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**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

**IN AND FOR THE STATE OF ARIZONA**

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| In the Matter of<br><br>LEGACY FOUNDATION ACTION FUND,<br><br>Petitioner/Appellant,<br><br>vs.<br><br>ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION<br><br>Respondent/Appellee. | Case No. 15F-001-CCE<br><br>**REPLY BRIEF OF PETITIONER/APPELLANT LEGACY FOUNDATION ACTION FUND**<br><br>(Assigned to the Honorable Thomas Shedden) |

## INTRODUCTION

LFAF demonstrated at least four reasons in its Opening Brief ("OB") why the CCEC erroneously held LFAF subject to the Clean Elections Act and imposed civil penalties in error: (I)

The CCEC exceeded its statutory authority in asserting jurisdiction over LFAF; (II) The CCEC failed to heed LFAF's justifiable reliance on the Arizona Superior Court's ruling that A.R.S. § 16-901.01(A) was unconstitutional; (III) The CCEC violated the First Amendment when it relied on subjective analysis in finding LFAF's advertisement constituted express advocacy; and (IV) The CCEC exceeded its statutory authority when it imposed civil penalties against LFAF under A.R.S. § 16-942(B).

The CCEC *admits* much of the second and third points in its Answer Brief ("AB"). In its attempt to explain away LFAF's reasonable reliance on the Arizona Superior Court's decision holding A.R.S. § 16-901.01(A)'s definition of "expressly advocates" to be unconstitutional, the CCEC generally concluded that LFAF did not rely on the decision and if it did, then such reliance could not be reasonable since the court did not issue an injunction. The CCEC does not dispute: (1) the Arizona Superior Court's ruling; (2) the fact that it was rendered prior to LFAF's airing of its advertisement; and (3) it was in effect at the time LFAF acted and when the initial complaint in this matter was filed. The Answer Brief provides no basis for its conclusion that LFAF's reliance was unreasonable . Further, the CCEC's Answer Brief argues a legal standard for the functional equivalent of express advocacy directly contrary to First Amendment and U.S Supreme Court precedent.

The CCEC also fails to address anywhere in its Answer Brief, the underlying basis actually asserted by the CCEC during the proceedings below. The Answer Brief never once references the transcripts from open meetings where the commissioners questioned LFAF's counsel, articulated opinions and inevitably employed an erroneous legal analysis to find against LFAF. Also missing from the CCEC's Answer Brief are citations to the CCEC's Executive Director, Tom Collins' Reason to Believe Recommendation as well as his Probable Cause Recommendation, which the

CCEC also relied upon when formulating its rulings against LFAF. While the Answer Brief occasionally refers to "the Commission's analysis," the CCEC never cites to the foundation for that analysis. In the end, the Answering Brief asserts arguments that were not relied upon by the CCEC at the time it rendered its rulings, and in the formulation presented failed to provide LFAF with adequate notice of the CCEC's position, and were generally not presented to the CCEC below. These vital omissions destroy the Answer Brief's arguments attempting to validate the CCEC's findings and imposed civil penalties.

As explained below, the CCEC's Answer Brief offers no legally valid basis for upholding the CCEC's ruling and imposed civil penalties against LFAF. The CCEC's order and assessed penalties should be reversed.

## ARGUMENT

### I. THE CCEC EXCEEDED ITS STATUTORY AUTHORITY IN ASSERTING JURISDICTION OVER LFAF.

The CCEC does not dispute the fact that the U.S. Supreme Court struck down, as unconstitutional, the Clean Elections Act's provision establishing the basis for independent expenditure reporting before the CCEC. *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-2829 (2011) (ruling the Clean Elections Act's independent expenditure matching funds provision unconstitutional). In effect, the U.S. Supreme Court's ruling abolished the purpose for which the Clean Elections Act imposed independent expenditure reporting requirements. *See McComish v. Brewer*, 2010 U.S. Dist. LEXIS 4932 (D. Ariz. Jan. 20, 2010) (describing the operation of the Clean Elections 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 participating candidate will receive matching funds….") (emphasis added) (internal quotations omitted). As recognized by these courts, the sole reason why the Clean Elections Act implemented independent expenditure reporting requirements in the first place was to track the amount of independent expenditure money spent so that participating candidates could be subsidized in accordance with the Clean Elections Act's provisions.

Also undisputed is the fact that Title 16, Chapter 6, Article 1 includes reporting requirements for independent expenditures that pre-dated the adoption of the CCEC. *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 Section 16-914.02 are subject to interpretation and enforcement by the Arizona Secretary of State, a separate and independent agency from the CCEC, and by the Arizona Attorney General. Both the independent expenditure reporting requirements in the Clean Elections Act as well as A.R.S § 16-914.02 are subject to the definition of "expressly advocates" in A.R.S. § 16-901.01(A).

Instead of addressing the next logical question, which is why would the citizens of Arizona include a reporting requirement in the Clean Elections Act that is duplicative of the requirement in Article 1 and subjects speakers to different civil regulatory regimes for the exact same conduct, the CCEC's Answer Brief unpersuasively cites a general Clean Elections Act purpose statement. AB at 11. The CCEC fails to point to a specific intent statement or other statutory basis justifying the duplicative independent reporting requirement in the Clean Elections Act. "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).

The only logical basis for the Clean Elections Act's independent reporting requirements eliminated when the U.S. Supreme Court ruled the "matching funds" program unconstitutional. As noted *infra*, the CCEC cannot simply formulate its own self-serving concepts of jurisdiction and enforcement as it has sought to do in this case as well as through recently implemented rulemaking, which was first asserted as a basis for jurisdiction over independent expenditures in 2013. It simply cannot be the case that citizens of Arizona intended for two different governmental agencies to possess the ability to reasonably interpret the same exact law and thus create the possibility of inconsistent outcomes in the context of potential civil violations.

Such a fundamentally unfair, illogical and speech-chilling result is what LFAF faces here. The Maricopa County Elections Department, reviewing the same complaint as the CCEC, interpreting the same statue (A.R.S. § 16-901.01(A)), found no reasonable cause to believe that LFAF violated Title 16, Chapter 6, Article 1's independent expenditure reporting requirement. The Clean Elections Act never intended to create a duplicative independent expenditure enforcement regime, but instead composed a statutory method to track independent expenditures for the purpose of fulfilling the needs of a matching funds system. That purpose was found unconstitutional, leaving the CCEC without authority to enforce the Act's independent expenditure reporting requirement. If such a burdensome enforcement process were allowed to exist, it would fly in the face of the First Amendment. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (noting "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.").

Additionally, the notion of duplicate reporting and civil enforcement regimes is contrary to the U.S Supreme Court's recent teaching that a "prophylaxis-upon-prophylaxis approach requires that we be particularly diligent in scrutinizing the law's fit." *McCutcheon v. FEC*, 134 S.Ct. 1434, 1458 (2014) (internal quotations omitted). In McCutcheon, the Supreme Court struck down a statute that imposed an aggregate contribution limit when the base limit was sufficient, in the view of the Court, to prevent the harm Congress was protecting against when imposing a base limit on contributions to candidates. *Id.*

Similarly, here Arizona statutes cannot constitutionally impose a "prophylaxis upon prophylaxis" approach to independent expenditure reporting requirements without running afoul of the U.S. Supreme Court's decision in *McCutcheon*. There is not nothing to be gained by permitting two different civil enforcement agencies to exercise jurisdiction over the exact same conduct – particularly when such a scheme puts speakers at risk of inconsistent judgments in the area of the First Amendment. Rather, the CCEC created its enforcement authority over independent expenditure reporting requirements in a late 2013 rulemaking action. As we note, *supra*, there is simply no statutory basis for the CCEC's assertion of independent jurisdiction and accompanying imposition of penalties particularly in a post-*Bennett* statutory regime. The lack of penalty authority discussed, *infra*, underscores this point. If the statutes intended to permit the CCEC jurisdiction here, there would be a clearly applicable penalty calculation provision.

Taken together, LFAF's arguments posed here and in its Opening Brief establish that the CCEC lacks jurisdiction over independent expenditure reporting requirements.

## II. 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.

As the CCEC points out, LFAF was not party to the case in which the Maricopa County Superior Court ruled A.R.S. § 16-901.01 unconstitutional. *Comm. for Justice & Fairness*, No. LC-2011-000734-001 ("*CJF*"). However, simply because LFAF was not a party to the case does not mean that the *CJF* ruling did not constitute a final judgment, and that LFAF could not reasonably rely on the judgment. Importantly, the Arizona Secretary of State's Office – which actually has clear enforcement jurisdiction over the independent expenditure reporting requirements pursuant to A.R.S. § 16-924 – was a party to the case. *See Comm. for Justice & Fairness v. Secretary of State*, CV-14-0250-PR (Ariz. Supreme Ct.). It is LFAF's position, supported by federal case law, that the Executive Branch of the Arizona government is, therefore, bound by the declaratory ruling. The CCEC is a part of the Executive Branch of the state government. Its members are appointed in alternating fashion by the Governor and the highest-ranking statewide officeholder who is not a member of the same political party of the Governor, and it is represented by the State's Attorney General. A.R.S. § 16-955 and A.R.S. 41-192.

The CCEC cites to *Taylor v. Sturgell* as support for its argument that "a person is not bound by a trial court's judgment in litigation in which he or she is not a party." AB at 28 (citing *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008). Absent from the CCEC's citation is the language in *Sturgell* that limited its application to "judgment[s] *in personam*" or a judgment directed toward a particular person. *Id.* *Sturgell* can be distinguished from *CJF* in that the court in *CFJ* did not issue a judgment directed toward a particular person but, instead, issued a judgment declaring A.R.S. § 16-901.01 unconstitutional in a case where the office clearly charged with civil enforcement of the statute was a party.

The CCEC's reliance on *Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., Ltd.,* directs the reader to a discussion regarding the extent to which a federal court may exercise personal

jurisdiction. *Omni Capital Int'l, Ltd. V. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). Casting aside this irrelevant and inapplicable legal authority, the CCEC is left relying on *State ex rel. Thomas v. Grant*, which it again misuses as authority. *State ex rel. Thomas v. Grant*, 222 Ariz. 197, 201, ¶ 12, 213 P. 3d 346, 350 (App. 2009). The court in *Grant* dealt with whether a court's protective order could apply to a party not a part of the underlying litigation. *Id.* at ¶ 13. While the CCEC used *Grant* to support the legal theory previously mentioned in *Sturgell*, its reliance on *Grant* fails for the same reason noted *supra*.

The *CJF* ruling was not limited to any particular party to the lawsuit but, rather, was broadly applicable to the constitutionality of A.R.S. § 16-901.01, and certainly included within its scope the Arizona Secretary of State's Office, which was a party. This remains true even though the court did not issue an injunction. AB at 28. The U.S. Supreme court has recognized that "the practical effect of injunctive and declaratory relief will be virtually identical." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975), *quoting Samuels v. Mackell*, 401 U.S. 66, 72 (1971); *Commonwealth ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 791 (E.D. Va. 2010) ("We have long presumed that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction.") (*quoting Comm. on the Judiciary of the United States House of Representatives v. Miers*, 542 F. 3d 909, 911 (D.C. Cir. 2008)); *Hammond v. A.J. Bayless Mkts.*, 58 Ariz. 58, 63, 117 P. 2d 490, 492(1941)).

LFAF's Opening Brief asserted support for its argument that "one ought not be punished if one reasonably relies upon a judicial decision later held to have been erroneous." *United States v. Moore*, 586 F. 2d 1029, 1033 (4th Cir. 1978). While LFAF believed at the time, and continues to believe and assert before this court, that its advertisement communicated a legitimate issue advocacy message, it aired its advertisement knowing that the court in *CJF* ruled Arizona's

"expressly advocates" statute unconstitutional. "It is a defense that the defendant acted in reasonable reliance upon a judicial decision, opinion or judgment later determined to be invalid or erroneous." *Ostosky v. State of Alaska,* 913 F. 2d 590, 595 (9th Cir. 1990).

CCEC's attempt to diminish the reasonableness of LFAF's reliance because LFAF knew that the *CJF* decision was pending appeal at the time, is a nonstarter. It is longstanding law that "the pendency of an appeal has no affect on the finality or binding effect of a trial court's holding." *SSIH Equip. S.A. v. United States Int'l Trade Com.,* 718 F. 2d 365, 370 (Fed. Cir. 1983) *citing Deposit Bank v. Frankfort,* 191 U.S. 499 (1903); *Clements v. Airport Authority,* 69 F. 3d 321 n.7 (9th Cir. 1995) ("the general rule is that a judgment may be treated as final for purposes of preclusion notwithstanding the fact that it may be subject to reversal on appeal.") (citing Restatement (Second) Judgments § 13 and comment f); *Ariz. Downs v. Superior Court,* 128 Ariz. 73, 76, 623 P. 2d 1229, 1232 (1981). Clear case law supports LFAF's reliance on *CJF*'s judgment as reasonable. Additionally, as LFAF noted before the CCEC below, Arizona law does not provide for any automatic stay pending appeal, and no stay was sought in *CJF* before the Superior Court or the Court of Appeals.

## III. THE CCEC VIOLATED THE FIRST AMENDMENT WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING LFAF'S ADVERTISEMENT CONSTITUTED EXPRESS ADVOCACY.

The most important aspect of the First Amendment that the CCEC overlooks in its Answer Brief is the fact that, while the government may restrict and regulate political and/or campaign speech, to the extent said speech constitutes express advocacy or its functional equivalent, it may not regulate issue advocacy speech because such speech, "may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate," and categorically is "not the functional equivalent of express advocacy…." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*,

*(WRTL)* 551 U.S. 449, 476 (2007); *see McConnell v. FEC*, 540 U.S. 93, 105 (2003); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam).

As noted *herein*, the Answer Brief fails to identify the basis below for the CCEC's ruling that LFAF's advertisement constituted express advocacy. Instead, the Answer Brief makes arguments that are only loosely tied to the CCEC's actual legal decisions below. In its Opening Brief, LFAF highlighted numerous examples of erroneous findings and flawed analysis on which the CCEC relied below in crafting is rulings. As LFAF's previous arguments go to the basis of the CCEC's decision-making; the arguments below touch upon the flawed contextual arguments in the Answer Brief.

The CCEC spends roughly ten pages purporting to "objectively" analyze the content of LFAF's advertisement. Yet, the CCEC encounters a dire problem at the start of its analysis when, in its own subsection heading, it identifies the argument's focus to be on the "*Context* of LFAF's Advertisement." AB at 15 (emphasis added). The CCEC would like this Court accept its context-centric analysis as permissible by citing to *WRTL*. *Id.* While CCEC is correct in that *WRTL* controls as the legal standard in this case, the CCEC fails to provide this Court with the Supreme Court's description of how a court may conclude whether a communication is express advocacy.

LFAF agrees with the CCEC 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). OP at 12. LFAF even asserted that "context may be considered when determining whether an advertisement constitutes the functional equivalent of express advocacy." OP at 13. However, it is contrary to the First Amendment, and the findings of the U.S. Supreme Court, to rely significantly on context – and essentially ignore the timing of the advertisement in relation to the election to which the communications are allegedly

directed. The Supreme Court noted that courts should not allow basic background information to "become an excuse for discovery." *WRTL*, 551 U.S. at 473-474. In fact, the Supreme Court concluded in *WRTL*, that contextual considerations "should seldom play a significant role" in determining whether speech is express advocacy. *Id.*

CCEC's errant reliance on contextual considerations inevitably resulted in the CCEC's Answer Brief's incorrect analysis of the content of LFAF's advertisement.

**A. LFAF's advertisement was timed to effectuate its issue advocacy purpose.**

The CCEC exerts considerable effort attempting to argue the significance between Mayor Smith's announcement that he intended to run as a candidate for Arizona governor and the fact that Mayor Smith resigned close in time after LFAF's advertisement stopped airing. AB at 20-25. If, however, the CCEC were attempting to exert a true objective analysis of the advertisement, it would recognize that LFAF's issue advocacy message could not have reasonably been directed to impact an election nearly five months away as the ad highlighted policy positions proffered by the U.S. Conference of Mayors, of which the president at the time of the advertisement's airing was the sitting Mesa, AZ Mayor, Scott Smith. What the CCEC is seemingly advocating in its argument is that LFAF should be required to refrain from engaging in issue advocacy speech because LFAF should have known that Mayor Smith had an intention to run for governor in Arizona.[1]

Even considering the point that Mayor Smith set an open-ended deadline for the possibility of relinquishing his Mayoral position, which he otherwise would have held until 2017, the fact that LFAF chose to air its advertisement close in time to that artificial deadline does not somehow defeat

[1] The CCEC completely disregards the notion that at anytime, Mayor Smith could have renounced his previous ambitions to run for governor. By contract, in the *CJF* case, the Superintendent of Education was a candidate for Attorney General, and win or lose that election, was going to be legally forced to vacate the Superintendent's office. Mayor Smith's term – had he opted against resigning – was set to run until January 23, 2017. See City of Mesa Charter, Article II, Section 201(F); *See aslo*, Gary Nelson, *Alex Flinter becomes mayor of Mesa as Smith era ends; huge new issues loom for city*, azcentral.com (April 16, 2014), http://www.azcentral.com/story/news/local/mesa/2014/04/16/alex-finter-new-mesa-mayor-scott-smith-era-ends/7791865/ (last visited January 25, 2015) (noting Mayor Smith faced term limits ending in January 2017).

the plain meaning of the advertisement. To find otherwise would destroy the distinction between protected issue advocacy speech and regulated express advocacy speech.

The Supreme Court recognized the fact that issue advocacy and express advocacy oftentimes blur in distinction. *See Buckley*, 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."). This is precisely why, the Supreme Court, in preserving the important right to engage in issue advocacy speech, chose to uphold a "brightline" relating to speech mentioning candidates within the electioneering window (30 days before a primary and 60 days before a general election). *WRTL*, 551 U.S. at 474 ("this test is *only triggered* if the speech meets the brightline requirements of BCRA 203 in the first place.") (emphasis added).

The Court – and the U.S. Congress - did not arbitrarily decide the electioneering communications 30 day pre-primary / 60 day pre-general timeframes. Rather, these 30/60 day time frames were established by elected officials with significant and personal experience with campaign advertising.

During the course of establishing its regulations on independent expenditures, and as a result of court decisions requiring the Federal Election Commission to justify its rules, the FEC commissioned a study to determine the frequency of advertisements run by candidates and how far out from the date of an election the ads were run.[2] The FEC concluded:

> Any time a candidate uses campaign funds to pay for an advertisement, it can be presumed that this advertisement is aired for the purpose of influencing the candidate's election. Additionally, candidates and their campaign staff are experienced and knowledgeable in matters of advertising strategy and are highly motivated to run advertisements at a time when they are likely to influence voters. Thus, data showing when candidates spend their own campaign funds on advertisements provide an empirical basis for predicting when advertising that has

[2] The data the FEC relied upon to reach its conclusions were provided to the CCEC and explained during the July 31, 2014 public hearing. *See* Exhibit 29 to Revised Index of Exhibits to Joint Stipulated Facts.

> the purpose of influencing a Federal election occurs. … ***Advertisements run outside of the effective time frame are of little value to the candidate, and therefore do not present the potential for corruption or the appearance of corruption that BCRA and the Act intend to prevent. …The data show that a minimal amount of activity occurs between 60 and 90 days before an election, and that beyond 90 days, the amount of candidate advertising approaches zero.*** …The data are consistent with the comments received by the Commission. ***Commenters stated that a 60-day time frame comports with the practical reality of when candidates run advertisements. Comments submitted by the Democratic National Committee, the Democratic Senatorial Campaign Committee, the Democratic Congressional Campaign Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee (''NRCC'') all stated that in their experience, coordinated activities occurred within 60 days of the 2004 elections. The NRCC further stated that both its coordinated and independent expenditures for the 2004 general election were all made within 60 days of that election. A 60-day time frame is also consistent with past Congressional, Supreme Court, and Commission findings.*** As one commenter stated, ''this time period [60 days] would be consistent with Congressional line-drawing in the context of electoral and political speech in the BCRA itself.''

71 Fed. Reg. 33193-33194 (June 8, 2006) (emphasis added, footnotes omitted).

The Supreme Court acknowledged these facts and concluded that issue advocacy advertisements naming a candidate and airing within a 30 day pre-primary and 60 day pre-general windows would be susceptible to the test outlined in *WRTL*. *WRTL*, 551 U.S. at 474. LFAF and the CCEC agree that LFAF's advertisement aired over five months prior to the election for Arizona governor, clearly outside the 30/60 day windows recognized by the Supreme Court.[3] Rather, the CCEC in this case seems to assert that it is more knowledgeable about what advertisements are "intended" to influence elections than are the national party committees of both political parties, empirical evidence obtained by the Federal Election Commission based on analysis of advertising purchases by hundreds of

[3] It is worth noting that the CCEC claims that even if the *CJF* court held the Arizona statute to be unconstitutional, the CCEC could rely on "controlling federal First Amendment case law that defines the term 'express advocacy.'" AB at 30. However, as noted in the above analysis, the CCEC's arguments would clearly fail under federal First Amendment case law noting the timing issue as one specific measure under which the CCEC's legal analysis comes up short.

actual candidates, and the judgment of both Congress and the Supreme Court concerning the timing of advertisements that actually might impact the outcome of an election.

In fact, Mayor Smith's own campaign did not spend money on television advertising until it reported a disbursement on June 17, 2014. *See* Pre-Primary Report (Smith Campaign) available at http://www.azsos.gov/cfs/PublicReports/2014/831839FB-4E48-4059-AFE1-AC9404391585.pdf (visited January 24, 2015). This expenditure was not made until roughly 69 days before the primary election, and the date of the expenditure does not reflect precisely what day the television advertisements began airing or over what time period. However, publicly available FCC records show that the first Smith television ads aired on June 19, 2014. *See* FCC Political File reports available at https://stations.fcc.gov/collect/files/41223/Political%20File/2014/State/Governor/Smith%20for%20Governor/Smith%20for%20Governor%206%2D19%2D14%20%2814035658692660%29.pdf and https://stations.fcc.gov/collect/files/35486/Political%20File/2014/State/Scott%20Smith%20for%20Governor/Smith%20889597%20%2814031278937996%29.pdf (Visited January 25, 2014). This expenditure was also more than 60 days after the LFAF ads were no longer on the air, and about two weeks before the underlying complaint in this case was filed.

In its Opening Brief, LFAF cites to cases where advertisements were deemed to be the functional equivalent of express advocacy. OB at 19. All of its supporting cases, including the *CJF* case, which the CCEC heavily relies upon, ruled that timing in proximity to the actual election proved a vital fact in determining whether an advertisement constituted the functional equivalent of express advocacy. *Id.* In every case cited by both LFAF and the CCEC that discussed specific ads, the timing of the communications in dispute were all very close in time to the election to which the

ads were related. *See e.g. Citizens United* (declaratory judgment action about electioneering communications intended to be within the 30/60 day windows); *CJF* ("within days of the election"); *Furgatch* ("one week prior to the 1980 presidential election"); *WRTL II* (declaratory judgment action about electioneering communications intended to be within the 30/60 day windows); *Getman* (declaratory judgment action brought in September of 2000 with proposed ads to influence the November 2000 general election). Not a single case cited by either side provides support for a position that an advertisement run nearly five months out from an election that did not contain "magic words" express advocacy can be the functional equivalent of express advocacy.

**B. LFAF's advertisement conveys a legitimate issue advocacy message**

A paramount example of the CCEC's subjective, context-based analysis is found in its attempt to argue LFAF's advertisement cast Mayor Smith in an "unfavorable light." AB at 16-20. The CCEC highlights a few of the advertisement's components, but fails to address the actual words of the ad since doing so would destroy its claim that the advertisement is the functional equivalent of express advocacy.

Even though it is clearly drawn out on the last screenshot of the advertisement, which remains on screen for a series of seconds and is accompanied by a voiceover reading of the text, the CCEC pays little heed to the advertisement's actual call to viewers to "tell Scot Smith, The US Conference of Mayors should support policies that are good for Mesa." This call to action addresses Mr. Smith in both his public roles as Mayor of Mesa and as President of the U.S. Conference of Mayors. It references policy initiatives that are highlighted earlier in the ad and are supported by the U.S. Conference of Mayors. LFAF's stated social welfare purpose opposes such policy initiatives and, as a result, LFAF determined it advantageous to spend money running an ad to seek policy change. The plain language of its ad called on the U.S. Conference of Mayors,

through Mayor Smith, the organization's president, to reform its policies. This message cannot be discounted by the CCEC's subjective reading and misguided reliance on *CJF*. The CCEC also acknowledges that Mayor Smith is not identified as a candidate, no political party is mentioned, no election is mentioned, and there is no call to action related to any election.

The CCEC likens the advertisement to the advertisement in *CJF*. However, upon review, the differences between the two advertisements are startling. First, the *CJF* advertisement aired immediately before the general election. *CJF* 235 Ariz. 347, 348-49, 322 P.2d 94, 95-96 (App. 2014). In contrast, the LFAF ad aired more than five months before the primary election. Second, at the time of the *CJF* advertisement's airing, Mr. Horne had been named the single nominee of the Republican Party. *Id.*. At the time of LFAF's ad, however, Mayor Smith, was still the mayor of Mesa, AZ, and President of the U.S. Conference of Mayors as he had only exhibited a public desire to at sometime in the future resign from office and run for governor. When comparing the advertisements, it is easy to see the differences and understand that the *CJF* ruling cannot be used as a basis for ruling the LFAF's advertisement to be the functional equivalent of express advocacy.[4]

## IV. THE CCEC EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CIVIL PENALTIES AGAINST LFAF UNDER A.R.S. § 16-942(B).

Statutory language must have meaning. "When analyzing statutes, the Supreme Court of Arizona applies fundamental principles of statutory 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." *Deer Valley Unified Sch. Dist. No 97 v. Houser*, 214 Ariz. 293, 296, ¶ 8, 152, P. 3d 490 (2007).

[4] By referencing the *CJF* advertisement, LFAF is not submitting that it agrees with the *CJF* court's legal analysis. Quite to the contrary, LFAF stands in stark disagreement with the *CJF* opinion and has filed an amicus curiae brief with the Arizona Supreme Court arguing that Arizona's "expressly advocates" statute is unconstitutional. A true and correct copy of LFAF's Amicus Curiae Brief is attached hereto as Exhibit "A".

A.R.S. § 16-942(B) establishes a "civil penalty for a violation by or on behalf of any candidate of any reporting requirement imposed by this chapter." This is a clear statute that allows for a civil penalty only to be applied to the maker of an expenditure "*by or on behalf of any candidate*." A.R.S. § 16-942(B) (emphasis added). By definition, an independent expenditure is made wholly independent of any candidate. The CCEC's 2013 rules attempt to blur this key point explicitly by applying a penalty provision created by regulation applicable to the maker of "an independent expenditure *on behalf of a candidate*." Rule 2-20-109(F)(3) [5] (emphasis added). This attempt to regulate an independent expenditure that is "on behalf of" a candidate wholly and improperly blurs the lines between independent expenditures and contributions to candidate.

Therefore, it is extremely puzzling how the CCEC tries to contort the words of Section 942(B) and its very own newly derived rule (Rule 2-20-109(F)(3)), which are wholly divorced from the actual text of the statute. AB at 33. The CCEC states "'[A] violation…on behalf of any candidate of any reporting requirement,' captures any other reporting violation involving a candidate campaign."). This self-serving interpretation has no legal basis and conflicts with the actual, true, meaning of the words composing the sentence. Nowhere does A.R.S. § 16-942(B) suggest that it is applicable to a maker of an independent expenditure, but rather the statute is clear that it is only applicable to an expenditure made "by or on behalf of a candidate." An expenditure "on behalf of a candidate" is in fact an in-kind contribution to that candidate pursuant to A.R.S. § 16-901(15) and A.R.S. § 16-901(8).

[5] This Rule was promulgated in 2013 in an attempt to carve out additional jurisdiction for the CCEC over independent expenditures. *See* Ariz. Admin Reg./Secretary of State. Vol. 19 Issue 45 (Nov. 8, 2013). As referenced *supra*, the Clean Elections Act vested a reporting regime for independent expenditures with the CCEC for the purpose of facilitating the now unconstitutional matching funds provision. The CCEC cannot simply create authority through rulemaking where its enabling statute is deficient. *See Anderson v. Arizona Game and Fish Dept.*, 226 Ariz. 39243, P 3d 1021 (App.2010) ("An administrative agency has only the authority granted by the legislature through its enabling legislation.").

To allow the CCEC to distort the meaning of its own statute to expand its regulatory reach over a reporting requirement rendered unenforceable by the U.S. Supreme Court is to provide a means to circumvent the fundamental principles of statutory construction. *See Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P. 2d 1222, 1223, (1991) ("Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial."). The CCEC cannot simply concoct a different meaning for existing statutory language to make it applicable to organizations making communications having no relation to candidates, as is the case here. If the statute was intended to apply to an organization like LFAF it would include language to that effect.

The same holds true for the part of A.R.S. § 16-942(B) holding the "candidate or candidate's campaign account…jointly and severally responsible for any penalty imposed pursuant to this subsection." These words clearly and unequivocally require the imposition of any penalty imposed in accordance with this section to the candidate or candidate's campaign account associated with the expenditure in question. This makes sense based on the plain language of the statute, since an expenditure "by or on behalf of a candidate" is either an expenditure by the campaign or an in-kind contribution to the campaign.

Instead of reading the plain meaning of the words, however, the CCEC argues that "This sentence applies to penalties imposed against the candidate or a candidate's campaign committee, but does not apply to other types of committees that may be subject to penalties under that section." AB at 33. This CCEC-created meaning is convenient for the Commission because in the case at hand there is *no* candidate or candidate's campaign account to hold jointly or severally responsible. The CCEC's statutory interpretations cannot withstand legal scrutiny for the very simple reason that

courts "avoid interpretations making language superfluous or redundant." *Guzman v. Guzman*, 175 Ariz. 183, 187, 854 P. 2d 1169, 1173 (App. 1993).

The CCEC's last-ditch effort to make A.R.S. § 16-942(B) applicable by claiming "independent expenditures are 'on behalf of' candidates" is in contradiction to, not in support of, A.R.S. § 16-901(14). AB at 34. The CCEC acknowledges and agrees that it found no reason to believe that LFAF and the Ducey 2014 Campaign coordinated in producing the advertisement. *Id*. Because LFAF and the Ducey 2014 Campaign did not coordinate, it cannot be said that LFAF produced its advertisement "on behalf of" candidate Ducey or any other candidate for that matter. Instead, the CCEC relied on its conclusion that LFAF made an independent expenditure, which, by its very own statutory definition, is required to be *independent* of any candidate. In pertinent part A.R.S. § 16-901(14) states that independent expenditures are made "without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate or any committee or agent of the candidate." A.R.S. § 16-901(14). Therefore, an independent expenditure, by its nature cannot be on behalf of a candidate. It goes without saying then that the CCEC's claim that "an independent expenditure opposing a candidate would be 'on behalf of' that candidate's opponents" is completely without merit. AB at 34.

As LFAF explained in its Opening Brief, the Clean Elections Act mandates the CCEC: (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. With respect to the first requirement, as we have outlined, the Commission found that the expenditure of funds in question here was not coordinated – and therefore not "on behalf of" any candidate. Second, the CCEC never determined or identified which of the multiple candidates for the Republican nomination for

Governor it would hold jointly and severally responsible for the penalty it imposed on LFAF. Because the CCEC has not and cannot identify and satisfy these statutory requirements, the CCEC has no basis for applying any civil penalties provided in A.R.S. § 16-942(B) against LFAF.

## CONCLUSION

For all of these reasons, in addition to the reasons explained in LFAF's Opening Brief, the CCEC's order and assessed penalties should be reversed.

DATED this 26th day of January, 2015.

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# EXHIBIT A

**SUPREME COURT**
**STATE OF ARIZONA**

No. CV-14-0250-PR

Court of Appeals No. 1 CA-SA 13-0037

Maricopa County Superior Court

No. LC 2011-000734

**ARIZONA SECRETARY OF STATE'S OFFICE,**
**A GOVERNMENTAL ENTITY; ET. AL.**
*Appellants,*

vs.
**COMMITTEE FOR JUSTICE &FAIRNESS (CJF),**
**A NON-PROFIT ORGANIZATION,**
*Appellee.*

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# BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REVIEW

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Legacy Foundation Action Fund ("LFAF") respectfully submits this brief of *Amicus Curiae* in support of the Committee for Justice & Fairness' ("CJF") petition for review of the Court of Appeals' published opinion *Committee for Justice & Fairness (CJF) v. Arizona Secretary of State's Office, et. al,* 332 P.3d 94 (Ariz. App. 2014) ("Opinion").

## INTEREST OF THE AMICI

LFAF is a tax-exempt nonprofit corporation organized under Section 501(c)(4) of the Internal Revenue Code. In late March and early April of 2014 it ran advertisements targeting citizens in the districts of three different mayors (Mesa, AZ, Baltimore, MD and Sacramento, CA) who held leadership positions with the U.S. Conference of Mayors. The Mesa, AZ advertisement was critical of the policy positions of the U.S. Conference of Mayors and focused on Mayor Scott Smith who, at the time, also served as President of the U.S. Conference of Mayors. At its conclusion, the ad asked viewers to tell Mayor Smith that "the U.S. Conference of Mayors should support policies that are good for Mesa."

LFAF considered its ad to be genuine issue advocacy since it ran the television advertisement roughly five months before any Arizona election and at a time Mayor Smith was both the Mayor of Mesa and the President of the National Conference of Mayors. Three months after the advertisement aired, a citizen complaint was filed with both the Secretary of State and the Arizona Citizen Clean

Elections Commission ("CCEC"). The Secretary of State's office declined to take any action on the complaint. However, LFAF currently is the subject of an ongoing enforcement action from the CCEC, even though LFAF has asserted that even undertaking such an action is beyond the authority of the CCEC. Fundamental to the enforcement action is CCEC's interpretation of A.R.S. § 16-901.01(A) and the application of the Opinion.

## SUMMARY OF ARGUMENT

The Court of Appeals' decision finding CJF engaged in express advocacy under A.R.S. § 16-901.01(A) does not align with First Amendment jurisprudence. The Court's reliance on the Administrative Law Judge's contextual factors to support its finding of express advocacy defied U.S. Supreme Court precedent requiring that contextual considerations "should seldom play a significant role" in determining whether speech is express advocacy. *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007) ("WRTL"). Additionally, the Court of Appeals failed to acknowledge or incorporate the 30 and 60 day time frames crucial to the WRTL analysis into its consideration of Arizona's statute.

The Court of Appeals' errors are, in part, due to its failure to recognize the validity of issue advocacy speech and the heightened First Amendment protections afforded to issue advocacy speech – particularly when expressed remote in time from elections. Where the government may restrict and regulate

political and/or campaign speech, to the extent it constitutes express advocacy or its functional equivalent, it may not regulate issue advocacy speech because such speech, "may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate," and categorically is "not the functional equivalent of express advocacy…." WRTL at 476. *See McConnell v. FEC*, 540 U.S. 93, 105 (2003); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). When regulation is applied to speech, bright lines must be used so as to protect issue advocacy speech.

By turning a blind eye to legitimate issue advocacy and the bright line time frames required by *WRTL*, the Court of Appeals is effectively stomping on the First Amendment rights of those wishing to engage in protected issue advocacy speech even when far in time from any pending election. "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).

## ARGUMENT

### I. The Court of Appeals Erred in its Application of the Functional Equivalent of Express Advocacy Test by Applying a Contextual Test to Determine Intent.

The U.S. Supreme Court in *Buckley v. Valeo* sought to narrow the scope of regulated political speech to speech that "expressly advocated" the election or defeat of a clearly identified candidate. *See Buckley*, 424, U.S. 1 (1976). It did so by limiting express advocacy to magic words conveying unambiguous advocacy for election or defeat: "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, reject." *Id.* at 44 n.52. It wasn't until the late 1980s that the Ninth Circuit, alone amongst the circuit courts, expanded the magic words test to include communications that, when read in total, and with limited reference to external events, were 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). Over 15 years later, the Ninth Circuit revisited the *Furgatch* opinion and narrowed its application by emphasizing that that 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); *See also Furgatch*, 807 F.2d at 864 (even the most expansive definition of "express advocacy" may only be subject to regulation "if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act").

The Arizona Court of Appeals Division Two recognized the *Furgatch* "clear plea" requirement for express advocacy by stating "[t]he communication must clearly and unmistakably present a plea for action, and identify the advocated action…." *Kromoko v. City of Tucson*, 202 Ariz. 499, 47 P.3d 1137 (App. 2002) (internal quotation marks omitted).

Noting that the "distinction between campaign advocacy and issue advocacy may often dissolve in practical application," the U.S. Supreme Court in *WRTL* established a test for determining the functional equivalent of express advocacy premised on providing a "safe harbor for those who wish to exercise First Amendment rights." *WRTL*, 551 U.S. at 457, 467 (internal citations and quotation marks omitted). That standard requires a court to find the functional equivalent of express advocacy only when an ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 470. Furthermore, Chief Justice Roberts made clear that the standard must be applied carefully, so that it is not deemed impermissibly vague:

> (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind this test is only triggered if the speech meets the brightline requirements of [the Bipartisan Campaign Reform Act of 2002 ("BCRA")] § 203 in the first place.

*WRTL*, 551 U.S. at 474 n7.

The Court of Appeals, without reference to *WRTL* or other controlling precedent, relied almost exclusively on the Administrative Law Judge's contextual analysis of the facts. *See CJF v. Ariz. Secy. of State's Office*, 332 P.3d 94, 101 (Ariz. App. 2014) (noting "[a]lthough not bound by the ALJ's legal conclusion, we nevertheless agree with his conclusions and *note the factual findings underpinning his reasoning are supported by substantial evidence*") (emphasis added). Instead of applying an objective analysis to CJF's ad, the Court of Appeals construed contextual factors including: the broadcast coverage of its ad buy; whether Tom Horne was, at the time of the ad's airing, a clearly identified candidate; and the critical position against legislative initiatives supported by Horne, to find that "*the only reasonable purpose* for running such an advertisement immediately before the election was to advocate Horne's defeat as candidate for Attorney General." *Id.* (emphasis added).

In error and in contradiction to U.S. Supreme Court precedent, the Court of Appeals proposed to divine the "reasonable purpose" of the CJF's ad rather than employing an objective analysis of the substance of the advertisement. *See WRTL*, at 469 (noting "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.") Both the U.S. Supreme Court in

*WRTL* and Division Two of the Arizona Court of Appeals in *Kromko* are in opposition to the methodology involked by Division One of the Court of Appeals with respect to CJF's ad. *See WRTL*, at 476 n.8. ("purpose is not the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy."); *See also Kromko* at 1141. ("the message must be examined within the textual context of the medium used to communicate it.").

## II. In Applying the "Functional Equivalent of Express Advocacy" Test, The Court of Appeals Failed to Require a Brightline Time Requirement Under Arizona Law.

Regulations as to political speech must contain bright lines protecting issue advocacy because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. *WRTL*'s test, as described *supra*, is applicable only when an issue advertisement is broadcast within the electioneering window (30 days before a primary and 60 days before a general election) under the BCRA § 203.

Once the issue ad is deemed subject to the test because of its proximity to the election, the Court applies the test to determine whether the ad constitutes the functional equivalent of express advocacy. *See WRTL,* at 474. ("this test is *only triggered* if the speech meets the brightline requirements of BCRA 203 in the first place.") (emphasis added).

The Court of Appeals made a point to establish that its finding was in large part based on the timing of CJF's ad, noting that it was aired "within days of the election" and "immediately before the election." *CJF*, at 101, 102. Absent from the Court of Appeals decision, however, was an objective analysis explaining *any* bright line language in the advertisement itself that made CJF's ad qualify as express advocacy. Indeed, the Court of Appeals categorically dismisses genuine issue advocacy speech under its subjective analysis of intent, which leaves those interested in engaging in protected issue advocacy speech left wondering whether a similar advertisement airing one month, two months or five months before the election would constitute genuine issue advocacy.

Arizona law defines a general advertisement as "express advocacy" if the advertisement:

> 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. Without a brightline triggering provision (or at least construing the statute to require one), Arizona's statute invites the type of whimsical subjective application of factors to divine intent that allows express advocacy determinations to be made based on theory that the less likely an issue ad

resembles express advocacy the more likely it resembles the functional equivalent of express advocacy. This faulty analysis was flatly dismissed by Chief Justice Roberts:

> this 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*, at 471 (citing McConnell 540 U.S. at 206). The Court of Appeals decision chills speech in that it discourages organizations wishing to engage in protected issue advocacy speech, like LFAF, from running issue ads for fear of being subjected to Arizona's complicated campaign finance regime or worse yet being penalized for airing an ad that it believed clearly fell outside the scope of Arizona's express advocacy statute.

At the very least, *WRTL* requires the Court of Appeals, when applying its express advocacy standard to advertisements, to invoke the brightline requirements of WRTL – specifically communications broadcast within 30 days of a primary or 60 days of a general election. To do less than apply these brightline limitations for a "functional equivalent" test would subject every issue advocacy communication made outside these brightline windows subject to enforcement actions. Such a

broad government supervised discussion of is not otherwise provided for in Arizona law.

## CONCLUSION

This Court should consider CJF's Petition for Review and reverse the Court of Appeals finding that CJF's advertisement was the functional equivalent of express advocacy because of the opinion's reliance on impermissible contextual factors. If this Court considers CJF's Petition for Review but sustains the Court of Appeals decision, it should clarify that the consideration of timing in determinations of the functional equivalent of express advocacy, should align with the brightline application in *WRTL*.

DATED this 19th day of November, 2014

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