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IN THE SUPERIOR COURT OF MARICOPA COUNTY

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 **ARIZONA SECRETARY OF STATE MICHELE REAGAN'S MOTION TO INTERVENE** (Assigned to the Honorable Crane McClennen)

Pursuant to Arizona Rules of Civil Procedure ("ARCP") Rule 24, Michele Reagan, in her official capacity as Arizona Secretary of State ("Secretary Reagan" or "Secretary"), moves to intervene as Petitioner/Appellant on the grounds set forth in this Motion and accompanying proposed Opening Brief (Exhibit A). Secretary Reagan seeks to intervene as of right; or, in the alternative, seeks permissive intervention. Secretary Reagan seeks to intervene to prevent the Arizona Citizens Clean Elections Commission ("Commission") from usurping the Secretary of State's statutory authority over independent expenditures, and to prevent the unconstitutional regulation of issue advertising in conflict with the Secretary's statutory authority. Secretary Reagan's participation as Intervenor-Petitioner/Appellant is therefore crucial to the proper resolution of this matter. The Secretary has consulted with the parties regarding this motion. LFAF consents to the Secretary's intervention; the Commission opposes the Secretary's intervention.

I. INTRODUCTION

The primary issue in this appeal is the Commission's usurpation of the Secretary of State's statutory authority over independent expenditure reporting. Arizona law contains a detailed statutory scheme for regulating independent expenditures and the Secretary has sole authority for enforcing those provisions, in coordination with various levels of law enforcement. As its assertion of authority here demonstrates, the Commission's imagined role in independent expenditure regulation creates a tangle of overlapping authority that would give rise to intractable enforcement and statutory interpretation problems. As discussed in the Secretary's proposed Opening Brief, the Commission has no authority over LFAF's purported independent expenditures and the Commission's Final Administrative Decision should be reversed.

II. APPLICANT, ARIZONA SECRETARY OF STATE MICHELE REAGAN

Secretary Reagan is Arizona's elected Secretary of State. Under Title 16, Chapter 6 of the Arizona Revised Statutes, campaign finance reporting requirements and their enforcement are neatly divided into two separate articles: "Article 1. General Provisions" and "Article 2. Citizens Clean Elections Act." The Secretary is charged with enforcing an interlocking web of statutes under Article 1 that impose a detailed regulatory structure over independent expenditures and the groups or individuals who make them. As explained in detail in the Secretary's proposed Opening Brief, the Secretary's authority over independent expenditures is exhaustive, and the Commission plays no role in it.

III. FACTUAL BACKGROUND

The Secretary adopts Petitioner/Appellant LFAF's Statement of the Case and Statement of the Facts Relevant to the Issues Presented for Review. LFAF Op. Br. 3-7.

IV. INTERVENTION OF RIGHT

ARCP Rule 24(a) provides for intervention of right:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Arizona courts have repeatedly held that "'Rule 24 is remedial and should be construed liberally in order to assist parties seeking to obtain justice in protecting their rights.'" *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 279, ¶ 53, 257 P.3d 181, 198 (App. 2011) (quoting *Dowling v. Stapley*, 221 Ariz. 251, 270, ¶ 58, 211 P.3d 1235,

1254 (App. 2009)). The Secretary seeks intervention under Rule 24(a)(2). Secretary Reagan satisfies the requirements set forth in the rule.

A. The Secretary's Motion to Intervene is Timely

When considering whether a motion to intervene is timely, courts generally consider the stage to which the action progressed before intervention was sought, whether the applicant could have sought intervention at an earlier stage, and, whether the delay in moving for intervention will prejudice the existing parties. *Winner Enterprises, Ltd. v. Superior Court*, 159 Ariz. 106, 109, 765 P.2d 116, 119 (App. 1988). Here, the Secretary seeks to intervene 9 days after appellant LFAF filed its Opening Brief. Although LFAF has ably presented the issues relevant to its appeal, its brief does not address the broader implications of the Commission's usurpation of the Secretary's authority over independent expenditures. As detailed in the Secretary's proposed Opening Brief, the Commission's position in this litigation threatens to upend the carefully delineated statutory authority of the Secretary over independent expenditures. The Secretary intervened as quickly as possible after the filing of LFAF's Opening Brief. The Commission's Opening Brief is due July 10, 2015, 36 days from the date of this motion; the Commission will thus have ample time to address the arguments raised by the Secretary.

B. Interest in the Subject of the Action and Potential for Impairment of Interest

The interest entitling a person to intervene must be of "such direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Hill v. Alfalfa Seed & Lumber Co.*, 38 Ariz. 70, 72, 297 P. 868, 869 (1931). The Court of Appeals explained that "a prospective intervenor must have such an interest in the case that the judgment would have a direct legal effect upon his or her rights and not merely a possible or contingent effect." *Dowling*, 251 Ariz. at 270, 211 P.3d at 1254 (citation omitted).

There is no question that the office of the Secretary has interests that will be directly affected by the outcome of this litigation. If the Commission succeeds, the direct result will be to intrude upon the official duties of the Secretary and create duplicative regulation of independent expenditure reporting. Secretary Reagan unquestionably has a duty to protect the functions of the Secretary's office.

In their filings in this Court and in the administrative proceedings below, neither LFAF nor the Commission has adequately discussed the role of the Secretary of State in this matter. LFAF argues that the Commission exceeds its statutory authority. LFAF Op. Br. 3. But, for the reasons explained in the Secretary's proposed Opening Brief, Secretary Reagan is in a unique position to argue that the Commission has usurped the Secretary of State's authority and plunged the entire statutory scheme Secretary Reagan is charged with enforcing into constitutional uncertainty. Secretary Reagan is uniquely positioned to present statutory and constitutional arguments that LFAF has not presented and that the Commission will obviously not present.

C. Adequacy of Representation

It is impossible for the existing parties to adequately represent the interests of the Secretary. In interpreting the equivalent adequacy requirement in federal courts, the U.S. Supreme Court has held that "this prong of the intervention analysis requires the intervenor to show only that representation of its interests 'may be' inadequate, and the applicant's burden on showing this element should be viewed as 'minimal.'" *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 247 (D.N.M. 2008) (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)).

While the Arizona courts have yet to set out a definitive test to determine whether the existing parties adequately represent the intervenor's interest, the Ninth Circuit has established a test

for the "adequacy of representation" requirement under the similar language of Fed. R. Civ. P. 24(a)(2). In *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003), the court stated the three factors to consider in determining adequacy of representation: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect."

The Secretary satisfies all three prongs of *Arakaki*. First, the Secretary has a duty to voters and to candidates in administering Arizona's election statutes. This duty necessarily pits the Secretary's interests against those of LFAF, whose interest is simply to be free of the exorbitant fine levied by the Commission. In the Commission's enforcement against LFAF, the Secretary's interests are necessarily not protected by LFAF's narrower interests. On the other hand, the Secretary's position is necessarily adverse to the Commission; consequently, the Secretary's interests are necessarily not protected by the existing parties. Second, for the same reasons, LFAF and the Commission are necessarily not capable and not willing to raise arguments raised by the Secretary. Third, the Secretary has a unique insight into the constitutionality of independent expenditure reporting and regulation that neither LFAF nor the Commission has. In sum, the Secretary is raising statutory and constitutional arguments, which no other party in this case is willing or qualified to make. And yet, they are arguments this Court must consider as it contemplates the fate of independent expenditure reporting and regulation in Arizona.

V. PERMISSIVE INTERVENTION

The Secretary alternatively seeks permissive intervention pursuant to ARCP Rule 24(b)(2), which provides that, upon timely application, intervention is appropriate:

> When an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the

> court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The Secretary, as Intervenor-Appellant, raises issues that share questions of fact and law in common with the main action. The question of the scope of the Commission's authority is inseparably linked to the question of the Secretary's authority, for giving authority to the Commission over independent expenditures necessarily intrudes upon the Secretary's authority and necessarily calls into question the constitutionality of the Secretary's authority over independent expenditures.

If the Secretary has to wait to raise these issues until after a determination in this case, it would severely compromise the official duties of her office. Every moment this action continues and the Commission thereby continues to usurp the Secretary's authority is an affront to the rule of law and the Secretary's statutory duty to enforce the law. Additionally, a complete resolution of all of these intertwined issues benefits the stability and predictability of the law, which benefits the citizens of Arizona, candidates, political committees, contributors, independent expenditure groups, and judicial economy.

Outside the requirements of Rule 24(b)(2), courts may consider additional factors for permissive intervention, such as "(1) the nature and extent of the [applicant]s' interest; (2) [the applicants'] standing to raise relevant legal issues; (3) the legal position [applicants] seek to advance, and its probable relation to the merits of the case; and (4) whether the intervenors' interests are adequately represented." *Bechtel v. Rose In and For Maricopa County*, 150 Ariz. 68, 72, 722 P.2d 236, 240 (citing *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1974)). The Secretary has already discussed factors (1), (3), and (4) above. In short, being responsible for oversight and regulation of campaign finance regulations, including reporting and regulation of independent expenditures, the Secretary's argument is an important and inseparable consideration in this case; and the Secretary's position is not adequately represented.

The Secretary also has standing. Whichever way this action is resolved, the official duties of the Secretary will be radically impacted. It is emphatically the Secretary's duty to protect the fidelity and integrity of her office. Indeed, it would be odd if the Secretary would not have standing to bring a challenge alleging that the Commission violated a statute the Secretary was charged with enforcing when the Commission has been held to have standing to bring a challenge alleging violation of a statute that the Commission was charged with enforcing. *Ariz. Citizens Clean Elec. Comm'n v. Brain*, 233 Ariz. 280, 284, ¶ 11, 311 P.3d 1093, 1097 (App. 2013) ("the Commission has standing to seek relief to determine how to meet its statutorily prescribed duty").

VI. CONCLUSION

Secretary Reagan seeks to intervene because of her concrete and particular interest in fulfilling her official duties. This Court should grant the Secretary's motion and permit this appeal, with all of the necessary issues, to be litigated completely and properly.

For all the foregoing reasons, the Secretary respectfully requests that she be granted leave to intervene as Petitioner/Appellant in this action.

DATED this 4th day of June, 2015.

Respectfully submitted,

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EXHIBIT A

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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 ARIZONA SECRETARY OF STATE MICHELE REAGAN** (Assigned to the Honorable Crane McClennen)

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INTRODUCTION

The only issues presented in this appeal are jurisdictional: (1) Whether the statutes governing independent expenditures give the Citizens Clean Elections Commission ("Commission") jurisdiction over independent expenditures; and (2) whether Legacy Foundation Action Fund's ("LFAF") advertisement addressing the policies of the U.S. Conference of Mayors was an independent expenditure coming within the jurisdiction of those statutes. Only the first question needs to be answered. The primary issue in this appeal is the Commission's usurpation of the Secretary of State's statutory authority over independent expenditure reporting. Arizona law contains a detailed statutory scheme for regulating independent expenditures and the Secretary has sole authority for enforcing those provisions, in coordination with various levels of law enforcement. As its assertion of authority here demonstrates, the Commission's imagined role in independent expenditure regulation creates a tangle of overlapping authority that would give rise to intractable enforcement and statutory interpretation problems. As demonstrated herein, the Commission has no authority over LFAF's purported independent expenditures and the Commission's Final Administrative Decision should be reversed. This Court unquestionably has authority to determine the scope of the Commission's jurisdiction. A.R.S. § 12-902(B).

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The Secretary adopts Appellant's Statement of the Case and Statement of the Facts Relevant to the Issues Presented for Review. LFAF Op. Br. at 3–7.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In addition to those issues presented for review by LFAF, the Secretary presents the following issues:

I. WHETHER THE COMMISSION USURPED THE SECRETARY OF STATE'S STATUTORY JURISDICTION OVER INDEPENDENT EXPENDITURES.

II. IF THE COMMISSION HAS JURISDICTION OVER LFAF'S EXPENDITURES, WHETHER THE CITIZENS CLEAN ELECTION ACT IS THEREFORE UNCONSTITUTIONAL.

ARGUMENT

I. THE COMMISSION USURPED THE SECRETARY OF STATE'S STATUTORY JURISDICTION OVER INDEPENDENT EXPENDITURES.

For all the reasons discussed in LFAF's Opening Brief, the Secretary concludes that LFAF's advertisement regarding Mesa Mayor Scott Smith, in his capacity as President of the U.S. Conference of Mayors, was issue advertising, not an independent expenditure. Under Arizona law, LFAF's advertisement could only be an independent expenditure, if it "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)(2) (emphasis added); A.R.S. § 16-901(14).[1] Even the Commission has conceded that the timing of the advertisement confirms that it does have a reasonable meaning other than to advocate the election or defeat of a candidate; it is therefore issue advocacy, not an independent expenditure. The Commission concedes that if the advertisement had run after Mayor Smith was no longer Mayor of Mesa and President of the U.S. Conference of Mayors, "LFAF would have none of the legal arguments that it is making here . . . ." Index of

[1] HB2415 added a new definition to A.R.S. § 16-901, so the current numbering in that section will soon shift up by one number following "election." 2015 Ariz. Legis. Serv. Ch. 286 (H.B. 2415).

Record on Review ("I.R.") 6 at 24. But the advertisements only addressed Mayor Smith's role with the Conference of Mayors and stopped running before Smith stepped down from that position. I.R. 54 ¶¶ 7, 14.

Whether LFAF's advertisement was an independent expenditure is beside the point because the Commission has no authority to investigate purported independent expenditures. Under Title 16, Chapter 6 of the Arizona Revised Statutes, campaign finance enforcement is divided into two separate articles: "Article 1. General Provisions" and "Article 2. Citizens Clean Elections Act." This division clearly delineates the regulatory authority of both the Secretary and the Commission. Under Article 1, the Secretary of State oversees and enforces campaign finance reporting requirements for all political participants not receiving taxpayer subsidies. Under Article 2, the Commission has oversight over "participating candidates," who fund their political campaigns with taxpayer dollars administered by the Commission. At one time, the Commission had reason to obtain disclosures (via reports filed with the Secretary) from non-participating candidates and independent expenditure groups in order to facilitate an unconstitutional scheme of candidate subsidies. After that scheme was struck down as unconstitutional, the Commission lost any justification for obtaining disclosures as to non-participating candidates and independent expenditures.

A. The Secretary's Authority.

Under Article 1, the Secretary enforces a detailed statutory definition of independent expenditures, exercises enforcement discretion, and provides guidance to political speakers about disclosure requirements. The Secretary enforces an extensive scheme of campaign finance reporting requirements, in coordination with the Attorney General, County Attorney, or City Attorney, depending on the geographical reach of the candidate at issue. A.R.S. § 16-924. The Secretary is charged with identifying any filing or registration violations, A.R.S. § 16-914.02(J), as well as

notifying the Attorney General of any violation of the reporting requirements regarding a candidate for statewide office or the legislature. A.R.S. § 16-924(A). Charging the Secretary with these duties is logical under the statutory scheme because the Secretary is positioned to identify violations as the filing officer for all registrations and reporting requirements for independent expenditures in statewide and legislative elections. A.R.S. § 16-914.02(B).

The Secretary is charged with enforcing an interlocking web of statutes under Article 1 that impose an exhaustive regulatory structure over independent expenditures and the groups or individuals who make them. These statutes define independent expenditures, A.R.S. § 16-901(14), and critical related terms like "expressly advocates." A.R.S. § 16-901.01. Further, these statutes incorporate detailed guidelines governing election officers and criteria for analyzing whether an independent expenditure is truly independent or rather coordinated with a candidate. A.R.S. § 16-911. Article 1 goes on to address disclosure requirements about the source of independent expenditures, A.R.S. § 16-912, as well as the manner in which political committees, corporations, limited liability companies, and labor organizations can make independent expenditures and the penalties for failing to comply with the statutes. A.R.S. §§ 16-917, -920, -924. This is why "a party such as [appellant] can request assistance from the Secretary of State in complying with its reporting requirements." *Comm. for Justice & Fairness v. Arizona Sec'y of State's Office*, 235 Ariz. 347, 360, 332 P.3d 94, 107 n.20 (Ct. App. 2014), review denied (Apr. 21, 2015). The value of that assistance would be eviscerated if the Commission could revoke its validity with the stroke of a pen that results in a different definition of "independent expenditure"—as it has done here.

Moreover, Article 1 gives the Secretary oversight over a slew of regulations governing the principal groups making independent expenditures: political committees. These statutes regulate the

organization, accounting, and reporting for political committees, A.R.S. §§ 16-901(19), -902, -902.01, -913, -918, and address out-of-state political committees, A.R.S. § 16-902.02.

The Secretary is also required by Article 1 to enforce candidate contribution limits. A.R.S. § 16-905. The contribution limits implicitly involve independent expenditure enforcement because independent expenditures that are coordinated with candidates are regulated as in-kind contributions. A.R.S. § 16-901(15) ("'In-kind contribution' means a contribution of goods or services or anything of value and not a monetary contribution."). The regulatory process for contributions is finely tuned: A.R.S. § 16-905(J) provides that a civil penalty may be assessed pursuant to A.R.S. § 16-924, which is the Secretary's enforcement statute. Likewise, A.R.S. § 16-924(A) grants the Secretary jurisdiction over "any provision of this title [16], except for violations of chapter 6, article 2." Alternatively, a complaint may be filed with "the attorney general or the county attorney of the county in which a violation of this section is believed to have occurred . . . ." A.R.S. § 16-905(K). If the Secretary and law enforcement do not bring an enforcement action within 45 days, the complainant may file a civil suit in court. A.R.S. § 16-905(L). None of this finely tuned process for regulating privately funded candidates involves the Commission or contemplates an entirely separate enforcement process through the Office of Administrative Hearings.

Article 1's extensive regulatory structure gives the Secretary express authority to regulate independent expenditures in every conceivable way, shape, and form. Meanwhile, the Commission plays no role in enforcing these statutes and is expressly excluded from enforcing the provisions of Article 1, preventing redundant enforcement of independent expenditures. A.R.S. § 16-905(O)(2) ("The citizens clean elections commission has no authority to accept, investigate or otherwise act on

any complaint involving an alleged violation of this article."). Rather, the Commission is left to supervise candidates who receive taxpayer money.

B. The Commission's Authority.

The story of the Commission's authority starts in 1998, when voters passed the Clean Elections Act so that "Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money." A.R.S. § 16-940(A). Indeed, neither the Legislative Council analysis, nor the "for" and "against" arguments in the Clean Elections Act publicity pamphlet even mention independent expenditures, much less contemplate regulation of independent expenditure groups themselves. *See Arizona Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 327 ¶ 21, 322 P.3d 139, 144 (2014) (quoting *Ruiz v. Hull*, 191 Ariz. 441, 450 ¶ 36, 957 P.2d 984, 993 (1998) ("In construing an initiative, we may consider ballot materials and publicity pamphlets circulated in support of the initiative.")); Clean Elections Act Publicity Pamphlet at 84–85, http://apps.azsos.gov/election/1998/Info/PubPamphlet/prop200.pdf ("The Citizens Clean Elections Commission would enforce and administer the system, including the allocation of money to qualified candidates, sponsor debates, adopt rules, ensure proper use of the money distributed to candidates and provide education to voters.").

To that end of reforming *candidate* campaign financing, the Commission was given authority to educate voters by hosting candidate debates and printing voter guides, to administer public funding for participating candidates, and to provide "matching funds" to participating candidates. A.R.S. §§ 16-956(A)(1), (A)(2), -956(A)(7), -951. That last purpose, providing matching funds, is the only reason the Commission once had cause to inquire about independent expenditure reporting. But that matching funds authority only lasted until 2011, when the U.S. Supreme Court struck down that aspect of the Clean Elections Act as unconstitutional. *Arizona Free*

Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2814 (2011). Under the unconstitutional scheme,

> [s]pending by independent groups on behalf of a privately funded candidate, or in opposition to a publicly funded candidate, result[ed] in matching funds. Independent expenditures made in support of a publicly financed candidate [could] result in matching funds for other publicly financed candidates in a race. The matching funds provision [was] not activated, however, when independent expenditures [were] made in opposition to a privately financed candidate.

Id. (citing A.R.S. § 16–952(C) (2010)). Under that scheme, it was essential for the Commission to have adequate disclosures about independent expenditures in order to be able to subsidize the candidates who had been opposed by those expenditures. That system is no more. After the Court struck down matching funds, the Clean Elections Act was amended to remove any references to those subsidies. 2012 Ariz. Legis. Serv. Ch. 257 (H.B. 2779). Now, the Commission regulates participating candidates (who get an initial allocation of taxpayer money, but not the matching funds struck down in Bennett) and it serves some voter education functions. A.R.S. §§ 16-956, -942. The Commission's regulatory interest in independent expenditures can reasonably be linked only to the unconstitutional purpose of providing matching funds. After the Supreme Court struck down matching funds, the Commission's only justification for monitoring independent expenditures (or having any enforcement authority over non-participating candidates[2]) vanished.

Even when it had matching funds authority, the Commission's power relating to independent expenditures was purely informational—that is, reviewing (not gathering) information to determine the amount of matching funds. Its authority never extended, and does not extend, to

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[2] Although Article 2 sets limits on non-participating candidates, enforcement of those limits falls to the Secretary. A.R.S. § 16-941(B) ("Notwithstanding any law to the contrary, a nonparticipating candidate shall not accept contributions in excess of an amount that is twenty per cent less than the limits specified in [Article 1] . . . . Any violation of this subsection shall be subject to the civil penalties and procedures set forth in [Article 1].").

regulation of independent expenditures themselves or to the people who make independent expenditures.

The Commission relies on A.R.S. § 16-941(D) as the basis for its jurisdiction here:

> Notwithstanding any law to the contrary, any person who makes independent expenditures related to a particular office cumulatively exceeding five hundred dollars in an election cycle, with the exception of any expenditure listed in § 16-920 and any independent expenditure by an organization arising from a communication directly to the organization's members, shareholders, employees, affiliated persons and subscribers, shall file reports with the secretary of state in accordance with § 16-958 so indicating, identifying the office and the candidate or group of candidates whose election or defeat is being advocated and stating whether the person is advocating election or advocating defeat.

Plainly, this subsection requires the Secretary, not the Commission, to collect reports, which A.R.S. § 16-958(D) then requires the Secretary to deliver to the Commission. A.R.S. § 16-958(D) ("The secretary of state shall immediately notify the commission of the filing of each report under this section . . . ."). These sections do not create any authority in the Commission to regulate independent expenditures; these sections simply entitle the Commission to receive reports filed with the Secretary—reports that the Commission only had use for in the pre-*Bennett* darkness of unconstitutional independent-expenditure subsidies to participating candidates. Post-*Bennett*, the Commission has no legitimate need of this information. Indeed, as discussed below, the Commission has failed to articulate any governmental interest actually served by authorizing the Commission to demand information about purported independent expenditures.

The limited scope of A.R.S. § 16-941(D) is further borne out by the statutory limits on the Commission's enforcement authority. Consistent with the Commission's erstwhile role as an equalizer of candidate funds, the Commission's enforcement authority over independent expenditures is limited to making public findings regarding alleged violations of Article 2, and to then "issue an order assessing a civil penalty in accordance with § 16-942 . . . ." A.R.S. § 16-

957(B). Each and every civil penalty set out in A.R.S. § 16-942 relates to candidates, including the only subsection relevant to reporting, A.R.S. § 16-942(B) (emphasis added):

> 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 candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty* imposed pursuant to this subsection.

The Commission simply has no authority to assess civil penalties for a violation that is not "by or on behalf of any candidate." Moreover, the Commission must identify "the candidate and the candidate's campaign account" that will be "jointly and severally responsible for any penalty." This is an additional indication that the Commission's jurisdiction is limited to participating candidates, not independent expenditures, because an independent expenditure group cannot logically be jointly and severally liable with a candidate unless the enforcement action involves a penalty against a candidate. Here, there was a finding that LFAF's advertisements were *not* coordinated with any candidate. LFAF Op. Br. at 30; I.R. 55 at 7:12–16. Even if they were coordinated, the Commission has no authority over the independent expenditure speakers, only over the candidate. Because the Commission has no jurisdiction over LFAF's purported independent expenditures, the Commission's Final Administrative Decision should be reversed.[3]

[3] Obviously, the Commission's regulations regarding independent expenditures, A.A.C. R2-20-109(F), are void to the extent that they exceed the scope of its statutory authority. *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767 (2003) ("Because agencies are creatures of statute, the degree to which they can exercise any power depends upon the legislature's grant of authority to the agency.").

II. IF THE COMMISSION HAD JURISDICTION OVER LFAF'S EXPENDITURES, THE CITIZENS CLEAN ELECTION ACT WOULD THEREFORE BE UNCONSTITUTIONAL.

As discussed above, the only coherent reading of Arizona's campaign finance statutes entrusts the Secretary with authority over independent expenditure reporting requirements. Even if the Commission's authority over independent expenditures were not limited by the plain text, history, and practical interplay of the statutes, it would be limited by the intractable constitutional problems that would result if the Commission could regulate independent expenditures in conflict with the Secretary. The Commission's grandiose view of its authority would create a statutory scheme that imposes undue burdens on political speech protected by the First Amendment and Ariz. Const. art. 2, sec. 6. Requiring those who speak about politicians to comply with overlapping and conflicting reporting requirements burdens political speech but provides no corresponding benefit to any governmental interest. The statutory scheme invented by the Commission would therefore conflict with the well-established principle of constitutional avoidance. *Ruiz v. Hull*, 191 Ariz. 441, 448, 957 P.2d 984, 991 (1998) ("where alternative constructions are available, the court should choose the one that results in constitutionality . . . . [W]here the regulation in question impinges on core constitutional rights, the standards of strict scrutiny apply and the burden of showing constitutionality is shifted to the proponent of the regulation."). Interpreting the statutory provisions at issue to vest authority over independent expenditure reporting solely with the Secretary avoids the significant constitutional problems created by the Commission's usurpation of authority.[4]

[4] Recognizing the statutory limits to the Commission's authority also resolves the constitutional problems that LFAF has identified with the Commission's enforcement action here—including the Commission's reliance on LFAF's subjective intent and the Commission's expansion of independent expenditure regulation beyond express advocacy or its functional equivalent—but those are problems of the Commission's own making and are unrelated to the statutory structure.

A. There is No Connection Between the Commission's Imagined Duplicative Enforcement Authority and any Governmental Interest.

Disclosure requirements burden protected speech. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest."). In order to justify that burden, the government must demonstrate that disclosure requirements "survive exacting scrutiny" which requires a "substantial relation" between the disclosures and a "sufficiently important" governmental interest. *Id.* at 64, 66; *see McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 105, 231–232 (2003); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67 (2010).

The Commission has failed to demonstrate any connection between a sufficiently important governmental interest and the Commission's imagined duplicative enforcement authority. Throughout this enforcement action, the Commission has articulated two governmental interests supposedly served by independent expenditure reporting: "voter education and deterrence of corruption or the appearance of corruption through disclosure of large contributions and expenditures." I.R. 6 at 11. Neither interest is served by allowing the Commission to second-guess the Secretary's authority over independent expenditures.

The Commission has yet to address the genuine problem created by conflicting enforcement of independent expenditure disclosure requirements. The Commission speculates that voter education and anti-corruption interests are served by independent expenditure disclosures. *Id.* Perhaps; although, given the independence of independent expenditures, there is inherently a diminished risk of corruption and therefore a diminished justification for disclosure. *See SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding "the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," but

upholding disclosure requirements). But the abstract question about the propriety of disclosures is not the issue here. Rather, the Commission must demonstrate that its envisioned system of *duplicative* authority does not unnecessarily burden rights protected by the First Amendment and Ariz. Const. art. 2, sec. 6. The Commission cannot meet the actual constitutional burden it faces, nor has it even tried. Any interests served by independent expenditure reporting requirements are served amply by the Secretary's expansive statutory authority.

As for voter education, the Commission plays no real role with regard to independent expenditures. The Secretary makes campaign finance information available to the public on the Internet. *See* Campaign Finance Search - Candidates, http://apps.azsos.gov/apps/election/cfs/search/. The Commission's only role in educating voters about independent expenditures is linking to the Secretary's website. *See* Home, http://www.azcleanelections.gov (link "View Campaign Finance Reports"). The Commission's role in voter education is nonexistent here.

As for deterrence of corruption, as discussed above, the Secretary enforces a detailed statutory definition of independent expenditures, exercises enforcement discretion, provides guidance to political speakers about disclosure requirements, and works in tandem with law enforcement to achieve judicial resolution of campaign finance violations. If the Commission had authority to issue conflicting legal interpretations and pursue conflicting or duplicative enforcement actions, it would introduce substantial additional burdens on the rights protected by the First Amendment and Ariz. Const. art. 2, sec. 6, with no corresponding benefit to any governmental interest. Candidates would be deprived of important due process rights protected by A.R.S. § 16-924(A) and (B), which permit parties to avoid penalties by taking corrective action. Forum shopping by complainants would be the norm, with overlapping investigations and twice the public

controversy. The risk of inconsistent results among the regulatory agencies and the regulated community are inevitable when duplicate complaints are filed, as is the case here. Such an interpretation of Title 16, Chapter 6, Articles 1 and 2 would introduce substantial "constitutional doubt" about Arizona's campaign finance disclosure statutes. *Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1369 (D.C. Cir. 1988).

B. This Court Can Easily Reconcile the Statutes in a Manner that Reduces Constitutional Doubt.

In order to avoid the same constitutional problems at issue here, the D.C. Circuit long ago resolved a similar conflict between federal agencies regarding the Federal Election Campaign Act ("FECA"). The background of that case is strikingly similar to this case. A politician filed a complaint with the Federal Election Commission ("FEC") and the U.S. Postal Service ("USPS") contesting the truthfulness of a political solicitation letter that used his name. *Id.* at 1365–66. (Much like Mayor Smith's attorney did here with duplicate complaints to the Secretary and the Commission. I.R. 54 ¶ 25.) The FEC determined that the complaint was mostly unfounded, but reached a conciliation agreement with the letter writers on a single FECA violation. *Id.* at 1365. (Much like the determination here by the Secretary and the Maricopa County Elections Department. I.R. 54 ¶¶ 27–28.) Undeterred, the USPS proceeded to retry the matter in front of an administrative law judge pursuant to the USPS's authority under 39 U.S.C. § 3005, to prosecute "scheme[s] or device[s] for obtaining money . . . through the mail by means of false representations . . . ." *Id.* (Here the analogy breaks down, but only because the USPS's enforcement authority was clearly established in the statute, whereas the Commission has no authority to levy the fines it imposed here. *See* A.R.S. § 16-942.) In the meantime, the parties settled the remaining issues between them and the politician attempted to withdraw his complaint; the USPS refused. *Id.* at 1366. (Likewise,

Mayor Smith attempted to withdraw his complaint; the Commission refused. I.R. 54 ¶¶ 40, 41.) The USPS determined that 39 U.S.C. § 3005 had been violated and the letter writers appealed. (As happened here. I.R. 55 at 7:22–24.)

The D.C. Circuit rejected the USPS's claimed authority and reversed to the extent that the USPS's jurisdictional claims conflicted with the FEC's statutory authority. *Galliano*, 836 F.2d at 1371. Unlike this case, *Galliano* involved a genuine conflict between statutes—and so the lack of genuine conflict makes the conclusion here much more straightforward—but the principle of constitutional avoidance on full display in *Galliano* points the way here. Writing for a unanimous panel, then-Circuit Judge Ruth Bader Ginsburg acknowledged that the USPS's claim of authority raised troubling constitutional implications because of the nature of the speech at issue. "[M]indful that the Postal Service's application of section 3005 to solicitations for political contributions poses genuine constitutional questions . . . [the court] reconciles the two statutes in a manner that reduces constitutional doubt." *Galliano*, 836 F.2d at 1369. As to questions explicitly regulated by FECA, the "FEC is the exclusive administrative arbiter . . . ." *Id.* at 1370. To allow the USPS to impose another layer of regulations on top of the explicit provisions of FECA

> would defeat the substantive objective of that Act's first-amendment-sensitive provisions. . . . A fine balance of interests was deliberately struck by Congress in the name and disclaimer requirements of FECA . . . . [W]e believe they were meant to provide a safe haven to candidates and political organizations . . . . If FECA requirements are met, then as we comprehend that legislation, no further constraints . . . may be imposed by other governmental authorities.

Id.

The court also recognized that "FECA's first-amendment-sensitive regime includes a procedural as well as a substantive component." *Id.* FECA provides for both conciliation and judicially imposed sanctions that serve to safeguard sensitive First Amendment rights. *Id.* The USPS's procedures, lacking both features, "would not measure up to the first-amendment-prompted

arrangements Congress devised for FECA enforcement actions." *Id.* Allowing the USPS to duplicate the FEC's enforcement efforts "based on its own assessment of the public's perception, the [USPS's] adjudication—both substantively and procedurally—would effectively countermand the 'precisely drawn, detailed' prescriptions of FECA." *Id.* at 1371. The D.C. Circuit would not allow the USPS to upend the carefully drawn limitations and protections contained in FECA by making an administrative end-run around the Act.

Nor should this Court allow the Commission to "countermand the 'precisely drawn, detailed' prescriptions of" Arizona's campaign finance laws. *Id.* Like FECA, A.R.S. § 16-924 requires the Secretary to work in collaboration with law enforcement to achieve a judicial remedy to violations of Arizona's campaign finance laws, operating under one set of rules enforced by the Secretary. *See United States v. Hsia*, 176 F.3d 517, 526 (D.C. Cir. 1999) (discussing *Galliano*, 836 F.2d at 1362) ("Unlike the Postal Service, the Department of Justice has no authority to develop substantive standards of its own. As a criminal enforcer, it brings cases in federal court, where judges interpret the underlying statutes without deference to the Department."). And, also like FECA, A.R.S. § 16-924 allows law enforcement to seek voluntary compliance with campaign finance laws before bringing legal action. A.R.S. § 16-924(A) ("The attorney general, county attorney or city or town attorney, as appropriate, may serve on the person an order requiring compliance with that provision."). On the other hand, the Commission, like the USPS, operates independent of law enforcement, A.R.S. § 16-957, making the substantive and procedural protections of A.R.S. § 16-924 a nullity. *See Galliano*, 836 F.2d at 1371. Most important, the Commission claims the authority to create its own standards for judging when Arizona's independent expenditure laws apply. I.R. 55 at 2:24–26. If the Commission's reading of the statutes were correct, it would mean Arizona had "empowered two bodies to promulgate conflicting

substantive standards—a result that *Galliano* presumed Congress would seek to avoid." *Hsia*, 176 F.3d. at 526. This Court should likewise presume that the voters and the Arizona Legislature would seek to avoid that result. *See Ruiz*, 191 Ariz. at 448, 957 P.2d at 991.

A decision to the contrary—interpreting of Title 16, Chapter 6, Articles 1 and 2 to allow both the Secretary and the Commission to make conflicting substantive enforcement decisions—would plunge the entire statutory scheme the Secretary of State is charged with enforcing into constitutional uncertainty. Because disclosure burdens rights protected by the First Amendment and Ariz. Const. art. 2, sec. 6, the Commission must demonstrate that a system of overlapping and conflicting disclosure requirements "survive exacting scrutiny" which requires a "substantial relation" between the disclosures and a "sufficiently important" governmental interest. *Buckley*, 424 U.S. at 64, 66; *see McConnell*, 540 U.S. at 231–232; *Citizens United*, 558 U.S. at 366–67. The Commission has not even confronted the true nature of the system it proposes, much less attempted to meet the attendant constitutional burden. Unless the Commission can offer evidence to justify its claim to the Secretary's authority, it will have failed to justify its preferred interpretation of Title 16, Chapter 6, Articles 1 and 2. *See Ruiz*, 191 Ariz. at 448, 957 P.2d at 991.

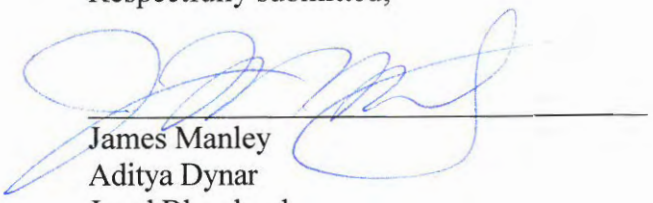
Even if the Commission's authority over independent expenditures were not limited by the plain text, history, and practical interplay of the statutes, it would be limited by the intractable constitutional problems that would result if the Commission could regulate independent expenditures in conflict with the Secretary. Interpreting the statutory provisions at issue to vest authority over independent expenditure reporting solely with the Secretary avoids the significant constitutional problems created by the Commission's usurpation of authority. This power-grab by the Commission unlawfully invades the Secretary's jurisdiction and endangers free-speech rights by subjecting independent expenditures to conflicting standards. It should not be allowed to stand.

CONCLUSION

For the reasons discussed above and in LFAF's Opening Brief, the Commission has no jurisdiction over LFAF's purported independent expenditures. The Commission's Final Administrative Decision should therefore be reversed. This Court should also award the Secretary reasonable expenses and attorney fees. A.R.S. § 12-348.01.

DATED this 4th day of June, 2015.

Respectfully submitted,



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