

THE STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona

July 31, 2014

10:03 a.m.

Reported By:

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Certified Reporter (AZ 50127)

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1 A PUBLIC MEETING, BEFORE THE CITIZENS CLEAN
 2 ELECTIONS COMMISSION, convened at 10:03 a.m. on July 31,
 3 2014, at the State of Arizona, Clean Elections
 4 Commission, 1616 W. Adams, Conference Room, Phoenix,
 5 Arizona, in the presence of the following Board members:
 6
 7 Mr. Timothy Reckart, Chairperson, Telephonic
 8 Mr. Thomas J. Koester
 9 Mr. Mitchell C. Laird, Acting Chairman
 10 Mr. Steve Titla

11 OTHERS PRESENT:

12 Thomas M. Collins, Executive Director
 13 Paula Thomas, Executive Assistant
 14 Sara Larsen, Campaign Finance Manager
 15 Gina Roberts, Voter Education Manager
 16 Todd Allison, Assistant Attorney General
 17 Steve Clawson, Moses Anshell
 18 Jason Torchinsky, LFAF
 19 Brian Bergin, LFAF
 20 Mike Liburdi, Ducey 2014
 21 Mary O'Grady, Assistant Attorney General
 22 Joe Roth, Assistant Attorney General
 23 Veronica Titla, Citizen
 24 Howie Fisher, Associated Press
 25 Mary Jo Pitzel, AZ Republic
 Michael Becker, Governor's Office

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P R O C E E D I N G

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 3 ACTING CHAIRMAN LAIRD: It's now 10 o'clock,
 4 and there being a quorum of the Commissioners, I call
 5 this meeting of the Clean Elections Commission to order.
 6 Chairman Reckart is on the phone; I'm acting on
 7 his behalf, chairing this meeting since I'm here in
 8 person; Commissioner Titla we thought was going to be on
 9 the phone, we're glad to have him here live in person;
 10 and Commissioner Hoffman is absent; but Commissioner
 11 Koestner -- Koester is also present.
 12 The Commission may vote to go into executive
 13 session for legal advice on any of the items on the --
 14 the agenda. The executive session, of course, will not
 15 be open to the public.
 16 Let's go now to the agenda. Having called the
 17 meeting to order, we'll go right to the Executive
 18 Director's report.
 19 MR. COLLINS: Thank you, Commissioner Laird,
 20 Commissioners. I will be brief as I can with the
 21 Executive Director's report. Since you're here, though,
 22 it's nice to have an opportunity to -- to update you.
 23 Announcements: Early voting begins today and
 24 the primary election is August 6th -- or, 26th rather;
 25 we have had our -- our candidate statement pamphlet has

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1 been issued; our -- and voters -- our -- our -- our
 2 district locator is -- is live on the website now.
 3 I want to note, also, that we got a direction
 4 to just begin looking at data and a plan around Native
 5 American languages, which we are working on -- Gina and
 6 Sara are working on now.
 7 You know, with respect to voter education, I
 8 just -- really quickly mention that the Maricopa County
 9 Recorder kicked off the election season and early voting
 10 with a press conference last week that Gina and I
 11 attended where she gave her thanks to us, this Clean
 12 Elections Commission, for our investment and efforts on
 13 -- on voter education; and we're grateful that --
 14 that -- that the Maricopa County Recorder, Helen
 15 Purcell, has taken the leadership she has taken on this.
 16 You'll see the participating candidate
 17 information there.
 18 And then, finally, the -- we've been updating
 19 you on the independent expenditure reports and
 20 exemptions. We've received -- actually, since this was
 21 written, we've received even an additional exemption
 22 from another organization, the Farm -- Farm Bureau.
 23 And then there are some notes about -- about
 24 news. So, I don't want to belabor it. If there are any
 25 questions about any of these items, I'm happy -- they're

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1 -- they're available for discussion, but other -- other
 2 than that, that concludes my report.
 3 ACTING CHAIRMAN LAIRD: Questions or comments
 4 from any of the Commissioners?
 5 COMMISSIONER TITLA: Chairman?
 6 ACTING CHAIRMAN LAIRD: Yes, Mr. Titla.
 7 COMMISSIONER TITLA: Mr. Collins, on the voter
 8 education, the primary election debates --
 9 MR. COLLINS: Yes.
 10 COMMISSIONER TITLA: -- you said -- you said
 11 were on the YouTube channel?
 12 MR. COLLINS: Correct.
 13 COMMISSIONER TITLA: How -- how would you --
 14 how would you get that?
 15 MR. COLLINS: You can click on the
 16 AZCleanElections.gov website, and on the right side of
 17 the website there is a link to "Debates" that takes you
 18 directly to that channel.
 19 COMMISSIONER TITLA: Okay. Thank you.
 20 ACTING CHAIRMAN LAIRD: There being no other
 21 questions or comments, we'll move on to the next agenda
 22 item, Item III(A). And with respect to Item III(A) and
 23 the complaint that has been filed, I think the order
 24 that we may do this morning is we'll hear the Executive
 25 Director's report and recommendation with respect to

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1 this matter; and then if anyone cares to speak on behalf
 2 of the Complainant, we'll do that next; and then,
 3 finally, comments by Respondent.
 4 So, without further ado, Mr. Executive
 5 Director, if you'd like to present your recommendation.
 6 MR. COLLINS: Yes. Thank you again,
 7 Commissioner Laird and Commissioners.
 8 I just want to briefly say a couple of things
 9 about this. This item -- the timing of this meeting and
 10 this rec- -- and -- and the recommendation that are
 11 before you are driven by the litigation that's been
 12 engaged in that's been filed by the Legacy Foundation
 13 Action Fund, which I'll be referring to as L-F-A-F or
 14 LFAF.
 15 Their decision to press ahead with the lawsuit
 16 challenging the Commission's authority and the statute
 17 that defines express advocacy, notwithstanding any
 18 finding by the Commission or enforcement order, has
 19 placed me in a position of having to make a decision
 20 between entirely standing on procedure without having
 21 analyzed the issues raised in the complaint, or
 22 providing you with my analysis.
 23 Had my analysis concluded that there was not
 24 express advocacy, I would be recommending that the
 25 complaint be closed and I assume then that the lawsuit
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1 I -- the recommendation does, in sum, make a
 2 recommendation on the law, but that in light of
 3 litigation that's outstanding -- and this is actually
 4 consistent with LFAF's position as they articulated in
 5 footnote 1 of their response, which indicates they
 6 believe the Horne litigation will conclude this matter.
 7 Although, I don't -- I'm not sure I agree with that with
 8 respect to LFAF. I don't think I agree with that with
 9 respect to LFAF, in fact; but I do recognize there is
 10 outstanding litigation.
 11 And it's up for the Commission and all of you
 12 Commissioners to determine the ultimate course. And, of
 13 course, your options today include adopting the
 14 recommendation, taking -- determining to hold the
 15 complaint until some later time, or dismissing the
 16 complaint. And, as Executive Director, I just want to
 17 make clear that I defer to the Commission's judgments.
 18 With respect to legal and procedural issues,
 19 Mary O'Grady and her partner, Joe Roth, are here.
 20 They've been authorized by the Attorney General's office
 21 to represent us in this matter because of conflicts of
 22 interest.
 23 And with that, I would like to go ahead and do
 24 a brief PowerPoint on the law here so that everybody is
 25 up to speed on where we are at.
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1 would be dismissed. But for LFAF's insistence that
 2 litigation go forward immediately, this recommendation
 3 and this meeting therefore would not have happened
 4 until, at the earliest, August 28th.
 5 But I owe the Commission my honest assessment
 6 of the materials presented by the parties. And I do
 7 have a confidence level -- I have a high confidence
 8 level that this is the proper analysis. This is the
 9 statute that has been employed by the Arizona Secretary
 10 of State's office and the Maricopa County Attorneys'
 11 office in the mat- -- 2010 matter of the Committee For
 12 Justice and Fairness; and the Secretary of State's
 13 office and the Arizona Attorney General's office in the
 14 matter of the -- either Citizens or Campaigns -- I'm not
 15 sure of the name -- for Better Neighborhoods in 2013.
 16 The Secretary continues to employ this statute
 17 in the analysis, even when it can declines reasonable
 18 cause, as it did in the matter of Arizona Public
 19 Integrity Alliance in the past few weeks; and it also
 20 was used by the Commission in its decline to provide no
 21 -- a no-action determination to Secretary of State Ken
 22 Bennett's proposed voter education campaign.
 23 Additionally, the Commission has defended the
 24 statute in the CJAF case as amicus.
 25 So -- and I would also just say that -- that
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1 ACTING CHAIRMAN LAIRD: Good.
 2 CHAIRPERSON RECKART: Paula, is that PowerPoint
 3 available?
 4 MS. THOMAS: Yes, sir. I'll get it to you.
 5 MR. COLLINS: Yeah, we'll make --
 6 CHAIRPERSON RECKART: Would you mind sending it
 7 to me?
 8 MS. THOMAS: Yes, sir.
 9 CHAIRPERSON RECKART: Thank you.
 10 MR. COLLINS: So, my intention here is to just
 11 set the stage for -- to -- to understand the
 12 recommendation. Hopefully, this will actually work.
 13 So we have here that campaign finance law and
 14 -- should we wait? Commissioner Reckart, do you want us
 15 to wait until you get it transmitted to you?
 16 I'm sorry.
 17 CHAIRPERSON RECKART: It would be helpful just
 18 because --
 19 MR. COLLINS: Okay. Well, let's -- let's -- we
 20 can -- I think we can do that with some -- pretty
 21 easily.
 22 (Whereupon there is a brief pause in the
 23 meeting.)
 24 MR. COLLINS: Sorry.
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1 CHAIRPERSON RECKART: Not a problem.
 2 There, I got it. Thank you.
 3 MR. COLLINS: Okay. Thank you. So we're on
 4 the -- essentially, the second slide.
 5 So there we discuss and I think the Commission
 6 is very familiar at this point with the fact that, you
 7 know, the law limits candidates and the contributions
 8 they may take and requires them to report their
 9 contributions and expenditures.
 10 Entities may make independent expenditures that
 11 advocate for and against a candidate that are not
 12 contributions to candidates.
 13 And if an entity's independent expenditure is
 14 coordinated, it is an in-kind contribution to the
 15 candidate. Those are all basic premises. I think we've
 16 talked about those in the past and -- and those issues
 17 are -- are detailed in the -- in the -- in the briefing
 18 you've received.
 19 We talk about express advocacy. An independent
 20 -- we'll talk about that first in the context of
 21 independent expenditures. That's an expenditure by a
 22 person or a political committee that expressly advocates
 23 the election or defeat of a clearly identified
 24 candidate. Again, this is language that comes out of
 25 16-901.14. I think it's language that's familiar to all
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1 campaign expenditure, and reporting and disclosure
 2 obligations apply to the entity making the independent
 3 expenditure.
 4 That brings us to the next -- the next question
 5 that's -- that's in this complaint, which is this
 6 question of coordination.
 7 Again, co- -- why does coordination matter?
 8 Because there are campaign finance limitations that
 9 apply to candidates and the -- and -- and, yet -- and,
 10 of course, independent expenditure groups may make
 11 independent expenditures freely. But when they become
 12 coordinated, they become in-kind contributions, which
 13 are directly related to the campaign contributions. And
 14 also has -- there's a disclosure interest there as well
 15 in knowing precisely who was actually making the
 16 expenditure.
 17 Those should -- need to be made without
 18 cooperation or consultation between a candidate or an
 19 agent of the candidate; and you see the rest of the
 20 language there.
 21 I don't want to just read the power bullet
 22 points, but I do want to -- and feel free to interrupt
 23 me. Obviously, you can, with -- with -- with a bullet
 24 point at the end for questions.
 25 So, the statute next tells us that an
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1 of us who have been dealing with these issues, certainly
 2 the Commission.
 3 And you see there the words "express advocacy"
 4 are there, and so that takes us to the next legal
 5 definition in here, which is: Express advocacy is
 6 defined in statute in a statute called 16-901.01, which
 7 was passed as part of the Clean Elections Act by the
 8 voters. That statute has a definition of express
 9 advocacy that includes what we colloquially refer to as
 10 "magic words," which is the "vote for," "vote to
 11 defeat," et cetera.
 12 And then we have the second definition, which
 13 is the issue here before us today, which is the longer
 14 definition -- which the font isn't quite big enough --
 15 but: Making a general public communication; referring
 16 to one or more clearly identified candidates; targeted
 17 at -- at the electorate; that in context can have no
 18 reasonable meaning other than to advocate the election
 19 or defeat of the candidates; as evidenced by factors
 20 such as the presentation of the candidates in a
 21 favorable/unfavorable light, the targeting, placement,
 22 or timing of the communication; and the inclusion of
 23 statements of the candidate or opponents.
 24 Again, just to -- just to reset the stage for
 25 this, if the communication is express advocacy, it's a
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1 expenditure is not independent if a number of
 2 circumstances apply, and there are four circumstances
 3 that are outlined in the statute in what is -- what's
 4 codified at 16-16-901.14, and is now codified at 16-9011
 5 [sic]; and we can talk about those if we get into it,
 6 but essentially those terms are identified here and you
 7 have them in your materials.
 8 Essentially, you have there one definition: An
 9 officer, member, employee, or agent of the political
 10 committee making an expenditure; is an officer, member
 11 employee, or agent of the committee of the candidate, or
 12 an agent of the candidate whose election is being
 13 advocated or defeated by the expendi- -- expenditure.
 14 There's an arrangement, coordination or
 15 direction with respect to the expenditure between the
 16 candidate or the candidate's agent and the person making
 17 the expenditure, including any officer, director,
 18 employee, or agent of the person.
 19 In this -- and then in this -- and then we
 20 have: In the same election, the person making the
 21 expenditure, including any officer, director, employee,
 22 or agent of that person, is or has been either
 23 authorized to raise or expend monies on behalf of the
 24 candidate; or receiving any form of compensation or
 25 reimbursement from the candidate, or the candidate's
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1 committee, and the candidate's agent.
2 It also -- if a -- I don't know if this --
3 that's the -- that's a repeat. Sorry. That shouldn't
4 be there.
5 Finally, the expenditure is based on
6 information about the candidate's plans, projects, or
7 needs or those of the candidate's campaign committee
8 provided to the expending person by the candidate or the
9 candidate's agents or any officer, member, or employee
10 of the candidate's campaign committee with a view toward
11 having the expenditure made.
12 So, those are things the statute says are
13 not -- making the expenditure not independent.
14 I'm going to see -- so, that concludes my legal
15 outline. I think we'll play the -- the ad, if we could,
16 and then I have -- or I can make one summary point,
17 whichever you prefer.
18 ACTING CHAIRMAN LAIRD: Go ahead.
19 MR. COLLINS: Okay. Let me make the summary
20 point first. I -- I think you'll find that this
21 advertisement, which you all have had made available to
22 you as well as the transcript of it, you know, is
23 express advocacy; and I do think the Commission has
24 jurisdiction. This advertisement, in context, has no
25 meaning other than to advocate against Smith for
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1 because of the litigation posture that's been taken,
2 that I advise you of whether or not this -- in my view,
3 this is express advocacy, and I've done that. And so I
4 -- you know, you have a number of options in front of
5 you, and I, you know, would take my direction from you
6 at that point.
7 And if you have any -- if you have any
8 questions of me, I'm happy to answer them.
9 ACTING CHAIRMAN LAIRD: Thank you,
10 Mr. Executive Director.
11 Okay. Well, at this point does -- would anyone
12 care to speak on behalf of Complainant?
13 Okay. If not, would anybody care to speak on
14 behalf of Respondent?
15 MR. FISHER: Be outrageous.
16 MR. LIBURDI: Howie is asking me to be
17 outrageous, Mr. Chairman. So if I am, it's his fault.
18 ACTING CHAIRMAN LAIRD: Duly noted.
19 MR. LIBURDI: For the record.
20 Thank you, Mr. Chairman, members, Mr. Collins,
21 for the opportunity to come here today. We do
22 appreciate you taking the time out of your schedules.
23 I do have a few points. I -- I'm Michael
24 Liburdi. I represent Ducey 2014. You've received a lot
25 of correspondence from me. I'd like to make a few
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1 governor.
2 Other possible meanings are not reasonable in
3 context under the precise test articulated by Justice
4 Roberts in the Wisconsin Right to Life case, and there's
5 no discovery necessary to make that particular
6 determination. Any other interpretation reduces
7 16-901.01 to applying a so-called "magic words" test,
8 such as "Vote against Smith," which both the Supreme
9 Court and the statute have rejected.
10 So, that's -- that's kind of where we leave
11 things. And we can -- I mean, I guess the question is
12 if you want to watch the ad again. It's up -- it's up
13 to you. I don't know that record-wise we need to view
14 it.
15 Do we?
16 MS. O'GRADY: It's not necessary, but if the
17 Commission wants to.
18 ACTING CHAIRMAN LAIRD: Do you have it queued
19 up?
20 MR. COLLINS: Okay. All right.
21 (Whereupon the video was played.)
22
23 MR. COLLINS: So as I say, you know,
24 Commissioners, I mean, my -- my direction is at your
25 disposal. My goal here was to make sure that I --
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1 points based on that.
2 First, I do want to note for the record that we
3 don't think the Commission has subject matter
4 jurisdiction. We've made that point; we don't waive it,
5 but we appear to address the substantive elements raised
6 in the complaint.
7 I want to defer to Mr. Torchinsky, who is here
8 on behalf of Legacy Foundation Action Fund, on the issue
9 of express versus issue advocacy. We've made our point
10 clear; we agree with Mr. Torchinsky's points; we don't
11 agree with the Executive Director on various -- for
12 various reasons, but for the sake of time I'll defer to
13 Mr. Torchinsky.
14 On coordination, I've made the point several
15 times that this Comm- -- this Commission has exactly
16 what it needs in front of it to dismiss the complaint
17 against Mr. Ducey on the coordination count. Whether or
18 not the Legacy Foundation advertisement is express or
19 issue advocacy is not a threshold question that bears on
20 -- on the determination of coordination. If it is
21 express advocacy, then there are reporting requirements
22 that attach, but it is a separate question whether there
23 was any coordination/communication/direction/
24 consultation between the Ducey campaign and -- and
25 Legacy Foundation.
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1 Now, I note for the record that the person
 2 making the complaint is not here. Okay? The person
 3 making the complaint did not ask anybody to appear on
 4 his behalf. The person who made the complaint is the
 5 lawyer for Scott Smith. Nobody on behalf of the Scott
 6 Smith gubernatorial campaign asked somebody to appear.
 7 In the last month, it's been since we've
 8 received the complaint, I've provided responses to this
 9 Commission, I've provided a supplemental response to the
 10 Commission yesterday, and I provided a initial response
 11 to the Maricopa County Recorder's office with a mountain
 12 of evidence. In fact, you have a CD -- I have a red
 13 well, it's about a thousand pages thick of evidence that
 14 we've gotten to respond to the complaint. The
 15 Complainant has given you zero evidence of coordination.
 16 The complaint makes tenuous observations about
 17 individuals who are vendors of the Ducey campaign who
 18 have specific responsibilities, they are limited in the
 19 -- their scope of agency for the Ducey campaign, making
 20 unsupported accusations and connections with Legacy
 21 Foundation Action Fund.
 22 You have before you six Declarations of
 23 individuals. These Declarations are sworn under the
 24 penalty of perjury that the information provided is
 25 correct. In each of those Declarations, those
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1 hundreds of pages of reimbursements by Mr. Smith where
 2 Mr. Smith asked the City of Mesa taxpayers, and he did
 3 receive about a hundred in tax -- a hundred thousand
 4 dollars in reimbursements from the City of Mesa
 5 taxpayers for what look like junkets across the world to
 6 cities like Morocco and other exotic European and Asian
 7 cities. He received some pictures of -- of -- of Mr.
 8 Smith at a meeting with Joe Biden attending that
 9 meeting; none of those pictures were in the -- the
 10 Legacy Foundation Action Fund. And there is other
 11 expense reimbursements for Mr. Smith where he billed the
 12 City of Mesa taxpayers for lunches with other people
 13 around town.
 14 Commissioners, nothing in that document set had
 15 anything to do with the advertisement at issue here.
 16 Beyond that, you have a Declaration from the
 17 campaign manager from -- for Ducey 2014 saying that
 18 nobody coordinated with Legacy Action Fund [sic] on
 19 this -- on this advertisement.
 20 Then in addition to that, you have the
 21 president of Legacy Foundation, Christopher Rants,
 22 saying: Yes, I'm involved in -- in this advertisement,
 23 but none of these people identified in the complaint had
 24 anything to do with this advertisement.
 25 That's the evidence before you. It is
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1 declarants say that they had absolutely nothing to do
 2 with the advertisement that was run by Legacy Foundation
 3 Action Fund. They had nothing to do with any sort of
 4 activity in Arizona. Larry McCarthy is a media
 5 consultant based in Washington D.C., he consulted on an
 6 advertisement in a Nebraska Senate race; he had nothing
 7 to do with the advertisement here.
 8 Jack Patavano owns a corporation that does
 9 direct mail. He helped another group called Legacy
 10 Foundation several years ago do a mailer with respect to
 11 SB 1070 when that was a -- a hot issue. He testifies in
 12 his Declaration, absolutely no -- no coordination.
 13 You have two Declarations from people
 14 associated with Copper State Research & Consulting where
 15 they -- where Shawna Pekau, the president of Copper
 16 State says: Yes, I admit; I submitted -- I submitted
 17 public records requests to the City of Mesa for
 18 information, but that was done in a way that, you know,
 19 the timing of it, I didn't receive this information
 20 until after this advertisement aired.
 21 And by the way, to come clean, here's
 22 everything that I got. We provided you with every piece
 23 of information that Shawna Pekau obtained from the City
 24 of Mesa and here's what it is: 500 pages of calendars,
 25 hundred of pages of financial disclosures of Mr. Smith,
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1 compelling that the person who made this complaint has
 2 provided nothing in addition to rebut that evidence; and
 3 it is compelling that he is not even here today to
 4 defend what he put in that letter.
 5 Now, why is this important? It's important
 6 because the law as interpreted by the United States
 7 Supreme Court, as set down in Section 16-901.14 of the
 8 Arizona Revised Statutes and has been interpreted by
 9 this Commission since at least 2006, is that there needs
 10 to be a showing of actual coordination before the
 11 Commission moves forward with a complaint; and the
 12 reasons for that are critical.
 13 This Commission cannot be a forum for rival
 14 campaigns to drop bogus, unsupported -- unsupported and,
 15 in my opinion here, desperate complaints to drive a
 16 media story and to get this Commission to act on
 17 something to influence the result of the election. That
 18 is not the purpose of the campaign finance laws; and,
 19 respectfully, that is not the purpose of this
 20 Commission. The purpose of this Commission is to uphold
 21 the Act and to make sure that people are acting pursuant
 22 to the law.
 23 It is not a forum for political maneuvering and
 24 that's what's been done here. You can't just file a
 25 complaint with speculation and -- and expect this
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1 Commission to go on a fishing expedition.
 2 That's not what happened with the Maricopa
 3 County Recorder's office, an independent counsel
 4 dismissed that complaint swiftly. The Complainant
 5 didn't do anything. It -- it's been two weeks. The
 6 Complainant didn't provide any additional evidence to
 7 try and revise that complaint; it just isn't there.
 8 Mr. Collins presented some slides on the law.
 9 That is a nice job of reflecting what is in the law.
 10 From my count, there are at least three lawyers on this
 11 Commission -- forgive me if I'm missing somebody -- but
 12 you don't just look at what's in a statute, you have to
 13 look at the way the Courts have interpreted those
 14 statutes.
 15 Dating back almost 20 years, the United States
 16 Supreme Court in the Colorado Republican Party
 17 Committee, the Supreme Court said that you cannot have
 18 in statute a presumption of coordination just because
 19 you have some overlapping members, there has to be a
 20 showing of actual coordination. And in my first letter
 21 to you, July 15th, I cite many other cases that follow
 22 that.
 23 Indeed, in my letter to you, I cite a
 24 transcript of a Commission hearing that I attended at
 25 the end of May involving a matter under review with the
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1 And he goes on to say: "There is no
 2 evidence that there was -- that this was true
 3 for the expenditure in question."
 4 That is a conclusion that this Commission drew
 5 just two months ago in a complaint that similarly had no
 6 factual basis. This Commission swiftly dismissed that
 7 complaint.
 8 I cited in my papers examples of three matters
 9 under the review -- you have the cites there -- from the
 10 2006 gubernatorial election where there was overlapping
 11 vendors between a -- a State party and a candidate and
 12 an independent expenditure committee. This Commission
 13 decided that there was no reason to believe a violation
 14 exists and swiftly dismissed all three of those
 15 complaints.
 16 So the precedent is there; the law is there.
 17 Even the text of the statute. If you look at the text
 18 of the statute, it begins with the cooperation or
 19 coordination lead-in.
 20 There just isn't anything here. There isn't
 21 anything to justify keeping this part of the complaint
 22 active and on the docket when the primary election
 23 starts today. Early ballots go out today. There is no
 24 reason to have this matter open and to continue it being
 25 in the public.
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1 Secretary of State where this Commission dismissed a
 2 complaint against the Secretary of State for
 3 coordination, saying that there was no evidence of
 4 coord- -- there has to be some evidence of actual
 5 coordination. And I'd like to read you some of the
 6 things that the Commission said.
 7 Commissioner Reckart commented: "As I read the
 8 definition of independent expenditure, it has
 9 to be made without cooperation or
 10 consultation and those to me, I read them as
 11 something that occurs concurrently with the
 12 decision to make an expenditure. I have a hard
 13 time seeing that because you endorse a message
 14 of somebody after they've already made this
 15 expenditure, that you're somehow coordinating;
 16 it takes it outside of that and would render
 17 this" -- meaning the statute or the
 18 complaint -- "inappropriate."
 19 Mr. Hoffman said: "Arizona law defines
 20 independent expenditure as an expenditure by a
 21 committee like the peace officers that is made
 22 without cooperation or consultation with any
 23 candidate or candidate's agent" -- paraphrasing
 24 there -- "and it is not made in concert with a
 25 request or suggestion of the candidate."
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1 I believe the Commission should follow the lead
 2 of the County Recorder in dismissing the complaint. The
 3 Commission should follow the lead of the Secretary of
 4 State when it dismissed similar complaints against the
 5 Complainant's own clients where he made arguments that
 6 are directly 180 degrees to the arguments that he makes
 7 here. And I think the Commission should follow --
 8 follow its own precedent.
 9 So with that, Commissioners, I -- I believe
 10 that summarizes my presentation. I would be delighted
 11 to answer any questions that you may have if you have
 12 any.
 13 ACTING CHAIRMAN LAIRD: Commissioners?
 14 COMMISSIONER KOESTER: Mr. Liburdi, I think
 15 your presentation and your points you made were well
 16 taken. I think you did a good job.
 17 As you know, as Mr. -- our Executive Director,
 18 Mr. Collins, has stated, in all likely we are only
 19 looking at the first part of this, which is the express
 20 advocacy, whether or not, which we'll probably vote on
 21 today.
 22 Do you feel that if the other matter which
 23 you're speaking mainly of, the coordination matter, is
 24 not settled today, we just want to wait on that, does
 25 that cause, we'll say, harm to your side just by the
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1 fact that we don't do anything today?
2 MR. LIBURDI: Commissioner Koester, thank you
3 for the -- for the kind words. And in addressing your
4 question directly, I would say that there -- that there
5 are problems.
6 First, let me just say, I -- I think that
7 their -- that this complaint should be dismissed. There
8 is no -- it should not go forward. There should be no
9 investigation. But I would appreciate that the
10 Commission does consider dismissing it today because the
11 -- as I said, the election is going forward.
12 Just the other night, Channel 3 ran a -- ran a
13 feature at -- of each candidate, and I don't know if any
14 of you saw it. One of the features that -- or, one of
15 the parts that was mentioned about Doug Ducey was there
16 is a, quote, "200-page complaint filed by the Scott
17 Smith campaign against Mr. Ducey." Now, that was
18 exaggerated, it was a five-page complaint with 200 pages
19 of unnecessary attachments, but -- but it is out there.
20 Besides, there -- there is a statute that I
21 would direct you to, Section 16-9 -- -957. I believe
22 it's part (C). It's a little confusing, I'm not sure
23 exactly what it means, but it says that if the
24 Commission doesn't act on a complaint within 30 days, a
25 candidate is allowed to go into Superior Court on a
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1 Subsection (A) of this section within 30 days
2 after the filing of such a complaint, the
3 candidate may bring a civil action in Superior
4 Court to impose the civil penalties prescribed
5 in this section."
6 Now, I -- this -- this is a confusing section
7 to me. I have a lot of questions as to what these
8 elements mean, but it would be a distraction for a
9 candidate to bring an action in Superior Court over this
10 section. It would drag this Commission into something;
11 it would drag Ducey's campaign into something; and it
12 would be costly for the taxpayers.
13 So, Mr. Chairman and members, I believe that
14 everything is here for this Commission to act
15 independently of the Executive Director's report, which
16 I will point out didn't make a recommendation either
17 way, but everything is on the table for you to make a
18 swift dismissal of this count against the Ducey 2014
19 complaint and then focus on the remaining issues in this
20 complaint.
21 I'd be delighted to answer any other questions.
22 CHAIRPERSON RECKART: Mr. Liburdi?
23 MR. LIBURDI: Yes, Mr. Chairman.
24 CHAIRPERSON RECKART: The statements that you
25 made -- and -- and -- and I guess -- this is as much a
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1 private right of action to enforce the violations
2 alleged in the complaint.
3 So, if the Commission doesn't act today,
4 there's risk that Scott Smith may drag this into court,
5 which is, again, another sensational media story, an
6 inappropriate use of State resources, and just
7 unnecessary. So, we --
8 CHAIRPERSON RECKART: What --
9 MR. LIBURDI: Pardon me, Commissioner.
10 CHAIRPERSON RECKART: No, no. I just --
11 Mr. Liburdi, I was just going to ask you if you could
12 cite that statute again that you just cited.
13 MR. LIBURDI: Mr. Chairman, I just had to grab
14 my book. I -- you didn't see me, but I came up here
15 with a lot of different -- a -- a lot of stuff in my
16 arms.
17 But, okay, Section 16-957(C). And it's -- it's
18 a little confusing, but I want to make sure that we
19 state our -- our point here. It says: "Any candidate
20 in a particular election contest who believes
21 that any opposing candidate has violated this
22 Article for that election, may file a complaint
23 with the Commission requesting that action be
24 taken pursuant to this section. If the
25 Commission fails to make a finding under
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1 question for Mr. Collins as it is for you. But, I've
2 been through the -- the stuff. I have to confess, I
3 have not read every line of it in all the exhibits
4 that -- that were attached to the -- to the complaint.
5 But, that being said, you -- you stated that there is no
6 evidence of coordination provided by the Complainant,
7 and I just want to make sure I understood you correctly.
8 And then, Mr. Collins, if -- if you have any
9 contrary view that I may have missed something with
10 regard to that, if you could speak to that as well too,
11 please.
12 MR. LIBURDI: Mr. -- Mr. Collins is gesturing
13 me, so I'll go first.
14 Thank you, Mr. Chairman. That is accurate.
15 And to summarize, the Complainant submitted a complaint,
16 it had attachments which were largely quoted news
17 stories from the Arizona Capital Times, a 200-page
18 campaign finance filing by Ducey 2014; absolutely no
19 evidence of any sort of coordination.
20 We provided responses to this Commission and to
21 the Maricopa County Recorder's office and you all
22 received my CD with, I think, roughly a thousand pages
23 of material. And, Mr. Chairman, I don't blame you for
24 not reading every line of that. But if you were to read
25 every line of that, you would see that there's no
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1 evidence of coordination.
2 So, my point is, is that not only have we made
3 the case that there's no co- -- coordination here, but
4 the Complainant has been given the opportunity through a
5 right of reply to provide the evidence that was lacking
6 in his complaint; he didn't do that. He didn't even
7 show up to this meeting to defend his complaint. So,
8 that's -- that's my point and -- and we think that it is
9 appropriate to dismiss that count.
10 I'd yield to Mr. Collins.
11 MR. COLLINS: And, Commissioner Laird,
12 Commissioner Reckart, I would -- I would only say this
13 about that, that if you look at the recommendation at
14 page -- I guess it is page 4 and 5 and footnote 3, you
15 will see there that we have the -- the -- cited
16 specifically the -- Mr. McCarthy's statement, and in
17 addition we have cited Mr. Rants' affidavit as well.
18 There's also a footnote there that says that we have not
19 addressed and there's no -- we see no cause to address
20 the direct response: And that the Pekau-related aspects
21 are also, because there's no evidence that there -- that
22 this third-party by whom the Complainant alleges Mr.
23 Pekau was paid, there's no evidence of that.
24 So -- so, we -- we -- so, that's our -- our
25 effort to place the evidence that -- to place what is in
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1 place any words in Mr. Liburdi's mouth. I think he said
2 when he got up and began testifying that they're not
3 agents. I'm not -- I'm not in a position to know the
4 answer to that question based on the papers.
5 CHAIRPERSON RECKART: Mr. Collins, right now in
6 terms of the complaint, is the only evidence that the
7 Complainant has provided is the summary statements on
8 page 3 of their complaint that just says -- is that --
9 go ahead, Tom.
10 MR. COLLINS: Yes. That's exactly right, yes.
11 We -- I think that the -- the recommendation, I
12 believe, and I don't -- obviously, if Mr. Liburdi
13 disagrees with this, the recommendation is intended to
14 explain what we think the Complainant alleged and I --
15 and -- and -- and that's correct. So, I think that -- I
16 mean, I'm not -- I'm not trying to be cute. I just -- I
17 think that -- that -- that -- I just am not in a
18 position to characterize in the way that Mr. Liburdi
19 might what the complaint says, but those are the facts
20 that we think are in the complaint, yes.
21 CHAIRPERSON RECKART: Okay. Thank you.
22 And then I -- I guess I would defer some
23 further discussion until executive session when I can
24 inquire of Ms. O'Grady about Mr. Liburdi's
25 characterization of -- of the law. But I -- I do have
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1 the complaint in the -- in the recommendation, and --
2 and -- and that's -- and then on the -- additionally,
3 sorry to just transition briefly. There is a -- the
4 question, then, would be: Assuming in the context of
5 this complaint, that this communication were express
6 advocacy, whether or not Mr. McCarthy and Mr. -- and
7 Mr. Rants' affidavits are -- are sufficient to not raise
8 any issues under 16-901.14, and the sub- -- and --
9 and -- and the -- and the parts of that definition --
10 including the parts of that definition that identify
11 what is not an independent expenditure.
12 I have been careful in this recommendation,
13 because I believe that that threshold question in the
14 context of this complaint does trigger different
15 questions around who is the -- what the appropriate
16 response or obligation of anybody was to -- to not go
17 farther than that. But the question, as I think the
18 recommendation summary, for example, specifically said
19 would be: Whether or not the definition of 16- -- in
20 16-901.14 allows for -- includes conduct that is not
21 specific -- that is not dispensed with entirely by the
22 affidavits of Mr. Rants and Mr. McCarthy. And that is
23 the question.
24 The -- there -- there are questions there with
25 respect to agency. I -- I'm not -- I don't want to
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1 to say to the Commission that I -- I don't see much here
2 in the way of supporting some bald allegation of
3 coordination, and to me it's right now something that I
4 think will be prejudicial to both the electorate and
5 to -- and inappropriately prejudicial to the Ducey
6 campaign to not take some action with respect to the
7 coordination question, because there's just nothing here
8 that makes me think there should be any action.
9 MR. LIBURDI: Mr. Chairman, if -- if I may just
10 quickly address that. I -- I want to make sure that the
11 Commission knows, I -- I am not faulting Mr. Collins in
12 his recommendation, so --
13 MR. COLLINS: You can fault me if you want to.
14 MR. LIBURDI: Well, to the -- to the effect of
15 the coordination count because I do want to recognize
16 that -- that this meeting was called together very
17 quickly and Mr. Collins was asked to do a lot of heavy
18 lifting in a short amount of time.
19 But what I do want to say is, number one, I
20 think it's appropriately agendized for the meeting that
21 the Commission could take the action that we're
22 requesting; number two, I think there's a -- there's a
23 submi- -- sufficient amount of information in the
24 Executive Director's report to provide guidance; number
25 three, I think there's plenty of information in the
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1 filings from us, from Legacy Foundation, and from the
 2 Complainant himself to justify this action.
 3 And then I would also say that I think that you
 4 need to read the statute in conjunction with the cases
 5 that have been cited also in conjunction with the prior
 6 action of this Commission in the MUR decisions from 2006
 7 that are cited; and in the transcript that I provided;
 8 and also, finally, in the actions of the Secretary of
 9 State and the County Recorder.
 10 Happy to answer any other questions.
 11 CHAIRPERSON RECKART: And my comments, again,
 12 were not intended by any way that -- to point out any
 13 deficiency in Mr. Collins' analysis. It's just he took
 14 a very prudent approach. And I'm -- I'm just looking to
 15 press the envelope a bit more to address an issue beyond
 16 what his recommendation is. And -- and I think Tom did
 17 a fine job in what he did in a very short period of
 18 time.
 19 MR. COLLINS: Thank you.
 20 ACTING CHAIRMAN LAIRD: Commissioner Titla.
 21 COMMISSIONER TITLA: Chairman, thank you.
 22 Mr. Liburdi, Mr. Collins, thank you for your analysis as
 23 presented by both gentlemen. Appreciate all the
 24 information that you both have given.
 25 With regard to the ad that we saw regarding the
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1 that there's no evidence, as you say, or further
 2 evidence, as provided by the Complainant, you know,
 3 affidavits or anything else. And so, I'm thinking about
 4 those two issues: About what the ad brings out to
 5 people; and then the evidence that we have before the
 6 Commission.
 7 But I would like to have this in executive
 8 session later on where we can ask questions of our
 9 esteemed counselor here as we go forward. But, thank
 10 you. Those are my observations.
 11 MR. LIBURDI: Thank you, Mr. Chairman,
 12 Commissioner Titla. I just defer to Mr. Torchinsky to
 13 comment on the substance of the ad, other than just to
 14 say that the Ducey campaign had nothing to do with it.
 15 COMMISSIONER TITLA: Thank you.
 16 ACTING CHAIRMAN LAIRD: Anyone else?
 17 COMMISSIONER KOESTER: Are we going to hear
 18 from --
 19 ACTING CHAIRMAN LAIRD: Yeah.
 20 COMMISSIONER KOESTER: Okay. I'll wait to
 21 ask --
 22 ACTING CHAIRMAN LAIRD: Thank you, Counselor,
 23 very much. Appreciate that.
 24 MR. LIBURDI: Thank you.
 25 MR. TORCHINSKY: Thank you, Commissioners. I'm
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1 -- Smith and President Obama. Mr. Smith, I take it, is
 2 running for Governor also in Arizona. Is that true, Mr.
 3 Liburdi?
 4 MR. LIBURDI: Pardon me, Mr. Titla. I didn't
 5 hear the last part.
 6 COMMISSIONER TITLA: Mr. Smith, he's running
 7 for Governor in Arizona?
 8 MR. LIBURDI: Mr. Chairman and Commissioner
 9 Titla, yes, that's correct.
 10 COMMISSIONER TITLA: Okay. So, the ad I just
 11 saw a while ago, and if -- if the ad had left Mr. Smith
 12 out of the advertisement that we saw, then I think it
 13 would have been pretty clear that there was no violation
 14 or allegation of violation under the law here. But when
 15 you include Mr. Smith and Obama together, Mr. Smith
 16 being a Republican, I think, and Obama being Democrat,
 17 so the ad associates Smith with Obama. And so that --
 18 that's -- to me seems to indicate that Smith is with
 19 Obama and, therefore, Republicans don't vote for him,
 20 but vote for Ducey or some other guy.
 21 So, that -- that's sort of clear to me from the
 22 ad itself, you know. And I think that that -- that
 23 analysis or that -- that observation would be true of
 24 people looking at the ad.
 25 But on the other hand, also, you have the fact
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1 Jason Torchinsky. I'm here on behalf of Legacy
 2 Foundation Action Fund. I am counsel to Legacy
 3 Foundation Action Fund.
 4 We want to first thank the Commission and
 5 Mr. Collins for holding this hearing expeditiously, and
 6 I just want to make sure that the Commissioners are
 7 aware of the entire procedural context here.
 8 First of all, this ad came off the air on
 9 April 14th; the complaint wasn't filed until July 1st,
 10 right as the election season started to heat up. I
 11 think that is an important factor for the Commission,
 12 because I think it goes to Mr. Liburdi's point that this
 13 whole matter appears to be a publicity stunt on behalf
 14 of Mr. Smith.
 15 I also want to point out that Maricopa County
 16 Elections dismissed the entire complaint before even
 17 getting a response from the Legacy Foundation Action
 18 Fund. Our response was due on a Friday, and on I
 19 believe it was either Monday night or Tuesday night we
 20 got the letter announcing that it had been dismissed.
 21 As has been noted, we have also filed a lawsuit
 22 challenging the State's definition of express advocacy
 23 and the Commission's jurisdiction over the Legacy
 24 Foundation Action Fund.
 25 But we are here today in an effort to cooperate
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1 with the administrative procedure and in -- in hopes
 2 that this matter can be resolved expeditiously and
 3 simply without the need for extensive and potentially
 4 prolonged litigation.

5 With respect to the recommendation's [sic]
 6 conclusions, I have to admit, I'm not wholly clear on
 7 what precisely the Executive Director's recommendation
 8 is about what the Commission should do going forward.
 9 I -- I understand that he concludes that the ad is
 10 express advocacy. But exactly what the status of the
 11 complaint should be going forward from here, I think he
 12 kind of deferred that and -- that -- which just strikes
 13 me as odd, given that we have a return date next week in
 14 front of the judge on August 7th.

15 I also understand the Commissioners received
 16 the letter that we sent yesterday addressing a number of
 17 points in the recommendation. I want to review the
 18 highlights of our disagreement with that analysis, and
 19 I'm going to ask that the Commission in the end reach a
 20 conclusion consistent with that of Maricopa County
 21 Elections and dismiss the entire complaint.

22 First, I think that the recom- --
 23 recommendation fails to present a full picture of the
 24 Supreme Court case law in this matter. In Wisconsin
 25 Right to Life, which the -- which the recommendation

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1 You know, the Court in Wisconsin Right to Life,
 2 said there should be no discovery or inquiry into
 3 contextual factors, and said discussion of issues can't
 4 be banned, and that any ties should be resolved in favor
 5 of the speaker.

6 The -- the recommendation concludes that
 7 there's only one reasonable interpretation of that ad,
 8 well, then you're saying that either Maricopa County is
 9 totally unreasonable or the comments on the -- the
 10 YouTube page that that -- that the -- that was just
 11 shown to the Commission, you know, the comments where
 12 people say, hey, this actually makes me like Mr. Smith,
 13 you know, is also an unreasonable conclusion, which
 14 doesn't seem consistent with anything that the Supreme
 15 Court has said, particularly when it has said over and
 16 over again: Ties are resolved in favor of the speaker.

17 I also point out that the -- that the
 18 recommendation didn't discuss Citizens United at all.
 19 In the wake of Wisconsin Right to Life, the Federal
 20 Election Commission went back and created an 11 factor
 21 test to determine what was acceptable during the
 22 electioneering communications period and what could be
 23 prohibited during the electioneering communications
 24 period.

25 In Citizens United, the Supreme Court expressly

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1 relied on fairly heavily, I think it's important to
 2 remember that Wisconsin Right to Life was about an
 3 electioneering communications statute that was passed as
 4 part of BCRA. And the electioneering communications
 5 statute by its own expressed bright-line terms applied
 6 only to broadcast ads that were aired within 30 days of
 7 a primary or within 60 days of a general election.

8 Here the ad, we submit, was -- was aired more
 9 than 120 days out from the election and more like, I
 10 think, somewhere about 150 days out from the election.
 11 And in Wisconsin Right to Life, the -- the Court sort of
 12 admonished against any what they called an "intent and
 13 effects test." Well, an intent and effects test is
 14 exactly what Mr. Collins does throughout his
 15 recommendation and -- and, Commissioner Titla, exactly
 16 what you just said. You said the ad pairs Obama and
 17 Smith and, therefore, that must be a signal to
 18 Republican voters that they shouldn't vote for
 19 Mr. Smith.

20 I mean, that is your perception of what
 21 Republican voter or voters who might vote in the
 22 Republican primary -- and I also point out that under
 23 Arizona law, Independents and people with no party
 24 registration are also eligible to vote in a Republican
 25 primary, and I think that's important to note as well.

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1 basically overruled the FEC's 11 factor test, and said
 2 either this runs the risk of creating a situation where
 3 government officials pore over every word of a test to
 4 see if it accords with the multi-factor test they
 5 promulgated. That is exactly what the recommendation
 6 does here. The recommendation claims to be objective,
 7 but the reality is that it reflects the wholly
 8 subjective judgments of the Executive Director.

9 As I pointed out, you know, viewers who saw it
 10 and commented on the YouTube channel reached a
 11 conclusion very different from what Mr. Collins
 12 concluded. It also ignores -- it also sort of glosses
 13 over the fact that the Maricopa County Elections --
 14 again, in consultation with an outside counsel --
 15 reached a very different conclusion than Mr. Collins.

16 The fact that both citizens and other
 17 governmental entities reached a conclusion different
 18 than the Executive Director demonstrates that there is
 19 clearly more than one reasonable interpretation of that
 20 ad.

21 The other significant fault that I take with
 22 the recommendation is the recommendation in its analysis
 23 of timing in the statute seems to focus on the timing of
 24 the ad in relation to Mr. Smith's resignation, and fails
 25 to in fact re- -- reflect on the ad in relation to the

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1 general -- or, to the primary election in which
 2 Mr. Smith was a candidate. The advertisement aired and
 3 was off the air nearly five months prior to the August
 4 primary election.
 5 I want to -- I know the Commission has -- has
 6 in the past sort of relied on or looked to what the FEC
 7 has done in similar circumstances, and I want to point
 8 the Commission to a 2006 action by the Federal Election
 9 Commission where they looked at -- they -- they actually
 10 had a Court order that had overruled some time frames
 11 that they had set up in their coordination rules at --
 12 at 11 CFR 109.21, and told the Comm- -- told the FEC to
 13 go back and either revise the -- the time periods that
 14 were in the coordination rules, or come up with some
 15 justification for the time periods that you used.
 16 And I want to just demonstrate, and I can
 17 provide a link to Mr. Collins to show where this is.
 18 The -- the FEC went back and commissioned a group called
 19 CMAG to look at when candidates spend money on their own
 20 elections on broadcasts, to basically come up with some
 21 proxy about when candidates perceived that voters could
 22 be most influenced.
 23 And I can pass around some of these. And,
 24 again, I can provide a link to the copy.
 25 But these are charts that show how far out from
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1 with basically some -- some color copies of that chart
 2 asking that it be made part of the record.
 3 MR. COLLINS: That will be -- that will be
 4 fine. We can take care of it.
 5 MR. TORCHINSKY: Okay. We'll do that.
 6 But I want to point out that, you know, when
 7 you look at what candidates perceived influenced
 8 elections, broadcast ads that are really far out from
 9 the election are not where candidates spend their
 10 dollars and the FEC used that to conclude that
 11 candidates believe that the further away an ad airs from
 12 an election, the less effective that ad is in
 13 influencing an election.
 14 And I -- I fault the recommendation here for
 15 not addressing the fact that this ad aired so far out
 16 from the election. You know, I contrast this ad with
 17 the ad at issue in Committee for Justice and Fairness
 18 that, obviously, the Commission is well aware of. That
 19 commission -- that ad went up on the air, I believe
 20 either October 21st or October 23rd, just before the
 21 general election. This ad aired so far out from the
 22 general election that that goes to -- that is an
 23 objective factor to demonstrate that this ad is not
 24 express advocacy.
 25 COMMISSIONER TITLA: Chairman, Counselor?
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1 elections -- let me see here. Here are the -- here are
 2 some House ones and I have the U.S. Senate ones as well.
 3 COMMISSIONER TITLA: Chairman -- excuse me,
 4 Chairman. Is this an exhibit to filing or?
 5 MR. TORCHINSKY: We've not filed -- we have not
 6 put this on file with the Commission yet. This is the
 7 first time you are seeing this from us. But I -- I will
 8 submit that it's a matter of public record because it's
 9 a -- I got it from the FEC website. It was part of
 10 their consideration of a supplemental notice of proposed
 11 rulemaking that they issued in 2005 and finalized in
 12 2006.
 13 COMMISSIONER TITLA: Chairman and Counselor,
 14 would you be making this an exhibit on your response?
 15 MR. TORCHINSKY: Yes. If that's -- yes. If
 16 that's permissible, I would do that.
 17 COMMISSIONER TITLA: What exhibit would that
 18 be?
 19 MR. TORCHINSKY: Do we -- Brian, did we number
 20 our exhibits?
 21 MR. BERGIN: I don't believe we did in the most
 22 recent submission.
 23 MR. TORCHINSKY: I don't believe that we
 24 numbered our exhibits. If it would help for the record,
 25 we could submit, you know, probably later today a letter
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1 MR. TORCHINSKY: Yes.
 2 COMMISSIONER TITLA: Regarding this exhibit,
 3 this talks about the total estimated cost of media slots
 4 airing on or before House primary caucus convention, and
 5 it seems to show that the costs of media spots are very
 6 high closer to the election than it is out 120 days
 7 before.
 8 MR. TORCHINSKY: I -- I think what they're
 9 showing is aggregate expenditures by candidates. In
 10 other words, candidates spent more as you got closer to
 11 the election than they did 120 days out from the
 12 election, where you can see that candidates spent almost
 13 nothing on broadcasts. So, it's not that the cost of a
 14 particular ad increased, it's that the volume of ads
 15 purchased by candidates increased as you got closer to
 16 an election.
 17 COMMISSIONER TITLA: Okay. Yeah. And so your
 18 point is just what you said a while ago?
 19 MR. TORCHINSKY: My -- my point is that this ad
 20 aired so far out from the election that there -- and the
 21 recommen- -- and I fault the recommendation for not even
 22 mentioning -- I mean, the recommendation doesn't even
 23 contain the primary date. It contains the date the ads
 24 aired and it makes much of the fact that Mr. Smith
 25 resigned as mayor on April 16th, but it doesn't point
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1 out that the primary wasn't until -- is not until
2 August 26th. Fails to sort of, you know -- if timing is
3 one of the significant factors in the statute, and I'll
4 get to my arguments about the constitutionality of the
5 statute. But if you are going to accept that the
6 statute is constitutional, the timing factor was not
7 addressed in a proper way in the recommendation because
8 the only timing discussed in the recommendation is the
9 timing of the ad in relation to Mr. Smith's resignation
10 as mayor, which was not, by any definition, an election.
11 The primary election in with -- in which Mr. Smith is a
12 candidate is not taking place until August 26th.
13 ACTING CHAIRMAN LAIRD: Counselor, can -- can I
14 interrupt you to make sure I understand the exhibit.
15 I -- I don't see it as being expressed in dollars with
16 -- so, it's not, you know, a comparison of the -- of the
17 cost or dollars spent. I -- the way I read it is number
18 of media spots. So, it's not -- not stated in terms of
19 dollars, it's -- it's stated in terms of number of spots
20 run. Am I reading that wrong?
21 MR. TORCHINSKY: I believe -- I believe each
22 sheet is something slightly different. Each -- each
23 sheet has some slightly different data on it. So, I --
24 I apologize. I think I handed up about six or eight
25 pieces of paper, but each one -- each chart shows
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1 over 180-days old, the FEC says has no value.
2 And I -- and so I -- I bring this up to point
3 to the fact that timing of an advertisement in relation
4 to an election is one of the factors in the statute and
5 I think that that was wholly ignored by the
6 recommendation and not properly addressed. And I think
7 as the Commission considers this today, I think the fact
8 that this ad was aired in April of 2000- -- March and
9 April of 2014, and the election is not until August of
10 2014, is a significant factor; because, again, if you
11 accept the statute as constitutional, it is in fact one
12 of the statutory factors.
13 I don't believe the timing as -- as it is
14 referred to in that election is supposed to relate to
15 the timing of somebody's resignation as a public
16 officeholder, I think it's supposed to be timing in
17 relation to the election.
18 I'm sorry.
19 COMMISSIONER TITLA: Chairman, Counselor?
20 MR. TORCHINSKY: Yes.
21 COMMISSIONER TITLA: You know, the -- the
22 evidence that you presented here -- or, the exhibit, I
23 guess, I had something that said "H2" I think.
24 MR. TORCHINSKY: Yeah. Again, there's -- I
25 think there's two or three Senate graphs and two or
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1 something slightly different. They're not all the same
2 chart.
3 ACTING CHAIRMAN LAIRD: Okay. I didn't have
4 the one with dollars, so. Okay.
5 MR. TORCHINSKY: Okay.
6 MR. COLLINS: Do you have S1 and H1? Is that
7 you...
8 MR. TORCHINSKY: Yeah, I -- what I submitted
9 was the House and Senate CMAG data --
10 MR. COLLINS: I just want to make sure.
11 MR. TORCHINSKY: -- that the FEC relied on.
12 And so the FEC's analysis of the data in the -- in the
13 supplemental explanation and justification that they
14 published in 2006, they determined that nearly all
15 spending by candidates for the House and Senate on
16 broadcasts occur within 90 days of the election.
17 They also -- I -- I did not submit the
18 presidential charts, but they determined that nearly all
19 broadcast spending by presidential candidates occurs
20 within 120 days of the election, with a concentration
21 much closer to the actual election day.
22 I also point out that the FEC, again, in 11 CFR
23 when they talk about sort of political data as it ages,
24 you know, polling data that's 61- to 180-days old is
25 only valued at 5 percent of its value; and data that's
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1 three House graphs.
2 MR. COLLINS: I thought this was -- I thought
3 you had made copies.
4 MR. TORCHINSKY: No, no, no, no. Each one of
5 the charts has somewhat different data on it. I -- I
6 apologize.
7 MR. COLLINS: Oh, consistent with -- everybody
8 is looking at the wrong --
9 MR. TORCHINSKY: As you can imagine --
10 MR. COLLINS: Everything is different.
11 MR. TORCHINSKY: -- getting the recommended --
12 I apologize. Everybody has got a different data sheet
13 in front of them, but we'll submit it --
14 COMMISSIONER TITLA: Counselor --
15 MR. TORCHINSKY: -- so that the full Commission
16 -- the full Commission has it.
17 COMMISSIONER TITLA: -- I'm confused now
18 because we have various charts here: H3, S3 --
19 MR. TORCHINSKY: What I sub- -- there's some --
20 like some explanatory notes and things.
21 COMMISSIONER TITLA: Please don't interrupt
22 while I'm speaking. Thank you.
23 MR. TORCHINSKY: Okay.
24 COMMISSIONER TITLA: I'm confused now. We have
25 charts H3, S2, S1 --
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1 MR. TORCHINSKY: The charts --

2 COMMISSIONER TITLA: -- page 2 and then --

3 MR. TORCHINSKY: The charts that begin with "H"

4 are different ways of looking at House data; the charts

5 that begin with "S" are different ways of looking at

6 Senate candidate data. The FEC commissioned the U.S.

7 House and U.S. Senate data separately from CMAG.

8 COMMISSIONER TITLA: Is it -- is it one exhibit

9 or is it --

10 MR. TORCHINSKY: We'll make it one exhibit.

11 COMMISSIONER TITLA: Okay. I'm still kind of

12 confused of all the different charts, so -- so --

13 MR. TORCHINSKY: Okay. I --

14 COMMISSIONER TITLA: So what you're saying is

15 that because this ad that we saw a while ago was aired

16 almost a year before --

17 MR. TORCHINSKY: Not a year, about five months.

18 COMMISSIONER TITLA: About five months before

19 this campaign, that it shouldn't make a difference? Is

20 that what you're saying?

21 MR. TORCHINSKY: No. I'm saying it absolutely

22 should make a difference. I'm saying if this ad were

23 aired on August 20th, you would evaluate that -- you

24 could under the statute evaluate that ad differently

25 than you could if it were aired last August or in April.

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1 County, which is clearly under the jurisdiction of the

2 Maricopa County Superior Court, and so while it's true

3 that the judgment of the Maricopa County Superior Court

4 is pending on appeal and the Commission urged reversal

5 in that case as amicus, the fact of the matter is the

6 reversal sought by the Commission has not occurred and

7 until such time as the appeals court rules, the Superior

8 Court's judgment is in force and is in effect, and is

9 clearly binding on this Commission.

10 I'm a little bit shocked at the notion that --

11 that it was our burden to demonstrate how the County

12 Court's rule applies to State agencies within the county

13 that -- that issued the ruling. That was kind of

14 shocking to me.

15 I'm going to echo what Mr. Liburdi said about

16 dismissal of the coordination complaint. I, too,

17 believe that that should be dismissed because I believe

18 that there is absolutely no evidence there, and so I

19 don't want to belabor that fact.

20 And I also believe that the Commission has no

21 jurisdiction here, as we've noted in our lawsuit.

22 You know, Arizona's campaign finance law covers

23 only expenditures, contributions, and independent

24 expenditures. You know, we first submit that this

25 advertisement isn't even an express advocacy

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1 COMMISSIONER TITLA: Okay.

2 MR. TORCHINSKY: I am saying the -- the

3 distance of the ad being aired with respect to the

4 election, how many view- -- I'm not going to get into --

5 to subjective issues. I mean, objectively, you can look

6 at the -- when the ad was aired in relation to the

7 election and in relation to charts about when candidates

8 apparently perceive ads to actually influence elections.

9 I next want to turn to the recommendations.

10 Basically, dismissal of the Maricopa County Superior

11 Court's decision declaring 16-901.01 unconstitutional

12 and -- and alleging that it was somehow the burden of

13 the Respondents to show how that -- that applied.

14 I can't believe I have to cite back to this,

15 but in Marbury vs. Madison, the U.S. Supreme Court said

16 it is the province of the -- of the judiciary to de- --

17 to say what the law is. As has the Arizona Supreme

18 Court recognized as recently as the case 47th

19 Legislature versus Napolitano in 2006, where the Arizona

20 Supreme Court relied on Marbury versus Madison and said,

21 quote: "It is emphatically the province and duty of the

22 judicial department to say what the law is."

23 We also noted in our letter yesterday that

24 there's no automatic stay when -- when cases are

25 appealed. We are standing right here in Maricopa

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1 advertisement, which takes it out of the jurisdiction of

2 Arizona's campaign finance laws in total, even -- and

3 then even assuming the Commission has jurisdiction, the

4 Commission only has jurisdiction over our matters in

5 Article II, not matters regulated in Article I.

6 We also submit that the regulations at

7 R2-20-109 that appear to provide jurisdiction here are

8 not in accordance with the Commission's authority under

9 the text of the statute.

10 And I also point to the new statute at 16-905

11 sub (O), which divests the Commission of any authority

12 it might have asserted here.

13 I also point the Commission to 16-941 sub (B),

14 which also demonstrates that the Commission has no

15 independent enforcement authority over independent

16 expenditures here.

17 Just one moment.

18 With that, I'll be happy to take any questions

19 from the Commissioners or Mr. Collins.

20 ACTING CHAIRMAN LAIRD: Commissioners?

21 Mr. Koester.

22 COMMISSIONER KOESTER: Yes. Counselor, I'm

23 sorry, I can't pronounce your last name. You want to

24 say it again?

25 MR. TORCHINSKY: It's Torchinsky.

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1 COMMISSIONER KOESTER: Torchinsky?
 2 MR. TORCHINSKY: Yeah.
 3 COMMISSIONER KOESTER: Okay.
 4 MR. TORCHINSKY: You can call me Jason, that's
 5 fine. It's probably easier.
 6 COMMISSIONER KOESTER: It might be easier.
 7 Anyway, hearing all of what you said, I just
 8 have a few questions. Regarding the gist of what you're
 9 saying, that this ad was really run because of the --
 10 Mr. Smith and two other people, Mr. Johnson and
 11 Ms. Blake were leaders in this conference --
 12 MR. TORCHINSKY: Correct.
 13 COMMISSIONER KOESTER: -- and that's why their
 14 names were brought up. When did the conference end?
 15 MR. TORCHINSKY: The U.S. Conference of Mayors
 16 is an ongoing organization --
 17 COMMISSIONER KOESTER: I know. But when did
 18 this conference, the 2013 conference, take place where
 19 your allegations or your --
 20 MR. TORCHINSKY: The U.S. Conference of Mayors
 21 is an ongoing organization; they have regularly
 22 scheduled meetings, and they also regularly put out
 23 press releases on various issues in between their
 24 meetings.
 25 COMMISSIONER KOESTER: Yes. But wasn't this
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1 the topics. I mean, they brought up hunger,
 2 homelessness, and immigration, all the things you expect
 3 conferences of mayors to bring up. But at the end of
 4 the conference, at least last year, the biggest thing
 5 that they all agreed on, and they're all -- because
 6 there's Democrats and Republicans and whatnot at the
 7 conference. In fact, the other two leaders, as you've
 8 mentioned, were both Democrats.
 9 MR. TORCHINSKY: That is correct.
 10 COMMISSIONER KOESTER: And they all agreed that
 11 they thought that municipal bonds should remain tax
 12 exempt and they all three talked about it, and that's
 13 probably not a Washington thing, but a small city/school
 14 district/county kind of thing, like preserving the tax
 15 exempt status. And --
 16 MR. TORCHINSKY: I don't believe that's --
 17 COMMISSIONER KOESTER: -- I didn't come away
 18 with any real feeling that this was all Democratic as
 19 far as the conference is concerned. Now, you do point
 20 out this is ongoing and that's true, but the conference
 21 took place like nine months before the 1st of April --
 22 MR. TORCHINSKY: Well, a meeting took place
 23 nine months --
 24 COMMISSIONER KOESTER: Yes, a meeting --
 25 MR. TORCHINSKY: -- before the 1st of April,
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1 meeting where Smith presided as president and Mr.
 2 Johnson was vice president and I think Ms. -- Ms. Blake
 3 was in June of 2013?
 4 MR. TORCHINSKY: I believe that Mr. Smith
 5 served as president for a two-year term and his term as
 6 U.S. president of U.S. Conference of Mayors terminated
 7 when he resigned from his public office.
 8 COMMISSIONER KOESTER: That's correct. But
 9 I'm -- I'm just saying the information used in the ad
 10 was the findings of what took place at this annual -- I
 11 think it was in Las Vegas -- in 2013, all the topics
 12 that were discussed, like tax on carbon and the other
 13 different things that were brought up came from this
 14 conference, did it not?
 15 MR. TORCHINSKY: I believe if you look at the
 16 press release page that we submitted in our link
 17 yesterday, the U.S. Conference of Mayors press release
 18 page, these are ongoing issues that the -- that the U.S.
 19 Conference of Mayors has been addressing all through. I
 20 don't think that the Commission -- or that the
 21 Conference of Mayors was silent on these issues at the
 22 conclusion of their 2013 conference.
 23 COMMISSIONER KOESTER: Well, I -- I went back
 24 and looked at the conference, you can get that on -- on
 25 the Internet, too, and I was surprised to see most of
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1 but --
 2 COMMISSIONER KOESTER: -- and that's where all
 3 the press came from is when you have your annual
 4 meetings. I think the ongoing thing is not quite as
 5 much as the annual meeting when -- when all these
 6 presses conference [sic] takes place when all the media
 7 gets around, so I -- I --
 8 MR. TORCHINSKY: I also believe they have a
 9 winter meeting.
 10 COMMISSIONER KOESTER: Well, I'm not --
 11 MR. TORCHINSKY: I believe they have a winter
 12 meeting.
 13 COMMISSIONER KOESTER: I'm not -- I might have
 14 misspoke, but that's what -- when I heard the different
 15 things brought up.
 16 And -- and, secondly, the amount of money
 17 spent, it seems like, yeah, he was a president and you
 18 have a vice president and a -- and a secretary; yes,
 19 they were Democrats, but there really was a disparity on
 20 the amount of money spent on the Smith ad versus the
 21 other two. I mean, it was like 95 percent went -- went
 22 towards Mayor Smith.
 23 MR. TORCHINSKY: That's true.
 24 ACTING CHAIRMAN LAIRD: Who resigned, like you
 25 said, on April 14th or 15th or 16th, whatever the exact
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1 date was, and the ads did stop, as you pointed out; but
2 to call him a mayor, you had to call him a mayor when he
3 was the mayor, which ended on April 16th or 15th as the
4 date may be, which I think is the point.

5 MR. TORCHINSKY: I think he still uses the
6 title.

7 COMMISSIONER KOESTER: Well, he could. Sure.
8 Just like ex-presidents or anybody, I -- I'm sure that's
9 right.

10 So, I'm just still kind of puzzled on the fact
11 that why was this money spent against Mayor Smith? I
12 mean, the ad. Now, you say it's for the fact that what
13 the conference generally was for, but it's still
14 bothersome to me.

15 MR. TORCHINSKY: I'm -- I'm going to point you
16 to the -- to the text of the ad itself and I'm also
17 going to point you to the portion of Wisconsin Right to
18 Life and Citizens United, where the Court said:
19 Discovery and -- and inquiry into intent is improper by
20 government regulators, and so what you just asked me was
21 to speak to -- to speculate as to what the intent might
22 have been. And I will say I think the Supreme Court in
23 Wisconsin Right to Life and Citizens United tells us you
24 have to look at the text of the ad.

25 And I will point you to the text of the ad.
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1 there patting him on his back.

2 CHAIRPERSON RECKART: I think the issue that it
3 comes down to is whether or not this is express
4 advocacy.

5 COMMISSIONER KOESTER: Exactly. Exactly.

6 CHAIRPERSON RECKART: And -- and I think that's
7 where we have to do the analysis. And I really need to
8 have a little bit more explication from our own counsel
9 on the Wisconsin Right to Life considerations and the --
10 and the Citizens case as well.

11 MR. TORCHINSKY: You know, Mr. Chairman, let me
12 also point out, you know, I -- I -- I think that the --
13 the Commission has cited to cases like Furgatch and
14 Getman. You know, I point out, the ad focused on
15 federal policy issues; it focused on Mayor Smith's role
16 in those policy issues as a leader of a national
17 organization; there was no reference to voting; there
18 were no references to the election; there were no
19 references to Mr. Smith's status as a candidate; there
20 were no references to pending elections; there were no
21 references to political parties.

22 These are all of the things that the Supreme
23 Court said, you know, the absence of all of these are
24 hallmarks of genuine issue ads. And -- and so, I submit
25 to you that this ad contains all of what the Supreme

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1 The organization said what it said and that's what it
2 intended to say. I think an -- I think an inquiry into
3 intent is improper under the Constitution, 'cause you're
4 not allowed to do that.

5 COMMISSIONER KOESTER: Well, I hear what you're
6 saying, but there's what they said and you didn't say
7 and you can report five or six things that seem to be
8 very Democratic in there. In fact, I mean --

9 MR. TORCHINSKY: 'Cause you think the
10 organization might have said something differently had
11 it chosen to say something different and --

12 COMMISSIONER KOESTER: No. Mr. -- Mr. Smith
13 was on a -- a -- a debate last night in Tucson and they
14 -- healthcare was brought up. He was very, very adamant
15 against Obama Care, but this ad seemed to indicate that
16 he was kind of for Obama Care. I mean, I can't
17 precisely say. But I -- hearing the -- the Republican
18 candidates who were in the primary last night, they all
19 definitely were Republican in their sounding, and
20 especially Mr. Smith.

21 So, I -- I think that the ad just gives you a
22 little bit of a wrong impression, as least it did to me.
23 Now, I'm not saying it does to everybody else, but I --
24 I just have to express my feelings. And -- and when I
25 hear him talk last night, I don't think Obama would be

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1 Court said is -- needs to be present in an ad to be a
2 hallmark of a genuine issue ad.

3 I think that the recommen- -- I also fault the
4 recommendation for saying that, you know, there --
5 basically, there were no pending issues. I mean, I
6 point out to the -- to the Commission, you know, Obama
7 Care has been a constant, constant public policy issue
8 at all levels of government since it passed.

9 The environment is an issue at all levels of
10 government that isn't going away. You know, whatever
11 your position is on the environment, the environment is
12 here and there's going to be a -- a debate over -- over
13 the government's role in that.

14 I also point out the, you know, the Second
15 Amendment debate is also not going away. And, again,
16 whatever your view is on the Second Amendment, I think
17 we can all agree there's an ongoing debate about the
18 Second Amendment.

19 So, I -- I think that, you know, the
20 recommendations -- I fault the recommendation again for
21 its conclusion that, you know, there were no pending
22 issues that the ad was discussing and I think that's
23 really not true. So, I fault the recommendation again
24 on that point. And, again, submit that this ad has all
25 the hallmarks of what are a genuine issue ad under

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1 Wisconsin Right to Life and Citizens United.

2 COMMISSIONER TITLA: Chairman, can we run this

3 ad again one more time? Can we see it again?

4 MR. COLLINS: I hope so.

5 ACTING CHAIRMAN LAIRD: Sure.

6 MR. COLLINS: Sara, I'm going to have to impose

7 on you.

8 COMMISSIONER KOESTER: Just one question while

9 they're getting that up. Could this ad run again?

10 MR. TORCHINSKY: Of course it could.

11 COMMISSIONER KOESTER: Okay. Good to know.

12 MR. TORCHINSKY: I mean, yes, I think the ad

13 could run again. Although he's not mayor anymore and

14 he's not president of the national -- can we pause that

15 for a moment?

16 I want to point out, I mean, the ad hasn't run

17 again, and he's no longer president of the National

18 Conference of Mayors. So, if the ad were aired again

19 today, it would be somewhat odd and awkward and out of

20 context because he's not the mayor of Mesa and he's not

21 the president of the National Conference of Mayors.

22 So, while, yes, as a technical matter, the

23 organization could rerun the ad, it still has it on its

24 YouTube page that I believe you're playing from now; it

25 has not paid to broadcast the ad since Mr. Smith left

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1 election.

2 MR. TORCHINSKY: And I want to point out, Mr.

3 Collins, that's not consistent with what the -- with

4 what the Secretary of State ruled when they were

5 evaluating the Public Integrity Alliance ad. They were

6 talking about an ad that aired in May and they were

7 talking about it being 90 days out from the election,

8 not 60 days out from the election. And I believe every

9 political calendar published by the State lists

10 August 26th as election day.

11 It is true that ballots go out today, but

12 election day is still August 26th.

13 MR. COLLINS: The people are voting right now.

14 Ballots are mailed today; ballots are available to

15 people, they can return those ballots, they do not need

16 to wait until election day. And in fact, I think, and

17 -- and Mr. Liburdi's observation is -- is the only thing

18 that I wanted to mention. His observation about the

19 state of this, with respect to the -- to the election, I

20 think follows in both -- in both in his argument and in

21 -- and in terms of framing this, that's all I want to

22 say.

23 MR. TORCHINSKY: So, even if you took the ad

24 instead and said it was 90 days out from the election

25 instead of 120 days out from the election, it's still

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1 office.

2 COMMISSIONER KOESTER: But he still calls

3 himself mayor, as you pointed out.

4 MR. TORCHINSKY: I -- I think so. I don't

5 know.

6 (Whereupon the video was played.)

7

8 MR. TORCHINSKY: I -- I don't see where the

9 clear call to action required by Getman, by Furgatch, by

10 Wisconsin Right to Life, by Citizens United is in that

11 ad; it's just not there.

12 COMMISSIONER TITLA: Counselor, was that a

13 question or?

14 MR. TORCHINSKY: No. It was a statement.

15 Hopefully concluding statement, but I'm still open to

16 questions if there are further questions.

17 COMMISSIONER TITLA: Thank you.

18 ACTING CHAIRMAN LAIRD: Commissioners?

19 MR. COLLINS: Can I make one -- just one

20 factual point. I want to -- we talked about August 26th

21 is the primary date. I just want to make clear that the

22 primary begins today. Mr. Liburdi, in fact, mentioned

23 that in his earlier comments, voting began today. So, I

24 mean, just in terms of the -- the day count, at the very

25 least that's a -- that is the -- today is the day of the

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1 well outside any of the windows in which candidates

2 aired lots of ads in the FEC reports, it's still outside

3 the electioneering communications windows, and it's

4 still outside the 90 days that Mr. Langhofer argued in

5 the Public Integrity Alliance case that the Secretary of

6 State accepted.

7 And I'd also point out, again, I want to

8 stress, Maricopa County dismissed this matter. They are

9 reasonable people and they came to a different

10 conclusion than Mr. Collins, so clearly this ad is

11 susceptible to some other reasonable interpretation

12 other than what Mr. Collins said it is or Maricopa

13 County wouldn't have dismissed.

14 COMMISSIONER TITLA: Chairman.

15 ACTING CHAIRMAN LAIRD: Commissioner Titla.

16 COMMISSIONER TITLA: Counselor, I noticed that

17 you're speaking without being asked a question. I think

18 the procedure here is that you make a presentation and

19 then you are asked questions by the Chairman or one of

20 the Commissioners, and I noticed that you're just

21 jumping in and making all these statements without being

22 asked a question. So maybe in future hearings or

23 notice, you can, you know, speak when the Chairman

24 recognizes or when you're being asked a question by, you

25 know, some body or some Commissioner.

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1 Just some recommendations for you that I
 2 observed. Thank you.
 3 ACTING CHAIRMAN LAIRD: Counselor, thank you.
 4 Does anyone care to speak on Item III(A)?
 5 If not, we're going to go to Item III(B). I
 6 don't know if anybody wants to comment, but before we
 7 go -- consider going into executive session, we'll
 8 probably go into executive session on Items III(A) and
 9 III(B), so does anybody care to speak on III(B), the
 10 litigation?
 11 Okay. If not, I would entertain a motion that
 12 we --
 13 COMMISSIONER TITLA: Motion.
 14 ACTING CHAIRMAN LAIRD: -- go into executive
 15 session?
 16 COMMISSIONER TITLA: Chairman, motion.
 17 ACTING CHAIRMAN LAIRD: We have a motion.
 18 Second?
 19 COMMISSIONER KOESTER: I second.
 20 ACTING CHAIRMAN LAIRD: Commissioner Koester
 21 seconds. All in favor, say "aye."
 22 (Chorus of ayes.)
 23
 24 ACTING CHAIRMAN LAIRD: And so the "ayes" have
 25 it. And so we will at this time go into executive
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1 You -- you seem to indicate in your argument
 2 that there had to be some objective indicia of
 3 coordination, and I don't know if that completely jives
 4 with the statute and I need you to address that if you
 5 would, please.
 6 MR. LIBURDI: Yes, Mr. --
 7 CHAIRPERSON RECKART: And maybe Ms. O'Grady,
 8 you can help me with the statutory reference.
 9 MR. LIBURDI: Yes, Mr. Chairman. The statute
 10 and this -- my understanding is the legislature amended
 11 the statute. So, if you're looking at it on the
 12 legislature's website, you're going to be getting an
 13 updated statute. But the purpose for this discussion,
 14 it's section 16- -- 16-901.14. The first part of that
 15 state -- statute says that an independent expenditure is
 16 made without cooperation or consultation with any
 17 candidate or committee or agent of the candidate; not
 18 made in concert with it, the request or suggestion of a
 19 candidate or any committee or agent of the candidate.
 20 After that, there is a -- what is, I will say,
 21 a confusing set of factors that are not laid out very
 22 well. But our argument is that you have to read the
 23 statute as a whole, that there is a requirement that
 24 there is actual coordination between the candidate and
 25 the independent expenditure committee. And that reading
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1 session. Thank you.
 2 (Whereupon the public retires from the meeting
 3 room.)
 4 (Whereupon the Commission is in executive
 5 session from 11:21 a.m. until 12:07 p.m.)
 6 * * * * *
 7 (Whereupon all members of the public are
 8 present and the Commission resumes in general session.)
 9
 10 ACTING CHAIRMAN LAIRD: Okay. We are back in
 11 general session.
 12 And, Commissioner Reckart, you indicated you
 13 might have some -- some follow-up questions for Counsel
 14 when we got back into general session. Do you -- is
 15 that still the case?
 16 CHAIRPERSON RECKART: It is, yes. Thank you.
 17 ACTING CHAIRMAN LAIRD: Please proceed.
 18 CHAIRPERSON RECKART: Mr. Liburdi, when looking
 19 at the coordination issue, the test seems to have some
 20 disjunctive elements to it that if there's -- one of
 21 those is being that the fact of an overlapping agency
 22 may be sufficient at least to raise a presumption of
 23 coordination. And I don't have the statutory reference
 24 right in front of me but maybe Counsel can help me with
 25 it.
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1 has been confirmed by the United States Supreme Court in
 2 Colorado Republican Party versus Federal Election
 3 Commission; in subsequent cases that I've cited in my
 4 materials; that has been confirmed in this Commission's
 5 prior decisions in 2006 where this Commission viewed
 6 complaints involving overlapping -- overlapping agents.
 7 And I'll just summarize that for you, Mr. Chairman.
 8 MUR 2006-18, this was a complaint filed against
 9 Len Munsil, a gubernatorial candidate, where there were
 10 allegedly overlapping -- overlapping principals between
 11 some independent expenditure committees and the campaign
 12 committee. This Commission said, quote: "Without
 13 evidence that Respondent directed the
 14 anti-Munsil activities or was otherwise
 15 affiliated with these entities or their
 16 principals as to disqualify the activities from
 17 treatment as independent expenditures under
 18 A.R.S. 16-901.14, then no charge could lie
 19 against the Respondent."
 20 And this Commission dismissed.
 21 In MUR 06-0023 involving a political consultant
 22 named Nathan Sproul who did work with the GOP, the
 23 Arizona GOP, and with the Len Munsil campaign, this was
 24 the subject of a complaint filed by a -- a -- a local
 25 attorney. The Commission noted in its reply:
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1 "Respondent acknowledges that both his campaign
 2 and the GOP have employed Sproul, although they
 3 disavow any coordination in connection with the
 4 advertisement."
 5 The Commission goes on to say -- this is at
 6 page 4: "There's little evidence of actual coordination
 7 between Respondent and the GOP with respect to
 8 the production of the Web ad. A finding of
 9 coordination would rest almost exclusively on
 10 the common employment of Sproul and both
 11 Respondent and the GOP. Respondent, the GOP,
 12 and Sproul himself have denied actual
 13 coordination."
 14 This was dismissed by the Commission.
 15 Finally, in MUR 06-0032, there was an
 16 allegation that a campaign consultant, Max Fose, did
 17 work for both an independent expenditure group called
 18 Arizona Together and Janet Napolitano's gubernatorial
 19 committee. Len Munsil, the opponent, filed a complaint
 20 and the statement of reasons says, quote:
 21 "In particular, though campaign consultant Max
 22 Fose worked for both campaigns, Respondent
 23 asserts that Fose has worked for several
 24 campaigns and did not share information
 25 between the campaigns."
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1 statute, help me get to the place that you are telling
 2 me the law is that there has to be some additional
 3 showing of coordination beyond just an overlapping
 4 agent. Because the way I read it, Section 14 provides,
 5 in relevant part: An expenditure is not an independent
 6 expenditure if any of the following applies; and then
 7 (A) is "overlapping agent."
 8 So, in light of that clear language, can you
 9 point me to the language in the statute itself that
 10 leads me to your legal conclusion that it also requires
 11 some other independent evidence of coordination?
 12 MR. LIBURDI: Commissioner Laird, I can only
 13 tell you what the law says. The law says --
 14 ACTING CHAIRMAN LAIRD: I want you to tell me
 15 what the statute says.
 16 MR. LIBURDI: The statute has a number of
 17 disjunctives. Okay? But it is unconstitutional for
 18 this Commission to make a finding of coordination based
 19 on one person who was a vendor for a group working in
 20 Nebraska for an advertisement a year ago and then doing,
 21 you know, advertisements for a candidate in Arizona.
 22 ACTING CHAIRMAN LAIRD: Well, I take it from
 23 your answer then, you're agreeing that if you just look
 24 at the statutory language, you can't get to your legal
 25 conclusion. I understand you're saying it's not
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1 Page 4, quote: "There is little evidence of
 2 actual coordination between Respondent and the
 3 Arizona Together with respect to the production
 4 of the Web ad and the Commission dismissed the
 5 complaint at this very stage."
 6 So, Mr. Chairman and members, the First
 7 Amendment guides everything that this Commission does.
 8 Because it is in -- playing in the arena of political
 9 speech, free speech. The Supreme Court, the Arizona
 10 courts talk to this Commission about how to apply
 11 statutes. It is very clear that you have to have a
 12 showing of actual coordination in order to penalize
 13 somebody for coordinating with an independent
 14 expenditure. It's very clear under this Commission's
 15 precedent.
 16 The -- the Complainant has had multiple
 17 opportunities to come here and provide evidence of
 18 actual coordination; he has not. We have provided
 19 substantial and overwhelming evidence that there was no
 20 coordination. And -- and there is reason here to
 21 dismiss the complaint.
 22 ACTING CHAIRMAN LAIRD: Counsel, let me ask you
 23 this: Just using the language of the statute -- and I'm
 24 referring to A.R.S. 16-901.14 that you just
 25 referenced -- just utilizing the language of the
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1 constitutional. But I want you to point me to the
 2 statutory language to -- to get to your legal conclusion
 3 about what state law is.
 4 MR. LIBURDI: Commissioner Laird, I'm sorry, I
 5 cannot go there.
 6 ACTING CHAIRMAN LAIRD: Okay.
 7 MR. LIBURDI: Because, you know, the scope of
 8 the -- the scope of the agency, the scope, as defined by
 9 901 Subsection 14 begins "in cooperation or
 10 consultation." That "in" forms the rest of the
 11 analysis.
 12 This Commission recognized that three times in
 13 2006. This Commission recognized that in May when it
 14 dismissed a cam- -- a complaint against the Secretary of
 15 State. The United States Supreme Court has recognized
 16 that. If you were to apply this statute in a vacuum,
 17 then we are going to be in court and that is completely
 18 unnecessary.
 19 There's no evidence here, sir, of any
 20 coordination. If the Resp- -- Complainant had some, he
 21 could have provided that to us.
 22 ACTING CHAIRMAN LAIRD: Thank you, Counselor.
 23 MR. LIBURDI: If there are any other questions,
 24 I'd be happy to answer them.
 25 ACTING CHAIRMAN LAIRD: Anyone else?
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1 Thank you, Counselor.

2 Okay. Do I hear a motion from any of my fellow

3 Commissioners with respect to the position the

4 Commission is going to take today on the complaint?

5 COMMISSIONER TITLA: Chairman?

6 ACTING CHAIRMAN LAIRD: Commissioner.

7 COMMISSIONER TITLA: I make a motion to -- that

8 the Commission acknowledges jurisdiction over the

9 complaint which involves an express advocacy

10 communication and follow the recommendation of the

11 Executive Director.

12 ACTING CHAIRMAN LAIRD: Okay. Do I hear a

13 second?

14 Okay. I do not hear a second.

15 Do I hear an alternative motion?

16 CHAIRPERSON RECKART: I would move that the

17 Commission determines that it has jurisdiction over the

18 matters presented in the complaint.

19 COMMISSIONER KOESTER: I second that.

20 ACTING CHAIRMAN LAIRD: Okay. We have a motion

21 and a second that the Commission acknowledge that it has

22 jurisdiction over the complaint, but it will take no

23 other action at this time. Is that an accurate

24 restatement, Commissioner?

25 CHAIRPERSON RECKART: No, sir.

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1 advocacy, so.

2 COMMISSIONER TITLA: Okay. Well, I didn't say

3 that. All I said was "which involves an express

4 advocacy communication." "Involves" is not a finding.

5 ACTING CHAIRMAN LAIRD: Oh, okay. I think our

6 understanding was that you were recommending the full

7 recommendation of the Executive Director.

8 COMMISSIONER TITLA: Yeah. I made -- I made

9 the motion that the Commission find jurisdiction over

10 the complaint which involves an express advocacy

11 communication, that's what I said.

12 ACTING CHAIRMAN LAIRD: I think that implies

13 that we're finding that there is express advocacy, and I

14 think the other Commissioners probably aren't willing to

15 do that at this point.

16 COMMISSIONER TITLA: Yeah. Well, I think

17 "finding" is a word, a legal word. That's different

18 from "involved."

19 ACTING CHAIRMAN LAIRD: We have a motion and a

20 second, and so I'm going to call for a vote on the

21 motion and the second that we're finding that we have

22 jurisdiction. All in favor, say "aye."

23 (Chorus of ayes.)

24

25 ACTING CHAIRMAN LAIRD: Passes unanimously.

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1 ACTING CHAIRMAN LAIRD: Okay. Please restate

2 it for me.

3 CHAIRPERSON RECKART: I did not include the

4 "take no other action at this time."

5 ACTING CHAIRMAN LAIRD: Okay.

6 CHAIRPERSON RECKART: So I would just remove

7 that from the restatement.

8 ACTING CHAIRMAN LAIRD: Okay. So we're -- just

9 a finding that we have jurisdiction, correct?

10 CHAIRPERSON RECKART: That's correct.

11 ACTING CHAIRMAN LAIRD: Okay. And we have a

12 second to that.

13 COMMISSIONER KOESTER: I second.

14 ACTING CHAIRMAN LAIRD: So, all in favor, say

15 "aye."

16 COMMISSIONER TITLA: Chairman?

17 ACTING CHAIRMAN LAIRD: Yes.

18 COMMISSIONER TITLA: I have a question.

19 ACTING CHAIRMAN LAIRD: Yes.

20 COMMISSIONER TITLA: How about -- what

21 difference is that from the motion that I made? The

22 second motion?

23 ACTING CHAIRMAN LAIRD: You included that we

24 would also -- the full recommendation of the Executive

25 Director, which would include a finding of express

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1 Okay. Do we have any other -- any other

2 motions at this time?

3 CHAIRPERSON RECKART: I -- I would like to

4 propose one.

5 ACTING CHAIRMAN LAIRD: Mr. Chairman.

6 CHAIRPERSON RECKART: We have considered the

7 statute and the relevant case law, been advised by our

8 own counsel, as well as have been in discussion with

9 counsel for the Ducey campaign. I think there is a

10 benefit to the electorate and to the political process

11 here if we try to get at least some of the aspects of

12 this complaint resolved.

13 While I appreciate that there are some

14 questions as to whether or not a -- a presumption has

15 been met under the statute as to whether or not there's

16 coordination, I -- I do have to agree with the

17 observation that there has been no evidence proffered to

18 support an allegation of coordination and that it's

19 really rest that allegation -- that allegation rests on

20 a false statement without any support.

21 With that in mind, mine -- my heartfelt

22 disposition is that we -- we need to address it as a

23 Commission and -- and not let this linger over the

24 campaign or be used inappropriately for something that I

25 just don't think has any merit at this point. And I

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1 think that Mr. Liburdi's statement that the tests for
2 coordination have to be colored by the phrase "in
3 coordination with," I think to me it's sufficient to
4 compel me to make the motion that the Commission find
5 that there is no coordination based on the complaint
6 that we've received.

7 ACTING CHAIRMAN LAIRD: Okay.

8 COMMISSIONER TITLA: Chairman?

9 ACTING CHAIRMAN LAIRD: Yes.

10 COMMISSIONER TITLA: The statement -- the
11 statement of our esteemed colleague, is he saying that
12 by the motion that was made and passed that we find no
13 coordination? Is that --

14 ACTING CHAIRMAN LAIRD: I believe that's his
15 motion, as I understand it.

16 COMMISSIONER TITLA: Is that a new motion?

17 ACTING CHAIRMAN LAIRD: A new motion.

18 MR. COLLINS: Yes. A new motion, correct.

19 ACTING CHAIRMAN LAIRD: A new motion.

20 COMMISSIONER TITLA: Oh, okay. I thought he
21 was talking about the prior motion.

22 ACTING CHAIRMAN LAIRD: No, this is a new --
23 this is new. The other one has already passed. So,
24 this is a new motion.

25 Do I hear a second for the Chairman's motion

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1 for a finding of no coordination?

2 Motion dies for lack of a second.

3 Any -- any other motions from any of the
4 Commissioners with respect to today's agenda items?

5 If not, now would be the time for public
6 comment, and we would open the podium to the public for
7 public comment.

8 And seeing as there is none, I would entertain
9 a motion to adjourn.

10 COMMISSIONER KOESTER: I move to adjourn.

11 COMMISSIONER TITLA: Second.

12 ACTING CHAIRMAN LAIRD: Motion and second. All
13 in favor, say "aye."

14 (Chorus of ayes.)

15
16 ACTING CHAIRMAN LAIRD: Commission adjourned.
17 (Whereupon the proceeding concludes at 12:23

18 p.m.)

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1 C E R T I F I C A T E

2
3 I, Angela Furniss Miller, Certified Reporter,
4 do hereby certify that the foregoing pages numbered 1
5 through 79, inclusive, constitute a full and accurate
6 printed record of my stenographic notes taken at said
7 time and place, all done to the best of my skill and
8 ability.

9 DATED, at LITCHFIELD PARK, Arizona, this 5th day
10 of August, 2014.

11

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Angela Furniss Miller, RPR, CR
Certified Reporter (AZ50127)

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