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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE STATE OF ARIZONA

In the Matter of

LEGACY FOUNDATION ACTION FUND,

Plaintiff/Appellant,

vs.

CITIZENS CLEAN ELECTIONS COMMISSION

Defendant/Appellee.

Case No. LC2015-000172-001

OPENING BRIEF OF PLAINTIFF/APPELLANT LEGACY FOUNDATION ACTION FUND

INTRODUCTION

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This is so because "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Therefore, the right of citizens to disseminate and receive information is a prerequisite to an "[e]nlightened self-government and a necessary means to protect it." *Id.* Because of this, "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Id.* (internal quotation marks omitted).

The U.S. Supreme Court has ruled that the application of intent- or purpose- based tests to determine whether speech constitutes express advocacy does not serve the "[v]alues the First Amendment . . . [because they open] the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *FEC v. Wis. Right to Life, Inc.*, ("*WRTL*") 551 U.S. 449, 468 (2007). A subjective, intent-based test chills speech because the test "blankets with uncertainty" whether the speech in question is express advocacy subject to regulation or issue advocacy. *Id.* Rather, issue advocacy speech deserves special protections because "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

This case presents several discreet questions. First, is whether the Citizens Clean Elections Commission ("CCEC") exceeded its statutory authority by asserting jurisdiction

in this matter in the first instance since the Plaintiff/Appellant, Legacy Foundation Action Fund ("LFAF") is not a candidate. Second, is whether the CCEC exceed its statutory authority by asserting jurisdiction over reporting of independent expenditures. Along those same lines, is whether the CCEC committed a constitutional violation by enforcing a statutory definition that had been declared unconstitutional at the time LFAF acted.

Next, if CCEC has jurisdiction and did not violate the constitution by enforcing the statute declared unconstitutional at the time, did the CCEC violate the First Amendment by applying a subjective, intent based test to an advertisement aired by LFAF to determine whether speech is express advocacy? Essentially, the question is whether the CCEC violated well established First Amendment jurisprudence when it interpreted and applied Arizona's statutory definition of "expressly advocates" in such a way to effectively bring nearly all issue advocacy speech within its regulatory jurisdiction in clear contradiction of Supreme Court precedent. In so doing, there is a question of whether the CCEC erred as a matter of law when it reversed the Administrative Law Judge's ("ALJ") interpretation of the law and the analysis of the facts.

Next, did the CCEC improperly exercise jurisdiction when it sought to impose a penalty against LFAF under A.R.S. § 16-942(B) and declared jurisdiction over an entity other than a candidate. CCEC further erred by invoking the penalty—making provisions of A.R.S. § 16-942(B) without making the necessary determination of which candidate LFAF's expenditure was "by or on behalf of" and appropriately allocating the assessed penalty.

Finally, because the CCEC's violation of LFAF's First Amendment rights gave rise to this action, does the CCEC owe LFAF reasonable legal fees as a result of its actions as a matter of law?

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY IN ASSERTING JURISDICTION OVER LFAF AND PURPORTED INDEPENDENT EXPENDITURES.**

II. **IF THE CCEC HAS JURISDICTION, WHETHER THE CCEC ERRED WHEN IT MADE FINDINGS OF FACT AND LAW WHEN IT WAS UNDISPUTED THAT, AT THE TIME LFAF RAN ITS ADVERTISEMENT, THE ARIZONA SUPERIOR COURT HAD RULED A.R.S. § 16-901.01(A)'S DEFINITION OF 'EXPRESSLY ADVOCATES' UNCONSTITUTIONAL.**

III. **IF THE CCEC HAD JURISDICTION AND THE DEFINITION WAS ENFORCEABLE AT THE TIME LFAF SPOKE, WHETHER THE CCEC VIOLATED THE FIRST AMENDMENT WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING LFAF'S ADVERTISEMENT CONSTITUTED EXPRESS ADVOCACY.**

IV. **WHETHER THE CCEC ERRED, AS A MATTER OF LAW, BY REVERSING THE INTERPRETATION OF THE LAW AND FACTS OF THE ADMINISTRATIVE LAW JUDGE'S DECISION.**

V. **WHETHER THE CCEC EXCEEDED ITS JURISDICTION AND STATUTORY AUTHORITY WHEN IT IMPOSED CIVIL PENALTIES AGAINST LFAF UNDER A.R.S. § 16-942(B).**

VI. **WHETHER THE CCEC'S ACTIONS, IN VIOLATING THE FIRST AMENDMENT, SHOULD RESULT IN THE AWARD OF LEGAL FEES TO LFAF.**

STATEMENT OF THE CASE

Plaintiff is an Iowa non-profit corporation, operating under Section 501(c)(4) of the Internal Revenue Code. Defendant Citizens Clean Elections Commission (the

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

On July 1, 2014 a complaint was filed with the Arizona Secretary of State and the Commission claiming that Plaintiff had run an "express advocacy" television advertisement (the "Subject Advertisement") but had failed to file the necessary registration and campaign finance disclosure forms with the Arizona Secretary of State and the Commission (the "Complaint Below"). Specifically, the Complaint Below alleged that Plaintiff violated A.R.S. §§ 16-914.02, -941(D) and -958(A)-(B).

In response to the Complaint Below, Maricopa Count Elections (acting on the request of the Secretary of State) dismissed the matter on July 21, 2014. In response same complaint, the Commission initiated its regulatory process and commenced proceedings before the Commission (captioned *In re Legacy Foundation Action Fund*, numbered 15F-001-CCE).

On July 18, 2014, LFAF commenced a Special Action in this Court challenging the jurisdiction of the CCEC. On July 31, 2014, the Commission declared it had jurisdiction to consider the allegations of the Complaint Below. This court heard the Special Action and on September 16, 2014, granted the CCEC's motion to dismiss finding that LFAF was required to exhaust its administrative remedies before its claims would be heard.

On September 11, 2014, the Commission found "reason to believe" that a violation of the Act occurred and authorized an investigation. The basis for the Commission's "reason to believe" finding was a conclusion that the Subject Advertisement was an independent expenditure and that Plaintiff violated A.R.S. §§ 16-941(D) and -958 by failing

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

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

On November 20, 2014, the Commission found probable cause to believe Plaintiff had violated the Act and authorized the assessment of $95,460 in penalties. On November 28, 2014, the Commission issued an order assessing civil penalties against Plaintiff (the "Order") and a Notice of Appealable Agency Action.

Plaintiff appealed the Commission's Order by requesting an administrative hearing, which was conducted by the Office of Administrative Hearings on January 28, 2015. On March 4, 2015, Administrative Law Judge Thomas Shedden entered his Decision (the "ALJ's Decision") and concluded, in part, that: (a) Plaintiff's Subject Advertisement does not constitute "express advocacy"; and (b) the Commission's assessment of civil penalties did not comply with A.R.S. § 16-942(B). The ALJ's Decision, therefore, ordered that Plaintiff's appeal should be sustained and the Commission's Order was rescinded.

The Commission, however, rejected the ALJ's Decision and rendered a Final Administrative Decision dated March 27, 2015, which declared: (a) the Commission has jurisdiction and authority to enforce violations of the Act; (b) the Subject Advertisement is "express advocacy" within the definition of A.R.S. §16-901.01(A)(2); and (c) the

Commission has authority to impose civil penalties against Plaintiff under A.R.S. § 16-942(B) (the "Decision").

In the Decision, the Commission reinstated its civil penalty of $95,460 against Plaintiff. This Notice of Appeal and Complaint for Judicial Review of Administrative Decision (the "Complaint") constitutes a Notice of Appeal of the Commission's Decision.

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

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

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

LFAF is a tax-exempt, nonprofit, social welfare organization organized under Internal Revenue Code Section 501(c)(4). Index of Record on Review ("I.R.") 13 at ¶ 1. Since its inception in 2011, LFAF has maintained a primary purpose to further the common good and general welfare of the citizens of the United States by educating the public on public policy issues including state fiscal and tax policy, the creation of an entrepreneurial environment, education, labor-management relations, citizenship, civil rights, and government transparency issues. *Id.*

Over the past four years, LFAF has run many issue advocacy advertisements in different mediums. Being familiar with the First Amendment protections afforded to issue

advocacy speech, LFAF ran a television advertisement in late March and early April of 2014 in Arizona referencing policy positions supported by the U.S. Conference of Mayors and its President, then-Mesa Mayor Scott Smith. *Id.* at ¶ 9. LFAF's Arizona advertisement was a part of a larger campaign regarding the U.S. Conference of Mayors as evidenced by advertisements airing not only in Mesa, AZ but also in Baltimore, MD and Sacramento, CA. *Id.* at ¶ 9; Exhibit 4 thereto (I.R. 24) .

The Arizona advertisement ran between March 31 and April 14, 2014, and discussed the U.S. Conference of Mayors' policy positions regarding the environment, Second Amendment, tax and spending, and federal budget. I.R. 13 at ¶ 14; Exhibit 6 thereto (I.R. 26). Consistent with LFAF's mission and tax-exempt purpose, the advertisement provided viewers with a call to action to contact Mayor Smith to tell him "The U.S. Conference of Mayors should support policies that are good for Mesa." *Id.*

Several months before LFAF aired this advertisement, Arizona's statutory definition of "expressly advocates" had been declared unconstitutional by the Maricopa County Superior Court. I.R. 13 at ¶ 8.

Over two and a half months after LFAF's advertisement was last broadcast, Mr. Kory Langhofer, a lawyer representing Mr. Smith, filed a complaint against LFAF, amongst other parties, alleging that LFAF's advertisement constituted express advocacy, thereby subjecting LFAF to the registration and reporting requirements of both Articles 1 and 2 of Title 16 Chapter 2 of the Arizona Revised Statutes. *Id.* at ¶¶ 25-26. Mr. Langhofer filed his complaint with the CCEC as well as with the Arizona Secretary of State's Office. *Id.* at ¶ 25. On July 16, 2014, LFAF filed its response to the complaint with the CCEC, arguing the

CCEC did not have jurisdiction over the matter and, even if it did, LFAF was not subject to registration or reporting requirements because its advertisement did not "expressly advocate" as the then-unconstitutional provision defined the term.[1] *Id.* at ¶ 30; Exhibit 10 thereto (I.R. 30).

The Arizona Secretary of State's Office referred the complaint to the Maricopa County Elections Department (the "Department"). I.R. 13 at ¶ 27. On July 21, 2014, Jeffrey Messing, a lawyer representing the Department, issued a letter indicating that the Department "does not have reasonable cause to believe that a violation of Arizona Revised Statutes A.R.S. § 16-901.01 *et seq.* has occurred." *Id.* at ¶ 28; Exhibit 8 thereto (I.R. 28).

On July 31, 2014, the CCEC held a public meeting and discussed, as an agenda item, the complaint against LFAF. I.R. 13 at ¶ 30. At that hearing the CCEC decided not to make a finding whether it had reason to believe a violation occurred, but instead limited its determination to declaring jurisdiction over the matter. *Id.* at ¶ 33; Exhibit 15 thereto (I.R. 34). Over a month later, on September 11, 2014, the CCEC revisited the issue and declared it had reason to believe that LFAF violated the Act and ordered an investigation. I.R. 13 at ¶ 35; Exhibit 17 thereto (I.R. 17). On September 26, 2014, the CCEC sent LFAF a Compliance Order asking LFAF to provide written answers to the following questions under oath:

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[1] At the time LFAF produced and aired the Arizona advertisement, the Arizona Superior Court had ruled A.R.S. § 16-901.01(A) unconstitutional. *Committee for Justice & Fairness v. Arizona Secretary of State*, No. LC-2011-000734. Therefore, as argued *infra*, the CCEC could not enforce this unconstitutional statute defining "expressly advocates" against LFAF. The express advocacy definition in A.R.S. § 16-901.01(A) has been ruled unconstitutional by the Arizona Superior Court on November 28, 2012, overturned by the Arizona Court of Appeals on August 7, 2014, and review was denied by the Arizona Supreme Court on April 21, 2015. LFAF believes that § 16-901.01(A) is unconstitutional and was permitted by the appellants and appellees in the appellate case to submit an amicus curiae brief arguing that the statute is unconstitutional.

1. Please provide how much money was expended to create and run the television advertisement identified in the Compliance Order.

2. Please identify any other advertisements pertaining to Scott Smith that ran in Arizona.

3. With regard to any advertisements identified in LFAF's response to question 2, please provide information on the scope of the purchase, including how much money was spent to create and run any such advertisements and where they ran.

I.R. 13 at ¶ 36; Exhibit 18 thereto (I.R. 18). LFAF responded to the CCEC's Compliance Order by letter arguing that the CCEC's request for additional information was not only irrelevant to the matter at hand because it exceeded the scope of the original complaint, but was also outside the scope of the CCEC's jurisdiction. I.R. 13; Exhibit 19 thereto (I.R. 39). Further, LFAF provided a detailed request to the CCEC in its response, asking the CCEC, when assessing civil penalties under A.R.S. § 16-942(B), to identify the candidate the advertisement was "by or on behalf of" and which candidate or candidate's campaign account shall be "jointly and severally liable" for any civil penalty assessment. I.R. 13; Exhibits 19-20 thereto (I.R. 39-40).

At its November 20, 2014 public meeting, the CCEC found probable cause to believe LFAF violated the Clean Elections Act. I.R. 13 at ¶ 41; Exhibit 25 thereto (I.R. 46). On November 28, 2014 the CCEC issued its "Order and Notice of Appealable Agency Action" in which it deemed LFAF's Arizona advertisement to be express advocacy and assessed a penalty against LFAF in the amount of $95,460. I.R. 13 at ¶ 43; Exhibit 26 thereto (I.R. 47).

LFAF filed its request for an administrative hearing timely on December 1, 2014. I.R. 13 at ¶ 44; Exhibit 27 thereto (I.R. 48). A hearing before ALJ Thomas Shedden took place on January 28, 2015. The ALJ issued his opinion on March 4, 2015 sustaining LFAF's appeal of the CCEC decision, and ordering the CCEC decision rescinded. Administrative Law Judge Decision, No. 15F-001-CCE (March 4, 2015) (hereinafter "ALJ Decision"). I.R. 54. The ALJ concluded that the LFAF advertisement can reasonably be seen as permissible issue advocacy and does not constitute express advocacy and is not subject to civil penalties under A.R.S. § 16-942(B). *Id.* at ¶ 22. The ALJ further concluded that, even if the advertisement was an independent expenditure subject to reporting requirements, the Order of the CCEC was improperly issued because it did not hold a candidate's campaign account jointly and severally liable. *Id.* at ¶ 23. On March 27, 2015, the CCEC rejected the ALJ's recommendations and entered a Final Administrative Decision stating that the Advertisement constituted express advocacy subject to CCEC registration and reporting requirements, and sent it to LFAF's counsel by electronic mail.[2] I.R. 55. LFAF timely filed this Notice of Appeal of April 14, 2015.

ARGUMENT

I. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY IN ASSERTING JURISDICTION OVER LFAF AND PURPORTED INDEPENDENT EXPENDITURES.

The CCEC's jurisdiction is limited by A.R.S. Title 16, Chapter 6, Article 2, which is delineated in the Act at A.R.S. §§ 16-940 to 16-961. In fact, A.R.S. §§ 16-956(A)(7) and

[2] *See* Opposition for Motion to Dismiss for additional arguments about the formal service of the opinion and applicable statutes governing judicial review.

16-957(A), explicitly limit the reach of the Commission to enforcing "this article" (Title 16, Chapter 6, Article 2).

The CCEC's declaration of jurisdiction through the independent expenditure reporting requirements outlined in A.R.S. § 16-941(D) is misguided as the statute's purpose in Article 2 is no longer relevant. The independent expenditure reporting requirements found in A.R.S. Title 16, Chapter 6, Article 2 were implemented to provide the CCEC a means to track independent expenditure spending so that it would be able to subsidize participating candidates for such expenditures.[3] *See Arizona Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-29 (2011). The U.S. Supreme Court struck down, as unconstitutional, the Clean Elections Act's provision establishing the basis for expenditure reporting before the CCEC. *See Bennett*, 131 S. Ct. at 2828-29 (ruling the Clean Elections Act's independent expenditure matching funds provision unconstitutional). In effect, the Supreme Court's ruling abolished the purpose for which the Clean Elections Act imposed the requirement that the Secretary of State provide independent expenditure information to the CCEC. *See McComish v. Brewer*, 2010 U.S. Dist. LEXIS 4931 (D. Ariz. Jan. 20, 2010) (describing the operation of the Clean Elections Act, "The participating candidate will also receive matching contributions if there are independent expenditures against the participating candidate or in favor of the non-participating opponent.") (internal quotations omitted). *See also, McComish v. Bennett*, 611 F. 3d 510, 516 (9th Cir. 2010) ("If

[3] The Citizens Clean Elections Act provided for subsidies to candidates choosing to opt-in to the statute's public financing provisions. As originally adopted, but later declared unconstitutional, such candidates were given subsidies from the state for independent expenditures run against such candidates. To track these expenditures, the Citizens Clean Elections Act provided a registration and reporting mechanism (in addition to the one already existing under Title 16, Chapter 6, Article 1) for the CCEC. Because such purpose is no longer constitutional, such a duplicative registration and reporting requirement exceeds CCEC's statutory authority.

the participating candidate has a nonparticipating opponent . . . whose expenditures combined with the *value of independent expenditures* . . . exceed the amount of her or his initial grant, the participating candidate will receive matching funds . . . .") (emphasis added) (internal quotations omitted). As recognized by these courts, the sole reason why the Clean Elections Act provided that the Secretary of State information about independent expenditures to the CCEC was to track the amount of independent expenditure money spent so that participating candidates could be subsidized in accordance with the Clean Elections Act's provisions.

As the penalty provisions of Article 2 make clear, the CCEC's jurisdiction extends only to expenditures "by or on behalf of any candidate." A.R.S. § 16-942(B). Because LFAF is not a candidate, and the CCEC dismissed allegations that LFAF's speech was made in coordination with a candidate, the CCEC has no jurisdiction over LFAF's speech.

As a result, the CCEC is without a legal foothold to assert jurisdiction over the independent expenditure reporting requirements after the United States Supreme Court held that scheme to be unconstitutional in *Bennett*. *Bennett*, 131 S. Ct. at 2828-29 ("the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."). Because independent expenditures are already subject to registration and reporting requirements in Article 1, which are enforced by the Arizona Secretary of State, Article 2's requirements are duplicative and any attempt to make such requirements applicable, through rulemaking or otherwise, impermissibly deviates from the statute's original intent and

purpose, and is the result of an agency seeking to expand its jurisdiction.[4] "Because administrative agencies derive their powers from their enabling legislation, their authority cannot exceed that granted by the legislature" (or, in the case of the Clean Elections Act, the people who voted for the law). *Pima County v. Pima County Law Enforcement Merit System Council*, 211 Ariz. 224, 227, 119 P. 3d 1027, 1030, (2005). In fact, during the administrative review phase of this matter, the ALJ reiterated that CCEC has authority to enforce the provisions of Article 2, [I.R. 54 at ¶ 12], which were passed into law by the voters of Arizona. It simply cannot be the case, however, that citizens of Arizona intended for two different governmental agencies to possess the ability to reasonably interpret the same exact law and thus create the possibility of inconsistent outcomes in the context of potential civil violations.

In any event, enforcement of independent expenditure reporting rests with the Secretary of State, which declined to take action on the complaint filed with that office in this matter. Upon referral by the Arizona Secretary of State's Office, the lawyer representing the Maricopa County Elections Department found no reasonable cause to believe that a violation of Title 16, Chapter 6, Article 1 occurred. I.R. 13 at ¶ 38; Exhibit 8 thereto (I.R. 28). In other words, after review of the very same complaint at issue here, the Maricopa County Elections Department determined unequivocally that LFAF's advertisement did not constitute express advocacy under A.R.S. § 16-901.01 and was, therefore, not subject to independent expenditure registration and reporting requirements. *Id.*

[4] As evidence of the CCEC's attempt to provide itself broader authority, the CCEC, in the summer and fall of 2013, implemented new regulations giving the CCEC authority beyond that which is contained in the text of the Citizens Clean Elections Act. *See* Ariz. Admin Reg./Secretary of State. Vol. 19 Issue 45 (Nov. 8, 2013).

The Maricopa County Elections Department's decision, acting on the request of the Arizona Secretary of State, renders the CCEC's attempt to apply Section 16-941(D) to LFAF meritless and without legal authority.[5]

As a result, the CCEC is simply without jurisdiction over LFAF in this instance because LFAF is not a candidate, did not coordinate its speech with any candidate, and because the enforcement of any independent expenditure requirements rests solely with the Secretary of State's office, which declined to take action here.

II. IF THE CCEC HAS JURISDICTION, WHETHER THE CCEC ERRED WHEN IT MADE FINDINGS OF FACT AND LAW WHEN IT WAS UNDISPUTED THAT, AT THE TIME LFAF RAN ITS ADVERTISEMENT, THE ARIZONA SUPERIOR COURT HAD RULED A.R.S. § 16-901.01(A)'S DEFINITION OF 'EXPRESSLY ADVOCATES' UNCONSTITUTIONAL.

On November 28, 2012, well before LFAF aired its advertisement, the Superior Court entered its "Final Judgment" in *Committee for Justice & Fairness v. Arizona Secretary of State's Office*, No. LC2011-000734-001 ("*CJF*"). I.R. 13 at ¶ 8. In its ruling, the Superior Court declared as unconstitutional, A.R.S. § 16-901.01, the statute defining "expressly advocates." *Id.* While the Secretary of State appealed the Superior Court's decision, a stay was not granted, nor was any other type of legal action imposed that suspended or reversed the Superior Court's ruling. The CCEC entertained discussion as to the effect of the Superior Court's ruling at its November 20, 2014 open meeting and

[5] It is a severe burden on First Amendment rights afforded to issue advocacy speakers in Arizona to have to expend money and resources fighting legal challenges before two separate agencies that may, as they have in this case, render two very different interpretations of the very same statutory provision. These complicated procedures most certainly chill speech by making any attempt to exert one's First Amendment right to air an issue advertisement prohibitively unpredictable and potentially costly, a result the U.S. Supreme Court explicitly cautions against. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010).

admitted the Superior Court's ruling controlled at the time LFAF aired its advertisement. I.R. 13; Exhibit 25 thereto (I.R. 46) at 39:5-40:8 and 57:22-58:22, (attempting to diminish the effect of the Superior Court's ruling by referring to it as a "minute entry"). It is LFAF's position, supported by federal case law, that the Executive Branch of the Arizona government, including the CCEC, was bound by the declaratory ruling in *CJF* because the Arizona Secretary of State's Office was a party to the case.

While LFAF believed at the time, and continues to believe and assert before this court, that its advertisement communicated a legitimate issue advocacy message, it aired its advertisement knowing that an Arizona court of competent jurisdiction deemed Arizona's statutory definition of "expressly advocates" to be unconstitutional. The U.S. Supreme Court recognized that unconstitutional laws are unenforceable against those who act in reliance on the law's status by establishing the *void ab initio* doctrine, which Justice Field described in *Norton v. Shelby County*. "An unconstitutional statute is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). While the U.S. Supreme Court's direct application of the *void ab initio* doctrine has been softened through the years to accommodate those who become unjustly effected by the retroactive application of an unconstitutional law, the general premise and legal doctrine holds true today for those who reasonably act in reliance on a law's status as being unconstitutional. *See Beatty v. Metropolitan St. Louis Sewer Dist.*, 914 S.W.2d 791, 794 (Mo.S.Ct. 1995) (citing *Norton,* at 442) ("The modern view,

however, rejects this rule to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held unconstitutional.").

Additionally, federal courts have recognized "that a federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect." *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) (*en banc*) (quotation marks omitted) (decision based on mootness). This finding is rooted in the notion that legitimate reliance on an official interpretation of the law is a defense. *See United States v. Brady,* 710 F.Supp. 290, 294 (D.Colo.1989) citing *United States v. Durrani*, 835 F.2d 410, 422 (2d Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984) (although there are few exceptions to the rule that ignorance of the law is no excuse, there "is an exception for legitimate reliance on official interpretation of the law."). "The doctrine is applied most often when an individual acts in reliance on a statute or an express decision by a competent court of general jurisdiction . . ." *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987); *United States v. Moore*, 586 F.2d 1029, 1033 (4th Cir. 1978) ("Of course, one ought not be punished if one reasonably relies on a judicial decision later held to have been erroneous").

By parallel analogy, the CCEC is, in this instance, attempting to enforce a state law that had been declared by a court of competent jurisdiction with power over the CCEC to be unconstitutional at the time LFAF acted. It was not until several weeks *after* the CCEC decided to pursue this matter, and several months after LFAF's advertisements aired, that the Court of Appeals reversed the judgment of the trial court. *Comm. For Justice & Fairness (CJF) v. Ariz. Secy. Of State's Office*, 235 Ariz. 347, 332 P.3d 94

(App. 2014).[6] In fact, the CCEC's position appeared to be that it was LFAF's "burden" to demonstrate how a valid declaratory judgment of the Maricopa County Superior Court was in fact "binding" on the CCEC. *See* I.R. 13; Exhibit 25 thereto (I.R. 46) at 58:9-20.

It is undisputed that A.R.S. § 16-901.01 was considered unconstitutional by the Maricopa County Superior Court at the time LFAF aired its advertisement. CCEC, therefore, cannot enforce the statute's express advocacy reporting requirements upon LFAF, as doing so would violate the legal doctrine of *void ab initio* and the constitutional due process requirements of not permitting an agency to enforce an unconstitutional law. The Arizona Secretary of State's office is in fact following this doctrine in a similar case where a federal court has declared the State's definition of "political committee" to be so vague as to be unenforceable. *Galassini v. Town of Fountain Hills*, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. Dec. 4, 2014); *see also* "Galassini Impact on Campaign Finance Law" ("Our office is currently not enforcing the compliance provisions of campaign finance law due to the district court order.") available at http://www.azsos.gov/cfs/Galassini.htm (visited December 27, 2014).

The CCEC's position is strikingly different from that of the Secretary of State and is a position that cannot be upheld.

[6] A Petition for Review of the CJF decision was pending before the Arizona Supreme Court at the time this appeal was filed. *Committee for Justice & Fairness v. Arizona Secretary of State*, CV-14-0250-PR (Ariz.S.Ct.). On April 21, 2015, the Arizona Supreme Court declined review of the decision of the Court of Appeals in that matter without further comment.

III. IF THE CCEC HAD JURISDICTION AND THE DEFINITION WAS ENFORCEABLE AT THE TIME LFAF SPOKE, WHETHER THE CCEC VIOLATED THE FIRST AMENDMENT WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING LFAF'S ADVERTISEMENT CONSTITUTED EXPRESS ADVOCACY.

Longstanding First Amendment jurisprudence requires a court to apply an objective standard when assessing whether speech constitutes the functional equivalent of express advocacy. *See Citizens United* at 558 U.S. at 324-325, (citing *WRTL* at 474 n.7 (noting "the functional-equivalent test is objective: [A] court should find that [a communication] is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.") (internal quotations omitted)). If the Arizona statutory definition allows for a subjective analysis of context, then this statute has to be unconstitutional following the Supreme Court decisions in *Citizens United* and *WRTL*.

The U.S. Supreme Court has held that only express advocacy or its functional equivalent is subject to regulation through campaign finance laws. *See McConnell v. FEC*, 540 U.S. at 93, 105 (2003); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per curiam). In *Buckley*, the Supreme Court emphasized the unique nature of "explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43 (finding the following words constituted express advocacy: "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, reject").

Buckley's "magic words" test had been upheld in courts throughout the country until recently when the Ninth Circuit expanded the definition to include not only communications containing magic words, but also communications when read in total, and with limited

reference to external events, are susceptible of "[n]o other reasonable interpretation but as an exhortation to vote for or against a specific candidate." *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). A later Ninth Circuit opinion clarified and narrowed *Furgatch* by noting when interpreting express advocacy, the Ninth Circuit presumes express advocacy "must contain some explicit words of advocacy." *California Pro-Life Counsel v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003); *Furgatch*, 807 F.2d. at 864 ("context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words"). While express advocacy may not be limited to "circumstances where an advertisement only uses so-called magic words . . . ." Supreme Court precedent explicitly confines the contours of express advocacy to protect the speaker's legitimate right to engage in issue advocacy speech. *Getman* and *Furgatch* demonstrate that the most expansive definition of express advocacy requires that speech only qualifies as express advocacy if it "[p]resents a clear plea for action, and thus speech that is merely informative is not covered by the Act." *Furgatch*, 807 F.2d. at 864.

The CCEC erred in its analysis of LFAF's advertisement by failing to apply an objective standard. *See WRTL*, 551 U.S. at 470 (requiring a standard that "focus[es] on the substance of the communication rather than amorphous considerations of intent and effect."). In rendering its decision, the CCEC overlooked two critical components of LFAF's advertisement. First, LFAF's advertisement did not proffer a clear plea for action in conjunction with Mr. Smith's campaign for Arizona Governor. Second, the substance of LFAF's advertisement, when viewed through an objective lens, shows that it was: (i)

targeted to effectuate a legitimate issue advocacy message, and (ii) part of a broad issue advocacy campaign.

A. LFAF's Advertisement Lacks A Clear Plea For Action

Because LFAF's advertisement lacks a clear plea for action, the CCEC erred when it ruled that the advertisement constituted the functional equivalent of express advocacy, contrary to well established U.S. Supreme Court precedent. Such a reading of the advertisement required the CCEC to exert a subjective, intent-based analysis of the facts; a chore that flies directly in the face of Chief Justice Roberts and the Supreme Court in *WRTL*. *See WRTL* 551 U.S. at 467 (declining to adopt a test "turning on the speaker's intent to affect the election.").

At the heart of the CCEC's decision is its reliance on the CCEC Executive Director's Probable Cause Recommendation ("Recommendation") presented to the Commission by Tom Collins, CCEC's Executive Director. Instead of applying an objective analysis of the facts, the Recommendation veils its findings in subjective, intent-based assertions. The instances are numerous and appear frequently throughout the Recommendation. On page 6 and continuing on to page 7 of the Recommendation, it suggests that LFAF's advertisement is meant to carry a message that sways Republican primary voters. I.R. 13; Exhibit 21 thereto (I.R. 41) at pp. 6-7. On page 10, the Recommendation states "the advertisement places Mr. Smith in a negative light with Republican primary voters." *Id.* at p. 10. Absent from the Recommendation, however, is objective evidence of such an impact. The basis for the Recommendation's statements are even more mysterious when considering the fact that Arizona does not have closed primaries, which leads one to believe that the advertisement

most certainly may have been interpreted differently by different primary election voters: Republicans, Independents and those who register without a party preference.

Furthermore, the CCEC on multiple occasions pressed to discern the intent behind LFAF's advertisement through questioning during is public meetings. *See* I.R. 13; Exhibit 14 thereto (I.R. 34) at 58:10-59:4), Exhibit 17 thereto (I.R. 37) at 22:9-23:16; Exhibit 25 thereto (I.R. 46) at 29:14-34:25). Instead of focusing on the four corners of the ad itself, the CCEC obscured and confused the ad's meaning with contextual and intent-based rhetoric. While context may be considered when determining whether an advertisement constitutes the functional equivalent of express advocacy, the U.S. Supreme Court does not support the CCEC's considerable reliance on contextual considerations. *See WRTL* 551 U.S. at 473-474. In fact, the Supreme Court concluded that contextual considerations "should seldom play a significant role" in determining whether speech is express advocacy. *WRTL,* 551 U.S. at 473-474. While "basic background information that may be necessary to put an ad in context" may be considered, the Court noted that courts should not allow basic background information to "become an excuse for discovery." *Id.*

Thus, the Recommendation's argument, which was relied upon by the CCEC, that the advertisement's call to action "is belied by the context of the advertisement" in that the advertisement does not relate to pending legislation in the City of Mesa, runs counter to Supreme Court precedent. I.R. 13; Exhibit 21 thereto (I.R. 41) at p. 9. The reality of the matter is that the federal policy issues mentioned in the advertisement (environment; healthcare; the Second Amendment; and the Federal Budget) are relevant issues of national importance. It is this factual reality that led the ALJ to conclude that "a communication

expressly advocates only if there can be 'no reasonable meaning other than to advocate the election or defeat of the candidate.'" I.R. 54 at ¶ 16 (citing A.R.S. § 16-901.01(A)(2)).

References throughout the Recommendation, as well as comments made during public Commission meetings, assume that statements affixed to policy positions of the U.S. Conference of Mayors were purposed to undermine Mayor Smith's efforts to be elected as governor. *See* I.R. 13; Exhibit 25 thereto (I.R. 46, 40:10-20, 44:4-16, 48:3-50:2). The reality is that Mayor Smith held the highest position within the U.S. Conference of Mayors and bore the burden of being associated with the issues of public importance promulgated by the Conference. In many ways, the federal public policy issues addressed in LFAF's advertisement constituted matters of greater importance than Mayor Smith's personal ambitions for higher office. Under the CCEC's analysis, there can be no such thing as a genuine issue advertisement when that ad mentions an individual who happens to be a candidate for public office at anytime before an election (even five months) even in cases where that candidate maintains a public position and the ad articulates a clear policy statement. Chief Justice Roberts dismissed such an attempt outright in saying,

> [t]his "heads I win," "tails you lose" approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads, contrary to our conclusion in WRTL I that as-applied challenges to § 203 are available, and our assumption in McConnell that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads."

WRTL, 551 U.S. at 471 (citing *McConnell* 540 U.S. at 206).

IV. WHETHER THE CCEC ERRED, AS A MATTER OF LAW, BY REVERSING THE INTERPRETATION OF THE LAW AND FACTS OF THE ADMINISTRATIVE LAW JUDGE'S DECISION.

Arizona defines express advocacy to mean only those communications that explicitly urge the election or defeat of a particular candidate or that "in context can have no reasonable meaning other than to advocate the election or defeat of the candidate(s), as evidenced by factors such as the presentation of the candidate(s) in a favorable or unfavorable light, the targeting, placement or timing of the communication or the inclusion of statements of the candidate(s) or opponents." A.R.S. § 16-901.01(A).

When objectively analyzed, LFAF's advertisement is seen for what it is, an issue advocacy communication. A reasonable person reviewing the advertisement will notice that there is no mention of any election whatsoever. First, the ad does not mention any individual as a candidate for office. Second, the ad does not reference voting and certainly does not mention any political party. Third, the unmistakable "call to action" is to "tell Scott Smith, the US Conference of Mayors should support policies that are good for Mesa." This call to action addresses Mr. Smith in both his public roles as Mayor of Mesa and as President of the U.S. Conference of Mayors. It references policy initiatives that are highlighted earlier in the ad and are supported by the Conference. Therefore, a simple, objective application of the factors proffered in Section 16-901.01 shows that LFAF's advertisement is genuine issue advocacy that has a reasonable meaning other than to defeat Mr. Smith in the Arizona primary election. Reasonably viewed, the Advertisement calls on the U.S. Conference of Mayors, through Mayor Smith, the organization's president, to reform its policies.

Under such an objective analysis, the ALJ agreed with LFAF that the advertisement is reasonably seen to be issue advocacy. I.R. 54 at ¶ 16 ("The Subject Advertisement can reasonably be seen as permissible issue advocacy based on factors such as the content of the communications; that they were aired at a time in which Mr. Smith was still the mayor of Mesa and the President of the Conference; . . . they were aired about four and one-half months before early voting started in the Republican Primary, . . . and voting was not limited to registered Republicans.")

The ALJ's finding is bolstered by the facts presented to the CCEC that comments made by ordinary citizens in response to the ad provide a sharp contrast to what the CCEC purports to be the purpose of the ad. These comments, posted to the Legacy Foundation Action Fund's YouTube channel, differ from the conclusion reached by the Maricopa County Department of Elections referenced, *supra*. Some of the comments from ordinary citizens include the following:

- I live in Chandler (the city boarding Mesa to the southwest) this ad made me want to volunteer for Scott Smith Mayoral Campaign.

- Wow! Scott Smith is supportive of health care for everyone, reducing pollution to stop global warming and keep guns out of the hands of lunatics? Sounds like a great mayor to me! Go Scott!

- . . . [T]his ad actually makes Mesa's Mayor, Scott Smith sound wonderful. Mayor Smith supports great ideas that are beneficial to common Americans . . . .

I.R. 5 at p. 17.

Therefore, while the CCEC claims that the advertisement can only have one "objective" meaning, the ALJ, as well as the public, disagreed. These comments and the conclusion of the Maricopa County Department of Elections demonstrate that there is more than one reasonable interpretation of the advertisement, thereby rendering CCEC's order and assessed penalty in error.

Without mere mention of the reasonable alternative interpretations highlighted above, the CCEC repeatedly suggested that the *only* reasonable meaning of the ad was to advocate the defeat of Mayor Smith. However, the CCEC in a biased fashion never appreciated LFAF's larger mission, which required it to be critical of the policy positions supported by the U.S. Conference of Mayors. Common sense dictates that when airing an advertisement that seeks to oppose the policy positions of an organization, it makes sense to identify those individuals responsible for the organization's decision making. Mayor Smith, at the time the advertisement aired, was the President of the U.S. Conference of Mayors and therefore served as the figurehead of that organization.[7] Whether Mr. Smith liked it or not, when he assumed that role, he undertook the public persona of being responsible for the public positions and policies of the Conference. This holds true for past positions of the Conference as well. Therefore, the fact that the advertisement aired during the last two weeks of Mayor Smith's term as mayor and President of the U.S. Conference of Mayors is

[7] LFAF's advertisement at issue was not aired in isolation. As mentioned *supra*, LFAF attacked the policies of the U.S. Conference of Mayors by running advertisements mentioning other leaders in that organization in Sacramento, CA and Baltimore, MD. The CCEC finds fault in the amounts of money spent in these other cities, but this information is hardly relevant given that viewers of the Arizona advertisements would have to undertake substantial efforts to make such comparisons.

irrelevant since the language in the advertisement very clearly criticized the policy positions of the U.S. Conference of Mayors.

i. LFAF's Advertisement Was Targeted To Be Effective For Its Issue Advocacy Purpose.

LFAF's advertisement ran in Mesa, AZ. However, a person looking to purchase television airtime in Mesa, AZ, cannot simply target its purchase to the city of Mesa. Instead, because of the configuration of television stations and coverage areas, LFAF had to purchase airtime in the Phoenix, AZ market. *See* I.R. 5; Exhibit A thereto; *see also* Exhibit B thereto at p. 11 and I.R. 30 at p. 6. The Recommendation cited the fact that LFAF targeted an audience greater than Mesa to suggest that such targeting was purposed to sway voters rather than to address policy issues to Mr. Smith's constituents. I.R. 41 at p. 6. Such an assertion is not taking into consideration the practical aspect of buying television airtime. LFAF was forced to purchase its airtime in the Phoenix, AZ market, the narrowest market available. This fact in no way takes away from the advertisement's issue advocacy message. To find otherwise would stifle protected First Amendment Free Speech rights in most any situation where such precise targeting is made unfeasible at no fault of the speaker.

ii. LFAF's Advertisement Was Part Of A Broad Issue Advocacy Campaign.

LFAF's advertisement aired nearly five months before any election, a span of time great enough to vastly diminish any alleged influence the ad may have had on any election. I.R. 13 at ¶ 14. The timing, in terms of airing of an ad to the date of the election, proved vital in many courts' decisions, contrary to the Recommendation's assertion otherwise. *See WRTL,* 551 U.S. at 472 (finding that every ad covered by BCRA § 203 will by definition air

just before an election – specifically 30 days in advance of a primary or 60 days in advance of a general election); *Furgatch,* 807 F.2d at 865 (finding it determinative that the newspaper advertisement was run one week prior to the general election); *Committee for Justice & Fairness v. Arizona Secretary of State's Office,* 325 P.3d 94, 101, 102 (App. 2014) (noting the ad was aired within days of the election and immediately before the election).

The CCEC failed to acknowledge the limitations of the reach of "functional equivalent" express advocacy definitions outside of the 30 and 60 day windows relative to primary and general election dates approved by the Supreme Court in *WRTL.* Both the Recommendation and the CCEC emphasized that LFAF's advertisement began airing after Mr. Smith announced his candidacy for governor. The Recommendation suggests that the CCEC should believe that Mr. Smith's role as President of the U.S. Conference of Mayors was not applicable or for some reason did not carry as much significance as Mr. Smith's newly-proclaimed role as candidate for governor. It is simply not the case that once Mr. Smith announced his candidacy for governor he relinquished his roles as Mayor of Mesa or President of the U.S. Conference of Mayors. In fact, Mr. Smith remained as Mayor of Mesa and President of the U.S. Conference of Mayors until April 15, 2014, which was after LFAF's advertisement was last broadcast. Therefore, for Commissioner Hoffman to remark that "I feel confident that it – that this ad would not have been run had [Mr. Smith] not announced a – gubernatorial campaign" shows just how shortsighted the Commission's analysis truly was and how focused the Commission was on its subjective analysis of its perception of LFAF's intent. I.R. 13; Exhibit 25 thereto (I.R. 46). This statement does not

even consider LFAF's organizational views and broader campaign to combat policies promulgated by the U.S. Conference of Mayors.

By focusing on the timing of LFAF's advertisement relative to Mr. Smith's announcement of his candidacy rather than on the date of the election nearly five months away, the CCEC turned a blind eye to established First Amendment jurisprudence. Under the CCEC's analysis, a public official who announces his candidacy for another public office cannot be the subject of an issue advocacy advertisement concerning actions taken by the public official during his tenure in his existing office. Such a standard does not support the notion that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

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

The CCEC may not assess a penalty against LFAF because it has failed to identify the candidate the advertisement was "by or on behalf of" and the "candidate or candidate's campaign account" that shall be "jointly and severally liable" for any civil penalty assessment. A.R.S. § 16-942(B). To assess a penalty solely against LFAF is to act in excess of the CCEC's jurisdiction.

The CCEC relied on A.R.S. §16-957 as well as A.A.C. R2-20-109(F)(3) as its basis for asserting jurisdiction and applying a civil penalty against LFAF for delinquent independent expenditure reports. I.R. 47. Both the statute and regulation point to A.R.S. § 16-942(B) as the sole means of assessing any civil penalty. However, the CCEC lacked the jurisdiction to exact a civil penalty under A.R.S. § 16-942(B), or any other statute for that

matter, because the statute's enforcement provisions are clear in that they refer to candidates or organizations making expenditures "by or on behalf of any candidate." A plain language reading of the statutory section below clearly illustrates this requirement,

> In addition to any other penalties imposed by law, the civil penalty for a violation *by or on behalf of any candidate* of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. *The candidate and the candidate's campaign account shall be jointly and severally responsible* for any penalty imposed pursuant to this subsection.

A.R.S. § 16-942(B) (emphasis added). Before the CCEC is able to apply the statutory penalties provided in Section 16-942(B) to LFAF, it must: (1) identify the candidate for which LFAF's advertisement was "by or on behalf of," and (2) hold that candidate and the candidate's campaign jointly and severally responsible.

The CCEC failed to identify the statutorily required candidate and attribute such to LFAF in light of its findings at its August 21, 2014 meeting as well as its November 20, 2014 meeting. At its August 21, 2014 meeting, the Commission voted to find no reason to believe that coordination between LFAF and Ducey 2014 Campaign existed.[8] Then, during its November 20, 2014 meeting, commissioners engaged in a series of questions from which it was made clear the CCEC did and does not fully grasp the notion that legislative language

[8] At the time of the Commission's consideration of this matter on July 31, 2014, there were seven candidates for the Republican nomination for Governor, including now-Governor Ducey and Mayor Smith.

cannot be superfluous. *See* I.R. 46 at 40:10-24 ("So, I don't – I don't quite understand why you're saying a campaign has to be identified or who would benefit from.").

The principles of statutory construction are grounded in the goal of giving effect to the Legislature's intent, or in the case of the Citizens Clean Elections Act, the people's intent. *People's Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, 403, P7, 46 P.3d 412, 414 (2012). It is only when the language of a statute is ambiguous that principles of statutory construction are applied. *Aros v. Beneficial Ariz., Inc.,* 194, Ariz. 62, 66, 977 P2.d 784, 788 (1999). If a statute is unambiguous, the statute is applied without applying such principles. *Id.*; *see In the Matter of: Joel Fox dba SCA*, 2009 AZ Admin. Hearings LEXIS 1307, 25-27 (holding "The County's position is not consistent with principles of statutory construction" when it interpreted statutory language to be inapplicable in contradiction to legislative intent).

A.R.S. § 16-942(B) is not ambiguous and, therefore, can only be applied to a candidate or an organization working "by or on behalf of" a candidate. Because LFAF is certainly not a candidate and the CCEC already found LFAF not to be working on behalf of (or even in coordination with) the Ducey 2014 Campaign or any other candidate committee, the CCEC erred in applying Section 16-942(B) to levy a civil penalty against LFAF.

Even if the language were to be deemed ambiguous, application of principles of statutory construction suggest that the statutory language of "candidate" and "by or on behalf of any candidate" have a meaning and purpose. The CCEC's failure to consider these mandatory statutory requirements requires that CCEC be prohibited from applying this statutory civil penalty provision against LFAF. To allow the CCEC to distort the

meaning of its own jurisdictional statute to expand its regulatory reach over a reporting requirement rendered unenforceable by the U.S. Supreme Court is to provide a means to circumvent the fundamental principles of statuary construction. *See Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P. 2d 1222, 1223, (1991) ("Each word, phrase, clause, and sentence [of a statute must be given meaning so that no part will be void, inert, redundant, or trivial.").

The ALJ concluded that, "[u]nder the 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 [the CCEC's regulation] and, in other cases, it would require adding a limitation to the statute that was not included by the voters." I.R. 54 at ¶ 20. The CCEC cannot simply concoct a different meaning for existing statutory language to make it applicable to organizations making communications having no relation to candidates, as is the case here. "CCEC's interpretation is contrary to the principles of statutory construction and the Order does not meet the requirements of ARIZ. REV. STAT. section 16-042(B)." I.R. 54 at ¶ 21 (citing *Guzman v. Guzman*, 175 Ariz. 183, 187, 854 P.2d 1169, 1173 (App. 1993); and *Darrah v. McClennen*, 689 Ariz. Adv. Rep. 12, 337 P.3d 550 (App. 2014).

The absence of any clearly applicable penalty provision also supports LFAF's argument, outlined *supra*, that the CCEC lacks jurisdiction over this matter – both LFAF as an entity and over the speech in which LFAF engaged – in the first instance.

VI. WHETHER THE CCEC'S ACTIONS, IN VIOLATING THE FIRST AMENDMENT, SHOULD RESULT IN THE AWARD OF LEGAL FEES TO LFAF.

Pursuant to Arizona law, LFAF should be awarded fees and other expenses resulting from the continued challenge of CCEC's jurisdiction and enforcement action in this case.

Arizona statutes provide, in pertinent part, that "[i]n addition to any costs that are awarded as prescribed by statute, a court shall award fees and other expenses to any party other than this state . . . that prevails by an adjudication on the merits in . . . a court proceeding to review state agency action . . . ." A.R.S § 12-348(A)(2). For this purpose, "fees and other expenses" means "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which the court finds to be directly related to an necessary for the presentation of the party's case and reasonable and necessary attorney fees, *and in the case of an action to review an agency decision pursuant to subsection A, paragraph 2 of this section, all fees and other expenses that are incurred in the contested case proceedings in which the decision was rendered.*" A.R.S. § 12-348(I)(1) (emphasis added).

The provision entitling LFAF to reasonable attorneys fees indicates that "the award of attorney fees may not exceed the amount that the prevailing party has paid or has agreed to pay the attorney or a maximum amount of seventy-five dollars per hour *unless the court determines that . . . a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee.*" A.R.S. § 12-348(E)(2). LFAF asserts that CCEC's enforcement action is precisely the type of First Amendment violation Chief Justice Roberts warned against in *Citizens United*: "The First Amendment does not permit

laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." 558 U.S. 310, 324 (2010). However, CCEC's misplaced interpretation of its jurisdiction and Arizona's independent expenditure reporting regime has done just that. As a result of the highly specialized area of First Amendment and campaign finance actions, LFAF further submits that this action is ripe for the exercise of this court's discretion in exceeding the $75 per hour cap as is authorized by A.R.S. § 12-348(E)(2).

CONCLUSION

The CCEC, even though it did not have jurisdiction over LFAF or its speech, applied a subjective, intent based analysis to find LFAF's advertisement constituted the functional equivalent of express advocacy, a finding that runs counter to well established U.S. Supreme Court precedent. LFAF acted in good faith reliance on the fact that Arizona's express advocacy statute had been ruled unconstitutional prior to and during the airing of the advertisement.

To the extent there is any overlap between express advocacy and issue advocacy in this matter, the Commission was required to "give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S. at 469. Instead, the Commission actually recognized that this analysis constituted a case of "grayness" but instead of following U.S. Supreme Court precedent, it found that "this one is far enough in the gray zone that it was express advocacy." I.R. 46 at 59:13-14.

The CCEC's Final Administrative Decision should be reversed. This court should conclude that the CCEC exceeded its statutory authority in asserting jurisdiction over this

matter (both in the person of LFAF and in the subject matter of the speech involved), that LFAF's Arizona advertisement was not express advocacy and therefore not subject to the CCEC's reporting requirements, and that the CCEC has no basis in fact or law for imposing any civil penalty at all in this matter. This court should further award LFAF reasonable expenses and attorneys fees adjusted appropriately for the highly-specialized questions of First Amendment law that CCEC's enforcement action has given rise to.

DATED this 26th day of May, 2015.

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