

1 Brian M. Bergin, #016375

2 **Bergin, Frakes, Smalley & Oberholtzer, PLLC**

3 4455 East Camelback Road, Suite A-205

4 Phoenix, Arizona 85018

5 Telephone: (602) 888-7857

6 Facsimile: (602) 888-7856

7 bbergin@bfsolaw.com

8 *Attorneys for Plaintiff/Appellant*

9 Jason Torchinsky

10 **Holtzman Vogel Josefiak PLLC**

11 45 North Hill Drive, Suite 100

12 Warrenton, VA 20186

13 Telephone: (540) 341-8808

14 Facsimile: (540) 341-8809

15 jtorchinsky@hvjlaw.com

16 *Co-Counsel for Plaintiff/Appellant*

17 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

18 **IN THE COUNTY OF MARICOPA**

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

21 Plaintiff/Appellant,

22 vs.

23 CITIZENS CLEAN ELECTIONS
24 COMMISSION;

25 Defendant/Appellee.

No.

LC2015-000172-001

**NOTICE OF APPEAL AND
COMPLAINT FOR JUDICIAL
REVIEW OF ADMINISTRATIVE
DECISION**

Plaintiff/Appellant, Legacy Foundation Action Fund ("Plaintiff") by and through undersigned counsel for its Notice of Appeal and Complaint for Judicial Review of Administrative Decision hereby alleges as follows:

PARTIES, JURISDICTION AND VENUE

1
2 1. Plaintiff/Appellant Legacy Foundation Action Fund is an Iowa non-profit
3 corporation, operating under Section 501(c)(4) of the Internal Revenue Code.

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

7
8 3. On July 1, 2014 a complaint was filed with the Arizona Secretary of State and the
9 Commission claiming that Plaintiff had run an "express advocacy" television advertisement
10 (the "Subject Advertisement") but had failed to file the necessary registration and campaign
11 finance disclosure forms with the Arizona Secretary of State and the Commission (the
12 "Complaint Below").

13
14 4. Specifically, the Complaint Below alleged that Plaintiff violated A.R.S. §§ 16-
15 914.02, -941(D) and -958(A)-(B).

16 5. In response to the Complaint Below, the Arizona Secretary of State, acting
17 through Maricopa County Elections, dismissed the matter on July 21, 2014.

18 6. By contrast, in response to the same Complaint Below, the Commission initiated
19 its regulatory process and commenced proceedings before the Commission captioned *In re*
20 *Legacy Foundation Action Fund* numbered 15F-001-CCE.
21

22 7. On July 31, 2014, the Commission declared it had jurisdiction to consider the
23 allegations of the Complaint Below.

24 8. On September 11, 2014, the Commission found "reason to believe" that a
25 violation of the Act occurred and authorized an investigation.

1 9. The basis for the Commission's "reason to believe" finding was a conclusion that
2 the Subject Advertisement was an independent expenditure and that Plaintiff violated
3 A.R.S. §§ 16-941(D) and -958 by failing to report those expenditures.

4 10. Plaintiff filed a Special Action, Case No. CV2014-003968, in this court on July
5 18, 2014, challenging the Commission's jurisdiction over this matter and asserting the
6 unconstitutionality of A.R.S. § 16-901.01(A). On September 23, 2014, this Court dismissed
7 the matter finding that the issue of jurisdiction could be addressed upon exhaustion of
8 administrative remedies.

10 11. On September 26, 2014, the Commission issued a Compliance Order along with
11 written questions to be answered under oath verifying Plaintiff's spending in Arizona.

12 12. Plaintiff declined to answer the questions in a letter dated October 3, 2014,
13 claiming that the Commission's inquiries were not relevant to the Complaint Below, the
14 Commission had no authority to ask about Plaintiff's spending in Arizona, was without
15 jurisdiction over the Complaint Below, and was without authority to impose penalties.

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

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

22 15. Plaintiff appealed the Commission's Order by requesting an administrative
23 hearing, which was conducted by the Office of Administrative Hearings on January 28,
24 2015.

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

5 17. The ALJ's Decision, therefore, ordered that Plaintiff's appeal should be sustained
6 and the Commission's Order should be rescinded.

7 18. The Commission, however, rejected the ALJ's Decision and rendered a Final
8 Administrative Decision dated March 27, 2015, which declared: (a) the Commission has
9 jurisdiction and authority to enforce violations of the Act; (b) the Subject Advertisement is
10 "express advocacy" within the definition of A.R.S. §16-901.01(A)(2); and (c) the
11 Commission has authority to impose the civil penalties it originally assessed against
12 Plaintiff under A.R.S. § 16-942(B) (the "Decision").
13
14

15 19. In the Decision, the Commission reinstated its civil penalty of \$95,460 against
16 Plaintiff.

17 20. This Notice of Appeal and Complaint for Judicial Review of Administrative
18 Decision (the "Complaint") constitutes a Notice of Appeal of the Commission's Decision.
19

20 21. Jurisdiction is appropriate in this Court to hear and determine this Complaint and
21 to grant the requested relief by virtue of A.R.S. § 12-905(A) for the reason that this action is
22 a review of a final administrative action authorized under A.R.S. §§12-901 et seq. and the
23 Arizona Rules of Procedure for Judicial Review of Administrative Decisions.

24 22. Venue for this action is proper in the Superior Court of Maricopa County for the
25 reason that the proceeding culminating in the Decision was conducted in this County.

1 23. Plaintiff was served with a copy of the Decision in conformity with A.R.S. § 12-
2 904 on or about March 27, 2015.

3 24. Said Decision is contrary to law and invalid because:

- 4 a. There is no substantial evidence to support the findings of the
5 Commission or to support the Decision;
6
7 b. The Decision is an abuse of discretion and arbitrary and capricious in that
8 the Commission exceeded its statutory authority in asserting jurisdiction
9 over Plaintiff.
10
11 c. The Decision is an abuse of discretion and arbitrary and capricious in that
12 the Commission erred when it made findings of fact and law when it was
13 undisputed that, at the time Plaintiff ran the Subject Advertisement, the
14 Arizona Superior Court had ruled A.R.S. §16-901.01(A)'s definition of
15 "expressly advocates" was unconstitutional.
16
17 d. The Decision is an abuse of discretion and arbitrary and capricious in that
18 the definition of "Expressly Advocates", on its face, as set forth in A.R.S.
19 § 16-901.01 and as interpreted and applied by the Commission is facially
20 unconstitutional and unconstitutional as applied to Plaintiff under the First
21 Amendment of the United States Constitution and Article 2, § 6 of the
22 Arizona Constitution.
23
24 e. The Decision is an abuse of discretion and arbitrary and capricious in that
25 the definition of "Expressly Advocates," on its face, as set forth in A.R.S.
§ 16-901.01 and as interpreted and applied by the Commission is

1 substantially overbroad because it infringes upon speech protected by the
2 First Amendment of the United States Constitution and Article 2, § 6 of
3 the Arizona Constitution.

4 f. The Decision is an abuse of discretion and arbitrary and capricious in that
5 the definition of "Expressly Advocates", on its face, as set forth in A.R.S.
6 § 16-901.01 and as interpreted and applied by the Commission is void for
7 vagueness under the First Amendment for the United States Constitution
8 and Article 2, § 6 of the Arizona Constitution because it fails to give
9 persons of ordinary intelligence a reasonable opportunity to learn what
10 speech is regulated and which is not, nor does it provide explicit standards
11 for the Commission to apply.

12 g. The Decision is an abuse of discretion and arbitrary and capricious in that
13 the Commission violated the First Amendment when it relied upon a
14 improper and subjective analysis finding Plaintiff's Subject Advertisement
15 constituted "express advocacy" that had no other reasonable
16 interpretation.

17 h. The Decision is an abuse of discretion and arbitrary and capricious in that
18 the Commission exceeded its statutory authority when it imposed civil
19 penalties against Plaintiff under A.R.S. § 16-942(B).

20 i. The Commission's registration and reporting regulation, Ariz. Admin.
21 Code § R2-20-109(F), adopted pursuant to A.R.S. § 16-942(B) exceeds its
22 statutory authority as applied to regulation of independent expenditures.
23
24
25

1 25. Plaintiff is harmed by the Commission's illegal and invalid Decision.

2 26. Plaintiff designates the entire record of the proceedings below and requests that
3 the complete record maintained by both the Commission and the Office of Administrative
4 Hearings be transmitted as part of the record on review.

5 WHEREFORE, Plaintiff prays for relief against the Commission as follows:

6 A. For a stay of enforcement of the Decision of the Commission until final
7 disposition of this appeal;

8 B. For judgment against the Commission reversing said Decision;

9 C. For Plaintiff's attorney's fees and expenses incurred herein pursuant to A.R.S.
10 § 12-348.
11

12 D. For such other and further relief as this Court deems just and proper.

13 DATED this 14th day of April, 2015.
14

15 **Bergin, Frakes, Smalley & Oberholtzer, PLLC**

16 
17 Brian M. Bergin

18 4455 East Camelback Road, Suite A-205
19 Phoenix, Arizona 85018

Attorneys for Plaintiff/Appellant

20 **ORIGINAL** of the foregoing filed this
21 14th day of April, 2015 at:

22 Clerk of the Court
23 Maricopa County Superior Court
24 201 W. Jefferson
25 Phoenix, Arizona