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6 **BEFORE THE ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION**  
7

8 In the Matter of

OAH No. 15F-001-CCE

9 Legacy Foundation Action Fund  
10  
11

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

12 Pursuant to A.R.S. § 41-1092.08(B), undersigned counsel requests that the  
13 Arizona Citizens Clean Elections Commission ("Commission") accept, reject or  
14 modify the Administrative Law Judge's decision ("Decision") in the Legacy  
15 Foundation Action Fund ("LFAF") case (OAH No. 15F-001-CCE) as described  
16 below. For the Commission's convenience, attached to this motion is a draft final  
17 administrative order that incorporates the recommendations described herein.

18 **1. Recommend that the Commission accept the Decision's Findings of**  
19 **Fact 1 through 44 and insert a clarifying footnote.**

20 **Explanation:** The Decision's Findings of Fact are from the joint stipulated  
21 facts and exhibits submitted by the parties. Although the Decision references attached  
22 exhibits, those exhibits are attached to the Findings of Fact, not to the Decision. This  
23 could be clarified in a footnote in the final administrative decision.

24 **2. Recommend that the Commission modify the Decision by adding the**  
25 **following Finding of Fact:**

26 Nothing in the record establishes that the substance of the advertisement  
27 relates to decisions then pending before Scott Smith as Mayor of Mesa  
28 or as President of the Conference of Mayors. The policies of the

1 Conference of Mayors highlighted in the video relate largely to actions  
2 that had nothing to do with Mr. Smith's leadership of the Conference.

3 **Explanation:** The factual record does not establish any connection between  
4 the advertisement and a policy decision pending before the City of Mesa or the  
5 Conference of Mayors. Further, the materials from the Conference of Mayors  
6 submitted in Exhibit 11 of Joint Exhibit 21 (and included in the January 29, 2015  
7 supplemental filing) show that only one of the Conference positions identified in the  
8 advertisement was issued in Smith's name, and that occurred in 2009. The others  
9 involve resolutions apparently adopted by the Conference at meetings in 2010 and  
10 2012 or are based upon 2013 Press Releases featuring an entirely different Mayoral  
11 Conference President, Michael Nutter of Philadelphia.

12 **3. Recommend that the Commission accept the Decision's Excerpts from**  
13 **Applicable Statutes and Rule.**

14 **4. Recommend that the Commission accept Conclusions of Law ¶ 1**  
15 **through ¶13.**

16 **5. Recommend that the Commission add the following case law**  
17 **description of the preponderance of evidence standard:**

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

25 **6. Recommend that the Commission reject Conclusions of Law ¶ 14**  
26 **through ¶16 and Conclusion ¶ 22 – Express Advocacy.**

1           **Explanation:** Paragraphs 14 through 16 and 22 include the Decision’s  
2 analysis of whether the advertisement is “express advocacy.” The Commission  
3 should reject the Decision’s conclusion that the Commission failed to establish that  
4 the advertisement at issue in this enforcement was express advocacy.

5           To be “express advocacy” an advertisement must involve a  
6 general public communication . . . targeted to the electorate of that  
7 candidate(s) that in context can have no reasonable meaning other than  
8 to advocate the election or defeat of the candidate(s), as evidenced by  
9 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.

10       A.R.S. §16-901.01(A)(2).

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

20           The Decision’s analysis also does not support the conclusion that the  
21 advertisement was not express advocacy. The Decision’s analysis of express  
22 advocacy consists of the following list:

23           the content of the communications; that they were aired at a time in  
24 which Mr. Smith was still the mayor of Mesa and the President of the  
25 Conference; although Mr. Smith had announced his intention to resign,  
26 he was under no legal obligation to do so and the Subject  
27 Advertisements were aired before the “window” in which candidates’  
28 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

1 election itself; and voting in the Republican primary was not limited to  
2 registered Republicans.

3 Decision ¶ 16.

4 This Decision's list fails to address all of the statutory factors and does not  
5 address the critical issue of whether "in context" the advertisement's only reasonable  
6 meaning is to advocate for the defeat of Scott Smith in the Republican primary. The  
7 Decision never offers an alternative reasonable meaning for this television  
8 advertisement that ran shortly before Smith's resignation as Mesa's mayor. In  
9 addition, the Decision's statement that Mr. Smith was under no legal obligation to  
10 resign as mayor is misleading. Once Smith filed his nomination petitions for the  
11 office of governor (which had to be filed between April 28 and May 28, 2014), he was  
12 obligated to resign as mayor pursuant to A.R.S. § 38-296 because he was not in his  
13 final year of his term as Mesa's mayor. The advertisements ran from March 31, 2014  
14 to April 14, 2014, and Scott Smith resigned as Mayor on April 15, 2014. Finally, the  
15 fact that Republicans as well as people who have not designated a party preference or  
16 are members of a party that is not represented on the ballot may vote in the  
17 Republican primary does not tip the scale one way or the other in the analysis of  
18 whether the advertisement is an independent expenditure subject to the Clean Election  
19 Act's disclosure requirements.

20 The Commission should reject the Decision's analysis of express advocacy and  
21 instead conclude that in context the advertisement's only reasonable meaning is to  
22 advocate for the defeat of Scott Smith in the 2014 Republican primary for Governor.  
23 The advertisement (Exhibit 6 in the record in the administrative proceeding) places  
24 Scott Smith in an unfavorable light as a candidate for the Republican nomination for  
25 Governor of Arizona. The advertisement's text, video, and voice over informed  
26 voters in the metro-Phoenix area that Smith was closely associated with President  
27 Barack Obama, a democrat, and several of his policy positions. For example, the  
28 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 policy issues linked to the Obama administration, including “Obamacare,” limits on gun rights, environmental regulations, and “Obama’s tax & spend proposals.” A few additional 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 is to advocate for Smith's defeat, as set forth in the Commission's November 28, 2014 order.

For these reasons, the Commission should reject the Decision's Conclusions of Law concerning express advocacy and modify the Decision to conclude 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.

**7. Recommend that the Commission modify Conclusion of Law ¶ 17 to correct the spelling of "described."**

**8. Recommend that the Commission reject Conclusions of Law ¶ 18 through ¶ 21 and Conclusion ¶ 23 – Civil Penalties.**

These paragraphs address the validity of the Commission's order imposing civil penalties against LFAF for failing to file an independent expenditure report. It is

important to reject the Decision's analysis in Paragraphs 18 through 21 and its conclusion in ¶ 23 to maintain the Commission's authority to impose penalties upon those who violate the reporting requirements for independent expenditures.

The Decision concludes 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 would have the effect of either removing all Commission authority to impose civil penalties for violating the reporting requirements for independent expenditures or requiring that candidates and candidate committees that, by definition, had nothing to do with the violation 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.

Instead, the Commission's final administrative decision should conclude that the Commission has the authority to impose civil penalties prescribed by A.R.S. § 16-942(B) and Arizona Administrative Code Rule R2-20-109(F)(3) for violations of the independent expenditure reporting requirements. Further, it should note that the provision in A.R.S. § 16-942(B) imposing joint and several liability on a candidate and candidate campaign committee for civil penalties does not apply here because no candidate or candidate campaign committee was involved in any way with the reporting violation.

**9. Recommend that the Commission Reject the Conclusion in ¶ 24 and the Decision's Order.**

**Explanation:** The conclusion in ¶ 24 and the Decision's order sustain LFAF's appeal and rescind the civil penalty against LFAF. Based on the explanation for rejecting the Decision's analysis of express advocacy and the civil penalty, this

1 conclusion and order should be rejected. The Order should instead affirm the  
2 Commission's November 28, 2014 Order.

3 **Conclusion**

4 Pursuant to A.R.S. § 41-1092.08(B), the Commission has the authority to  
5 "accept, reject or modify" all or part of the Decision in this matter. The above  
6 recommendations attempt to assure that the Commission's final administrative  
7 decision complies with the law governing the Commission's enforcement authority  
8 and responsibilities.

9 Dated this 20<sup>th</sup> day of March, 2015.

10 OSBORN MALEDON, PA

11 By /s/ Mary O'Grady

12 Mary O'Grady\*  
13 2929 N. Central Avenue, Suite 2100  
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14  
15 \*Served as counsel for the Commission in the proceeding before the Office of  
16 Administrative Hearings and in the proceedings before LFAF's administrative appeal.  
17 An attorney who did not previously represent or advise the Commission on this matter  
18 will provide the Commission independent advice with regard to the Commission's  
decision regarding whether to accept, reject or modify the Administrative Law  
Judge's decision.

19 COPY of the foregoing electronically mailed  
20 this 20th day of March, 2015, to:

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/s/ Peggy L. Nieto  
5977066

# **DRAFT ADMINISTRATIVE ORDER**

**DRAFT FINAL ADMINISTRATIVE ORDER**

**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.<sup>1</sup> The Commission also accepts the Decision’s Conclusions of Law 1 through 13 but rejects

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<sup>1</sup> 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.

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

### 3 **THE PREPONDERANCE OF EVIDENCE STANDARD**

4 "The preponderance of the evidence standard requires that the fact-finder  
5 determine whether a fact sought to be proved is more probable than not." *Kent K. v.*  
6 *Bobby M.*, 210 Ariz. 279, 284, ¶ 25, 110 P.3d 1013, 1018 (2005) (citing Black's Law  
7 Dictionary 1201 (7<sup>th</sup> ed. 1999)); *see also, e.g., Pima Cnty. v. Pima Cnty. Law*  
8 *Enforcement Merit Sys. Council*, 211 Ariz. 224, 228, ¶ 21, 119 P.3d 1027, 1031  
9 (2005) (equating "preponderance of the evidence" standard with requiring facts to be  
10 found "more likely than not to be true").

### 11 **ADDITIONAL FINDING OF FACT**

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

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

### 21 **DISCUSSION OF LEGAL CONCLUSIONS AND ORDER**

#### 22 **I. Whether the Advertisement Is Express Advocacy**

23 The Commission rejects the Decision's conclusion that the Commission failed  
24 to establish that the Advertisement at issue in this enforcement was express advocacy.  
25 To be "express advocacy" an advertisement must involve a  
26

27 general public communication . . . targeted to the electorate of that  
28 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

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

4 A.R.S. §16-901.01(A)(2).

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

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

19 the content of the communications; that they were aired at a time in  
20 which Mr. Smith was still the mayor of Mesa and the President of the  
21 Conference; although Mr. Smith had announced his intention to resign,  
22 he was under no legal obligation to do so and the Subject  
23 Advertisements were aired before the “window” in which candidates’  
24 nominations were due at the Secretary of State’s Office; they were aired  
25 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.

26 Decision ¶ 16.

27 This Decision’s list fails to address all of the statutory factors and does not  
28 address the critical issue of whether “in context” the advertisement’s only reasonable

1 meaning is to advocate for the defeat of Scott Smith in the Republican primary. The  
2 Decision never offers another reasonable meaning for this television advertisement  
3 that ran shortly before Smith's resignation as Mesa's mayor. In addition, the  
4 Decision's statement that Mr. Smith was under no legal obligation to resign as mayor  
5 is misleading. Once Smith filed his nomination petitions for the office of governor  
6 (which had to be filed between April 28 and May 28, 2014), he was obligated to  
7 resign as mayor pursuant to A.R.S. § 38-296 because he was not in his final year of  
8 his term as Mesa's mayor. The advertisements ran from March 31, 2014 to April 14,  
9 2014, and Scott Smith resigned as Mayor on April 15, 2014. Finally, the fact that  
10 Republicans as well as people who have not designated a party preference or are  
11 members of a party that is not represented on the ballot may vote in the Republican  
12 primary does not tip the scale one way or the other in the analysis of whether the  
13 advertisement is an independent expenditure subject to the Clean Election Act's  
14 disclosure requirements.

15       The Commission rejects the Decision's analysis of express advocacy and  
16 instead concludes that in context the advertisement's only reasonable meaning is to  
17 advocate for the defeat of Scott Smith in the 2014 Republican primary for Governor.  
18 The advertisement (Exhibit 6 in the record in the administrative proceeding) places  
19 Scott Smith in an unfavorable light as a candidate for the Republican nomination for  
20 Governor of Arizona. The advertisement's text, video, and voice over informed  
21 voters in the metro-Phoenix area that Smith was closely associated with President  
22 Barack Obama, a democrat, and several of his policy positions. For example, the  
23 advertisement opens by referring to Smith as "Obama's favorite mayor":  
24  
25  
26  
27  
28



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



1 not jointly and severally responsible for the penalties. The Decision's reasoning  
2 either removes all Commission authority to impose civil penalties for violating the  
3 reporting requirements for independent expenditures or requires that candidates and  
4 candidate committees that, by definition, had nothing to do with the violation must be  
5 jointly and severally liable for any civil penalty. Either reading leads to absurd and  
6 potentially unconstitutional consequences that undermine the Clean Elections Act and  
7 its rule (R20-109(F)(3)) governing penalties for violations of independent expenditure  
8 reporting requirements.

9 The Commission has the authority to impose civil penalties for any violation of  
10 the Clean Elections Act, A.R.S. § 16-957(D), and the penalties prescribed by A.R.S. §  
11 16-942(B) and Arizona Administrative Code Rule R2-20-109(F)(3) apply to  
12 violations of the independent expenditure reporting requirements. The provision in  
13 A.R.S. § 16-942(B) imposing joint and several liability on a candidate and candidate  
14 campaign committee for penalties does not apply here because no candidate or  
15 candidate campaign committee was involved in any way with the reporting violation  
16 that occurred.

17 The Commission, therefore, rejects the Decision's conclusion regarding  
18 penalties and affirms the Commission's authority to impose civil penalties for  
19 violations of the reporting requirements for independent expenditures as prescribed by  
20 R2-20-109(F)(3) and A.R.S. § 16-942(B). It reinstates the civil penalty of \$95,460.

## 21 **CONCLUSION**

22 For these reasons, the Commission rejects the Decision's recommended order  
23 and affirms the Commission's November 28, 2014 order and civil penalties of  
24 \$95,460.

25 Pursuant to A.R.S. § 41-1092.08(F), this is the final administrative decision in  
26 this matter.

1           DONE this \_\_ day of March, 2015.

2

3

By \_\_\_\_\_  
Chair, Citizens Clean Elections  
Commission

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Electronically filed on March \_\_, 2014 with:

Office of Administrative Hearings  
1400 W. Washington St., Suite 101  
Phoenix, AZ 85007

COPY of the foregoing emailed  
this \_\_\_\_ day of March, 2015, to:

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Attorneys for Legacy Foundation Action Fund

# **ADMINISTRATIVE LAW JUDGE DECISION**

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**No. 15F-001-CCE**

## ADMINISTRATIVE LAW JUDGE

## DECISION

Respondent/Appellee.

**APPEARANCES:** Brian M. Bergin, Esq., Bergin, Frakes, Smalley & Oberholtzer, and Jason Torchinsky, Esq. (pro hac vice) Holtzman Vogel Josefiak PLLC for City Foundation Action Fund; Mary R. O’Grady, Esq. and Yaser Ali, Esq., OSBORN DON, P.A. for Arizona Citizens Clean Elections Commission

## **FINDINGS OF FACT**

2. The Notice of Hearing provided that the hearing was to consider Legacy Foundation Action Fund's ("LFAF") appeal of the CCEC's probable cause finding made on November 20, 2014, and the Order And Notice of Appealable Agency Action issued by CCEC on November 28, 2014.

3. The parties agreed to submit stipulated facts and that LFAF would submit an initial brief, CCEC answering or response brief, and LFAF a reply.

1           4.     On January 5, 2015, the parties submitted Joint Stipulated Facts and  
2 Exhibits. The Joint Stipulated Facts are reproduced below.<sup>1</sup>

3           5.     On January 6, 2015, LFAF submitted its Opening Brief. On January 21,  
4 2015, CCEC submitted its Answering Brief; on January 26, 2015, LFAF its Reply. The  
5 parties presented oral argument on January 28, 2015, but presented no evidence other  
6 than the Joint Stipulated Facts and Exhibits.

7           6.     On February 4, 2015, LFAF submitted a Notice of Additional Authority.

8                     **THE PARTIES' STIPULATED FACTS**

9           Petitioner Legacy Foundation Action Fund ("LFAF") and Respondent Arizona  
10 Citizens Clean Elections Commission ("CCEC") hereby stipulate and agree that the  
11 facts stated below are true. The parties, however, reserve the right to dispute the  
12 relevance of any fact included in this stipulation. They also stipulate to the admissibility  
13 of the exhibits identified herein while reserving the right to dispute the relevance of any  
14 exhibits referenced in the legal arguments presented in the case.

15                    **The Parties**

16           1.     LFAF is organized as a social welfare organization pursuant to 42 U.S.C.  
17 § 501(c)(4). LFAF was established to further the common good and general welfare of  
18 the citizens of the United States by educating the public on public policy issues,  
19 including state fiscal and tax policy, the creation of an entrepreneurial environment,  
20 education, labor-management relations, citizenship, civil rights, and government  
21 transparency issues. LFAF's purpose is described in Exhibit 1 hereto.

22           2.     LFAF is not registered with the Arizona Secretary of State's Office as a  
23 political committee.

24           3.     Respondent CCEC is a state agency charged with implementing and  
25 enforcing campaign finance violations under the Citizens Clean Elections Act, Article 2  
26 Chapter 6 of Title 16 (A.R.S. §§16-940 to 16-961) (the "Act").

27           4.     The CCEC receives campaign finance complaints about violations of the  
28 Act and resolves them following procedures set out in statute and rules.

29 \_\_\_\_\_  
30 <sup>1</sup> Although the exhibits referenced in the Stipulated Facts are not attached to this Decision, those exhibits  
were accepted into evidence and are part of the record in this matter.

### **LFAF's Advertisement**

1  
2 5. On January 9, 2014, Scott Smith, then Mayor of the City of Mesa,  
3 established his candidate campaign committee, Smith for Governor 2014, and publicly  
4 announced his candidacy. Press reports attached as Exhibit 2 indicated that Smith  
5 announced his intention to resign no later than May 2014, as mayor of Mesa.

6 6. At the time he announced his candidacy for governor, Smith was also the  
7 President of the U.S. Conference of Mayors (the "Conference"). Press reports attached  
8 as Exhibit 3 indicated that Smith would leave that post when he resigned as Mesa's  
9 mayor.

10 7. Smith resigned from his position as Mayor of Mesa and President of the  
11 U.S. Conference of Mayors on April 15, 2014.

12 8. On November 28, 2012, in an administrative appeal of a campaign finance  
13 enforcement, a Maricopa County Superior Court judge ruled that the definition of  
14 "expressly advocates" in A.R.S. § 16-901.01(A) was unconstitutional. See Final  
15 Judgment, *Committee for Justice & Fairness v. Arizona Secretary of State*, No. LC-  
16 2011-000734. The court did not enjoin the implementation of the statute. The Clean  
17 Elections Commission was not a party to this lawsuit; the court denied its motion to  
18 intervene.

19 9. Beginning on March 31, 2014, LFAF bought airtime and ran  
20 advertisements related to the U.S. Conference of Mayors' policy positions in the  
21 districts of three mayors who held leadership roles in the Conference.

22 10. LFAF spent \$3,395 to purchase radio advertisements in the Sacramento,  
23 California market where Kevin Johnson, the officer who succeeded Smith as President  
24 of the U.S. Conference of Mayors, served as mayor. These expenses are described in  
25 Exhibit 4 hereto.

26 11. LFAF spent \$2,595 to purchase radio advertisements in the Baltimore,  
27 Maryland market where the U.S. Conference of Mayors' second vice president,  
28 Stephanie Rawlings-Blake, served as mayor. These expenses are described in Exhibit  
29 4 hereto.  
30

1 12. LFAF spent over \$260,000 to purchase television advertisements in the  
2 Phoenix, Arizona market (the "Subject Advertisement"). These purchases are described  
3 in Exhibits 4 and 5 hereto.

4 13. The advertisements in the Phoenix market were about Mesa Mayor Scott  
5 Smith and the U.S. Conference of Mayors' policy views on certain issues. The  
6 advertisement is submitted on a flash drive as Exhibit 6 and remains available online at  
7 [http://www.youtube.com/watch?v=NycZZLOA\\_OQ](http://www.youtube.com/watch?v=NycZZLOA_OQ).

8 14. The full text of the advertisement along with screen shots is Exhibit 6  
9 hereto. The Subject Advertisement in the Phoenix market aired for approximately two  
10 weeks from March 31, 2014, to April 14, 2014.

11 15. Phoenix is the major media market in the State of Arizona.

12 16. LFAF did not file any report prescribed by A.R.S. § 16-914.02 concerning  
13 the Subject Advertisement.

14 17. LFAF did not file any report prescribed by A.R.S. §§ 16-941(D) and -958  
15 concerning the Subject Advertisement.

16 18. On August 7, 2014, the Arizona Court of Appeals vacated the Superior  
17 Court's ruling concerning the constitutionality of the definition of "expressly advocates."  
18 *Committee for Justice & Fairness v. Secretary of State*, 332 P.3d 94 (2014).

19 **Arizona Elections.**

20 19. Candidate nominations for the Office of Governor for the 2014 election  
21 had to be filed at the Secretary of State's Office between April 28, 2014 and May 28,  
22 2014.

23 20. Early voting for the primary election began on July 31, 2014. Any Arizona  
24 voter is eligible to vote during the early voting period.

25 21. The primary election took place on August 26, 2014.

26 22. Early voting for the general election began October 9, 2014.

27 23. The general election took place on November 4, 2014.

28 24. Registered Republicans and persons registered as independents or as  
29 members of a party not represented on the ballot may vote in the Republican primary.

30 **Procedural History**

1           25. On July 1, 2014, counsel for the gubernatorial campaign of Mayor Smith  
2 filed a complaint with the Arizona Secretary of State and the CCEC alleging, among  
3 other things, that the Subject Advertisement amounted to “express advocacy” under  
4 Arizona law but failed to file the necessary registration and campaign finance  
5 disclosure forms with the Arizona Secretary of State and the CCEC. A copy of the  
6 Complaint is Exhibit 7 hereto.

7           26. In particular, the complaint alleged that LFAF violated A.R.S. §§ 16-  
8 914.02, -941(D) and -958(A)-(B).

9           27. The Arizona Secretary of State’s Office referred the complaint to the  
10 Maricopa County Elections Department (the “Department”).

11           28. By letter dated July 21, 2014, a lawyer representing the Department  
12 informed counsel for former Mayor Smith that the Department did not have reasonable  
13 cause to believe that LFAF had committed a violation of A.R.S. § 16-901.01 *et. seq.* A  
14 copy of this letter is Exhibit 8 hereto.

15           29. Meanwhile, the CCEC also initiated its regulatory process for dealing with  
16 complaints. In a letter dated July 8, 2014, the CCEC provided LFAF with notice and an  
17 opportunity to respond to the Complaint. A copy of this letter is Exhibit 9 hereto.

18           30. Following notice on July 8, 2104, LFAF filed a response with the CCEC on  
19 July 16, 2014, and appeared at a hearing before the CCEC on July 31, 2014. LFAF’s  
20 response is exhibit 10.

21           31. LFAF also filed a lawsuit in Superior Court on July 18, 2014, challenging  
22 the CCEC’s jurisdiction and the constitutionality of A.R.S. § 16-901(A), and seeking to  
23 enjoin the CCEC from acting on the complaint. This lawsuit was dismissed on  
24 September 23, 2014, for reasons set forth on the record. Exhibit 11. A transcript of the  
25 proceedings on the Motion to Dismiss has been ordered and will be submitted, upon  
26 receipt, as exhibit 28.

27           32. On July 28, 2014, the CCEC Executive Director provided a  
28 recommendation to the Commission on jurisdiction and express advocacy  
29 communication, a copy of which is attached as Exhibit 12. LFAF submitted a  
30



1 supplemental filing to the CCEC on July 30, 2014, a copy of which is attached hereto  
2 as Exhibit 13.

3 33. On July 31, 2014, the CCEC found that it had jurisdiction to consider the  
4 allegations in the Complaint. A transcript of the July 31, 2014 CCEC meeting is Exhibit  
5 14 hereto. LFAF also made a supplemental filing on or about August 13, 2014, to the  
6 CCEC, a copy of which is attached hereto as Exhibit 15.

7 34. The CCEC Executive Director provided a recommendation to the  
8 Commission on September 9, 2014, regarding whether there was reason to believe a  
9 violation occurred. A copy of that recommendation is Exhibit 16.

10 35. On September 11, 2014, the CCEC found reason to believe that a  
11 violation of the Act may have occurred and authorized an investigation. A transcript of  
12 this meeting is Exhibit 17 hereto. The basis for the CCEC's reason to believe finding  
13 was that the Subject Advertisement was an independent expenditure and that LFAF's  
14 failure to report those expenditures pursuant to A.R.S. 16-941(D) and -958 violated the  
15 Clean Elections Act.

16 36. On September 26, 2014, the CCEC issued a Compliance Order along with  
17 written questions to be answered under oath verifying LFAF's spending in Arizona.  
18 LFAF declined to answer the questions in a letter dated October 3, 2014, claiming that  
19 the CCEC's inquiries were not relevant to the Complaint and that the CCEC had no  
20 authority to ask about LFAF's spending in Arizona. A copy of CCEC's Compliance  
21 Order and LFAF's response are Exhibits 18 and 19 respectively.

22 37. On October 14, 2014, LFAF provided a second response to the  
23 Compliance Order, again asserting the CCEC had no authority over LFAF's advertising  
24 and challenging the CCEC's authority to issue penalties. A copy of this response is  
25 Exhibit 20 hereto.

26 38. The Executive Director submitted recommendations to the Commission  
27 regarding probable cause and potential penalties dated November 7, 2014. The  
28 probable cause recommendation is Exhibit 21 and the recommendation regarding  
29 penalties is Exhibit 22.

1           39. LFAF filed a response in opposition to the Executive Director's Probable  
2 Cause Recommendation on November 17, 2014. A copy of LFAF's response is Exhibit  
3 23 hereto.

4           40. By letter dated November 19, 2014, counsel for former candidate Smith  
5 filed a letter with the CCEC executive director, seeking to withdraw his July 1, 2014  
6 Complaint. A copy of this letter is Exhibit 24 hereto.

7           41. On November 20, 2014, the CCEC found probable cause to believe LFAF  
8 had violated the Clean Elections Act and authorized the assessment of \$95,460 in  
9 penalties. The penalty assessment was calculated at \$860 per day for 111 days, which  
10 was the number of days between the Commission's assessment of penalties and and  
11 its assertion of jurisdiction on July 31, 2014. The CCEC also determined that the  
12 complainant's letter seeking to withdraw the complaint did not deprive it of jurisdiction.  
13 A copy of the November 20, 2014 transcript is Exhibit 25 hereto.

14           42. The adjusted primary election spending limit for the office of Governor in  
15 the 2014 race was \$753,616. Ten percent of that amount is \$75,362.

16           43. On November 28, 2014, the CCEC issued order assessing civil penalties  
17 against LFAF and a notice of appealable agency action. A copy of this order is Exhibit  
18 26 hereto.

19           44. In response, LFAF filed a timely request for an administrative hearing. A  
20 copy of this request for a hearing is Exhibit 27 hereto.

21           **EXCERPTS FROM APPLICABLE STATUTES AND RULE**

22           "Independent expenditure" means:

23           [A]n expenditure by a person or political committee, other than a  
24 candidate's campaign committee, that expressly advocates the election  
25 or defeat of a clearly identified candidate, that is made without  
26 cooperation or consultation with any candidate or committee or agent  
27 of the candidate and that is not made in concert with or at the request  
28 or suggestion of a candidate, or any committee or agent of the  
29 candidate. Independent expenditure includes an expenditure that is  
30 subject to the requirements of section 16-917, which requires a copy of  
campaign literature or advertisement to be sent to a candidate named  
or otherwise referred to in the literature or advertisement.

1 ARIZ. REV. STAT. § 16-901(14).

2 "[E]xpressly advocates" means:

3 Making a general public communication, such as in a broadcast  
4 medium, newspaper, magazine, billboard or direct mailer referring to  
5 one or more clearly identified candidates and targeted to the electorate  
6 of that candidate(s) that in context can have no reasonable meaning  
7 other than to advocate the election or defeat of the candidate(s), as  
8 evidenced by factors such as the presentation of the candidate(s) in a  
9 favorable or unfavorable light, the targeting, placement or timing of the  
communication or the inclusion of statements of the candidate(s) or  
opponents.

10 ARIZ. REV. STAT. § 16-901.01(A)(2).

11 ARIZ. REV. STAT. § 16-941(D) provides that:

12 Notwithstanding any law to the contrary, any person who makes  
13 independent expenditures related to a particular office cumulatively  
14 exceeding five hundred dollars in an election cycle, with the exception  
15 of any expenditure listed in section 16-920 ... shall file reports with the  
16 secretary of state in accordance with section 16-958 so indicating,  
17 identifying the office and the candidate or group of candidates whose  
election or defeat is being advocated and stating whether the person is  
advocating election or advocating defeat.

18 ARIZ. REV. STAT. § 16-942(B) provides that:

19 In addition to any other penalties imposed by law, the civil penalty for a  
20 violation by or on behalf of any candidate of any reporting requirement  
21 imposed by this chapter shall be [calculated as follows ....] The  
22 candidate and the candidate's campaign account shall be jointly and  
23 severally responsible for any penalty imposed pursuant to this  
subsection.

24 ARIZ. ADMIN CODE section R2-20-109(F)(3) provides that:

25 Any person making an independent expenditure on behalf of a  
26 candidate and not timely filing a campaign finance report as required  
27 by A.R.S. § 16-941(D), A.R.S. § 16-958, or A.R.S. § 16-913 shall be  
subject to a civil penalty as described in A.R.S. § 16-942(B).

28 ARIZ. REV. STAT. § 16-957 provides that:

29 A. If the commission finds that there is reason to believe that a person  
30 has violated any provision of this article, the commission shall serve on

1 that person an order stating with reasonable particularity the nature of  
2 the violation and requiring compliance within fourteen days. During that  
3 period, the alleged violator may provide any explanation to the  
4 commission, comply with the order, or enter into a public administrative  
5 settlement with the commission.

6 B. Upon expiration of the fourteen days, if the commission finds that  
7 the alleged violator remains out of compliance, the commission shall  
8 make a public finding to that effect and issue an order assessing a civil  
9 penalty in accordance with section 16-942, unless the commission  
10 publishes findings of fact and conclusions of law expressing good  
11 cause for reducing or excusing the penalty. The violator has fourteen  
12 days from the date of issuance of the order assessing the penalty to  
13 appeal to the superior court as provided in title 12, chapter 7, article 6.

#### 14 **CONCLUSIONS OF LAW**

15 1. CCEC bears the burden of persuasion. ARIZ. REV. STAT. § 41-  
16 1092.07(G)(3).

17 2. The standard of proof on all issues in this matter is that of a  
18 preponderance of the evidence. ARIZ. ADMIN. CODE § R2-19-119(A).

19 3. “Unless otherwise provided by law: 1. The party asserting a claim, right,  
20 or entitlement has the burden of proof; [and] 2. A party asserting an affirmative defense  
21 has the burden of establishing the affirmative defense....” ARIZ. ADMIN. CODE § R2-19-  
22 119(B).

23 4. A preponderance of the evidence is:

24 The greater weight of the evidence, not necessarily established by the  
25 greater number of witnesses testifying to a fact but by evidence that  
26 has the most convincing force; superior evidentiary weight that, though  
27 not sufficient to free the mind wholly from all reasonable doubt, is still  
28 sufficient to incline a fair and impartial mind to one side of the issue  
29 rather than the other.

30 BLACK’S LAW DICTIONARY 1373 (10th ed. 2014).

1 The primary objective in construing statutes adopted by initiative is to give  
2 effect to the intent of the electorate. *Arizona Early Childhood Development & Health*  
3 *Board v. Janice K. Brewer*, 221 Ariz. 467, 212 P.3d 805 (2009).

1           6.       Generally, if a statute is clear, the tribunal should not read into the statute  
2 words or limitations that the voters did not themselves include. *Darrah v. McClennen*,  
3 698 Ariz. Adv. Rep. 12, 337 P.3d 550 (App. 2014); *Home Builders Association of*  
4 *Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 483, 930 P.2d 993, 997  
5 (1997)(“Where the language of a statute is clear and unambiguous, [the tribunal is] not  
6 warranted in reading into the law words the legislature did not choose to include.”)

7           7.       Statutes should be considered in context to determine the intent of the  
8 entire act. “A statute is to be given such an effect that no clause, sentence or word is  
9 rendered superfluous, void, contradictory or insignificant.” *Guzman v. Guzman*, 175  
10 Ariz. 183, 187, 854 P.2d 1169,1173 (App. 1993)

11           8.       The United States Supreme Court has adopted a “functional equivalent”  
12 test regarding express advocacy. Under that test, a communication is considered  
13 express advocacy only if it is susceptible to no reasonable interpretation other than an  
14 appeal to vote for or against a specific candidate. The speaker’s subjective intent is  
15 irrelevant to the inquiry. The tribunal may consider the communication’s context,  
16 including the timing of the communication, but these factors cannot be used as a proxy  
17 for that subjective intent. *See Committee for Justice & Fairness v. Ariz. Secy. Of State's*  
18 *Office*, 235 Ariz. 347, 332 P.3d 94, (App. 2014)(reviewing applicable federal case law).

19           CCEC has authority to enforce violations of the Clean Elections Act

20           9.       CCEC has authority to enforce the Clean Elections Act. ARIZ. REV. STAT. §  
21 16-956(A)(7).

22           10.      LFAF raises three arguments intended to show that CCEC has exceeded  
23 its authority: (1) LFAF argues that because the matching funds provision of the Act has  
24 been found unconstitutional and independent expenditures are also subject to  
25 regulation under Title 16, Chapter 6, Article 1, the reporting requirements found in ARIZ.  
26 REV. STAT. section 16-941(D) are no longer relevant; (2) LFAF’s expenditures are  
27 exempt from reporting pursuant to ARIZ. REV. STAT. section 16-920(A)(5); and (3) on  
28 referral from the Arizona Secretary of State’s Office, the Maricopa County Elections  
29 Department found no reasonable cause to believe that LFAF had violated Title 16,  
30 Chapter 6, Article 1.

1 11. CCEC argues that: (1) the disclosure rules serve “substantial government  
2 interests” including voter education and deterrence of corruption; (2) that the  
3 exemptions found in ARIZ. REV. STAT. section 16-920(A)(5) do not apply; and (3) the  
4 Secretary of State/Maricopa County findings are not relevant to the Clean Elections  
5 Act.

6 12. LFAF presents no persuasive authority showing that the invalidation of the  
7 matching funds provision has eliminated CCEC’s duty to enforce the remainder of the  
8 Act or that the Secretary of State’s decisions regarding Article 1 limit CCEC’s authority  
9 regarding Article 2.

10 13. ARIZ. REV. STAT. section 16-920(A)(5) applies to “[c]ontributions for use to  
11 support or oppose an initiative or referendum measure or amendment to the  
12 constitution.” As such, it is not applicable to this matter.

13 The Subject Advertisement does not Constitute Express Advocacy

14 14. CCEC has not shown that the Subject Advertisement constitutes express  
15 advocacy intended to advocate for the defeat of Mr. Smith in the Republican primary.

16 15. As set out above, a communication expressly advocates only if there can  
17 be “no reasonable meaning other than to advocate the election or defeat of the  
18 candidate.”<sup>2</sup> ARIZ. REV. STAT. § 16-901.01(A)(2).

19 16. The Subject Advertisement can reasonably been seen as permissible  
20 issue advocacy based on factors including: the content of the communications; that  
21 they were aired at a time in which Mr. Smith was still the mayor of Mesa and the  
22 President of the Conference; although Mr. Smith had announced his intention to resign,  
23 he was under no legal obligation to do so and the Subject Advertisements were aired  
24 before the “window” in which candidates’ nominations were due at the Secretary of  
25 State’s Office;<sup>3</sup> they were aired about four and one-half months before early voting  
26 started in the Republican primary, and about five and one-half months before the  
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28 <sup>2</sup> Under this standard, a showing that the Subject Advertisement can reasonably be construed as being  
29 express advocacy is not sufficient to meet the burden of proof. *Cf. Committee for Justice & Fairness*, 235  
30 Ariz. at 351, 332 P.3d at 98 (substantial evidence can exist to support a decision even if the record also  
supports a different conclusion).

<sup>3</sup> See Stipulated Fact No. 19.

election itself; and voting in the Republican primary was not limited to registered Republicans.

The Order Assessing Civil Penalties does not Comply with  
ARIZ. REV. STAT. Section 16-942(B)

17. Under ARIZ. ADMIN. CODE section R2-20-109(F)(3), a party making an independent expenditure on behalf of a candidate and not properly reporting that expenditure is subject to a penalty as described in ARIZ. REV. STAT. section 16-942(B).<sup>4</sup>

18. Section 16-942(B) provides penalties for any reporting violation and that “[t]he candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed pursuant to this subsection.” (Underscore added.)

19. CCEC argues that the portion of the statute imposing joint and several responsibility on the candidate and committee applies only when that candidate or his committee has committed the reporting violation, and does not apply when the violation is by another entity on behalf of the candidate.

20. Under CCEC’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 R2-20-109(F)(3)<sup>5</sup> and, in other cases, it would require adding a limitation to the statute that was not included by the voters (i.e., a limitation to the effect that joint and several responsibility applies not to “any” penalty, but only to penalties for violations made by candidates or their committees).<sup>6</sup>

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<sup>4</sup> LFAF argues to the effect that the statute cannot reasonably be applied to independent expenditures because such expenditures cannot be made “on behalf” of a candidate. But the Administrative Law Judge has no authority to disregard the plain language of R2-20-109(F)(3), which by its express terms directs that a penalty shall be imposed. *See, e.g., Phoenix v. Winn*, 70 Ariz. 316, 220 P.2d 222 (1950)(statutes are presumed valid); *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095 (2011) (statutes and rules are construed using the same principles).

<sup>5</sup> Consequently, the Administrative Law Judge does not agree with CCEC’s position that its interpretation harmonizes the statute and rule.

<sup>6</sup> CCEC argues that its interpretation of the statute avoids an “absurd result” wherein a party making an independent expenditure would avoid any penalty. This argument is not persuasive in light of the statute’s requirement that “any penalty” is to be imposed jointly and severally and because nothing in the statute precludes holding the party making the independent expenditure and the candidate and committee jointly and severally responsible. And as LFAF argues, the party making an independent expenditure would also be subject to penalties enforced by the Secretary of State’s Office.

21. As such, CCEC's interpretation is contrary to principles of statutory construction and the Order does not meet the requirements of ARIZ. REV. STAT. section 16-942(B). See *Guzman v. Guzman*; *Darrah v. McClennen*.

## Conclusion<sup>7</sup>

22. Because the Subject Advertisement can reasonably be seen as permissible issue advocacy, it does not constitute express advocacy as the term is defined for purposes of the Clean Elections Act. Because the Subject Advertisement is not express advocacy, LFAF did not make an independent expenditure subject to the reporting requirements of ARIZ. REV. STAT. section 16-941(D) and LFAF is not subject to a civil penalty under ARIZ. REV. STAT. section 16-942(B).

23. Even if the Subject Advertisement was an independent expenditure subject to the reporting requirements, the Order was not properly issued because under ARIZ. REV. STAT. section 16-942(B), the candidate on whose behalf the expenditure was made and that candidate's campaign account must be made jointly and severally responsible, which the Order does not do.

24. Consequently, LFAF's appeal should be sustained and the Order assessing a civil penalty rescinded.

## ORDER

**IT IS ORDERED** that Legacy Foundation Action Fund's appeal is sustained;

**IT IS FURTHER ORDERED** that the November 28, 2014 Order assessing civil penalty is rescinded.

*In the event of certification of the Administrative Law Judge Decision by the Director of the Office of Administrative Hearings, the effective date of the Order is five days after the date of that certification.*

Done this day, March 4, 2015.

/s/ Thomas Shedden  
Thomas Shedden

<sup>7</sup> Because the Administrative Law Judge had found that the Subject Advertisement was not express advocacy and that the Order is not in compliance with Ariz. Rev. Stat section 16-942(B), he does not address LFAF's contention that the superior court's ruling that section 16-901.01(A) was unconstitutional rendered that law unenforceable.



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Administrative Law Judge

Transmitted electronically to:

Thomas Collins, Executive Director  
Citizens Clean Elections Commission