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BEFORE THE ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

In the Matter of

LEGACY FOUNDATION ACTION FUND

OAH NO. 15F-001-CCE

**RESPONSE TO MOTION TO ACCEPT,
REJECT, OR MODIFY THE
ADMINISTRATIVE LAW JUDGE'S
DECISION**

Pursuant to A.R.S. § 41-1092.08(B), the Legacy Foundation Action Fund ("LFAF") requests that the Arizona Citizens Clean Elections Commission ("Commission") accept, in whole, the Administrative Law Judge's decision ("Decision") in this matter (OAH No. 15F-001-CCE). As explained more fully below, LFAF requests that the Commission deny any motion to reject or modify the Decision as made by counsel for the Commission in the proceeding before the Office of Administrative Hearings. Mot. to Accept, Reject or Modify the Administrative Law Judge's Decision, May 20, 2015 (OAH No. 15F-001-CCE)(the "Motion").

Specifically, counsel for the Commission has moved to modify or reject the Decision's: (1) Finding of Facts to indicate that the factual record does not support any interpretation that the advertisement in question (the "Subject Advertisement") has any purpose other than to advocate for the defeat of a candidate, (Mot., ¶ 2); (2) Conclusion of Law to conclude that the Subject Advertisement constituted express advocacy, (Mot., ¶ 6); (3) Conclusion of law to conclude that civil penalties are proper under the Arizona Citizens Clean Elections Act (A.R.S. §§ 16-940 *et seq.*), (Mot., ¶ 8); and (4) the Conclusion and Order of the ALJ, (Mot., ¶ 9).¹

LFAF respectfully requests that the Commission reject the Motion for two primary reasons. First, counsel to the Commission has introduced neither new case law nor any novel argument. The arguments laid out in the Motion are precisely the same arguments stated before, and rejected by the Administrative Law Judge ("ALJ"). Second, LFAF continues to assert that the Commission lacks jurisdiction in this matter, as the alleged violations of law are not violations of the Arizona Citizens Clean Elections Act. If the Commission were to accept the Motion, it would leave LFAF no choice but to appeal to the Arizona Superior Court and allow that court to determine the extent of the Commission's jurisdiction in matters not affecting candidates that voluntarily submit to the Arizona Citizens Clean Election Act.

1. The Commission should reject the Motion because it has been presented with no new arguments, precedent, or factual recitations.

Counsel to the Commission has presented no new evidence, arguments, or case law that compels rejection or modification to any portion of the ALJ's Decision.

Counsel to the Commission suggests that the Commission adopt a Finding a Fact stating:

¹ Counsel to the Commission also suggests modifying the Relevant Law Section to add a citation to Arizona case law regarding the "preponderance of the evidence" standard. While LFAF is content with the citation to Black's Law Dictionary, LFAF does not object to the addition found in ¶ 5 of the Motion to Accept, Reject or Modify the Administrative Law Judge's Decision.

1 Nothing in the record establishes that the substance of the
2 advertisement relates to decisions then pending before Scott
3 Smith as Mayor of Mesa or as President of the Conference of
4 Mayors. The policies of the Conference of Mayors
5 highlighted in the video relate largely to actions that had
6 nothing to do with Mr. Smith's leadership of the conference.

7 Mot., ¶ 2.

8 Adoption of such a Finding of Fact would not only undermine the Decision by simply
9 overriding the ALJ's findings, but also would ignore the record and the plain language establishing
10 the burden of persuasion in any administrative appeal. First, LFAF presented evidence to the
11 Commission, as well as the ALJ, indicating that "[o]ne of Legacy Foundation Action Fund's
12 projects involves motivating individuals through grassroots issue advocacy to oppose certain policy
13 positions taken by the U.S. Conference of Mayors." Aff. of Christopher Rants, July 15, 2015, at ¶ 6.
14 The Subject Advertisement cites specific positions advocated by the Conference and its leadership.
15 LFAF ran the Subject Advertisement locally and similar advertisements in the cities where the
16 Conference of Mayors' leaders each were then serving as Mayor. Rants Aff. At ¶ 8-9. These
17 undisputed facts reveal this proposed Finding of Fact is not supported by the record.

18 Further, by examining this potential modification in the context of the Decision as well as
19 the plain meaning of the applicable statutes, it is evident that the proposed modification also is
20 contrary to the law. In any hearing on the Commission's imposition of fees or penalties, the
21 Commission bears the burden of persuasion. A.R.S. § 41-1092.07(G)(3), Conclusions of Law at ¶ 1,
22 Administrative Law Judge's Decision, OAH No. 15F-001-CCE. Arizona requires groups that make
23 independent expenditures to register and report their political activity to the Secretary of State.
24 A.R.S. § 16-941(D). Independent expenditures are those expenditures by a person or political
25 committee "that expressly advocate[] the election or defeat of a clearly identified candidate." A.R.S.
§ 16-901(14). Finally, "expressly advocates" means "making a general public communication ...

1 referring to one or more clearly identified candidates and targeted to the electorate of that
2 candidate(s) that in context *can have no reasonable meaning other than to advocate the election or*
3 *defeat of the candidate(s)*, as evidenced by factors such as ... the targeting, placement or timing of
4 the communication or the inclusion of statements of the candidate(s) or opponents.” A.R.S. 16-
5 901.01(A)(2) (emphasis added).

6 When interpreting the Arizona Citizens Clean Elections Act, the ALJ correctly concluded
7 that “if the statute is clear, the tribunal should not read into the statute words or limitations that the
8 voters did not themselves include (Conclusions of Law, Administrative Law Judge’s Decision at ¶ 6
9 (OAH No. 15F-001-CCE) (citing *Darrah v. McClennen*, 698 Ariz. Adv. Rep. 12, 337 P.3d 550
10 (App. 2014); *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479,
11 483, 930 P.2d 993, 997 (1997)). And, “[a] statute is to be given such an effect that no clause,
12 sentence or word is rendered superfluous, void, contradictory or insignificant.” *Guzman v. Guzman*,
13 854, P.2d 1169, 1173 (Ariz. App. 1993).

15 Taking the statutory construction as a whole, the Commission bore the burden of persuading
16 the ALJ that the Subject Advertisement was express advocacy because there was no reasonable
17 meaning other than to advocate for the election or defeat of the candidate. Consequently, the
18 Commission had to present sufficient evidence to overcome the presumption and persuade the ALJ
19 that the Subject Advertisement’s *only reasonable purpose* was to advocate for the defeat of Scott
20 Smith. When considering the evidence the ALJ evaluated the possible reasonable intent of the
21 message to determine if it constituted express advocacy. Conclusions of Law, at ¶16; A.R.S. §16-
22 901(14). The Decision clearly considers and addresses the factors, articulated in the statute, and
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properly concluded that the Subject Advertisement “can reasonably been [sic] seen as permissible issue advocacy.”² Conclusions of Law at ¶16.

Acceptance of the Motion adding the Finding of Fact requested by counsel to the Commission improperly would ignore the statutory presumption and burden of persuasion, render portions of the definition of express advocacy superfluous or insignificant, and impermissibly ignore the evidence presented to the ALJ. The Commission possessed the burden of persuasion on the issue of whether the Subject Advertisement had no other purpose than to advocate for the defeat of Scott Smith in the Republican Gubernatorial Primary. Appropriately considering the timing, targeting, and content of the Subject Advertisement, the ALJ correctly determined that there exist alternative reasonable purposes for the Subject Advertisement.

The Motion further suggests that the Commission reject the Decision’s Conclusions of Law regarding Express Advocacy. Mot. at ¶ 6. Rejection of the Decision’s Conclusions of Law regarding Express Advocacy, however, would be contrary to several decisions already rendered regarding the Subject Advertisement. There exists harmony among two other Arizona government agencies that the Subject Advertisement **does not** constitute express advocacy. The Secretary of State’s Office referred this same issue to the Maricopa County Elections Department, which determined (before even receiving LFAF’s Response to the Complaint) that there was no reasonable cause to believe that LFAF had committed a violation of the independent expenditures registration and reporting requirements.³ See Exhibit 8, Administrative Law Judge’s Opinion, OAH No. 15F-

² Counsel for LFAF believes that the ALJ intended the phrase “permissible issue advocacy” to be a shorthand for a non-express advocacy communication that did not require reporting under Arizona statutes. Nothing in the ALJ’s decision suggest – as counsel for the Commission seems to imply – that the intent of the ALJ was to suggest that any advocacy was impermissible. Rather, we understand that phrase to refer to issue advocacy not subject to reporting.

³ Notably, on November 1, 2014, Scott Smith’s counsel, who initiated the complaint, withdrew the complaint.

001-CCE. Most recently, the ALJ's Decision consistently concludes that the Subject Advertisement does not constitute express advocacy and, therefore, does not subject LFAF to registration and reporting requirements (or fees and penalties associated with any alleged violation of those requirements). Conclusions of Law, at ¶ 22-24.

The same arguments laid out by the counsel to the Commission are those that have failed to persuade any legal or regulatory body except for the Commission itself. When applying the burden of persuasion and the plain meaning of the definition of express advocacy, it is clear that the Commission has failed to show that the *only* purpose of the Subject Advertisement was to call for the election or defeat of Mr. Smith. "A showing that the Subject Advertisement can reasonably be construed as being express advocacy is not sufficient to meet the burden of proof." Conclusions of Law, fn. 2 (citing *Committee for Justice & Fairness v. Arizona Secretary of State*, 332 P.3d 94, at 98).

Time and again, LFAF has presented several factors illuminating the Subject Advertisement as a pure issue advertisement: the Subject Advertisement aired more than 120 days in advance of a partisan primary for which Mr. Smith intended to run; the Subject Advertisement aired while Mr. Smith was the sitting Mayor of Mesa; the Subject Advertisement does not reference party affiliation, other candidates, elections, primaries, the status of Mr. Smith as a candidate, nor any reference to voting. In fact, the Subject Advertisement maintains all the hallmarks of a genuine issue advertisement as described by the Supreme Court of the United States in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 470 (2007) (explaining that the content of genuine issue advertisements "lack indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger.").

1 Simply put, the issue of whether the Subject Advertisement is issue advocacy or express
2 advocacy has now been presented to, and decided by different entities of the Arizona government.
3 The Maricopa County Elections Department determined the Subject Advertisement was not express
4 advocacy. The Office of Administrative Hearings, through the ALJ Decision, agreed with LFAF.

5 LFAF has maintained from the beginning that the Subject Advertisement comports with the
6 analysis of issue advocacy, rather than that of express advocacy as considered by the Supreme Court
7 of the United States in similar cases such as *Wisconsin Right to Life*. Public opinion, as expressed
8 via the online comments associated with the YouTube clip of the Subject Advertisement evidence
9 the Subject Advertisement's varied and contradicting effects upon those that it reached. The variety
10 of responses clearly indicates that there are other reasonable purposes for the Subject Advertisement
11 beyond specifically advocating for the defeat of Mr. Smith in the Republican gubernatorial primary.

12 In fact, seemingly the only body that stands in contravention of the consensus among those
13 reviewing the Subject Advertisement is this Commission.
14

15 Finally, the Motion recommends that the Commission reject the ALJ's Conclusions of Law
16 regarding the application of the civil penalties provision found within the Arizona Citizens Clean
17 Elections Act. Conclusions of Law at ¶¶ 17-20. In the underlying order giving rise to the appeal
18 before the Office of Administrative Hearings, the Commission interpreted certain aspects of the
19 Arizona Administrative Code to allow it to issue fines for violations of independent expenditures as
20 part of the Arizona Citizens Clean Elections Act. However, the function of the independent
21 expenditure notice provisions in the Act were to provide the Commission notice so that it could
22 provide additional public funds to candidates participating in Clean Elections where independent
23 expenditures were made in those races. *See* Ariz. Admin. Code § R2-20-109(F)(3). As the
24 Supreme Court noted, the purpose of these provisions were to "level the playing field" for
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1 candidates who seek public funding of their campaigns by appropriating public money in races in
2 which independent expenditures are made on one candidate's behalf. *See McComish v. Bennett*, 611
3 F.3d 510, 511 (9th Cir. 2010) This function of the Commission is no longer in operation since the
4 Supreme Court found it to be unconstitutional. *See Arizona Free Enterprise Club v. Bennett*, 131 S.
5 Ct. 2806, 2825-26 (2011) ("We have repeatedly rejected the argument that the government has a
6 compelling state interest in leveling the playing field' that can justify undue burdens on political
7 speech.")

8 The Arizona Statutes provide for the reporting requirements in Title I, and provide that the
9 place for reporting is with the Secretary of State. This structure makes sense and is logical since the
10 independent expenditure reporting requirements of the Arizona Statutes pre-dated the creation of the
11 Commission. The Act did not change the place of reporting, nor did the Act change the agency with
12 responsibility for policing failures to report independent expenditures. This is confirmed by the
13 structure of the statutory language regarding civil penalties for violations of Title II. The statute
14 states "the candidate and the candidate's campaign account shall be jointly and severally responsible
15 for any penalty imposed pursuant to this subsection." A.R.S. § 16-942(B). The Commission has
16 repeatedly argued that this portion of the statute is to, at times, have no effect and no meaning and,
17 in other cases, require an unwritten limitation to the statute. Conclusions of Law at ¶ 20. The ALJ
18 correctly rejected those arguments. It is the Commission's own regulation that provides penalties
19 for violations of independent expenditure report requirements that are inconsistent with,
20 unsupported by, and contrary to, the language of Arizona Statutes. Ariz. Admin. Code § R2-20-
21 109(F)(3). As the ALJ correctly noted, in the context of statutory interpretation explained
22 throughout this Response, a statute must be read so that "no clause, sentence or word is rendered
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1 superfluous, void, contradictory or insignificant.” *Guzman v. Guzman*, 854 P.2d 1169, 1173 (Ariz.
2 Ct. App. 1993).⁴

3 While LFAF continues to assert that the Subject Advertisement is not express advocacy
4 bringing it under the purview of independent expenditure registration and reporting requirements
5 cited by the Commission, LFAF does agree with the ALJ on the Conclusions of Law surrounding
6 civil penalties. The intent of the statute is clear from its plain text that the power asserted by the
7 Commission here —namely the power to assess penalties for violations of independent expenditure
8 reporting requirements—is simply not within the province of this Commission’s jurisdiction. To
9 read the Arizona Citizens Clean Elections Act to grant such jurisdiction to the Commission would
10 require reading words that are not present in the Act while disregarding those that are. If the statute
11 was intended to grant this Commission authority to act, it would have done so plainly and clearly.
12 Rather, the Motion seeks to have the Commission divine a power to assess civil penalties that the
13 statute does not clearly confer. As a result, this portion of the Motion should be rejected.
14

15 In light of the foregoing, acceptance of the Motion to reject ALJ’s Decision would be a
16 baseless, and transparent, override of the ALJ’s review of the record, leaving LFAF with no choice
17 but to appeal the final Administrative decision to the Superior Court, as is its right under A.R.S. §
18 12-905.
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21 ⁴ If this matter proceeds to appeal before the Superior Court, LFAF intends to seek to have Ariz.
22 Admin. Code § R2-20-109(F)(3) struck down as exceeding the authority of the Commission. See
23 *U.S. Parking Systems v. City of Phoenix*, 772, P.2d 33, 34 (Ariz. Ct. App. 1989) (ruling that the
24 agency exceeded jurisdiction in interpreting Arizona ordinances because “[w]here a term is used in
25 one provision of a statute and omitted from another, that term should not be read into the section
where it is omitted.”); and see *State ex rel. Montgomery v. Mathis*, 290 P.3d 1226 at fn. 16 (Ariz.
Ct. App. 2012) (“although we give deference to an agency’s interpretation of a statute or regulation
it is charged with enforcing, it is ultimately the responsibility of the judiciary to interpret the
meaning and applicability of statutory and constitutional provisions.”)

1 **2. A rejection of the ALJ’s Findings of Fact, Conclusions of Law, and Conclusion and**
2 **Order inevitably will result in an appeal to the Superior Court.**

3 In the Decision, the ALJ found that the Subject Advertisement was not express advocacy
4 and that penalties assessed by the Commission against LFAF were improper without reaching the
5 merits of LFAF’s assertion that the Commission lacked jurisdiction to regulate this type of speech.
6 If the Commission rejects or modifies the ALJ’s Decision, LFAF will again assert that the
7 Commission lacks jurisdiction on appeal before the Superior Court. The Commission should
8 consider how an adverse outcome on appeal might result in a judicial declaration limiting its
9 jurisdiction in future matters.

10 A.R.S. § 12-905(A) states the “[j]urisdiction to review final administrative decisions is
11 vested in the superior court.” On appeal, “[t]he court may affirm, reverse, reverse, or modify or
12 vacate and remand the agency action.” A.R.S. § 12-910(E). The court may overturn the agency
13 action if it “is not supported by substantial evidence, is contrary to law, is arbitrary and capricious,
14 or is an abuse of discretion.” A.R.S. §12-910(E). The superior court will reach its own legal
15 conclusions. *Smith v. Ariz. Long Term Care Sys*, 84 P.3d 482, 486 (Ariz. Ct. of App. 2004). Should
16 the Commission reject the ALJ’s Decision, LFAF will argue, among other positions, that the
17 Commission’s final disposition is contrary to law because the Commission lacks jurisdiction to
18 regulate issue advocacy. LFAF believes it is likely to prevail on that claim.

19 Second, the Commission should consider that this proceeding is not occurring in a vacuum.
20 In the context of another challenge to the express advocacy statute still pending before the Arizona
21 Supreme Court (*Committee for Justice and Fairness v. Arizona Secretary of State*, Case No. LC
22 2011-000734(“CJF”)), it is questionable whether the Superior Court would find the Commission
23 has jurisdiction over A.R.S. §§16-901 and 16-901.01. In CJF, the Commission filed a Motion to
24 Intervene after the Superior Court declared aspects of Arizona’s express advocacy statute
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unconstitutional. *Committee for Justice and Fairness v. Arizona Secretary of State*, Case No. LC 2011-000734, Motion to Intervene on behalf of the Citizens Clean Election Commission, November 1, 2012. The Commission argued that it has a “strong interest in the constitutionality of Arizona’s election statutes” because the provisions deemed unconstitutional “implicate[] the Clean Elections Act and the statutes that the Commission administers.” *Id.* at 1. On November 29, 2012, Judge Crane McClennen denied the Commission’s Motion to Intervene. *Committee for Justice and Fairness v Arizona Secretary of State*, Minute Entry of November 28, 2012, LC2011-000734-001 DT.

Appeal of any final decision of the Commission in this matter that contradicts the Decision of the ALJ will once again be heard by the Superior Court. Current Judicial assignment suggests Judge McClennen would hear LFAF's appeal. Given his ruling in CJF and subsequent rejection of the Commission's Motion to Intervene, the Commission would do well to consider whether the Superior Court would find that the Commission has jurisdiction over this type of speech.

Moreover, LFAF, having a significant interest in challenging the restrictions on free speech that Arizona’s express advocacy statutes represent, has briefed the Arizona Supreme Court in the CJF matter as *amici*. LFAF, therefore, maintains the right to inform the Arizona Supreme Court of any Commission action to further restrict First Amendment protections of issue advocacy.

Conclusion

The Commission should reject the motion to modify the Decision. Motion to Accept, Reject or Modify the Administrative Law Judge's Decision, OAH No. 15F-001-CCE, at ¶ 2.

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1 DATED this 25th day of March, 2015.

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11 **COPY** of the foregoing e-mailed this
12 25th day of March, 2015 at:

13 Arizona Citizens Clean Elections Commission

14 c/o Thomas Collins

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16 And a **COPY** e-mailed/mailed
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