



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**LEGACY FOUNDATION ACTION FUND v.  
CITIZENS CLEAN ELECTIONS COMMISSION  
CV-16-0306-PR**

**PARTIES:**

*Petitioner:* Legacy Foundation Action Fund (“Legacy”)

*Respondent:* Citizens Clean Elections Commission (“Commission”)

**FACTS:**

Scott Smith was the Mayor of the City of Mesa and also President of the U.S. Conference of Mayors. In January 2014 he publicly announced he was running for governor and on April 15, 2014, he resigned from the City of Mesa and the Conference of Mayors to pursue his campaign.

Legacy, a non-profit organization, purchased airtime and ran television advertisements opposing certain policies of Mayor Smith from March 31 to April 14, 2014.

Smith filed a complaint against Legacy with the Commission, arguing that the advertisements violated A.R.S. §§ 16–940 to –961 of the Citizens’ Clean Elections Act (“CCEA”). The complaint alleged that the ads contained “express advocacy” against Smith’s gubernatorial campaign, and that Legacy was therefore required to register and file campaign finance disclosure forms with the Arizona Secretary of State and the Commission.

On November 20, 2014, the Commission found probable cause to believe Legacy had violated the CCEA and it assessed \$95,460 in penalties. Legacy timely requested a hearing before an Administrative Law Judge (“ALJ”).

**The ALJ Decision.**

The ALJ looked to the definition of “independent expenditure” under A.R.S. § 16-901(31) and “express advocacy” under A.R.S. § 16-901.01(A). The ALJ noted that the U.S. Supreme Court has adopted a “functional equivalent” test regarding express advocacy. “Under that test, a communication is considered express advocacy only if it is susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate. The speaker’s subjective intent is irrelevant to the inquiry. The tribunal may consider the communication’s context, including the timing of the communication, but these factors cannot be used as a proxy for that subjective intent.”

The ALJ concluded that Legacy’s speech was permissible issue advocacy and not express advocacy, and Legacy did not make an independent expenditure under the CCEA. Legacy therefore was not subject to the reporting requirements or penalties.

## **The Commission’s Final Administrative Decision.**

On March 27, 2015, the Commission entered its Final Administrative Decision adopting the ALJ’s factual findings but rejecting the ALJ’s conclusions of law. The Commission found the ALJ Decision was incorrect for two reasons: First, it did not apply the statutory framework set out in A.R.S. § 16-901.01(A)(2). Second, it misstated the issue by referring to “permissible issue advocacy.” All issue advocacy is permissible, just as all express advocacy through independent expenditures is permissible. The only issue in this case is whether the disclosure requirements for independent expenditures prescribed in A.R.S. §§ 16-941(D) and -958 of the CCEA apply to the Legacy advertisements.

The Commission concluded that the advertisements’ only reasonable meaning was to advocate for the defeat of Scott Smith in the 2014 Republican primary for Governor, and noted the advertisements’ repeated mocking references to Smith concerning non-local policy issues.

The Commission also disagreed with the ALJ’s interpretation of the statute and rule imposing penalties “jointly and severally” on the candidate on whose behalf the expenditure was made. It stated, “The provision in A.R.S. § 16-942(B) imposing joint and several liability on a candidate and candidate campaign committee for penalties does not apply here because no candidate or candidate campaign committee was involved in any way with the reporting violation that occurred.” The Commission reinstated the \$95,460 penalty against Legacy.

Legacy appealed to the superior court, and the superior court granted the Commission’s motion to dismiss because Legacy did not file the appeal within the 14-day deadline under A.R.S. § 16-957(B). Legacy appealed to the court of appeals, which agreed with the superior court that Legacy’s deadline to appeal to the superior court was 14 days under A.R.S. § 16-957(B) and not 35 days under the Judicial Review of Administrative Decisions Act, A.R.S. § 12-904(A). Legacy also argued that the Commission had no jurisdiction over Legacy and therefore the decision imposing the penalties was void. Because the decision was void, Legacy argued that it could pursue an untimely appeal challenging the Commission’s subject matter jurisdiction under A.R.S. § 12-902(B).

### **ISSUE:**

Until the Court of Appeals ruling below, both the First And Second Divisions of the Arizona Court of Appeals were in agreement that A.R.S. § 12-902(B) permitted challenges to an agency’s jurisdiction even after the time to seek judicial review had lapsed. *Under State ex rel. Dandoy v. Phoenix*, 133 Ariz. 334 (App. 1982), and *Arkules v. Board of Adjustment*, 151 Ariz. 438 (App. 1986), did the Maricopa County Superior Court and the Court of Appeals err when it [sic] dismissed as untimely LFAF’s [Legacy’s] appeal challenging the Commission’s jurisdiction over LFAF’s [Legacy’s] speech?

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