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MAY 12 2015

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE COUNTY OF MARICOPA

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

Plaintiff/Appellant,

vs.

CITIZENS CLEAN ELECTIONS
COMMISSION;

Defendant/Appellee.

No. LC2015-000172-001

RESPONSE TO MOTION TO DISMISS

(Oral Argument Requested)

(Assigned to the Honorable Crane McClellenn)

Plaintiff/Appellant, Legacy Foundation Action Fund ("LFAF") by and through undersigned counsel hereby submits its Response to the Motion to Dismiss submitted by the Citizens Clean Elections Commission ("CCEC"). This response is made based on the detailed Memorandum of Points and Authorities that follows and the oral argument of counsel offered at any hearing conducted concerning this matter. Wherefore, LFAF respectfully requests that this Court deny the Motion to Dismiss and proceed to resolve this appeal on the merits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

LFAF opposes this motion on several grounds. First, LFAF timely and properly commenced this appeal of a final administrative order by following the procedures provided for under the CCEC's Rule (R2-20-228), the Uniform Administrative Hearing Procedure Act (A.R.S. § 41-1092.08(H)) and the statutes governing the Judicial Review of Administrative Decision (A.R.S. § 12-904). Second, LFAF submits that the provisions of A.R.S. § 16-957(B) were observed and satisfied by the parties in the proceedings leading to LFAF's successful administrative appeal and do not apply to the appeal of the subsequent final administrative order.

Third, even if A.R.S. § 16-957(B) applies to this appeal, the CCEC did not properly follow the statutory procedures to invoke that statute's 14-day time limitation because the CCEC has yet to comply with, and file the requisite order required by, the two-stage process of A.R.S. § 16-957(A) and (B). Thus, if that statute applies, the appeal time has not yet commenced. Fourth, even if A.R.S. § 16-957(B) applies, LFAF is still timely under the rules because the Arizona Rules of Procedure for Judicial Review of Administrative Decisions apply and, either LFAF was not yet properly served or the five day mail rule applies making the filing of the Notice of Appeal timely in any event.

Finally, even if the Court accepts the CCEC's argument about application of the 14-day rule of A.R.S. § 16-957(B), this essentially is nullified by the exception to all statutory time frames provided in A.R.S. § 12-902(B) when a person challenges an agency's jurisdiction over the person or subject matter. From the beginning of this matter – both before the CCEC and in a special action previously filed by LFAF on this subject – LFAF has contested the CCEC's jurisdiction over LFAF as an entity and over the subject matter of its speech.

1 **II. Procedural Background**

2 This matter is an appeal from a Final Administrative Decision entered by the CCEC March
3 27, 2015. The full administrative record in this matter is soon to be filed with the Court by the
4 Office of Administrative Hearings, and this Court has on record LFAF's prior special action filed in
5 *Legacy Foundation Action Fund v. Citizens Clean Election Commission*, No. CV2014-003968. For
6 convenience of the court, this Memorandum will not recite the entire procedural history of the
7 underlying matter except where necessary to oppose the pending Motion.¹

8 In March and April of 2014, LFAF aired an advertisement discussing Mayor Smith of Mesa,
9 Arizona and the policy positions of the U.S. Conference of Mayors. At the time the advertisements
10 aired, Mayor Smith was the president of that organization. LFAF's advertisement ceased broadcast
11 several days before Mayor Smith resigned as Mayor of Mesa in mid-April of 2014. No other actions
12 were taken from April of 2014 to July 1, 2014.

13 On July 1, 2014, a complaint was filed, both with the CCEC and the Secretary of State,
14 alleging that LFAF has engaged in express advocacy independent expenditures related to the
15 Republican gubernatorial primary without filing the appropriate paperwork with the Secretary of
16 State or the CCEC. The Secretary of State, acting through Maricopa County Department of
17 Elections, dismissed the matter on July 21, 2014. LFAF filed a special action in this court on July
18 18, 2014, challenging the jurisdiction of the CCEC over this matter and, on September 26, 2014,
19 this Court dismissed the special action for failure to exhaust administrative remedies.

20 The CCEC held several hearings on this matter. Throughout this entire case, LFAF has
21 maintained that the CCEC has exceeded its jurisdiction. On September 26, 2014, the CCEC issued
22 an Order Requiring Compliance pursuant to A.R.S. § 16-957(A) & A.A.C. R2-20-208(A) along
23 with a notice of hearing. LFAF has not appeared at the hearing.

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¹ LFAF intends to file its merits brief by May 22, 2015, and will include citations to the record in that brief where appropriate to address the merits.

1 with written questions to be answered under oath verifying LFAF's spending in Arizona (the
2 "Compliance Order"). A true and correct copy of the Compliance Order is attached hereto as
3 Exhibit "A." Notably, the Compliance Order found that there was "reason to believe that [LFAF]
4 violated the Citizens Clean Elections Act and Rules" (emphasis in original) and stated:

5 **14 Day Period to Comply**

6 You are hereby ordered to comply with A.R.S. §§ 16-941(D);-958
7 and A.A.C. R2-20-109 within 14 days of the date of this order. ...

8 After the 14 days, if the Commission finds that you remain out of
9 compliance, the Commission shall make a public finding to that
10 effect and issue an order assessing a civil penalty, unless the
11 Commission publishes findings of fact and conclusions of law
12 expressing good cause for reducing or excusing the penalty. A.R.S. §
13 16-957(B).

14 (emphasis in original).

15 LFAF declined to answer the questions in a letter dated October 3, 2014, claiming that the
16 CCEC's inquiries were not relevant to the Complaint and that the CCEC had no jurisdiction over
17 LFAF or its speech.

18 On November 28, 2014, the CCEC issued an Order and Notice of Appealable Agency
19 Action that made a "public finding" that LFAF failed to comply with the Compliance Order within
20 "the expiration of fourteen days" and assessed civil penalties against LFAF (the "Order Assessing
21 Civil Penalty"). A true and correct copy of the Order Assessing Civil Penalty is attached hereto as
22 Exhibit "B." The Order Assessing Civil Penalty specifically stated that LFAF could request an
23 administrative hearing to contest the order. On December 1, 2014, LFAF filed a Request for an
24 Administrative Hearing pursuant to A.R.S. §§ 16-957(B), 41-1092.03(B) and A.A.C. R2-20-224.

25 The Office of Administrative Hearings conducted a hearing on January 28, 2015, following
the procedures found in the statutes governing administrative hearings (A.R.S. § 41-1092 et. seq.)
and the CCEC's rules (A.A.C. R2-223-228). On March 4, 2015, Administrative Law Judge Thomas

1 Shedden entered an Order sustaining LFAF's appeal (the "ALJ Order"). Notably, the ALJ Order
2 specifically ordered *"that the November 28, 2014 Order assessing civil penalty is rescinded."*

3 On March 27, 2015, after an additional public hearing on the basis of a "Motion to Accept,
4 Reject or Modify" the decision of the administrative law judge, the CCEC entered a "Final
5 Administrative Decision," rejecting Judge Shedden's ALJ Order and reinstated civil penalties
6 against LFAF (the "Final Administrative Decision"). A true and correct copy of the Decision is
7 attached hereto as Exhibit "C". The Final Administrative Decision was sent to LFAF's counsel via
8 electronic mail only, and stated *"Pursuant to A.R.S. § 41-1092.08, this is the final administrative*
9 *decision in this matter."* (Exhibit C at p. 7) (emphasis added). The Final Administrative Decision
10 does not claim to be an order issued pursuant to A.R.S. § 16-942(B). On April 14, 2015 (18
11 calendar days later), LFAF filed its Notice of Appeal and Complaint for Judicial Review of
12 Administrative Decision, pursuant to A.R.S. §12-901 and A.A.C. R2-20-228. On May 4, 2015, the
13 CCEC filed its Motion to Dismiss, citing A.R.S. §16-957(B).
14

15 **III. LFAF Properly and Timely Followed the Procedure for Appealing a Final**
16 **Administrative Decision in Accordance With A.R.S. §§ 12-901 et. seq.; A.R.S. § 41-**
1092.08(H); and the CCEC's Own Rules.

17 When Arizona's voters created the CCEC, the CCEC was authorized to "adopt rules . . . to
18 govern procedure of the Commission." A.R.S. § 16-956(C). Exercising that authority, in 2001, the
19 CCEC adopted its administrative procedures, including those applicable to the request for an
20 administrative appeal of an appealable agency action and the judicial review of the ensuing final
21 administrative decision. See A.A.C. R2-20-217-228. Those rules impose an exhaustion requirement
22 mandating that a party "does not have the right to judicial review unless that party first exhausts its
23 administrative remedies by going through the above steps [of A.A.C. R2-20-224-227]."² The
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25 ² The CCEC's rules were enacted after A.R.S. § 16-957 and created a new requirement that a party must exhaust its
administrative remedies before it may appeal to superior court. A.R.S. § 41-1092.08(H); A.A.C. R2-20-228. If this rule

1 "steps" mandated under the CCEC's rules require the respondent to pursue appeal through the
2 Administrative Procedure Act and culminate with clear direction on how a party is to appeal the
3 resulting final administrative decision to the Superior Court. In that regard, both the Administrative
4 Procedures Act and the CCEC's own rules specifically direct that a party wishing to appeal a final
5 administrative decision do so pursuant to A.R.S. § 12-901 et. seq.; A.R.S. § 41-1092.08(H); and
6 A.A.C. R2-20-228. As noted above, both the CCEC and LFAF followed these administrative
7 review procedures precisely and timely. The CCEC reviewed the ALJ Order and on March 27,
8 2015, entered its Final Administrative Decision, citing A.R.S. § 41-1092.08(B), pursuant to A.A.C.
9 R2-20-227.³ The Final Administrative Decision does not claim to be an order entered under A.R.S.
10 § 16-957(B). In fact, it states "pursuant to A.R.S. § 41-1092.08(F), this is the Final Administrative
11 Decision in this matter." Final Administrative Decision at 7: 25-26. That statute and the CCEC's
12 rules both direct that a party seeking judicial review of a final administrative decision must do so
13 "pursuant to A.R.S. § 12-901 et. seq." A.A.C. R2-20-28; A.R.S. § 41-1092.08(H).

14
15 In this case, none of the applicable statutes, the CCEC's own rules, nor the Final
16 Administrative Decision make any reference to an appeal of a final administrative decision through
17 a repeated application of A.R.S. § 16-957(B). The rules and statutes do not reference A.R.S. § 16-
18 957(B) because it simply does not apply to an appeal of a final administrative decision.

19 As a result, LFAF correctly appealed a final administrative decision by observing the
20 procedures cited in (1) the electronically-served Final Administrative Decision, (2) the Uniform
21 Administrative Hearing Procedures, and (3) the CCEC's own regulations, by filing its Notice of
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24 was in excess of the agency's authority pursuant to statute and the Voter Protection Act, then significant portions of the
25 CCEC's rules need to be struck down by this Court and the entire proceeding against LFAF under this improper
procedure dismissed. See, e.g., *Ariz. Citizens Clean Elections Comm'n v. Bruin*, 234 Ariz. 322 (2014); and *Dioguardi*
v. Superior Court 184 Ariz. 414, 417 (1995).

³ Notably, the Final Administrative Decision was served upon LFAF via email only on Friday, March 28, 2015.

1 Appeal and Complaint for Judicial Review of Administrative Decision on April 14, 2015—well
2 within the 35-day appeal period provided for in the statutes governing administrative procedures
3 (A.R.S. § 41-1092.08(H)) and the Judicial Review of Administrative Decisions. A.R.S. § 12-904.

4 **IV. The Provisions of A.R.S. § 16-957(B) do not Apply to an Appeal of a Final**
5 **Administrative Order.**

6 In its Motion to Dismiss, the CCEC has asked this Court to ignore the statutes governing the
7 conduct and judicial review of administrative hearings and further ignore the CCEC's own
8 administrative rules. For the first time, the CCEC suggests, instead, that the 14-day time limitations
9 of A.R.S. § 16-957(B) apply to this action. A plain reading of A.R.S. § 16-957, however, reveals
10 that it simply does not apply. That statute governs the method and manner through which a party
11 appeals a compliance order issued under A.R.S. § 16-957(A), not an appeal of a final administrative
12 order issued pursuant to A.R.S. § 41-1092.08(F). The parties previously complied with A.R.S. § 16-
13 957(B) through the proceedings resulting in the Order Assessing Civil Penalty and giving rise to
14 LFAF's timely and successful administrative appeal.

15 A.R.S. § 16-957(A) dictates the procedure the CCEC must follow when it "finds that there
16 is reason to believe that a person has violated any provision of this article." As explained above, the
17 CCEC found "reason to believe" and, on September 26, 2014, issued its Order Requiring
18 Compliance citing A.R.S. § 16-957(A). LFAF followed all applicable timelines arising from that
19 "reason to believe" finding and the CCEC's subsequent civil penalty order entered under A.R.S. §
20 16-957(B) from which LFAF commenced its administrative appeal, following the Administrative
21 Procedures Act and the CCEC's own rules. The CCEC apparently agreed that procedures were
22 properly followed by LFAF through this stage of the proceedings.

23 The CCEC's effort to give further meaning to A.R.S. § 16-957 belies the statute's language.
24 Paragraphs (A) and (B) must be read together. Together they create a 28-day process resulting in a
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1 civil penalty, which then (through operation of the CCEC's exhaustion requirement) becomes an
2 appealable agency action. LFAF and the CCEC observed and carried out the procedures of A.R.S. §
3 16-957 as modified through subsequent rule making, which culminated in LFAF's initiation of its
4 administrative appeal. Once the administrative appeal commenced, this matter became subject to the
5 statutes and rules governing such proceedings. Consequently, A.R.S. § 16-957 has been observed
6 and satisfied and had no further meaning to the parties' dispute.

7 The CCEC's proposed application of A.R.S. § 16-957(B) leads to a conclusion that the
8 statute must be observed twice: first, according to its terms, when the CCEC has found "reason to
9 believe," provided a 14-day compliance period (subsection (A)), made a public finding, published
10 findings of fact and conclusions of law, and issued an order assessing a civil penalty (subsection
11 (B)); and second, after completion of the mandatory administrative appeal and Final Administrative
12 Decision by the CCEC. The CCEC's tortured and redundant claim that application of A.R.S. § 16-
13 957 is required twice is not supported by the statutory language, runs directly afoul of the clearly-
14 applicable statutes governing appeals for final administrative orders, the language of the CCEC's
15 own rules, and the statute cited in the Final Administrative Decision.⁴

17 **V. Even if the Timelines of A.R.S. § 16-957 Were Applicable to this Matter, the CCEC**
18 **Has Not Strictly Complied with That Statute.**

19 Alternatively, even if the CCEC is correct and A.R.S. § 16-957 were resurrected and once-
20 again applies after exhaustion of the administrative appeal, the CCEC has not complied with all of
21 the statute's requirements and cannot, therefore, ask the Court to selectively enforce only the 14-day
22 timeline of A.R.S. § 16-957(B).

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25 ⁴ Moreover, imposition of the CCEC's proposed abbreviated 14-day appeal deadline of A.R.S. § 16-957(B) to this
appeal of a final administrative order would effect an impermissible diminishment of LFAF's procedural rights under the
Administrative Procedure Act. A.R.S. § 41-1002(B).

1 A.R.S. § 16-957, like all statutes, must be read in its entirety and the Court must seek to give
2 meaning to all its terms. *Guzman v. Guzman*, 175 Ariz. 183, 187 (App. 1993) (“A statute is to be
3 given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory, or
4 insignificant”). As explained above, A.R.S. § 16-957 creates a two-part, 28-day, enforcement and
5 appeal process. According to the specific language of that statute, before the 14-day appeal period
6 can be invoked, the CCEC *first must observe its obligations under A.R.S. § 16-957(A) to advise*
7 *LFAF of the nature of the violation and allow 14-days for compliance*. Only after that order and
8 compliance period has expired does A.R.S. § 16-957(B) become relevant. That subsection requires
9 the CCEC to take the second step of “making a public finding” and entering an order assessing a
10 penalty. Under the CCEC’s strained reading and repeated application of A.R.S. § 16-957, therefore,
11 the Final Administrative Decision, which rejected the ALJ’s Order vacating the civil penalty and
12 sought to impose its own penalty, at most, satisfied the “reason to believe” and compliance order
13 requirements of A.R.S. § 16-957(A). If the CCEC’s argument is accepted, it has not fulfilled the
14 statute’s 28-day, two-step, process and the 14-day limitations period has not even begun to run.⁵

15
16 Consequently, even if A.R.S. § 16-957 applies a second time after prosecution of the
17 administrative proceeding, the CCEC has not fulfilled the statute’s requirements. As a result, the
18 Motion should be denied and this appeal should proceed to be determined according to its merits.

19 **VI. The Smith Case is Not Applicable To This Appeal.**

20 The CCEC relies entirely on the case of *Smith v. Arizona Citizens Clean Elections*
21 *Commission*, 212 Ariz. 407, 132 P.3d 1187 (2006) (en banc), for its position in the Motion.
22 However, *Smith* is wholly distinguishable from the case at hand. In *Smith*, the CCEC issued an
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25 ⁵ The CCEC’s Final Administrative Decision presents itself as a “final administrative decision” “pursuant to A.R.S. § 41-1092.08(F)” and nowhere cites the appeal provision of A.R.S. § 16-957(B). The only reference to A.R.S. § 16-957 in the Final Administrative Decision is in connection with the CCEC’s declaration that it possesses “authority to impose civil penalties” against LFAF – an assessment which LFAF has consistently opposed.

1 order pursuant to A.R.S. § 16-957(B) on March 25, 2005 concluding that Appellant violated the
2 Clean Elections Act. The order explicitly stated that appellant could appeal the CCEC's decision by
3 requesting a hearing before an ALJ just as the Order Assessing Civil Penalty in this case stated. *Id.*
4 at 1192. Appellant filed a timely request for an administrative hearing, a hearing was held, and,
5 *unlike* this case, the ALJ issued a decision affirming the CCEC's action. *Id.* On August 25, 2005,
6 the CCEC adopted the ALJ's recommendation and issued a final order. *Id.* Notably, the final order
7 contained the following instructions:

8 Pursuant to A.R.S. § 41-1092.09, any party that is aggrieved by this
9 Order may file with the Commission, not later than thirty (30) days
10 after service of this decision, a written motion for rehearing or review
11 In the alternative, any party may file an action for judicial
review in the Superior Court of Arizona. *pursuant to A.R.S. § 16-*
957(B) and A.A.C. R2-20-228.

12 *Id.* at 1194 (emphasis added). The CCEC expressly advised the appellant that it believed § 16-
13 957(B) governed judicial review. As a result of this language, none of the parties disputed what
14 statute governed. They had no reason to. All parties assumed that the CCEC was accurate and the
15 14-day time limit of § 16-957(B) was the correct time limit to apply.

16 The facts of this case are vastly different. First, while the CCEC's actions were upheld by
17 the ALJ in *Smith*, the ALJ sustained LFAF's appeal in this matter and "rescinded" the November
18 28, 2015, Order Assessing Civil Penalty issued pursuant to A.R.S. 16-957(B). In doing so, the ALJ
19 vacated the CCEC's Decision. ". . . [W]hen a conviction is vacated, the effect is to nullify the
20 judgment entirely and place the parties in the position of no trial having taken place at all, thus a
21 vacated judgment is of no further force or effect." *United States v. Williams*, 904 F.2d 7, 8 (7th
22 Cir.1990) (internal citations omitted).

23 In essence, the ALJ, by sustaining LFAF's appeal, held that the CCEC should not have
24 found "reason to believe" in the first place and, as a result, the initial "reason to believe" finding of
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1 A.R.S. § 16-957(A) and civil penalty order of A.R.S. § 16-957(B) should not have existed.

2 Therefore, as explained above, if A.R.S. § 16-957 has any further application, with no initial order.
3 the provisions of A.R.S. § 16-957 have not been employed. Even if this court were to find that § 16-
4 957 governed the appellate process in LFAF's appeal, it could find only that LFAF has acted before
5 being served with a proper §16-957(B) notice and its appeal is not ripe.

6 Second, the CCEC's order in *Smith* referred the respondent specifically to A.R.S. § 16-957
7 for the appellate process. In this case, the CCEC did not claim that the Final Administrative Order
8 was entered pursuant to A.R.S. § 16-957(B). In fact, the CCEC specifically declared that "pursuant
9 to A.R.S. § 41-1092.08(F), this is the Final Administrative Decision in this matter.". Relying on the
10 language of the Final Administrative Order, sent electronically by the CCEC,⁶ LFAF followed the
11 procedures governing the appeal of an A.R.S. § 41-1092.08(F) final administrative order. A.R.S. §
12 41-1092.08(H), A.R.S. § 12-901 et. seq., and A.A.C. R2-20-224.

13
14 Unlike *Smith*, LFAF does not argue that the CCEC waived the applicable time limit for
15 judicial review. It does not argue that a complaint seeking judicial review before the final order is
16 issued is timely because it falls "within" the time limit to request review.

17 Rather, LFAF argues that the CCEC has applied the wrong statute, and thus, the wrong time
18 limit, to LFAF's appeal. This is an issue of statutory construction that requires careful analysis of
19 the statutes' terms, the overall statutory scheme, legislative intent and history, CCEC's instructions
20 to LFAF, and the CCEC's own rules concerning appeals procedures -- none of which were
21 discussed or analyzed in the *Smith* decision. While the court in *Smith* may have included a brief
22 paragraph on the general rule that specific agency procedures trump the provisions of the Judicial
23 Review of Administrative Decisions Act ("JRADA"), it summarily concluded that A.R.S. § 16-
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⁶ LFAF has yet to be served a final order by mail as is required by applicable statutes or CCEC regulations. LFAF has not consented to electronic service as the sole means of service of the Final Administrative Order.

1 957(B) governed judicial review of the CCEC's ruling in *Smith* because the parties had never
2 disputed or argued otherwise, and the parties had been provided with explicit notice of the
3 applicable time frames by the CCEC. *Id.* at 1193. In contrast, the very heart of the parties' present
4 dispute is which statute and time limit governs LFAF's right to judicial review of a final
5 administrative decision. Accordingly, the *Smith* case is clearly not binding or even persuasive. It is
6 inapposite.

7 **VII. Alternatively, Even If The 14-day Period of A.R.S. § 16-957(B) Were Applicable,**
8 **LFAF's Appeal Was Timely Filed.**

9 Alternatively, even if this Court were to apply A.R.S. § 16-957(B), LFAF's appeal was
10 timely filed. A.R.S. § 16-957(B) provides that "the violator has fourteen days from the date of
11 issuance of the order assessing the penalty to appeal to the superior court" Unlike other
12 timelines that commence from "service," "notice," or "filing," this statute chooses to link the appeal
13 timeline to the unusual and confusing landmark of "issuance."

14 Rules of Procedure for Judicial Review of Administrative Decisions governs the procedure
15 for all appeals from administrative decisions, including this one. JRAD Rule 1(a). Those same rules
16 incorporate certain of the Arizona Rules of Civil Procedure. JRAD Rule 1(b). Included within the
17 rules incorporated for application to this proceeding are those rules governing service and the
18 calculation of time. *Id.*; Ariz.R.Civ.P. 5, 6.

19 Rule 6(e) of the Arizona Rules of Civil Procedure is of particular importance in this case.
20 Rule 6(e) states,
21

22 Whenever a party has the right or is required to do some act or take
23 some proceedings within a prescribed period after the service of a
24 notice or other paper upon the party and the notice or paper is served
25 by a method authorized by Rule 5(c)(2)(C), (D) or (E), five calendar
days are added after the prescribed period would otherwise expire
under Rule 6(a).

1 Rule 6(e) can apply to the proposed appeal deadline of A.R.S. § 16-957(B) because the
2 Final Administrative Order was sent by electronic mail, which, under Rule 6(e), is given the same
3 treatment as service by mail. *See* Ariz.R.Civ.P. 5(c)(2)(D). Here, if the Court were to apply the
4 deadline of A.R.S. § 16-957(B) that statute, as extended by the five calendar days of Rule 6(e),
5 would have made LFAF's appeal due on or before April 15, 2015. LFAF filed its complaint
6 initiating this appeal on April 14, 2015.

7 Faced with a similar issue, the Court of Appeals stated "We hold in this appeal that Rule
8 6(e), Arizona Rules of Civil Procedure, extends the time for filing a superior court complaint
9 seeking judicial review of an administrative decision when the decision has been served by mail."
10 *See Thielking v. Kirschner*, 176 Ariz. 154, 155, 859 P.2d 777, 118 (App. 1993). In this case,
11 although the statute is different, the considerations remain the same. The CCEC's own
12 administrative rules provide that a Final Administrative Action is something that must be "served on
13 all parties." A.A.C. R2-20-227(B). Faced with a similarly ambiguous statute that defined a timeline
14 as "thirty days after the notice" the Court of Appeals applied Rule 6(e) and added an additional five
15 days to the relevant time period. *In re Forty-Seven Thousand Six Hundred Eleven Dollars and*
16 *thirty-One Cents U.S. Currency*, 196 Ariz. 1, 992 P.2d 1 (App. 1999).

18 Here, by virtue of the fact that the statute proposed as applicable by the CCEC seeks to
19 impose a very abbreviated 14-day appeal time period and employs the unusual and ambiguous time
20 for commencement as "issuance," application of the five days provided under Rule 6(e) is justified.
21 To "issue" according to Black's Law Dictionary is "the act of issuing, sending forth . . ." Black's
22 Law Dictionary, 5th ed. (1979). That definition is confusingly similar to "service" and the fact that
23 the legislature chose to not use the words "file" or "certify" (words employed in A.A.C. R2-20-227)
24 from which to commence the appeal time certainly leads to a reasonable conclusion that the
25

1 legislature intended for this appeal period to be treated as any other period that commences with
2 service⁷.

3 **VIII. Section 12-902(B) Applies to Challenges to Agency Jurisdiction, Therefore**
4 **Applying the Provisions of The CCEC's Conferring Statute Is Improper.**

5 LFAF has argued from the initiation of this matter that the CCEC lacks jurisdiction over
6 LFAF as a person and over the subject matter at issue. The CCEC was created to have jurisdiction
7 over candidates and because LFAF is not a candidate, the CCEC does not have the power to
8 regulate it.⁸ Second, the governing statutes provide only for jurisdiction over communications that
9 are express advocacy and lodges enforcement of reporting violations of those statutory provisions
10 with the Secretary of State and not the CCEC. Since LFAF engaged only in issue advocacy, the
11 speech at issue is not subject to regulation by the Secretary of State or the CCEC under the
12 applicable statutory framework. Because the very nature of the person and the subject matter bear
13 upon whether the CCEC has jurisdiction under A.R.S. § 12-902(B), this court should hear the merits
14 of the case in full. *Gilbert v. Board of Medical Examiners*, 155 Ariz. 169, 175 (1987) ("there are
15 other means by which an administrative judgment may be attacked collaterally. One means is where
16 the jurisdiction of the administrative agency is questioned.")

17 Even if the time bars in A.R.S. § 16-957 discussed *supra* apply, the exception to any other
18 time bars provided by statute found at A.R. S. § 12-902(B) clearly applies here and provides, in
19 pertinent part:
20

21 If, under the terms of the law governing procedure before an agency
22 an administrative decision becomes final *because of failure to file*
any document in the nature of an objection, protest, petition for

23 ⁷ As one commentator has noted with respect to the use of "issuance" it is "unnecessarily confusing. . . it would seem,
24 though, to be more straightforward to provide. . . that the time to respond runs from the date of service rather than the
date of the issuance of the summons." 2 Collier Bankruptcy at § 119 (1981).

25 ⁸ As LFAF has noted before the CCEC and the ALJ, the independent expenditure reporting requirements of the A.R.S.
pre-dated the creation of the CCEC, and provide that the Secretary of State is the filing office for any such reports. The
Secretary agreed that LFAF did not have to file any reports covering the speech in which it engaged in this case.

1 hearing, or application for administrative review within the time
2 allowed by the law, the decision is not subject to judicial review
3 under the provisions of this article *except for the purpose of*
4 *questioning the jurisdiction of the administrative agency over the*
5 *person or subject matter.*

6 Since the CCEC's initial action against LFAF, LFAF consistently has asserted that the
7 CCEC does not have jurisdiction over either the person—LFAF itself because LFAF is not a
8 candidate—or the subject matter—because LFAF maintains that it engaged in issue advocacy
9 outside the jurisdiction of the CCEC.⁹

10 Courts have long held the provisions of § 12-902(B) to be a timing provision that allows for
11 judicial review of a final agency decision to be challenged on jurisdictional grounds irrespective of
12 the agency's timeliness provisions. *See, e.g., Dioguardi v. Superior Court* 184 Ariz. 414, 417
13 (1995); *See also State ex. rel. Arizona Department of Economic Security v. Kennedy*, 143 Ariz. 341
14 at 343 (App. 1985) (holding the time frame at A.R.S 12-904 inapplicable to special actions).¹⁰

15 Consequently, LFAF's appeal was timely filed and the Motion should be denied on any of
16 the grounds outlined, *supra*.

17 DATED this 24 day of May, 2015.

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

19 
20 Brian M. Bergin

21 4455 East Camelback Road, Suite A-205
22 Phoenix, Arizona 85018

23 ⁹ In this case, LFAF challenged the very notion that the CCEC can regulate it or its speech based upon the CCEC's
24 conferring statute from the outset. LFAF raised the jurisdictional argument before the CCEC in its initial response to the
25 agency on July 16, 2014. LFAF asserted a jurisdictional challenge in a special action filed in this court on July 18, 2014,
which was dismissed due to failure to exhaust administrative remedies. LFAF asserted the jurisdictional argument again
in a hearing before the CCEC on July 31, 2014. LFAF raised jurisdictional arguments in its October 3, 2014 letter to the
CCEC refusing to disclose the information the CCEC sought. LFAF raised the jurisdictional argument at the hearing
before the CCEC on January 27-28, 2015. And finally, LFAF raised the jurisdictional argument in its notice for appeal.

¹⁰ Should this Court determine that this case can only be heard as a Special Action, this Court could either construe the
filing to be in the nature of a special action, or LFAF could be given leave to amend its initial pleading within five days
of this Court's order to that effect.

Attorneys for Plaintiff/Appellant

Holtzman Vogel Josefak PLLC


Jason Torchinsky

45 North Hill Drive, Suite 100

Warrenton, VA 20186

Attorneys for Plaintiff/Appellant

ORIGINAL of the foregoing filed this
12th day of May, 2015 at:

Clerk of the Court
Maricopa County Superior Court
201 W. Jefferson
Phoenix, Arizona 85003-2243

COPY of the foregoing hand-delivered this
12th day of May, 2015 to:

The Honorable Crane McClennen
Central Court Building
201 W. Jefferson
Phoenix, AZ. 85003-2243

COPY of the foregoing mailed this
12th day of May, 2015 to:

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007

Mary R. O'Grady
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012-2793

Attorneys for Citizens Clean Elections Commission

By: 

EXHIBIT A

Janice K. Brewer
Governor

Thomas M. Collins
Executive Director



Timothy J. Reckart
Chair

Louis J. Hoffman
Thomas J. Koester
Mitchell C. Laird
Steve M. Tida
Commissioners

State of Arizona
Citizens Clean Elections Commission

1616 W. Adams - Suite 110 - Phoenix, Arizona 85007 - Tel (602) 364-3477 - Fax (602) 264-3487 - www.azcleanelections.gov

ORDER REQUIRING COMPLIANCE
A.R.S. § 16-957 & A.A.C. R2-20-208(A)

VIA FEDERAL EXPRESS

September 26, 2014

Legacy Foundation Action Fund
C/O Jason Torchinsky
Holtzman Vogel Josefiak PLLC
1010 Wisconsin Ave. NW
Suite 530
Washington, DC 20007

RE: CCEC File No.: #14-007 – Legacy Foundation: Action Fund

Dear Mr. Torchinsky:

On September 11, 2014, the Citizens Clean Elections Commission ("Commission") found **reason to believe** that the Legacy Foundation Action Fund (LFAF) violated the Citizens Clean Elections Act and Rules.

Violation & Factual Basis Supporting The Finding

Failure to Report Independent Expenditures

Section 16-941(D) of the Arizona Revised Statutes and Arizona Administrative Code Section R2-20-109 provide that all persons shall file reports of independent expenditures above a threshold set forth in the Act. The Commission has reason to believe that between March 31 and April 14, 2014 LFAF made independent expenditures of at least \$260,000 that expressly advocated the defeat of Candidate Scott Smith in the Republican gubernatorial primary. A.R.S. §§ 16-941(D); -958; -901.01; 961(A). It filed no reports of any kind of the expenditure. The advertisement is available here: http://www.youtube.com/watch?v=NvcZZLOA_OQ.

14 Day Period to Comply

You are hereby ordered to comply with A.R.S. §§ 16-941(D); -958 and A.A.C. R2-20-109 within 14 days of the date of this order. During that period, you may provide any explanation to the Commission, comply with the order, or enter into a public administrative settlement with the Commission. A.R.S. § 16-957(A) and A.A.C. R2-20-208(A).

After the 14 days, if the Commission finds that you remain out of compliance, the Commission shall make a public finding to that effect and issue an order assessing a civil penalty, unless the Commission publishes findings of fact and conclusions of law expressing good cause for reducing or excusing the penalty. A.R.S. § 16-957(B).

If you have any questions, please call (602) 364-3477 or toll free (877) 631-8891.

Issued this 26th day of September, 2014
Citizens Clean Elections Commission

EXHIBIT B

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STATE OF ARIZONA

CITIZENS CLEAN ELECTIONS COMMISSION

In the Matter of

Case No.: 14-007

**LEGACY FOUNDATION ACTION FUND,
RESPONDENT**

**ORDER AND NOTICE OF APPEALABLE
AGENCY ACTION**

The Citizens Clean Elections Commission ("Commission") shall enforce the provisions of the Citizens Clean Elections Act ("Act"). Pursuant to those duties, the Commission hereby issues this Order and Notice of Appealable Agency Action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legacy Action Foundation Fund ("LFAF" or "Respondent") is a 501(c)(4) social welfare organization. Respondent is not registered with the Secretary of State's Office as a political committee or independent expenditure committee.

On January 9, 2014, Scott Smith, then Mayor of the City of Mesa, established his candidate campaign committee, Smith for Governor 2014, with the Secretary of State's office. At this time, Smith was also the President for the U.S. Conference of Mayors. Before Smith resigned as mayor and thus ended his term as president of the Conference, LFAF aired over \$260,000 in television advertisements in the Phoenix market. This advertisement coincided with Smith's last two weeks in these positions. The ad is express advocacy under A.R.S. § 16-901.01

On July 31, 2014, the Commission found it had jurisdiction to determine whether Respondent had complied with the Clean Elections Act and Rules in regards to the advertisement.

On September 11, 2014, the Commission found reason to believe that Respondent had violated A.R.S. §§ 16-941(D) and -958(A) and (B) of the Act. On September 26, 2014, the Commission served an

1 order of compliance on Respondent stating with reasonable particularity the nature of the violations and
2 requiring compliance within fourteen days. A.R.S. § 16-957(A).

3 On November 20, 2014, the Commission found probable cause to believe Respondent violated
4 the Clean Elections Act.

5 Any person who makes independent expenditures exceeding \$500 in an election cycle is required
6 to file campaign finance reports with the Secretary of State's Office in accordance with A.R.S. § 16-958.
7 A.R.S. § 16-941(D).

8 Any person who has filed an original report pursuant to A.R.S. § 16-941(D) must file
9 supplemental reports to declare previously unreported independent expenditures exceeding \$1,000.
10 A.R.S. § 16-958(A). Before the beginning of the primary election period, June 24, 2014, the person shall
11 file an original report on the first of each month after the expenditures exceed \$700, and supplemental
12 reports on the first of each month after the previously unreported expenditures exceed \$1,000. A.R.S. §
13 16-958(B)(1).

14 **Count I. Original Report.**

15 Respondent's expenditures exceeded \$260,000 during March 2014, and Respondent was
16 required to file the original report by April 1, 2014. As of November 20, 2014, Respondent was 234 days
17 late filing the original report for expenditures.

18 **FAILURE TO COMPLY**

19 After the Commission's September 11, 2014 finding that there was reason to believe Respondent
20 had violated requirements of the Act, the expiration of fourteen days, and service of an order requiring
21 compliance, Respondent failed to comply with A.R.S. §§ 16-941(D and 16-958(A) by filing campaign
22 finance reports. To this date, Respondent has never filed the campaign finance reports required by
23 A.R.S. §§ 16-941(D and 16-958(A). In *United States v. Locke*, 471 U.S. 84 (1985), the United States
24 Supreme Court rejected the notion of compliance with a filing deadline sometime after the deadline falls
25 due. "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect
to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any
content, the deadline must be enforced." *Id.* at 101. Therefore, Respondent failed to comply with the

1 reporting deadlines, and could not subsequently comply with those deadlines by filing the reports at a
2 later date.

3 Accordingly, the Commission hereby makes a public finding that the Respondent violated the Act,
4 failed to comply with the reporting deadlines, and issues this Order assessing a civil penalty in
5 accordance with A.R.S. § 16-942 and R2-20-109(F)(3).

6 **PENALTIES**

7 The civil penalty for a violation by or on behalf of any candidate of any reporting requirement
8 imposed by the Act is \$430 per day for statewide office. The Commission has determined the daily
9 penalty shall be calculated from the day following the date the Commission asserted jurisdiction in this
10 matter, August 1, 2014, through November 20, 2014, the date of the Commission's probable cause
11 determination and assessment of penalties--111 days.

12 The penalty imposed shall be doubled if the amount not reported for a particular election cycle
13 exceeds ten percent of the adjusted primary or general election spending limit. The amount of the
14 expenditure (\$260,000) exceeds ten percent of the adjusted primary spending limit for the governor's race
15 (\$75,362). The penalty shall be \$860 per day for 111 days, which results in the assessment of a penalty
16 of \$95,460.

17 **ORDER**

18 WHEREFORE, the Citizens Clean Elections Commission hereby imposes a civil penalty of
19 \$95,460. This civil penalty will be satisfied upon receipt of payment to the Citizens Clean Elections
20 Commission, 1616 W. Adams, Ste. 110, Phoenix, Arizona 85007.

21 You may request an administrative hearing to contest this Order by submitting a written request
22 for a hearing within 30 days of receipt of this Order. The written request for a hearing shall be sent to the
23 Citizens Clean Elections Commission, 1616 W. Adams, Ste. 110, Phoenix, Arizona 85007.

24 If you request a hearing, you may request an informal settlement conference pursuant to A.R.S. §
25 41-1092.06.

Individuals with a disability may request reasonable accommodation by contacting the Citizens
Clean Elections Commission, 1616 W. Adams, Ste. 110, Phoenix, Arizona 85007, Telephone: (602) 364-

1 3477; and during a hearing by contacting the Office of Administrative Hearings, 1400 West Washington,
2 Suite 101, Phoenix, Arizona 85007, Telephone: (602) 542-9826. Requests should be made as early as
3 possible to allow time to arrange the accommodation.

4
5 Dated this 28 day of November, 2014.

6 By: Thomas M. Collins

7 Thomas M. Collins, Executive Director
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EXHIBIT C

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3 **ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION**
4 **CAMPAIGN FINANCE ENFORCEMENT PROCEEDING**
5

6 **IN THE MATTER OF**

7 **LEGACY FOUNDATION ACTION**
8 **FUND**

No. 15F-001-CCE

Final Administrative Decision

9 **(Rejecting Recommendation of**
10 **Administrative Law Judge Decision**
11 **in Office of Administrative**
12 **Hearings Case 15F-001-CCE dated**
13 **March 4, 2015 and Affirming Clean**
14 **Elections Commission Order Dated**
15 **November 28, 2014)**

16 On March 4, 2015, Administrative Law Judge Thomas Shedden ("the ALJ")
17 issued his decision ("the Decision") in Arizona Office of Administrative Hearings
18 Case 15F-001-CCE. The Decision sustains the Legacy Foundation Action Fund's
19 ("LEAF's") appeal of the Citizen Clean Elections Commission's ("Commission's")
20 order issued November 28, 2014 ("the Order" or "the November 28 Order") and
21 rescinds the civil penalty imposed in the Order. The Commission has reviewed the
22 Decision and relevant portions of the record in this matter. The Decision is attached
23 and incorporated herein by reference.

24 Pursuant to A.R.S. § 41-1092.08(B), the Commission accepts the Decision's
25 Findings of Fact 1 through 44 and Excerpts from Applicable Statutes and Rule.¹ The
26 Commission also accepts the Decision's Conclusions of Law 1 through 13 but rejects

27 ¹ The Commission notes that the exhibits referenced in the Findings of Fact are not attached
28 to the Decision but correspond to Exhibits submitted by parties in the administrative
proceeding.

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

3 THE PREPONDERANCE OF EVIDENCE STANDARD

4 "The preponderance of the evidence standard requires that the fact-finder
5 determine whether a fact sought to be proved is more probable than not." *Kent K. v.*
6 *Bobby M.*, 210 Ariz. 279, 284, ¶ 25, 110 P.3d 1013, 1018 (2005) (citing *Black's Law*
7 *Dictionary* 1201 (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 1. Whether the Advertisement is Express Advocacy

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

26
27 general public communication . . . targeted to the electorate of that
28 candidate(s) that in context can have no reasonable meaning other than
to advocate the election or defeat of the candidate(s), as evidenced by

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

5 A.R.S. §16-901.01(A)(2).

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

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

20 the content of the communications; that they were aired at a time in
21 which Mr. Smith was still the mayor of Mesa and the President of the
22 Conference; although Mr. Smith had announced his intention to resign,
23 he was under no legal obligation to do so and the Subject
24 Advertisements were aired before the "window" in which candidates'
25 nominations were due at the Secretary of State's Office; they were aired
26 about four and one-half months before early voting started in the
27 Republic primary and about five and one-half months before the
28 election itself; and voting in the Republican primary was not limited to
registered Republicans.

Decision ¶ 16.

This Decision's list fails to address all of the statutory factors and does not
address the critical issue of whether "in context" the advertisement's only reasonable

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

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



11 Screenshot of LEAF Advertisement (Ex. 6) at :02.

12 Throughout, the ad presents both men in a series of mocking illustrations, and
13 links Smith with several generic non-local policy issues supported by the Obama
14 administration, including "Obamacare," limits on gun rights, environmental
15 regulations, and "Obama's tax & spend proposals." A few examples from the
16 advertisement are below:



27 Screenshot of LEAF Advertisement at :08.



Screenshot of LEAF Advertisement at :21.

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

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

B. The Order Assessing Penalties

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

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

9 The Commission has the authority to impose civil penalties for any violation of
10 the Clean Elections Act, A.R.S. § 16-957(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.

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
this 27th day of March, 2015, to:**

Brian Bergin, Esq.
Bergin, Frakes, Smalley & Oberholzer
4455 E. Camelback Road, Suite A-205
Phoenix, AZ 85018

Jason Torchinsky, Esq.
Holtzman Vogel Josefiak PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186

Attorneys for Legacy Foundation Action Fund

/s/ Sara A. Larsen

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Legacy Foundation Action Fund

No. 15F-001-CCE

Petitioner/Appellant,

ADMINISTRATIVE LAW JUDGE

v.

DECISION

Arizona Citizens Clean Elections Commission

Respondent/Appellee.

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

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

ADMINISTRATIVE LAW JUDGE: Thomas Shedden

FINDINGS OF FACT

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

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

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

1 4. On January 8, 2015, the parties submitted Joint Stipulated Facts and
2 Exhibits. The Joint Stipulated Facts are reproduced below.¹

3 5. On January 8, 2015, LFAF submitted its Opening Brief. On January 21,
4 2015, CCEC submitted its Answering Brief; on January 26, 2015, LFAF its Reply. The
5 parties presented oral argument on January 28, 2015, but presented no evidence other
6 than the Joint Stipulated Facts and Exhibits.

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

8 **THE PARTIES' STIPULATED FACTS**

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

15 **The Parties**

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

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

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

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

29
30 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

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.

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

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

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

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

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

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

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

Arizona Elections.

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

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

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

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

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

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

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, 2014, LFAF filed a response with the CCEC on
19 July 16, 2014, and appeared at a hearing before the CCEC on July 31, 2014. LFAF's
20 response is exhibit 10.

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

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

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

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

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

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

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

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

26 38. The Executive Director submitted recommendations to the Commission
27 regarding probable cause and potential penalties dated November 7, 2014. The
28 probable cause recommendation is Exhibit 21 and the recommendation regarding
29 penalties is Exhibit 22.
30

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

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

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

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

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

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

EXCERPTS FROM APPLICABLE STATUTES AND RULE

"Independent expenditure" means:

[A]n expenditure by a person or political committee, other than a candidate's campaign committee, that expressly advocates the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate. Independent expenditure includes an expenditure that is 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 ~~TE~~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
31 candidate and not timely filing a campaign finance report as required
32 by A.R.S. § 16-941(D), A.R.S. § 16-958, or A.R.S. § 16-913 shall be
33 subject to a civil penalty as described in A.R.S. § 16-942(3).

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

35 A. If the commission finds that there is reason to believe that a person
36 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
7 B. Upon expiration of the fourteen days, if the commission finds that
8 the alleged violator remains out of compliance, the commission shall
9 make a public finding to that effect and issue an order assessing a civil
10 penalty in accordance with section 16-942, unless the commission
11 publishes findings of fact and conclusions of law expressing good
12 cause for reducing or excusing the penalty. The violator has fourteen
13 days from the date of issuance of the order assessing the penalty to
14 appeal to the superior court as provided in title 12, chapter 7, article 6.

15 CONCLUSIONS OF LAW

16 1. CCEC bears the burden of persuasion. ARIZ. REV. STAT. § 41-
17 1092.07(G)(3).

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

20 3. "Unless otherwise provided by law: 1. The party asserting a claim, right,
21 or entitlement has the burden of proof; [and] 2. A party asserting an affirmative defense
22 has the burden of establishing the affirmative defense..." ARIZ. ADMIN. CODE § R2-19-
23 119(B).

24 4. A preponderance of the evidence is:

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

31 BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

32 5. The primary objective in construing statutes adopted by initiative is to give
effect to the intent of the electorate. *Arizona Early Childhood Development & Health
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. *Darran 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.

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

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

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

The Subject Advertisement does not Constitute Express Advocacy

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

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

16. The Subject Advertisement can reasonably be seen as permissible issue advocacy based on factors including: 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; although Mr. Smith had announced his intention to resign, he was under no legal obligation to do so and the Subject Advertisements were aired before the "window" in which candidates' nominations were due at the Secretary of State's Office;³ they were aired about four and one-half months before early voting started in the Republican primary, and about five and one-half months before the

² Under this standard, a showing that the Subject Advertisement can reasonably be construed as being express advocacy is not sufficient to meet the burden of proof. Cf. *Committee for Justice & Fairness*, 235 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. 16.

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

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

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

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

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

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

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

⁵ Consequently, the Administrative Law Judge does not agree with CCEC's position that its interpretation 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.

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

Conclusion

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

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

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

ORDER

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

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

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

Done this day, March 4, 2015.

/s/ Thomas Shedden
Thomas Shedden

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

Administrative Law Judge

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Transmitted electronically to:

Thomas Collins, Executive Director
Citizens Clean Elections Commission