect to our voter education effort in coordination with the County is to try to talk to folks about the need to get their early ballot back quickly. Because what happens if you vote in early ballot but you don't deliver it to the County until election day, then they've got to tear that open, check the signature, essentially, and it -- and it becomes a backlog.

So, for example, when the results are first

announced on a given night, right, there's an immediate analysis, says all -- all these votes have already been tabulated, those are actually, as I understand it, early votes that were already counted because they got back in a timely manner; and then you get the voting machine that day totals; and then finally you get the -- you get the -- the last totals.

So, there's a -- there's some -- and then on the equipment front, and -- and just generally, we've talked about trying to have some legislation passed to give us some flexibility to assist the counties with technical efforts that they may want to undertake in terms of making the process more efficient. So, that's something next month we're talking about more in terms of legislation, but -- but -- so, we -- we do see those as sort of trying to work hand-in-glove.

Trying to get the public to understand that, you know. They -- if they -- we're going -- if we're going to have early voting set up the way it is, if they want to also have the results on the day of the -- on election day, they've got to help the counties out by getting those -- getting those ballots back.

On the other hand, to the extent that there are technical or equipment issues out there, you know, that we -- we have sought some legislative flexibility that

could -- that could try to address that.

I'm not -- Gina actually is. And I don't know if we can get into it, but Gina actually is more of an expert on all of the things related to the technicalities of how elections actually run than I am; and actually knows, like, more about Cochise County than probably anybody in terms of -- because she actually ran the -- helps run the Secretary of State's election night reporting system. So, Gina is an expert in this. We can -- I don't know if we can within this context get into that level of detail, but we certainly can get you more information.

CHAIRPERSON RECKART: Yeah. I think, you know, for a future meeting, let's talk about that just because it seems to have been a reoccurring problem, especially with Cochise. I don't know about the other counties, just the CD2 was such a tight race that it was drawing everyone's attention because of the difficulties they were having.

The other thing was is, as I recall, national turnout was around 36 percent. So, actually I thought -- I thought we did pretty well, if that's correct. So, that's -- I don't know, we're doing something a little bit better than the rest. Makes me wonder how bad some other states might be in terms of turnout.

But anyway, just -- no response needed. Thank

you.

All righty. Next agenda item is discussion and possible action on MUR 14-006 and 14-015, Tom Horne and Campaign Committee. We'll take that together with the Tom Horne 2014 Reasonable Cause Notice and Related Enforcement Proceeding, including a possible conciliation that -- that I think the Executive Director may have reached with Tom Horne.

And then, lastly, to the extent it is relevant, we can discuss the case now, I think Horne versus the Commission and Horne versus Bergin cases now pending before the Courts.

Mr. Collins, I'll ask you to introduce it, please.

MR. COLLINS: Sure. Mr. Chairman, Commissioners, thanks.

I want to make a couple prefatory remarks. There's -- it doesn't appear that anybody representing Mr. Horne or Mr. Horne is here. You know, we have -- and Mr. Kanefield is here if we have legal questions, and if you, you know -- and I'm sure if he feels the need, he'll jump up and tell us we need to go into executive session.

But, I just want to, you know, we have Mr. Horne's word through his attorney that he'll sign this conciliation agreement. It has three principles in it

that I think are important: It acknowledges expressly that State employees cannot campaign on State time; it -- it pays a $10,000 fine, which to put in some perspective is the maximum fine that would be allowed under our rules for a rule violation, so it does have a metric associated with it. It's ten times the amount of the fine that the Corporation Commission candidates paid in our last -- our last MUR that we conciliated. It also ensures a public accounting because the investigation for enforcement that's been undertaken by the Gilbert Town Attorney and Judge -- former Judge Dan Barker is underway. And although, you know, that has yet to proceed to a final conclusion, when that is finally concluded, you know, with -- along with the procedures associated with it, Mr. Horne is -- is bound to follow any public accounting of in terms of campaign finance reports that are -- that are necessary to -- deemed necessary. So, the public's interest is secured there.

I also want to tell you, this doesn't have any effect on any future criminal or civil investigation. And I want to put this in perspective a little bit if I could, because we've had -- there's been some public discussion, I don't know if anyone would ultimately want to make public comment but, you know.

You know, I would concede that the word "guilt"

is not in this document. Mr. Horne has argued in Court that this process and this Agency are not legitimate; and as an attorney for this Agency, he has had or his spokesman has in our own Court -- I don't know which -- as a State employee, attacked this process and the Commission itself.

This agreement acknowledges the Commission's legitimacy; it acknowledges the Clean Elections Act; it an acknowledges that it applies. It results in him not appealing the judgment of Judge Bergin that makes clear -- if there was any doubt, which I, of course, believe there is none -- that the Commission has the authority to enforce Clean Elections Act against candidates, whether they participate in public financing or they do not.

It also results in the withdrawal of his special action at the Supreme Court.

So, I think you take those commitments in addition to the acknowledgments that are here; in addition to the fine; and in addition to the securing of the parameter of the future accounting, if the Gilbert County Attorney and Judge Barker come to the conclusion there is further accounting to be made; and the public's interest is secured; the Commission's interest in ensuring the Clean Elections Act is enforced and recognized; and that State employees cannot campaign on State time are all

acknowledged here.

So, the agreement speaks for itself. And I would say that anything else you would hear today is spin. And I think we will -- undoubtedly, that is the way that these things play out. That's -- that's the nature of practicing and working in this arena. But, that's the agreement that's been secured and that's why I recommend it to you.

So, I -- if you have any questions about it, I am, obviously, more than happy to answer them. And -- and Joe is here if there are any legal questions that -- or other legal advice that you might seek. But that's -- those are my comments.

CHAIRPERSON RECKART: Okay. Thank you. Well stated.

I invite the Commissioners to ask Mr. Collins any questions in regard to the proposed conciliation.

MR. COLLINS: I can also tell you -- if you're interested, I can tell you, I did hear from the Complainant's attorney and he believes that the conciliation is appropriate, for what it's worth.

CHAIRPERSON RECKART: Okay. Well, that's good.

There being no discussion, does anybody feel the need to talk with Mr. Kanefield in executive session?

All righty. Well, you're off the hook, sir.

With that, is there any more discussion with regard to this -- this matter?

I -- I'll say this, is that I studied it, I talked to Mr. Collins about it, I've taken a look at the, you know, both the role of this -- of this Commission and the -- you know, the issues that have been raised in the course of debating, resolving, fighting over the allegations in this thing, and I think -- I endorse what the Executive Director says with regard to the effectiveness. I think it does give me comfort that the -- in some regards to know that an actual fine has been -- under our rules has been assessed and that there is no preclusion of other proceedings going forward; and, therefore, in some respects -- proceedings before a competent authority, I might add. So, I -- I have comfort with -- with going ahead with that.

So, that being said, I'll entertain a motion with regard to the Commission's entering into the conciliation agreement. I think that's -- that's really what we want here.

MR. COLLINS: Well, I think, yeah, looking for a motion to authorize me to -- to actually sign the thing.

CHAIRPERSON RECKART: Yeah. Yeah, that's how I took it. So, if someone is so disposed to move, I invite that.

COMMISSIONER LAIRD: I make a motion that we authorize the Executive Director to enter into the conciliation agreement proposed today with Mr. Horne.

COMMISSIONER HOFFMAN: Second the motion.

CHAIRPERSON RECKART: Okay. We have -- thank you, gentlemen. We have a motion and a second. Any further discussion?

There being none, all in favor, please indicate by saying "aye."

(Chorus of ayes.)

CHAIRPERSON RECKART: Okay. All opposed? It passes unanimously. Thank you.

I think listed Item No. V has been withdrawn from the agenda.

MR. COLLINS: Yeah. We have Mr. -- I heard from Mr. Huppenthal -- or, Sarah heard from Mr. Huppenthal's office yesterday and he's -- he's not available. We have some stuff pending with him, so we're going to get together next week and we'll bring that back hopefully in December.

CHAIRPERSON RECKART: Okay. Thank you. And then probably for the most enjoyable part of the day here, we're going to deal with Item VI, which is the Legacy Foundation Action Fund, MUR 14-007. We have from last

meeting a probable cause recommendation that, as I recall, the Commission voted that there was reason to believe.

MR. COLLINS: Yes.

CHAIRPERSON RECKART: And then with that, Mr. Collins has -- then there was response from the LFAF, Mr. Torchinsky submitted that, which is in our packets; and then there was a suggestion for an assessment of penalties from Mr. Collins in the amount of $201,240.

So, Mr. Collins, if you would beyond that introduce more of this and then we'll ask Mr. Torchinsky to add his perspective.

MR. COLLINS: And -- yeah. And there's one other thing. I -- literally, this is just received. I haven't had a chance to forward this to Mr. Torchinsky, Mr. Bergin, or the Commission, for that matter, so I'm going to tell you, and I will try to get this forwarded, maybe Paula or Sara can forward the e-mail I just sent to you to Jason and Brian and Mary, and everybody. But the e-mail -- then we can print it.

But an e-mail from -- or, a letter from Kory Langhofer, who is the Complainant in the underlying complaint. And he -- and I will just read it, if I could, because I think it's relevant and probably a perfectly appropriate time to read it into the record because it's fairly brief.

He simply says that: On July 1st, in his capacity as counsel for the gubernatorial campaign of Scott Smith, he filed a complaint with the Commission alleging campaign vio- -- finance violations by the Legacy Foundation Action Fund and others.

"After careful consideration in this matter in consultation with Mayor Smith and his campaign staff, I hereby withdraw this complaint. And I respectfully request the Commission dismiss the complaint and terminate any pending proceeding relating to it."

So, that is a thing that occurred.

CHAIRPERSON RECKART: Okay.

MR. COLLINS: Now that, I mean, we can talk about if anybody wants to talk about what that means as a legal matter. I'm certainly happy to do that.

But you need to be aware of it. It came in at 9:41. So, the timing really, literally, couldn't have been more appropriate.

CHAIRPERSON RECKART: But I -- I think -- I think that's nice, but the investigation, the action, the jurisdiction has been -- has been asserted. We've taken effort to do the investigation, et cetera. I don't think it affects anything that we're planning to do today whatsoever.

MR. COLLINS: I -- I mean, I certainly think that we've gone past -- we've gone past that.

CHAIRPERSON RECKART: Yeah. Just -- okay. Yeah.

COMMISSIONER HOFFMAN: Mr. Chair?

CHAIRPERSON RECKART: Yes, sir.

COMMISSIONER HOFFMAN: I move we go into executive session to discuss that issue.

CHAIRPERSON RECKART: Okay. All -- is there a second to that motion?

COMMISSIONER LAIRD: Second.

CHAIRPERSON RECKART: Okay, all in favor say "aye."

COMMISSIONER HOFFMAN: Aye.

COMMISSIONER LAIRD: Aye.

COMMISSIONER KOESTER: Aye.

CHAIRPERSON RECKART: All opposed?

Nay.

All right. Let's -- we go in executive session. Thank you, everyone.

MR. TORCHINSKY: And I'll drop off the phone, then.

CHAIRPERSON RECKART: Thank you.

(Whereupon the public retires from the meeting room.)

(Whereupon the Commission is in executive session

from 9:55 a.m. until 10:01 a.m.)

* * * * *

(Whereupon all members of the public are present and the Commission resumes in general session.)

CHAIRPERSON RECKART: All righty. Let's go back into public session now. Okay. I don't know if there's any further discussion with regard to the letter from Mr. Langhofer.

COMMISSIONER HOFFMAN: Yeah, I have a question, Mr. Chair.

CHAIRPERSON RECKART: Please, Mr. -- yeah. Mr. Hoffman.

COMMISSIONER HOFFMAN: Mr. Collins, did -- did you have any conversation with Mr. Langhofer about the letter? Specifically, was there any reason given for withdrawing?

MR. COLLINS: I -- I did have a brief conversation with him telling me that there was going to be a letter, and the conversation is consistent with exactly what he says here.

COMMISSIONER HOFFMAN: In other words, he hasn't stated any reason or any --

MR. COLLINS: Beyond -- beyond that there was a

consultation with Mayor Smith and that the decision was made to withdraw the complaint.

COMMISSIONER HOFFMAN: Right. Okay. Well, we don't have any information indicating -- you know, in the letter, indicating that there was any, you know, error of any sort and/or any reason why, and I -- I for one believe that if we perceive a violation of the Clean Elections Act after having already done an investigation pursuant to a then-pending complaint, we actually have a duty to continue to remedy the -- any -- to find whether there was a violation and remedy any violation that we perceive. So, I believe we should proceed.

CHAIRPERSON RECKART: All righty. Any other comments?

I think to second those thoughts, we have started the process, we've done the investigation, absent any compelling reason to suspend that -- and I have -- I have none here, even with this letter -- then I think we -- we are duty bound to continue, so.

COMMISSIONER HOFFMAN: I want to say one other thing is we're not here as a -- as a tool of Mr. Langhofer or Mr. -- Mayor Smith or anyone else, we're here to uphold the public interest in enforcing the Clean Elections Act. And so just as, you know, we respond to citizen complaints when people perceive violations, and decide whether or not

they exist; but we're here to uphold the public interest, not Mr. Smith's private interest. So, while he -- Mayor Smith could withdraw a private legal complaint in court, like a court action that he had brought, this is an action that's not brought by -- by him, it's brought by the Commission once a complaint is made -- or, once an investigation is made.

Also, our Executive Director could have initiated this complaint -- could have filed a complaint himself had information come to his attention for whatever reason, and that, you know, has been done through his investigation and findings. So, in effect, I think we should deal with it regardless of whether the genesis was the original complaint from Mr. Smith or -- or by our staff.

CHAIRPERSON RECKART: Okay.

COMMISSIONER HOFFMAN: Thank you, Mr. Chair.

CHAIRPERSON RECKART: Thanks, Mr. Hoffman. Any further comments? Mr. Laird? Mr. Koester? No?

Okay. Then -- now, that we've gotten beyond that preliminary matter, Mr. Collins if I could hear from you --

MR. COLLINS: Sure.

CHAIRPERSON RECKART: -- a little bit more on this matter so we can proceed.

MR. COLLINS: Sure. You know, and just to kind

of update you on where we are. I think we've kind of gone over this, I think it's been captured by other comments, but just to reiterate here. We've got -- we have moved to what we call the probable cause recommendation and -- and we have before you a recommendation on probable cause and -- and a recommendation on penalty.

In effect, you know, the issues in this matter have not really changed significantly during the course of it, because, you know, for the most part this is a -- this is a -- a legal question. And so the question is whether or not this communication with respect to Scott Smith was a -- met the definition of express advocacy that's set forth in the -- in the Act, and whether or not that results in the requirement to file reports.

You know, we -- you know, my views are laid out in some detail here, and they are that it -- it does meet that statute. That that statute is itself constitutional. We have had that reaffirmed recently by the Arizona Court of Appeals. Our authority to enforce that statute has been made express by the statutory interpretation of the Arizona Supreme Court. So, those are binding authorities on the interpretation of statutes if they weren't clear on their face, which in this case they actually are. So, I feel like that's belt-and-suspenders, as they say.

I think that with respect to the question of the

operation 16-942(B), you know, I -- I disagree with the arguments that you see in the response, which -- which have been in other responses we've received as to how the phrases, you know, "on behalf of a candidate" and "the joint and several liability" operate.

I think that the -- as a matter of statutory construction, if you were to interpret those phrases in the manner that Mr. Torchinsky suggests, I think that leads you to an absurd conclusion that the statute which -- which, you know, we clearly enforce the reports that are indisputably part of the Clean Elections Act somehow would not be subject to the penalties that are authorized by the Act, and that doesn't make a lot of sense to me. So -- in fact, it makes -- doesn't make any sense to me, I guess I...

So, those are my highlights. I think, therefore, that, you know, I would recommend we proceed with probable cause. I'd also recommend we proceed with penalty. I've said and I -- and I, you know, and I think in -- in all of our proceedings, I always want to make clear that the penalty is something I believe the Commission has discretion on. And so, you know, I -- you know, we've made a recommendation based on a calculation of what we think the max penalty is for the failure to file here. You know, but I'm not -- and I -- and I -- just so with

that, there is -- that's subject to discussion as well.

So, I guess there's not really anything else I think I have to -- to say. Unless you have questions, that's my high-level summary of where we are at.

CHAIRPERSON RECKART: Okay. I have some questions, but I think I want to wait. There are some things that the LFAF brief or response addresses that are not addressed by the recommendation that once Mr. Torchinsky presents those, I would ask that you be ready to respond to some questions with regard to those issues that he raises that are not addressed in our recommendation.

Are there any comments or questions before I move -- for Mr. Collins before I move on to Mr. Torchinsky? No?

Okay. Mr. Torchinsky, sir, you have the -- you have the floor.

MR. TORCHINSKY: Sure. I'll be -- I'll be as brief as I possibly can. First, I want to address express advocacy. With respect to whether the advertisement constituted express advocacy, I think we fully laid out that in our various written submissions.

I want to highlight some information here. That at the time LFAF acted, the definition of express advocacy that's now being applied was not constitutional pursuant

to a ruling of Maricopa County Superior Court. In fact, it was after the complaint was filed that the Appeals Court reversed that trial court's decision. So, I think that's important for the Commission to keep in mind.

And I think that certainty is key here, and I just want the -- the Commission to consider the constitutional implications of applying a statute that at the time we acted, you know, had been held by a court of competent jurisdiction to be unconstitutional and is now applied because subsequent to the filing of the complaint, that the Appeals Court reversed, you know, puts us in a weird position, I think, as a constitutional matter.

Second, with respect to the Commission's jurisdiction, we reiterated our argument again as to why we believe the Commission doesn't have jurisdiction over this matter. And I think that the split of conclusions between Maricopa County and the Executive Director's recommendation shows that the advertisement had a -- a reasonable interpretation other than express advocacy at the time it was broadcast.

On the penalty provisions, which is the application of -- of -942(B), we have not previously addressed this to the Commission verbally, but we do -- but we do believe that the penalty provision that the Executive Director is relying on here for the penalty

calculation is -- is simply inapplicable.

We had some correspondence with the Executive Director in late September and early October where we addressed the following pieces of -942 Sub (B). The language in -942 Sub (B) says -- provides for:

"A civil penalty for a violation by or on behalf of any candidate of any reporting requirement."

And I guess the question that I would pose to the Commission if you are a going to apply this language is, you know, which candidate was this by or on behalf?

The Commission itself dismissed the coordination allegation contained in the original complaint. The statute -- the statutory language provides for a penalty for candidates for a statewide office of $300 per day, but says nothing about any other type of actor; and there's no doubt that the Legacy Foundation Action Fund was not a candidate for any elected office in Arizona.

The statute goes on to say that, quote: "The candidate and the candidate campaign account shall be joint- -- jointly and severally responsible for any penalty imposed pursuant to this section."

So, my question to the Commission is, which candidate or candidate campaigns are -- are jointly and severally liable here if you apply this statute?

You know, our understanding is that there were about six candidate for the Republican nomination for Governor other than Mayor Smith at the time that Legacy Foundation aired -- or, Legacy Foundation Action Fund aired the ad in question.

So, the application of the statute by the plain words is inconsistent with -- with what the -- with what the Executive Director is saying this statute means here.

So, you know, in that case, you know, this goes -- this ties back into our argument that the Commission doesn't have jurisdiction here in the first place. I know Mr. Collins says, look, it's observed that the Commission clearly does have jurisdiction. Our point is if the Commission so clearly had jurisdiction, there would be an applicable -- a clearly applicable penalty provision.

You can't just say: Oh, we have jurisdiction, so we've got to flip the statute and -- and, you know, render superfluous various phrases and sentences in the statute in order for us to exercise the jurisdiction that we think we clearly have.

So, I think that the sort of absence of a clear penalty provision ties back into our argument that the Commission doesn't have jurisdiction here in the first place.

So, I guess in conclusion, we would ask that the

Commission find that there is no probable cause to believe the advertisement was express advocacy under the law as it existed at the time LFAF acted; and we further ask if the Commission does find probable cause that the advertisement constituted express advocacy, that it decline the Executive Director's request to authorize the penalty of over $200,000 in light of the facts of the law at the time Legacy Foundation Action Fund acted, and in the absence of any clearly applicable penalty provision in Title II.

And with that, I'll guess I'll take any questions.

CHAIRPERSON RECKART: Do we have any questions for Mr. Torchinsky?

COMMISSIONER HOFFMAN: Yeah. I have -- I have a couple if -- Mr. Chair.

CHAIRPERSON RECKART: Please, Mr. Hoffman.

COMMISSIONER HOFFMAN: I -- the Messing letter doesn't provide any analysis or any statement of the reason why the Department, which was the Maricopa County Elections Department, determined there was no reasonable cause to believe a violation had occurred. Do you have any solid information from Mr. Messing or the Elections Department? Have they told you why they don't believe a violation occurred?

MR. TORCHINSKY: Other than the submission that

we made to them and the letter we received from them, we've had no additional communication with them.

COMMISSIONER HOFFMAN: All right. Well, I find an unreasoned statement kind of hard to put any weight in. And I -- I -- I wonder, also, that -- I assume that you agree that they did not investigate whether there was any violation of Article II -- i.e., the Clean Elections Act -- correct?

MR. TORCHINSKY: I -- the only information that I -- the only communications I've had with them was the submission that we made to them, which I believe we provided you a copy of, and the letter from Mr. Messing. I don't know what else they might have looked at.

COMMISSIONER HOFFMAN: Okay. In the -- in your brief, and I'm -- I'm trying to -- to find it, you had a sentence in which you stated that -- what the intention of your client was in -- in -- in placing the advertisement. And I wondered, are you making any affirmative assertion as to why the advertisement was run?

MR. TORCHINSKY: No. Other than what was in -- other than what was in Mr. Rants' affidavit about, you know, about the organization's attempt to influence the National Conference of Mayors, no.

COMMISSIONER HOFFMAN: Well, what --

MR. TORCHINSKY: Because as I think I've said,

we've pointed out before, the intent behind the ad is not a relevant factor that you're allowed to consider under Supreme Court precedent. You're allowed to look at the ad itself, but the inquiries into intent have been foreclosed by the U.S. Supreme Court.

COMMISSIONER HOFFMAN: Right. That -- that's the -- the issue that I was curious about. You -- I found the section. In your brief you wrote: "LFAF's advertisement sought to persuade the people of Mesa, Arizona, to oppose the U.S. Conference of Mayor's policy position."

That seems to me a statement -- you're making an affirmative statement of the LFAF's intention.

MR. TORCHINSKY: I think that's just a rephrasing of what Mr. Rants said in his affidavit.

COMMISSIONER HOFFMAN: And, yes, it is. And so, both you and Mr. Rants are asking us to -- yeah, his -- his affidavit says, for example: "The purpose of the ads was to draw attention to the Mayor's involvement in support of the agenda promulgated by the U.S. Conference of Mayors."

So, again, do you want us to consider your intention?

You know, in other words, the Supreme Court has said -- your argument -- you've argued to us the Supreme

Court has said that we can't look into intention, but are we then obligated to let you make assertions about intention without investigation?

Or, do you want us to simply ignore the -- the intention of the -- of your organization and solely judge it based on the content of the advertisement?

MR. TORCHINSKY: I believe that what Mr. Rants was doing was simply restating what was in the advertisement itself. I think if you look at the -- if you look at what the ad says, the ad says, essentially: Change the position of the Conference of Mayors. I don't think that there's much that he -- you don't need to get into what was in anybody's head to read the -- you know, to look at the ad and look at what the ad asked people to do.

COMMISSIONER HOFFMAN: Well, you didn't say the ad drew attention to the Mayor's involvement in support of the agenda. He said: "The purpose of the ads was to draw."

I'm just asking, would you like us to consider your or disregard your organization's purpose?

MR. TORCHINSKY: I think you're allowed to look at the four corners of the ad in determining -- in determining whether the ad was express advocacy or not.

COMMISSIONER HOFFMAN: Okay. Again, answer my

question. You want us to ignore or consider evidence of your organization's purpose and intention?

MR. TORCHINSKY: I think -- I believe that evidence of intent is not a permissible consideration at all --

COMMISSIONER HOFFMAN: So, you would like us to --

MR. TORCHINSKY: -- from your perspective.

COMMISSIONER HOFFMAN: So, you would like us to ignore the statements that are in the record about your organization's intention; is that correct?

MR. TORCHINSKY: No. I'm saying that what Mr. Rants was saying was essentially rephrasing the -- the ad itself, and you're allowed to look at the ad itself to understand what it was that the ad was doing.

COMMISSIONER HOFFMAN: Okay. I don't mean to go over it, but that's just not true. He says that it -- he talks about the purpose and what it sought to do, and those are indications of -- of intention. And, you know, it's a very -- it seems double-sided, you know, to suggest that we're not allowed to -- to -- to consider that, but you get free rein to say whatever you want about the purpose.

And, you know, if those are just stray comments that you'd like us to ignore, we could understand that

and -- and say that, you know -- and treat them as though they're not statements of purpose and, you know, not consider them. But if you want us to consider them, then, you know, I think we have the right to, you know, question the truthfulness of that, and in effect you've waived the constitutional protection that's involved. So --

MR. TORCHINSKY: I --

COMMISSIONER HOFFMAN: -- that's why I'm asking for a clear answer as to whether you want us to ignore any statements of intention or not. 'Cause they are clearly statements of intention, they're not just characterizations of the ad.

MR. TORCHINSKY: Well, I -- I mean, I think we have a disagreement then on that and take it how you -- how you wish to take it. But I think the Supreme Court has made clear that inquiries into intent are not permissible in these kind of circumstances.

COMMISSIONER HOFFMAN: Yeah. Unless you intentionally waive your constitutional rights. So, you know, that's -- that's -- that's what I'm trying to find out if you intended to do that.

MR. TORCHINSKY: I am -- I am unaware of -- of any case where anybody -- where any investigator has made that argument or -- I just -- I'm unaware of any caselaw support for what you're asserting.

COMMISSIONER HOFFMAN: I'm unaware of any case in which the Respondent has put in record evidence of their intention and, you know, tried to rely on it.

So, anyway, the -- the -- the point is that -- we'll leave it at that. I -- I don't want to, you know, waste too much time on this situation. But it seems very -- it seems problematic to me that you make statements of intention and then tell us we can't question that.

I honestly don't believe the -- the statements of intention. And, you know, if there was permissible to inquire into that, I would want to instruct our staff to inquire into it. And if you opened the issue, you know -- you know, I would want to do that, personally. But -- because, you know, I believe that this is, you know, thinly disguised at best, and that the -- that the evidence would show, if we were permitted to inquire into this, that your organization did intend to influence an election; and your statements there, Mr. Torchinsky, give the opening to allow that to happen.

If on the other hand --

MR. TORCHINSKY: Well, I believe --

COMMISSIONER HOFFMAN: If on the other hand --

MR. TORCHINSKY: I believe procedurally we're past the investigation phase.

COMMISSIONER HOFFMAN: Yeah. If -- if you're -- well, let me ask you another question. You -- during the investigation stage, you were asked to provide certain answers according to our rules which you declined to do, correct?

MR. TORCHINSKY: That is correct.

COMMISSIONER HOFFMAN: And so -- so I'm not quite so sure that we're done investigating, or -- and -- and, Mr. Collins, what is the penalty for someone who doesn't cooperate with an investigation?

MR. COLLINS: I don't think anyone has ever asked me that question before.

MR. TORCHINSKY: You know, I -- we've asserted from the beginning that we don't think the Commission has jurisdiction here in the first place. So to assert that we somehow are required to cooperate where we don't believe the Commission has jurisdiction in the first place, you know, if you want to issue a subpoena, then we can tee it up for the Court and we can have the argument or the -- the substance of the -- the merit argument that I wanted to have back in July that the Commission objected to on a procedural matter.

So, if the Commission chooses to issue a subpoena, we'll move to quash, and we can tee the issue up to the Superior Court before going through the rest of

this process.

COMMISSIONER HOFFMAN: Mr. -- Mr. Torchinsky, you talked about the status of cases as they stand before. As the case stands now, the Court has ruled that this Commission does have jurisdiction. And that your --

MR. TORCHINSKY: Actually, that's not --

COMMISSIONER HOFFMAN: -- your arguments -- your arguments were wrong in that respect. So --

MR. TORCHINSKY: Actually, that's not what the Court said at the time. He basically said: I would have the same opportunity to review this question after going through the administrative process, so I'm going to deny your Motion for an Injunction. He did not rule on the merits of the injunction because he said, essentially, I would have an opportunity to review the same question after going through all of the procedural processes that are contained in the Act of the Administrative Review Procedure.

So, I don't believe that the Court actually ruled on the substance of whether the CCEC has jurisdiction. He just said the procedural matter felt that -- that the issuing the injunction was -- was not appropriate procedurally.

COMMISSIONER HOFFMAN: And -- and your --

MR. TORCHINSKY: And that's what -- and that's,

in fact, what your counsel argued in front of the Judge.

COMMISSIONER HOFFMAN: Your argument in front of the Court was that the -- because the Commission had no jurisdiction that that should not be the ruling.

MR. TORCHINSKY: That's correct. And the Judge concluded as a procedural matter that -- that Mary's argument about exhaustion of administrative remedies before the Judge could brief the merits of the question was required, kind of carried the day in that court case.

COMMISSIONER HOFFMAN: Yeah. By --

MR. TORCHINSKY: So, I think --

COMMISSIONER HOFFMAN: By "as a procedural matter," what we mean is that the Commission does have jurisdiction. So, anyway, the -- the -- again, I don't mean to -- to make this argumentative.

The -- you know, Mr. Collins, I'll let you off the hook on that question and we can consider it later.

But with -- with regard to the question on the issue advocacy message, could you state in just a sentence what the reasonable alternative interpretation was of this ad just relying rather than on intent -- or, relying specifically on, you know, the -- the nature of the ad.

That -- that -- which is -- which is the -- what is the -- the -- the statute says that we're supposed to look for whether there's a reasonable meaning other than

to advocate the defeat of Mayor Smith. And, so, could you please state in just a sentence or two what you believe the reasonable meaning other than calling for Mr. Smith's defeat is?

MR. TORCHINSKY: Sure. If you look at the language of the ad, the ad asks the viewers to call Mayor Smith and change the position of the Conference of Mayors. That's what the ad asks people to do and that's the totally reasonable interpretation, other than to vote for or against Mayor Smith. Whose -- by the way, whose election wasn't until almost 150 days after this advertisement ran.

COMMISSIONER HOFFMAN: Okay. So, you are saying that the purpose of it was to ask Mayor Smith to influence the position of the Conference of Mayors?

MR. TORCHINSKY: I'm not speaking to purpose. I'm speaking to the ad --

COMMISSIONER HOFFMAN: Yeah. The reasonable interpretation --

MR. TORCHINSKY: -- what the ad actually says.

COMMISSIONER HOFFMAN: I'm sorry. The reasonable interpretation that we should consider of the ad is to ask Mr. Smith to -- to change the position of the Conference of Mayors?

MR. TORCHINSKY: Correct.

COMMISSIONER HOFFMAN: Okay. Thank you for clarifying that.

I think that's all I have at the moment.

CHAIRPERSON RECKART: Okay. Yes, Mr. Laird.

COMMISSIONER LAIRD: Yeah. This is Commissioner Laird, Counselor. Let me make sure that I understand the legal impact of the argument that I think you maybe raised for the first time today, that at the time Legacy acted, the statute was -- at that time had been declared unconstitutional by a court of law and that decision had not yet been overturned. Is that sort of a good faith argument that the Commissioners ought to consider as a mitigating factor in determining what an appropriate penalty would be? Or, is there some other legal effect with respect to that particular argument?

MR. TORCHINSKY: I think there's two. I think you can consider it in terms of whether or not it was express advocacy at all, if you consider the law as it actually stood at the time the ad aired, which was that that definition of express advocacy that the Commission now appears to be relying on was unconstitutional at the time that Legacy Foundation Action Fund acted.

And, second, you can certainly consider it as evidence of mitigation and damages if you were going to make any penalty assessment. So, I think you can consider

it for -- for both reasons.

And I think there's also sort of a -- a constitutional argument where, you know, people are only supposed to comply with laws that are on the books and in effect; and the Maricopa County Superior Court had held that that provision to be unconstitutional at the time we acted.

COMMISSIONER LAIRD: Very good. Thank you.

CHAIRPERSON RECKART: Mr. Koester?

COMMISSIONER KOESTER: Yes. I'd like to ask, at one point you were making about that this should be tied to a campaign, whether it's Ducey's campaign or let's say Christine Jones' campaign, because it -- it should be favoring somebody. I don't quite understand. I mean, in our -- I think our -- Mr. Collins' opinion, it was -- it was -- was saying: "Don't vote for Scott Smith," which automatically means that any other candidate or candidates at the time, which could be four, five, six, whatever, would benefit. Of course, mainly the leading candidates, which might be Ducey or Christine Jones at the time.

So, I don't -- I don't quite understand why you're saying a campaign has to be identified or who would benefit from. Could you explain that again a little bit further?

MR. TORCHINSKY: Yes. Let me -- let me read you

the sentence that I'm pointing to.

"The candidate and the candidate's campaign account shall be jointly and severally liable for any penalties imposed pursuant to this Subsection."

So, if you don't have a candidate or candidate campaign account, I don't believe Subsection (B) can be applied. I mean, otherwise -- otherwise what you're saying is simply: Okay, well, we don't believe that that sentence has any meaning and you're basically declaring legislative language superfluous, and I don't think as -- as an administrative agency, you have the authority to do that.

You know, again, under the canons of statutory interpretation, legislators don't enact superfluous language. There has to be meaning to that sentence.

COMMISSIONER LAIRD: And, Counselor, this is Commissioner Laird again. Similarly, you had argued that's consistent with the provision that provides that the violation has to be "by or on behalf of any candidate." So, I guess you're -- you're -- you're arguing that that -- the language you just read later in that same provision is consistent with it has to be a violation "by a candidate or on behalf of a candidate." And I take it to mean -- that to mean a specific

candidate.

MR. TORCHINSKY: Well, Legacy Foundation Action Fund is certainly not a candidate.

COMMISSIONER LAIRD: Right.

MR. TORCHINSKY: So, yes. "By or on behalf of any candidate."

I mean, look, if -- if the Commission had concluded that this was done in coordination with Ducey, you know, then you could have made an argument that this was on behalf of a particular candidate, but the Commission itself rejected that argument. So, with no candidate involved here, I don't -- I don't see how you get to the, you know, violation "by or on behalf of any candidate," because I don't see what candidate this was by or on behalf of laid out in anything that Mr. Collins has presented to the Commission.

COMMISSIONER LAIRD: Thank you, Counsel.

COMMISSIONER HOFFMAN: Mr. Torchinsky, do you think that if -- if -- and I want to give you a hypothetical. I realize it's counterfactual. But had Legacy Foundation acted on behalf of all candidates opposing Mr. Smith, do you think that would be "by or on behalf of a candidate"?

MR. TORCHINSKY: You know, that would -- that would call for -- for an analysis of facts that, as you

said, just aren't here. I'm not -- trying to answer that. I mean, if the Commission had found that the six other candidates had conspired together to have an outside group advertise to -- to promote the defeat of a particular candidate, so the Commission has gone after, you know, all six candidates, yeah, I think it could.

COMMISSIONER HOFFMAN: Yeah. And -- and so "by or on behalf of a candidate" means one or more, right?

MR. TORCHINSKY: I would think so, yes.

COMMISSIONER HOFFMAN: Okay. Thank you. That's helpful.

CHAIRPERSON RECKART: Mr. Torchinsky, this is Chairman Reckart. There is -- thank you.

I'm going to make a series of statements here and you can either encourage me to pursue that line of thinking or dissuade me from it, but let me get through them and -- just to give you my dispositions as to certain things.

One is, is I have sympathy for your concern regarding the state of the law at the time. I also am aware that the determination of whether or not something constitutes express advocacy is -- does not admit of a bright-line test, so that there is some uncertainty and it be in areas where there is grayness in making these decisions; you don't want to assess penalties that may

chill speech, legitimate speech, of -- of other people. So, I -- I have some sympathy for that in the context of exercising First Amendment rights and -- and the like.

Secondly, as I look at this ad, however, it is directed specifically to Mr. Smith, the comparisons are made to Mr. Smith, he appears with Mr. Obama, he is contrasted or -- or -- or lumped in with the policies of Mr. Obama, it is directed very much personally to Mr. Smith. It is not something directed to policies in the mayoral conference overall and I have a hard time believing that it isn't something intended to -- to cast Mr. Smith in negative light with a upcoming Republican primary for Governor.

So, I -- I am not buying into this characterization that it is -- it is not express advocacy, just issue advocacy.

Lastly, with regard to the application of the penalty, the way I look at this is the -- this notion of the candidate, of the candidate's account being liable, I -- I think it's still consistent to the idea that if someone acts to the benefit of a candidate and that -- even though it may not be coordinated, but acts to benefit a candidate, that the liability still rests with the person who acts because, in effect, even though it may be an independent uncoordinated expenditure, it in effect

serves in the same -- serves to benefit that candidate in the same way a candidate's account would have.

So, I think we're still within the scope of the -- of Section -942(D), that that independent expenditure, if you will, could be characterized as falling within a, quote, "candidate account."

So, anyway, with those three thoughts, you can respond and then we'll take anymore comments from the Commissioners and then try to get this thing to resolution. Thank you.

MR. TORCHINSKY: I don't think I have any further response to that.

CHAIRPERSON RECKART: Okay. Thank you.

All righty. No more comments, then let's entertain a motion with regard to the -- actually -- actually, I want to do one more thing.

I want to raise with the Commission the amount of the -- the fine. I have asked Mr. Collins to provide me some information with regard to things that may determine when the fine calculation should commence. If we go from the date of the filing of the complaint, we have 141 days from July 1st to today, which would give us a fine in the range of anywhere to 42,000 to 121,000, depending on what rate we use, the $300 original statutory rate or, you know, the doubling of the current rate, which would bring

it to $860 a day.

Notice of the complaint was given on July 8th, it's been 135 days, that would reduce it a little bit more; and jurisdiction was asserted on July 31st.

Is that as a result of a meeting? I can't remember.

MR. COLLINS: Yeah. Mr. Chairman, Commissioners, we -- I can't remember. The complaint was filed, the lawsuit was filed, we had a meeting, and then we had a -- we had an initial question about whether or not there was even jurisdiction and we had a vote on that at that point.

CHAIRPERSON RECKART: Okay.

MR. COLLINS: And then we proceeded to reason to believe in a subsequent meeting.

CHAIRPERSON RECKART: Okay. In any event, I raise all this because the calculation provided in Mr. Collins' request is from the date of the ads as I recall, more to the point. And -- and I -- I think Mr. Torchinsky raises a fair point with regard to the state of the law at that point. We're also dealing with an area that does not admit of a bright-line test, express advocacy communications.

And so that there is not a -- an inappropriate chilling of speech, I think, you know, we should allow for people to have interaction with the Commission to

understand that the Commission may take a view different from theirs with regard to whether or not something constitutes express advocacy.

For that reason, I'm willing to entertain and -- and would invite comment from the other Commissioners with regard to determination of the fine based on a date other than the date of the running of the ad, and would like to open that up for discussion and see if people have thoughts when that date should be. Perhaps the date we assert jurisdiction or -- or maybe even later.

But I -- looking at that, I just -- I think it's something that I'm compelled to raise in light of my sensitivities with respect to the First Amendment issues that it creates. So, I invite Commissioners to weigh in on it, please.

COMMISSIONER HOFFMAN: Mr. Chair, if I may, I guess I'd like to move that there's probable cause to believe that Respondent has violated the Act and then talk about the penalty thereafter.

CHAIRPERSON RECKART: Sure. I think that's -- that's a good thought.

COMMISSIONER HOFFMAN: So, I -- I so move.

CHAIRPERSON RECKART: Okay.

COMMISSIONER KOESTER: I'll second.

CHAIRPERSON RECKART: All right. It's been moved

and seconded. Thank you, gentlemen. All those in favor, please indicate -- any further discussion?

COMMISSIONER HOFFMAN: Yeah. I was hoping to just comment. To me, the -- the -- when you put aside all the chaff, it seems that the question comes down to whether the -- we meet this whether there's a reasonable meaning other than the -- the one that should have been reported of asking people to vote against Mr. Smith for Governor or let -- not let his candidacy get off the ground.

And when I look at the text of the ad, and in -- in the context of the timing that -- of the ad, this ad was run two weeks before -- after it was made known that he was resigning as mayor of Mesa and therefore wouldn't be positioned as the president or the -- officer -- yeah, president of the Council of Mayors for an additional two weeks. And I just don't think it's reasonable to believe that the -- that -- that the purpose of the ad was to have Mr. Smith influence conference -- long-standing conference policy in a very short time period. You know, had this ad been run when he was just elected as the president of the Conference of Mayors, maybe the answer would have been different. But -- but I don't think we're permitted or should ignore the timing. And I -- I feel confident that it -- that this ad would not have been run had he not

announced a -- a gubernatorial campaign.

So -- so I -- you know, I think that's the -- the bottom line on -- on this and, you know, with all the other stuff.

If we are going to get into the question because the Respondent puts it on the table of what their actual subjective intent is, I'd sure like to look into that and find out whether that was indeed -- what they're saying is indeed true. As I said before, I doubt it.

But my -- I believe the -- just looking at the text of the ad and the timing of it and the -- it says that the stated alternative reason -- alternative purpose -- or, not purpose, the alternative -- I keep having to put that statute in front of me to -- to make it right. The alternative meaning other than advocating Mr. Smith's defeat is -- is not a reasonable one based on the way the ad is -- is worded.

I also think the appearance and juxtaposition of Mr. Smith with Mr. Obama and certain policies of Mr. Obama make that clear as well. We're not required to ignore the fact that that was the main Republican position in -- in this election, to tie -- the main strategy was to tie candidates that they wanted to oppose to what they viewed as an unpopular president and particularly unpopular among Republican voters.

So, that was -- for those reasons, I'd -- I'd like to urge we support that -- the motion.

CHAIRPERSON RECKART: Okay. Mr. Koester, do you have any comments?

COMMISSIONER KOESTER: Just to quickly add to what Commissioner Hoffman said. I -- the money spent, which was close to $300,000, and the -- and the Legacy Foundation said they're going after the leadership, that is three people: The president, the vice president, and I guess the secretary or treasurer. But the vast amount of the money, which is about 95 percent, was directed against Mayor Smith in the Phoenix/Mesa area. So, it doesn't sound like it was quite so much the leadership but Mr. Smith himself, which adds to what Commissioner Hoffman said. It looks like express advocacy to me, too.

CHAIRPERSON RECKART: Mr. Laird, any comment?

COMMISSIONER LAIRD: No. I think the statements made by my fellow Commissioners are -- including yours, Mr. Chairman, are well put.

CHAIRPERSON RECKART: Okay. All righty. Following on that motion then, I'll call for a vote. All those in favor, please indicate by saying "aye."

(Chorus of ayes.)

CHAIRPERSON RECKART: Okay. All those opposed?

Okay. It passes unanimously.

Now, I think per Commissioner Hoffman's very good suggestion, let's take a look at the penalty aspects of this. Again, I -- I -- I made the point here that I am sympathetic to some of the concerns raised by Mr. Torchinsky. And, again, I just want to open it up for discussion as well, what is an appropriate time given, you know, some -- some of the grayness of the law, given the state of the law at the time, to start assessing fines?

And I -- I, for one, do not think it's the date of the ad, I think it should be at some point later. I -- I haven't determined that yet, I'm -- I'm inclined to go with the jurisdictional decision by this Commission, so. But, I welcome other thoughts.

COMMISSIONER HOFFMAN: Mr. Chair, I -- I have a thought on that subject. What -- when would they have been required to report the -- the ad?

MR. COLLINS: The next day after the expenditure was made.

COMMISSIONER HOFFMAN: Just one day?

MR. COLLINS: Yeah.

COMMISSIONER HOFFMAN: And that's pursuant to which time?

MR. COLLINS: 16-941(D) and 16-958 and 16-942(B).

COMMISSIONER HOFFMAN: Say that again slower.

MR. COLLINS: 16-941(D), -958, and -942(B). You'd think I'd have these things come to mind faster.

I'll let you ask the next question.

COMMISSIONER HOFFMAN: Okay. So -941(D) says that you have to -- if you exceed $500, you have to report.

MR. COLLINS: Right. So, when you exceed 500 --

COMMISSIONER HOFFMAN: Then you go to -958, which says any time you reach it -- you have to file a report any time it's above -- you reach that amount or go above an extra $1,000. And then it's --

MR. COLLINS: Let me -- let me -- let me stop you there, if I may, Commissioner. I don't mean to interrupt you, but the question is: When did you reach the threshold? And the threshold is reached and then you file. That is -- and -- and I think the most natural reading is to start the clock on the day after the threshold is reached because to make you file it at the very minute you reach the threshold would be difficult to administrate, so --

COMMISSIONER HOFFMAN: I'm just --

MR. COLLINS: So there is nothing -- nothing in the statute that says it starts on the day, it is implied by the fact that the threshold is set and once you meet the threshold you are required to report.

COMMISSIONER HOFFMAN: Okay. I'm wondering about --

CHAIRPERSON RECKART: (B)(2).

COMMISSIONER HOFFMAN: -- (B)(1), which says before the beginning of the primary -- oh. I'm sorry. (B)...

CHAIRPERSON RECKART: (B)(2) and (B)(3).

COMMISSIONER HOFFMAN: (B)(2) and (B)(3), yeah.

MR. COLLINS: Those are -- I don't --

CHAIRPERSON RECKART: It says --

MR. COLLINS: What -- what do you want to -- what are you trying to --

CHAIRPERSON RECKART: Any person --

COMMISSIONER HOFFMAN: I'm just wondering, the following Tuesday or...

MR. COLLINS: Are we talking now about the reports of the expenditures?

COMMISSIONER HOFFMAN: The one business day -- the one business day is -- is only for the last two weeks before the general election or primary election.

MR. COLLINS: We're not talking -- I don't think we're talking about the same thing, okay? That's what I'm trying to say.

COMMISSIONER HOFFMAN: That's why I'm trying to understand what you're saying.

MR. COLLINS: Okay. 16-941(D) says you must file a report; 16-958 says once those -- that report is filed, subsequent reports are due at certain times if you make additional expenditures. It's our understanding here that there is a single expenditure for the amount of this ad buy. We have no other facts than that, so there are no other trigger reports, so called, or Clean Elections --

CHAIRPERSON RECKART: Okay.

MR. COLLINS: -- independent expenditure reports. It is merely the threshold of -941(D) was exceeded, and the initial report was never filed and it has not been filed since that time.

That -- that's -- that's how I understand it. Mary is here if you want to -- Mary has worked with these statutes longer than I have, so she -- I will look to her for --

COMMISSIONER HOFFMAN: Okay. So you read --

MR. COLLINS: -- for more authoritative guidance than that.

COMMISSIONER HOFFMAN: So you read -958(B) as applying to supplemental reports, not the original report?

MR. COLLINS: That is the presumption that is behind the recommendation that I have made to you, yes.

COMMISSIONER HOFFMAN: Okay. And the -- the original report, you think there's no specific statement

of timing in the statute, but that the -- but that the -- and -- and, therefore, you come up with the next day?

MR. COLLINS: Right. Yeah. The threshold was exceeded and then you file the next day. That's been my assumption. That's my understanding, frankly, of how it's operated for 15 years.

COMMISSIONER HOFFMAN: Was this before the beginning of the primary election period or no? It was not, right? It was?

MS. LARSEN: Yes.

COMMISSIONER HOFFMAN: I'm sorry?

MR. COLLINS: Yes.

COMMISSIONER HOFFMAN: "Yes" what?

MS. LARSEN: It was before the primary election period started.

COMMISSIONER HOFFMAN: Before the primary election period started?

MS. LARSEN: Right.

COMMISSIONER HOFFMAN: Okay. So -- so, help me understand this. If -- if -- if they had spent $500 and reported it, and then spent $300,000 on the ad, they would -- in that scenario, the report would have been due the 1st of the following month? True?

MR. COLLINS: I -- I believe -- well, we can -- let me -- let me get the schedule out. I -- I really

appreciate -- I'm not -- just let me try to get this correct.

I believe that what our position has been and what we have told people who have to file reports is that if you have to file an original report under 16-941(D), that is one thing; and then if you have previously unreported amounts, you have to file on the schedule delineated by 16-958(B), and we identify those dates for folks and publish them.

COMMISSIONER HOFFMAN: Right.

MR. COLLINS: So, I believe that if there was an initial filing and then there were additional expenditures, that those would have to be caught up on the schedule that we have provided, that's correct.

COMMISSIONER HOFFMAN: Okay. And the -- the -- this was advertised in -- the updated advertisement was April -- ended April 14th?

MR. COLLINS: That's the best information we have. That's the information we have. Let me put it this way: We have evidence of that and that evidence has not been, you know, denied by -- in anything that we have ever seen from Mr. Torchinsky, Mr. Rants, or anybody.

COMMISSIONER HOFFMAN: You pay this -- it says the advertising campaign commenced on or about March 31st and concluded April 14th?

MR. COLLINS: Right. I'm sorry. Did I misunderstand your question?

COMMISSIONER HOFFMAN: Well, I'm just wondering when the payment is. Does that mean it was paid for before the start?

MR. COLLINS: Yes. That's correct.

COMMISSIONER HOFFMAN: So -- so, in normal course --

MR. COLLINS: I would have said March -- whatever the initial date of the run, I think. I mean...

COMMISSIONER HOFFMAN: So, you would have set it at March 31st plus one day, basically?

MR. COLLINS: I believe that's what we based the calculation off of. I -- I --

COMMISSIONER HOFFMAN: And if it was the beginning, as it just so happens March 31st, the beginning of the following month is April 1st, anyway, right? So, even under -- yeah. Okay.

I'm sorry. We went around in a big giant circle there, but ended up at the same date, April 1st.

CHAIRPERSON RECKART: All right.

COMMISSIONER HOFFMAN: Okay. Also, could you remind me when the Superior Court ruling was?

MR. COLLINS: The Superior Court ruling?

COMMISSIONER HOFFMAN: Yeah. In the -- in the

case about -941 -- -9- --
CHAIRPERSON RECKART: In regards to jurisdiction?
MR. COLLINS: That would have been back in May of 2013, May of -- April of 2013. I mean --
COMMISSIONER HOFFMAN: Okay. Got it.
CHAIRPERSON RECKART: The CFJ [sic] case.
MR. COLLINS: CJF, yeah. I mean, that was something like -- some -- 2013, spring of 2013.
COMMISSIONER HOFFMAN: Okay. I just have one other brief comment about that subject. You know, I think there are -- it is certainly appropriate to consider it in the penalty, but I -- I would be surprised if there was real reliance on that opinion, given its nature and given the --
CHAIRPERSON RECKART: It was a minute entry, basically, as I recall.
COMMISSIONER HOFFMAN: Yeah. But it was also -- you know, we often ask people to make complicated decisions based on -- you know, with a -- with interim rulings. But -- but, anyway.
Okay. I think I understand the date issue. So, your suggestions, Mr. Chair?
CHAIRPERSON RECKART: August. My suggestion is going to be August 1st. At just the point in which we took jurisdiction, we asserted that there was an issue

that needed to be examined. I think at that point the -- I think at that point the position of the Commission could be anticipated and that, you know, a responsible act would have been to file the report to -- to ensure compliance with the law. And, of course, pending any -- pending any further determinations by the Commission. So, my thinking is, is if we started it from August 1st, it would be the first -- the day after the July 1st determination.
Again, I'm sympathetic to the idea as to whether or not something is express advocacy. I -- I have a hard time saying that this is that hard a call. As I expressed earlier, to me, it's fairly clear, and I think as we've all agreed that it is -- it is -- this one is far enough in the gray zone that it was express advocacy. So, whether that warrants the doubling of the -- of the amount -- the daily amount, the per diem, is -- is a question I could be convinced one way or the other.
But my suggestion would be to start the calculation from August 1st. We would do it at the rate -- the doubling rate of 860 per day and then assess the fine based on that basis.
COMMISSIONER KOESTER: What would the fine be, Mr. Chairman?
CHAIRPERSON RECKART: The amount would be just short of 80- -- of $96,000 -- and I'm looking at Ms.

Larsen.
MS. LARSEN: 95,460.
CHAIRPERSON RECKART: 95,460.
COMMISSIONER HOFFMAN: Well, on the -- I'm sorry to keep putting off your suggestions because I'm having trouble with it a little bit myself. I did want to say with regard to the argument about the candidate and candidate's campaign account jointly and severally responsible for any penalty imposed pursuant to the Subsection, that that does not mean that they're jointly and severally responsible for penalties imposed on people other than the candidate and the candidate campaign committee.
CHAIRPERSON RECKART: Okay.
COMMISSIONER HOFFMAN: So --
CHAIRPERSON RECKART: I want to deal with the penalty right now.
COMMISSIONER HOFFMAN: Yeah. That is a penalty issue, but anyway.
I -- you know, I feel we ought -- we ought to impose the penalty that's statutorily required and, you know, if there's conciliation, I'd certainly be open to considering a conciliation agreement. But, you know, but -- but I think the -- the statute is pretty clear and I don't know -- I think we ought to just, you know, follow

what it says and impose the penalty it says. And if there's -- if there's conciliation, other factors can be taken into account. But I don't necessarily feel comfortable with just making up a different date.
CHAIRPERSON RECKART: Well, I know. I take --
COMMISSIONER HOFFMAN: I don't mean to --
CHAIRPERSON RECKART: I take issue with that characterization. There is a very good basis for that, that's what I was trying to convey. The point I'm getting to is I -- I -- also, this Commission has on a regular basis not imposed the statutory amounts. They've imposed other amounts. In fact, I think it's more -- it's more the exception to -- to the rule that we apply the statutory amount. So, I think it makes sense for us to consider this. And also --
COMMISSIONER HOFFMAN: You're saying waive some penalties?
CHAIRPERSON RECKART: Well, no. Assess a penalty different than what the statutes mandates -- or, not -- doesn't mandate, but the statute suggests. We -- we regularly do that, so.
COMMISSIONER HOFFMAN: Yeah, you have a point there. I mean, we have --
CHAIRPERSON RECKART: I -- I can't remember a time we actually did impose it in my tenure, so.

MR. COLLINS: In your tenure, I think that's actually right.
CHAIRPERSON RECKART: Yes.
MR. COLLINS: I mean, in the -- this -- I mean, it's been a long while.
CHAIRPERSON RECKART: In my four years here.
COMMISSIONER LAIRD: I'm sympathetic to that. And -- and -- and I think the -- Mr. Chairman, I have a lot of sympathy for the comments that you made about freedom of speech and -- and -- and maybe a more appropriate way to calculate it, I'm just not sure we have the discretion to do that. I read this statute as saying "shall be" and -- and that being the case, I don't know that we have discretion to assess a different penalty than what is statutorily prescribed.
CHAIRPERSON RECKART: And, again, I make the point we have not in my tenure ever assessed the statutory penalty. It's clearly, I think, something within our discretion. It's not been challenged, so.
Anyway, I'll -- I'll call for a motion on it so we can move it on. It's -- let's get this behind us.
I'll -- I'll move -- I'll make my motion, if no one seconds it, then someone else can make another motion with regard to the penalty. I'll move that the statutory -- that the penalty assessed by the Commission in light of

its reasonable cause -- finding that there is a reasonable cause to believe a violation has occurred --
COMMISSIONER HOFFMAN: Probable cause.
CHAIRPERSON RECKART: Probable cause. Thank you -- be assessed from April 1st until through November 20th at the rate of $860 per day. Is there a second?
MR. COLLINS: You meant August, right?
CHAIRPERSON RECKART: I'm sorry. What did I say?
COMMISSIONER KOESTER: You said --
MR. COLLINS: You said April instead of August.
COMMISSIONER KOESTER: -- April.
CHAIRPERSON RECKART: I'm sorry. August 1st. Yeah, I correct the motion. August 1st. Thank you. Yeah.
Is there a second?
COMMISSIONER KOESTER: I second that. I like that idea.
CHAIRPERSON RECKART: Okay. Are there -- I think we've discussed this enough so I'm going to call for the vote. Any -- any -- all those in favor, please indicate by saying "aye."
COMMISSIONER KOESTER: Aye.
COMMISSIONER LAIRD: Aye.
CHAIRPERSON RECKART: Aye.

All --
COMMISSIONER HOFFMAN: Aye.
CHAIRPERSON RECKART: -- opposed? Oh. Okay. Sorry. It passes unanimously.
We've got that done. So, the amount then will be 95,460, per Ms. Larsen's thing.
Okay. Thank you, Mr. --
MR. TORCHINSKY: Thank you. Thank you very much.
CHAIRPERSON RECKART: Thank you, Mr. Torchinsky. Take care.
MR. TORCHINSKY: Bye-bye.
CHAIRPERSON RECKART: Bye-bye.
AUTOMATED VOICE: Leaving the meeting. Jason Torchinsky.
CHAIRPERSON RECKART: All right. Discussion -- all right. Now, we get to some fun stuff, I think. Discussion and possible action on random audits. Selection of participating candidates for the 2014 cycle from the general election.
And we have our trusty little thing here, is that what we're going to do?
MR. COLLINS: Yes.
MS. LARSEN: Okay. I'm going to have Gina draw -- I'm going to have Gina draw two statewide candidates 'cause we only have three eligible statewide

candidates for -- for audit in the general election, so. Let's let her draw two balls out of there.
MS. ROBERTS: We have number three, Doug Little.
MS. LARSEN: Okay. Doug -- Doug Little.
MS. ROBERTS: And Diane Douglas.
MS. LARSEN: And Diane Douglas.
And then we're -- and then we're going to draw eight legislative candidates for audit.
MS. ROBERTS: So, we have number 13, and that is Mark Finchem; and number 29, and that is Andrew Sherwood; 17, Janie Hydrick; 14, Rosanna Gabaldon; 20, Joseph Longoria; 2, John Ackerley; 35 is Larry Woods; and the last one is number 16, that is Steve Hansen.
CHAIRPERSON RECKART: All righty. Thank you.
Takes me back to my bingo days at college. So, anyway. All right. Final -- thank you.
Item VII(B), final audit approval for the following participating candidates of the primary election: Terry Goddard, Patrice Kennedy, Juan Mendez, and Jose Suarez. And, Mr. Collins?
MR. COLLINS: Yeah, Commissioner -- Chairman Reckart, Commissioners, we got these back right on I guess I want to say Monday, or -- right?
MS. LARSEN: Yeah.
MR. COLLINS: So, we tried to get them on the

agenda. There's -- they're all -- there's no findings in any of these audits, but our rules require us to get a final blessing from you. So, they're -- they are clean audits. We thought we'd get them on the agenda and get them off the docket as soon as we could and that's why they are here.

So, we don't have -- I have nothing to add to them. I think Sara provided a -- a highlight. I want to say I think you got a memo summary telling you what the auditors actually did review and where -- where they -- we found one thing, I will just note, we asked them to identify whether or not they had any legal defense funds, and none of them said they had legal defense funds. So, just an interesting thing. We've never asked that before, but there's this AG opinion out there about legal defense funds, so we thought we might see if anybody actually has one and these guys didn't.

MS. LARSEN: Chairman, Commissioners, if you have any questions on the audits, I'm happy to answer them, but we actually got these back in record time, so we thought we would get them on the agenda and get them done, so.

CHAIRPERSON RECKART: Boy. I hear that.

COMMISSIONER HOFFMAN: Mr. Chair, I move we accept the audits for the four candidates listed on Item VII(B).

CHAIRPERSON RECKART: Is there a second?

COMMISSIONER LAIRD: Second.

CHAIRPERSON RECKART: All right. Mr. Laird, thank you. Mr. Hoffman, thank you. All those in favor, please indicate by saying "aye."

(Chorus of ayes.)

CHAIRPERSON RECKART: All opposed? Carries unanimously.

Okay. Meeting dates. Item VIII, on attachment VIII to our agenda here, we have the proposed meeting dates. I think the only one up -- up for actual decision is the April one.

Paula, I'm sorry to jump in here, but was everybody available on either of those dates and we've just got to choose out of an abundance of caution?

MS. THOMAS: Yeah. The majority --

CHAIRPERSON RECKART: Okay.

MS. THOMAS: -- was available either way. There -- there was no preference on -- in April.

CHAIRPERSON RECKART: Okay. So, it -- I'd like to just discuss, does anyone have a preference for -- so we're all agnostic?

COMMISSIONER KOESTER: Well, the 23rd would make a little more sense only because May is the 14th and shove

those kind of together.

CHAIRPERSON RECKART: That's a -- that's a good point. And since you're likely to be running things, I'll leave that up to you. So -- all righty. Let's go with the 23rd. And then let's adopt -- see if we can adopt the slate. It will be: January 29th, February 26th, March 26th, April 23rd, May 14th, and June 25th for the scheduled meeting dates the first half of 2015.

All those in favor, please indicate by saying "aye."

(Chorus of ayes.)

CHAIRPERSON RECKART: Okay. Carries unanimously. Thank you.

All righty. Then, discussion and possible action for selection of Chairman for 2015. I'll note that I think, unless I abdicate earlier and I don't think anyone would let me, that I -- I carry the chairmanship until January -- the January meeting.

MR. COLLINS: Yes. And when we were putting together the agenda, we know already we have a pretty heavy agenda for December, so we thought that it would be -- it might be -- you know, we're talking about might be a good idea to -- if you're comfortable doing this now, to do it now and -- and -- and that way it's one less

thing to do in -- in December.

CHAIRPERSON RECKART: Okay.

MR. COLLINS: And, you know. But, that's -- it's all -- obviously, you know, I just -- this is not for me to participate in.

CHAIRPERSON RECKART: Okay. I don't think -- and our custom has been, and it's worked quite well, maybe with the exception of this tenure, but it's worked quite well that we -- the -- the most senior-ranking person who has -- who meets the qualification and requirements under the rules be elected and I -- I believe that's you, Mr. Koester.

COMMISSIONER KOESTER: Thanks a lot.

CHAIRPERSON RECKART: I know. I tried desperately to get out of it, too.

But anyway, with that, I would nominate Mr. Koester to assume the chairmanship in -- for the -- beginning with the expiration of my chairmanship at the end of the January [sic] meeting.

COMMISSIONER LAIRD: I second that. I like that.

CHAIRPERSON RECKART: Okay. I'm sure Mr. Laird will. So -- so all those in favor, please indicate by saying "aye."

COMMISSIONER LAIRD: Aye.

COMMISSIONER HOFFMAN: Aye.

CHAIRPERSON RECKART: Aye.
All those opposed? All righty, it carries.
COMMISSIONER HOFFMAN: Mr. Koester didn't vote "oppose," so.
CHAIRPERSON RECKART: Yeah. Yeah, I'm assuming he's in shock.
COMMISSIONER KOESTER: I was outnumbered anyway.
CHAIRPERSON RECKART: All righty. This is the time for public comment. Consideration of comments and suggestions anyone here who has been brave enough to endure may want to make. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date or responding to criticism.
Do we have any people who want to comment?
It appears not.
With that, I'll entertain a motion to adjourn. I'll move it.
COMMISSIONER HOFFMAN: I move we -- or, I'll second it then.
CHAIRPERSON RECKART: All right. Great. All in favor?
(Chorus of ayes.)

CHAIRPERSON RECKART: Okay. We are adjourned. Well done. Thank you, everyone.
(Whereupon the proceeding concludes at 11:13 a.m.)

* * * * *

C E R T I F I C A T E

I, Angela Furniss Miller, Certified Reporter, do hereby certify that the foregoing pages numbered 1 through 70, inclusive, constitute a full and accurate printed record of my stenographic notes taken at said time and place, all done to the best of my skill and ability.
DATED, at LITCHFIELD PARK, Arizona, this 25th day of November, 2014.

_____
Angela Furniss Miller, RPR, CR
Certified Reporter (AZ50127)

EXHIBIT D

STATE OF ARIZONA

CITIZENS CLEAN ELECTIONS COMMISSION

In the Matter of:	Case No.: 14-007
LEGACY FOUNDATION ACTION FUND, RESPONDENT	**ORDER AND NOTICE OF APPEALABLE AGENCY ACTION**

The Citizens Clean Elections Commission ("Commission") shall enforce the provisions of the Citizens Clean Elections Act ("Act"). Pursuant to those duties, the Commission hereby issues this Order and Notice of Appealable Agency Action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legacy Action Foundation Fund ("LFAF" or "Respondent") is a 501(c)(4) social welfare organization. Respondent is not registered with the Secretary of State's Office as a political committee or independent expenditure committee.

On January 9, 2014, Scott Smith, then Mayor of the City of Mesa, established his candidate campaign committee, Smith for Governor 2014, with the Secretary of State's office. At this time, Smith was also the President for the U.S. Conference of Mayors. Before Smith resigned as mayor and thus ended his term as president of the Conference, LFAF aired over $260,000 in television advertisements in the Phoenix market. This advertisement coincided with Smith's last two weeks in these positions. The ad is express advocacy under A.R.S. § 16-901.01

On July 31, 2014, the Commission found it had jurisdiction to determine whether Respondent had complied with the Clean Elections Act and Rules in regards to the advertisement.

On September 11, 2014, the Commission found reason to believe that Respondent had violated A.R.S. §§ 16-941(D) and -958(A) and (B) of the Act. On September 26, 2014, the Commission served an

order of compliance on Respondent stating with reasonable particularity the nature of the violations and requiring compliance within fourteen days. A.R.S. § 16-957(A).

On November 20, 2014, the Commission found probable cause to believe Respondent violated the Clean Elections Act.

Any person who makes independent expenditures exceeding $500 in an election cycle is required to file campaign finance reports with the Secretary of State's Office in accordance with A.R.S. § 16-958. A.R.S. § 16-941(D).

Any person who has filed an original report pursuant to A.R.S. § 16-941(D) must file supplemental reports to declare previously unreported independent expenditures exceeding $1,000. A.R.S. § 16-958(A). Before the beginning of the primary election period, June 24, 2014, the person shall file an original report on the first of each month after the expenditures exceed $700, and supplemental reports on the first of each month after the previously unreported expenditures exceed $1,000. A.R.S. § 16-958(B)(1).

Count I. Original Report.

Respondent's expenditures exceeded $260,000 during March 2014, and Respondent was required to file the original report by April 1, 2014. As of November 20, 2014, Respondent was 234 days late filing the original report for expenditures.

FAILURE TO COMPLY

After the Commission's September 11, 2014 finding that there was reason to believe Respondent had violated requirements of the Act, the expiration of fourteen days, and service of an order requiring compliance, Respondent failed to comply with A.R.S. §§ 16-941(D and 16-958(A) by filing campaign finance reports. To this date, Respondent has never filed the campaign finance reports required by A.R.S. §§ 16-941(D and 16-958(A). In *United States v. Locke*, 471 U.S. 84 (1985), the United States Supreme Court rejected the notion of compliance with a filing deadline sometime after the deadline falls due. "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *Id.* at 101. Therefore, Respondent failed to comply with the

reporting deadlines, and could not subsequently comply with those deadlines by filing the reports at a later date.

Accordingly, the Commission hereby makes a public finding that the Respondent violated the Act, failed to comply with the reporting deadlines, and issues this Order assessing a civil penalty in accordance with A.R.S. § 16-942 and R2-20-109(F)(3).

PENALTIES

The civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by the Act is $430 per day for statewide office. The Commission has determined the daily penalty shall be calculated from the day following the date the Commission asserted jurisdiction in this matter, August 1, 2014, through November 20, 2014, the date of the Commission's probable cause determination and assessment of penalties--111 days.

The penalty imposed shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. The amount of the expenditure ($260,000) exceeds ten percent of the adjusted primary spending limit for the governor's race ($75,362). The penalty shall be $860 per day for 111 days, which results in the assessment of a penalty of $95,460.

ORDER

WHEREFORE, the Citizens Clean Elections Commission hereby imposes a civil penalty of $95,460. This civil penalty will be satisfied upon receipt of payment to the Citizens Clean Elections Commission, 1616 W. Adams, Ste. 110, Phoenix, Arizona 85007.

You may request an administrative hearing to contest this Order by submitting a written request for a hearing within 30 days of receipt of this Order. The written request for a hearing shall be sent to the Citizens Clean Elections Commission, 1616 W. Adams, Ste. 110, Phoenix, Arizona 85007.

If you request a hearing, you may request an informal settlement conference pursuant to A.R.S. § 41-1092.06.

Individuals with a disability may request reasonable accommodation by contacting the Citizens Clean Elections Commission, 1616 W. Adams, Ste. 110, Phoenix, Arizona 85007, Telephone: (602) 364-

3477; and during a hearing by contacting the Office of Administrative Hearings, 1400 West Washington, Suite 101, Phoenix, Arizona 85007, Telephone: (602) 542-9826. Requests should be made as early as possible to allow time to arrange the accommodation.

Dated this 28th day of November, 2014.

By: _____
Thomas M. Collins, Executive Director

EXHIBIT G

ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

CAMPAIGN FINANCE ENFORCEMENT PROCEEDING

IN THE MATTER OF LEGACY FOUNDATION ACTION FUND	No. 15F-001-CCE **Final Administrative Decision** **(Rejecting Recommendation of Administrative Law Judge Decision in Office of Administrative Hearings Case 15F-001-CCE dated March 4, 2015 and Affirming Clean Elections Commission Order Dated November 28, 2014)**

On March 4, 2015, Administrative Law Judge Thomas Shedden ("the ALJ") issued his decision ("the Decision") in Arizona Office of Administrative Hearings Case 15F-001-CCE. The Decision sustains the Legacy Foundation Action Fund's ("LFAF's") appeal of the Citizen Clean Elections Commission's ("Commission's") order issued November 28, 2014 ("the Order" or "the November 28 Order") and rescinds the civil penalty imposed in the Order. The Commission has reviewed the Decision and relevant portions of the record in this matter. The Decision is attached and incorporated herein by reference.

Pursuant to A.R.S. § 41-1092.08(B), the Commission accepts the Decision's Findings of Fact 1 through 44 and Excerpts from Applicable Statutes and Rule.[1] The Commission also accepts the Decision's Conclusions of Law 1 through 13 but rejects

[1] The Commission notes that the exhibits referenced in the Findings of Fact are not attached to the Decision but correspond to Exhibits submitted by parties in the administrative proceeding.

Conclusions of Law 14through 24. Finally, the Commission rejects the Decision's recommended order.

THE PREPONDERANCE OF EVIDENCE STANDARD

"The preponderance of the evidence standard requires that the fact-finder determine whether a fact sought to be proved is more probable than not." *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, ¶ 25, 110 P.3d 1013, 1018 (2005) (citing Black's Law Dictionary 1201 (7th ed. 1999)); *see also, e.g., Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council,* 211 Ariz. 224, 228, ¶ 21, 119 P.3d 1027, 1031 (2005) (equating "preponderance of the evidence" standard with requiring facts to be found "more likely than not to be true").

ADDITIONAL FINDING OF FACT

Nothing in the record establishes that the substance of the Advertisement relates to any decisions then pending before Scott Smith as Mayor of Mesa or as President of the Conference of Mayors. The policies of the Conference of Mayors highlighted in the Advertisement were largely unrelated to actions during Mr. Smith's leadership of the Conference.

This is evidenced by the stipulated facts and exhibits submitted to the Court. The information regarding the Conference of Mayors' positions is described in Exhibit 11 to Exhibit 21 and the January 29, 2015 supplemental exhibit containing the materials at the website links listed in the specified exhibits.

DISCUSSION OF LEGAL CONCLUSIONS AND ORDER

I. Whether the Advertisement Is Express Advocacy

The Commission rejects the Decision's conclusion that the Commission failed to establish that the Advertisement at issue in this enforcement was express advocacy. To be "express advocacy" an advertisement must involve a

> general public communication . . . targeted to the electorate of that candidate(s) that in context can have no reasonable meaning other than to advocate the election or defeat of the candidate(s), as evidenced by

> factors such as the presentation of the candidate(s) in a favorable or unfavorable light, the targeting, placement or timing of the communication or the inclusion of statements of the candidate(s) or opponents.

A.R.S. §16-901.01(A)(2).

The Decision identifies several factors that led it to conclude that the Advertisement "can reasonably be[] seen as permissible issue advocacy." This analysis is incorrect for two reasons. First, it does not apply the statutory framework established in A.R.S. §16-901.01(A)(2). Second, and more fundamentally, it misstates the issue by referring to "permissible issue advocacy." All issue advocacy is permissible, just as all express advocacy through independent expenditures is permissible. The only issue in this case is whether the disclosure requirements for independent expenditures prescribed in A.R.S. §§ 16-941(D) and -958 of the Clean Elections Act apply to the Advertisement at issue in the case.

The factors set out to support the Decision's conclusions also do not support the conclusion that "in context" the advertisement "can have no reasonable meaning other than to advocate" for Scott Smith's defeat in the Republican primary for Governor. A.R.S. §16-901.01(A)(2). The Decision's analysis of express advocacy consists of the following list:

> the content of the communications; that they were aired at a time in which Mr. Smith was still the mayor of Mesa and the President of the Conference; although Mr. Smith had announced his intention to resign, he was under no legal obligation to do so and the Subject Advertisements were aired before the "window" in which candidates' nominations were due at the Secretary of State's Office; they were aired about four and one-half months before early voting started in the Republic primary and about five and one-half months before the election itself; and voting in the Republican primary was not limited to registered Republicans.

Decision ¶ 16.

This Decision's list fails to address all of the statutory factors and does not address the critical issue of whether "in context" the advertisement's only reasonable

meaning is to advocate for the defeat of Scott Smith in the Republican primary. The Decision never offers another reasonable meaning for this television advertisement that ran shortly before Smith's resignation as Mesa's mayor. In addition, the Decision's statement that Mr. Smith was under no legal obligation to resign as mayor is misleading. Once Smith filed his nomination petitions for the office of governor (which had to be filed between April 28 and May 28, 2014), he was obligated to resign as mayor pursuant to A.R.S. § 38-296 because he was not in his final year of his term as Mesa's mayor. The advertisements ran from March 31, 2014 to April 14, 2014, and Scott Smith resigned as Mayor on April 15, 2014. Finally, the fact that Republicans as well as people who have not designated a party preference or are members of a party that is not represented on the ballot may vote in the Republican primary does not tip the scale one way or the other in the analysis of whether the advertisement is an independent expenditure subject to the Clean Election Act's disclosure requirements.

The Commission rejects the Decision's analysis of express advocacy and instead concludes that in context the advertisement's only reasonable meaning is to advocate for the defeat of Scott Smith in the 2014 Republican primary for Governor. The advertisement (Exhibit 6 in the record in the administrative proceeding) places Scott Smith in an unfavorable light as a candidate for the Republican nomination for Governor of Arizona. The advertisement's text, video, and voice over informed voters in the metro-Phoenix area that Smith was closely associated with President Barack Obama, a democrat, and several of his policy positions. For example, the advertisement opens by referring to Smith as "Obama's favorite mayor":

Screenshot of LFAF Advertisement (Ex. 6) at :02.

Throughout, the ad presents both men in a series of mocking illustrations, and links Smith with several generic non-local policy issues supported by the Obama administration, including "Obamacare," limits on gun rights, environmental regulations, and "Obama's tax & spend proposals." A few examples from the advertisement are below:

Screenshot of LFAF Advertisement at :08.

Screenshot of LFAF Advertisement at :21.

The theoretical alternative explanations that this advertisement was intended to advocate to change Smith's conduct as a leader of the Conference of Mayors or as Mesa's mayor are unreasonable. Mr. Smith had announced his candidacy for governor and his impending resignation a few months before the advertisement was aired. In context, the only reasonable meaning for the advertisement in context is to advocate for Smith's defeat, as set forth in the Commission's November 28, 2014 order.

For these reasons and those set forth in the Commission Executive Director's November 3, 2014 Probable Cause Recommendation, the Commission concludes that the advertisement is express advocacy and, as a result, is an independent expenditure subject to the reporting requirements in A.R.S. §§ 16-941(D) and -958. It rejects the Decision's contrary conclusion.

II. The Order Assessing Penalties

The Commission also rejects the Decision's conclusion in ¶ 23 that the Commission's order imposing penalties is not proper because "the candidate on whose behalf the expenditure was made and that candidate's campaign account" are

not jointly and severally responsible for the penalties. The Decision's reasoning either removes all Commission authority to impose civil penalties for violating the reporting requirements for independent expenditures or requires that candidates and candidate committees that, by definition, had nothing to do with the violation must be jointly and severally liable for any civil penalty. Either reading leads to absurd and potentially unconstitutional consequences that undermine the Clean Elections Act and its rule (R20-109(F)(3)) governing penalties for violations of independent expenditure reporting requirements.

The Commission has the authority to impose civil penalties for any violation of the Clean Elections Act, A.R.S. § 16-957(B), and the penalties prescribed by A.R.S. § 16-942(B) and Arizona Administrative Code Rule R2-20-109(F)(3) apply to violations of the independent expenditure reporting requirements. The provision in A.R.S. § 16-942(B) imposing joint and several liability on a candidate and candidate campaign committee for penalties does not apply here because no candidate or candidate campaign committee was involved in any way with the reporting violation that occurred.

The Commission, therefore, rejects the Decision's conclusion regarding penalties and affirms the Commission's authority to impose civil penalties for violations of the reporting requirements for independent expenditures as prescribed by R2-20-109(F)(3) and A.R.S. § 16-942(B). It reinstates the civil penalty of $95,460.

CONCLUSION

For these reasons, the Commission rejects the Decision's recommended order and affirms the Commission's November 28, 2014 order and civil penalties of $95,460.

Pursuant to A.R.S. § 41-1092.08(F), this is the final administrative decision in this matter.

DONE this 27th day of March, 2015.

By /s/Thomas J. Koester
Thomas J. Koester, Chairman
Citizens Clean Elections Commission

Electronically filed on March 27, 2014 with:

Office of Administrative Hearings
1400 W. Washington St., Suite 101
Phoenix, AZ 85007

COPY of the foregoing emailed
this 27th day of March, 2015, to:

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Attorneys for Legacy Foundation Action Fund

/s/Sara A. Larsen

EXHIBIT J

State of Arizona
Citizens Clean Elections Commission

1616 W. Adams - Suite 110 - Phoenix, Arizona 85007 - Tel (602) 364-3477 - Fax (602) 364-3487 - www.azcleanelections.gov

April 11, 2018

Via Federal Express and Email

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Re: Legacy Foundation Action Fund Administrative Penalty

Dear Brian and Jason:

I am sending this letter to you because you have represented Legacy Foundation Action Fund ("LFAF") with regard to proceedings before the Citizens Clean Elections Commission. If you no longer represent LFAF, please let me know.

As you know, on March 27, 2015, the Commission entered a final administrative order assessing a civil penalty against LFAF in the amount of $95,460 (the "Penalty Order"). LFAF had the opportunity to seek judicial review of the Penalty Order but failed to do so within the statutory deadline. The Commission has refrained from pursuing collection of the Penalty Order while LFAF litigated the dismissal of its untimely complaint for judicial review. That litigation has now concluded and all amounts assessed under the Penalty Order remain due and owing.

Please tender payment of the $95,460 penalty or contact me by April 16, 2018 to arrange a payment plan. If the penalty is not paid, the Commission will pursue all available legal remedies. I look forward to receiving the payment so this matter can come to a close.

Sincerely,

Thomas M. Collins
Executive Director

Exhibit 1

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Kenneth M. Frakes, #021776
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Co-Counsel for Petitioner/Appellant

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

IN AND FOR THE STATE OF ARIZONA

In the Matter of LEGACY FOUNDATION ACTION FUND, Petitioner/Appellant, vs. ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION Respondent/Appellee.	Case No. 15F-001-CCE **OPENING BRIEF OF PETITIONER/APPELLANT LEGACY FOUNDATION ACTION FUND** (Assigned to the Honorable Thomas Shedden)

INTRODUCTION

The First Amendment declares that "Congress shall make no law... abridging the freedom of speech...." U.S. Const. amend. I. This is so because "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Therefore, the right of citizens to disseminate and receive information is a prerequisite to an "[e]nlightened self-government and a necessary means to protect it." *Id.* Because of this, "The First Amendment has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id.* (internal quotation marks omitted).

The U.S. Supreme Court has ruled that the application of intent or purpose based tests to determine whether speech constitutes express advocacy does not serve the "[v]alues the First Amendment...[because they open] the door to a trial on every ad...on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *FEC v. Wis. Right to Life, Inc.*, ("*WRTL*") 551 U.S. 449, 468 (2007). A subjective, intent based, test chills speech because the test "blankets with uncertainty" whether the speech in question is express advocacy subject to regulation or issue advocacy. *Id.* Rather, issue advocacy speech deserves special protections because "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

This case is about the Citizens Clean Elections Commission ("CCEC") stepping beyond its statutory authority by asserting jurisdiction and applying an unconstitutional subjective, intent based, test to an advertisement aired by Legacy Foundation Action Fund ("LFAF") and finding that such advertisement constituted

express advocacy. Instead of heeding to well-established First Amendment jurisprudence, the CCEC erred when it interpreted and applied the Arizona statutory definition of "expressly advocates" in such a way to effectively eliminate nearly all issue advocacy speech, which is in clear contradiction to Supreme Court Precedent. Additionally, the CCEC violated the U.S. Constitution when it applied a statute against LFAF that had been declared unconstitutional by the Superior Court of Maricopa County at the time LFAF acted.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY IN ASSERTING JURISDICTION OVER LFAF.

II. WHETHER THE CCEC ERRED WHEN IT MADE FINDINGS OF FACT AND LAW WHEN IT WAS UNDISPUTED THAT, AT THE TIME LFAF RAN ITS ADVERTISEMENT, THE ARIZONA SUPERIOR COURT HAD RULED A.R.S § 16-901.01(A)'S DEFINITION OF 'EXPRESSLY AVOCATES' UNCONSTITUTIONAL.

III. WHETHER THE CCEC VIOLATED THE FIRST AMENDMENT WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING LFAF'S ADVERTISEMENT CONSTITUTED EXPRESS ADVOCACY.

IV. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CIVIL PENALTIES AGAINST LFAF UNDER A.R.S. § 16-942(B).

STATEMENT OF THE CASE

Petitioner/Appellant, Legacy Foundation Action Fund ("LFAF") is a tax-exempt, nonprofit, social welfare organization organized under Internal Revenue Code Section 501(c)(4). (Joint Stipulation of Facts ¶ 1). Since its inception in 2011,

LFAF has maintained a primary purpose to further the common good and general welfare of the citizens of the United States by educating the public on public policy issues including state fiscal and tax policy, the creation of an entrepreneurial environment, education, labor-management relations, citizenship, civil rights, and government transparency issues. (Exhibit 1).

Over the past four years, LFAF has run many issue advocacy advertisements in different mediums. Being familiar with the First Amendment protections afforded to issue advocacy speech, LFAF ran a television advertisement in late March and early April of 2014 in Arizona referencing policy positions supported by the U.S. Conference of Mayors and its President, former Mesa Mayor Scott Smith. (Joint Stipulation of Facts ¶ 9). LFAF's Arizona advertisement was a part of a larger campaign regarding the U.S. Conference of Mayors as evidenced by advertisements airing not only in Mesa, AZ but also in Baltimore, MD and Sacramento, CA. (Joint Stipulation of Facts ¶¶ 9-11) (Exhibit 4).

The Arizona advertisement ran between March 31 and April 14, 2014, and discussed the U.S. Conference of Mayors' policy positions regarding the environment, Second Amendment, tax and spending, and federal budget. (Joint Stipulation of Facts ¶ 14) (Exhibit 6). Consistent with LFAF's mission and tax-exempt purpose, the advertisement provided viewers with a call to action to contact Scott Smith to tell him "The U.S. Conference of Mayors should support policies that are good for Mesa." (Exhibit 6).

Several months before LFAF aired this advertisement, Arizona's statutory definition of "expressly advocates" had been declared unconstitutional by the Maricopa County Superior Court. (Joint Stipulation of Facts ¶ 8).

Over two and a half months after LFAF's advertisement stopped running, Mr. Kory Langhofer, a lawyer representing Mr. Smith, filed a complaint against LFAF, amongst other parties, alleging that LFAF's advertisement constituted express

advocacy, thereby subjecting LFAF to the registration and reporting requirements of both Articles 1 and 2 of Title 16 Chapter 2 of the Arizona Revised Statutes. (Joint Stipulation of Facts ¶¶ 25, 26). Mr. Langhofer filed his complaint with the CCEC as well as with the Arizona Secretary of State's Office. (Joint Stipulation of Facts ¶ 25). On July 16, 2014, LFAF filed its response to the complaint with the CCEC, arguing the CCEC did not have jurisdiction over the matter and, even if it did, LFAF was not subject to registration or reporting requirements because its advertisement did not "expressly advocate" as the then-unconstitutional provision defined the term. [1] (Joint Stipulation of Facts ¶ 30) (Exhibit 10).

The Arizona Secretary of State's Office referred the complaint to the Maricopa County Elections Department. (Joint Stipulation of Facts ¶ 27). On July 21, 2014 Jeffrey Messing, a lawyer representing the Department, issued a letter indicating that the Department "does not have reasonable cause to believe that a violation of Arizona Revised Statutes A.R.S. § 16-901.01 *et seq.* has occurred." (Joint Stipulation of Facts ¶ 28) (Exhibit 8).

On July 31, 2014, the CCEC held a public meeting and discussed, as an agenda item, the complaint against LFAF. (Joint Stipulation of Facts ¶ 30). At that hearing the CCEC decided not to make a finding as to reason to believe a violation occurred, but instead limited its determination to establishing jurisdiction over the matter. (Joint Stipulation of Facts ¶ 33) (Exhibit 15). Over a month later, on September 11, 2014, the CCEC revisited the issue and declared it had reason to believe that LFAF violated the Act and ordered an investigation. (Joint Stipulation of

[1] Several months before LFAF produced and aired the Arizona advertisement, the Arizona Superior Court ruled A.R.S. § 16-901.01(A) unconstitutional. *Committee for Justice & Fairness v. Arizona Secretary of State*, No. LC-2011-000734-001. Therefore, as argued *infra*, the CCEC could not enforce this unconstitutional statute defining "expressly advocates" against LFAF. The express advocacy definition in A.R.S. § 16-901.01(A) has been ruled unconstitutional by the Arizona Superior Court on November 28, 2012, overturned by the Arizona Court of Appeals on August 7, 2014, and is currently on appeal before the Arizona Supreme Court, CV-14-0250-PR. LFAF believes that § 16-901.01(A) is unconstitutional and has been permitted by the appellants and appellees in the appellate case to submit an amicus curiae brief arguing that the statute is unconstitutional.

Facts ¶ 35) (Exhibit 17). On September 26, 2014, the CCEC sent LFAF a Compliance Order asking LFAF to provide written answers to the following questions under oath:

1. Please provide how much money was expended to create and run the television advertisement identified in the Compliance Order.

2. Please identify any other advertisements pertaining to Scott Smith that ran Arizona.

3. With regard to any advertisements identified in LFAF's response to question 2, please provide information on the scope of the purchase, including how much money was spent to create and run any such advertisements and where they ran.

(Joint Stipulation of Facts ¶ 36) (Exhibit 18). LFAF responded to the CCEC's Compliance Order by letter arguing that the CCEC's request for additional information was not only irrelevant to the matter at hand because it exceeded the scope of the original complaint, but was also outside the scope of the CCEC's jurisdiction. (Exhibit 19). Further, LFAF provided a detailed request to the CCEC in its response, asking the CCEC, when assessing civil penalties under A.R.S. § 16-942(B), to identify the candidate the advertisement was "by or on behalf of" and which candidate or candidate's campaign account shall be "jointly and severally liable" for any civil penalty assessment. (Exhibit 19).

At its November 20, 2014 public meeting, the CCEC found probable cause to believe LFAF violated the Clean Elections Act. (Joint Stipulation of Facts ¶ 41) (Exhibit 25). On November 28, 2014 the CCEC issued its "Order and Notice of Appealable Agency Action" in which it deemed LFAF's Arizona advertisement to be express advocacy and assessed a penalty against LFAF in the amount of $95,460. (Joint Stipulation of Facts ¶ 43) (Exhibit 26).

LFAF filed its request for an administrative hearing timely on December 1, 2014. (Joint Stipulation of Facts ¶ 44) (Exhibit 27).

ARGUMENT

I. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY IN ASSERTING JURISDICTION OVER LFAF.

The CCEC's jurisdiction is limited to A.R.S. Title 16, Chapter 6, Article 2, which is delineated in the Act at A.R.S. §§ 16-940 to 16-961. In fact, A.R.S. §§ 16-956(A)(7) and 16-957(A), explicitly limit the reach of the Commission to enforcing "this article" (Title 16, Chapter 6, Article 2).

The CCEC's declaration of jurisdiction through the independent expenditure reporting requirements outlined in A.R.S. § 16-941(D) is misguided as the statute's purpose in Article 2 is no longer relevant. The independent expenditure reporting requirements found in A.R.S. Title 16, Chapter 6, Article 2 were implemented to provide the CCEC a means to track independent expenditure spending so that it would be able to subsidize participating candidates for such expenditures.[2] *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-2829 (2011). The CCEC is without a legal foothold to enforce the independent expenditure reporting requirements, however, since the United States Supreme Court held that scheme to be unconstitutional in *Bennett*. *Bennett*, at 2828-2829. ("the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."). Because independent expenditures are already subject to registration and

[2] The Citizens Clean Elections Act provided for subsidies to candidates choosing to opt-in to the statute's public financing provisions. As originally adopted, but later declared unconstitutional, such candidates were given subsidies from the state for independent expenditures run against such candidates. To track these expenditures, the Citizens Clean Elections Act provided a registration and reporting mechanism (in addition to the one already existing under Title 16, Chapter 6, Article 1) for the CCEC. Because such purpose is no longer constitutional, such a duplicative registration and reporting requirement exceeds CCEC's statutory authority.

reporting requirements in Article 1, which are enforced by the Arizona Secretary of State, Article 2's requirements are duplicative and any attempt to make such requirements applicable, through rulemaking or otherwise, impermissibly deviates from the statute's original intent and purpose, and is the result of an agency seeking to expand its jurisdiction.[3]

Furthermore, Section 16-941(D) requires persons making qualifying independent expenditures to otherwise report such expenditures to CCEC "with the exception of any expenditure listed in Section 16-920…." A.R.S § 16-941(D). Section 16-920 outlines certain reporting requirements under Article 1 to the Arizona Secretary of State and specifically exempts from reporting, and subsequently, the CCEC's enforcement authority, expenditures in the form of "[c]ontributions for use to support or oppose an initiative or referendum measure or amendment to the constitution." A.R.S. § 16-920(A)(5). LFAF's advertisement addressed relevant public policy issues of national import including: (1) the environment; (2) healthcare; (3) the Second Amendment; and (4) the Federal Budget, which fit squarely in Section 16-920(A)(5)'s exemption. (Exhibit 6). The content of the Advertisement, therefore, rendered the reporting requirements of § 16-941(D) and 16-958(A), (B) inapplicable.

Finally, as noted *supra*, upon referral by the Arizona Secretary of State's Office, the lawyer representing the Maricopa County Elections Department found no reasonable cause to believe that a violation of Title 16, Chapter 6, Article 1 occurred. (Joint Stipulation of Facts ¶ 38) (Exhibit 8). In other words, after review of the very same complaint at issue here, the Maricopa County Elections Department determined unequivocally that LFAF's advertisement did not constitute express advocacy under A.R.S. 16-901.01 and was, therefore, not subject to independent expenditure registration and reporting requirements. *Id.* The Maricopa County Elections

[3] As evidence of the CCEC's attempt to provide itself broader authority, the CCEC, in the summer and fall of 2013 implemented new regulations giving the CCEC authority beyond that which is contained in the text of the Citizens Clean Elections Act. *See* Ariz. Admin Reg./Secretary of State. Vol. 19 Issue 45 (Nov. 8, 2013).

Department's decision, standing in for the Arizona Secretary of State, renders the CCEC's attempt to apply Section 16-941(D) to LFAF meritless and without legal authority.[4]

II. WHETHER THE CCEC ERRED WHEN IT MADE FINDINGS OF FACT AND LAW WHEN IT WAS UNDISPUTED THAT, AT THE TIME LFAF RAN ITS ADVERTISEMENT, THE ARIZONA SUPERIOR COURT HAD RULED A.R.S § 16-901.01(A)'S DEFINITION OF 'EXPRESSLY AVOCATES' UNCONSTITUTIONAL.

On November 28, 2012, well before LFAF aired its advertisement, the Maricopa County Superior Court entered its "Final Judgment" in *Committee for Justice & Fairness v. Arizona Secretary of State's Office*, No. LC2011-000734-001. (Joint Stipulation of Facts ¶ 8). In its ruling, the Superior Court declared as unconstitutional, A.R.S. § 16-901.01, the statute defining "expressly advocates." *Id.* While the Secretary of State appealed the Superior Court's decision, a stay was not granted, nor was any other type of legal action imposed that stalled or reversed the Superior Court's ruling. The CCEC entertained discussion as to the effect of the Superior Court's ruling at its November 20 open meeting and admitted the Superior Court's ruling controlled at the time LFAF aired its advertisement. (Exhibit 25 at 39:5-40:8 and 57:22-58-22, attempting to diminish the effect of the Superior Court's ruling by referring to it as a "minute entry").

Therefore, when LFAF composed and aired its advertisement, it did so relying on the fact that an Arizona court of competent jurisdiction deemed Arizona's statutory definition of "expressly advocates" to be unconstitutional. The U.S. Supreme Court recognized that unconstitutional laws are unenforceable against those

[4] It is a severe burden on First Amendment rights afforded to issue advocacy speakers in Arizona to have to expend money and resources fighting legal challenges before two separate agencies that may, as they have in this case, render two very different interpretations of the very same statutory provision. These complicated procedures most certainly chill speech by making any attempt to exert one's First Amendment right to air an issue advertisement prohibitively unpredictable and potentially costly, a result the U.S. Supreme Court explicitly cautions against.

who act in reliance on the law's status by establishing the *void ab initio* doctrine, which Justice Field described in *Norton v. Shelby County*. "An unconstitutional statute is not 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, 442 (1886). While the U.S. Supreme Court's direct application of the *void ab initio* doctrine has been softened through the years to accommodate those who become unjustly effected by the retroactive application of an unconstitutional law, the general premise and legal doctrine holds true today for those who reasonably act in reliance on a law's status as being unconstitutional. *See Beatty v. Metropolitan St. Louis Sewer Dist.,* 914 S.W.2d 791, 794 (Mo.S.Ct. 1995) (citing *Norton,* at 442) ("The modern view, however, rejects this rule to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held unconstitutional.").

Additionally, federal courts have recognized "that a federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect." *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) (*en banc*) (quotation marks omitted) (decision based on mootness). This finding is rooted in the notion that legitimate reliance on an official interpretation of the law is a defense. *See United States v. Brady,* 710 F.Supp. 290, 294 (D.Colo.1989) citing *United States v. Durrani*, 835 F.2d 410, 422 (2d Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984) (although there are few exceptions to the rule that ignorance of the law is no excuse, there "is an exception for legitimate reliance on official interpretation of the law"). "The doctrine is applied most often when an individual acts in reliance on a statute or an express decision by a competent court of general jurisdiction . . ." *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987); *United States v. Moore*, 586 F.2d

1029, 1033 (4th Cir. 1978) ("Of course, one ought not be punished if one reasonably relies on a judicial decision later held to have been erroneous").

By parallel analogy, the CCEC is, in this instance, attempting to enforce a state law that had been declared by a court of competent jurisdiction with power over the CCEC to be unconstitutional. It was not until several weeks *after* the CCEC decided to pursue this matter that the Court of Appeals reversed the judgment of the trial court. *Comm. for Justice & Fairness (CJF) v. Ariz. Secy. of State's Office*, 235 Ariz. 347, 332 P.3d 94 (App. 2014).[5] In fact, the CCEC's position appeared to be that it was LFAF's "burden" to demonstrate how a valid declaratory judgment of the Maricopa County Superior Court was in fact "binding" on the CCEC. *See* (Exhibit 25 at 58:9-20).

It is undisputed that A.R.S. § 16-901.01 was considered unconstitutional by the Maricopa County Superior Court at the time LFAF aired its advertisement. CCEC, therefore, cannot enforce the statute's express advocacy reporting requirements upon LFAF, as doing so would violate the legal doctrine of *void ab initio* and the constitutional due process requirements of not permitting an agency to enforce an unconstitutional law. The Arizona Secretary of State's office is in fact following this doctrine in a similar case where a federal court has declared the State's definition of "political committee" to be so vague as to be unenforceable. *Galassini v. Town of Fountain Hills*, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. Dec. 4, 2014). See also "Galassini Impact on Campaign Finance Law" ("Our office is currently not enforcing the compliance provisions of campaign finance law due to the district court order.") available at http://www.azsos.gov/cfs/Galassini.htm (visited December 27, 2014).

[5] As noted at fn 1, supra, a Petition for Review of the CJF decision is pending before the Arizona Supreme Court. *Committee for Justice & Fairness v. Arizona Secretary of State*, CV-14-0250-PR (Ariz.S.Ct.).

The CCEC's position is strikingly different from that of the Secretary of State – while presumably being advised by the same Attorney General's Office – and is a position that cannot be upheld.

III. WHETHER THE CCEC VIOLATED THE FIRST AMENDMENT WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING LFAF'S ADVERTISEMENT CONSTITUTED EXPRESS ADVOCACY.

Longstanding First Amendment jurisprudence requires a court to apply an objective standard when assessing whether speech constitutes the functional equivalent of express advocacy. *See Citizens United* 558 U.S. at 324-325, (citing *WRTL* at 474 n.7 (noting "the functional-equivalent test is objective: [A] court should find that [a communication] is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *(internal quotations omitted)*). If the Arizona statutory definition allows for a subjective analysis of context, then this statute has to be unconstitutional following the Supreme Court decisions in *Citizens United* and *WRTL*.

The U.S. Supreme Court has held that only express advocacy or its functional equivalent is subject to regulation through campaign finance laws. *See McConnell v. FEC*, 540 U.S. at 93, 105 (2003); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). In *Buckley*, the Supreme Court emphasized the unique nature of "explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43 (finding the following words constituted express advocacy: "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, reject").

Buckley's "magic words" test had been upheld in courts throughout the country until recently when the Ninth Circuit expanded the definition to include not only communications containing magic words, but also communications, when read

in total, and with limited reference to external events, are susceptible of "[n]o other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). A later Ninth Circuit opinion clarified and narrowed *Furgatch* by noting when interpreting express advocacy, the Ninth Circuit presumes express advocacy "must contain some explicit words of advocacy." *California Pro-Life Counsel v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003); *also Furgatch*, 807 F.2d. at 864 ("context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words"). While express advocacy may not be limited to "circumstances where an advertisement only uses so-called magic words…," Supreme Court precedent explicitly confines the contours of express advocacy to protect the speaker's legitimate right to engage in issue advocacy speech. *Getman* and *Furgatch* demonstrate that the most expansive definition of express advocacy requires that speech only qualifies as express advocacy if it "presents a clear plea for action, and thus speech that is merely informative is not covered by the Act." *Furgatch*, 807 F.2d. at 864.

The CCEC erred in its analysis of LFAF's advertisement by failing to apply an objective standard. *See WRTL*, 551 U.S. at 470 (requiring a standard that "focus[es] on the substance of the communication rather than amorphous considerations of intent and effect."). In rendering its decision, the CCEC overlooked two critical components of LFAF's advertisement. First, LFAF's advertisement did not proffer a clear plea for action in conjunction with Mr. Smith's campaign for Arizona Governor. Second, the substance of LFAF's advertisement, when viewing the four corners of the advertisement, shows that it was: (i) targeted to effectuate a legitimate issue advocacy message, and (ii) part of a broader issue advocacy campaign.

A. LFAF's Advertisement Lacks A Clear Plea For Action

Contrary to well established U.S. Supreme Court precedent, the CCEC erred when it ruled that LFAF's advertisement constituted the functional equivalent to express advocacy. Such a reading of the advertisement required the CCEC to exert a subjective, intent-based analysis of the facts; a chore that flies directly in the face of Justice Roberts and the Supreme Court in *WRTL*. *See WRTL* 551 U.S. at 467 (declining to adopt a test "turning on the speaker's intent to affect an election.").

At the heart of the CCEC's decision is its reliance on the CCEC Executive Director's Probable Cause Recommendation ("Recommendation") presented to the Commission from Tom Collins, CCEC's Executive Director. Instead of applying an objective analysis of the facts, the Recommendation veils its findings in subjective, intent-based assertions. The instances are numerous and appear frequently throughout the Recommendation. On page 6 and continuing on to page 7 of the Recommendation, it suggests that LFAF's advertisement is meant to carry a message that sways Republican primary voters. (Exhibit 21 at pp. 6-7). On page 10, the Recommendation states "the advertisement places Mr. Smith in a negative light with Republican primary voters." (Exhibit 21 at p. 10). Absent from the Recommendation, however, is empirical evidence of such an impact. The basis for the Recommendation's statements are even more mysterious when considering the fact that Arizona does not have closed primaries, which leads one to believe that the advertisement most certainly may have been interpreted differently by different primary election voters; Republicans, Independents and those who register without a party preference.

Furthermore, the CCEC on multiple occasions pressed to discern the intent behind LFAF's advertisement through questioning during its public meetings. *See* (Exhibit 14 at 58:10-59:4), (Exhibit 17 at 22:9-23:16), (Exhibit 25 at 29:14-34:25).

Instead of focusing on the four corners of the ad itself, the CCEC obscured and confused the ad's meaning with contextual and intent-based rhetoric. While context may be considered when determining whether an advertisement constitutes the functional equivalent of express advocacy, the U.S. Supreme Court does not support the CCEC's considerable reliance on contextual considerations. *See WRTL* 551 U.S. at 473-474. In fact, the Supreme Court concluded that contextual considerations "should seldom play a significant role" in determining whether speech is express advocacy. *WRTL,* 551 U.S. at 473-474. While "basic background information that may be necessary to put an ad in context" may be considered, the Court noted that courts should not allow basic background information to "become an excuse for discovery." *Id.*

Thus, the Recommendation's argument, which was relied upon by the CCEC, that the advertisement's call to action "is belied by the context of the advertisement" in that the advertisement does not relate to pending legislation in the City of Mesa runs counter to Supreme Court precedent. (Exhibit 21 at p. 9). The reality of the matter is that the federal policy issues mentioned in the advertisement (environment; healthcare; the Second Amendment; and the Federal Budget) are relevant issues of national importance.

References throughout the Recommendation, as well as comments made during public Commission meetings, assume that statements affixed to policy positions of the U.S. Conference of Mayors were purposed to undermine Mayor Smith's efforts to be elected as governor. *See* (Exhibit 25 40:10-20, 44:4-16, 48:3-50:2). The reality is that Mayor Smith held the highest position within the U.S. Conference of Mayors and bore the burden of being associated with the issues of public importance promulgated by the Conference. In many ways, the federal public policy issues addressed in LFAF's advertisement constituted matters of greater importance than Mayor Smith's personal ambitions for higher office. Under the

CCEC's analysis, there can be no such thing as a genuine issue advertisement when that ad mentions a candidate for public office at anytime before an election (even five months in advance of a primary and before candidate filings even occurred) even in cases where that candidate maintains a public position and the ad articulates a clear policy statement. Justice Roberts dismissed such an attempt outright in saying,

> "[t]his 'heads I win' 'tails you lose' approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads, contrary to our conclusion in WRTL I that as-applied challenges to § 203 are available, and our assumption in McConnell that 'the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.'"

WRTL, 551 U.S. at 471 (citing *McConnell* 540 U.S. at 206).

B. LFAF's Advertisement Does Not Constitute The Functional Equivalent Of Express Advocacy Under A.R.S. § 16-901.01.

Arizona defines express advocacy to mean only those communications that explicitly urge the election or defeat of a particular candidate or that "in context can have no reasonable meaning other than to advocate the election or defeat of the candidate(s), as evidenced by factors such as the presentation of the candidate(s) in a favorable or unfavorable light, the targeting, placement or timing of the communication or the inclusion of statements of the candidate(s) or opponents." A.R.S. § 16-901.01(A).

When objectively analyzed, LFAF's advertisement is seen for what it is, an issue advocacy communication. A reasonable person reviewing the advertisement will notice that there is no mention of any election whatsoever. First, the ad does not mention a candidate for office. Second, the ad does not reference voting and certainly does not mention any political party. Therefore, a simple, objective application of the factors proffered in Section 16-901.01 shows that LFAF's

advertisement is genuine issue advocacy that has a reasonable meaning other than to defeat Mr. Smith in the Arizona primary election.

In contrast to the CCEC's purported "objective" analysis of LFAF's advertisement, are comments made by ordinary citizens made in response to the ad and posted to the Legacy Foundation Action Fund's YouTube channel, and the differing conclusion reached by the Maricopa County Department of Elections referenced, *supra*. Some of the comments from ordinary citizens include the following:

- I live in Chandler (the city bordering Mesa to the southwest) this ad made me want to volunteer for Scott Smith's Mayoral Campaign.

- Wow! Scott Smith is supportive of health care for everyone, reducing pollution to stop global warming and keep guns out of the hands of lunatics? Sounds like a great mayor to me! Go Scott!

- …[T]his ad actually makes Mesa's Mayor, Scott Smith sound wonderful. Mayor Smith supports great ideas that are beneficial to common Americans….

Therefore, while the CCEC claims that the advertisement can only have one "objective" meaning, this simply is not the case. These comments and the conclusion of the Maricopa County Department of Elections demonstrate that there is more than one reasonable interpretation of the advertisement, thereby rendering CCEC's order and assessed penalty in error.

Without mere mention of the reasonable alternative interpretations highlighted above, the CCEC repeatedly suggested that the *only* reasonable meaning of the ad was to advocate the defeat of Mayor Smith. However, the CCEC in a biased fashion never appreciated LFAF's larger mission, which required it to be critical of the policy positions supported by the U.S. Conference of Mayors. Common sense dictates that, when airing an advertisement that seeks to oppose the policy positions of an

organization, it makes sense to identify those individuals responsible for the organization's decision making. Mayor Smith, at the time the advertisement aired, was the President of the U.S. Conference of Mayors and, therefore, served as the figurehead of that organization.[6] Whether Mr. Smith liked it or not, when he assumed that role, he undertook the public persona of being responsible for the public positions and policies of the Conference. This holds true for past positions of the Conference as well. Therefore, the fact that the advertisement aired during the last two weeks of Mayor Smith's term as mayor and President of the U.S. Conference of Mayors is irrelevant since the language in the advertisement very clearly criticized the policy positions of the U.S. Conference of Mayors.

i. LFAF's Advertisement Was Targeted To Be Effective For Its Issue Advocacy Purpose.

LFAF's advertisement ran in Mesa, AZ. However, a person looking to purchase television airtime in Mesa, AZ, cannot simply target its purchase to the city of Mesa. Instead, because of the configuration of television stations and coverage areas, LFAF had to purchase airtime in the Phoenix, AZ market. *See* DMA analysis attached hereto as Exhibit A. *See also* attached Ducey Response 7/15/14 attached hereto as Exhibit B at p. 11 and Exhibit 10 at p. 6. The Recommendation cited the fact that LFAF targeted an audience greater than Mesa to suggest that such targeting was purposed to sway voters rather than to address policy issues to Mr. Smith's constituents. (Exhibit 21 at p. 6). Such an assertion is not taking into consideration the practical aspect of buying television airtime. LFAF was forced to purchase its airtime in the Phoenix, AZ market, the most narrow market available. This fact in no way takes away from the advertisement's issue advocacy message. To find

[6] LFAF's advertisement at issue was not aired in isolation. As mentioned *supra*, LFAF attacked the policies of the U.S. Conference of Mayors by running advertisements mentioning other leaders in that organization in Sacramento, CA and Baltimore, MD, and continues to criticize that body and its current leadership on its website. http://legacyaction.us/mayors.

otherwise would stifle protected First Amendment Free Speech rights in most any situation where such precise targeting is made unfeasible at no fault of the speaker.

ii. LFAF's Advertisement Was Part Of A Broad Issue Advocacy Campaign.

LFAF's advertisement aired nearly five months before any election, a span of time great enough to vastly diminish any alleged influence the ad may have had on any election. (Joint Stipulation of Facts ¶ 14). The timing, in terms of airing of an ad to the date of the election, proved vital in many courts' decisions, contrary to the Recommendation's assertion otherwise. *See WRTL,* 551 U.S. at 472 (finding that every ad covered by BCRA § 203 will, by definition, air just before an election – specifically 30 days in advance of a primary or 60 days in advance of a general election); *Furgatch,* 807 F.2d at 865 (finding it determinative that the newspaper advertisement was run one week prior to the general election); *Committee for Justice & Fairness v. Arizona Secretary of State's Office,* 325 P.3d 94, 101, 102 (App. 2014) (noting the ad was aired within days of the election and immediately before the election).

Both the Recommendation and the CCEC emphasized that LFAF's advertisement began airing after Mr. Smith announced his candidacy for governor. The Recommendation suggested that the CCEC should believe that Mr. Smith's role as President of the U.S. Conference of Mayors was not applicable or for some reason did not carry as much significance as Mr. Smith's newly-proclaimed role as candidate for governor. It is simply not the case that once Mr. Smith announced his candidacy for governor he relinquished his roles as Mayor of Mesa or President of the U.S. Conference of Mayors. In fact, Mr. Smith remained as Mayor of Mesa and President of the U.S. Conference of Mayors until April 15, 2014, which was after LFAF's advertisement was last broadcast. Therefore, for Commissioner Hoffman to remark that "I feel confident that it – that this ad would not have been run had [Mr.

Smith] not announced a – gubernatorial campaign" shows just how shortsighted the Commission's analysis truly was and how focused the Commission was on its subjective analysis of its perception of LFAF's intent. (Exhibit 25). This statement does not even consider LFAF's organizational views and broader campaign to combat policies promulgated by the U.S. Conference of Mayors.

By focusing on the timing of LFAF's advertisement relative to Mr. Smith's announcement of his candidacy rather than to the date of the election nearly five months away, the CCEC turned a blind eye to established First Amendment jurisprudence. Under the CCEC's analysis, a public official who announces his candidacy for another public office cannot be the subject of an issue advocacy advertisement concerning actions taken by the public official during his tenure in his existing office. Such a standard does not support the notion that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

IV. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CIVIL PENALTIES AGAINST LFAF UNDER A.R.S. § 16-942(B).

The CCEC may not assess a penalty against LFAF because it has failed to identify the candidate the advertisement was "by or on behalf of" and the "candidate or candidate's campaign account" that shall be "jointly and severally liable" for any civil penalty assessment. A.R.S. § 16-942(B).

The CCEC relied on A.R.S. §16-957 as well as A.A.C. R2-20-109(F)(3) as its bases for asserting and applying a civil penalty against LFAF for delinquent independent expenditure reports. (Exhibit 28). Both the statute and regulation point to A.R.S. § 16-942(B) as the sole means of assessing any civil penalty. However, the CCEC lacked the ability to exact a civil penalty under A.R.S. § 16-942(B), or any

other statute for that matter, because the statute's enforcement provisions are clear in that they refer to candidates or organizations making expenditures "by or on behalf of any candidate." A plain language reading of the statutory section below clearly illustrates this requirement,

> In addition to any other penalties imposed by law, the civil penalty for a violation *by or on behalf of any candidate* of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. *The candidate and the candidate's campaign account shall be jointly and severally responsible* for any penalty imposed pursuant to this subsection.

A.R.S. § 16-942(B) (emphasis added) (*See* Exhibit W p. 13). Before the CCEC is able to impose the statutory penalties provided in Section 16-942(B) against LFAF, it must: (1) identify the candidate for which LFAF's advertisement was "by or on behalf of," and (2) hold that candidate and the candidate's campaign jointly and severally responsible.

The CCEC failed to identify the statutorily-required candidate and attribute such to LFAF in light of its findings at its August 21, 2014 meeting as well as its November 20, 2014 meeting. At its August 21, 2014 meeting, the Commission voted to find no reason to believe that coordination between LFAF and Ducey 2014

Campaign existed.[7] Then, during its November 20, 2014 meeting, commissioners engaged in a series of questions from which it is clear the Commission does not fully grasp the notion that legislative language cannot be superfluous. *See* (Exhibit Z 40:10-24) ("So, I don't – I don't quite understand why you're saying a campaign has to be identified or who would benefit from.").

The principles of statutory construction are grounded in the goal of giving effect to the Legislature's intent, or in the case of the Citizens Clean Elections Act, the people's intent. *People's Choice TV Corp. v. City of Tuscon*, 202 Ariz. 401, 403, P7, 46 P.3d 412, 414 (2012). It is only when the language of a statute is ambiguous that principles of statutory construction are applied. *Aros v. Beneficial Ariz., Inc.*, 194, Ariz. 62, 66, 977 P.2d 784, 788 (1999). If a statute is unambiguous, the statute is applied without applying such principles. *Id. See In the Matter of: Joel Fox dba SCA*, 2009 AZ Admin. Hearings LEXIS 1307, 25-27 (holding "The County's position is not consistent with principles of statutory construction" when it interpreted statutory language to be inapplicable in contradiction to legislative intent).

A.R.S. § 16-942(B) is not ambiguous and, therefore, can only be applied to a candidate or an organization working on behalf of a candidate. Because LFAF is certainly not a candidate and the CCEC already found LFAF not to be working on behalf of (or even in coordination with) the Ducey 2014 Campaign, the CCEC erred in applying Section 16-942(B) against LFAF.

Even if the language were to be deemed ambiguous, application of principles of statutory construction command that the statutory language of "candidate" and "on behalf of any candidate" have a meaning and purpose. The CCEC's failure to consider these mandatory statutory requirements require that CCEC be prohibited from applying this statutory civil penalty provision against LFAF.

[7] At the time of the Commission's consideration of this matter on July 31, 2014, there were seven candidates for the Republican nomination for Governor, including now-Governor Ducey and Mayor Smith.

The absence of any clearly applicable penalty provision also supports LFAF's argument, outlined *supra*, that the CCEC lacks jurisdiction over this matter in the first instance.

CONCLUSION

The CCEC, even though it did not have jurisdiction over this matter, applied a subjective, intent based analysis to find LFAF's advertisement constituted the functional equivalent of express advocacy, a finding that runs counter to well established U.S. Supreme Court precedent. LFAF acted in good faith reliance on the fact that Arizona's express advocacy statute had been ruled unconstitutional prior to, and during, the airing of the advertisement.

To the extent there is any overlap between express advocacy and issue advocacy in this matter, the Commission was required to "give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S. at 469. Instead, the Commission actually recognized that this analysis constituted a case of "grayness" but instead of following U.S. Supreme Court precedent, it found that "this one is far enough in the gray zone that it was express advocacy." (Exhibit 25 59:13-14).

The CCEC's order and assessed penalties should be reversed. This court should conclude that the CCEC exceeded its statutory authority in asserting jurisdiction over this matter, that LFAF's Arizona advertisement was not express advocacy and was, therefore, not subject to the CCEC's reporting requirements, and that the CCEC has no basis in fact or law for imposing any civil penalty at all in this matter.

DATED this 6th day of January, 2015.

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EXHIBIT A

AZ

POLIDATA ®
REGION MAPS

County-Based Regions
and Markets for

ARIZONA

15 Counties and Portions of

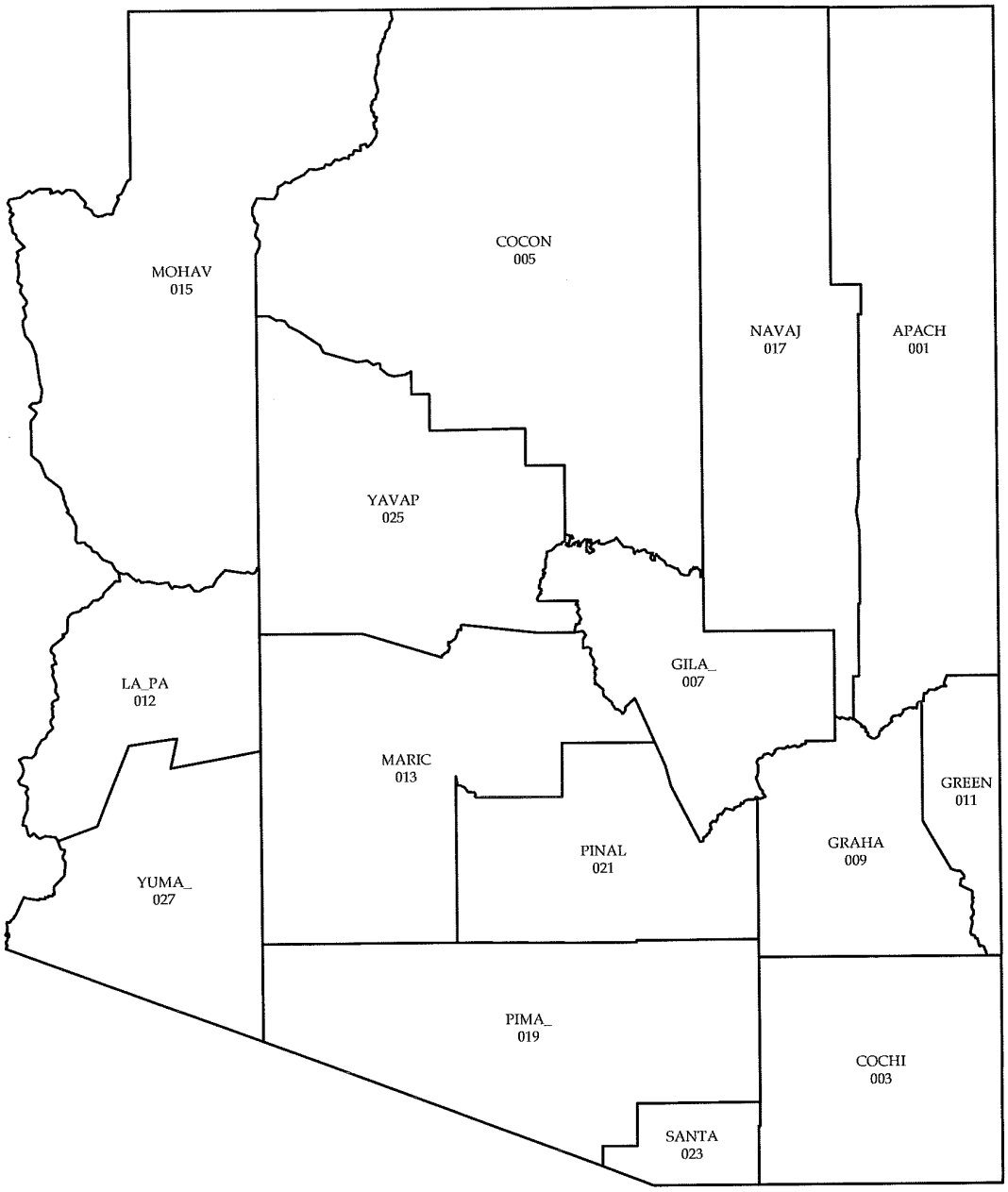
5 MSAs (Metropolitan Statistical Areas from OMB for 1999)
4 GMRs (Metro Groups from Polidata and Gary Maloney for 1999)
4 DMAs (Designated Markets Areas from Nielsen for 2000)
7 ISRs (Internal State Regions from Polidata for 1996)

[04bmb000~psdpbmb1~2104]

ARIZONA, 15 Counties

Polidata County Abbreviations and County FIPS Codes

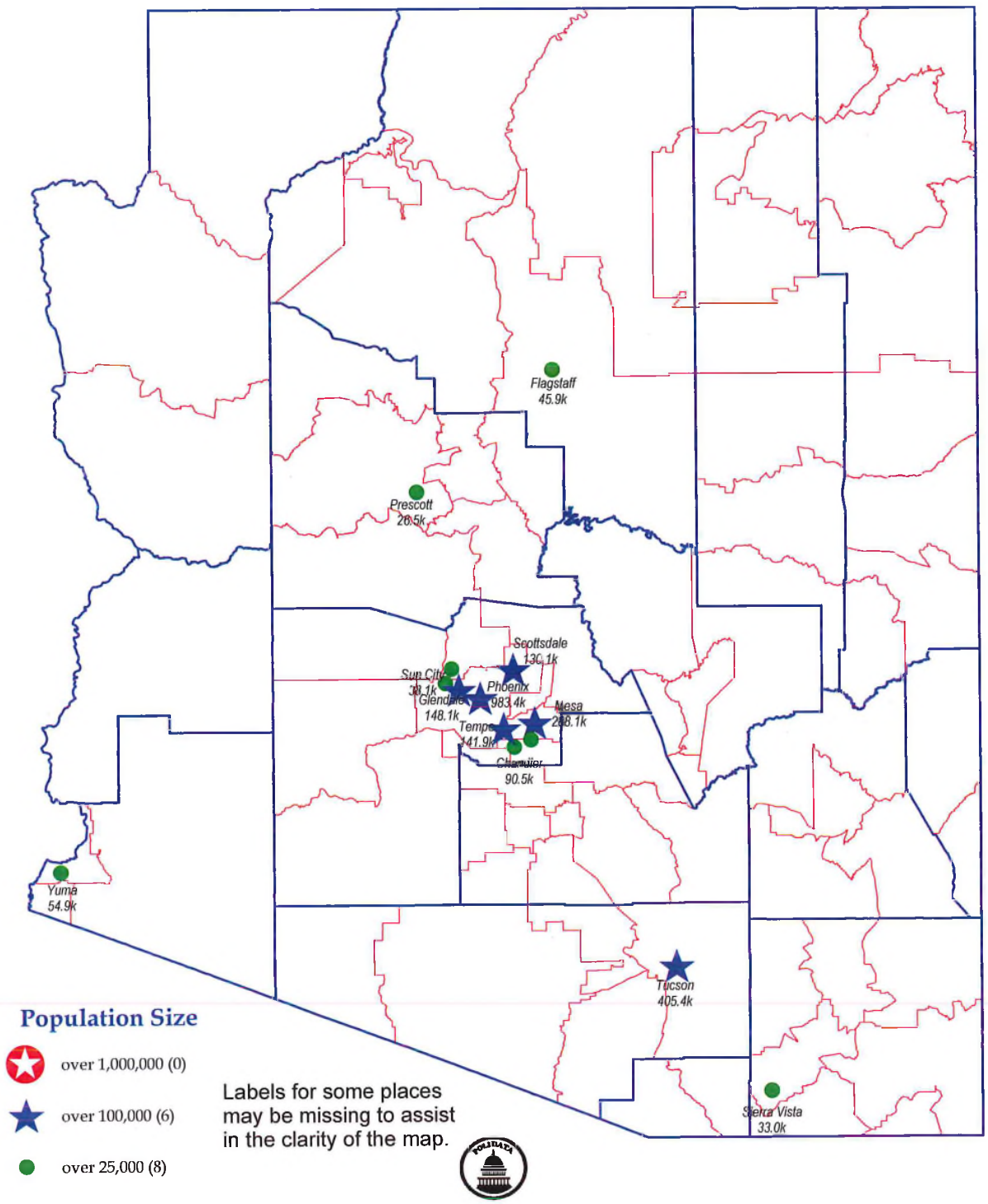
State FIPS Code is 04



Counties are the primary political subdivisions of states. Equivalents include Parishes, Boroughs and Independent Cities.

ARIZONA, Selected Places

2000 Census of Population and Housing, County Subdivisions



Map: AZRGEOBA.Mrsym

County Code Listing
ARIZONA, 15 Counties

County or Equivalent	Cy Seq	Population Centers	County Seat	1990 Tot. Pop.	2000 Tot. Pop.	FIPS Code	Polidata CyAbb
APACHE	1	Chinle	St. Johns	61,591	69,423	1	APACH
COCHISE	2	Sierra Vista	Bisbee	97,624	117,755	3	COCHI
COCONINO	3	Flagstaff	Flagstaff	96,591	116,320	5	COCON
GILA	4	Payson	Globe	40,216	51,335	7	GILA_
GRAHAM	5	Safford	Safford	26,554	33,489	9	GRAHA
GREENLEE	6	Clifton	Clifton	8,008	8,547	11	GREEN
LA PAZ	7	Parker	Parker	13,844	19,715	* 12	LA_PA
MARICOPA	8	Phoenix	Phoenix	2,122,101	3,072,149	* 13	MARIC
MOHAVE	9	Lake Havasu City	Kingman	93,497	155,032	15	MOHAV
NAVAJO	10	Winslow	Holbrook	77,674	97,470	17	NAVAJ
PIMA	11	Tucson	Tucson	666,957	843,746	19	PIMA_
PINAL	12	Casa Grande	Florence	116,397	179,727	21	PINAL
SANTA CRUZ	13	Nogales	Nogales	29,676	38,381	23	SANTA
YAVAPAI	14	Prescott	Prescott	107,714	167,517	25	YAVAP
YUMA	15	Yuma	Yuma	106,895	160,026	27	YUMA_
ARIZONA		Phoenix	Phoenix	3,665,339	5,130,632	4	STATE

1. County Equivalents include Independent Cities in MD, MO, NV and VA; Boroughs or Census Areas in AK; Parishes in LA; DC treated as State and County.
2. Counties are the primary legal subdivisions of a state. In the New England states they perform few, if any, governmental functions.
3. In some states (CT, RI) they are recognized as historic geographic areas for statistical purposes only.
4. The FIPS Code is the Federal Information Processing Standards code; 3 digit county code unique within the state, 2 digit state code unique within the nation.
5. The Polidata CyAbb is an abbreviation used primarily on our maps. The Cy Seq is a sequential count of county units within the state. Asterisk indicates a break in sequence.

[pscel11-04ccla00.ps~2l04]

Population by Areas/Markets
ARIZONA

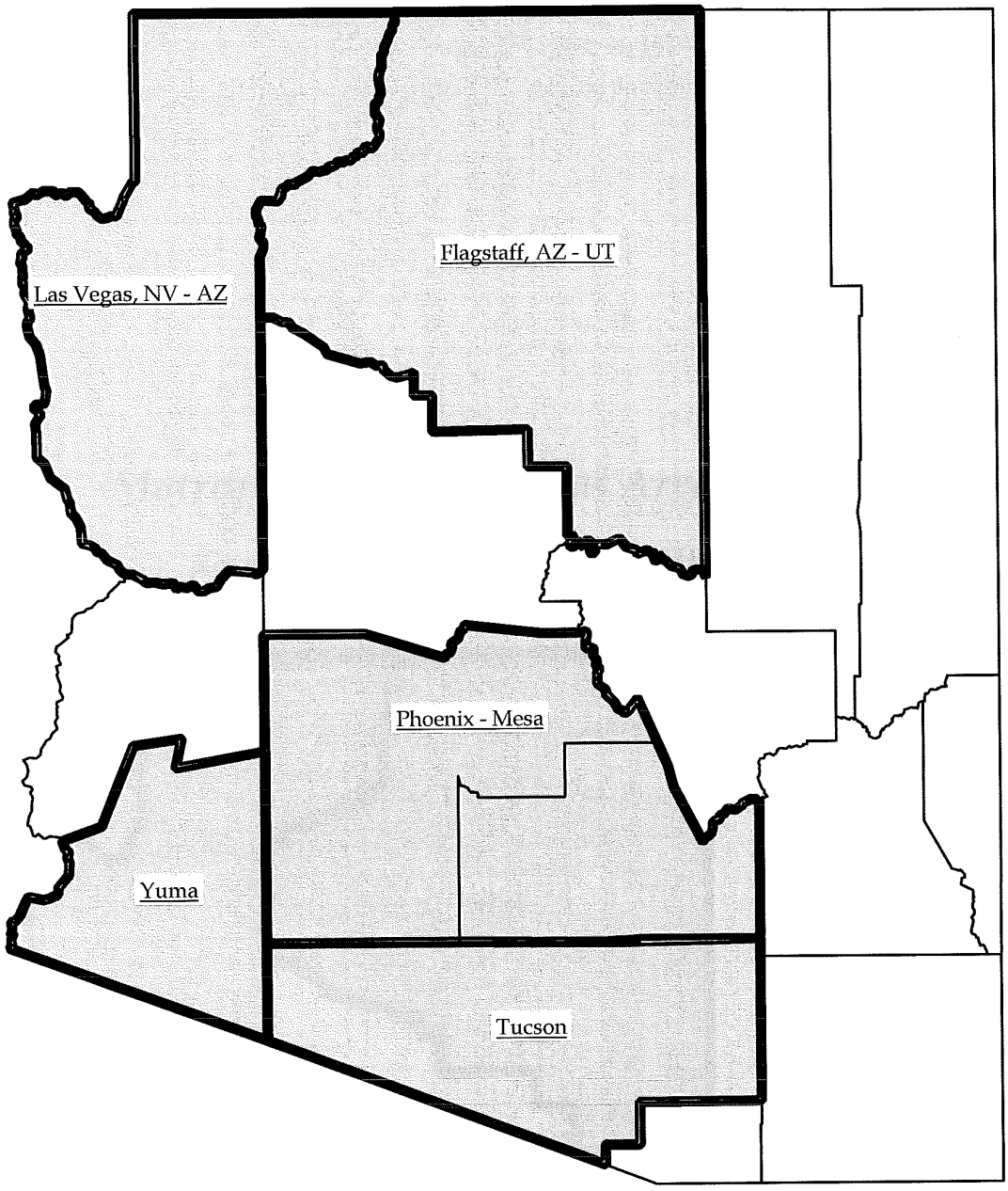
AZ

Seq	2000 Est. Pop.	Net % 90-00	Area/Market	% of State	% of Market
	5,130,632	40.0	ARIZONA		
			MSAs-Metropolitan Statistical Areas (OMB, 1999)		
1	116,320	20.4	Flagstaff, AZ - UT MSA	2.3	95.1
2	155,032	65.8	Las Vegas, NV - AZ MSA	3.0	9.9
3	3,251,876	45.3	Phoenix - Mesa, AZ MSA	63.4	100.0
4	843,746	26.5	Tucson, AZ MSA	16.4	100.0
5	160,026	49.7	Yuma, AZ MSA	3.1	100.0
6	603,632	30.4	Not Assigned to Metro Area (NAM)	11.8	100.0
			GMRs-Metro Groups (Polidata/Maloney, 1999)		
1	3,251,876	45.3	Phoenix Metro	63.4	100.0
2	843,746	26.5	Tucson Metro	16.4	100.0
3	431,378	45.3	Other Metro	8.4	100.0
4	603,632	30.4	Non Metro	11.8	100.0
			DMAs-Designated Market Areas (Nielsen, 2000)		
1	3,901,301	44.4	Phoenix, AZ DMA	76.0	100.0
2	160,026	49.7	Yuma - El Centro, AZ - CA DMA	3.1	52.9
3	999,882	25.9	Tucson (Nogales), AZ DMA	19.5	100.0
4	69,423	12.7	Albuquerque - Santa Fe, NM - AZ - CO DMA	1.4	4.1
			ISRs-Internal State Regions (Polidata, 1996)		
1	116,320	20.4	Canyon Country	2.3	100.0
2	166,893	19.9	Indian Country	3.3	100.0
3	93,371	24.9	High Country	1.8	100.0
4	167,517	55.5	Central Territory	3.3	100.0
5	3,251,876	45.3	Valley of the Sun	63.4	100.0
6	334,773	56.3	Arizona's West Coast	6.5	100.0
7	999,882	25.9	Old West Country	19.5	100.0

1. Areas/Markets are county-based regions comprised of whole counties or equivalents. This includes Parishes (LA), Independent Cities (MD,MO,NV,VA) Boroughs (AK), and Census Areas (AK).
2. Metropolitan Statistical Areas (MSAs) reflect federal statistical areas. Some counties are not assigned. MSAs are contiguous yet may cross state borders. NECMAs are used in New England.
3. Designated Market Areas (DMAs) reflect television media markets. All counties are assigned to one DMA (a few counties are actually split). DMAs may be noncontiguous and may cross state borders.
4. Internal State Regions (ISRs) reflect geographic regions based largely upon travel regions. All counties are assigned. ISRs are contiguous and internal to state borders.
5. Metro Groups (GMRs) reflect the size and nature of metropolitan counties. They are based upon work done by Dr. Gary Maloney in 1997 and updated/modified/expanded by Polidata.
6. Codes are assigned by either OMB, Nielsen or Polidata to be unique within the nation. Counties unassigned to a metro area are grouped together for consistency purposes.

Metropolitan Statistical Areas, MSAs

Groups of Counties assigned by OMB (1999)

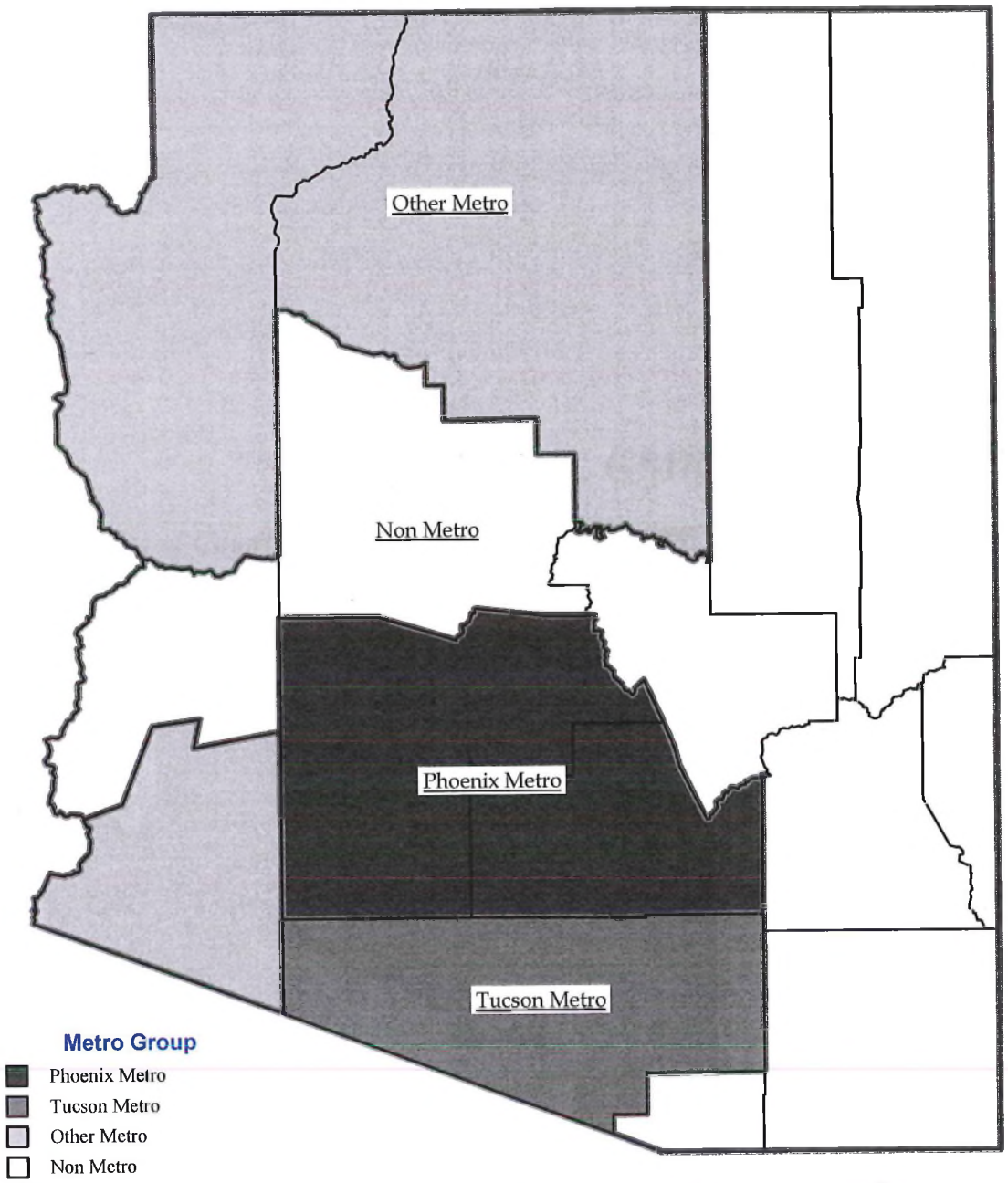


MSAs reflect federal statistical regions. Some counties are not assigned. MSAs are contiguous yet may cross state boundaries.

Map: AZRMSABA.

Metro Groups, GMRs

Groups of Counties assigned by Polidata and Dr. Gary Maloney (1999)

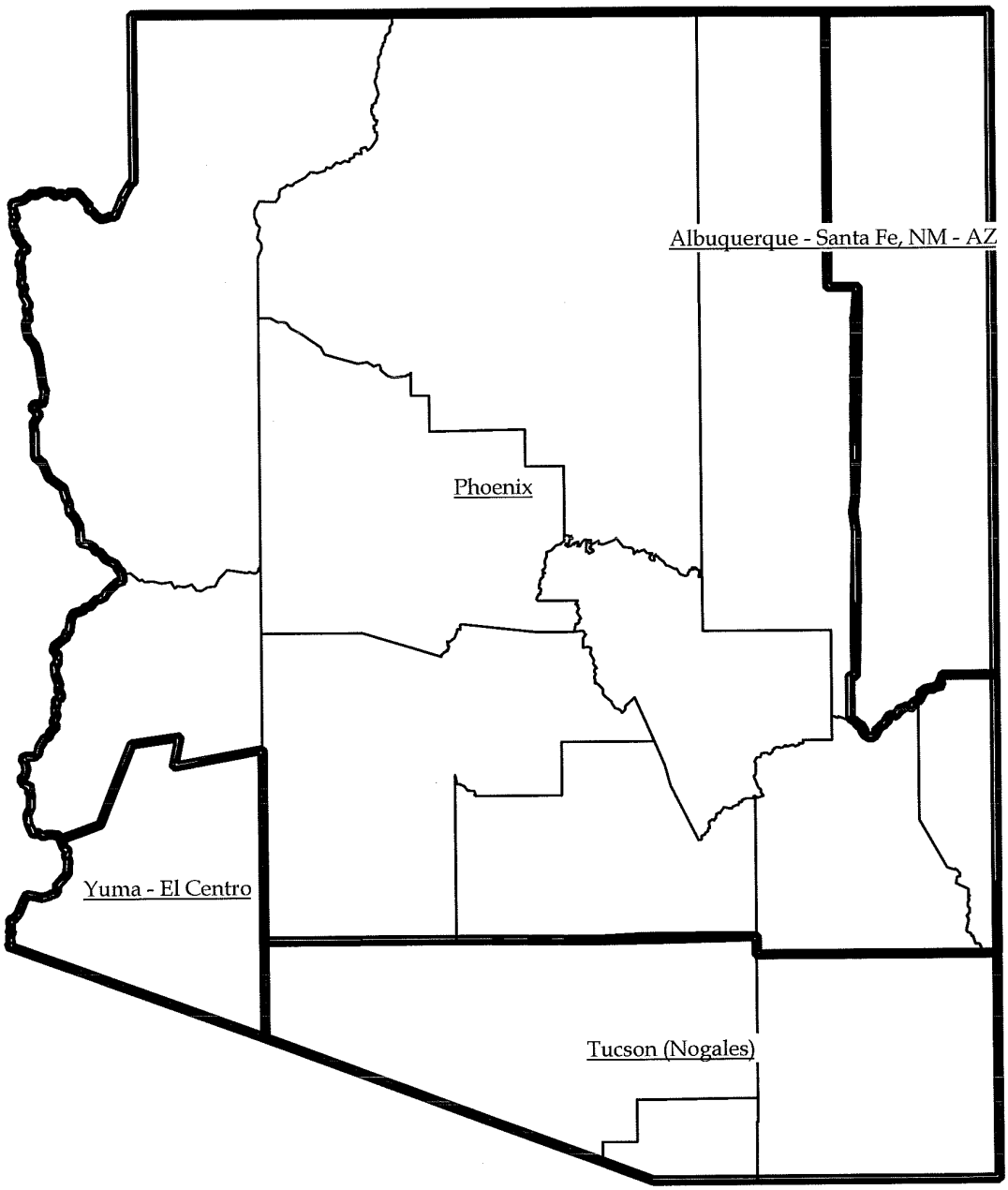


GMRs reflect the size and nature of metropolitan counties. Shaded counties are Metropolitan.

Map: AZRGMRBA._Name

Designated Market Areas, DMAs

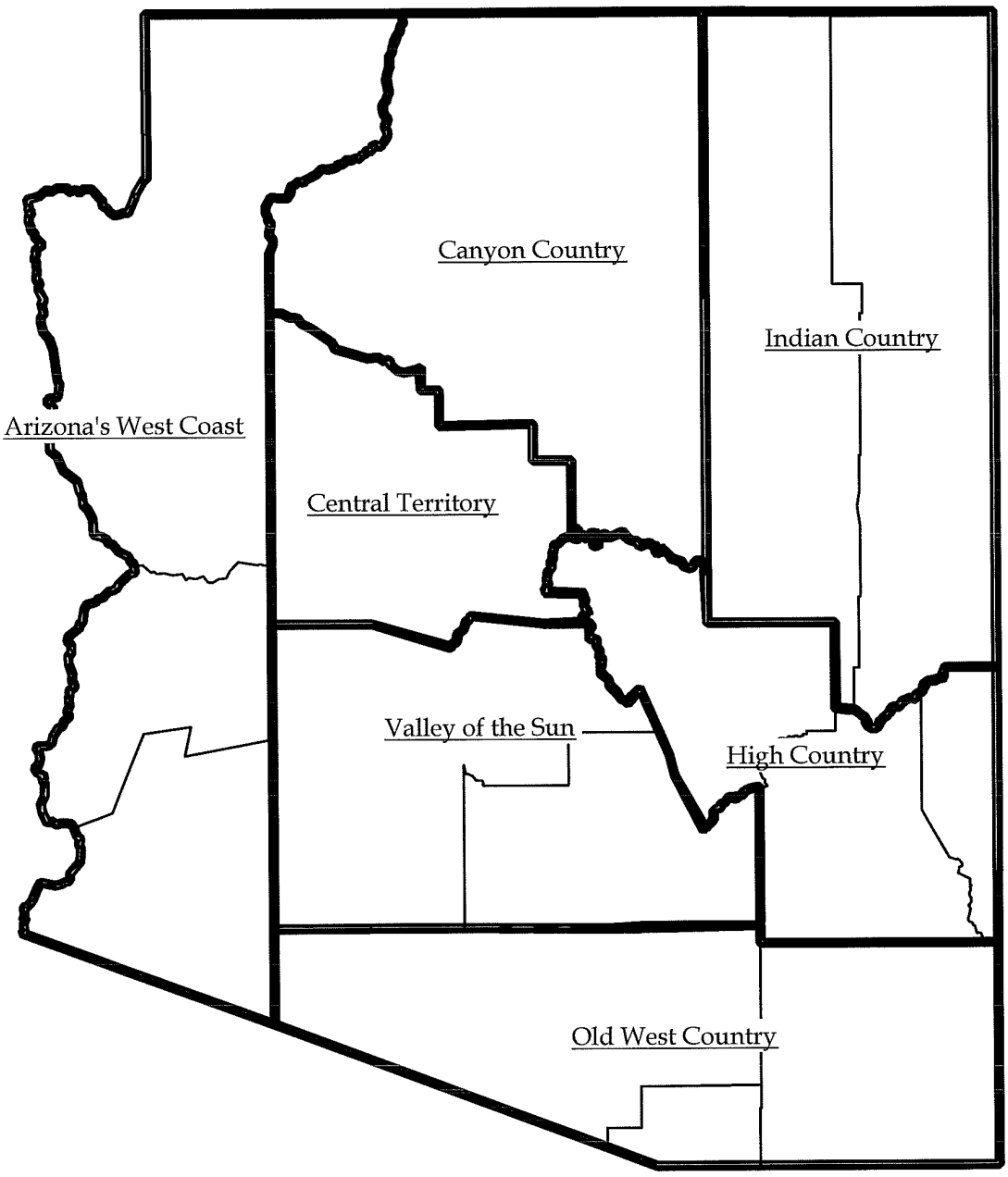
Groups of Counties assigned by Nielsen Media Research (2000)



DMAs reflect television media markets. Every county is assigned (very few are split). DMAs may be noncontiguous and cross state borders.

Internal State Regions, ISRs

Groups of Counties assigned by Polidata (1996)



ISRs reflect geographic regions based largely upon travel regions. Every county is assigned and regions are internal to state borders.

County	County-Based Area/Market Assignments
ARIZONA	
APACHE	Indian Country ISR; Albuquerque - Santa Fe, NM - AZ - CO DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
COCHISE	Old West Country ISR; Tucson (Nogales), AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
COCONINO	Canyon Country ISR; Phoenix, AZ DMA; Flagstaff, AZ - UT MSA; Other Metro GMR.
GILA	High Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
GRAHAM	High Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
GREENLEE	High Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
LA PAZ	Arizona's West Coast ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
MARICOPA	Valley of the Sun ISR; Phoenix, AZ DMA; Phoenix - Mesa, AZ MSA; Phoenix Metro GMR.
MOHAVE	Arizona's West Coast ISR; Phoenix, AZ DMA; Las Vegas, NV - AZ MSA; Other Metro GMR.
NAVAJO	Indian Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
PIMA	Old West Country ISR; Tucson (Nogales), AZ DMA; Tucson, AZ MSA; Tucson Metro GMR.
PINAL	Valley of the Sun ISR; Phoenix, AZ DMA; Phoenix - Mesa, AZ MSA; Phoenix Metro GMR.
SANTA CRUZ	Old West Country ISR; Tucson (Nogales), AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
YAVAPAI	Central Territory ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
YUMA	Arizona's West Coast ISR; Yuma - El Centro, AZ - CA DMA; Yuma, AZ MSA; Other Metro GMR.

1. Areas/Markets are county-based regions comprised of whole counties or equivalents. This includes Parishes, Independent Cities, Boroughs, and Census Areas.
2. Metropolitan Statistical Areas (MSAs) reflect federal statistical regions. Some counties are not assigned. MSAs are contiguous yet may cross state borders. NECMAs are used in New England.
3. Designated Market Areas (DMAs) reflect television media markets. All counties are assigned. A few counties are actually split. DMAs may be noncontiguous and may cross state borders.
4. Internal State Regions (ISRs) reflect geographic regions based largely upon travel regions. All counties are assigned. ISRs are contiguous and internal to state borders.
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6. Codes are assigned by either OMB, Nielsen or Polidata to be unique within the nation. Counties unassigned to a metro area are grouped together for consistency purposes.

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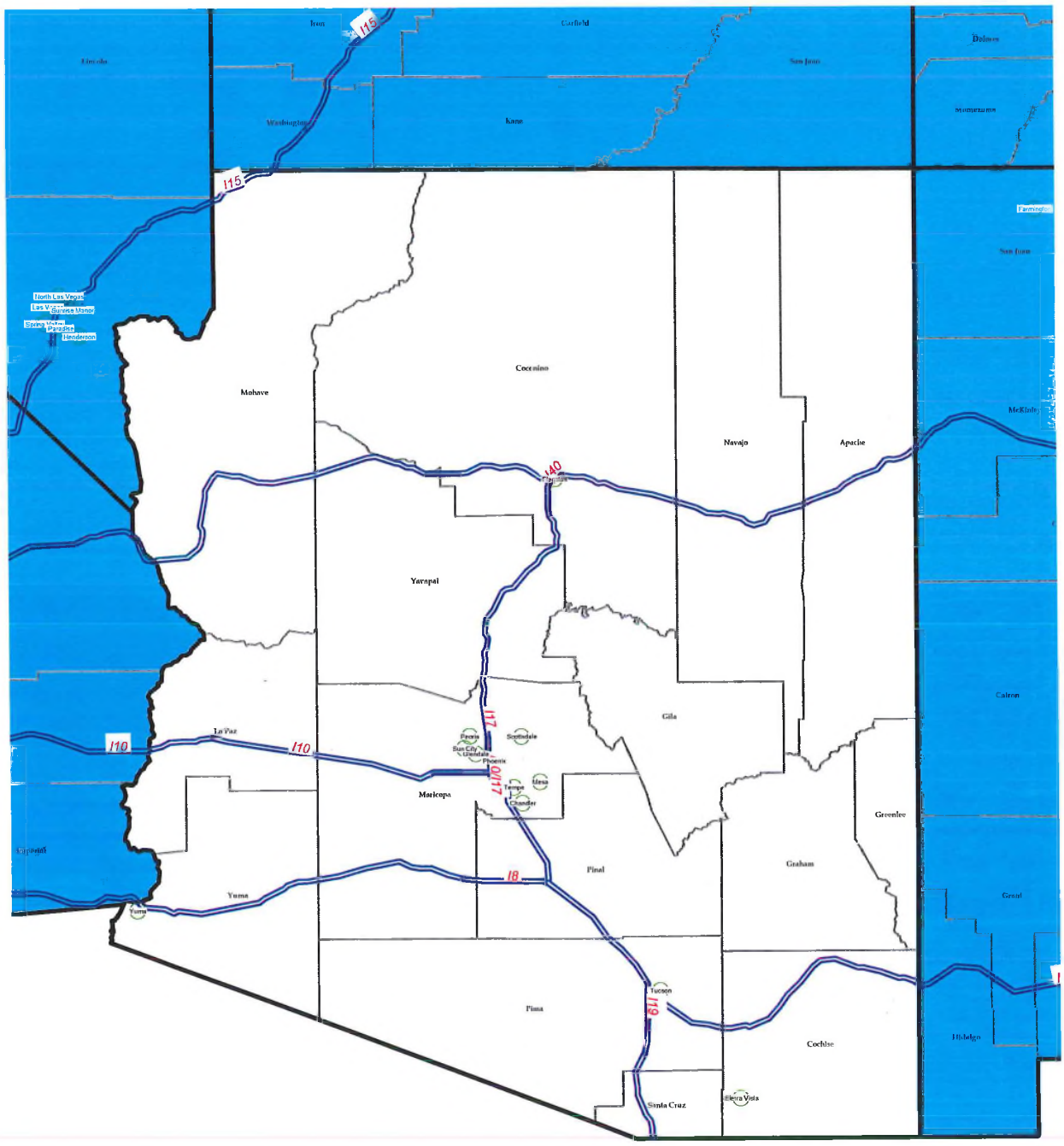
Regional Overview Map



See other maps for census geography

Refer to Gazetteer for profile material

Map: AZROVRBA.Substr(_Id,1,2)

EXHIBIT B

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July 15, 2014

Thomas M. Collins
Executive Director
Citizens Clean Elections Commission
1616 West Adams, Suite 110
Phoenix, AZ 85007

HAND-DELIVERED

'14 JUL 15 PM 4:12 CCEC

Re: Ducey 2014's Response to MUR 14-007

Dear Mr. Collins:

This letter serves as Ducey 2014's response to MUR 14-007, initiated by the letter from Scott Smith's campaign lawyer, Kory Langhofer. Ducey 2014 is a non-participating political committee, registered with the Arizona Secretary of State, formed by Doug Ducey, who is a candidate for the Republican Party nomination for governor.

As we explain in detail below, the Citizens Clean Elections Commission (the "Commission") should take no action on Mr. Smith's complaint because it lacks jurisdiction to investigate questions involving non-participating candidate contributions. Besides this, the Commission should take no action for either of two separate and independent reasons. First, there was no actual coordination between LFAF and Ducey 2014. Second, the Legacy Foundation Action Fund ("LFAF") advertisement complained of is issue advocacy protected by the First Amendment.

Upon information and belief, LFAF produced a television advertisement relating to the U.S. Conference of Mayors' (the "Conference") positions on certain federal issues and identified Mr. Smith as President of the Conference. The advertisement is located at the following You Tube URL: http://www.youtube.com/watch?v=NycZZLOA_OQ.[1] The advertisement identified specific positions that the Conference has taken on those federal issues. The advertisement further encouraged viewers to call Mr. Smith, who was then the president of the Conference and

[1] The letter makes a reference to "radio, internet, and mail advertisements painting Mr. Smith in a misleading and negative light" but only provides evidence of the television advertisement. 7/1/2014 Langhofer Letter at 2 n.1. The letter provides no evidence of any other form of communication. It is, therefore, impossible to respond to any allegation concerning "radio, internet, and mail advertisements" and Smith's alleged portrayal in a "negative light."

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the Mayor of the City of Mesa, and ask him to change the Conference's position on those issues. Upon information and belief, the advertisement ran for two weeks in early April 2014 in Phoenix. Upon further information and belief, at approximately the same time period, LFAF ran similar advertisements mentioning the mayors in Sacramento, California and Baltimore, Maryland, both of whom also have leadership positions with the Conference, in those markets.

Legal Argument

I. Burden of Proof

In order to prevent rival campaigns from unfairly using the campaign finance code in a manner that manipulates media coverage and sensationally deceives voters on the eve of an election, Arizona law and this Commission's practice requires that a complainant provide the Commission with actual evidence that a campaign finance violation has occurred. *See* A.A.C. R2-20-203(D); *see also, e.g.*, MUR06-0023 (Munsil) (taking no action on complaint involving common political consultant where complainant failed to provide evidence of actual coordination between candidate and independent expenditure); MUR06-0032 (Napolitano) (similar). Where a complainant provides nothing more than unsupported speculation, innuendo, and conjecture that a violation has occurred, the Commission should determine that no action be taken. *See id.*

II. The Commission Lacks Jurisdiction to Proceed With This Complaint

The Commission's enforcement authority extends only to suspected violations of the Citizens Clean Elections Act, A.R.S. §§ 16-940 to 16-961. A.R.S. §§ 16-956(A)(7) ("The commission shall: . . . Enforce this article [Title 16, Chapter 6, Article 2, Arizona Revised Statutes]."); 16-957(A) (If the commission finds that there is reason to believe that a person has violated any provision of this article [Title 16, Chapter 6, Article 2, Arizona Revised Statutes]."). The Commission does not have wholesale authority to investigate campaign finance violations alleged against non-participating candidates, and it specifically lacks the jurisdiction to move forward with this matter.

The only substantive campaign finance statutes that Mr. Smith alleges to have been violated are A.R.S. §§ 16-901, 16-905, 16-919, and 16-941(B).[2] The first three sections cited are

[2] Smith cites A.R.S. § 16-941(C)(2), stating that a nonparticipating candidate "[s]hall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article." This statute does not confer any substantive directive but rather states the obvious. A nonparticipating candidate must follow the campaign finance laws codified in Article I. There can be no independent "violation" of § 16-941(C)(2).

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found in Title 16, Chapter 6, Article 1 of the Arizona Revised Statutes and not part of the Citizens Clean Elections Act. The last sentence in A.R.S. § 16-941(B), which is part of the Act, states that "[a]ny violation of this subsection [reducing non-participating contribution limits by 20%] ***shall be subject to the penalties and procedures set forth in section 16-905, subsections J through M and section 16-924***." (Emphasis added.)

Although §§ 16-956 and 16-957 may provide the Commission with general authority to enforce "any provision of this article," these statutes definitely do not confer authority upon the Commission to enforce alleged contribution limit violations and coordination involving nonparticipating candidates. Rather, these statutes are broadly written to give the Commission investigative authority associated with violations of such things as reporting requirements, impermissible use of campaign funds by participating candidates, and expenditures of funds by participating candidates in excess of the Act's limits.

The more specific statute, § 16-941(B), intentionally carves-out alleged violations of non-participating candidate contribution limits from the scope of § 16-956 and 16-957. Under these circumstances, where a specific statute is read in conjunction with a general one, courts consistently hold that the specific statute prevails. *See*, *e.g.*, *Clouse v. State*, 199 Ariz. 196, 199, 16 P.3d 757, 760 (2001) ("It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control."). Any other interpretation impermissibly renders the last sentence in § 16-941(B) superfluous. *See May v. Ellis*, 208 Ariz. 229, 231, 92 P.3d 859, 861 (2004) (holding that, when construing two statutes together, the court's "first duty . . . is to 'adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved.'" (Citation omitted.)). Therefore, the Commission does not have the appropriate jurisdiction to review this matter and, in actuality, this matter is already being reviewed by the Maricopa County Recorder, as the Secretary of State has a conflict.

III. Even if the Commission Has Jurisdiction, Which It Does Not, There Was No Coordination Between LFAF and Ducey 2014.

A. The First Amendment and Arizona Law Requires a Complainant to Show Actual Coordination.

Arizona's statute on independent expenditures, A.R.S. § 16-901(14), requires that Mr. Smith show that there was actual coordination, cooperation, arrangement, or direction between a person making an independent expenditure and a candidate for office.

The Secretary of State and this Commission have recently opined on this very statute and concluded that, in order to constitute coordination, there must be actual direction, cooperation, or

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consultation, or some similar arrangement between the independent expenditure and the candidate. Specifically, on May 22, 2014, the Commission dismissed a complaint filed against Secretary of State Ken Bennett alleging coordination between an independent expenditure and his gubernatorial campaign, after Secretary Bennett acquired from a political committee a surplus sign advocating in favor of his election as governor. Secretary Bennett argued, and the Commission agreed, that there must be some "cooperation or consultation with any candidate or candidate's agent, . . . made in concert with a request or suggestion of the candidate." Commission 5/22/14 Transcript at 34:20-25 (excerpts attached hereto as Exhibit 1).

Both Secretary Bennett and the Commission went so far as to say that a candidate may freely use the work product of an independent expenditure after the expenditure has been made, because what the statute prohibits is coordination in the making of the expenditure. Secretary Bennett gave the example of an IE committee producing a sign, and the candidate taking a picture of it and "tweeting" it. *Id.* at 30:5-21; *see also* MUR06-0018 (Napolitano) ("Without evidence that Respondent directed the anti-Munsil activities or was otherwise affiliated with these entities or principals, so as to disqualify the activities from treatment as independent expenditures under A.R.S. § 16-901(14), then no charge can lie against Respondent.").

This testimony conforms with the Commission's past dispositions of coordination-based complaints. The Commission has consistently voted to take no action on complaints that provide no substantive evidence of actual coordination. *E.g.*, *id.*; *see also* MUR06-0023 (Munsil) (taking no action on complaint involving common political consultant where complainant failed to provide evidence of actual coordination between candidate and independent expenditure); MUR06-0032 (Napolitano) (similar).

The United States Supreme Court and other courts hold the same position. In order to constitute a coordinated expenditure, there must be some actual direction or cooperation between the person making the expenditure and the candidate. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), for example, the Supreme Court declared unconstitutional a presumption of coordination between a political party and candidates. *Id.* at 619. The Court held that a political party has a constitutional right to engage in independent expenditure activity and that the law cannot prohibit it absent actual coordination between the party and candidate. *Id.*; *see also Republican Party of Minnesota v. Pauly*, 63 F. Supp. 2d 1008 (D. Minn. 1999); *FEC v. Freedom's Heritage Forum*, 1999 WL 33756662 (W.D. Ky Sept. 29, 1999).

Similarly, in *Republican Party of Minnesota*, the court overturned a state statute presuming coordination between a political party and its endorsed candidates. The court invalidated the statute even where "[t]he party coordinated candidate appearances and voter registration drives, and helped to recruit volunteer assistance. [Party] officials conducted 'issue

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research,' 'developed campaign plans,' and provided candidates with donor lists from which to solicit campaign contributions." 63 F. Supp. 2d at 1016. Despite this, the court reasoned that "the record in this case provides no support for an inference of actual coordination in conducting independent party expenditures." Moreover, the court observed that the legislative record "is void of any committee findings, legislative debate transcripts, legislative findings, or other empirical evidence to support . . . a legislative determination [that it should be presumed that a party and its nominee work together]." *Id.*

In *Freedom's Heritage Forum*, the court granted a motion to dismiss the FEC's complaint alleging coordination between the candidate and independent expenditure. The court held that "the FEC has failed to plead sufficient factual allegations of coordination under the statute" and that it "fails to tie together the Forum and Hardy's election campaign." 1999 WL 33756662 at *2. In dismissing the complaint, the court found it significant that "[t]he FEC does not allege that Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made.*" *Id.*

It is clear that this Commission, Secretary Bennett, and numerous courts have taken a common-sense approach to coordination statutes. A complainant needs to show some actual coordination between an independent expenditure and candidate in the form of cooperation, consultation, or direction in order to trigger an investigation. This is critical because an overly expansive interpretation of what constitutes coordination will necessarily render a statute unconstitutionally vague and ambiguous or impermissibly sweep in conduct that has nothing to do with making the expenditure. The requirement to show actual coordination weeds out frivolous and meritless claims, such as Mr. Smith's, that are advanced on the eve of an election simply to embarrass and harass a political opponent and third parties or silence constitutionally protected speech.

B. The Letter Fails to Identify Any Evidence of Coordination.

Mr. Smith cannot point to a single piece of evidence that Ducey 2014 engaged in any cooperation or consultation with LFAF in the making of the ad. In fact, Mr. Smith provides no evidence that Copper State was ever engaged by LFAF. Instead, he attempts to manufacture a false connection between a vendor, Copper State, and draw the false conclusion that, through Copper State, Ducey 2014 directed, consulted on, or cooperated with the LFAF ad.

Mr. Smith's entire argument breaks down for its lack of factual support and failure to cite any recognized legal theory under federal or state law to justify its complaint. Mr. Smith has failed to provide any facts – an unsubstantiated allegation (at 1) "upon information and belief" is not a well-pled fact – that there was any common "officer, director, employee, or agent" between LFAF and Ducey 2014. Mr. Smith ignores the teachings of the Supreme Court and Commission

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precedent requiring a showing of *actual coordination* between a campaign and independent expenditure. *Colorado Republican Fed. Campaign Cte.*, 518 U.S. at 619.[3]

As demonstrated in Table 1, below, all of the position statements made in the ad are available directly on the Conference's publicly accessible website and were located with a minimal level of Internet searches in order to provide the website links with this letter.

Table 1: Publicly Available Information on the U.S. Conference of Mayors' Website

LFAF Ad Statement	US Conference of Mayors Website Location
"fully endorsed Obamacare from the start"	http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf
"vocally supported the Obama administration's efforts to regulate carbon emission"	http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf http://www.usmayors.org/resolutions/80th_conference/AdoptedResolutionsFull.pdf (page 113) http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf (page 80)
"backed the President's proposal to limit our 2nd amendment rights"	http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf
"Obama's budget was 'a balanced approach'"	http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf

[3] The introductory sentence of § 16-901(14) requires "cooperation or consultation" or that the expenditure is made "in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." All of the subsidiary elements of Section 16-901(14) must be read in conjunction with this predicate sentence.

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In addition, the attached declaration of Shauna Pekau, CEO of Copper State, explains that the documents that she obtained in her public records requests to the City of Mesa are related to completely different subjects than the Conference's federal lobbying agenda. [Declaration of Shauna Pekau ("S. Pekau Decl.") at ¶¶ 7-14 attached hereto as Exhibit 2.] The declaration further explains that she has no connection to LFAF whatsoever and that, to the best of her knowledge, none of the information that she obtained from the City of Mesa has any relation to the LFAF advertisement. In fact, the documents obtained from the City of Mesa have absolutely nothing to do with the public positions taken by the Conference on the four federal issues identified in the advertisement.

Also attached hereto as Exhibit 3 is a declaration from Gregg Pekau, who Mr. Smith's complaint suggests of providing "opposition research" to LFAF. In it, Mr. Pekau's declaration explains that he has no connection to LFAF whatsoever. [Declaration of Gregg Pekau ¶¶ 2-4, (Exhibit 3)].

Worse yet is Mr. Smith's use of the already discredited "connection" involving Larry McCarthy. Mr. McCarthy had *no* involvement in the LFAF Smith ad. [Declaration of Lawrence McCarthy ¶¶ 3-4, attached hereto as Exhibit 4.] It is well known, and it is a matter of public record with the Federal Election Commission, that in March 2014 Mr. McCarthy worked on a television ad for LFAF involving a United States Senate candidate in Nebraska. This does not even come close to coordination on an entirely *separate* project sponsored by LFAF, at a completely different time, in a completely different state, on a totally unrelated matter.

Similarly, there is no evidence linking Direct Response Group ("DRG"), a direct mail vendor, to LFAF and Ducey 2014. DRG is a vendor that provides printing and mailing services. It has had no involvement in the *LFAF* advertisement complained of here. [Declaration of J. Padovano ¶¶ 3-5, attached hereto as Exhibit 5.]

Finally, attached hereto as Exhibit 6 is a declaration from Jonathan P. Twist, campaign manager for Ducey 2014, explaining that there has been no coordination whatsoever between Ducey 2014 and LFAF.

IV. The LFAF Advertisement is Issue Advocacy and Cannot Be Classified as an "Independent Expenditure."

Although Mr. Smith cannot provide a scintilla of actual evidence showing actual unlawful coordination, the Commission should also determine that there is no reason to believe that an alleged violation occurred because the LFAF advertisement is pure issue advocacy falling

outside of the statutory definition of an "independent expenditure." Under A.R.S. § 16-901(14), only an advertisement "that ***expressly advocates*** the election or defeat of a clearly identified candidate" constitutes an "independent expenditure."[4] (Emphasis added.)

A. Under Controlling Supreme Court Precedent, the Advertisement is Unmistakably Issue-Based and Protected by the First Amendment.

The First Amendment prohibits government regulation of issue advocacy. The United States Supreme Court has held that government may regulate a message as express advocacy only where an advertisement (i) uses express advocacy magic words such as "vote for" or "vote against" a candidate[5] or (ii) is the functional equivalent of express advocacy where "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Federal Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 469 (2007) ("*WRTL*"); *accord Kromko v. City of Tucson*, 47 P.3d 1137, 202 Ariz. 499 (2002) (holding that municipal literature informing the public of the projected impact of road improvement ballot propositions was not express advocacy).[6]

---

[4] The term "expressly advocates," defined under A.R.S. § 16-901.01(A), has been ruled unconstitutional by the Arizona Superior Court. *See* Final Judgment, *Committee or Justice & Fairness v. Arizona Secretary of State's Office, et al.*, No. LC-2011-000734 (Ariz. Superior Court Maricopa County Nov. 28, 2012) (attached hereto as Exhibit 7). This case is pending review at the Arizona Court of Appeals. Ducey 2014 agrees that A.R.S. § 16-901.01 is unconstitutional under the First Amendment of the United States Constitution and Article II § 6 of the Arizona Constitution and asserts this argument as a reason why the Commission should take no action on the complaint.

[5] The advertisement here does not use the express advocacy "magic words."

[6] *Kromko* explored a "second, alternative test" focusing on whether a communication "'taken as a whole[,] unambiguously urge[s]' a person to vote in a particular manner." 202 Ariz. at 503, 47 P.3d at 1141. The court held that the communication "must clearly and unmistakably present a plea for action, and identify the advocated action; it is not express advocacy if reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." *Id.* The court clarified that it was "not suggesting that [the] timing or other circumstances independent of the communication itself[] may be considered . . . ." *Id.* As this Response explains, the LFAF advertisement exerts all of the indicia of issue advocacy and, given its context, it cannot be said that it "clearly and unmistakably present[s] a plea for action, and identif[ies] the advocated action." *Id.*

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This second category of express advocacy "has the potential to trammel vital political speech, and thus regulation of speech 'as the functional equivalent of express advocacy' warrants careful judicial scrutiny." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) ("NCRTL"). In the context of examining whether an advertisement is the functional equivalent of express advocacy, the Supreme Court has held that the regulator must examine the advertisement itself without straying into circumstantial arguments about the intent of the speaker, the effect of the advertisement on the viewing public, and other "contextual factors" such as the timing of the advertisement. *WRTL*, 551 U.S. at 474 n.7. The Court further explained that the government cannot regulate advertisements on public issues "merely because the issues might be relevant to an election." *Id.* Finally, and importantly, the Court held that "in a debatable case, the tie is resolved in favor of protecting speech." *Id.*

Following its "no reasonable interpretation" test, the Court in *WRTL* held that advertisements that mentioned then-Senator Feingold, who was running for reelection, and that criticized the Senate's failure to act on judicial nominees were issue advocacy communications. The Court reasoned that the advertisements "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id.* at 470.

Here, the LFAF's Conference advertisement includes those elements:

- The ad identifies Mr. Smith as president of the Conference. This statement is true, as Mr. Smith was president of that organization from June 24, 2013 until April 15, 2014.

- The ad states that the Conference supports the federal Patient Affordable Care Act ("PACA" a/k/a "Obamacare"), federal proposals to regulate carbon emissions, and federal proposals to enact gun control and firearm restrictions. It also states that the Conference supported President Obama's proposed budget. These statements are true, and the Conference's policy positions are available on its website.

- The ad states that "these policies are wrong for Mesa," questions "why does Mayor Scott Smith support policies that are wrong for Mesa," and urges viewers to call Mr. Smith on the provided City of Mesa phone number and "make his organization more like Mesa, not the other way around."

Like the advertisement in *WRTL*, the LFAF advertisement focused on federal legislative issues: PACA, carbon emissions, gun control, and the budget. All of the issues identified in the

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advertisement are federal issues, which the Conference attempts to influence through its federal lobbying activities.

Like the advertisement in *WRTL*, the LFAF advertisement took a position on the issues – "policies that are wrong for Mesa" – and urged the public to adopt that position. Finally, like the advertisement in *WRTL*, the LFAF advertisement provided a City of Mesa government phone number and urged viewers to contact Mayor Smith and tell him to change the policies advocated by the national organization that he leads.

In addition to this, the *WRTL* opinion provided a deeper analysis of the advertisement, observing that "[t]he ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office." *Id.* The LFAF advertisement here displays the same characteristics. Nowhere does the advertisement mention an election, anyone's candidacy, a political party, or any challenger. There is no appeal to vote. The advertisement does not take a position on Mr. Smith's character, qualifications, or fitness for any office.

Rather, the focus of the advertisement is on Mr. Smith's position as president of a national organization, public positions that organization has taken on federal legislation, and on urging viewers to contact Mr. Smith and adopt different positions. All of these factors are the traditional indicia of issue advocacy. *Id.*; *see also FEC v. Cent. Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 50-51 n.6, 53 (2d Cir. 1980) (rejecting FEC's argument that a committee's "bulletin" showing twenty-four votes cast by the identified congressman, analyzed in terms of whether they were "for lower taxes and less government," and concluding with the statement "since *you* are paying the tax bills, *you* are the boss. And don't let your Representative forget it!" was issue advocacy).

B. The Contextual Factors Cited in Mr. Smith's Letter are Irrelevant but Nevertheless Fail to Re-Classify the Advertisement as Express Advocacy.

In *WRTL*, the Supreme Court stated that the government cannot examine "contextual factors" surrounding an advertisement to determine whether it is express advocacy. Mr. Smith's letter ignores this and instead asks that this Commission entertain certain speculative theories to re-classify the advertisement. This attempt should be rejected.[7]

[7] The Executive Director's Report analyzing Secretary Bennett's request for a no action letter re voter advertisements (at 6) quotes part of a sentence from *WRTL*, that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context." *WRTL*, 551 U.S. at 474. The full quote is as follows: "Courts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad 'describes a legislative

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Mr. Smith first contends (at 2) that LFAF should have limited its advertisement to City of Mesa voters. He argues that the advertisement was actually targeted to "the gubernatorial primary electorate" and that it was aired "on channels watched disproportionately by Republic [sic] primary voters." This argument wrongly uses a homespun contextual argument that speculates into LFAF's intent. The First Amendment prohibits this factor's consideration. In *NCRTL*, the Fourth Circuit overturned a North Carolina statute that took into account "the distribution of the communication to a significant number of registered voters for that candidate's election." 525 F.3d at 281, 284 (holding that contextual factor relating to distribution of advertisement violated First Amendment and asking "how many voters would be considered 'significant'?"). In any event, the fact is that broadcast and radio advertisements cannot be limited within the "Phoenix Market" to specific municipalities. Mr. Smith provides no evidence whatsoever that certain channels are "disproportionately" viewed by Republican primary voters. And he fails to provide any evidence of mailers or internet advertisements.

Next, Mr. Smith admits (at 2) that public information about the Conference's public positions "has been publicly available for a long time," but argues that because the advertisements ran in April 2014 it indicates LFAF's intent to run an express advocacy message. Mr. Smith's contextual argument goes to the intent of the speaker in a manner that impermissibly attempts to second-guess the timing of the advertisement. This is irrelevant to the analysis and ultimately wrong. *See NCRTL*, 525 F.3d at 281, 284 ("[H]ow is a speaker—or a regulator for that matter—to know how the 'timing' of his comments 'relate to the 'events of the day?'"). The fact of the matter is that the advertisement ran almost five months before the primary election date, well before the election.

Mr. Smith then contends that the ads were run "just days before [his] last day in office as Mayor of the City of Mesa (*i.e.*, April 15, 2014). No rational actor would spend more than $275,000 to influence the last two weeks of [his] term as mayor . . . ." This is exactly the kind of sophistry that the *WRTL* Court warned against. How a "rational actor" would spend $275,000 is far beyond what the Commission may constitutionally consider and an inquiry into "intent" that is not permissible in this area of the law. *See NCRTL*, 525 F.3d at 283 (holding that the issue that is either currently or the subject of legislative scrutiny or likely to be the subject of such scrutiny in the future.'" *Id.* (quoting *WRTL v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006) (emphasis added)). The Court added that "the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns." *Id.* That "broader inquiry" includes the contextual factors rejected in *WRTL*, such as timing, and those overturned in *NCRTL* and in *Committee for Justice & Fairness v. Ariz. Secretary of State's Office*. The "basic background information" here is the fact that PACA, gun control, carbon regulation, and the federal budget are all prominent national legislative issues.

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North Carolina statute "runs directly counter to the teaching of *WRTL* when it determines whether speech is regulable based on how a 'reasonable person' interprets a communication in light of four 'contextual factors'" and asking "at what 'cost' does political speech become regulable?").

Indeed, in *WRTL*, the Supreme Court specifically declined to consider the timeliness of advertisements mentioning Senator Feingold that were run "30 days prior to the Wisconsin primary" and that "WRTL did not run the ads after the elections." 551 U.S. at 460. Similarly, the Supreme Court has weighed against the exact type of intent-based test urged by the complainant in this matter because it would "open[] the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *Id.* at 486. Such tests also "lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another." *Id.*; *see also infra*, Part IV.C.

Mr. Smith further contends that the City of Mesa public records requests submitted by Copper State "tracks the content of the public records requests submitted by Pekau." They do not. The Copper State document requests relate to completely different subject matters than the Conference's federal legislative agenda. [S. Pekau Decl. at ¶¶3-15 (Exhibit 2).] For example, the documents show:

- Mr. Smith has approximately $97,427.49 in travel reimbursements billed to the City of Mesa taxpayers. [S. Pekau Decl. Exh. B]
- Twenty-five trips involved expenses covered by other entities, including Italy, China, Saudi Arabia, Morocco, Canada and Mexico. [*Id.* Exh. B]
- Photographs of Mr. Smith sitting next to, laughing with, and hugging Vice President Joe Biden during and after Mr. Biden delivered a speech. [*Id.* Exh. C]
- Direct non-travel charges to Mr. Smith's City of Mesa credit card. [*Id* Exh. B]
- Mr. Smith's City of Mesa calendars from 2008 to 2014. [*Id.* Exh. E]

The City of Mesa responded to Copper State's public records requests in late March and April, 2014. Not only are the documents produced far afield of the LFAF advertisement's content, they were produced too late to validate the complainant's speculative timeline alleging an overlap between the requests and the advertisement's production.

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Finally, Mr. Smith argues that LFAF "has been reported to have very close ties to the Ducey Campaign." The fact that Mr. Smith resorts to citing to bloggers, gossip publications, and other unsubstantiated Internet reports is hardly evidence. The fact is that there are no ties between LFAF and Ducey 2014 whatsoever. [*See* Declarations attached hereto as Exhibits 2-6 .]

C. Arguments Advanced by Mr. Smith's Attorney in Another Matter Reinforce the Conclusion that LFAF's Advertisement is Issue Advocacy.

The LFAF ads are remarkably similar in nature to those recently defended by Mr. Langhofer, who is the author of Mr. Smith's letter and the complainant in this matter. Attached hereto as Exhibits 8 and 9 are letters from Mr. Langhofer to the Arizona Secretary of State explaining that his client's ads in that other matter, remarkably similar to the one complained of here, are issue advertisements.[8] In defending his client's advertisements, Mr. Langhofer took the following positions:

- An advertisement that identifies a candidate as a government official "may not be deemed electioneering activities solely because the individual happens to be a candidate for elected office." Langhofer June 2, 2014 letter at 2 (citing IRS Rev. Rul. 2004-6).

- An advertisement distributed to "'civic-minded adults,' as might be expected of advertising concerning issues of social importance," does not indicate express advocacy. *Id.*

- The timing of an advertisement should not be considered. On behalf of his client, Mr. Langhofer argued "that the ad was aired three months before the primary election cycle is coincidental." *Id.* at 3

- Singling out a single elected official for criticism "is entirely contextual; an issue-based communication is not transmuted into 'express advocacy' or its equivalent merely because it has the incidental effect of embarrassing a public official who may someday run for reelection. . . . By the Complaint's logic, all criticism of

[8] The Secretary of State agreed and dismissed one complaint against the Arizona Public Integrity Alliance, with the second still under consideration. See Exhibit 10 hereto. We also note an April 9, 2014, letter from the Secretary of State, attached hereto as Exhibit 11, dismissing a complaint filed by Mr. Langhofer alleging an illegal campaign expenditure in which the Secretary's office noted that "you have consistently stated that AZPIA is involved in issue advocacy and therefore does not have to register as a political committee. Accepting your assertions as true in those complaints against AZPIA [we dismiss your complaint]."

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> government officials in the three months before an election—regardless of whether the ad is or can reasonably be interpreted as an issue-based criticism—would constitute electioneering subject to campaign finance and reporting and disclosure requirements. ***That is not the law under either WRTL or the Arizona statutes; express advocacy is required, and citizens remain free to criticize their government on issues even during election season.***" *Id.* at 4 (emphasis added).

The very arguments made by Mr. Smith's attorney in defending a separate campaign finance law complaint filed against a different client strongly reinforce the conclusion that the LFAF advertisements are issue advocacy and that Mr. Smith's complaint fails factually and as a matter of law.

Conclusion

The Commission should take no action on this complaint for any one of three reasons: (i) the Commission lacks jurisdiction in a campaign finance matter involving a non-participating candidate, (ii) Mr. Smith and his lawyer have failed to produce any evidence of actual coordination between LFAF and Ducey 2014, and the evidence produced with this response shows conclusively that there was none, and (iii) the LFAF advertisement is pure issue advocacy.

Respectfully submitted,

Snell & Wilmer

Michael T. Liburdi

Michael T. Liburdi

State of Arizona)
)
County of Maricopa)

Subscribed and sworn (or affirmed) before me this 15th day of July, 2014 by Michael T. Liburdi.

Cynthia J. Tassielli
Notary Public

CYNTHIA J. TASSIELLI
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
June 1, 2015

(seal)

Snell & Wilmer
L.L.P.

cc: Karen Osborne
Jeffrey Messing
Kory Langhofer

ML/ct

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