

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 (7th 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
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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":

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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.



11 Screenshot of LFAF Advertisement at :21.

12 The theoretical alternative explanations that this advertisement was intended to
13 advocate to change Smith's conduct as a leader of the Conference of Mayors or as
14 Mesa's mayor are unreasonable. Mr. Smith had announced his candidacy for
15 governor and his impending resignation a few months before the advertisement was
16 aired. In context, the only reasonable meaning for the advertisement in context is to
17 advocate for Smith's defeat, as set forth in the Commission's November 28, 2014
18 order.

19 For these reasons and those set forth in the Commission Executive Director's
20 November 3, 2014 Probable Cause Recommendation, the Commission concludes that
21 the advertisement is express advocacy and, as a result, is an independent expenditure
22 subject to the reporting requirements in A.R.S. §§ 16-941(D) and -958. It rejects the
23 Decision's contrary conclusion.

24 **II. The Order Assessing Penalties**

25 The Commission also rejects the Decision's conclusion in ¶ 23 that the
26 Commission's order imposing penalties is not proper because "the candidate on
27 whose behalf the expenditure was made and that candidate's campaign account" are
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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(B), 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.

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DONE this 27th day of March, 2015.

By /s/Thomas J. Koester
Thomas J. Koester, Chairman
Citizens Clean Elections Commission

Electronically filed on March 27, 2014 with:

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

COPY of the foregoing emailed
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/s/Sara A. Larsen

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 In the Matter of Legacy Foundation Action
4 Fund

No. 15F-001-CCE

5 Petitioner/Appellant,

ADMINISTRATIVE LAW JUDGE

6 v.

DECISION

7
8 Arizona Citizens Clean Elections
9 Commission

10 Respondent/Appellee.
11

12
13 **HEARING:** January 28, 2015, with the record held open until February 12, 2015

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

18 **ADMINISTRATIVE LAW JUDGE:** Thomas Shedden
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20 **FINDINGS OF FACT**

21 1. On December 16, 2014, the Arizona Citizens Clean Elections Commission
22 (“CCEC”) issued a Notice of Hearing setting the above-captioned matter for hearing on
23 January 27 and 28, 2015, at the Office of Administrative Hearings in Phoenix, Arizona.

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

28 3. The parties agreed to submit stipulated facts and that LFAF would submit
29 an initial brief, CCEC answering or response brief, and LFAF a reply.
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1 4. On January 5, 2015, the parties submitted Joint Stipulated Facts and
2 Exhibits. The Joint Stipulated Facts are reproduced below.¹

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.

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30 ¹ 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

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

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

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

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

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

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

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

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.

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
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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
10 communication or the inclusion of statements of the candidate(s) or
11 opponents.

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

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

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

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

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

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

30 Any person making an independent expenditure on behalf of a
candidate and not timely filing a campaign finance report as required
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).

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

A. If the commission finds that there is reason to believe that a person
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.”² ARIZ. REV. STAT. § 16-901.01(A)(2).

19 16. The Subject Advertisement can reasonably be 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;³ 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
27

28 ² 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).

³ See Stipulated Fact No. 19.

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

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

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

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

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

15 20. Under CCEC’s interpretation, the statute’s sentence regarding joint and
16 several responsibility would have no effect and would be given no meaning when
17 assessing penalties for violations accruing under R2-20-109(F)(3)⁵ and, in other cases,
18 it would require adding a limitation to the statute that was not included by the voters
19 (i.e., a limitation to the effect that joint and several responsibility applies not to “any”
20 penalty, but only to penalties for violations made by candidates or their committees).⁶

21
22
23 ⁴ LFAF argues to the effect that the statute cannot reasonably be applied to independent expenditures
24 because such expenditures cannot be made “on behalf” of a candidate. But the Administrative Law
25 Judge has no authority to disregard the plain language of R2-20-109(F)(3), which by its express terms
26 directs that a penalty shall be imposed. See, e.g., *Phoenix v. Winn*, 70 Ariz. 316, 220 P.2d 222
27 (1950)(statutes are presumed valid); *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249
28 P.3d 1095 (2011) (statutes and rules are construed using the same principles).

29 ⁵ Consequently, the Administrative Law Judge does not agree with CCEC’s position that its interpretation
30 harmonizes the statute and rule.

⁶ 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.

1 21. As such, CCEC's interpretation is contrary to principles of statutory
2 construction and the Order does not meet the requirements of ARIZ. REV. STAT. section
3 16-942(B). See *Guzman v. Guzman*; *Darrah v. McClennen*.

4 Conclusion⁷

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

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

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

18 **ORDER**

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

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

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

25 Done this day, March 4, 2015.

26
27 /s/ Thomas Shedden
28 Thomas Shedden

29 ⁷ Because the Administrative Law Judge had found that the Subject Advertisement was not express
30 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.

Administrative Law Judge

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Transmitted electronically to:
Thomas Collins, Executive Director
Citizens Clean Elections Commission