NOTICE OF PUBLIC MEETING
AND POSSIBLE EXECUTIVE SESSION OF THE
STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

Location: **Citizens Clean Elections Commission**

1616 West Adams, Suite 110

Phoenix, Arizona 85007

Date: **Thursday, July 19, 2018**

Time: **9:30 a. m.**

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the Commissioners of the Citizens Clean Elections Commission and the general public that the Citizens Clean Elections Commission will hold a regular meeting, which is open to the public on July 19, 2018. This meeting will be held at 9:30 a.m., at the Citizens Clean Elections Commission, 1616 West Adams, Suite 110, Phoenix, Arizona 85007. The meeting may be available for live streaming online at www.livestream.com/cleanelections. Members of the Citizens Clean Elections Commission will attend either in person or by telephone, video, or internet conferencing.

The Commission may vote to go into executive session, which will not be open to the public, for the purpose of obtaining legal advice on any item listed on the agenda, pursuant to A.R.S. § 38-431.03 (A)(3). The Commission reserves the right at its discretion to address the agenda matters in an order different than outlined below.

The agenda for the meeting is as follows:

I. Call to Order

II. Discussion and Possible Action on Commission Minutes for June 28, 2018 meeting.

III. Discussion and Possible Action on Executive Director's Report

IV. Discussion and Possible Action on Clean Elections Voter Education and Matters related to Informing Public of Debates.

V. Discussion and possible action on legal matters involving the Clean Elections Act and/or the Clean Elections Commission.

A. Arizona Advocacy et. al. v. Reagan et. al.

B. HCR 2007 related litigation

C. Legacy Foundation Action Fund Related litigation

The Commission may choose to go into executive session on Item V for discussion or consultation with its attorneys to consider its position and instruct its attorneys regarding the public body's position regarding contracts, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation. A.R.S. § 38-431.03(A)(4).

VI. Discussion and Possible Action on Recap of Arizona Voter Crisis Report and related issues.

VII. Public Comment

This is the time for consideration of comments and suggestions from the public. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date or responding to criticism

VIII. Adjournment.

This agenda is subject to change up to 24 hours prior to the meeting. A copy of the agenda background material provided to the Commission (with the exception of material relating to possible executive sessions) is available for public inspection at the Commission's office, 1616 West Adams, Suite 110, Phoenix, Arizona 85007.

Dated this 17th day of July, 2018.

Citizens Clean Elections Commission
Thomas M. Collins, Executive Director

Any person with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting the Commission at (602) 364-3477. Requests should be made as early as possible to allow time to arrange accommodations.

ITEM II - June 28th Minutes

THE STATE OF ARIZONA

CITIZENS CLEAN ELECTIONS COMMISSION

REPORTER'S TRANSCRIPT OF PUBLIC MEETING

Phoenix, Arizona

June 29, 2018

10:02 a.m.

COASH & COASH, INC.
Court Reporting, Video & Videoconferencing
1802 North 7th Street, Phoenix, AZ 85006
602-258-1440 staff@coashandcoash.com

Prepared by:
LILIA MONARREZ, CSR, RPR
Certificate No. 50699

Page 2

PUBLIC MEETING BEFORE THE CITIZENS CLEAN ELECTIONS COMMISSION convened at 10:02 a.m. on June 29, 2018, at the State of Arizona, Clean Elections Commission, 1616 West Adams, Conference Room, Phoenix, Arizona, in the presence of the following Board members:

Mr. Damien R. Meyer, Chairperson
Mr. Mark S. Kimble (Telephonic)
Mr. Steve Titla (Telephonic)
Ms. Amy B. Chan
Mr. Galen D. Paton

OTHERS PRESENT:

Thomas M. Collins, Executive Director
Paula Thomas, Executive Officer (Telephonic)
Gina Roberts, Voter Education Manager
Alec Shaffer, Web Content Manager
Stephanie Cooper, Executive Support Specialist
Nathan Arrowsmith, Osborn Maledon
Joseph LaRue, Attorney General's Office
Representative Ken Clark, D-24
Joel Edman, Executive Director, AZLN
Rivko Knox, AZ LWV
Kayla Blessinger, AZAN
Rehit Rajan, AZAN
Morgan Dick, AZAN
Rhonda Barnes, House
Lisette Flores, Senate
Talei Hornback, RIESTER

10:02:20-10:03:06 Page 3

P R O C E E D I N G

CHAIRMAN MEYER: All right. Good morning. We're going to call to order the Citizens Clean Elections Commission meeting. It's Friday, June 29, 2018, at 10:00 o'clock a.m.

It looks like we have a quorum here.

Tom, is anyone on the phone?

MR. COLLINS: I think Commissioner Kimble is joining us on the phone. I don't know if he's on yet.

COMMISSIONER PATON: Yes, he's there.

MR. COLLINS: Okay.

COMMISSIONER KIMBLE: Yes, I am here.

CHAIRMAN MEYER: Thank you.

MR. COLLINS: Okay.

CHAIRMAN MEYER: Good morning, Commissioner Kimble.

COMMISSIONER KIMBLE: Good morning.

CHAIRMAN MEYER: So Item Number II on the agenda is discussion and possible action on Commission minutes for April 19, 2018 and May 10, 2018.

Any comments or questions on the minute -- minutes for those meetings?

COMMISSIONER CHAN: Mr. Chairman, I would

10:03:08-10:04:03 Page 4

move that we approve the minutes as written.

CHAIRMAN MEYER: Is there a second?

COMMISSIONER PATON: Second.

CHAIRMAN MEYER: All right. We have a motion to approve the minutes.

All in favor say aye.

(Chorus of ayes.)

CHAIRMAN MEYER: Opposed?

(No response.)

CHAIRMAN MEYER: Abstentions?

(No response.)

CHAIRMAN MEYER: Okay. The motion carries unanimously to approve the minutes.

Let's go to Item Number III, which is the discussion and possible action on the executive director's report.

Tom?

MR. COLLINS: Yes. Mr. Chairman, Commissioners, just to take the highlights, as you can see, there is a comprehensive amount of activity going on in voter education that Gina and Alec and Stephanie are spearheading. We've had -- our debates on Horizon have begun. We are starting to work with Apache, Coconino and Navajo Counties on voter education advertising on KTNN to reach those -- that underserved

10:04:08-10:05:25 Page 5

community.

We are working to expand our 18 in 2018 campaign to raise awareness among younger voters. Gina has been invited to present at the American Indian Right to Vote Conference in July. Alec will be presenting at the Municipal Clerks Association Election Conference in July, and then we'll be doing a -- this is a new event for us.

The "Capitol Times" has for years hosted a thing called the Meet the Candidates event, and that event had previously been a paid-for admission event for -- you know, people paid for admission. And we decided, because of the possibility of addition -- in addition to the debates and the -- and the -- and the pamphlet, that it would be a good, interesting idea to try this year to see if we could make that available to the public.

So we -- we, essentially, became the exclusive sponsor of it in order that the entire public could -- could participate instead of having to -- have paid admission the way they kept time. So it's more of a forum and an opportunity for people to come to Phoenix or who are in Phoenix and meet -- and meet candidates and interact with them.

So we think that's, you know, consistent

10:05:28-10:06:34 Page 6

with what we've been trying to do. It's not a debate, per se, but it is an opportunity to promote interaction with candidates, which is a key part of what Clean Elections does. So I think that's -- that's sort of the high points there.

We will have, just to -- just to -- and this has been in the newspaper. We will -- under the Clean Elections rules, we have a gubernatorial Republican candidate, Former Secretary of State Ken Bennett, who is a participating candidate. Governor Ducey has declined to participate in that debate. And, in accordance with our rules, there will be a 30-minute Q and A session where then Mr. Bennett is obligated to take questions during. So that will be in the beginning of August.

COMMISSIONER PATON: Question.

MR. COLLINS: Yes.

COMMISSIONER PATON: So on the Q and A --

MR. COLLINS: Yeah.

COMMISSIONER PATON: -- would that be on TV?

MR. COLLINS: It will be on TV. We think that, you know, KAET may or may not have different obligations under its own standards to provide time to Mr. Ducey if they want to. Our rules are clear -- and

10:06:39-10:08:04 Page 7

Mr. Ducey was invited to participate, and our rules are clear that the burden here is on Mr. Bennett. He has to take the questions.

And our anticipation is that although, obviously, he gets time on air, we don't anticipate those questions will be easy. I mean, I think that Ted Simons -- one of the reasons we've had a long and trusted relationship with Arizona PBS is because Ted is good at bringing out real information from candidates and making them ask questions -- answer questions that are tough. And in the case of any candidate, there are tough questions.

So we don't -- we don't -- although -- so really, as I said, the burden is on Mr. Bennett. He has obligated himself under the rules to sit for this, and whether or not KAET offers some other time to Governor Ducey is their -- you know, that's their business. We don't have any problem with that or -- you know, that's just -- that's just their issue. This is more of an issue of complying with our rules.

COMMISSIONER PATON: Thank you.

MR. COLLINS: I wanted to raise a couple of issues real quick. And I know these -- and I know we have a lot to get to later, but, one, I just want to call your attention to the "Republic," especially, as

10:08:08-10:09:00 Page 8

well as other news outlets, have catalogued a number -- a high number of cases involving petitions -- candidate petition signature irregularities. Some of these matters, I believe, are still in appeal.

Joe, is that right?

MR. LaRUE: Yes, Tom, that is correct.

MR. COLLINS: Yes. So we will see how that --

COMMISSIONER TITLA: Tom?

MR. COLLINS: Yes.

COMMISSIONER TITLA: Steve Titla. I joined the call earlier.

MR. COLLINS: Oh, good. I didn't hear you. Sorry.

COMMISSIONER TITLA: Mr. Chairman, thank you.

CHAIRMAN MEYER: Just for the record, we have -- Commissioner Titla has joined the meeting.

MR. COLLINS: Wonderful. Thank you. Sorry.

So -- anyway, so that's their -- I think that's something to be aware of because, you know, it may -- I think that looking at some of the Secretary of State's comments there in the article, I will tell you that I think that we may see some changes to that

10:09:03-10:10:04 Page 9

process. It's not entirely clear how those changes will play out but, you know, I think that the -- that the consensus among folks who pay attention to this stuff is that this is -- year was pretty -- pretty extraordinary for that.

So I don't know if --

COMMISSIONER PATON: And I have a question.

MR. COLLINS: Yes, please.

COMMISSIONER PATON: And what -- do we have any kind of -- I mean, besides just interest, you know, individual interest, do we have any interest, since we're Clean Elections --

MR. COLLINS: Right.

COMMISSIONER PATON: -- and, obviously, that wasn't clean.

MR. COLLINS: Right.

COMMISSIONER PATON: Is there -- what kind of overlap do we have with the Secretary of State or --

MR. COLLINS: Right. That's a very good question. And, Mr. Chairman, Commissioner Paton, I think -- I think it will -- I think the overlap, as this develops, will come in two ways. First, under 16-950 and under the existing Attorney General's opinions, the oversight over the review of qualifying signatures that go with the $5 slips is done by the

10:10:07-10:11:21 Page 10

Secretary of State and the County -- County Recorders. That's of statutory -- that's their statutory obligation.

However, the Commission does have the authority in its mandate to make suggestions on how to improve the process to make it, you know, cleaner. And so I think that, A, you know, we have some issues that I don't think it's appropriate for us to discuss now in terms of what we may be looking at specifically, but we may have some general -- but, generally, I think we will want to weigh in on that from a Clean Elections perspective.

And then I think, more generally, because of our interaction with signature gathering in all of its facets -- because you need to qualify for the ballot in order to be funded. I think there's a nexus there for us to be constructive. So I think what we'll try to do going forward, as much as we can -- that's Secretary of State, the Maricopa County Recorder, the other recorders -- I think that -- I think, you know, Pima, Yavapai, other -- Yuma -- the other -- you know, all of the other recorders that are dealing with these issues -- I think we do have an opportunity to -- to be constructive.

And I think that is with that mandate, but

10:11:23-10:12:33 Page 11

it remains to be seen what, you know, kinds of proposals get developed. And we may come to a point where we want to develop our own proposals down the road that may have a nexus with the $5 qualifying process and may have a nexus with the qualifying for the ballot process.

We'll just have to -- we'll have to -- we're going to have to play this a little by ear, but it's definitely something that's within our -- to directly answer your question, it's definitely within our -- both our -- the Comission's express authority to make recommendations on proving the process and the Commission's duty to ensure that the electoral -- the integrity of the electoral process.

CHAIRMAN MEYER: Commissioner Chan.

COMMISSIONER CHAN: As long as Commissioner Paton has gotten his answer.

COMMISSIONER PATON: Shoot. Yes.

COMMISSIONER CHAN: Just a comment on that. I find it pretty disheartening that we're seeing this many irregularities and an increase, you know, from years, but it does happen, unfortunately. And I think that the fact that candidates were kind of cut out, so to speak, for their actions -- or even if it wasn't directly their actions, the people that they allowed to

10:12:35-10:13:48 Page 12

circulate for them -- I don't know the details of any particular case in this moment, but I think -- you know, I don't want to say the system works, but I mean, I think the system is set up so that these types of irregularities can be caught and made evident.

And one of the things is having a healthy and robust system of folks running against each other because it's always, kind of, the loyal opposition or, you know, the opposing candidate that looks through and may catch some of these things. So I think when the recorders are looking through signatures for the clean candidates, that's very -- a very important component.

MR. COLLINS: Right.

COMMISSIONER CHAN: But I think it's also very important to have, you know, a healthy and robust system of people who want to be active in government so that we have folks who are keeping an eye on each other. I've never felt that way more strongly, I think, than I do now that -- that it's very important for people to be involved and keep an eye on the folks who are running for election.

And just one last comment with regard to this, I believe there are only a few reasons that a person is prohibited from running for office, and if I'm not mistaken -- and I don't know if Joseph or Tom

10:13:50-10:14:50 Page 13

might know this off the top of their heads.

One of the bars to running for office, even filing for office to run for office, is a campaign fraud, like a signature fraud-type conviction. So that's the other piece here. It's not just that they don't get to run for office. They might get kicked off the ballot for this election. If they're actually convicted by being referred for criminal activity, then I believe that they could be barred for a period of years from even filing.

MR. COLLINS: I'm a little rusty on that. I know there's a -- or was a provision of law that said that there was certain things that could happen that would cause you to be out for five years. I don't know if that -- I don't know what the trigger on that is.

COMMISSIONER CHAN: That might have been a campaign finance thing.

MR. COLLINS: Yeah.

COMMISSIONER CHAN: I think.

MR. COLLINS: So I will say this, just to add a little more context -- and, Joe, correct me if I'm wrong. You know, one of the things that's pending at the -- I think the Arizona Supreme Court is an appeal by a candidate for the Secretary of State's Office over the amount of time that she received to

10:14:52-10:15:59 Page 14

review a report from the Maricopa County Recorder's Office.

The Maricopa County Recorder's Office has taken the position that, really, there's no statutory obligation to -- for them to be doing these reviews and, in effect, inviting the legislature to review these things if they were successful in that argument. So I do think that going forward -- to Commissioner Paton's point -- there's going to be -- you know, that case may not be the -- may not resolve that issue, but that case is an indicator that there's going to be some legislative activity.

I mean, I think it's safe to say there will be some legislative interest here; that coupled with Mr. Spencer's comments and the story I provided. I think -- I think you'll see some legislative activity in this area next year.

COMMISSIONER PATON: I have a statement, I guess.

Particularly, it looks like the incentive for people to pass petitions for monetary gain -- I mean, as a job is, obviously, causing the majority of this issue. And so, I mean, I don't want to malign everybody that's doing this, but when they find hundreds and dead people signing up and people that are

10:16:04-10:17:31 Page 15

out of the country and so on that have no chance to sign, it's pretty disheartening because when it gets to the newspapers and the TV and everything, it -- the average -- the average person thinks that politicians aren't that trustworthy as it is.

MR. COLLINS: Right.

COMMISSIONER PATON: And, then, do we want to be one of these countries that the electorate doesn't believe that anything legitimate is happening anymore? And I certainly don't want to go through something like that, and -- so I don't know what we can do, but I'm really pretty concerned about that.

MR. COLLINS: And if I -- I don't want to take -- you know, I know we have some other activity, but just to, sort of, amplify and validate, Commissioner Paton, what you've been saying, one of the things the legislature did in 2014, '15, '16, somewhere like that, was to prohibit per-signature payment for initiative and referendum gathering.

Now, to your point, they did not do that for candidates, and so the tension between those two policies is exacerbated by the news that has happened this year. So, again, I don't know how the legislature will wrestle with that but, you know, they did take steps based precisely on your -- or at least, in their

10:17:35-10:18:34 Page 16

view, based precisely on your view regarding initiatives. Perhaps they will make a similar effort with respect to candidates. It's hard to say, but we'll definitely keep an eye on it.

COMMISSIONER PATON: Okay. Thank you.

MR. COLLINS: Just real quick, running through issues, we've got the AZN, et al., lawsuit. The summary judgment briefing is ongoing. We have an update on See the Money. It appears the See the Money program is -- is now being fed -- the current information, by the campaign finance reporting system which is good, but we'll continue to keep you apprised of that.

And then --

COMMISSIONER PATON: I have a question. I'm sorry.

MR. COLLINS: Sure, sure, sure.

COMMISSIONER PATON: Talking about -- I haven't been for a couple --

MR. COLLINS: Well, none of us have been. We didn't have a meeting last month.

COMMISSIONER PATON: So I read that newspaper article about all of that, and we're satisfied that things are going well, then, as staff?

MR. COLLINS: Commissioner -- Chairman

10:18:37-10:20:00 Page 17

Meyer, Commissioner Paton, I would say this: That the amount of work that has gone into both updating the campaign -- let's back up a second.

There's two different systems. There's the campaign finance reporting system into which candidates and others input their information and there's See the Money, which is the public-facing, a search function and -- you know, functionality of that.

Because -- as I understand it, because of all the rehab of the back-end system, there was a delay in connecting it to the front-end system. I had extensive conversations with the Secretary of State's Office after that story broke. They relayed to me that they expected that connection to be made within a week, and they did make good on that. I think the next campaign finance filing window opens July 5th.

And so, you know, we'll see, you know, how that works, but we've -- we have evaluated this from a couple of different perspectives, and as of right now, you know, we don't think there's any sort of bad faith issue. We think it's more of just -- you know, it's an amount of work and trying to get a lot of work done in a short period of time. So we think that by the time voters are really clued in as we reach people file, people have the ballot and the July 5th reporting

10:20:04-10:21:07 Page 18

deadline comes, our anticipation is that things will be working the way they're anticipated.
If that turns out to be different, we'll let you know, but we have had, I would say, productive conversations with the Secretary of State's Office to keep ourselves informed and to keep you informed about where that is.
COMMISSIONER PATON: Since we helped --
MR. COLLINS: Right.
COMMISSIONER PATON: -- pay for this.
MR. COLLINS: Yeah.
COMMISSIONER PATON: I think the article made it sound like it was shear chaos or -- you know. So -- but you don't seem to be too concerned.
MR. COLLINS: Well, I --
COMMISSIONER PATON: So I guess I shouldn't be.
MR. COLLINS: Well, I would say this about that. I would say that in talking to the Secretary of State's Office, I think their view -- and I'm somewhat speaking for them and, you know -- is that the distinction between CFRS and See the Money is not always drawn neatly in press reports, but the more important thing to me is to ensure that they are continuing to make progress so that by the time we're

10:21:11-10:22:29 Page 19

at the most critical time, which is coming up here as we enter the meat of the election season, things are functioning.
They seem to be responsive to our questions, which is -- which is a good thing. So so long as we continue to be able to have a productive relationship with them and conversation with them around these issues, you know, my -- my anxiety level around this is lower than it otherwise would be.
COMMISSIONER PATON: Thank you.
CHAIRMAN MEYER: Commissioner Chan.
COMMISSIONER CHAN: Thank you, Mr. Chairman.
Commissioner Paton, I'm actually glad you brought that up because I think it was last month that this news story broke, if I'm not mistaken, and I had actually forgotten just because so much has happened since then, but I was very disappointed that one of the fundamental bases of what I thought See the Money was going to be was not happening, which was to be hooked into actual real information from the campaign finance system.
I mean, what is the point of See the Money if it's not hooked into real actual information? It just -- I really actually -- you could have knocked me

10:22:33-10:23:46 Page 20

over with a feather, I think, when I read that article. And I'm very happy to hear that they have now addressed that. I think this kind of goes to my trust issues that we discussed at length with their office when they asked us for this money to save this project.
And, unfortunately, it's just another, kind of, broken step in our -- this Commission's relationship, I think, with that office that this was how they approached it; that they did not think that was an important enough piece to have it hooked into real time information.
And so, thank you, Commissioner Paton, for reminding me that that was an issue.
And as I mentioned, Tom, you are the voice of reason, and I appreciate that very much.
MR. COLLINS: You may be the only person who thinks that.
COMMISSIONER CHAN: But I'm -- I just wanted to make that statement because I wanted to have on the record that I was appalled when I learned that that -- I just don't understand how that could even have been an option with See the Money.
MR. COLLINS: Right. Well -- and if I may, Mr. Chairman, Commissioner Chan, I think -- I think -- you know, I think we'll just continue to work through

10:23:48-10:24:50 Page 21

this. I think that the -- I think there is some pressure on the Secretary's office, and I think that there -- and I think -- my feeling is that -- you know, just from a staff perspective, which is different from a commissioner's perspective is that, you know, my job at this point is to try to keep the lines of communication open until we can -- until something -- you know, so that we can get what we need, you know.
And we can -- you know, certainly, you can direct -- either you or Commissioner Paton can direct me to put this on the agenda as a separate item in the future, if you'd like to have a more extensive discussion.
COMMISSIONER CHAN: I think, Mr. Chairman and Tom, the thing that's disappointing is that we even have to be having this discussion when they came here and promised us that this was going to be a particular way and then one of the fundamental aspects of it wasn't even put in place. So --
MR. COLLINS: Understood.
COMMISSIONER CHAN: But having said that, thank you.
And the other thing I'll say is that it would be difficult to know what we would even need -- that we would even need to put it on the agenda

10:24:52-10:25:55 Page 22

without, you know, reporting, like Dustin Garner has been doing.
So, anyway, thank you very much for that.
Thank you, Mr. Chairman.
MR. COLLINS: Thank you.
CHAIRMAN MEYER: And I'll just make a brief comment on that.
As far as See the Money, I mean, I'm glad we're part of it. I understand this was a cutting-edge piece of technology and new thing that other states are doing. I understand there's going to be some bumps in the road anytime you try to implement a system like that. I'm glad that they're working on it and we're going to get this up and running. It's going to do what they said it would do. So, I mean, I understand anytime you implement systems like this, it's very common to have some bumps in the road.
So I would, I guess, urge some patience from my fellow commissioners and let Tom, who is very optimistic on this issue, to keep doing what he's doing. And I think we're going to get what we -- what we were told we were going to get and just -- and I'll leave it at that.
MR. COLLINS: Mr. Chairman, the last item I want to highlight is that there is litigation related

10:25:59-10:27:11 Page 23

to the substance -- well, I should say the procedures by which HCR 2007 was put on the ballot. Oral arguments on the motion for a preliminary injunction filed by -- in the Hoffman v. Reagan matter are July 12th.
That's really all I want to highlight. Unless anyone else has questions, I am concluded.
CHAIRMAN MEYER: Commissioner Kimble, Commissioner Titla, unless you have questions, we're going to move on to the next agenda item.
COMMISSIONER KIMBLE: I'm good. Thank you.
CHAIRMAN MEYER: Okay. We're going to bump up an item here, public comment.
Do you want to do now, Tom, or do you want to --
MR. COLLINS: Well, yeah. What I would propose would be -- with respect to Item IV, what I would propose is that we take -- we'll still need to do the public comment that we have noticed, but since we take public comment on items, I was going to suggest, since we have folks here who are interested in addressing this particular item after the legislative council met yesterday to pass its summary that goes in the publicity pamphlet, we have at least three people here who, I believe, are interested in testifying on

10:27:13-10:28:09 Page 24

that.
So I thought it would be best to have them testify prior to going into executive session, although, I think Nate and I recommend that we do go into executive session after that. And so that would be the way I would structure it just --
CHAIRMAN MEYER: So we're going to do public comment on just HCR 207 -- 2007 right now?
MR. COLLINS: 2007 publicity pamphlet, yeah.
CHAIRMAN MEYER: And then we'll --
MR. COLLINS: And then go into executive session.
CHAIRMAN MEYER: All right.
MR. COLLINS: And, if I could, as a matter of preface, just so everybody knows the background, yesterday the legislative council met and drafted the language that will go in the publicity pamphlet of the Secretary of State. As I think everyone knows, that language is very important. The courts look to it to interpret initiatives and referendums. The voters look at it as a way -- it may be the only interaction that voters have with the actual text of the legal measures that are obligated to -- where they have the opportunity to vote on.

10:28:10-10:29:30 Page 25

And more than that, because it goes out to every household in the state, it is the best way to reach voters of all demographics because -- because everybody gets the mail.
So, you know, we can discuss some of the issues with it, but I thought that it might be better to allow -- to kind of put this in order, I'd like -- Representative Ken Clark is the representative from central Phoenix who was -- is on "leg council" and offered amendments yesterday, not all of which were heard by the council. I think it would be good if Representative Clark were able to address the Commission first and then maybe Mr. Edman and then Rivko, if that works for you. Okay.
REPRESENTATIVE CLARK: Thank you, Chair, members, commissioners. My name is Ken Clark, state representative of District 24. I just wanted to make myself available, really, for questions. I can -- if you'd like, I can go through the two -- the two amendments that I offered, neither of which were accepted or really seriously debated. I don't -- we didn't really push for a vote on either of them because I was hoping that we would have a serious conversation about them.
They took parts of one of them, but let me

10:29:33-10:30:57 Page 26

just say first, with the help of our Senate staff, we put these together in an effort to address an overriding problem with the -- with the language, and that was that unlike the two other pamphlet language propositions that went before us yesterday, the one regarding HCR 2007 didn't give any context, really, as to why they were doing what they were doing.

So, for instance, the one on retirement issues did give you some amount of knowledge about what the system is like right now and what is being changed, although they denied that in the committee yesterday. It wasn't true. And then the conversation about the EASs did give context as to what the law is right now and then what the -- what a passing yes/no vote would do if that were passed.

So if you -- if a person were looking at that ballot language or the pamphlet language, they could possibly come to the conclusion -- I think very likely come to the conclusion that the things that the legislature is attempting to do in HCR 2007 are not already being done by the -- by the Commission.

And to that point, there were two amendments addressing two issues. One was that it seemed as if the Commission did not already make its rules -- its own rules, have its own rule-making

10:31:01-10:32:30 Page 27

authority. Second, it seemed as if the Commission did not already have rules in place deciding what candidates could and could not spend money on, particularly in regards to political parties.

So we brought those two issues forward. The only thing that was -- that they kind of took part of was my second amendment that has to do with the role of the Governor's Regulatory Review Council and in -- insofar as they only took, I think, the part that -- I think that just kind of said it's a council of six members who are appointed by the governor, like that.

So from my perspective, I think -- I think -- I tried to say at the very end of the whole meeting as I was explaining my vote on one of the other pamphlet language questions -- I tried to draw the distinction that we had just spent a large amount of time talking about this ESA thing, going into great detail, adding language, clarifying language, adding context on something for ESAs that ended up being about 50 lines long, yet one of the big reasons that they used not to accept either of my amendments was, well, we don't want to make this too long.

So even had they accepted my amendments in full which, you know, of course, they didn't, had they accepted those amendments in full, it would have come

10:32:33-10:33:09 Page 28

up to something, like, I think, 40-some lines.

COMMISSIONER CHAN: Mr. Chairman, Representative Clark, if I could, just to that point, one of the questions I had, even when you started presenting is, is there a limit on the words or lines that the legislative council's summary -- is there any limit on that?

REPRESENTATIVE CLARK: I don't know the answer to that question.

CHAIRMAN MEYER: Yeah, I had that same question.

COMMISSIONER CHAN: Okay. Maybe --

CHAIRMAN MEYER: Because I think the one -- HCR 2007 is 14 lines?

REPRESENTATIVE CLARK: Yeah. I think I've got that.

CHAIRMAN MEYER: Do I have that right?

REPRESENTATIVE CLARK: Yeah, 14 lines.

COMMISSIONER CHAN: I mean, certainly if the other one is 50 lines, they could have done a little more.

REPRESENTATIVE CLARK: Yeah. Exactly. And -- thank you, Commissioner. I think that that points to the animosity that the legislature shows toward -- for the Commission and on this language.

10:33:15-10:34:20 Page 29

The point that I made was if you look at the history, the legislature -- of which this meeting yesterday was a subset and very -- I don't know if it's representative of the legislature, but there were ten Republicans and four Democrats. That legislature has historically shown hostility toward the Clean Elections Commission. You can look at the record and see that; whereas, they have shown a warm embrace toward empowerment scholarship accounts.

And they were happy to go into great detail and add context to that one, but they were not to this one. And I don't know what that gets you but --

COMMISSIONER PATON: Excuse me.

REPRESENTATIVE CLARK: Yeah.

COMMISSIONER PATON: The ESA, is that -- does that mean the scholarships?

REPRESENTATIVE CLARK: Yeah, the EASs.

COMMISSIONER PATON: Okay.

REPRESENTATIVE CLARK: So -- and I don't know what that gets you in the end. Obviously, I am not a legal scholar. And I don't know if that informs in any way what could be done at this point, but I don't know if there's a much more clear example of a legislature that has open hostility toward a Commission and, therefore, expresses that hostility in the way

10:34:24-10:35:32 Page 30

that it very misleadingly writes the ballot -- or the pamphlet language.
COMMISSIONER CHAN: Mr. Chairman?
CHAIRMAN MEYER: Go ahead, Commissioner Chan.
COMMISSIONER CHAN: Representative Clark, I think, you know, definitely being -- having worked in elections for years and worked in and around the legislature for years, I'm very familiar with this, you know, process. And it's just a political process. And so I think there's definitely -- what you're saying, I think, is accurate on many levels. I know that there's a lot of animosity from some legislators toward the Commission.
Unfortunately, for the Commission's, you know, feeling -- well, I guess I can't speak for the Commission yet, but unfortunately, from my feelings about this summary and about this bill, since I'm actually one of the plaintiffs in the other lawsuit that -- in the lawsuit that's pending right now, you know, having ten Rs on the committee, I'm sure they all feel strongly about the Clean Elections role.
And, frankly, I will -- I want to, kind of, give some credit to Commissioner Paton because I know when this Commission considered rules regarding using

10:35:37-10:36:56 Page 31

Clean Election monies for -- to pay political parties for services, he expressed concern that we would have this kind of clap back and here it is. So everything is political. Everything is -- in that sense, you know, can be biased, in my opinion, you know.
I think -- I'm sure I want to -- I think when legislators come to write the summary, they're definitely coming from their own -- we all have our own biases. So they're coming from their biased space, and I think when I read this summary, I was sorrily disappointed in it, but I understand, you know, the -- how this comes to be. And so, obviously, thank you so much for your time and being here today and, kind of, going over with us your two amendments.
I didn't have an opportunity yet to watch the committee meeting or even look at your two amendments, and I would -- I'd really be interested in looking at those as well. So just thank you, and I just wanted to kind of validate what you're saying.
REPRESENTATIVE CLARK: Well, Commissioner grab a soda and some popcorn because it's a lot of fun.
COMMISSIONER CHAN: Okay. Thank you.
CHAIRMAN MEYER: Commissioner Paton, do you have a comment?
COMMISSIONER PATON: No. I mean, my

10:36:59-10:38:34 Page 32

inclination during -- you know, when we set our rules was that this was going to happen and it was going to be more restrictive than what -- because of them not being happy with -- with our rules. And I'm not happy with the GRRC being lumped in with this, and now I'm just not happy with the whole situation, actually.
REPRESENTATIVE CLARK: If I could, there was some discussion, both during the ESA issue and this yesterday, about our job as legislators to present an impartial -- impartial language regarding -- and I don't know how anybody can believe that leaving out these two very critical things could be in any way considered impartial. I obviously -- I have my opinion. I believe it's a power grab. I believe that the governor, in an attempt to influence a Commission that he does not like, is trying to, with his friends in the legislature, fold this under the Governor's Regulatory Review Council.
I would not try to put that in this language, but I would like people to be able to understand the very basics here, that the Commission already has successful rules in place and has rule-making authority as set up by a proposition that was passed by the voters. And that's it. All you have to do is say that, and I think people will fully

10:38:37-10:39:32 Page 33

understand what's happening.
CHAIRMAN MEYER: Commissioner Kimble or Commissioner Titla, do you have any questions for Representative Clark?
COMMISSIONER TITLA: No comments.
COMMISSIONER KIMBLE: No. I don't think I do at this point. Thank you.
CHAIRMAN MEYER: Representative Clark, thank you. I will just say I appreciate you being here. I appreciate your perspective, your context and, I mean, from my chair -- and I think I'll safely include Commissioner Chan's chair, I mean, you're preaching to the choir -- a choir of two, anyway. So thank you for your comments. We'll take them into consideration, and unless you have anything more to offer, we appreciate that.
REPRESENTATIVE CLARK: Thank you.
COMMISSIONER PATON: Thank you.
CHAIRMAN MEYER: Next up, Tom?
MR. COLLINS: Yeah, we're going to --
CHAIRMAN MEYER: I forget the order.
MR. COLLINS: Yeah. We're going to have -- Joel and Rivko can fight to go -- over who's next, I guess.
MR. EDMAN: It's yours.

10:39:32-10:40:41 Page 34

CHAIRMAN MEYER: Let's not have a --
MR. EDMAN: I don't know if I'm going to fight Rivko.
Yeah, Mr. Chairman, Commissioners, I'm Joel Edman, Arizona Advocacy Network. As you know, we're longtime friends of Clean Elections and the Commission and have played several roles now in this saga here, sort of. So we're active at the legislative session, trying to oppose HCR 2007, along with the League who actually just filed an amicus brief in the case challenging it under the single subject rule, and we were there at "leg council" yesterday.
And so I'll just start, I think, by saying that I think Representative Clark's characterization of how things went and sort of the summary of what happened, I agree with all of that. And so I won't repeat it, but just try to add a couple of points.
You know, there was a lot of discussion about, oh, we can't add these couple of sentences; it will make it too long and it needs to be concise. And it's true that they have an obligation to be concise but also to be clear, and there can be a tradeoff at times there, right? And I think that there's a couple of instances of where moving towards being more concise is misleadingly incomplete.

10:40:44-10:41:49 Page 35

And, for example, at the top of the language here, you know, it explains what the Clean Elections Act is very briefly in a short parenthetical that only highlights the public funding aspect of Clean Elections, not your voter education activities, not your authority to regulate independent expenditures, nonparticipating candidates. And, of course, those last pieces are really where this issue comes from, right?
That's been the fight with GRRC over the last several years. It has really been about that aspect of the Clean Elections program, and since that is, I think, the fundamental change that would be made by this measure to put the Commission, at least arguably -- I'm sure there will be legal fights at first, but under these sort of auspices of GRRC, that's really the ball game here, right?
And so to not tell voters or not signal to voters the Clean Elections is more than, you know, handing out checks to candidates, they do a lot of other things that would also be affected by that change, I think is misleadingly incomplete. And I know that was something that Representative Clark was pushing to have changed, to have just, you know, a sentence or two saying the other things the Clean

10:41:52-10:42:50 Page 36

Elections does.
You know, the -- in the voucher, Prop 305, the ESA measure, I didn't stick around for hours of debate that happened there, but the draft had, you know, a paragraph or two at the top explaining what the EASs are. And, you know, that sort of context is appropriate for something that voters aren't necessarily going to have all, you know, at the top of their head. And, you know, these are complicated changes. To understand how they actually play out is important.
And then I think, you know, the -- as part of that, in that parenthetical, you know, it says voluntary system of public funding of election campaigns for candidates. And, of course, that's correct. That in itself leaves out an important aspect of the public funding piece. Candidates give something up to get that, you know.
They -- as Mr. Collins was explaining, they have certain obligations to show up to debates. They can't raise money from certain sources of people, right? They can only raise a limited amount of private money. They have an expenditure cap. You know, it's not just you show up and say give me some money. And, you know, if you don't have that background knowledge,

10:42:52-10:43:50 Page 37

that -- just this phrase here makes it sound like it's, well, voluntary; I can show up and get public funding. And I think that kind of colors, potentially, in people's minds their impression of the Clean Elections system if that's all the information they have.
And then the other piece, as -- you know, Representative Clark already mentioned this but, you know, on Point 2 here that the Commission would be required to follow rule-making requirements without any context that you already do, of course, have your own rule-making requirements that are in some way similar and some ways inconsistent with, you know, the Administrative Procedures Act, but it sort of suggests without any context that you have just been able to do whatever you want from, you know, day one until now.
And I think that is, you know, also misleadingly incomplete. I think the -- adding "except as currently provided by law," I don't know --
CHAIRMAN MEYER: That tells no one anything.
MR. EDMAN: Exactly.
COMMISSIONER CHAN: I wasn't even sure what that meant.
CHAIRMAN MEYER: It's because it doesn't mean anything.

10:43:50-10:44:45 Page 38

COMMISSIONER CHAN: Yeah, it doesn't mean anything.
MR. EDMAN: Yeah, I don't -- I agree. I don't think that helps at all.
CHAIRMAN MEYER: Pardon the informality there.
MR. EDMAN: No, no, no. So -- I know. I thinks that's -- those are really all the points I wanted to make. I'm happy to take any questions on sort of thoughts on what happened yesterday or this whole process.
CHAIRMAN MEYER: I just want to make a quick point. On the language that says "except as currently provided by law," I mean, the point of these summaries is to give voters a fair summary that's unbiased of what the law is. So when you say "except as currently provided by law," it's nonsensical completely.
Commissioner Chan?
COMMISSIONER CHAN: Thank you, Mr. Chairman.
First of all, I wanted to mention, Tom pointed out to me that staff had included Representative Clark's amendments in our packet. So we do have them.

10:44:46-10:45:40 Page 39

Did you have any feeling -- are you familiar with the amendments that Representative Clark was going to offer yesterday or discussed yesterday?
MR. EDMAN: Yes.
COMMISSIONER CHAN: Do you have any feelings about either of those amendments? Did you, like, maybe separate them out? Could you kind of tell us what you think about -- if those would have been an improvement, as far as giving a little more information?
MR. EDMAN: Yeah, Mr. Chair, Commissioner Chan --
COMMISSIONER CHAN: Do you need to see them?
MR. EDMAN: Yeah. I don't have them in front of me. I mean, I know that, generally, I think they provided the sort of context that was needed. I mean, I think, looking here at Amendment 1, yeah, the Citizens Clean Elections act as a system of public funding and then adds -- sorry -- voter education and campaign finance enforcement, you know, the other sort of main aspects of the program. And that, I think, gets to that problem.
I didn't mention the [inaudible] that Representative Clark did that, you know, the Commission

10:45:41-10:46:46 Page 40

already has rules -- and that's also mentioned here in Amendment 1 -- rules that are in the same vein as what's being changed here. And I think that -- well, I think, you know, Commissioner Paton, you were right to predict that there would be sort of a backslash from adopting, let's say, less restrictive rules than the legislature would have liked.
I think it's still useful context for voters to know there are rules, right? It's not just, you know, there's nothing in place right now and that we're going to impose some rules. So I think that would have been good context.
The -- and then Amendment 2, yeah, as it explains, the Clean Elections, you know, already has a rule-making process, I think, that you all go through. And, you know, I think that that's also an important, you know, point to make for voters that it's not sort of, you know, lawless, right? That there is a process here and that this would mean changing the process.
And I think, also -- you know, and this may not be appropriate to include in an analysis or not, but since that process is inconsistent with the Procedures Act -- Mike Braun from the "leg council" yesterday, when he testified, sort of had to speculate as to how those two systems would be merged together.

10:46:49-10:47:35 Page 41

I think voters, you know, may want to know that there could likely be some litigation or at least just legal costs to the state in figuring out what the rules are from item to item.
I don't know if that's appropriate for this kind of analysis or not, but it's important background information.
COMMISSIONER CHAN: Thank you.
MR. EDMAN: Thank you.
CHAIRMAN MEYER: Thank you.
Any other questions for Mr. Edman?
(No response.)
MR. EDMAN: Thank you.
CHAIRMAN MEYER: Commissioner Kimble, Commissioner Titla, any questions?
COMMISSIONER KIMBLE: No, thank you.
COMMISSIONER TITLA: No, no comment. Thank you.
CHAIRMAN MEYER: And Ms. Knox?
MS. KNOX: Good morning, Chairman Meyer and members of the Commission and staff. I'm Rivko Knox. I'm representative -- representing the nonpartisan League of Women Voters of Arizona. I've spoken many times at this Commission.
I want to start by, kind of, maybe throwing

10:47:39-10:48:55 Page 42

in a little humor by saying this reminds me a lot of something I heard with another board that I've been involved in where the saying was everything has been said but not everyone said it. And so, in this case, I think pretty much everything has been said, but I haven't had the chance to say my part yet.

So, anyway, I did show up yesterday and -- representing the League. I wanted to say that the process was very confusing. And I have sat in many legislative committees, but the way that it worked, I had no idea that it would be this long debate. And then they would -- before they took votes, they would ask for the public comment. It was a very confusing process to begin with.

I have not had a chance to see Representative Clark's amendments, but what I planned to say was very similar to that. And so, of course, I appreciated what he had to say, and it was very well -- much better phrased than what I think I said and with, you know, appropriate legal background, et cetera, et cetera.

It was -- to me there was no question but that when there was no -- I love the word that Representative Clark used: context. When there was no explanation of the current status, there was no way for

10:48:58-10:50:19 Page 43

the public to know what was being changed. And I pointed out, when I spoke, I had not read the pension -- the first item on the agenda because, truthfully, I don't know enough about pensions to have had an opinion before that. And the League does not have an opinion.

Although I will read it before I vote in November, I saw no point in downloading it and reading it, but I have read the Proposition 305 because, truthfully, the League does have a position on that. And very clearly there were sentences that started the current situation is, currently this is, and they would not allow that. So it was very frustrating. I pointed out that the omission of the current situation was very distorting and kept it from being clear and impartial, in my opinion.

I think the whole issue -- and I pointed out, again, in my testimony that prior to my coming and observing and having a chance just to speak -- thank you -- to the Clean Elections Commission, I would have had no idea what GRRC was. When I reported to the League of Women Voters of Arizona board, they were, like, what -- I have always had to clarify what this was and the difference between a bipartisan or, in your -- bipartisan/nonpartisan board the way you are

10:50:23-10:51:43 Page 44

and the ways that you are appointed compared to the GRRC.

So -- and I also wanted to add, in relation to what you said, Commissioner Paton, that from what I understand, the tension or disagreements between GRRC and the Clean Elections Commission came about well before the change in the expenditure rules for use of Clean Election money to purchase services from political parties. So I think it preceded that.

So it was -- it was disturbing. I think people, if the language remains the same, will not have the opportunity to really be informed -- voters -- when they vote.

I will also add, by the way, that the League has already submitted a statement to the Secretary of State's Office. We have not seen the language that was proposed yesterday. Although I think we cover quit of bit, but I think if we had known how, bluntly speaking, in my opinion, distorted it was, by supposed brevity -- or conciseness was the word they used -- we might have reworded some of our argument, but we've already submitted a statement in opposition -- I shouldn't say it's for -- in opposition to HCR 2007.

So is there any -- any questions? Okay.

10:51:46-10:52:33 Page 45

CHAIRMAN MEYER: I don't have any.

Do any other commissioners?

(No response.)

CHAIRMAN MEYER: Okay. Thank you, Ms. Knox. We're always -- always glad to hear your perspective.

So at this time, Tom, I think --

MR. COLLINS: Right. So --

CHAIRMAN MEYER: We'll move to --

MR. COLLINS: Mr. Chairman, yeah, unless there's anybody else who wants to make public comment before, I think that what we would like to do -- what I would recommend we do is we have to make some decisions about what, if anything, to do now. And, in order to do that, we need to have some discussion with our legal counsel. So I would recommend someone make a motion to go into executive session.

CHAIRMAN MEYER: I will move that we go into executive session.

Is there a second to the motion?

COMMISSIONER CHAN: I second it.

CHAIRMAN MEYER: We have a motion to go into executive session.

All in favor?

(Chorus of ayes.)

10:52:33-11:26:41 Page 46

CHAIRMAN MEYER: All opposed?
COMMISSIONER TITLA: Aye.
CHAIRMAN MEYER: Okay. Just to confirm, Commissioner Titla, are you opposing going into executive session?
COMMISSIONER TITLA: No. I said aye.
CHAIRMAN MEYER: Okay. I went too fast.
So all opposed, aye -- or all in favor, aye.
(Chorus of ayes.)
CHAIRMAN MEYER: Any opposition?
(No response.)
CHAIRMAN MEYER: Okay. None. Okay. Motion carries. We are in -- we'll go into executive session.
(The following section of the meeting is in executive session and bound under separate cover.)
* * * * *
(End of executive session. Public meeting resumes at 11:26 a.m.)
CHAIRMAN MEYER: Okay. We are back from executive session. Thank you, everyone.
Is there any motion to be made out of executive session?
COMMISSIONER CHAN: Mr. Chairman, I move

11:26:42-11:28:00 Page 47

that we direct counsel and the executive director to take such legal actions necessary to ensure that a fair, legal and accurate summary of HCR 2007 is included in the State's publicity pamphlet.
CHAIRMAN MEYER: Is there a second?
COMMISSIONER PATON: Second.
CHAIRMAN MEYER: We have a motion pending.
All in favor of that motion say aye.
(Chorus of ayes.)
CHAIRMAN MEYER: Commissioner Titla --
COMMISSIONER TITLA: Yeah, aye.
CHAIRMAN MEYER: Commissioner Kimble?
MR. COLLINS: Did we lose Kimble?
CHAIRMAN MEYER: Commissioner Kimble, was your vote an aye?
MS. THOMAS: It looks like he dropped off the line. I don't see him on the line.
CHAIRMAN MEYER: Okay. Do we want to try to get him back for this vote?
MS. THOMAS: Yes, sir. One moment, please.
MR. COLLINS: Okay.
MS. THOMAS: I believe he's on.
Commissioner Kimble, are you back on the line?
One second.

11:28:45-11:31:05 Page 48

I'm trying to reach him, but it's busy. So I don't know if he's -- if he went into a non-signal area, but give me one minute.
THE OPERATOR: Mr. Kimble has rejoined.
CHAIRMAN MEYER: Mr. Kimble -- Commissioner Kimble, are you on the line?
COMMISSIONER KIMBLE: Yeah. I got dropped and then I couldn't get back on.
CHAIRMAN MEYER: No problem. I just want a clean record on this motion.
So currently there is a motion on the table, a motion that the Commission direct legal counsel and the executive director to take such legal actions necessary to ensure that a fair, legal and accurate summary of HCR 2007 is included in the State's publicity pamphlet. That motion was made by Commissioner Chan. It was seconded by Commissioner Paton. So now I want to call a vote for this again.
All in favor of the motion, vote aye, please.
(Chorus of ayes.)
CHAIRMAN MEYER: So we have five ayes.
Any opposition?
(No response.)
CHAIRMAN MEYER: Any abstention?

11:31:08-11:32:14 Page 49

(No response.)
CHAIRMAN MEYER: Okay. The motion carries 5 to 0.
And I just want to state that the legal action the Commission will be taking is not to prevent a vote on HCR 2007. We have no issue with this going to the ballot. Rather, we are going to take action to ensure that there will be a fair, non-partisan and informed vote on this issue. This action we're taking is consistent with our duties as a Commission, which is to maintain and protect the integrity of the government of this state.
If any other commissioners have a comment they'd like to make, please do so.
(No response.)
CHAIRMAN MEYER: Okay. Now we'll move on to -- is there any other public comment today from those in attendance?
Ms. Knox.
MS. KNOX: I'll be very brief. Again, this is Rivko Knox on behalf of the League of Women Voters of Arizona.
When I spoke earlier, I was focusing, obviously, on yesterday's legislative council. I wanted just, also, as kind of a private citizen, to

11:32:17-11:33:12 Page 50

mention that I have -- I attended my legislative district's Clean Election debate which was quite well attended. Luigi Depart [phonetic], the moderator, did an outstanding job, and I've watched every one of the Horizon debates. And I think they were really good.
And I would like to compliment the Commission for -- and staff for how this has been organized. And I do agree that Ted Simons was asked very difficult -- or, shall we say, challenging questions that really get to the heart of, I think, what the particular office is supposed to do and how the various candidates feel about what their roles would be if elected.
So thank you.
CHAIRMAN MEYER: Thank you.
Any other public comment?
(No response.)
CHAIRMAN MEYER: All right. Hearing none --
MR. COLLINS: Motion to adjourn?
CHAIRMAN MEYER: -- is there a motion to adjourn?
COMMISSIONER CHAN: Do we need to do this one?
MR. COLLINS: What?

11:33:17-11:33:39 Page 51

COMMISSIONER CHAN: The proposed meeting dates?
CHAIRMAN MEYER: Oh, the meeting dates. That's right.
COMMISSIONER CHAN: Do we need to do that or --
MR. COLLINS: Yeah. I guess --
CHAIRMAN MEYER: Yeah.
MR. COLLINS: Yeah, I guess we do need to do that.
CHAIRMAN MEYER: Oh, I'm sorry. What?
MR. COLLINS: We've forgot about the meeting dates.
Do you all agree --
CHAIRMAN MEYER: Oh, the meeting dates issue.
COMMISSIONER CHAN: That's just Item V.
MR. COLLINS: Yeah. Do you want to move on the --
CHAIRMAN MEYER: Forgive me. I missed Item V and the discussion and possible action on proposed meeting dates.
COMMISSIONER CHAN: How do I do that?
MR. COLLINS: Just move them.
COMMISSIONER CHAN: Could I -- I'll move

11:33:41-11:34:18 Page 52

that we adopt these meeting dates for the remainder of the year.
CHAIRMAN MEYER: I'll second that motion.
All in favor of the motion to approve the meeting dates say aye.
(Chorus of ayes.)
CHAIRMAN MEYER: Any opposition?
(No response.)
CHAIRMAN MEYER: Abstentions?
(No response.)
CHAIRMAN MEYER: Motion carries unanimously.
Now I will ask for a motion to adjourn the meeting.
COMMISSIONER CHAN: I move that we adjourn our meeting.
CHAIRMAN MEYER: Is there a second?
COMMISSIONER PATON: Second.
CHAIRMAN MEYER: All right. All in favor of adjourning the meeting say aye.
(Chorus of ayes.)
CHAIRMAN MEYER: Any opposition?
(No response.)
CHAIRMAN MEYER: Abstentions?
(No response.)

11:34:18-11:34:20 Page 53

CHAIRMAN MEYER: All right. We are adjourned.
Thank you, everybody.
(Whereupon, the proceedings concluded at 11:34 a.m.)

STATE OF ARIZONA)
COUNTY OF MARICOPA)

BE IT KNOWN the foregoing proceedings were taken by me; that I was then and there a Certified Reporter of the State of Arizona, and by virtue thereof authorized to administer an oath; that the proceedings were taken down by me in shorthand and thereafter transcribed into typewriting under my direction; that the foregoing pages are a full, true, and accurate transcript of all proceedings and testimony had and adduced upon the taking of said proceedings, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to nor employed by any of the parties thereto nor am I in any way interested in the outcome hereof.

DATED at Phoenix, Arizona, this 30th day of June, 2018.

LILIA MONARREZ, RPR, CR #50699

D

E

F

Q

R

S

CITIZENS CLEAN ELECTIONS COMMISSION
EXECUTIVE DIRECTOR REPORT
July 19, 2018

Announcements:

- The public can view Commission meetings live via the internet at www.livestream.com/cleanelections. A link is available on our website.

Voter Education:

- Debates are underway and voters can view the debate schedule, or recorded debates, on our website.
    - Staff is gearing up for the debates in Pima County, which will be held in partnership with Sahuarita, Sahuaro and Empire schools.
- The digital version of the Voter Education Guide is available on our website. The print version will begin to arrive in households on July 25th.
- Gina presented at the American Indian Right to Vote conference on July 12th.
- Alec will present at the Arizona Municipal Clerks' Association Election Conference on July 25th.
- A "Meet the Candidates" event will be held by the Arizona Capitol Times on August 1st at The Palomar in downtown Phoenix. This event will be free to the public, through a sponsorship by CCEC.

2018 Candidate Information:

- Participating Legislative Candidates: **63**; Received Funding: **49**
- Participating Statewide Candidates: **10**; Received Funding: **7**
- Clean Elections Training Workshops:
    - Online training is still available for candidates. https://www.azcleanelections.gov/en/run-for-office/candidate-training

Enforcement – 2018:

Complaints Pending: 1

- MUR 18-04: Kathy Hoffman

Enforcement – 2014:

Complaints Pending: 3

- MUR 14-006, -015 (consolidated/conciliated): Horne - pending correction of campaign finance reports consistent with the conciliation agreement.
- MUR 14-007: Legacy Foundation Action Fund (LFAF) – LFAF and the Commission's lawsuits were consolidated. The Commission seeks a court order requiring LFAF to pay its fine and file reports, LFAF raises identical claims to those already foreclosed by its failure to appeal. Initial motions are due at the end of the month.

ITEM III

Miscellaneous

- Proposed Consent Decree between LULAC et al and Secretary Reagan
    - The Secretary, Recorder Fontes, and a set of plaintiffs lead by LULAC have proposed a consent decree addressing the treatment of voter registration forms.
    - According to Capitol Media Services' Howard Fischer, under the proposal: "Secretary of State Michele Reagan has agreed to:
        - Not demand proof of citizenship to register for federal, state and local elections if people already have provided such proof to the Motor Vehicle Division to obtain a driver's license;
        - Make it easier for people to move from county to county without having to provide new citizenship proof at their new address;
        - Accept voter registration forms from those who do not have proof of citizenship to let them at least cast ballots for president and members of Congress.

      http://tucson.com/news/local/arizona-agrees-to-ease-some-restrictions-for-people-registering-to/article_ad64689d-f043-51bf-90b7-11aa8eed3d8f.html#tracking-source=home-the-latest
    - The approved consent decree is attached as Exhibit A.
- A new case has been filed in Federal Court, called Knox v. Brnovich. That case challenges the state's ballot collection law as preempted by federal postal law. The Complaint and Motion for Preliminary Injunction are attached at Exhibit B. and C.
- There is an outstanding legislative signature appeal that deals with an independent candidate – i.e. a candidate who would if he is successful only appear on the general ballot—that is remains pending at the Arizona Supreme Court.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

League of United Latin American Citizens of Arizona; Arizona Students' Association, Plaintiffs, v. Michele Reagan, in her official capacity as Secretary of State of Arizona; Adrian Fontes, in his official capacity as Maricopa County Recorder, Defendants.	No. CV17-4102-PHX DGC **CONSENT DECREE**

Before the Court is the Joint Motion Requesting Entry of Consent Decree, filed by Plaintiff League of United Latin American Citizens of Arizona ("LULAC-Arizona"), Plaintiff Arizona Students' Association ("ASA"), Defendant Michele Reagan, in her official capacity as Secretary of State of Arizona (the "Secretary"), and Defendant Adrian Fontes, in his official capacity as Maricopa County Recorder ("Recorder Fontes"). Doc. 36. All Plaintiffs and Defendants shall hereafter be referred to as the "Parties."

On November 7, 2017, LULAC-Arizona and ASA initiated this action against the Secretary and Recorder Fontes. The complaint alleged that Arizona's dual voter registration policies violate the First and Fourteenth Amendments to the United States Constitution. Specifically, LULAC-Arizona and ASA alleged that Arizona treats voter

registration applicants differently depending on whether they use Arizona's state registration form (the "State Form") or the national registration form (the "Federal Form"). At the time the lawsuit was filed, fourteen of Arizona's County Recorders rejected State Form applications submitted without valid documentary proof of citizenship ("DPOC"). Federal law required the County Recorders to accept Federal Form applications, even when they are submitted without DPOC. The Motor Vehicles Department ("MVD") Proxy Table was then electronically checked through an automated process to determine whether the Federal Form applicants had a valid driver's license, which indicates that DPOC is supposed to be on file with the MVD. Those with DPOC on file are eligible to vote in both state and federal elections ("Full Ballot Voter"). Those who did not have DPOC on file with the MVD were only able to vote in federal elections ("Fed Only Voter").

As a result, whether one who does not present valid DPOC is registered to vote in federal elections is entirely dependent on which form the applicant uses to register. Those using the Federal Form but not providing DPOC, are registered to vote in federal elections; and, depending on the results of the Secretary's automated review of the MVD database, may be registered to vote in state elections as well. But those using the State Form, and not providing valid DPOC, are not registered to vote in any elections because the application is rejected in its entirety. LULAC-Arizona and ASA alleged that this dual voter registration process violated the First and Fourteenth Amendments.

The Secretary denies that Arizona's voter registration policies violate the First and Fourteenth Amendments or are otherwise illegal under state or federal law. The Secretary asserts that Federal and State Form applicants are not similarly situated for equal protection purposes. The Secretary asserts that Arizona is constitutionally permitted to require those applying to register to vote using the State Form to personally provide DPOC at the time that they submit their State Form. The Secretary further asserts that there is no constitutional or statutory requirement that Arizona election officials register applicants for federal elections when they have chosen to use the State Form to register to vote rather than the Federal Form.

Nevertheless, the Secretary and Recorder Fontes desire to make it as easy possible for Arizona's citizens to register to vote, while remaining consistent with Arizona and federal law and also providing necessary safeguards to deter those who would commit voter registration fraud. Having reviewed the applicable law, the Secretary and Recorder Fontes have concluded that current technology allows the Secretary, Recorder Fontes, and the other Arizona County Recorders to treat State Form applications exactly as they treat Federal Form applications, and that because of current technology such treatment is consistent with the provisions of Arizona law, including the requirements of Proposition 200, codified at A.R.S. §§ 16-166(F) and 16-152(A)(23). The Secretary and Recorder Fontes agree that treating Federal Form and State Form applications the same will make it easier for Arizona's citizens to register to vote, while also providing important safeguards to prevent unlawful voter registration. Accordingly, on February 8, 2018, the Secretary and Recorder Fontes through their counsel notified counsel for LULAC-Arizona and ASA of their desire to enter into an agreement that will resolve the underlying litigation and also benefit Arizona's citizens.

The Parties have negotiated in good faith and agree to the entry of this Consent Decree as an appropriate resolution. Accordingly, the Parties stipulate and agree as follows:

PRELIMINARY RECITALS

1. LULAC-Arizona is the Arizona-based branch of the oldest and largest national Latino civil rights organization. LULAC is a non-profit membership organization with a presence in most of the fifty states. Founded in 1929, it works to advance the economic condition, educational attainment, political influence, health and civil rights, including voting rights, of the Hispanic population of the United States.

2. ASA is a student-led, non-partisan membership organization created to represent the collective interest of the over 140,000 university students and over 400,000 community college students in Arizona. ASA advocates at the local, state, and national levels for the interests of students. As a part of its mission, ASA encourages students throughout Arizona to register to vote through voter registration activity.

3. Michele Reagan is the Arizona Secretary of State. The Secretary of State is responsible for supervising voter registration throughout the state and providing binding regulations and guidelines for voter registration. A.R.S. § 16-142. Secretary Reagan was sued in her official capacity only.

4. Adrian Fontes is the Maricopa County Recorder, an elected countywide officer. Recorder Fontes is responsible for conducting voter registration in Maricopa County. A.R.S. §§ 16-131, -134. Recorder Fontes was sued in his official capacity only.

5. This action was brought by LULAC-Arizona and ASA to vindicate First and Fourteenth Amendment rights relating to voter registration.

6. Arizona's practice of treating Federal Form and State Form applications differently, described above, arose from past Arizona election officials' understanding of the effect of Proposition 200, which was passed by Arizona's voters in 2004 and codified at A.R.S. §§ 16-166(F), 16-152(A)(23), in conjunction with the technology available at the time. Since the passage of Prop. 200 in 2004, a new statewide voter registration database has been implemented and provides additional tools to election officials.

7. Arizona's voter registration technology, including its voter registration database, now allows DPOC already on file with the MVD database to be associated near-instantaneously with voter registration applications submitted without DPOC, irrespective of whether the applications are State Forms or Federal Forms.

8. The Secretary denies that prior practices, challenged in this lawsuit, were unlawful. By agreeing to this Consent Decree, the Secretary and Recorder Fontes seek to serve Arizona's citizens by (1) continuing to comply with Arizona law while (2) making the voter registration process using the State Form easier.

DEFINITIONS

1. "ADOT" means the Arizona Department of Transportation, which is established pursuant to A.R.S. § 28-331. It has the responsibility to "provide for an integrated and balanced state transportation system." The Arizona Motor Vehicles Division is a division of ADOT. A.R.S. § 28-332(C).

2. "AHCCCS" means the Arizona Health Care Cost Containment System,

which is established pursuant to A.R.S. § 36-2902. AHCCCS is Arizona's Medicaid agency that offers health care programs to serve Arizona residents.

3. "Applicant" means an individual who has submitted an application to register to vote in the State of Arizona.

4. "AVID Database" means the voter registration database, currently being developed for the state of Arizona and intended to replace the current Database. The AVID Database is projected to be operational sometime in 2019 or early 2020, but shall be operational no later than July 1, 2020 except as provided in subparagraph (a), below.

(a) The date of July 1, 2020, contemplated for the operational function of the AVID Database, is contingent on the vendor with whom the Secretary has contracted to develop AVID fulfilling its obligations to have AVID operational in 2019 or early 2020 at the latest. Should the vendor be unable to meet this contingency, or should the implementation of the AVID Database otherwise be delayed, the Secretary shall notify the Court and the Parties to this Consent Decree, in writing, and shall indicate in writing the date by which the vendor believes that AVID will be operational. Plaintiffs retain the right to seek a remedy from the Court to enforce this agreement if the implementation of the AVID database is unduly delayed.

(b) The provisions in this consent decree that apply to the AVID database will also apply to any future voter registration system adopted by the Secretary of State's office.

5. "County Recorder" means the County Recorder of each of Arizona's fifteen counties, and includes all county election officials working in or in conjunction with their offices.

6. "Database" means the existing electronic storage system developed and administered by the Secretary that contains the official voter registration record for every voter in the state. *See* A.R.S. § 16-168(J).

7. "DES" means the Arizona Department of Economic Security, which is established pursuant to A.R.S. § 41-1952.

8. "Designated voter registration agencies" are agencies that are required to

provide voter registration services pursuant to the National Voter Registration Act.

9. "DHS" means the Arizona Department of Health Services, which is established pursuant to A.R.S. § 36-102.

10. "DPOC" means documentary proof of citizenship, and is limited to the forms of satisfactory evidence of citizenship listed in A.R.S. § 16-166(F).

11. "F-type License" means the designation that the MVD uses in its database to distinguish Arizona driver's license holders who, at the time that their driver's licenses were issued, were presumed by MVD to not be United States citizens.

12. "Fed Only Voter" means an individual who is registered to vote solely in Arizona elections for federal office.

13. "Federal Form" means the National Mail Voter Registration Form, provided by the U.S. Elections Assistance Commission and used to register to vote in elections for federal office, as well as the Federal Write-in Absentee Ballot and Federal Post Card Application as those terms are used in 52 U.S.C. §§ 20302 and 20303.

14. "Federal Office" means the office of President or Vice President; or of Senator or Representative in, or Delegate or Resident Commissioner to, the United States Congress. 52 U.S.C. § 20502(2).

15. "Full Ballot Voter" means an individual who is registered to vote in Arizona elections for federal, state, and local office.

16. "Guidance" means formal guidance on voter registration procedures that the Secretary of State will provide to the County Recorders pursuant to her role as chief election official responsible for prescribing uniform procedures for voting. *See* A.R.S. § 16-142. The Secretary will provide Plaintiffs' counsel with copies of her Guidance before it is sent to the County Recorders.

17. "MVD" means the Arizona Motor Vehicles Division.

18. "MVD database" means the electronic storage system developed and administered by the Arizona Motor Vehicle Department.

19. "MVD Proxy Table" means the MVD data provided to the Secretary of State that includes the nightly updates of MVD transactions that occurred in the past

twenty-four hours that MVD sends to the Secretary in batch form.

20. "Procedures Manual" means the State of Arizona Elections Procedures Manual, which provides the rules related to voting and the conduct of elections. A.R.S. § 16-452. The Secretary is required to develop the Procedures Manual in conjunction with the fifteen County Recorders. *Id*. The Procedures Manual has the force of law. A.R.S. § 16-452(C). The Procedures Manual, 2018 Edition, has been drafted by the Secretary and submitted to the Governor and Attorney General as required by law for their review. *Id*.

21. "Protected Voter Registration" means the program to ensure anonymity to survivors of stalking, domestic violence, and sexual assault through the Address Confidentiality Program provided by A.R.S. § 41-161, et seq., and certain other individuals pursuant to A.R.S. § 16-153.

22. "Secretary" means the Arizona Secretary of State and her office, as well as successors in office.

23. "State Form" means the options for voter registration created and provided by the State of Arizona and its agencies, including but not limited to the online registration available through Service Arizona, the paper application available on the Secretary of State's website, the paper application available at all County Recorder offices, and the Protected Voter Registration process.

24. "State Office" means any elected statewide, county-wide, or municipal public office, other than a Federal Office, for which a voter registered in the State of Arizona is eligible to vote.

ORDER

Accordingly, the Parties having freely given their consent, and the terms of the Consent Decree being fair, reasonable, and consistent with the requirements of state and federal law,

IT IS ORDERED as follows:

1. The Joint Motion for Approval of Consent Judgment (Doc. 36) is **granted.**

2. **The Procedures Manual.** The Parties are aware that the draft Procedures Manual, 2018 Edition has been submitted by the Secretary to Arizona's Governor

and Attorney General for their review as required by statute. *See* A.R.S. § 16-452(B). Within thirty days after entry of this Consent Decree, the Secretary shall revise the Procedures Manual to incorporate the terms of this Consent Decree ("Procedures Manual Revisions") and send the Procedures Manual Revisions, together with the Secretary's recommendation of approval, to the Governor and Attorney General for their review, *see* A.R.S. § 16-452(B), and also to Plaintiffs' counsel. If Plaintiffs determine that the Procedures Manual Revisions do not comply with this Consent Decree, Plaintiffs may seek review by this Court through the Court's procedures for motions. If the Governor and Attorney General do not approve the Procedures Manual Revisions or request modifications, the Secretary will send the Attorney General and/or Governor's rejections or proposed modifications to Plaintiffs' counsel. If those rejections or proposed modifications are in any respect inconsistent with this Consent Decree, Plaintiffs may use any available legal remedies to secure compliance with this Consent Decree.

2. **State Form Applications Submitted Without DPOC.** Within thirty days after entry of this Consent Decree, the Secretary shall, in writing:

a. provide guidance to the County Recorders to accept State Form applications submitted without DPOC;

b. provide guidance to the County Recorders to enter all such applications in the Database (or, in the case of Maricopa County and Pima County, to enter all such applications in their county voter registration databases and transmit such entries to the Database);

c. provide guidance to the County Recorders to immediately register the applicants for federal elections, provided the applicant is otherwise qualified and the voter registration form is sufficiently complete; and

d. check all State Form applications submitted without DPOC against the MVD database Proxy Table, via the automated processes in the

Database, to determine whether the MVD has DPOC on file for the applicants. If DPOC is located, the Secretary shall promptly notify the applicable County Recorder via the automated processes in the Database that the State Form applicant has DPOC on file with the MVD and so must be made a Full Ballot Voter via the automated process in the Database.

i. if the Secretary's check performed by the automated processes in the Database against the MVD database Proxy Table indicates that a State Form applicant holds an F-Type License, the Secretary shall promptly notify the applicable County Recorder of that fact via the automated processes of the Database. The automated processes of the Database will also flag this issue so that the County Recorder will know to change that applicant's voter registration status to "not eligible." The Secretary shall provide guidance to the County Recorders that the County Recorders shall notify the applicant by U.S. Mail within ten business days after receiving notice via the automated process in the database, according to information on file with the MVD database, that the applicant holds an F-Type License indicating non-citizenship and so will not be registered to vote. The notification from the County Recorder shall also inform the applicant that the applicant can provide valid DPOC to the County Recorder in order to become a Full Ballot Voter. The notification will be accompanied by the form described in Paragraph 3 (the "DPOC Submission Form"). The applicant may submit DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter.

ii. if the Secretary's check via the automated features of the Database determines that a State Form applicant does not hold an F-Type License, but also does not have DPOC on file with the MVD, the Secretary shall promptly notify the applicable County Recorder of that result via the automated processes of the Database. The County Recorder shall notify these applicants by U.S. Mail within ten business days after receiving notice from the Secretary that (1) the County Recorder does not have the requisite DPOC to process their application; (2) they must submit DPOC if they wish to be a Full Ballot Voter; and, (3) until such time as they submit DPOC, they will be a Fed Only Voter and so will only be eligible to vote in Federal elections. The notification shall be accompanied by the form described in Paragraph 3 (the "DPOC Submission Form"). The applicant may submit DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter. Until and unless the applicant submits valid DPOC, the County Recorders shall cause those voter registration applicants to be made Fed Only Voters.

3. **Provision of DPOC After the Submission of a State Form Application.** Applicants who do not submit DPOC with their State Form application and do not have DPOC on file with MVD, and are notified by the applicable County Recorder that they will be Fed Only Voters unless and until they submit DPOC, may submit valid DPOC to become a Full Ballot Voter. To do so, they shall submit their DPOC to the County Recorder with a form provided to them by that official. This form (the "DPOC Submission Form"), which shall be developed by the Secretary and the County Recorders within thirty days after entry of this Consent Decree, shall contain sufficient information to allow the County Recorder to link the voter registration applicant's DPOC

with his or her State Form application already on file in the Database.

A. Applicants who submit their State Form application at least twenty-nine days before an election as required by statute, A.R.S. §§ 16-120(A), -134(C), and whose valid DPOC with the DPOC Submission Form is received by their County Recorder by 5 p.m. local time on the Thursday before the election, will be made Full Ballot Voters by the County Recorder and may vote in the upcoming election as a Full Ballot Voter. The registrations of such applicants shall be deemed to have occurred on the date that they originally submitted their State Form application. If the County Recorder has already transmitted a Fed Only early ballot to that voter, the voter will have the option to vote either that Fed Only early ballot or else vote a provisional Full Ballot at the polling place or vote center and comply with the rules regarding provisional ballots.

B. Applicants who submit their State Form application at least twenty-nine days before an election, and whose valid DPOC is received by 5 p.m. local time on the Thursday before the election, but who do not submit the DPOC Submission Form, may be made Full Ballot Voters by the County Recorder if the County Recorder has sufficient information to link the voter registration applicant's DPOC with the applicant's State Form application already on file in the Database. If the County Recorder makes such an applicant a Full Ballot Voter, and if the County Recorder has already transmitted a Fed Only early ballot to that voter, the voter will have the option to vote either that Fed Only early ballot or else vote a provisional Full Ballot at the polling place or vote center and comply with the rules regarding provisional ballots.

C. Applicants who do not submit their State Form application at least twenty-nine days before an election as provided by statute, or whose valid DPOC is received by their County Recorder after 5 p.m. local time on the Thursday before the election, will not be made Full Ballot Voters for the upcoming election. The County Recorder shall make such applicants Full Ballot Voters within five business days after processing provisional ballots, and they shall be Full Ballot Voters for subsequent elections.

D. For all applicants who submit State Form applications without valid DPOC, but subsequently submit valid DPOC and do not submit the DPOC Submission

Form, the County Recorder may make the applicant a Full Ballot Voter if the County Recorder has sufficient information to link the voter registration applicant's DPOC with the applicant's State Form application already on file in the Database. If the County Recorder lacks sufficient information to link the DPOC to the voter's application in order to make the applicant a Full Ballot Voter, the County Recorder may follow up with the applicant to seek the missing information if the County Recorder has sufficient information to do so. Applicants who subsequently provide the missing information necessary to link their DPOC to their applications shall be made Full Ballot Voters by the County Recorder within ten business days.

4. **State Form Applications Submitted On or After January 1, 2017.** This Consent Decree will govern all voter registration applications submitted after entry of this Consent Decree, including applications submitted within thirty days after entry of this Consent Decree. However, within thirty days after entry of this Consent Decree, the Secretary shall also provide written guidance to all County Recorders except the Maricopa County Recorder that, pursuant to the Consent Decree, they may, at their discretion, implement the new procedures outlined in Paragraphs 2–3 of this Consent Decree for State Form applications dating back to January 1, 2017, provided that they have the capability to ensure that such applicants have not moved, become deceased, or otherwise subsequently already registered to vote. Any applicants whose applications were filed before entry of this Consent Decree who are newly registered as Fed Only or Full Ballot Voters as a result of that process will be given the proper notice of their new registration status by U.S. Mail.

Within ninety days of entry of this Consent Decree, the Maricopa County Recorder shall implement the new procedures outlined in Paragraphs 2–3 of this Consent Decree for State Form applications dating back to January 1, 2017. This process shall include: (1) entering all State Forms submitted without DPOC into the database and immediately registering those applicants for federal elections, (2) checking the applicants' status against the MVD database, and (3) sending the applicants notification of their new registration status.

5. **Federal Form Applications.** Within thirty days after entry of this Consent Decree, the Secretary shall provide written guidance to the County Recorders to promptly register all applicants who submit their Federal Form application with valid DPOC as Full Ballot Voters and promptly register all applicants who submit their Federal Form application without valid DPOC as Fed Only Voters. From the date of the entry of the Consent Decree, the Secretary shall also cause all new Federal Form applications submitted without DPOC to be checked against the MVD Proxy Table promptly upon entry into the Database, via the automated processes in the Database, to determine whether the MVD has DPOC on file for such Federal Form applicants, and take the following steps:

a. If this check determines that the MVD Proxy Table has DPOC on file for any Federal Form applicant, the Secretary shall promptly notify the applicable County Recorder via the automated process in the Database that the applicant has DPOC on file with MVD and so must be made a Full Ballot Voter via the automated process in the Database.

b. If this check determines that the MVD Proxy Table has information indicating that any Federal Form applicant holds an F-Type License, the Secretary shall promptly notify the applicable County Recorder of that fact via the automated processes of the Database and flag this record for the County Recorder to change that applicant's voter registration status to "not eligible." The County Recorder shall notify the applicant by U.S. Mail within ten business days after receiving notice from the Secretary that, according to information on file with the MVD database, the applicant holds an F-Type License indicating non-citizenship and so will not be registered to vote. The County Recorder's notice shall also inform the applicant that, if this information is not correct, the applicant may provide valid DPOC in order to become a Full Ballot Voter. The notification will be accompanied by the DPOC Submission Form described in Paragraph 3. The applicant may submit valid DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter.

c. If this check determines for any applicant that the MVD database does not

have DPOC on file and also that the applicant does not hold an F-Type License, the Secretary shall promptly notify the applicable County Recorder of that result via the automated processes of the Database. The County Recorder shall notify these applicants by U.S. Mail within ten business days after receiving notice from the Secretary that (1) the County Recorder does not have the requisite DPOC to process their application; (2) they must submit valid DPOC if they wish to be a Full Ballot Voter; and, (3) until such time as they submit valid DPOC, they will be a Fed Only Voter and so will only be eligible to vote in Federal elections. The notification will be accompanied by the DPOC Submission Form described in Paragraph 3. The applicant may submit valid DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter. Until and unless the applicant submits valid DPOC, the County Recorders shall cause those voter registration applicants to be made Fed Only Voters.

d. Federal Form applicants who subsequently submit valid DPOC shall be made Full Ballot Voters according to and in conformity with the process described in Paragraph 3.

6. **Registered Voters Who Move From One Arizona County to Another.** The AVID Database or another voter registration database similar to the AVID Database shall be operational as described, and according to the terms set forth, in the Definitions section of this consent decree. When the AVID Database is operational, the Secretary and County Recorders will be able to verify DPOC and append that information to applicants' voting records when those applicants change voter registration from one Arizona county to another. Consequently, once the AVID Database is operational and in use by the Secretary and the County Recorders, registered Full Ballot Voters will not be required to independently submit DPOC to their new County Recorder, so long as their DPOC is in the AVID Database.

7. **Application to Other Forms of Registration.** The procedures outlined above for processing voter registration applications submitted without valid DPOC will apply equally to all forms of voter registration, including voter registration through designated voter registration agencies, the Federal Post Card Application (FPCA), the

Federal Write-In Absentee Ballot, and the In-Person EZ Voter Registration system.

8. **Education of the Public.** The Secretary shall continue to make reasonable efforts to better educate the citizens of Arizona concerning their opportunities to register to vote, including opportunities presented by the Federal Form. The Secretary will provide Plaintiffs' counsel with a copy of the planned notice that she intends to place on her website. Within thirty days after the entry of this Consent Decree, the Secretary shall:

a. Update her website to explain that:

i. the State Form requires valid DPOC for state elections only;

ii. submission of a sufficiently complete State Form with valid DPOC will make the applicant a Full Ballot Voter;

iii. submission of a sufficiently complete State Form without DPOC will make the applicant a Fed Only Voter;

iv. the Federal Form does not require DPOC;

v. submission of the Federal Form without valid DPOC will make the applicant a Fed Only Voter; and

vi. submission of the Federal Form with valid DPOC will make the applicant a Full Ballot Voter.

b. Provide guidance to the County Recorders that they should provide the information required in this Section 8 on their websites;

c. Notify ADOT, DHS, AHCCCS, and DES of the changes in voter registration procedures outlined in this Consent Decree;

d. Within four months after the entry of this Consent Decree, the Secretary shall create a new State Form that explains that citizens who do not submit DPOC with their registration forms will be registered only for federal elections until the appropriate proof of citizenship is provided or acquired. The Secretary will provide notice to Plaintiffs' counsel regarding the form of the explanation described in the previous sentence. The Secretary will create the new State Form within three months if the Secretary determines that it is possible to do so. The Secretary shall provide guidance to the County Recorders and all State Offices that disseminate voter registration forms,

including designated voter registration agencies, that they should utilize the new State Form as soon as practicable. *See* A.R.S. § 16-352(C). Within thirty days after entry of the Consent Decree, the Secretary will provide written notice to the County Recorders that there will be changes made to the State Form within four months after the date the Consent Decree was entered.

10. **Continuing Jurisdiction**. The Court shall retain jurisdiction over this action until December 31, 2020 to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree.

11. **Attorneys' Fees and Costs.** The Parties will continue to confer regarding what amount, if any, the State Defendants should pay to Plaintiffs for their attorneys' fees and costs. If the Parties are unable to agree privately upon payment of fees and costs, Plaintiffs will file a motion for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 within forty-five days after entry of this consent decree.

The Clerk of Court is directed to terminate this action.

Dated this 18th day of June, 2018.

David G. Campbell
United States District Judge

EXHIBIT B

Spencer G. Scharff (028946)
SCHARFF PLC
502 West Roosevelt Street
Phoenix, Arizona 85003
T: (602) 739-4417
spencer@scharffplc.com

Roopali H. Desai (024295)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1200
Phoenix, Arizona 85004
T: (602) 381-5490
F: (602) 224-6020
rdesai@cblawyers.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Rivko Knox, Plaintiff, v. Mark Brnovich, in his official capacity as Arizona Attorney General, Defendant.	No. **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Plaintiff Rivko Knox brings this action against Mark Brnovich, in his official capacity as Arizona Attorney General ("Defendant"), and alleges as follows:

NATURE OF THE CASE

1. This action challenges the constitutionality of A.R.S. § 16-1005(H), which was amended by House Bill ("HB") 2023 in 2016 (hereinafter referred to as "HB 2023"). HB 2023 criminalizes lawful conduct—the "collection" and delivery of early ballots. Specifically, HB 2023 makes it a class 6 felony for any person to "knowingly

collect[] voted or unvoted early ballots from another person," with a presumptive sentence of one year of incarceration and a fine of up to $150,000 plus surcharges.

2. Under HB 2023, the term "collects" means "to gain possession or control of an early ballot."

3. HB 2023 exempts the collection of early ballots for elections held by certain special taxing districts and ballots collected by a voter's family member, household member, or caregiver. The terms "caregiver," "family member," and "household member" are defined in HB 2023.

4. HB 2023 also exempts "[a]n election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail … if the official, worker or other person is engaged in official duties." However, HB 2023 does not define the phrases "allowed by law to transmit U.S. mail" or "engaged in official duties."

5. HB 2023 regulates the handling of U.S. Mail. An unvoted early ballot delivered to the wrong address is a piece of mail. Also, once sealed in an envelope with pre-paid postage, a voted early ballot becomes a piece of mail. HB 2023's prohibition against collecting and delivering a voted or unvoted early ballot constitutes the regulation of U.S. Mail.

6. Article I, Section 8, Clause 7 of the United States Constitution authorizes Congress "[t]o establish Post Offices and post Roads[.]" The Postal Power allows Congress to regulate the entire postal system. *See Ex Parte Rapier*, 143 U.S. 110, 113 (1892). Since 1792, Congress has exercised its authority to regulate the handling of U.S. Mail. *See* 18 U.S.C. § 1691, et. seq.

7. Specifically, federal law expressly permits the private carriage of mail without compensation. *See* 18 U.S.C. § 1696(c).

8. Thus, HB 2023 is preempted by federal law because it prohibits permitted methods of private carriage of mail-in ballots.

9. Moreover, HB 2023 directly infringes free-speech rights because it unconstitutionally restricts Plaintiff's and other's access to voluntary, private mail carriage.

10. HB 2023 is also excessively and unconstitutionally vague because it exempts a person who is "allowed by law to transmit U.S. mail," but only if the person is "engaged in official duties," and HB 2023 does not define those phrases. Even though Plaintiff believes she is authorized to transmit U.S. mail because **all** persons are authorized to transmit mail, she does not know if she is protected from criminal sanctions under HB 2023 because she is unable to determine whether she is "engaged in official duties."

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Plaintiff's claims under the U.S. Constitution, as well as under 42 U.S.C. § 1983.

12. The Court has authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.

13. The Court has authority to award costs and attorneys' fees under 42 U.S.C. § 1988.

14. Venue is proper in this District under 28 U.S.C. § 1391(b). Defendant is sued in his official capacity and his official place of business is located within this District. All of the events giving rise to this Complaint occurred within this District. The events giving rise to this Complaint are the enactment, within this District, of an unconstitutional statute of the State of Arizona, and its implementation, enforcement, and threatened prosecution by Defendant.

PARTIES

15. Plaintiff Rivko Knox is a citizen of Arizona and has resided in this state since 1966. [Knox Declaration ("Decl."), attached hereto as **Exhibit 1**, at ¶ 2.]

16. Defendant Mark Brnovich is the Arizona Attorney General ("Attorney General") and chief legal officer of the State of Arizona. A.R.S. § 41-192(A). Among other duties, the Attorney General is charged with enforcing state criminal statutes, including HB 2023. The Attorney General is empowered to enforce state election laws like HB 2023 "[i]n any election for state office, members of the legislature, justices of the supreme court, judges of the court of appeals or statewide initiative or referendum," A.R.S. § 16-1021. Defendant Brnovich is sued in his official capacity.

ALLEGATIONS

Collecting and delivering mail-in ballots before and after the enactment of HB 2023

17. Plaintiff Rivko Knox ("Plaintiff" or "Ms. Knox") is active in her community and is currently a Democratic Precinct Committeeperson ("PC") for the Acacia Precinct. [Knox Decl. at ¶ 3.] She is also a longstanding member of the League of Women Voters of Arizona ("LWVAZ"), which is a non-profit, non-partisan political membership organization, the fundamental goal of which is to empower citizens to shape better communities worldwide. [*Id*.] The LWVAZ seeks to achieve this goal by, among other things, building public participation in the democratic process and engaging communities in promoting positive solutions to public policy issues through education and advocacy. [*Id*.]

18. A large part of Ms. Knox's community involvement, both before and since becoming a PC, is to engage in door-to-door canvassing to initiate direct contact with individuals to raise awareness about candidates and issues, register voters, and encourage participation in the democratic process. [Knox Decl. at ¶ 4.]

19. Ms. Knox canvasses every month of every year, regardless of whether it is an election year. [Knox Decl. at ¶ 5.] On average, Ms. Knox canvasses 1-2 times per month for 2-3 hours per canvass. [*Id*. at ¶ 6.] She typically knocks on 20-30 doors during a single canvass and, on average, someone answers the door approximately 50% of the time. [*Id*.]

20. Ms. Knox often encourages voters to fill out and mail their early, mail-in ballots when she is canvassing door-to-door in neighborhoods. [Knox Decl. at ¶ 7.]

21. Prior to the 2016 election cycle, Ms. Knox accepted and delivered at least one voted ballot for a voter that she met while canvassing, and who requested that she deliver an early ballot. [Knox Decl. at ¶ 8.]

22. Prior to the 2016 election cycle, she desired and was willing to assist voters who requested that she deliver their voted early ballots to a United States mail receptacle, the County Recorder's Office, an early voting center, or a polling place. [Knox Decl. at ¶ 9.]

23. In 2016, HB 2023 was enacted to prohibit the collection and delivery of mail-in ballots. HB 2023 amended A.R.S. § 16-1005 by adding the following provisions:

> H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.
>
> I. Subsection H of this section does not apply to:
>
> 1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.
>
> 2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:
>
> (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.
>
> (b) "Collects" means to gain possession or control of an early ballot.
>
> (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.

(d) "Household member" means a person who resides at the same residence as the voter.

24. Since the effective date of HB 2023, Ms. Knox is very careful not to offer to deliver or accept for delivery another person's early ballot, even if they ask her for assistance. [Knox Decl. at ¶ 10.]

25. For example, Ms. Knox canvassed for a candidate seeking election in the Special Election for Congressional District 8 in April 2018. While she was canvassing on Sunday, April 22, 2018 (two days before the April 24, 2018 Special Election), she encountered several voters who had not yet mailed their early ballots. Ms. Knox was required to censor herself by not offering to collect and deliver the voters' early ballots, even though she knew based on her experience that it was unlikely that the voters would deliver their ballots in time to be counted. Rather than offering to collect and deliver early ballots for these voters on April 22, 2018, Ms. Knox encouraged the voters not to place their ballots in the mail because it was too late and, instead, to deliver their ballots to an appropriate location before the polls closed. [Knox Decl. at ¶ 11.]

26. Although Ms. Knox presently desires to collect and deliver—without compensation—voted, mail-in ballots, she fears doing so as a result of the passage of HB 2023. [Knox Decl. at ¶ 22.]

27. Indeed, if the statute did not exist and it was not ostensibly illegal to collect and deliver completed mail-in ballots for voters, Ms. Knox would offer to deliver ballots for voters she meets while canvassing. [*Id*.]

28. Further, Ms. Knox would organize canvassing events at nursing homes and adult community centers for the purpose of collecting and delivering mail-in ballots of elderly and sick voters. [Knox Decl. at ¶ 25.]

29. Ms. Knox believes that assisting voters with the delivery of their early ballots was, and continues to be, a part of expressing her political belief that all registered voters have an opportunity to use their franchise. [Knox Decl. at ¶ 13.]

30. Specifically, Ms. Knox supports the continued and widespread use of voting by mail, and believes that the United States' postal system provides a secure and easy platform to exercise the franchise and conduct elections. [Knox Decl. at ¶ 16.]

31. In her view, this is especially true today because the number of voters who receive early ballots by mail increases every year. [Knox Decl. at ¶ 17.]

32. Ms. Knox desires and plans to engage in door-to-door canvasing in connection with the upcoming 2018 Primary and General Elections, but fears prosecution if she delivers an early ballot for another person. [Knox Decl. at ¶¶ 20–22.]

33. Ms. Knox sometimes mistakenly receives mail directed to her neighbors and, in such cases, she takes the piece of mail to her neighbor's house. Prior to the passage of HB 2023, Ms. Knox would have freely and without hesitation delivered an unvoted early ballot to a neighbor if she mistakenly received the neighbor's early ballot in her mailbox. As a direct result of HB 2023, Ms. Knox would not follow the same practice if she mistakenly received a neighbor's early ballot in her mailbox. [Knox Decl. at ¶ 27.]

Private-Carriage Exception to the Private Express Statutes

34. Congress enacted the Private Express Statutes, 18 U.S.C. §§ 1693–1699, 39 U.S.C. §§ 601–606, pursuant to its constitutional authority to establish "Post Offices and post roads," U.S. Const. art. I, § 8, cl. 7. In general, these statutes establish the United States Postal Service ("USPS") as a monopoly by prohibiting others from carrying letters over postal routes.

35. A postal monopoly has prevailed in this country since the Articles of Confederation, *see* Act of Oct. 18, 1782, 23 J. Continental Cong. 672–673 (G. Hunt ed. 1914), and Congress embraced the concept in its first postal law, *see* Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. Because Congress desires "prompt, reliable, and efficient services to [postal] patrons in all areas," 39 U.S.C. § 101(a), it has enacted the Private Express Statutes and has provided for nationwide delivery of mail at uniform rates.

36. From its inception, the monopoly granted the USPS had always been limited to the carriage of mail "for hire." *See* Act of Oct. 18, 1782, 23 J. Continental Cong. 670, 672–673 (G. Hunt ed. 1914); Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. The private-carriage exception is a reflection of the limited nature of the monopoly; it was designed to ensure that private carriage is not undertaken "for hire or reward." *Ibid*.

37. While the limited nature of the postal monopoly always implied that private, gratuitous carriage was excepted from the prohibitions of the Private Express Statutes, Congress made the exception express in 1845. *See* S. Rep. No. 137, 28th Cong., 1st Sess., 1, 10 (1844); H.R. Rep. No. 477, 28th Cong., 1st Sess., 1 (1844).

38. Congress developed a narrow exception for carriage by "private hands," crafting the exception in such a way as to permit only gratuitous carriage undertaken out of friendship, not pursuant to a business relationship. H.R. Rep. No. 477, *supra*, at 4 ("Penalties are provided ... with exceptions in favor of the party ... who conveys the letter out of neighborly kindness, without fee or reward").

39. Congress used unambiguous language to accomplish its goals. Persons or entities other than the United States Postal Service—*i.e.*, "private hands"—may carry letters without violating the Private Express Statutes only so long as they do not receive any form of benefit from the sender, *i.e.*, "without compensation." *See* 18 U.S.C. § 1696(c) ("This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only."); 39 CFR § 310.3(c) ("The sending or carrying of letters without compensation is permitted.").

40. In fact, the USPS actually uses Arizona in its published example of private letter carriage:

> Laura Bowley plans to travel to Cottonwood, Arizona. A friend asks Mrs. Bowley to carry a letter to another friend who resides there without payment of any compensation. Such private carriage is permissible under this exception.

Publication 542 - Understanding the Private Express Statutes (June 2014).

41. Notably, the Postal Service has asserted its authority over the transmission of "Balloting Materials." *See, e.g.*, USPS Domestic Mail Manual ("8.0 Balloting Materials"); Balloting Materials Postage, 78 Fed. Reg. 25677 (proposed May 2, 2013) (codified at 39 § C.F.R. 111) (requiring all ballot types to indicate that the proper amount of postage must be paid and requiring balloting materials to indicate the amount of postage for the return of ballots, unless mailed under the special exemption for military or overseas voting or returned under Business Reply Mail service).

Attorney General's Threatened Strict Enforcement

42. Since its enactment, the Defendant has repeatedly emphasized his intent to prosecute any and all efforts to collect mail-in ballots. For example, in an October 3, 2016 court filing, the Defendant stated:

> Because H.B. 2023 is a criminal law, neither county nor state elections officials are responsible for its enforcement. Instead, that task falls to the Attorney General, who intends to act on any information he receives regarding violations of H.B. 2023. *See* A.R.S. § 16-1021.

Feldman, et al. v. Reagan, et al., No. 16-01065, Dkt. 212 at 18.

43. In light of the above and other statements made by Defendant and his agents about their intention to strictly enforce HB 2023, Plaintiff faces a credible threat of prosecution for engaging in her desired conduct—delivering mail-in ballots without compensation for other Arizona voters.

August 2018 Primary Election

44. Arizona is holding a statewide primary election on August 28, 2018 (the "2018 Primary Election").

45. Vote-by-mail ballots will be mailed to Arizona voters on August 1, 2018.

46. Election Officials have informed voters that they must mail their voted ballot via the United States Postal Service by August 22, 2018. *See, e.g.*, https://recorder.maricopa.gov/elections/electioncalendar.aspx.

47. Plaintiff intends to engage in activities governed by the private-carrier exception in connection with the 2018 Primary Election—collect and return mail-in ballots.

48. Plaintiff, however, will not collect and return ballots if she does not obtain the judicial relief presently requested.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

49. An actual and substantial controversy exists between Plaintiff and Defendant as to their respective legal rights and duties. Plaintiff contends that she has already been harmed by HB 2023, that she faces an imminent threat of harm if HB 2023 is enforced, and that HB 2023 violates the U.S. Constitution and federal law. Defendant is obligated to enforce HB 2023 unless it is found to be illegal.

50. In violating Plaintiff's rights under the U.S. Constitution and federal law, Defendant will be acting under color of law.

51. If not enjoined, HB 2023 will continue to thwart Plaintiff's lawful conduct and subject her to criminal prosecution, and thus cause irreparable injury to Plaintiff.

52. Plaintiff has no plain, speedy, and adequate remedy at law against HB 2023 other than the relief requested in this Complaint.

53. Defendant's enforcement of HB 2023 constitutes an official policy of the State of Arizona.

54. Plaintiff is entitled to a declaration that HB 2023 is unconstitutional on its face and to an order preliminarily and permanently enjoining its enforcement.

FUTURE PLANS AND ONGOING AND IRREPARABLE HARM

55. In the future, Plaintiff intends to take actions materially similar to those that she desires and intends to take here, if not limited or prohibited by the challenged laws. Given the recurring election-related context, the usual length of time of litigation such as this to be finally resolved, and the ongoing restrictions imposed by HB 2023, there is a strong likelihood that situations similar to those described above will recur without opportunity for full litigation. Thus, even if this case is not fully litigated

before the 2018 Primary Election, this case will not be moot because it will be capable of repetition yet evading review.

56. Plaintiff faces a credible threat of prosecution if she proceeds with her intended activities without the requested relief.

57. If Plaintiff does not obtain the requested relief, she will not proceed with her intended activities. In such an event, she will continue to be deprived of her constitutional rights under the Supremacy Clause, and the First and Fourteenth Amendments to the United States Constitution and will suffer irreparable harm. There is no adequate remedy at law.

CLAIMS FOR RELIEF

COUNT ONE

(Supremacy Clause; 42 U.S.C. § 1983)

58. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint as though fully set forth herein.

59. The Supremacy Clause, Article VI, Section 2, of the U.S. Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding.

60. The Supremacy Clause mandates that federal law preempts state law in any area over which Congress expressly or impliedly has reserved exclusive authority or which is constitutionally reserved to the federal government, or where state law conflicts or interferes with federal law.

61. HB 2023 is void in its entirety because it attempts to prohibit and criminalize conduct that federal law expressly permits. *See* 18 U.S.C. § 1696(c) ("This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular

occasion only."); 39 CFR § 310.3(c) ("The sending or carrying of letters without compensation is permitted.").

62. HB 2023 conflicts with federal law and policy, attempts to legislate in a field occupied by the federal government, and imposes burdens and penalties not authorized by and contrary to federal law, each in violation of the Supremacy Clause. *See Arizona v. United States*, 567 U.S. 387 (2012) (concluding that federal law preempted an Arizona statute where "Congress decided it would be inappropriate to impose criminal penalties" on the conduct criminalized by the state statute).

COUNT TWO

(First Amendment; 42 U.S.C. § 1983)

63. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint as though fully set forth herein.

64. The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." The First Amendment's guarantees are applied to the States through the Fourteenth Amendment.

65. "It is axiomatic that restrictions upon the mail system implicate the First Amendment." *Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004); *see also Blount v. Rizzi*, 400 U.S. 410, 416 (1971) ("The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring in the judgment) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights.").

66. HB 2023's prohibition against private mail carriage is an unlawful restraint on protected speech.

67. Plaintiff seeks to engage in the private carriage of mail-in ballots in the 2018 Primary Election, but because the Defendant has threatened her and others with criminal sanctions for doing so, she credibly fears engaging in such conduct.

68. Although HB 2023 may not discriminate among viewpoints, HB 2023 constitutes a content-based speech restriction because it provides restrictions on the delivery of mail based on the mail's subject matter—ballots.

COUNT THREE

(Excessive Vagueness in Violation of the Due Process Clause of the Fourteenth Amendment; 42 U.S.C. § 1983)

69. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint as though fully set forth herein.

70. The Due Process Clause of the Fourteenth Amendment provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." It is "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

71. The criminal penalties in HB 2023 are triggered if a person is deemed to have "collected" an early ballot of another person. However, HB 2023 confusingly states that, "any [] person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the … person is engaged in official duties." However, the phrase "allowed by law to transmit United States mail" is undefined and vague. In addition, the phrase, "engaged in official duties" is inherently unclear, as the phrase can be understood to apply only to government employees or officials in the scope of their employment. Indeed, under federal law, **all** persons are authorized to deliver mail as long as it is done so without compensation.

72. Because HB 2023 imposes significant criminal penalties on individuals that collect and deliver early ballots in violation of the statute, the vagaries of the phrase "any [] person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the … person is engaged in official duties" present particularly grave dangers. A person that makes an honest and reasonable determination that she is permitted to deliver a piece of mail under federal law may

nevertheless face a presumptive sentence of one year of incarceration and a fine of up to $150,000 plus surcharges. Those dangers are compounded by the inherent vagueness of the phrase "engaged in official duties," which invites arbitrary or discriminatory enforcement of HB 2023 by the Attorney General. Moreover, the vagueness implicates fundamental free speech concerns under the First Amendment.

73. HB 2023 is therefore void for vagueness in violation of the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing facts and arguments, Plaintiff requests that the Court:

A. Assume jurisdiction over this matter;

B. Declare that HB 2023 is unconstitutional in its entirety;

C. Preliminarily and permanently enjoin Defendant, his officers, agents, servants, employees, and attorneys, and those officials in active concert or participation with him from implementing or enforcing HB 2023;

D. Award Plaintiff's costs of suit, reasonable attorneys' fees, and other expenses pursuant to 42 U.S.C. § 1988; and

E. Grant such other relief as the Court may deem appropriate.

Respectfully submitted this 3rd day of July, 2018.

COPPERSMITH BROCKELMAN PLC

By s/ Roopali H. Desai
Roopali H. Desai

SCHARFF PLC

By s/ Spencer G. Scharff
Spencer G. Scharff

Attorneys for Plaintiff

EXHIBIT C

Spencer G. Scharff (028946)
SCHARFF PLC
502 West Roosevelt Street
Phoenix, Arizona 85003
T: (602) 739-4417
spencer@scharffplc.com

Roopali H. Desai (024295)
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1200
Phoenix, Arizona 85004
T: (602) 381-5490
F: (602) 224-6020
rdesai@cblawyers.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Rivko Knox, Plaintiff, v. Mark Brnovich, in his official capacity as Arizona Attorney General, Defendant.	No. **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OF HB 2023 AND MEMORANDUM IN SUPPORT THEREOF** (Oral Argument Requested) (Expedited Relief Requested)

Pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, Plaintiff Rivko Knox ("Plaintiff") respectfully requests that the Court preliminarily enjoin Defendant Mark Brnovich, in his official capacity as the Attorney General of Arizona, from implementing or enforcing Arizona House Bill 2023, enacted as 2016 Session Law Chapter 5 and codified at A.R.S. § 16-1005(H)-(I). Pursuant to Rule 65(a)(2), Plaintiff also requests that the Court consolidate the hearing on this Motion with the trial on the merits. This Motion is supported by the following Memorandum of Points and Authorities and the Knox Declaration attached to Plaintiff's Complaint.

MEMORANDUM AND POINTS OF AUTHORITIES

I. INTRODUCTION

This action challenges the constitutionality of A.R.S. § 16-1005(H), which was amended by House Bill ("HB") 2023 in 2016 (hereinafter referred to as "HB 2023"), because it is preempted by federal law. Since 1792, Congress has exercised its authority to regulate the handling of U.S. Mail. *See* 18 U.S.C. § 1691, et. seq. Specifically, federal law expressly permits the private carriage of mail without compensation. *See* 18 U.S.C. § 1696(c). Indeed, Article I, Section 8, Clause 7 of the United States Constitution authorizes Congress "[t]o establish Post Offices and post Roads[.]" The Postal Power allows Congress to regulate the entire postal system. *See Ex Parte Rapier*, 143 U.S. 110, 113 (1892).

Yet HB 2023 unlawfully regulates the handling of U.S. Mail by prohibiting the collection and delivery of early ballots.[1] In other words, HB 2023 criminalizes lawful conduct—the "collection" and delivery of another person's early ballot. Specifically, HB 2023 makes it a class 6 felony for any person to gain possession or control of a mail-in ballot from another person, except in a limited number of narrow circumstances, with a presumptive sentence of one year of incarceration and a fine of up to $150,000 plus surcharges. An unvoted early ballot, once mailed, is a piece of mail. Likewise, once sealed in an envelope with pre-paid postage, a voted early ballot becomes a piece of mail. Both are regulated by federal law. Thus, HB 2023 is preempted by federal law because it prohibits permitted methods of private carriage of early ballots.

---

[1] Arizona law provides that, [a]ny election called pursuant to the laws of th[e] state shall provide for early voting[,]" and, moreover, "[a]ny qualified elector may vote by early ballot." A.R.S. § 16-541(A). An "early ballot shall be one prepared for use in the precinct in which the applicant resides and, if a partisan primary election, of the political party with which the applicant is affiliated…," and "[t]he ballot shall be identical with the regular official ballots, except that it shall have printed or stamped on it 'early.'" A.R.S. § 16-545(A). Early ballots, which are commonly referred to as "mail-in" ballots, must be accompanied with return envelopes that protect "the voter's selections and that is tamper evident when properly sealed." A.R.S. § 16-545(B)(2).

HB 2023 suffers from other constitutionally fatal flaws as well. The law directly infringes on free-speech rights because it unconstitutionally restricts Plaintiff's access to voluntary, private mail carriage.

Further, HB 2023's description of persons who are deemed not to have "collected" early ballots in violation of the law is unconstitutionally vague; it states that "any [] person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot," but only if the "person is engaged in official duties." First, federal law allows **all** persons to transmit United States mail, as long as they are doing so without charging a fee. Second, HB 2023 does not define what it means for a person to be "engaged in official duties." Thus, even if state law could impose additional requirements to authorize the lawful delivery of mail, which it cannot do, it is impossible to know if a person satisfies the arbitrary test set forth in the statute.

Unless enjoined, HB 2023 will cause irreparable harm to Plaintiff. HB 2023 effectively eliminates the ability for private citizens like Plaintiff to assist with the delivery of mail-in ballots, notwithstanding the fact that federal law authorizes such conduct. The broad prohibition against the "collection" and delivery of another person's early ballot, coupled with the harsh statutory penalties and ambiguous compliance requirements, have caused Plaintiff to stop delivering ballots for voters who request assistance. Such "loss of First Amendment freedoms" "unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1706 (2010).

On the one hand, Plaintiff will suffer irreparable harm because a deprivation of constitutional rights constitutes irreparable harm. On the other hand, the government *cannot* suffer harm from an injunction that merely ends an unlawful practice. Moreover, the public has no interest in Defendant continuing a policy that violates the Supremacy Clause, the First Amendment, and the Due Process Clause of the Fourteenth Amendment. Plaintiff easily satisfies the requirements for a preliminary injunction and, therefore, this Court should grant Plaintiff's Motion.

II. FACTS

A. The History of Private Mail Carriage in the United States.

Congress enacted the Private Express Statutes, 18 U.S.C. §§ 1693–1699, pursuant to its constitutional authority to establish "Post Offices and post roads," U.S. Const. art. I, § 8, cl. 7. In general these statutes establish the United States Postal Service ("USPS") as a monopoly by prohibiting others from carrying letters over postal routes. A postal monopoly has prevailed in this country since the Articles of Confederation, *see* Act of Oct. 18, 1782, 23 J. Continental Cong. 672–673 (G. Hunt ed. 1914), and Congress embraced the concept in its first postal law, *see* Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. From its inception, the monopoly granted the USPS had always been limited to the carriage of mail "for hire." *See* Act of Oct. 18, 1782, 23 J. Continental Cong. 670, 672–673 (G. Hunt ed. 1914); Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236. The Private-Carriage Exception is a reflection of the limited nature of the monopoly; it was designed to ensure that private carriage is not undertaken "for hire or reward." *Id.*

While the limited nature of the postal monopoly always implied that private, gratuitous carriage was excepted from the prohibitions of the Private Express Statutes, Congress made the exception express in 1845—the "Private-Carriage Exception." *See* S. Rep. No. 137, 28th Cong., 1st Sess., 1, 10 (1844); H.R. Rep. No. 477, 28th Cong., 1st Sess., 1 (1844). The Private-Carriage Exception represents a narrow exception for carriage by "private hands," which was crafted to permit only gratuitous carriage undertaken out of friendship, not pursuant to a business relationship. H.R. Rep. No. 477, *supra*, at 4 ("Penalties are provided ... with exceptions in favor of the party ... who conveys the letter out of neighborly kindness, without fee or reward").

B. HB 2023

On March 9, 2016, the Arizona Legislature passed HB 2023 and, on the same day, the Governor approved and signed the law. Although HB 2023 on its face seeks to

prohibit the collection and delivery of early ballots, in practice, it regulates the handling of U.S. Mail. Specifically, HB 2023 provides:

> H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.
>
> I. Subsection H of this section does not apply to:
>
> 1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.
>
> 2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:
>
> (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.
>
> (b) "Collects" means to gain possession or control of an early ballot.
>
> (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.
>
> (d) "Household member" means a person who resides at the same residence as the voter.

Notably, HB 2023 does not define the phrases "allowed by law to transmit United States mail" or "engaged in official duties," and, therefore, it is unclear who is exempt from the broad prohibitions against collecting and delivering another person's early ballot.

C. Plaintiff's Voter Outreach Activities Curtailed.

1. Plaintiff is active in her community and is currently a Democratic Precinct Committeeperson ("PC") for the Acacia Precinct. [Knox Declaration ("Decl."), attached to Plaintiff's Complaint as **Exhibit 1**, at ¶ 2.] She is also a longstanding member of the League of Women Voters of Arizona ("LWVAZ"), which is a non-profit, non-partisan political membership organization, the fundamental goal of which is to empower citizens to shape better communities. [*Id.*] A large part of Ms. Knox's

community involvement is to engage in door-to-door canvassing to initiate direct contact with individuals to raise awareness about candidates and issues, register voters, and encourage participation in the democratic process. [*Id*. at ¶ 4.] And, she canvasses regularly—almost every month of every year—regardless of whether it is an election year. [*Id*. at ¶ 5.] Specifically, she canvasses 1-2 times per month for 2-3 hours per canvass, and typically knocks on 20-30 doors during a single canvass. [*Id*. at ¶ 6.] When canvassing, Ms. Knox encourages voters to look out for and then complete and mail their early, mail-in ballots. [*Id*. at ¶ 7.]

Of particular relevance to this case, prior to the 2016 election cycle, Ms. Knox accepted and delivered at least one voted ballot for a voter she met while canvassing. [*Id*. at ¶ 8.] (She may have also accepted and delivered other early ballots prior to the 2016 election cycle.) [*Id*.] Ms. Knox did so because she desired and was willing to assist voters who requested that she deliver their voted early ballot to a United States Mail receptacle, the County Recorder's Office, an early voting center, or a polling place. [*Id*. at ¶ 9.] However, since the effective date of HB 2023, she is prohibited from collecting and delivering another person's early ballot. [*Id*. at ¶ 10.] In fact, she is very careful not to offer to deliver or accept for delivery another person's early ballot, even if they ask her to assist with their ballot. [*Id*.]

The prohibition imposed by HB 2023 is adversely impacting Ms. Knox. For example, while she was canvassing for a candidate seeking election in the Special Election for Congressional District 8 on Sunday, April 22, 2018 (two days before the April 24, 2018 Special Election), she encountered several voters who had not yet mailed their early ballots, but she was unable to assist them due to HB 2023. [*Id*. at ¶ 11.] Specifically, Ms. Knox was required to censor herself by not offering to collect and deliver the voters' early ballots, even though it was unlikely the voters would timely return their ballots. [*Id*.] She could not and did not offer or agree to deliver early ballots on behalf of these voters because she feared criminal sanctions under HB 2023. [*Id*. at ¶ 12; *see also id*. at ¶¶ 20, 22, 24, and 28.]

Ms. Knox believes that voting is the most fundamental right in a democratic society and she is committed to helping qualified electors exercise their right to vote regardless of *who* they vote for. [*Id*. at ¶ 15.] She wishes to express this belief, in part, by assisting voters with the delivery of their early ballots. [*Id*. at ¶ 13.] Indeed, Ms. Knox supports the continued and widespread use of voting by mail, and believes that the United States' postal system provides a secure and easy platform to exercise the franchise and conduct elections. [*Id*. at ¶ 16.] During each election cycle, there comes a time when it is too late for voters to mail their early ballots by regular mail because they will not be received in time to be counted. Leading up to and after this time, Ms. Knox increases her voter outreach through door-to-door canvassing and it is during this time that she particularly desires to assist voters with the delivery of their early ballots. [*Id*. at ¶ 18.]

Alas, however, Ms. Knox is unable to offer or agree to deliver mail-in ballots for qualified electors because she fears prosecution under HB 2023. [*Id*. at ¶¶ 20, 22, 24, and 28.] Indeed, but for HB 2023, Ms. Knox would do more to assist voters, including organizing canvassing events at nursing homes and adult community centers for the purpose of collecting and delivering mail-in ballots of elderly and sick voters. [*Id*. at ¶ 25.]

Arizona is holding a statewide primary election on August 28, 2018 (the "2018 Primary Election"). Vote-by-mail ballots will be mailed to Arizona voters on August 1, 2018. Election Officials have informed voters that they must mail their voted ballot via the United States Postal Service by August 22, 2018. *See, e.g.*, https://recorder.maricopa.gov/elections/electioncalendar.aspx. Plaintiff wishes and intends to engage in activities governed by the private-carrier exception in connection with the 2018 Primary Election—collect and return mail-in ballots. [Knox Decl. at ¶¶ 21-22, 26.]

Plaintiff faces a credible threat of prosecution if she proceeds with her intended activities without the requested relief. Plaintiff, however, will not collect and return

ballots if she does not obtain the judicial relief presently requested. In such an event, she will be deprived of her constitutional rights under the Supremacy Clause and the First and Fourteenth Amendments to the United States Constitution and will suffer irreparable harm.

III. ARGUMENT

Plaintiffs seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit weighs these factors on a sliding scale, such that where there are only "serious questions going to the merits"—that is, less than a "likelihood of success" on the merits—a preliminary injunction may still issue so long as "the balance of hardships tips sharply in the plaintiff's favor" and the other two factors are satisfied. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

A. Plaintiff Is Likely to Succeed on the Merits.

HB 2023 regulates the delivery of a specific-subset of mail—mail-in ballots. This is undisputable. It says (albeit, vaguely) who can and cannot deliver mail-in ballots, and provides severe criminal consequences for violators. This law comports with Arizona's recent history of enacting laws, which have consistently been struck down, that invade the Federal Government's plenary authority. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012) (holding that "§§ 3, 5(C), and 6 of S.B. 1070 are preempted"); *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1279 (2018) (concluding Arizona's policy of denying licenses to noncitizens with certain employment authorization documents was preempted violated the Supremacy Clause because it "encroache[d] on the exclusive federal authority to create immigration classifications"); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1012 (9th Cir. 2013) (affirming the trial court's preliminary injunction against A.R.S. § 13–

2929, "which attempts to criminalize the harboring and transporting of unauthorized aliens within the state of Arizona," because the statute is "preempted by federal law and thus invalid under the Supremacy Clause."); *Valenzuela v. Ducey*, No. CV-16-03072-PHX-DGC, 2018 WL 3069464, at *1 (D. Ariz. June 21, 2018) (concluding Arizona's policy of denying licenses to noncitizens with certain employment authorization documents was preempted); *Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012, at *17 (D. Ariz. Mar. 27, 2017) (permanently enjoining certain Arizona statutes, which interfered with federal immigration law); *Nation v. City of Glendale*, 804 F.3d 1292, 1301 (9th Cir. 2015) (holding that "H.B. 2534 is invalid based on federal preemption"); *We Are Am. v. Maricopa Cty. Bd. of Supervisors*, 297 F.R.D. 373, 377 (D. Ariz. 2013) (holding A.R.S. § 13–2319 "conflicts with federal immigration law").

1. Federal Law Preempts HB 2023.

"The Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting U.S. Const. art. VI, cl. 2). Under this clause, "Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Federal law may preempt state law in three ways: (1) express preemption, where Congress states in express terms the preemptive effect of a federal law, (2) field preemption, where "federal regulation in a particular field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and (3) conflict preemption, where "compliance with both federal and state regulations is a physical impossibility." *Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011) (quoting *Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002)).

This case focuses on field and conflict preemption. Field preemption precludes states "from regulating conduct in a field that Congress, acting within its proper

authority, has determined must be regulated by its exclusive governance." *Id*. (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992)). Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility," and "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (internal citations and quotation marks omitted).

a. Conflict Preemption: HB 2023 is in conflict with the Private-Carriage Exception.

As discussed in detail above, the Private-Carriage Exception exempts individuals who carry mail without compensation from the Private Express Statute's criminal sanctions. *See* Section II(A), *supra*. This Congressionally-mandated exemption is longstanding and employs unambiguous language to accomplish its goals. Persons or entities other than the United States Postal Service—*i.e.*, "private hands"—may carry letters without violating the Private Express Statutes only so long as they do not receive any form of benefit from the sender, *i.e.*, "without compensation." *See* 18 U.S.C. § 1696(c) ("This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only."); 39 CFR § 310.3(c) ("The sending or carrying of letters without compensation is permitted.").

In fact, the USPS uses Arizona in its published example of the Private-Carriage Exception:

> Laura Bowley plans to travel to Cottonwood, Arizona. A friend asks Mrs. Bowley to carry a letter to another friend who resides there without payment of any compensation. Such private carriage is permissible under this exception.

Publication 542 - Understanding the Private Express Statutes (June 2014).[2]

[2] The PES also permits private parties to deliver letters to a mailbox/post office:

> The private carriage of letters which enter the mail stream at some point between their origin and their destination is permissible.

Although sanctioned by federal law, under HB 2023, Ms. Bowley would be committing a class 6 felony if she took her friend's mail-in ballot to the nearest post office or to the Yavapai County Recorder's Office. Thus, HB 2023 is preempted because it directly conflicts the federal Private Express Statutes. *See Arizona v. United States*, 567 U.S. 387, 406 (2012) (concluding that federal law preempted an Arizona statute where "Congress decided it would be inappropriate to impose criminal penalties" on the conduct criminalized by the state statute).

b. Field Preemption: Congress has occupied the field of the regulation of postal mail.

"States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* at 399. Congressional intent to displace state law can be inferred from either "a federal interest...so dominant that the federal system will be assumed to preclude enforcement of state laws," or where "a framework of regulation [is] so pervasive...that Congress left no room for the States to supplement it[.]" *Id.* (internal quotations omitted). "The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Hillsborough Cty. Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985).

Congress has occupied the field of the regulation of postal mail. The postal "power possessed by Congress" under Article I, section 8, "embraces the regulation of the entire Postal System of the country"; Congress alone has "'[t]he right to designate what shall be carried'" and "'what shall be excluded.'" *USPS v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126–27 (1981) (quoting *Ex Parte Jackson*, 96 U.S. 727, 732 (1878)).

---

39 CFR 310.3(e)(1).

Notably, the Postal Service has asserted its authority over the transmission of "Balloting Materials." *See, e.g.*, USPS Domestic Mail Manual ("8.0 Balloting Materials"); Balloting Materials Postage, 78 Fed. Reg. 25677 (proposed May 2, 2013) (codified at 39 C.F.R. § 111) (requiring all ballot types to indicate that the proper amount of postage must be paid and to requiring balloting materials to indicate the amount of postage for the return of ballots, unless mailed under the special exemption for military or overseas voting or returned under Business Reply Mail service). Thus, HB 2023 is preempted because Congress has occupied the field of the regulation of mail.

2. HB 2023 Violates Plaintiff's First Amendment Rights.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140, 2018 WL 3116336, at *7 (U.S. June 26, 2018). Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 35 S. Ct. 2218, 2226 (2015). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*. This stringent standard reflects the fundamental principle that governments have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id*. (internal citations omitted).

As discussed above, HB 2023 constitutes a regulation on the use and delivery of mail. As such, it constitutes a speech restriction. *See Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004) ("It is axiomatic that restrictions upon the mail system implicate the First Amendment."); *see also Blount v. Rizzi*, 400 U.S. 410, 416 (1971) ("The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues...."); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring

in the judgment) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights.").

HB 2023's restrictions only apply to a certain subset of mail—mail-in ballots. Arizona does not impose any similar restrictions on the collection of other forms of mail. In sum, HB 2023 constitutes a presumptively unconstitutional, content-based restriction on noncommercial speech.

3. Alternatively, HB 2023 Is Unconstitutionally Vague.

HB 2023 is also unconstitutional because its definition of when a person is deemed not to have collected an early ballot is excessively vague and incapable of being predictably or consistently applied. Vagueness in a statute is constitutionally repugnant because it has the effect of "trap[ping] the innocent by not providing fair warning" and of "delegat[ing] basic policy matters" to those who enforce the law "for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

Specifically, a statute is unconstitutionally vague on its face if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). "Vague statutes are invalidated for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms." *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 928 (9th Cir. 2009) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998)) (internal quotation marks omitted).

Here, HB 2023 exempts from its restrictions (1) election officials, (2) USPS workers, and (3) "any other person who is allowed by law to transmit United States mail" provided that "the official, worker, or other person is engaged in official duties." A.R.S. § 16-1005(H). Yet, the statute does not provide any guidance as to "who is

allowed by law to transmit United States mail" or as to the parameters of conduct that constitutes "official duties." Given that the Private-Carriage Exception permits individuals, like the Plaintiff, from delivering, without compensation, mail for others, Plaintiff should certainly qualify as an individual who is "allowed by law to transmit United States mail," but it is not clear if such activity would qualify as "official duties."

Because HB 2023 imposes significant criminal penalties on individuals that collect and deliver early ballots in violation of the statute, the vagaries of the phrase "any [] person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot" present particularly grave dangers. A person that makes an honest and reasonable determination that she is permitted to deliver a piece of mail under federal law may nevertheless face a presumptive sentence of one year of incarceration and a fine of up to $150,000 plus surcharges. Those dangers are compounded by the inherent vagueness of the phrase "engaged in official duties," which invites arbitrary or discriminatory enforcement of HB 2023 by the Attorney General.

HB 2023 implicates both of the constitutional evils that the vagueness doctrine is designed to guard against: It fails to provide "fair warning," thereby threatening to "trap the innocent," *Grayned*, 408 U.S. at 108, and "it may authorize and even encourage arbitrary and discriminatory enforcement," *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The vagueness of HB 2023's "allowed by law to transmit United States mail" and "engaged in official duties" phrases is especially harmful because a reasonable, but ultimately incorrect, guess as to what the statute means could result in criminal penalties.

This ambiguity has had and will continue to have a chilling effect on Plaintiff and others. Therefore, HB 2023 is unconstitutionally vague.

B. Plaintiff Will Suffer Irreparable Harm Absent an Injunction.

This requirement is satisfied under Ninth Circuit law. A deprivation of constitutional rights constitutes irreparable harm. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights

'unquestionably constitutes irreparable injury.'"); *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."), *rev'd on other grounds*, 562 U.S. 134 (2011). Notably, the Ninth Circuit has applied this principle in preemption cases. *See Am. Trucking Ass'n, Inc. v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) ("[T]he constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm. The Supreme Court has implied as much.") (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992)); *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (We have "stated that an alleged constitutional infringement will often alone constitute irreparable harm."), *rev'd in part on other grounds*, 567 U.S. 387 (2012); *see also United States v. Arizona*, 703 F. Supp. 2d 980, 1006–07 (D. Ariz. 2010).

Here, as noted above, HB 2023 infringes Plaintiff's constitutionally protected free speech rights, causing her irreparable injury and warranting issuance of a preliminary injunction. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009) (finding irreparable injury where plaintiff demonstrated a likelihood of success on the merits of his claims "[g]iven the free speech protections at issue in th[e] case").

C. The Public Interest and Balance of Equities Tip Sharply in Plaintiff's Favor.

In deciding whether to grant a preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief ... [and] should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation marks and citations omitted). Addressing these factors with respect to a preliminary injunction in the Dream Act case, the Ninth Circuit held:

> [B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction. It is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available. On the contrary, the public interest and the balance of the equities favor prevent[ing] the violation of a party's constitutional rights.

Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1069 (9th Cir. 2014) (quotation marks and citations omitted).

This reasoning applies here. The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). And the public has little interest in Defendant continuing a policy that violates the Supremacy Clause and the First Amendment.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Rivko Knox respectfully requests that this Court issue a preliminary injunction, enjoining Defendant from enforcing HB 2023. Plaintiff also requests, pursuant to Rule 65(a)(2), that the Court consolidate the hearing on this Motion with the trial on the merits.

Finally, Plaintiff respectfully requests an award of attorneys' fees, costs, and expenses under 42 U.S.C. § 1988. Upon entry of an order granting Plaintiff's Motion, Plaintiff will file and serve a motion for award of attorneys' fees and related non-taxable expenses.

Respectfully submitted this 3rd day of July, 2018.

COPPERSMITH BROCKELMAN PLC

By s/ Roopali H. Desai
Roopali H. Desai

SCHARFF PLC

By s/ Spencer G. Scharff (w/ permission)
Spencer G. Scharff

Attorneys for Plaintiff

MEMORANDUM

RIESTER

Client:	Citizens Clean Elections Commission
Project:	Governor Search Engine Marketing Ad
Subject:	Additional Questions
Date:	July 16, 2018

1. Was the employee a regular member of the team that works on the Clean Elections account?

   Yes, the employee was recently hired (2/5/18) as a full time employee at RIESTER whose responsibility was to provide strategic and tactical recommendations for clients' media needs such as search and digital media. The employee's title is Digital Media Strategist and he had eight years experience performing paid digital media prior to being hired at RIESTER.

2. Was it determined by your office that there were no political or unprofessional motivations? Was it simply a matter of not following approval protocols?

   There were no underlying political or unprofessional motivations. Our media director directly discussed the nature of the incident and the tone of the Adwords copy with the employee to identify if this was politically motivated and concluded that it was a series of missteps.

   While assessing the performance of the original debates campaign (client-approved and absent any specific candidate names) the employee noticed that the Adwords campaign had been performing with low search volume. In an attempt to increase impressions and awareness, the employee performed a keyword assessment and determined that candidate names and the word "defend" were frequently searched and would deliver a higher amount of impressions.

   The employee then developed a recommendation for all debates using candidates' names to share with the CCEC team members as a method to increase search volume/traffic to the CCEC website. That recommendation was verbally discussed in status meetings. A formal document was never handed out

though, because through the dialogue it was concluded that this path was not desirable. The CCEC team immediately declined this approach.

Meanwhile because the ad in question, with the use of names, had been drafted in the corresponding software, it, regretfully, remained in the system. It was then accidentally set live without approval.

Subsequently, the substance of the ad was sourced from the CCEC website. The employee overlooked the line through the name of Governor Doug Ducey. He made a mistake.

SUBMIT DEBATE QUESTION

2018 STATEWIDE PRIMARY DEBATE SCHEDULE

OFFICE	WHERE	WHEN
Gubernatorial Debate (Republican)	Watch Live on Arizona PBS Candidates: Ken Bennett ✔, ~~Doug Ducey~~	Wednesday, August 1, 2018 5:30 PM
Gubernatorial Debate (Democratic)	Watch Live on Arizona PBS Candidates: Steve Farley ✔, David Garcia ✔, Kelly Fryer ✔	Thursday, August 2, 2018 5:30 PM
Secretary of State Debate (Republican)	Watch Live on Arizona PBS Candidates: Michele Reagan ✔, Steve Gaynor ✔	Thursday, July 19, 2018 5:30 PM
Secretary of State (Democratic)	To Be Determined	CANCELLED
Attorney General Debate	To Be Determined	CANCELLED
Mine Inspector Debate	To Be Determined	CANCELLED
Treasurer Debate (Republican)	View Live Candidates: Kimberly Yee ✔, Jo Sabbagh ✔	Wednesday, July 11, 2018 5:30 PM
Superintendent of Public Instruction Debate (Democratic)	View Live Candidates: David Schapira ✔, Katherine Hoffman ✔	Wednesday, June 13, 2018 5:30 PM

3. Please provide more detail on the process RIESTER follows for developing a client recommendation for SEM:

   I ask this specifically because the language in the ad is very different than the typical copy/key words we utilize. Terms like “defend his record”, the incorrect date, and founded in 1998, are not usual terms we employ. Overall, the ad is very different than what CCEC would approve, so I would actually not imagine RIESTER even providing something like this as a recommendation to us. The way I read the outcome of the process, it could be implied that CCEC typically employs these types of ads, with this tone and wording, and it simply ran before being approved by the client. It feels like more needs to be said about how this was even considered to be a draft.

   The standard process to provide clients with a SEM recommendation is as follows:
   1. Review account and identify opportunity for additional volume
   2. Write ad copy in AdWords Editor (desktop application)
   3. Send recommendation to client for review
   4. Upload approved ads from AdWords Editor into the live platform
   5. If ads are not yet approved, ads are paused upon upload

   The employee did not grasp the true role and responsibility of CCEC and its need to remain unbiased in all efforts nor did he understand the CCEC brand and tone. The employee’s role is a mathematically driven function within the business and the employee focused on getting maximum impressions for CCEC. If the campaign is not performing (the allocated budget is not generating the recommended impressions) the employee is not doing his/her job.

   The recommendations that were in place did not fully utilize the allocated media dollars. The employee developed the above mentioned recommendation for all debates using candidates’ names to share with the CCEC team members as a recommendation on how to increase search volume/traffic to the CCEC website. That recommendation was discussed in status meetings, but the document was never handed out as the CCEC team immediately declined this approach.

   Unfortunately, the recommended ad copy was not taken out of the system and the first ad was accidentally set live without approval.

4. Was this the only unauthorized ad? We still need clarification on how it was just this particular office.

Yes. This was the only debate-related ad with the use of a candidate name that went live. It was the first ad on the list of the draft recommendation using candidate names uploaded into Google Adwords and it was the only one accidently set live.

5. How could an unauthorized ad run for 3 weeks without being noticed by a team member? Are there internal controls established that monitor what is in market, is what actually should be in market (after an approved ad goes live)?

   It went undetected because this specific ad, because of its topic, was bundled into the original (and approved) debate search campaign without use of candidate names. This campaign employed generic terms related to debates like party and name of the state office.

   The campaign, as a whole, is optimized for performance twice weekly by the paid search employee assigned to the account. Optimization occurs based on the recommended bid provided by Google. In this particular instance, the search terms/campaign specifics were not reviewed during that process. The employee only focused on reviewing the numbers. We will set up an automated report moving forward to allow for additional review.

   5a. I was surprised to learn that the ad was live for so long. Especially with clicks, it would seem like this should have been noticed by someone internally.

   Due to the low search volume of the Adwords account, the employee reviewed bids (not keywords) to review which bids to optimize to gain impressions, but did not focus on reviewing adwords again as he perceived all those as already being approved.

6. Is it possible for a CCEC staffer to have access and training for Adwords. We have access to Hootsuite for our social posts, so we can see what is scheduled to run and when. Can we do something similar where our team can see the final, approved ads? Is there a better way that CCEC can be involved in this process?

   Yes, we can allow for view access for the CCEC Adwords campaigns going forward.

7. Please provide a list of all RIESTER employees that perform work on the CCEC account. We would like an updated list if/whenever this may change.

Mirja Riester - Chief Strategic Officer
Ryan Wheelock - Account Manager/Project Manager
Talei Hornback - Strategic Planner

Christina Borrego - Executive Director Public Relations and Social Communications
Hayley Shanks - Social Media

Sam Dubose - Chief Financial Officer
Melissa Defio - Ap & Billing Manager

Aaron Smitthipong - Digital Director
Aaron Cain - Digital Art Director
Jason Newlin - Manager of Front End Development
Mike Lehnhardt - Senior Digital Designer
Carlos Tirado - Senior Back End Developer
Andrew Enzweiler - Motion Designer
Greg Trotter - Senior Digital Designer
Angel Jimenez - Digital Production Artist

David Kovacs - Associate Director of Content Strategy
Bernadette Smith - Content & User Experience Strategist

Tom Ortega - Chief Creative Officer
Ben Dveirin -- Associate Creative Director/Art Director
Brooke West -- Senior Designer
Debbie Zapatka -- Senior Art Director
Christina Scherer -- Production Artist/Designer
David Higgins -- Production Artist
Vanessa Svancara - Production Artist
Liz Rogers -- Copywriter
Samara Byrne -- Content Producer
Bill Robbins -- Print Production Manager

Kurt Krake-Executive Director of Analytics and Innovation
Tricia Kashima--Media Director

Kari Torrez-Associate Media Director
Jeff Rahm-Media Supervisor
Danielle Day-Media Planner/Buyer
Danelle Benton-Smith - Programmatic Campaign Manager
Anna Garza - Media Supervisor

Mary R. O'Grady, 011434
Joseph N. Roth, 025725
Nathan T. Arrowsmith, 031165
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
mogrady@omlaw.com
jroth@omlaw.com
narrowsmith@omlaw.com

Attorneys for The Citizens Clean Elections Commission

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Arizona Advocacy Network; Sen. David Bradley; Sen. Olivia Cajero-Bedford; Sen. Lupe Contreras; Sen. Andrea Dalessandro; Sen. Steve Farley; Sen. Katie Hobbs; Sen. Catherine Miranda; Sen. Martin Quezada; Sen. Andrew Sherwood; Rep. Richard C. Andrade; Rep. Lela Alston; Rep. Mark A. Cardenas; Rep. Ken Clark; Rep. Diego Espinoza; Rep. Charlene R. Fernandez; Rep. Randall Friese; Rep. Rosanna Gabaldon; Rep. Albert Hale; Rep. Stefanie Mach; Rep. Matthew Kopec; Rep. Juan Jose Mendez; Rep. Rebecca Rios; Rep. Macario Saldate; Rep. Ceci Velasquez; Rep. Bruce Wheeler; and Bricklayers and Allied Craftworkers Local Union #3 AZ-NM, Plaintiffs, vs. The State of Arizona, a body politic; Michele Reagan, in her official capacity as Secretary of State; and The Citizens Clean Elections Commission; Governor's Regulatory Review Council, Defendants.	No. CV2017-096705 **CITIZENS CLEAN ELECTIONS COMMISSION'S RESPONSE TO STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable David K. Udall)

Defendant Citizens Clean Elections Commission hereby responds to the Cross-Motion for Summary Judgment (the "Cross-Motion") filed by Defendants State of Arizona and Secretary of State Michele Reagan, and joined by the members of the

Governor's Regulatory Review Council ("GRRC") (collectively, the "State Defendants"). The Cross-Motion is premised on a fundamental misunderstanding of the Clean Elections Act and the principles of statutory construction. SB 1516 is plainly inconsistent with the Act and to argue otherwise strains credulity. To the extent the inconsistent portions of SB 1516 amend or supersede the Act, they violate the Voter Protection Act ("VPA") and are therefore invalid. Plaintiffs are entitled to judgment as a matter of law that SB 1516 is unconstitutional to the extent it amends or supersedes the Act. The Court should deny the Cross-Motion and grant Plaintiff's motion.

I. The Act incorporates by reference certain portions of A.R.S. § 16-901 and subsequent changes to § 16-901 do not affect the Act.

Arizona law is clear: when a statute "refers to and adopts the provisions of a prior statute," that statute "is not repealed or affected by the subsequent repeal of the prior statute." *Dairy & Consumers Coop. Ass'n v. Ariz. Tax Comm'n*, 74 Ariz. 35, 38 (1952); *Maricopa Cnty. v. Osborn*, 60 Ariz. 290, 296 (1943) (citation omitted). "In such [a] case, the incorporated provisions, considered as a part of the second statute, continue in force and are unaffected by the repeal." *Dairy & Consumers Coop.*, 74 Ariz. at 38; *Osborn*, 60 Ariz. at 296-97.[1]

Here, the Act expressly incorporates by reference certain definitions from A.R.S. § 16-901: the "terms 'candidate's campaign committee,' 'contribution,' 'expenditures,' 'exploratory committee,' 'independent expenditure,' 'personal monies,' 'political committee,' and 'statewide office' are defined in § 16-901" (the "Incorporated Definitions"). A.R.S. § 16-961(A). As a result, any subsequent amendments to § 16-901 do not impact the Act. *See* Ariz. Op. Att'y Gen. No. I16-001 ("[W]hen a statute adopts part or all of another statute, the adoption takes the statute as it exists at the time

[1] Although the Legislature attempted to change this longstanding principle of statutory construction by enacting A.R.S. § 1-255 in 2015, that statute cannot be retroactively applied to the Act. *See* A.R.S. § 1-244 ("No statute is retroactive unless expressly declared therein."). It is also worth noting that A.R.S. § 1-255 was not passed with a 3/4 majority of both houses of the Legislature. Interpretation of the Act, therefore, is governed by the principles of statutory construction set forth above.

and does not include subsequent additions or modifications absent clear intent of the drafters to the contrary.") (quoting Ariz. Op. Att'y Gen. No. I78-171).

The Cross-Motion misunderstands and misapplies this longstanding principle of statutory construction. The State Defendants claim (at 6) that it is Plaintiffs' position that "the VPA enshrines any statute merely referenced in [the Act] with VPA protection, and that, as such, the legislature cannot modify any statute referenced in [the Act] unless it complies with the VPA's requirement." This is not Plaintiffs' position as the Commission understands it, but it is wrong in any event. The Legislature is free to change any statute referenced by or incorporated into the Act, but Arizona law is clear that any changes to statutes incorporated by reference into the Act ***do not amend the Act***. *See Dairy & Consumers Coop.*, 74 Ariz. at 38; *Osborn*, 60 Ariz. at 296-97; Ariz. Op. Atty. Gen. No. I16-001. Put another way, the Legislature can certainly amend § 16-901 or repeal it in its entirety. But those actions, without more, simply would not affect the Incorporated Definitions. Accordingly, the Incorporated Definitions, as they existed in 1998, remain in effect as part of the Act. There is, of course, no dispute that the Act cannot be amended unless the Legislature complies with the VPA and that SB 1516 was not passed with a three-fourths majority in either chamber of the Legislature.

Both the Cross-Motion (at 3-4) and GRRC's joinder (at 2) reference a federal district court case – *Galassini v. Town of Fountain Hills* – as a reason why SB 1516 was necessary, arguing that "SB 1516 was designed in large part to remedy the vagueness in § 16-901" as identified in *Galassini*. No. CV 11-02097-PHX-JAT, 2013 WL 5445483, at *19 (D. Ariz. Sept. 30, 2013). The purpose behind SB 1516 is not relevant to whether SB 1516 amended the Act. The Incorporated Definitions are part of the Act and may not be changed by the Legislature, regardless of the purpose, unless it complies with the VPA. A federal court determination that a voter protected statute is unconstitutional would not relieve the Legislature of its obligations under the VPA.[2]

[2] Moreover, Defendants' assertions that the purpose of SB 1516 was to correct a purported issue with § 16-901 created by *Gallasini* is disingenuous. In a 2015 press

II. The *Brain* case does not control here.

Next, the Cross-Motion (at 5-9) relies on a misguided analogy to *Arizona Citizens Clean Elections Commission v. Brain*, 234 Ariz. 322 (2014) to argue that the Incorporated Definitions were not, in fact, incorporated into the Act. *Brain* has no purchase here. There, the Arizona Supreme Court considered a challenge to the constitutionality of HB 2593, which amended campaign contribution limits found in A.R.S. § 16-905 and referenced in § 16-941. *Brain*, 234 Ariz. at 324 ¶ 5. The Court ultimately concluded that § 16-941(B) was "most reasonably interpreted as establishing a formula" for campaign contribution limits rather than fixing campaign contribution limits. *Id.* at 325 ¶¶ 13-14. As support for this conclusion, the Court noted that: (1) § 16-941(B) used a percentage, which "is characteristic of a formula," (2) "the voters fixed monetary amounts in other parts of § 16-941 and elsewhere in the" Act, (3) "voters treated the § 16-941(B) limits differently from fixed amount limits specified elsewhere in the Act," (4) interpreting § 16-941(B) as fixing contribution limits would widen the gap between contribution limits for participating and non-participating candidates, which was likely contrary to voters' intent, (5) fixed contribution limits would create "a needlessly confusing system," and (6) the ballot and publicity materials did not contain language informing voters that the Act would permanently fix contribution limits. *Id.* 325-27 ¶¶ 15-21.

Brain is distinguishable here. With the Incorporated Definitions, the Act imported fixed, defined terms, not a formula that fluctuates. The Incorporated Definitions – in their fixed form – are key terms used throughout the Act. *See, e.g.*, A.R.S. § 16-941(A), (D) (contribution, expenditure, independent expenditure); § 16-942(A) (contribution and expenditure); § 16-958(A), (C) (independent expenditure and

---

release, the Secretary asserted that a different piece of legislation was "in response to a federal court ruling that Arizona's definition of a political committee was 'vague, overbroad and consequently unconstitutional in violation of the First Amendment.'" Press Release, Ariz. Sec'y of State, (April 15, 2015), https://azsos.gov/about-office/media-center/press-releases/291 (referencing *Gallasini*).

candidate's campaign committee). If any change to § 16-901 had the effect of amending the Act, the Legislature could change the Incorporated Definitions in such a way as to fundamentally undermine the purpose of the Commission and the Act without actually amending the Act. The voters did not intend to create a campaign finance system that could be manipulated and changed at the whim of those in power. *See* A.R.S. § 16-940(A) (noting that the purpose of the Act is to "improve the integrity of Arizona state government by diminishing the influence of special-interest money[.]").

The State Defendants (at 8) make much of the fact that the VPA and the Act were passed at the same time and if the VPA had failed, the Legislature would be able to change the Act whenever it wanted. But even if the VPA did not exist, the Legislature still could not change the Incorporated Definitions simply by amending § 16-901 – it would need to pass legislation ***explicitly amending the Act*** to make changes to § 16-901 effective as to the Act. *See* Ariz. Op. Att'y Gen. No. I78-171 (noting that it was "the responsibility of future sessions of the Arizona Legislature to decide whether" changes to a federal statute that had been incorporated into an Arizona statute "should be made applicable" to the Arizona statute). Accordingly, the comparison to the formula at issue in *Brain* fails. The Incorporated Definitions may only be amended or repealed if the Legislature complies with the VPA. It failed to do so here and the Cross-Motion should therefore be denied.

III. SB 1516 is plainly inconsistent with the Act.

Although it is clear that the Legislature cannot (and did not) change the Incorporated Definitions without complying with the VPA, any effort to get enough votes to do so would fail because SB 1516 is inconsistent with the Incorporated Definitions because it purported to repeal and replace all of the definitions in § 16-901, including the Incorporated Definitions. Yet, the State Defendants spend a significant portion of their brief (at 10-14) arguing that SB 1516 does not conflict with the Act. The Court should reject this argument. To the extent that SB 1516 purports to allow candidates to receive contributions or make expenditures that would not be permitted

under the Incorporated Definitions and the Act, SB 1516 is inconsistent with the Act and impermissibly attempts to amend the Act.

Of course, the Legislature cannot amend or repeal portions of the Act without complying with the VPA, which it did not do here. The Court should therefore find SB 1516 unconstitutional to the extent it amends or repeals portions of the Act.

IV. SB 1516 cannot diminish the Commission's authority to enforce the Act or reporting requirements found in title 16, chapter 6.

The State Defendants next argue (at 14-17) that SB 1516 does not remove any of the Commission's enforcement authority because the Commission "does not enjoy (and has never enjoyed) the broad enforcement authority Plaintiffs contend." To support their argument, however, the State Defendants rely upon a contorted reading of the Act. The Act is not only title 16, chapter 6, article 2 – the Act also amended article 1, referred to article 1, and incorporated by reference portions of article 1. The Act specifically gives the Commission authority to enforce ***any*** reporting requirement imposed by title 16, chapter 6, including reporting requirements in article 1: A.R.S. § 16-942(B) prescribes civil penalties for violations "by or on behalf of any candidate of any reporting requirement imposed by ***this chapter***[.]" (emphasis added) The Act then gives the Commission authority to adjudicate suspected violations by "a person [who] has violated any provision of this article," and to assess "civil penalt[ies] in accordance with § 16-942[.]" A.R.S. § 16-957(A)-(B); *see also* A.R.S. §§ 16-941(C)(2) (requiring all candidates to comply with election and campaign finance laws unless they conflict with the Act); -947(B)(2) (requiring candidates applying for Clean Elections funding to certify their compliance with campaign finance requirements in article 1). Accordingly, the Act vests the Commission with enforcement authority over violations of reporting requirements imposed by title 16, chapter 6 and to impose civil penalties.

The State Defendants argue that § 16-942(B) only allows the Commission to assess penalties against candidates, even though nothing in § 16-942(B) says that. The plain language of § 16-942(B) imposes a "civil penalty for a violation by or on behalf of

any candidate of any reporting requirement imposed by this chapter[.]" The phrase "by or on behalf of any candidate" does not limit such penalties to candidates only – it means a violation of reporting requirements by a candidate or by a non-candidate making an expenditure benefitting a candidate will trigger a civil penalty under the Act. *Id.* The State Defendants also point to the last sentence of § 16-942(B) which states that a "candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed[.]" Similarly, this does not limit the reach of § 16-942(B) to candidates – it simply means that if a candidate commits a violation of a reporting requirement, the candidate and his or her campaign account will be jointly and severally liable for the civil penalty imposed by the Act.

The State Defendants (at 16) contend that a "clear delineation of enforcement authority" existed before SB 1516, with the Secretary purportedly bearing sole responsibility for enforcing article 1 and the Commission limited to enforcing article 2. As set forth above, this is inaccurate based on the plain language of the Act. If such a delineation were clear, then SB 1516's amendments to § 16-938 providing that the Secretary is the "sole public officer" authorized to investigate alleged violations of article 1 would have no purpose. The State Defendants also argue (at 15) that prior to the enactment of SB 1516, amendments to § 16-905 already provided that alleged violations of article 1 were solely within the Secretary's jurisdiction. This argument fundamentally misses the point of this lawsuit, which is that the Legislature cannot repeal, amend, or alter the scope of the Commission's authority without complying with the VPA. To the extent prior amendments to § 16-905 sought to repeal, amend, or alter the scope of the Commission's authority, those amendments were also ineffective and unconstitutional.

Importantly, even indirect amendments to a voter-approved law are not permitted under the VPA. The Arizona Supreme Court has held that the Legislature effectively amended a voter-approved law when it passed a law inconsistent with the express terms of the voter-approved law. *See State v. Maestas*, --- Ariz. ---, 417 P.3d 774, 778 ¶¶ 15-

16 (Ariz. May 23, 2018) (holding that the Legislature had impermissibly attempted to amend the Arizona Medical Marijuana Act by enacting a statute purporting to criminalize marijuana possession that was authorized under that law). Even though the amendments to § 16-938 do not directly amend the Act, they are still unconstitutional to the extent they conflict with the Act.

The Legislature cannot interfere with or alter the authority of the Commission to enforce the Act, including any reporting requirement imposed by title 16, chapter 6. Because SB 1516 is an impermissible attempt to do just that, the Court should deny the Cross-Motion and grant Plaintiffs' motion.[3]

V. Conclusion.

The Cross-Motion grossly misstates the issues in this case and should be denied. The Incorporated Definitions are as much a part of the Act as if they were fully reprinted in § 16-961 and cannot be amended or repealed by the Legislature unless the requirements of the VPA are fulfilled. Additionally, the Legislature cannot diminish the authority of the Commission or repeal, amend, or supersede the Act without complying with the VPA. There is no dispute that the VPA's requirements were not met here. The Court should deny the Cross- Motion and enter judgment in favor of Plaintiffs.

DATED this 2nd day of July, 2018.

OSBORN MALEDON, P.A.

By /s/ Nathan T. Arrowsmith
Mary R. O'Grady
Joseph N. Roth
Nathan T. Arrowsmith
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant The Citizens Clean Elections Commission

[3] The Commission's position with respect to Plaintiffs' Article VII § 16 claim is set forth in the Commission's Response to Plaintiffs' Motion for Summary Judgment (at 10).

THE FOREGOING has been electronically filed and e-delivered this 2nd day of July, 2018, to:

The Honorable David K. Udall
Maricopa County Superior Court
222 E. Javelina, SE-2E
Mesa, AZ 85210

COPY of the foregoing e-mailed and mailed this 2nd day of July, 2018, to:

Israel G. Torres
James E. Barton II
Saman J. Golestan
TORRES LAW GROUP, PLLC
2239 W. Baseline Road
Tempe, AZ 85283
james@thetorresfirm.com
Attorneys for Plaintiffs

Timothy Berg
Emily Ward
Dena Sanders
FENNEMORE CRAIG, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, AZ 85016
tberg@fclaw.com
eward@fclaw.com
dsanders@fclaw.com
Attorneys for Defendants State of Arizona and Secretary of State Michele Reagan

Timothy A. La Sota
TIMOTHY A LA SOTA, PLC
2198 E. Camelback Road, Suite 305
Phoenix, AZ 85016
tim@timlasota.com
Attorneys for Defendant Governor's Regulatory Review Council

/s/ Debra Huss

7649411

Timothy A. La Sota, SBN 020539
TIMOTHY A. LA SOTA, PLC
2198 EAST CAMELBACK ROAD, SUITE 305
PHOENIX, ARIZONA 85016
TELEPHONE: (602) 515-2649
tim@timlasota.com
Attorney for Defendant Governor's Regulatory Review Council Members

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

ARIZONA ADVOCACY NETWORK; *et al.*; Plaintiffs, vs. THE STATE OF ARIZONA, a body politic; MICHELE REAGAN, in her official capacity as Secretary of State; THE CITIZENS CLEAN ELECTIONS COMMISSION; and NICOLE ONG COLYER, BRENDA BURNS, JOHN SUNDT, CONNIE WILHELM, FRANK THORWALD, STEVE VOELLER, AND CHRISTOPHER AMES, each in their official capacity as Governor's Regulatory Review Council members; Defendants.	No. CV2017-096705 **GRRC DEFENDANTS REPLY TO PLAINTIFFS' RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT** (assigned to the Honorable David Udall)

Defendants NICOLE ONG COLYER, BRENDA BURNS, JOHN SUNDT, CONNIE WILHELM, FRANK THORWALD, STEVE VOELLER, AND CHRISTOPHER AMES (collectively, the "GRRC Defendants"), each in their official capacity as Governor's Regulatory Review Council members, join in the Reply to Cross-Motion for Summary Judgment submitted by Defendants State of Arizona and Michele Reagan.

ITEM V - GRRC Reply to Plaintiffs

In addition, the GRRC Defendants would like to make the following points.

I. GRRC'S REPEAL OF THE CLEAN ELECTIONS COMMISSION'S RULES DID NOT VIOLATE THE VOTER PROTECTION ACT

Plaintiffs start their rebuttal on this point by erring on the factual background behind the expiration of the Clean Elections Commission's rules, and GRRC's actions with regard to that. But as Plaintiffs state, the motivation of GRRC is not terribly important. The real issue is whether GRRC's actions were legal[1], so the GRRC Defendants will cover that first.

It is ironic to see the Arizona Advocacy Network, the self-described "protector"[2] of the Clean Elections Act, attempt to eviscerate an important provision of the Act. The Clean Elections Act is very specific in terms of what rulemaking authority is exempted from the general rulemaking process applicable to most rulemaking agencies in Arizona. *See* A.R.S. §§ 41-1021 through 41-1038. The Clean Elections Act[3] exempts Commission

---

[1] Plaintiffs have never been entirely clear on what, exactly, GRRC's role in this lawsuit is, beyond somewhat vague claims that Senate Bill 1516 somehow had something to do with GRRC's claimed illegal actions. This is not even accurate from a foundational standpoint, but it is true that there is an ongoing dispute between GRRC and the Clean Elections Commission regarding each agency's respective powers. Since Plaintiffs seem to be (cryptically) invoking that dispute, GRRC will state the basis for its jurisdiction.

[2] "Arizona Advocacy Network has taken on the responsibility of protecting the CEA in the absence of the Clean Elections Institute." Plaintiffs' First Amended Verified Complaint, p. 8, ¶ 29.

[3] Because the main issue involves questions related to the objectives of the electorate in passing the Clean Elections Act, in this brief GRRC refers to the language of the Clean Elections Act as passed by the voters of Arizona in 1998. (See Proposition 200, 1998 General Election, http://apps.azsos.gov/election/1998/Info/PubPamphlet/prop200.pdf.) The Act has been amended since it was passed. Though GRRC Defendants point to some of these changes in its argument, the changes to the Act do not have a fundamental effect on the issues in this case that

rules from the general rule making provisions: "Commission rulemaking is exempt from Title 41, Article **3**, Chapter 6…" A.R.S. 16-956(D)(emphasis added)[4]. Instead, the Clean Elections Act spells out a different, more streamlined process for the Commission to follow in adopting rules:

> …the Commission shall submit the rules for publication and the secretary of state shall publish the rules in the Arizona Administrative Register. The commission shall propose and adopt rules in public meetings, with at least sixty days allowed for interested parties to comment after the rules are proposed.

Id. While the Commission is exempt from the rulemaking procedures set forth in Title 41, Chapter 6, Article 3, the Clean Elections Act does not exempt Commission rules from Title 41, Chapter 6, Article **5**.

The duties performed by GRRC are codified in Title 41, Chapter 6, Article **5**. Specifically, A.R.S. § 41-1056 requires for the five-year review for all rules, and this statute forms the basis of the dispute between GRRC and the Clean Elections Commission, and the claimed illegal actions by GRRC. A.R.S. § 41-1056(A)("At least once every five years, each agency shall review all of its rules…") A.R.S. § 41-1056(G) further states that "[t]he agency shall notify the council of an amendment or repeal of a rule for which the council has set an expiration date under subsection E of this section. If the agency does not amend or repeal the rule by the date specified by the council under subsection E of this section or the extended date under subsection F of this section, the rule automatically expires." These are statutory duties, actions that GRRC is required by law to take.

---

involve GRRC. That is, as far as GRRC's role is concerned, the Act is substantively the same now as it was when passed.

[4] This statute is now found at A.R.S. § 16-956(C).

Expiration by default of a rule that GRRC had ordered be repealed is exactly what happened here. GRRC required the Clean Elections Commission to repeal Rule R2-20-109(F)(2)-(12) and (G), which the Commission subsequently split up between Rules R2-20-109 and R2-20-111[5], the Clean Elections Commission did not do so by the expiration date, and hence those rules have automatically expired and are no longer valid. The Clean Elections Act did not take away GRRC's power to conduct this five-year review. And in fact, the Clean Elections Act's provision exempting certain rulemaking functions, but not exempting others (such as the review process outlined above), is strong evidence that the voters very much intended that GRRC continue to perform this function. *Pima County v. Heinfeld*, 654 P.2d 281, 282, 134 Ariz. 133, 134 (1982) ("A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed.")

In addition, GRRC's five-year review function, embodied in A.R.S. § 41-1056, has been in Article 5 of Chapter 6, Title 41 since before the Clean Elections Act was passed. *See* A.R.S. § 41-1051 *et seq.*, Credits and historical notes. In interpreting initiatives passed by the voters, Arizona courts presume that voters understand the current state of the law. *Hall v. Elected Officials' Retirement Plan*, 383 P.3d 1107, 1128, 241 Ariz. 33, 54 (2016) ("We presume that the legislature (in this instance, the measure's drafters and the electorate) knows the prior law…") If the intent was to exempt the Commission from all statutes related to rulemaking and rule review, that could have easily been accomplished.

The Clean Elections Act's manner of exempting the Commission's rule making powers, in conjunction with the absence of an exemption from GRRC's rule review

[5] The mechanics of this are explained in greater detail in Section II below.

function, leads to the inescapable conclusion that GRRC's rule review function remains valid and intact. GRRC has a statutory obligation to review all rules, including those passed by the Clean Elections Commission. It discharged that duty lawfully. If the Commission feels that the Clean Elections Act should be changed, they should simply attempt to amend the Act following the rules of the Voter Protection Act that they champion when it suits them.

II. PLAINTIFFS CONTINUE TO CLING TO THE ERRONEOUS ASSERTION THAT THERE IS SOME CORRELATION BETWEEN THE PASSAGE OF SENATE BILL 1516 AND THE EXPIRATON OF COMMISSION RULES R2-20-109 AND R2-20-111

Though it is ultimately less important than the main issue briefed above, the record needs to be set straight about the lack of a relationship between GRRC's vote to require the repeal of R2-20-109(F)(2)-(12) and (G) and the passage of Senate Bill 1516.

To begin with, the reason that the minutes of February 2, 2016 only list R2-20-109 is because after the February 2, 2016 meeting, the Clean Elections Commission reorganized what had been R2-20-109 into R2-20-109 and R2-20-111 in an ineffective attempt to reimplement this rule. That is why GRRC's position is that both of these rules have automatically expired. The Clean Elections Commission cannot avoid the law by simply giving a set-to-expire rule a new number.

In addition, Plaintiffs' claim that "Defendant GRRC members had actual or constructive knowledge of SB 1516 before it was formally introduced or passed in the legislature because of the ten month public drafting, notice and advice process Defendants admit happened." [Response, p. 13, lines 14-17]. Plaintiffs cite no legal support for their

proposition that it should just be assumed that GRRC has knowledge of just about anything that happens or might happen at the Legislature. But their argument also ignores the fundamentals of what GRRC does. It is GRRC's legal duty to review all rules of Arizona agencies, which cover wide-ranging areas including public health and safety, transportation, and the environment. GRRC has no special interest in campaign finance related bills such as Senate Bill 1516. The backhanded compliment notwithstanding, GRRC members are not all knowing.

III. PLAINTIFFS' ENDORSEMENT OF THE ABILITY OF THE LEGISLATURE TO FIX CONSTITUTIONAL PROBLEMS WITH THE CLEAN ELECTIONS ACT WHEN IT SUITS THEM IS A TACIT ADMISSION THAT PRESERVING THE LEGISLATURE'S ABILITY TO DO THIS GOING FORWARD IS SOMETHING THIS COURT SHOULD CONSIDER

Curiously, Plaintiffs criticize the GRRC Defendants argument that this Court should consider the "legislative straight jacket" that the Plaintiffs ask this Court to impose on the Legislature. Specifically, they call this a "speculative non-sequitur." [Response, p. 10, line 6.] And yet, elsewhere in their brief, they praise the Legislature's 2012 repeal of the unconstitutional matching funds provision as "further[ing] the purpose [of the Clean Elections Act] because the people had intended to pass a working constitutional law…" [Response, p. 12, lines 11-12.]

Plaintiffs apparently agree that the Legislature has already had to act to preserve the constitutional aspects of the Clean Elections Act. It is true that the Legislature was able to put together a three-quarter vote in that circumstance, but such bipartisan agreement on anything of importance is rare, and even less so on controversial campaign

finance matters. The bottom line is that this Court should consider whether the voters of this state truly intended the position advocated by the Plaintiffs, which could ultimately doom the parts of the Clean Elections Act that are still valid law by making it politically and practically impossible to change it.

IV. CONCLUSION

For the foregoing reason, the GRRC Defendants respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment and grant the Defendants' Cross-Motions for Summary Judgment.

RESPECTFULLY SUBMITTED this 17th day of July, 2018.

TIMOTHY A. LA SOTA, PLC

By: /s/ Timothy A. La Sota
Timothy A. La Sota
2198 East Camelback Road, Suite 305
Phoenix, Arizona 85016
tim@timlasota.com
Attorney for Defendant members of the Governor's Regulatory Review Council

I hereby certify that on July 17, 2018, I caused the foregoing document to was filed with the Maricopa County Superior Court Clerk via the Turbo Court E-file system.

I hereby certify that on July 17, 2018 the foregoing was sent via first class U.S. mail and email to:

Israel G. Torres
James E. Barton II
Saman J. Golestan
TORRES LAW GROUP, PLLC
2239 West Baseline Road
Tempe, Arizona 85283
James@TheTorresFirm.com
Attorneys for Plaintiffs

Timothy Berg
FENNERMORE CRAIG
2394 E Camelback Rd. Suite 600
Phoenix, AZ 85016
tberg@fclaw.com
Attorneys for Defendant State of Arizona and Michele Reagan

Mary O'Grady
OSBORN MALEDON
2929 North Central Avenue
Twenty-First Floor
Phoenix, AZ 85012-2793
mogrady@omlaw.com
Attorneys for Defendant Citizens Clean Elections Commission

/s/ Timothy A. La Sota

FENNEMORE CRAIG, P.C.
Timothy Berg (No. 004170)
Janice Proctor-Murphy (No. 013078)
Emily Ward (No. 029963)
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
Telephone: (602) 916-5000
Email: tberg@fclaw.com
Email: jpmurphy@fclaw.com
Email: eward@fclaw.com

Attorneys for Defendants
State of Arizona and
Secretary of State Michele Reagan

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

ARIZONA ADVOCACY NETWORK; et al., Plaintiffs, v. THE STATE OF ARIZONA, a body politic; MICHELE REAGAN, in her official capacity as Secretary of State; THE CITIZENS CLEAN ELECTIONS COMMISSION; and NICOLE ONG COLYER, BRENDA BURNS, JOHN SUNDT, CONNIE WILHELM, FRANK THORWALD, STEVE VOELLER, and CHRISTOPHER AMES, each in their official capacity as Governor's Regulatory Review Council members, Defendants.	No. CV2017-096705 **DEFENDANTS STATE OF ARIZONA'S AND SECRETARY OF STATE MICHELE REAGAN'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** (Assigned to the Hon. Janice Crawford) ***Oral Argument Requested***

Plaintiffs and the Commission set forth conflicting and impractical constructions of how the VPA should be interpreted. Plaintiffs contend that any statute merely referenced in a voter-passed statute is enshrined with VPA protection. The Commission, on the other hand, asserts that voter-passed statutes should be interpreted with the referenced statutes as the referenced statutes existed when the voter-passed statute became law. Instead of these unreasonable interpretations, the Court should focus on what the VPA's text

commands: only when a statute amends, repeals, or supersedes a voter-passed statute is the VPA implicated. Neither Plaintiffs nor the Commission has shown that S.B. 1516 amends, repeals, or supersedes any statute in Article 2. As such, the Court should grant summary judgment in favor of Defendants the State of Arizona (the "State") and Secretary of State Michele Reagan (the "Secretary").

I. S.B. 1516 DOES NOT VIOLATE THE VPA BECAUSE IT DOES NOT AMEND ARTICLE 2.

Both Plaintiffs and the Commission advance multiple (and sometimes conflicting) theories in an effort to substantiate their claim that S.B. 1516 violates the VPA. As Defendants explained in their Response and Cross-Motion, whether S.B. 1516 violates the VPA turns upon whether S.B. 1516 amends, supersedes, or repeals a statute in Article 2.

A. Plaintiffs' and the Commission's contrary constructions of the VPA are divorced from the VPA's text and would be impractically difficult to understand.

Plaintiffs contend that any statute that a voter-passed statute references is shielded from any change indefinitely unless the proposed change receives three-fourths vote of the legislature and furthers the voter-passed statute's purpose under the VPA. As applied here, because portions of S.B. 1516 are referenced in Article 2, Plaintiffs move this Court to declare those portions of S.B. 1516 unconstitutional both as to Article 1 and Article 2 and enjoin their enforcement.

In contrast, the Commission maintains that the legislature may change a statute that a voter-passed statute references, but such a change is unconstitutional as applied to the voter-passed statute. Instead, the prior, unchanged version of the referenced statute remains in effect for purposes of interpreting the voter-passed statute. Pursuant to that theory, the Commission argues that S.B. 1516's changes would apply to Article 1, but not Article 2. To the extent Article 2 referenced a definition in Article 1, the applicable definition would be that utilized in 1998 when the voters passed Article 2. Both Plaintiffs' and the Commission's interpretations are unmoored from the actual text of the VPA and are also unworkable in practice.

Under Plaintiffs' VPA theory, the VPA enshrines any statute merely referenced in a voter-passed statute from any amendment unless such amendment receives three-fourths majority vote and furthers the purpose of the voter-passed statute. However, the VPA was designed to protect voter-passed statutes—not the additional statutes merely referenced therein. To bestow the VPA with the ability to immunize from any amendment other statutes that voters did not pass stretches the VPA beyond its intended design. *See* Analysis by Legislative Counsel, Publicity Pamphlet for Proposition 105 (VPA), *available at* http://apps.azsos.gov/election/1998/Info/PubPamphlet/Prop105.html (explaining that the VPA "[p]rohibits the State Legislature from ever repealing the approved measure or from amending an approved measure except as provided below" (emphases added)). The VPA says nothing about constraining the legislature's power to amend statutes only incorporated by reference into a voter-passed statute.

The Commission's VPA theory proposes an unworkable set of circumstances wherein readers of Article 2 must somehow divine that A.R.S. § 16-961's references to the definitions in A.R.S. § 16-901 actually refer to the definitions as they existed in the 1998 version of A.R.S. § 16-901—not the current definitions. *See Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 327, ¶ 20 (2014) (counseling against an interpretation that would create a "needlessly confusing system"). The same term used in two different articles of Chapter 6 would have different meanings, but that difference would not be apparent from the face of the statutes. The Commission fails to explain how this could work as a practical matter, making its construction of the VPA of questionable value.

Moreover, the Commission does not adhere to its own construction of the VPA. The Commission's rules do not refer to the definitions in A.R.S. § 16-901 as they were in 1998. By way of example, even though the term "expenditure" is included in A.R.S. § 16-961's list of terms referencing the definition of "expenditure" in A.R.S. § 16-901, the Commission uses the current definition of "expenditure" under S.B. 1516—not the definition in 1998. Rule R2-20-104 provides, "Spending the money lawfully prior to

April 30 of an election year in a way that does not constitute a direct campaign purpose and does not meet the definition of 'expenditure' under A.R.S. § 16-901(24)." The definition of "expenditure" in 1998, however, was in A.R.S. § 16-901(8)—not A.R.S. § 16-901(24). *See* 1997 Ariz. Sess. Laws ch. 5, § 37 (2nd Spec. Sess.). Ironically, the definition of "expenditure" did not move to A.R.S. § 16-901(24) until S.B. 1516.

This Court should not adopt either Plaintiffs' or the Commission's overly expansive construction of the VPA in determining the fate of S.B. 1516. Instead, the Court should examine simply whether S.B. 1516 amends, supersedes, or repeals a statute in Article 2.

B. S.B. 1516 Does Not Amend the Definitions in § 16-961.

1. Arizona has abrogated the specific reference canon.

Both Plaintiffs' and the Commission's theories of S.B. 1516 "indirectly amending" A.R.S. § 16-961 are premised on this Court following their reading of the incorporation-by-reference canon of construction. For support, Plaintiffs and the Commission predominantly rely on *Maricopa Cty v. Osborn*, 60 Ariz. 290 (1943) and *Dairy and Consumers Co-Op. Ass'n v. Ariz. Tax Comm'n*, 74 Ariz. 35 (1952)[1] to support their theory that S.B. 1516 cannot amend definitions incorporated by reference into § 16-961.

Arizona Citizens Clean Elections Commission v. Brain undercuts the specific reference canon. 234 Ariz. at 328, ¶ 27. Although *Brain* did not mention *Osborn* or *Dairy* by name, it counseled against applying the specific reference canon in *Nelson Machinery Co. v. Yavapai Cty.*, 108 Ariz. 8, 11 (1971), which cited *Osborn* and *Dairy*. 234 Ariz. at 328, ¶ 27. *Brain* even went so far as to explicitly "recogniz[e] the canon's

[1] *Osborn* and *Dairy* involved quite different situations than the one before this Court. In both cases, the issue was not whether an amendment to a prior definitional statute that was later incorporated by reference into a subsequent statute would be interpreted pursuant to the amended definitions. Rather, the *Osborn* and *Dairy* courts addressed whether the repeal of a statute incorporated into another statute meant that the latter statute could be considered repealed as well. *E.g.*, *Dairy*, 74 Ariz. at 37 (considering whether the repeal of A.R.S. § 73-1303(a), which was adopted by reference in A.R.S. § 73-1306, was indicative of a legislative intent to absolve the plaintiff from paying the tax under A.R.S. § 73-1306). Here, however, no party contends that S.B. 1516's changes to the definitions in § 16-901 would somehow nullify any statute in Article 2 referencing those definitions.

limitations" and noted that the canon "does not help ascertain the voters' intent." *Id.*; *see also id.* at 329–30, ¶ 35 (advocating for "disclaim[ing] the specific reference canon entirely" (Bales, C.J., dissenting)). To say that "Arizona law is clear" that the definitions incorporated in § 16-961 must be the 1998 definitions as the Commission argues ignores the obvious directives of *Brain*.

In addition to rejecting the specific reference canon, *Brain* signaled approval of other legislative enactments of specific rules of construction holding that a reference to any portion of a statute incorporates all revisions or amendments of that statute. *Id.* at 328, ¶ 27, n.4 (citing Colo. Rev. Stat. Ann. § 2-4-209 (West 2014) ("A reference to any portion of a statute applies to all reenactments, revisions, or amendments thereof.") and Cal. Gov't Code § 9 (West 2014) ("Whenever reference is made to any portion of this code or any other law of this State, the reference applies to all amendments and additions now or hereafter made.")). Indeed, *Brain*'s suggestion of such a legislative canon of construction was acted upon by the Arizona Legislature in passing A.R.S. § 1-255 just a year after *Brain* in 2015. A.R.S. § 1-255 is virtually identical to Colo. Rev. Stat. Ann. § 2-4-209 and Cal. Gov't Code § 9, instructing that "[a] reference to a statute or portion of a statute applies to all reenactments, revisions or amendments of the statute or portion of the statute." A.R.S. § 1-255 provides this Court with the applicable principle of statutory construction to apply herein: S.B. 1516's amendments to the definitions in § 16-901 apply to A.R.S. § 16-961.

The Commission argues that A.R.S. § 1-255 cannot be retroactively applied to any provision in Article 2. *See* Commission's Response to Defendants' Cross-Motion for Summary Judgment ("Comm'n Resp.") at 2 n.1. A.R.S. § 1-255 is not being "retroactively applied" because it does not contain any substantive rights; it is a procedural canon of construction that would presently apply to this Court's construction of S.B. 1516. *See State v. Aguilar*, 218 Ariz. 25, 32, ¶ 25 (App. 2008) ("[A] statute is not impermissibly retroactive if it is merely procedural and does not affect an earlier established substantive right.").

To the extent the Commission is arguing that A.R.S. § 1-255 must be ignored by this Court because it infringes on the VPA, *see* Comm'n Resp. at 2 n.1, such an argument grossly overinflates the scope of the VPA—allowing it to swallow any Arizona law enacted after it was passed in 1998. The VPA is not a rule of universal application; it only prevents the legislature from amending, superseding, or repealing a voter-passed statute unless such legislation receives three-fourths majority vote of the legislature and furthers the purpose of the voter-passed law.

2. *Brain* establishes that S.B. 1516 does not amend § 16-961.

In an attempt to distinguish *Brain*, Plaintiffs and the Commission contend that *Brain* does not apply because Article 2 (A.R.S. § 16-961) "imported fixed, defined terms, not a formula that fluctuates." Comm'n Resp. at 4; Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment ("Pls.' Resp.") at 11 (attempting to distinguish *Brain* by arguing that "[h]ere, there is no issue of a numerical input into a formula"). Although *Brain* described § 16-941(B) as a "formula," the issue before the Court actually involved a legislative change to a definitional-type provision incorporated in a voter-passed statute. Specifically, the Court addressed whether the legislature could amend then existing § 16-905's campaign contribution limits when the voter-passed § 16-941(B) referenced the "limits specified in § 16-905." Contrary to Plaintiffs' and the Commission's argument, the text of § 16-941(B) did not specify a "formula." The court in *Brain* only characterized § 16-941(B) as a "formula" in determining whether to interpret that section as providing "fixed limits" or a "formula." 234 Ariz. at 325, ¶ 13 ("That subsection can be reasonably read as either providing a formula for calculating campaign contribution limits for nonparticipating candidates, applicable as the amounts prescribed in § 16–905 change (as Intervenors argue and the superior court determined) or fixing those limits at eighty percent of the amounts listed in § 16–905 at the time of the 1998 election (as the Commission argues and the court of appeals held)."). The text of § 16-941(B) contains a definitional limit in § 16-905 just as § 16-961 does with the definitions in § 16-901. The issue in *Brain* is nearly identical to the issue before this

Court.

The Commission also argues that *Brain* is somehow different because § 16-961's incorporated definitions are "key terms used throughout the Act." Comm'n Resp. at 4–5. However, § 16-941(B)'s incorporation of campaign contribution limits in § 16-905 was just as much (if not more) of a "key term" as the definitions in § 16-901 incorporated into § 16-961.

3. S.B. 1516's definitions can be read harmoniously with § 16-961.

As explained by *Cave Creek Unified Sch. Dist. v. Ducey*, if conflicting statutes can be "harmonized to give each effect and meaning," there is no amendment or repeal for purposes of the VPA. 233 Ariz. 1, 7, ¶ 8 (2013). The Commission summarily contends that S.B. 1516 is "plainly inconsistent" with Article 2 simply because § 16-901's definitions changed. Comm'n Resp. at 5–6. Notably, the Commission does not actually articulate how S.B. 1516 is inconsistent with Article 2. Plaintiffs' and the Commission's only argument is simply that the definitions in § 16-901 are now different so there "must be" a conflict with Article 2 anytime those definitions are referenced in Article 2. *Brain* forecloses this argument.

In response to Plaintiffs' Motion, the Commission contends that at least one of S.B. 1516's definitions as applied to Article 2 would "fundamentally undermine" Article 2. *See* Commission's Response to Plaintiffs' Motion for Summary Judgment ("Comm'n Resp. to Pls.' MSJ") at 7. The Commission takes issue with S.B. 1516's change to the definition of "political committee," arguing that the newly added definition of "primary purpose" within the definition of "political committee" "plainly purports to exempt from the reporting requirements of the Act certain entities that would fall under the definition of 'political committee' incorporated into the Act." *Id.* However, there are only three references to "political committee" within Article 2—none of which impose reporting requirements within Article 2. *See* A.R.S. §§ 16-955 ("No commissioner, during the commissioner's tenure or for three years thereafter, shall seek or hold any other public office, serve as an officer of any political committee or employ or be employed as a

lobbyist."); 16-958 ("The secretary of state shall distribute computer software to political committees to accommodate such electronic filing [of reports required under Article 1]."); and 16-961 (incorporating definitions from § 16-901).

The Commission also contends that S.B. 1516's exemptions for certain contributions in A.R.S. § 16-911(B) "fundamentally undermines" the purpose of Article 2. *See* Comm'n Resp. to Pls.' MSJ at 7. However, A.R.S. § 16-911(B) does not apply to Article 2. Article 2's references to "contribution" are controlled by A.R.S. § 16-961, which only incorporates the definition in A.R.S. § 16-901—not A.R.S. § 16-911(B).[2]

C. S.B. 1516 Does Not Abrogate the Commission's Authority.

The Commission's Response does not actually articulate any conflict between S.B. 1516 and the Commission's authority. Instead, the Commission pieces together an amalgamation of statutes in Article 2 in an attempt to justify the Commission's belief that it has such broad powers as to "enforce <u>any</u> reporting requirement imposed by title 16, chapter 6, including reporting requirements in article 1." Comm'n Resp. at 6. However, a common sense reading of Article 2 shows that the Commission's authority is limited to reporting requirements involving candidates—not <u>any</u> reporting requirement in Article 1.

The Commission predominantly relies upon A.R.S. § 16-942(B), which provides for civil penalties for violations "by or on behalf <u>of any candidate</u>[3] of any reporting

---

[2] The Commission does not challenge the definitional change of "contribution" in A.R.S. § 16-901, which makes sense considering that the change was minimal. *Compare* A.R.S. § 16-901 (2015) ("'Contribution' means any gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing an election . . . ."), *with* A.R.S. § 16-901 (2016) ("'Contribution' means any money, advance, deposit or other thing of value that is made to a person for the purpose of influencing an election.").

[3] The Commission argues that the phrase "by or on behalf of any candidate" in A.R.S. § 16-942(B) does not only apply to candidates. Comm'n Resp. at 7. To the extent § 16-942(B) does not exclusively apply to candidates themselves, it is limited to reports "on behalf of candidates"—not everyone as the Commission contends. Plainly, Article 2's reporting requirements and corresponding penalties concern candidates for public office—not elections generally. *See* Legislative Council Analysis, Publicity Pamphlet for Proposition 200 (Clean Elections Act), *available at* http://apps.azsos.gov/election/1998/Info/PubPamphlet/Prop200.html ("Proposition 200 would establish reporting requirements for participating candidates in addition to the requirements under current law and would provide for various penalties, including forfeiture of office, for violations.").

requirement imposed by this chapter." Comm'n Resp. at 6 (selectively quoting A.R.S. § 16-942(B) (emphasis added)). The Commission then bootstraps some selected quotations from A.R.S. § 16-957(A) and (B) to contend that Article 2 "gives the Commission authority to adjudicate suspected violations by 'a person [who] has violated any provision of this article,'[4] and to assess 'civil penalt[ies] in accordance with § 16-942.'" *Id.* (selectively quoting A.R.S. § 16-957(A), (B) (emphasis added)). After blending those three provisions together, the Commission concludes that it has the "enforcement authority over violations of reporting requirements imposed by title 16, chapter 6, and to impose civil penalties." *Id.*

The more accurate and controlling description of the Commission's enforcement authority is found in A.R.S. § 16-956 entitled "Enforcement Duties." That statute makes clear that the Commission is only entitled to "[e]nforce this article [2]"—not all of Chapter 6. A.R.S. § 16-956(A)(7) (emphasis added). It also clearly states that the Commission is only entitled to "monitor reports filed pursuant to this chapter"—not police reporting requirement violations. *Id.* (emphasis added).

Further, construction of the Commission's authority under Article 2 turns upon the intent of the voters, and here, there is no evidence that the voters believed the Commission would enforce all reporting requirements in Chapter 6. In fact, at the time the voters passed Article 2 in 1998, the existing law specified that the secretary of state was to investigate violations of Article 1 and the attorney general, county attorney, or city attorney was to impose penalties for such violations of Article 1. A.R.S. § 16-924(A) (1994) ("Unless another penalty is specifically prescribed in this article, if the secretary of state has reasonable cause to believe that a person is violating any provision of this article, the secretary of state shall notify the attorney general for a violation regarding a statewide office or the legislature, notify the county attorney for that county for a violation regarding a county office or notify the city or town attorney for a violation regarding a

[4] Of course, the Commission overlooks A.R.S. § 16-957(A)'s explicit reference to Article 2—not Chapter 6.

city or town office."). Without some specific clarification in the text of Article 2 specifying that the Commission was going to assume those duties, the voters could not have intended the Commission to take over those responsibilities from the Secretary of State and others.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIM.

Plaintiffs' Response does not challenge (or even address) Defendants' argument that Plaintiffs' Equal Protection Claim is moot or that Plaintiffs cannot obtain attorneys' fees for the moot claim. As such, the Court should grant Defendants summary judgment on Plaintiffs' Equal Protection Claim. *See* Ariz. R. Civ. P. 56(e).

III. S.B. 1516 DOES NOT VIOLATE ARTICLE VII, § 16.

Plaintiffs' Response advances an interpretation of Article VII, § 16 that is entirely untethered from the text of Article VII, § 16. According to Plaintiffs, "Once the legislature acted pursuant to the constitutional mandate in setting the reporting standards by which persons or entities must report, it cannot then act to reduce or remove the standards." Pls.' Resp. at 15; *see also id.* at 17 (asserting that "the legislature cannot unwind or repeal the system it has created under constitutional mandate unless it replaces it with a similarly compliant measure"). Article VII, § 16, however, only requires the legislature to pass <u>one</u> law at its <u>first session</u> providing for general publicity. *See* Ariz. Const., art. VII, § 16 ("The legislature, at its first session, shall enact a law providing for a general publicity, before and after election, of all campaign contributions to, and expenditures of campaign committees and candidates for public office."). Article VII, § 16 says nothing about future laws, maintaining the same law enacted at the first session, or even what a "law providing for a general publicity" requires. Without any of these necessary provisions, S.B. 1516 cannot violate Article VII, § 16 because there is no portion of Article VII, § 16 that S.B. 1516 contravenes.

Plaintiffs also argue that Defendants' "discussion of a private right of action or self-executing provision is irrelevant" because Plaintiffs are only "asking for prospective,

injunctive relief." Pls.' Resp. at 16. Precisely because Plaintiffs are seeking relief demonstrates why Plaintiffs must establish the predicate cause of action—i.e., a private right of action. *See Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451, 454 (App. 1984). Similarly, because Article VII, § 16 is not self-executing in that it requires the legislature to prospectively "enact a law," it is only the subsequent enactment that could potentially create a private cause of action—not Article VII, § 16's requirement for the legislature to pass a law.

IV. CONCLUSION

Because neither Plaintiffs nor the Commission can show that S.B. 1516 amends, supersedes, or repeals any statute in Article 2, Plaintiffs' VPA claim must fail. Plaintiffs' claim under Article VII, § 16 should similarly fail because that constitutional provision does not afford Plaintiffs a private right of action. Accordingly, the Court should deny Plaintiffs' Motion for Summary Judgment and grant the State's and the Secretary's Cross-Motion for Summary Judgment.

DATED this 17th day of July, 2018.

FENNEMORE CRAIG, P.C.

By /s/ *Timothy Berg*
Timothy Berg
Janice Proctor-Murphy
Emily Ward
Attorneys for Defendants
State of Arizona and
Secretary of State Michele Reagan

ELECTRONICALLY FILED
on the 17th day of July, 2018, with the
Clerk of the Maricopa County Superior
Court using AZTurboCourt.

COPY transmitted via eFiling system to:

The Honorable Janice Crawford
Maricopa County Superior Court
222 E. Javelina Avenue, Room 2E/205
Mesa, AZ 85210-6234

A copy has been emailed and mailed this
17th day of July, 2018, to:

Israel G. Torres
James E. Barton II
Saman J. Golestan
Torres Law Group, PLLC
2239 West Baseline Road
Tempe, AZ 85283
Email: James@TheTorresFirm.com
Attorneys for Plaintiffs

Mary R. O'Grady
Joseph N. Roth
Nathan T. Arrowsmith
Osborn Maledon, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, AZ 85012-2793
Email: mogrady@omlaw.com
Email: jroth@omlaw.com
Email: narrowsmith@omlaw.com
Attorneys for The Citizens Clean Elections Commission

Timothy A. La Sota
Timothy A. La Sota, PLC
2198 E. Camelback Road, Suite 305
Phoenix, AZ 85016-4747
Email: tim@timlasota.com
Attorneys for GRCC Members

/s/ *Phyllis Warren*

Chris DeRose, Clerk of Court
*** Electronically Filed ***
07/16/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2018-009512 07/13/2018

HONORABLE MARGARET R. MAHONEY

CLERK OF THE COURT
G. Verbil
Deputy

ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

MARY R O'GRADY

v.

JAVAN MESNARD, et al.

TIMOTHY BERG
JUDGE GATES

MINUTE ENTRY

The Court learned today that this elections matter has been assigned to it. The parties have today filed a stipulation to set an expedited briefing schedule on their cross-motions for summary judgment and have also requested oral argument on those cross-motions on an accelerated basis to be held July 27, 30, 31 or August 1, 2018.

This Division recuses itself due to unavailability and defers to Judge Gates to reassign the matter to a Judge who will be available during the dates at issue.

ITEM V - Superior Court Ruling in Single Subj Case

Mary R. O'Grady, No. 011434
Joseph N. Roth, No. 025725
Nathan T. Arrowsmith, No. 031165
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
mogrady@omlaw.com
jroth@omlaw.com
narrowsmith@omlaw.com

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Legacy Foundation Action Fund, an Iowa non-profit corporation, Plaintiff, vs. Citizens Clean Elections Commission, Defendant.	No. CV2018-004532 Consolidated with CV2018-006031 **CITIZENS CLEAN ELECTIONS COMMISSION'S MOTION TO DISMISS**
Citizens Clean Elections Commission, Plaintiff, vs. Legacy Foundation Action Fund, an Iowa non-profit corporation, Defendant.	(Assigned to the Honorable Christopher Whitten)

The complaint filed by Legacy Foundation Action Fund ("LFAF") in this matter is barred and should be dismissed. LFAF's complaint is an impermissible collateral attack on a final decision of the Citizens Clean Elections Commission (the "Commission"). LFAF had an opportunity to raise all of its claims challenging the Commission's decision via direct appeal of the Commission's decision. LFAF failed to timely do so and the Arizona Supreme Court unanimously affirmed the dismissal of its

case. *See Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 408 P.3d 828 (Ariz. 2018).

LFAF's complaint is yet another round of litigation in LFAF's effort to undo its error. But the special action jurisdiction it invokes does not apply here. Special action jurisdiction is available **only** when there is no adequate remedy available via appeal. LFAF had the right to appeal; it failed to invoke its right. The failure to take advantage of a right to appeal does not convert an adequate right to appeal into an inadequate one. *See Rosenberg v. Ariz. Bd. of Regents*, 118 Ariz. 489, 493 (1978) (where appellant "had an appeal under the Administrative Review Act, it cannot be said she did not have an adequate remedy at law" even though she failed to timely file an appeal). The Commission's decision is now final, conclusively presumed to be just, reasonable, and lawful, and *res judicata* as to all issues that were or might have been litigated. LFAF is therefore precluded from re-litigating the Commission's decision and the Court should dismiss LFAF's complaint in its entirety.

I. Factual Background.

The relevant factual background of this complaint has been laid out numerous times in several briefs of which the Court can take judicial notice.[1]

In 1998, Arizona voters approved the Citizens Clean Elections Act (the "Act"), a statutory scheme which created the Commission. *See* A.R.S. §§16-940 to -961. The Act charges the Commission with the responsibility to "[e]nforce this article[.]" A.R.S. § 16-956(A)(7). As part of the Commission's enforcement duties, the Act authorizes the Commission to impose penalties for a failure to comply with the Act's reporting and disclosure requirements for campaign-related spending and advertising. *See* A.R.S.

---

[1] *See* Defendant's Motion to Dismiss and Reply in Support, Maricopa County Superior Court Case No. LC 2015-00172-001; Defendant/Appellee's Answering Brief, Arizona Court of Appeals Case No. 1 CA-CV-15-0455; Defendant/Appellant's Response to Petition for Review and Supplemental Brief, Arizona Supreme Court Case No. CV-16-0306-PR. *See also* Defendant's Motion to Dismiss and Reply in Support, Maricopa County Superior Court Case No. CV 2015-004730.

§ 16-942. These requirements include disclosures regarding "independent expenditures" made to advocate for the election or defeat of a candidate. *See* A.R.S. § 16-941(D) (setting forth disclosure requirements for "independent expenditures related to a particular office").

On July 1, 2014, the Commission received a complaint alleging that LFAF violated A.R.S. §§ 16-941 and 16-958(A)-(B) by failing to file certain required independent expenditure reports.[2] After reviewing the complaint, the Commission found reason to believe that LFAF had committed the violations alleged and on September 26, 2014, issued an Order Requiring Compliance (the "Compliance Order"[3]), requiring LFAF to comply with the Act and file the reports required by A.R.S. §§ 16-941(D) and 958 and Ariz. Admin. Code R2-20-109 within 14 days. LFAF did not file the required reports within 14 days.

Because LFAF remained out of compliance with the Act, at a subsequent public meeting the Commission found probable cause to believe that LFAF had violated the Act and authorized the issuance of an order assessing civil penalties. The Commission then entered an order on November 28, 2014 (the "November 28 Order"), in which it concluded that LFAF had violated the Act and imposed a civil penalty of $95,460 in accordance with A.R.S. § 16-942. Collection Action, Ex. C.

LFAF requested an administrative hearing and one was held before an Administrative Law Judge ("ALJ"). On March 4, 2015, the ALJ issued a Decision sustaining LFAF's appeal and rescinding the November 28 Order. Pursuant to A.R.S. § 41-1092.08(B), the Commission then accepted part and rejected part of the ALJ's decision, and on March 27, 2015, the Commission entered a final administrative order imposing a civil penalty of $95,460 on LFAF (the "Final Order"). Collection Action,

---

[2] LFAF filed a special action on July 18, 2014, CV 2014-003968, seeking to prevent the Commission from considering the complaint. That special action was dismissed because LFAF had failed to exhaust its administrative remedies.

[3] The Compliance Order is attached as Exhibit B to the Commission's complaint in CV2018-006031 (the "**Collection Action**").

Ex. A. The Final Order concluded that LFAF's advertisement was an independent expenditure and subject to the reporting requirements in A.R.S. §§ 16-941 and 958 and affirmed the civil penalty of $95,460 originally assessed in the November 28 Order. Collection Action, Ex. A.

Eighteen days after the issuance of the Final Order, on April 14, 2015, LFAF filed a complaint (the "Administrative Appeal") seeking judicial review of the Final Order in superior court under the Judicial Review of Administrative Decisions Act ("JRADA"). The superior court dismissed the Administrative Appeal because the Act states that a party "has fourteen days from the date of issuance of the order assessing the penalty to appeal to the superior court as provided in" JRADA, A.R.S. § 16-957(B), and the Administrative Appeal was not filed within that timeframe. Collection Action, Ex. D.

LFAF appealed and the dismissal was upheld by both the Court of Appeals and the Arizona Supreme Court.[4] *See Legacy Found. Action Fund*, 408 P.3d 828. The Supreme Court issued its Mandate on February 13, 2018. Collection Action, Ex. E. On April 11, 2018, the Commission's Executive Director sent a letter to counsel for LFAF demanding payment in full of the Final Order. Collection Action, Ex. F. LFAF has neither paid any portion of the Final Order, nor has it complied with the Act and submitted the independent expenditure reports required by the Compliance Order, the Final Order, and the Act.

The Commission therefore filed the Collection Action asking the Court to enter judgment against LFAF for the amount of the penalty assessed in the Final Order and to order LFAF to submit the required reports. On the same day, LFAF filed CV2018-004532 (the "Special Action"), seeking again to delay its compliance with the Final Order.

---

[4] While LFAF's appeal was pending, LFAF filed a special action in superior court (CV2015-004730) raising the same arguments it raises here. That action was dismissed.

II. The Special Action should be dismissed because special action jurisdiction is not available to LFAF.

This is now the third time LFAF has tried to bring a special action making the arguments it raised in its untimely Administrative Appeal. But Arizona law is clear that LFAF may not use this Court's special action jurisdiction as a substitute for an appeal. When there is a remedy available by appeal, special action jurisdiction is not available. *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990). Indeed, Arizona court rules make this clear by stating that "the special action ***shall not*** be available where there is an equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Act. 1(a) (emphasis added). This rule reinforces the "strong Arizona policy against using extraordinary writs as substitutes for appeals." *Neely*, 165 Ariz. at 76; *see also* Ariz. R. P. Spec. Act. 1, St. B. Comm. Note (a) (noting that special action jurisdiction is limited "due to the strong policy in this state that the writs are subordinate to and are not a substitute for appeal").

There is no question that LFAF had an adequate remedy available by appeal under A.R.S. § 16-957(B), which provides that aggrieved parties may appeal a final Commission order pursuant to JRADA. The Special Action seeks review of the very same legal claims LFAF raised in the Administrative Appeal. *See* LFAF Notice of Appeal and Complaint in Case No. LC 2015-00172-001, attached as **Exhibit 1**; LFAF Opening Brief in Case No. LC 2015-00172-001, attached as **Exhibit 2**. Accordingly, because LFAF had an appeal as of right on these very issues, special action jurisdiction "shall not" be available to LFAF as a substitute.

The fact that LFAF failed to timely file the Administrative Appeal (and thereby deprived the superior court of jurisdiction over it) does not render the availability of the remedy inadequate or somehow trigger the availability of special action jurisdiction. *Neely*, 165 Ariz. at 77 (a special action petitioner cannot show a need for special action relief "when a petitioner fails to seek relief until after its remedy at law has been abandoned through inaction"); *Rosenberg*, 118 Ariz. at 493 (where appellant "had an

appeal under the Administrative Review Act, it cannot be said she did not have an adequate remedy at law" even though she failed to timely file an appeal); *Hurst v. Bisbee Unified Sch. Dist. No. Two*, 125 Ariz. 72, 75 (App. 1979) (special action in the nature of mandamus "does not lie to correct errors in an appealable judgment and cannot be used as a substitute for the ordinary channels of appeal").

This rule applies with even more force here where LFAF was a full participant in the administrative proceedings leading up to the administrative decision. It is not as if LFAF were an absent entity surprised to find an agency order entered against it who then missed a close-in-time appeal deadline. LFAF litigated at every stage of the proceeding and "fail[ed] to seek relief until after its remedy at law [had] been abandoned through inaction." *Neely*, 165 Ariz. at 77.

LFAF contends, however, that it is permitted to bring an independent, collateral attack on the Commission's jurisdiction notwithstanding its failure to timely appeal the Final Order. The Arizona Supreme Court has twice foreclosed this argument in this context. Most recently, in *Smith v. Arizona Citizens Clean Elections Commission* – a case dealing with exactly the same statutes as are at issue here – the Arizona Supreme Court held that the plaintiff, Smith, could not save his untimely appeal by construing his complaint as a separate action for declaratory relief to which the 14-day deadline did not apply. 212 Ariz. 407, 416-17 ¶¶ 48-50 (2006). The court held that the plaintiff "was required to raise all of his challenges to the Commission's actions and his related constitutional claims in a timely complaint for judicial review" and could "not use a complaint for declaratory relief as a substitute for a timely complaint." *Id.*

In *Rosenberg*, the Court noted that older cases have held that "appeal pursuant to the Administrative Review Act" is not exclusive because "[c]ommon law extraordinary writs may be used to attack the jurisdiction of the agency where there is no plain, speedy and adequate remedy at law." 118 Ariz. at 493. Thus, explained the Court, "facts must appear" to indicate that a party "did not have an adequate remedy at law." The Court concluded that because the "appellant had an appeal under the Administrative

Review Act, it cannot be said she did not have an adequate remedy at law" – even though she had failed to timely seek review. *Id.*

In other words, *Rosenberg* and *Smith* instruct that when an appeal is available in which a party can bring its jurisdictional or other constitutional challenges, the party ***must*** bring those claims via the available appeal. A party may not fail to timely file an appeal and then rely on the special action procedure to save those claims.

Here, LFAF relies on the principle that collateral challenges to jurisdiction are permitted but ignores the requirement that special action procedure/extraordinary writs may be used only if there is not an adequate remedy by appeal. With *Rosenberg* and *Smith*, the Arizona Supreme Court has made it clear that LFAF is mistaken. The special action procedure is not a do-over for untimely appeals.

Finally, LFAF (Mem. of Law at 9) cites *Legacy* as somehow authorizing or "inviting" it to file the Special Action. That is nonsense. Nothing in *Legacy* alters the precedent discussed above. There, the Court stated that it "express[ed] no view on whether [LFAF] may pursue alternative procedural means to challenge the Commission's penalty order as void." 408 P.3d at 832 ¶ 19. This sentence cannot be read as anything more than the court declining to opine on issues not before it. It does not create a right where none exists or change the fact that LFAF had, but failed to utilize, an adequate remedy by appeal.

III. LFAF's claims are precluded in any event.

Even if the Court is inclined to exercise special action jurisdiction, LFAF's claims are precluded for several reasons and should be dismissed.

A. Administrative orders which are not appealed may not be collaterally attacked.

First, where a party fails to timely appeal an administrative order, Arizona courts "conclusively" presume that the order is "just, reasonable and lawful." *Gilbert v. Bd. of*

Med. Examiners of State of Ariz., 155 Ariz. 169, 176 (App. 1987)[5] (quoting *Hurst*, 125 Ariz. at 75). This principle applies "even to alleged constitutional errors which might have been corrected on proper application to the court which has jurisdiction of the appeal." *Gilbert*, 155 Ariz. at 176 (quoting *Hurst*, 125 Ariz. at 75). Accordingly, a collateral attack on the administrative order is "precluded" by a party's failure to appeal. *Gilbert*, 155 Ariz. at 176 (quoting *Hurst*, 125 Ariz. at 75). The Final Order is therefore "conclusively" presumed to be "just, reasonable and lawful," and LFAF's failure to appeal the Final Order precludes it from collaterally attacking the Final Order even if "alleged constitutional errors [ ] might have been corrected" by a timely appeal. The Court should dismiss the Special Action on this basis alone.

B. The Final Order is res judicata and LFAF is precluded from re-litigating it in this Special Action.

"Failure to appeal a final administrative decision makes that decision final and res judicata." *Gilbert*, 155 Ariz. at 174 (citing *Hurst*). Res Judicata embraces two concepts: "claim preclusion and the related concept of issue preclusion." *Pettit v. Pettit*, 218 Ariz. 529, 530 n.2 (App. 2008) (citing Restatement (Second) of Judgment, introductory note to ch. 3 (1982)).

Claim preclusion, as the name suggests, bars an entire claim. "[W]hen a party has brought an action and a final, valid judgment is entered," the party is then "foreclosed from further litigation on the claim[.]" *Circle K Corp. v. Indus. Comm'n of Ariz.*, 179 Ariz. 422, 425 (App. 1993). A future claim is precluded only when "the

---

[5] It is important to note that *Gilbert* contains language suggesting that an administrative order may be collaterally attacked "where the jurisdiction of the administrative agency is questioned," and cites A.R.S. § 12-902(B) and *State ex rel Dandoy v. Phoenix*, 133 Ariz. 334, 336 (App. 1982) as support. 155 Ariz. at 175. LFAF relied on these authorities to make the same arguments in the Administrative Appeal and they were soundly rejected by the Supreme Court in *Legacy*: "§ 12-902(B) does not create an exception to the time allotted to take an appeal from a final agency decision. We therefore disavow the language in . . . *Dandoy* that construes § 12-902(B) to provide limitless entitlement to challenge an administrative agency's jurisdiction[.]" *Legacy*, 408 P.3d at 831 ¶ 15.

matter now in issue between the same parties or their privities was, or might have been, determined in the former action." *Hall v. Lalli*, 194 Ariz. 54, 57 ¶ 7 (1999); *see also Gilbert*, 155 Ariz. at 174 (noting that res judicata "binds the same party standing in the same capacity in subsequent litigation on the same cause of action, not only upon facts actually litigated but also upon those points which might have been litigated.").

The doctrine of issue preclusion prevents a party from re-litigating an issue where the party "had a full opportunity to litigate the issue" and "actually did litigate the issue" in a prior proceeding where "a final judgment was entered" and "the issue was essential to a final judgment." *Circle K Corp.*, 179 Ariz. at 425.

i. The Special Action is barred by claim preclusion.

All the elements of claim preclusion are present here. First, there is no question that the Special Action involves the same parties as the Administrative Appeal – LFAF was the plaintiff there, as it is here, and the Commission was the defendant. Second, the claims asserted and issues raised are the same, as is the evidence relied upon. Here, just as in its Administrative Appeal, LFAF seeks a judicial determination that the Commission acted outside of its statutory authority and jurisdiction (Ex. 1, ¶¶ 24(b), (h); Special Action Compl. ¶¶ 35, 39, 47, 51-55). In both cases, LFAF relies solely upon the statutes contained in the Clean Elections Act and the same set of background facts. Thus, no additional evidence would be "needed to prevail" in this action. Although the issues surrounding the Commission's jurisdiction were not actually litigated in LFAF's Administrative Appeal as a result of the complaint's untimeliness, claim preclusion bars those points "which might have been litigated." *Pettit*, 218 Ariz. at 531.

Finally, the dismissal of the Administrative Appeal also operates as a final judgment on the merits for purposes of claim preclusion. *See, e.g., Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274 (1971) ("[A] dismissal with prejudice is a judgment on the merits . . . and is therefore res judicata as to every issue reasonably framed by the pleadings."); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006) (a dismissal with prejudice is a determination on the merits for purposes of res judicata).

Because all the elements of claim preclusion are present here, the Special Action is barred and should be dismissed.

The claim preclusion here further undermines LFAF's contention that it should be able to bring a collateral attack on jurisdiction. The cases LFAF cites (Mem. of Law at 9-11) for that principle involve parties bringing jurisdictional claims for the first time, not repeat claims in successive cases (i.e., not when the party was a party to an administrative proceeding, had a right to appeal an adverse decision including on jurisdictional grounds, yet failed to exercise its right of appeal):

- *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323 (1954) (challenge brought by non-party to agency decision; no challenge to jurisdiction at the agency level).
- *Pac. Greyhound Lines v. Sun Valley Bus Lines*, 70 Ariz. 65 (1950) (same).
- *Tucson Rapid Transit Co. v. Old Pueblo Transit Co.*, 79 Ariz. 327 (1955) (same).
- *Ariz. Pub. Serv. Co. v. S. Union Gas Co.*, 76 Ariz. 373 (1954) (same).
- *Whitfield Transp., Inc. v. Brooks*, 81 Ariz. 136 (1956) (challenge to ex parte order of Corporation Commission; no challenge at agency level).
- *Dallas v. Ariz. Corp. Comm'n*, 86 Ariz. 345 (1959) (same).
- *State v. Downey*, 102 Ariz. 360 (1967) ("direct attack" on authority of Board of Supervisors to incorporate a town).
- *Rural/Metro Corp. v. Ariz. Corp. Comm'n*, 129 Ariz. 116 (1981) (challenge to constitutionality of a statute not brought as part of or as appeal from agency proceeding).
- *George v. Ariz. Corp. Comm'n*, 83 Ariz. 387 (1958) (challenge by third party to Corporation Commission order; no prior jurisdictional challenge).

LFAF, however, has already challenged jurisdiction at the administrative, superior court, and appellate levels and had its case dismissed. Thus, unlike with LFAF, claim preclusion would not apply in the cases cited by LFAF because those cases did not involve a previous order which could have preclusive effect. *See, e.g., Ariz. Bd. of Regents for & on Behalf of Univ. of Ariz. v. State ex rel. State of Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 156 (App. 1989) (permitting challenge to agency jurisdiction when party had never attempted to challenge jurisdiction).

ii. The Special Action is also barred by issue preclusion.

Similarly, all the elements of issue preclusion are present here: (1) LFAF had a full opportunity to litigate the issue of the Commission's jurisdiction in the proceeding before the Commission, (2) LFAF did, in fact, litigate the issue; (3) a final judgment was entered – the Final Order – and (4) the issues raised in LFAF's complaint were "essential" to the Final Order. *Circle K Corp.*, 179 Ariz. at 425. Accordingly, LFAF is barred from seeking to re-litigate these issues. *Id.*

Gilbert confirms that the doctrine of issue preclusion applies to administrative proceedings. *See* 155 Ariz. at 174-75 (concluding that a litigant was barred from seeking to re-litigate issues determined during an administrative proceeding). There, the Board of Medical Examiners held an administrative hearing and revoked the medical license of a doctor. *Id.* at 173. The doctor did not seek judicial review of the Board's decision. *Id.* The doctor subsequently sued the Board but the superior court dismissed, concluding that his suit was an impermissible collateral attack on the Board's revocation order. *Id.* The Court of Appeals agreed, noting that the doctor could only prevail on his tort claims by "proving that the revocation was improper" and that "pivotal issue has already been litigated and decided against him." *Id.* at 175. As in *Gilbert*, the Commission's authority to issue the Final Order has already been litigated and decided against LFAF and LFAF may not now re-litigate those issues.

IV. Conclusion.

The Court should see this Special Action for what it is – the latest attempt by LFAF to make up for the fact that it failed to timely appeal the Final Order. But LFAF cannot undo well-settled Arizona law. This Court's special action jurisdiction is not available where, as here, the petitioner had an adequate remedy by appeal. Additionally, LFAF's failure to timely appeal the Final Order gives the Final Order preclusive effect and LFAF is barred from re-litigating issues that were, or might have

been decided, in the administrative proceedings leading to the Final Order or in its failed Administrative Appeal. The Special Action should therefore be dismissed.

DATED this 11th day of July, 2018.

OSBORN MALEDON, P.A.

By /s/ Nathan T. Arrowsmith
Mary R. O'Grady
Joseph N. Roth
Nathan T. Arrowsmith
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

Attorneys for Defendant

THE FOREGOING has been electronically filed this 11th day of July, 2018.

COPY of the foregoing mailed and e-mailed this 11th day of July, 2018, to:

Brian M. Bergin
Bergin, Frakes, Smalley
& Oberholtzer, PLLC
4343 E. Camelback Rd., Suite 210
Phoenix, AZ 85018
bbergin@bfsolaw.com

Jason Torchinsky
Holtzman Vogel Josefiak PLLC
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
jtorchinsky@hvjlaw.com

/s/ Debra Huss
7653066

Exhibit 1

Brian M. Bergin, #016375
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4455 East Camelback Road, Suite A-205
Phoenix, Arizona 85018
Telephone: (602) 888-7857
Facsimile: (602) 888-7856
bbergin@bfsolaw.com
Attorneys for Plaintiff/Appellant

Jason Torchinsky
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Telephone: (540) 341-8808
Facsimile: (540) 341-8809
jtorchinsky@hvjlaw.com
Co-Counsel for Plaintiff/Appellant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE COUNTY OF MARICOPA

LEGACY FOUNDATION ACTION FUND, an Iowa non-profit corporation, Plaintiff/Appellant, vs. CITIZENS CLEAN ELECTIONS COMMISSION; Defendant/Appellee.	No. LC2015-000172-001 **NOTICE OF APPEAL AND COMPLAINT FOR JUDICIAL REVIEW OF ADMINISTRATIVE DECISION**

Plaintiff/Appellant, Legacy Foundation Action Fund ("Plaintiff") by and through undersigned counsel for its Notice of Appeal and Complaint for Judicial Review of Administrative Decision hereby alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff/Appellant Legacy Foundation Action Fund is an Iowa non-profit corporation, operating under Section 501(c)(4) of the Internal Revenue Code.

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

3. On July1, 2014 a complaint was filed with the Arizona Secretary of State and the Commission claiming that Plaintiff had run an "express advocacy" television advertisement (the "Subject Advertisement") but had failed to file the necessary registration and campaign finance disclosure forms with the Arizona Secretary of State and the Commission (the "Complaint Below").

4. Specifically, the Complaint Below alleged that Plaintiff violated A.R.S. §§ 16-914.02, -941(D) and -958(A)-(B).

5. In response to the Complaint Below, the Arizona Secretary of State, acting through Maricopa County Elections, dismissed the matter on July 21, 2014.

6. By contrast, in response to the same Complaint Below, the Commission initiated its regulatory process and commenced proceedings before the Commission captioned *In re Legacy Foundation Action Fund* numbered 15F-001-CCE.

7. On July 31, 2014, the Commission declared it had jurisdiction to consider the allegations of the Complaint Below.

8. On September 11, 2014, the Commission found "reason to believe" that a violation of the Act occurred and authorized an investigation.

9. The basis for the Commission's "reason to believe" finding was a conclusion that the Subject Advertisement was an independent expenditure and that Plaintiff violated A.R.S. §§ 16-941(D) and -958 by failing to report those expenditures.

10. Plaintiff filed a Special Action, Case No. CV2014-003968, in this court on July 18, 2014, challenging the Commission's jurisdiction over this matter and asserting the unconstitutionality of A.R.S. § 16-901.01(A). On September 23, 2014, this Court dismissed the matter finding that the issue of jurisdiction could be addressed upon exhaustion of administrative remedies.

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

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

13. On November 20, 2014, the Commission found probable cause to believe Plaintiff had violated the Act and authorized the assessment of $95,460 in penalties.

14. On November 28, 2014, the Commission issued an order assessing civil penalties against Plaintiff (the "Order") and a Notice of Appealable Agency Action.

15. Plaintiff appealed the Commission's Order by requesting an administrative hearing, which was conducted by the Office of Administrative Hearings on January 28, 2015.

16. On March 4, 2015, Administrative Law Judge Thomas Shedden entered his Decision (the "ALJ's Decision") and concluded, in part, that: (a) Plaintiff's Subject Advertisement does not constitute "express advocacy"; and (b) the Commission's assessment of civil penalties did not comply with A.R.S. § 16-942(B).

17. The ALJ's Decision, therefore, ordered that Plaintiff's appeal should be sustained and the Commission's Order should be rescinded.

18. The Commission, however, rejected the ALJ's Decision and rendered a Final Administrative Decision dated March 27, 2015, which declared: (a) the Commission has jurisdiction and authority to enforce violations of the Act; (b) the Subject Advertisement is "express advocacy" within the definition of A.R.S. §16-901.01(A)(2); and (c) the Commission has authority to impose the civil penalties it originally assessed against Plaintiff under A.R.S. § 16-942(B) (the "Decision").

19. In the Decision, the Commission reinstated its civil penalty of $95,460 against Plaintiff.

20. This Notice of Appeal and Complaint for Judicial Review of Administrative Decision (the "Complaint") constitutes a Notice of Appeal of the Commission's Decision.

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

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

23. Plaintiff was served with a copy of the Decision in conformity with A.R.S. § 12-904 on or about March 27, 2015.

24. Said Decision is contrary to law and invalid because:

a. There is no substantial evidence to support the findings of the Commission or to support the Decision;

b. The Decision is an abuse of discretion and arbitrary and capricious in that the Commission exceeded its statutory authority in asserting jurisdiction over Plaintiff.

c. The Decision is an abuse of discretion and arbitrary and capricious in that the Commission erred when it made findings of fact and law when it was undisputed that, at the time Plaintiff ran the Subject Advertisement, the Arizona Superior Court had ruled A.R.S. §16-901.01(A)'s definition of "expressly advocates" was unconstitutional.

d. The Decision is an abuse of discretion and arbitrary and capricious in that the definition of "Expressly Advocates", on its face, as set forth in A.R.S. § 16-901.01 and as interpreted and applied by the Commission is facially unconstitutional and unconstitutional as applied to Plaintiff under the First Amendment of the United States Constitution and Article 2, § 6 of the Arizona Constitution.

e. The Decision is an abuse of discretion and arbitrary and capricious in that the definition of "Expressly Advocates," on its face, as set forth in A.R.S. § 16-901.01 and as interpreted and applied by the Commission is

substantially overbroad because it infringes upon speech protected by the First Amendment of the United States Constitution and Article 2, § 6 of the Arizona Constitution.

f. The Decision is an abuse of discretion and arbitrary and capricious in that the definition of "Expressly Advocates", on its face, as set forth in A.R.S. § 16-901.01 and as interpreted and applied by the Commission is void for vagueness under the First Amendment for the United States Constitution and Article 2, § 6 of the Arizona Constitution because it fails to give persons of ordinary intelligence a reasonable opportunity to learn what speech is regulated and which is not, nor does it provide explicit standards for the Commission to apply.

g. The Decision is an abuse of discretion and arbitrary and capricious in that the Commission violated the First Amendment when it relied upon a improper and subjective analysis finding Plaintiff's Subject Advertisement constituted "express advocacy" that had no other reasonable interpretation.

h. The Decision is an abuse of discretion and arbitrary and capricious in that the Commission exceeded its statutory authority when it imposed civil penalties against Plaintiff under A.R.S. § 16-942(B).

i. The Commission's registration and reporting regulation, Ariz. Admin. Code § R2-20-109(F), adopted pursuant to A.R.S. § 16-942(B) exceeds its statutory authority as applied to regulation of independent expenditures.

25. Plaintiff is harmed by the Commission's illegal and invalid Decision.

26. Plaintiff designates the entire record of the proceedings below and requests that the complete record maintained by both the Commission and the Office of Administrative Hearings be transmitted as part of the record on review.

WHEREFORE, Plaintiff prays for relief against the Commission as follows:

A. For a stay of enforcement of the Decision of the Commission until final disposition of this appeal;

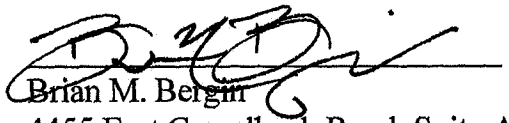
B. For judgment against the Commission reversing said Decision;

C. For Plaintiff's attorney's fees and expenses incurred herein pursuant to A.R.S. § 12-348.

D. For such other and further relief as this Court deems just and proper.

DATED this 14th day of April, 2015.

Bergin, Frakes, Smalley & Oberholtzer, PLLC



Brian M. Bergin
4455 East Camelback Road, Suite A-205
Phoenix, Arizona 85018
Attorneys for Plaintiff/Appellant

ORIGINAL of the foregoing filed this 14th day of April, 2015 at:

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

Exhibit 2

Brian M. Bergin, #016375
Kenneth M. Frakes, #021776
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4455 East Camelback Road, Suite A-205
Phoenix, Arizona 85018
Telephone: (602) 888-7857
Facsimile: (602) 888-7856
kfrakes@bfsolaw.com
bbergin@bfsolaw.com
Attorneys for Petitioner/Appellant

Jason Torchinsky
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Telephone: (540) 341-8808
Facsimile: (540) 341-8809
jtorchinsky@hvjlaw.com
Co-Counsel for Petitioner/Appellant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE STATE OF ARIZONA

In the Matter of LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, vs. CITIZENS CLEAN ELECTIONS COMMISSION Defendant/Appellee.	Case No. LC2015-000172-001 **OPENING BRIEF OF PLAINTIFF/APPELLANT LEGACY FOUNDATION ACTION FUND**

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I.R. 5 at p. 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

DATED this 26th day of May, 2015.

Bergin, Frakes, Smalley & Oberholtzer, PLLC

Brian M. Bergin
4455 East Camelback Road, Suite A-205
Phoenix, Arizona 85018
Attorneys for Petitioner/Appellant

Holtzman Vogel Josefiak PLLC

PER J.T.

Jason Torchinsky
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Attorneys for Petitioner/Appellant

ORIGINAL of the foregoing filed this 26th day of May, 2015 at:

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

And a **COPY** emailed/mailed this 26th day of May, 2015 to :

Mary R. O'Grady
Osborn Maledon

2929 North Central Avenue
21st Floor
Phoenix, Arizona 85012
Attorney for Defendant

By: Rachell Chiumazzi

ITEM V- Legacy Motion to Dismiss CEC

Brian M. Bergin, #016375
Bergin, Frakes, Smalley & Oberholtzer, PLLC
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Telephone: (602) 888-7857
Facsimile: (602) 888-7856
bbergin@bfsolaw.com
Attorneys for Plaintiff

Jason Torchinsky
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Telephone: (540) 341-8808
Facsimile: (540) 341-8809
jtorchinsky@hvjlaw.com
Co-Counsel for Plaintiff
Admitted Pro Hac Vice

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN THE COUNTY OF MARICOPA

LEGACY FOUNDATION ACTION FUND, an Iowa non-profit corporation, Plaintiff, vs. CITIZENS CLEAN ELECTIONS COMMISSION, Defendant.	Case No.: CV2018-004532 Case No.: CV2018-006031 (Consolidated) **DEFENDANT LEGACY FOUNDATION ACTION FUND'S MOTION TO DISMISS FOR WANT OF JURISDICTION** **(Assigned to the Honorable Christopher Whitten)** **(Oral Argument Scheduled August 30, 2018 at 9:30 AM)**
CITIZENS CLEAN ELECTIONS COMMISSION, Plaintiff, vs. LEGACY FOUNDATION ACTION FUND, an Iowa non-profit corporation, Defendant.	

INTRODUCTION

From the very beginning, four years ago, the Citizens Clean Elections Commission ("CCEC") was without jurisdiction. CCEC has never had jurisdiction to pursue Legacy Foundation Action Fund ("LFAF") for its constitutionally-protected speech. Unfortunately, the ensuing four years have resulted in a long circuitous road, beginning with the Secretary of State's Office, to the CCEC, to an Administrative Law Judge, back to the CCEC, then to the Arizona courts, all the way to the Arizona Supreme Court. Now, years later, LFAF returns to this Court with a clear question for this Court to answer:[1] Can CCEC enforce a penalty on LFAF for its speech when CCEC lacks jurisdiction over the very action it sought to enforce? The answer is a resounding no.

The CCEC contends that it has authority to impose penalties for failure to comply with A.R.S. § 16-941(D). CCEC's April 24, 2018 Complaint ("Compl.") ¶¶ 5-6. The CCEC states that it found reason to believe and eventually probable cause, that an advertisement LFAF aired constituted an independent expenditure requiring LFAF to file independent expenditure reports. Compl. ¶¶ 9, 12. Despite an Administrative Law Judge ("ALJ") sustaining LFAF's appeal, the CCEC rejected the ALJ's findings and proceeded to impose a civil penalty of $95,460.00 for failing to comply with Arizona's requirement to file independent expenditure reports. LFAF appealed through the entire Arizona judicial system, but these appeals were dismissed on timeliness grounds. Compl. ¶¶ 15-18.

Now, as a permissive collateral attack, LFAF challenges CCEC's jurisdiction to impose the $95,460.00 fine for LFAF's advertisement campaign against Mayor Scott Smith in 2014.

STANDARD OF REVIEW

The CCEC lacks subject-matter jurisdiction to enforce its $95,460.00 penalty. This

---

[1] Procedurally this case can be simplified as follows: Every court to hear this case has yet to make *any* finding on LFAF's jurisdictional claim because those courts held they were without jurisdiction to hear any claim in the first instance. That being said, there can be no dispute that this Court has jurisdiction to potentially enforce a judgment against LFAF, and cognizant—and as explained herein—with that jurisdiction it now has the jurisdiction to dismiss CCEC's enforcement action as void.

Court should dismiss the Complaint pursuant to Ariz. R. Civ. P. 12(b)(6). Although well-pleaded factual allegations are presumed true, legal assertions receive no deference and are reviewed *de novo*. *Harper v. State*, 241 Ariz. 402, 404, 388 P.3d 552, 554 (App. 2016).

ARGUMENT

CCEC was created by statute and it is, therefore, limited by statute. A.R.S. § 16-955; *Pima Cnty. v. Pima Cnty. Law Enforcement Merit Sys. Council*, 211 Ariz. 224, 227, 119 P. 3d 1027, 1030 (2005) ("Because administrative agencies derive their powers from their enabling legislation, their authority cannot exceed that granted by the legislature.").

Arizona vested CCEC with authority to enforce the Clean Elections Act, codified at A.R.S. §§ 16-940, *et seq* (the "Act"). The CCEC asserts that A.R.S. § 16-942 vests it with jurisdiction to impose penalties on LFAF for its March and April 2014 advertisements. Compl. ¶5. The CCEC concluded that LFAF's advertisement and subsequent failure to report violated A.R.S. §§ 16-941 and 16-958.

It is black-letter law that "an administrative judgment may be attacked collaterally . . . . where the jurisdiction of the administrative agency is questioned." *Gilbert v. Bd. of Med. Exam'r*, 155 Ariz. 169 (App. 1987); A.R.S. § 12-902(B). The Arizona Supreme Court was very clear that a *direct appeal* was not an appropriate means of challenging jurisdiction in this matter, but specifically did not extinguish LFAF's ability to contest jurisdiction through "alternative procedural means"—such as, "special action or as a defense to an enforcement action." *Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 243 Ariz. 404, 406-408, 408 P.3d at 830-32 (2018).

The CCEC lacks jurisdiction to enforce these provisions and, accordingly, its complaint should be dismissed.

I. THE CCEC LACKS JURISDICTION BECAUSE LFAF IS NOT A CANDIDATE OR A CANDIDATE'S COMMITTEE.

The penalty provisions of Article 2 of the Act make clear that CCEC's jurisdiction extends only to expenditures "by or on behalf of any candidate." A.R.S. § 16-942(B). Because LFAF is not a candidate, and the CCEC dismissed allegations that LFAF's speech was made in

coordination with a candidate, the CCEC has no jurisdiction over LFAF's speech.

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

To the extent that the Act grants the CCEC enforcement authority, such grant is expressly limited in A.R.S. §§ 16-956 and 16-957 to "any provision of this article" and does not reach to allegations involving nonparticipating candidates or entities that are not candidates. The CCEC is not allowed to manufacture its own jurisdiction, it must adhere to the specific statute that defines its enforcement authority. That grant, as noted above, is found in A.R.S. § 16-942(B). Courts have held that when a specific statute coincides with a general statute, the specific statute must be the controlling statute. *See, e.g.*, *Clouse v. State*, 199 Ariz. 196, 199, 16 P.3d 757, 760 (2001) ("It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.").

The CCEC relied on A.R.S. §16-957 as well as A.A.C. R2-20-109(F)(3) as its basis for asserting jurisdiction over, and imposing a civil penalty against, LFAF for delinquent independent expenditure reports. Both the statute and the regulation point to A.R.S. § 16-942(B) as the sole means of assessing civil penalties. The CCEC, however, lacked the jurisdiction to exact a civil penalty under A.R.S. § 16-942(B) (or any other statute for that matter) because the statute's enforcement provisions are clear in that they apply only to "candidates" or organizations making expenditures "on behalf of any candidate." A plain language reading of the statutory section below clearly illustrates this jurisdictional limitation:

> In addition to any other penalties imposed by law, the civil penalty for a violation *by or on behalf of any candidate* of any reporting requirement imposed by this chapter shall be one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office. The penalty imposed by this subsection shall be doubled if the amount not reported for a particular

> election cycle exceeds ten percent of the adjusted primary or general election spending limit. No penalty imposed pursuant to this subsection shall exceed twice the amount of expenditures or contributions not reported. *The candidate and the candidate's campaign account shall be jointly and severally responsible* for any penalty imposed pursuant to this subsection.

A.R.S. § 16-942(B) (emphasis added).

The principles of statutory construction are grounded in the goal of giving effect to the Legislature's intent, or in the case of the Act, the people's intent. *People's Choice TV Corp. v. City of Tucson*, 202 Ariz. 401, 403 at ¶7, 46 P.3d 412, 414 (2012). It is only when the language of a statute is ambiguous that principles of statutory construction are applied. *Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66, 977 P.2d 784, 788 (1999). If a statute is unambiguous, the statute is applied without applying such principles. *Id*.; *see In the Matter of: Joel Fox dba SCA*, 2009 AZ Admin, Hearings LEXIS 1307, 25-27 (at P32-P34) (holding that "[t]he County's position is not consistent with principles of statutory construction" when it interpreted statutory language as contrary to legislative intent).

A.R.S. § 16-942(B) is not ambiguous and, therefore, only can be used to sanction a candidate or an organization working "on behalf of" a candidate. Because LFAF is certainly not a candidate and was not working "on behalf of" any candidate, the CCEC exceeded its jurisdiction in seeking to penalize LFAF, an entity not subject to A.R.S. § 16-942(B).

Even if the language were to be deemed ambiguous, application of principles of statutory construction require that the statutory language of "candidate" and "on behalf of any candidate" have a meaning and purpose. To allow the CCEC to distort the language of its own jurisdictional statute in an effort to expand its regulatory reach over a reporting requirement rendered unenforceable by the U.S. Supreme Court would enable the CCEC to assert jurisdiction without statutory authority. *See Janson ex rel. Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) ("we follow fundamental principles of statuary construction, the cornerstone of which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.").

The CCEC cannot simply conjure a contrary meaning for clear statutory language to make an inapplicable statute magically applicable to organizations having no relation to candidates. The CCEC's interpretation is contrary to the principles of statutory construction and its Enforcement Order does not meet the requirements of A.R.S. § 16-042(B). *Guzman v. Guzman*, 175 Ariz. 183, 187, 854 P.2d 1169, 1173 (App. 1993); *Darrah v. McClennen*, 689 Ariz. Adv. Rep. 12, 337 P.3d 550 (App. 2014).

The absence of any clearly applicable penalty provision also supports LFAF's argument, outlined *supra*, that the CCEC lacks jurisdiction over this matter.

II. THE CCEC LACKS JURISDICTION BECAUSE THE STATUTES THROUGH WHICH THE CCEC ASSERTS AUTHORITY TO ENFORCE ARE NOT PART OF CLEAN ELECTIONS ACT.

The underlying Administrative Complaint submitted to the CCEC, which spawned this action, alleged violations of A.R.S. §§ 16-901, 16-905, and 16-914.02, statutes which clearly reside in Title 16, Chapter 6, Article 1 and fall outside the CCEC's jurisdiction.

The CCEC does not have jurisdiction to enforce Article 1 of Title 16, Chapter 6. Article 1 includes reporting requirements for independent expenditures that pre-dated the adoption of the CCEC. *See, e.g.*, A.R.S. § 16-915(F) (1997) (showing that independent expenditures were reported to the Secretary of State at least as early as 1993). As clearly provided in A.R.S. § 16-924, the provisions in §16-914.02 are subject to interpretation and enforcement by the Arizona Secretary of State (an office and agency independent from the CCEC) and by the Arizona Attorney General. When the voters enacted the Act by initiative four years after the enactment of independent expenditure enforcement provisions under the authority of the Secretary of State, they did not make any mention of altering, amending, modifying or supplanting the enforcement regime already in place. "Because administrative agencies derive their powers from their enabling legislation, their authority cannot exceed that granted by the legislature" (or, in the case of the Act, the people who voted for the law). *Pima Cnty*, 211 Ariz. at 227, 119 P. 3d at 1030.

The independent expenditure reporting provisions found in A.R.S. Title 16, Chapter 6,

Article 2 provide that expenditure filings are submitted to the Secretary of State and the Secretary is charged with supplying that information to the CCEC. These provisions were implemented to provide the CCEC a means to track independent expenditure spending so that it would be able to subsidize participating candidates for such expenditures.[2] *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-29 (2011). In 2011, the U.S. Supreme Court struck down as unconstitutional the Act's provision establishing the basis for expenditure reporting to the CCEC. *See Bennett*, 131 S. Ct. at 2828-29 (ruling the Clean Elections Act's independent expenditure matching funds provision unconstitutional). In effect, the Supreme Court's ruling abolished the purpose for which the Act imposed the requirement that the Secretary of State provide independent expenditure information to the CCEC. *See McComish v. Brewer*, 2010 U.S. Dist. LEXIS 4931 (D. Ariz. Jan. 20, 2010) (describing the operation of the Act, "The participating candidate will also receive matching contributions if there are independent expenditures against the participating candidate or in favor of the non-participating opponent.") (internal quotations omitted). *See also McComish v. Bennett*, 611 F. 3d 510, 516 (9th Cir. 2010) ("If the participating candidate has a nonparticipating opponent . . . whose expenditures combined with the *value of independent expenditures* . . . exceed the amount of her or his initial grant, the participating candidate will receive matching funds . . . .") (emphasis added) (internal quotations omitted). As recognized by these courts, the sole reason why the Act provided that the Secretary of State share information about independent expenditures to the CCEC was to track the amount of independent expenditure money spent so that participating candidates could be subsidized in accordance with the Act's provisions.

---

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

As a result, after *Bennett*, the CCEC is without a legal foothold to assert jurisdiction over the independent expenditure reporting requirements. *Bennett*, 131 S. Ct. at 2828-29 ("the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority.").

Article 1 of Title 16, Chapter 6 includes a detailed statutory definition of independent expenditures, which only the Secretary of State is tasked with enforcing. The Secretary enforces an extensive scheme for campaign finance reporting requirements, in coordination with the Attorney General, County Attorney, or City Attorney, depending on the geographical reach of the candidate at issue. As a result, the Secretary of State is charged with enforcing an interlocking web of statutes under Article 1 that impose an exhaustive regulatory structure over independent expenditures and the groups or individuals who make them.

Because independent expenditures already are subject to registration and reporting requirements in Article 1, which are enforced by the Arizona Secretary of State, Article 2's requirements (to the extent they are independent at all from Article 1) are duplicative and any attempt to make such requirements enforceable by the CCEC, through rulemaking or otherwise, impermissibly deviates from the statute's original intent and purpose, and is the result of an agency improperly seeking to expand its jurisdiction.[3] "Because administrative agencies derive their powers from their enabling legislation, their authority cannot exceed that granted by the legislature" (or, in the case of the Clean Elections Act, the people who voted for the law). *Pima Cnty.*, 211 Ariz. at 227, 119 P. 3d at 1030.

It simply cannot be the case that the citizens of Arizona intended for two different governmental agencies each to possess equal ability to reasonably interpret and enforce the same exact same definition of independent expenditures and the associated reporting regime,

---

[3]As evidence of the CCEC's attempt to provide itself broader authority, the CCEC, in the summer and fall of 2013, and just months before LFAF engaged in the challenged speech, implemented new regulations giving the CCEC authority beyond that which is contained in the text of the Act. *See* Ariz. Admin Reg./Secretary of State, Vol. 19 Issue 45 (Nov. 8, 2013). This 2013 regulation is the first time in the history of the CCEC that it attempted to issue a regulation purporting to grant itself jurisdiction over entities other than candidates, and this set of regulations exceed the CCEC's statutory authority.

thereby creating the possibility of inconsistent outcomes in the context of potential civil violations. It is the Secretary of State who enforces the exhaustive requirements contained in Arizona's independent expenditure statute, including what constitutes express advocacy.

LFAF is the unfortunate recipient of just such inconsistent determinations. While the CCEC used the Administrative Complaint as justification to impose penalties against LFAF, the Secretary, analyzing the same facts, found no violation.

The underlying Complaint also alleges that LFAF's actions violated provisions of the Act, namely A.R.S. §§ 16-941(B), (C)(2), (D), and 16-958(A), (B). The CCEC cannot establish authority to draw LFAF under its jurisdiction through A.R.S. § 16-941(B) since the statute defers enforcement to A.R.S. §§ 16-905 (J)-(M) and 16-924. *See* A.R.S. § 16-941(B) ("[a]ny violation of this subsection [reducing non-participating contribution limits by 20%] ***shall be subject to the penalties and procedures set forth in section 16-905, subsections J through M and section 16-924***." (Emphasis added.)). The CCEC has no enforcement authority under A.R.S. § 16-941(C)(2) because the statute's provision is a general proscription provision and does not confer a substantive grant of authority. *See* A.R.S. § 16-941(C)(2) (a nonparticipating candidate "[s]hall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article.").

III. THE CCEC LACKS JURISDICTION BECAUSE LFAF'S ADVERTISEMENT DOES NOT CONSTITUTE EXPRESS ADVOCACY.

Even if this Court finds that the CCEC has jurisdiction over LFAF despite it being a committee without a connection to a candidate, and even if this Court finds that the CCEC has jurisdiction over non Clean Election Act provisions, the CCEC still lacks jurisdiction because, under the First Amendment, LFAF's advertisement does not constitute express advocacy.

A First Amendment defense is properly brought in a Motion to Dismiss. *See Citizen Publ. Co. v. Miller*, 210 Ariz. 513 (Ariz. 2005). As will be shown, the CCEC's continued attempts to hold LFAF liable for its clearly protected speech is in violation of the First Amendment to the United States Constitution.

a. <u>The First Amendment Requires that Tests Used to Distinguish Between Campaign Speech and Issue Speech Must Be Clear and Not Ambiguous.</u>

The First Amendment to the United States Constitution declares, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The protections of the First Amendment—through the Fourteenth Amendment—prevent the States from violating their residents' free speech rights. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

The central purpose of the First Amendment "was to protect the free discussion of governmental affairs." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978). This is so because speech about issues is "indispensable to decision making in a democracy." *See id*. 435 U.S. at 777. Consequently, the First Amendment at least guarantees "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id*. 435 U.S. at 776. In fact, the First Amendment enshrines our nation's national commitment "to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Fed. Election Comm'n v. Wis. Right to Life, Inc*., 551 U.S. 449, 467, 127 S. Ct. 2652, 2665, 168 L.Ed.2d 329 (2007) (*citing Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)).

The Supreme Court, therefore, has ruled that tests to determine whether speech constitutes political advocacy that may be subject to regulation must be clear and not ambiguous. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336, 130 S. Ct. 876, 896, 175 L. Ed. 2d 753 (2010) (rejecting FEC's 11 factor test and stating that this has the effect of putting the speaker in the position of either refraining from speech or putting speech at the mercy of how the FEC applies its 11 factor test to the speech); *Buckley*, 424 U.S. at 43 (upholding independent expenditure definition statute so long as it captured the following activity that included only these magic words:[4] "vote for, elect, support, cast your ballot for,

[4] Even under the more expansive *Furgatch* standard, there must be some explicit plea for action that that is susceptible to only one interpretation, namely, to vote for or against a specific candidate. *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).

Smith for Congress, vote against, defeat, reject").

The line between express advocacy and issue advocacy must be clear to provide "security for free discussion" and therefore cannot put the speaker "wholly at the mercy of the varied understanding of his hearers." *Fed. Election Comm'n*, 551 U.S. at 468-69. The test must, therefore, be objective and it "must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal." *Id*. at 469 (internal citation and quotation marks omitted) (alteration in original). Such a test that puts the speaker at the mercy of the hearers and does not provide clear rule that provides security for free discussion "will unquestionably chill a substantial amount of political speech." *Id*. To prevent this result, an express advocacy statute can only capture that speech that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 470. Thus, an advertisement that focuses on an issue, exhorts the public to take a position on that issue, and urges the public to contact the official to also adopt that position on the issue, and further does not otherwise mention an "election, candidacy, political party, or challenger; and [] do[es] not take a position on a candidate's character, qualifications, or fitness for office" does not constitute express advocacy but is, in fact, an issue advertisement. *See id*.

b. <u>CCEC's Application of Arizona's Express Advocacy Statute to LFAF's Speech Violates the First Amendment.</u>

Considering these principles, the advertisement does not constitute express advocacy and, therefore, CCEC is without jurisdiction to enforce its penalty.

The CCEC's analysis applied to LFAF's advertisement was ambiguous and, therefore, unconstitutional. The advertisement described Mayor Smith as "Obama's Mayor" because, while Smith was serving as the President of the U.S. Conference of Mayors, the Conference supported profligate spending, limits on Second Amendment rights, Obamacare, and the regulation of carbon emissions. The advertisement discusses issues of: government spending, second amendment rights, and the regulation of carbon emissions. The advertisement then informs the listeners that these policies are wrong for Mesa. The advertisement closes with an

exhortation to the public to call Mayor Smith and tell him to support policies that are good for Mesa. *See* Transcript of LFAF's Advertisement, attached hereto as Exhibit "A." It also aired simultaneously with ads in Baltimore and Sacramento to address the incoming officers of the U.S. Conference of Mayors. Furthermore, the advertisement never mentions Mayor Smith as a gubernatorial candidate, as a Republican, that a primary election is approaching, or that Mayor Smith possessed bad character or was otherwise unqualified for office. *Compare id.*; *with Fed. Election Comm'n*, 551 U.S. at 470 (advertisement was not express advocacy where it discussed an issue, took a position on an issue, exhorted the public to adopt that position, and exhorted the public to call their official without discussing an election, campaign, candidate, or saying that the official had a bad character or was otherwise unfit to serve office). Both the ALJ and the Secretary of State concluded that LFAF's advertisement did not constitute express advocacy.

One thing is for sure, this advertisement is not susceptible to only one reasonable interpretation that it is express advocacy. Therefore, it is not express advocacy. Accordingly, this Court should find that the advertisement does not constitute an independent expenditure and, therefore, CCEC does not have jurisdiction to impose a fine.

To hold otherwise would permit precisely the type of analysis that *Fed. Election Comm'n* sought to avoid. If the CCEC's ruling stands, it will require a case-by-case determination and mini-trials on all advertisements to determine if they constitute express advocacy. *See Citizens United*, 558 U.S. at 329. The First Amendment eschews "the open-ended rough-and-tumble of factors,"—*e.g.*, using the fact that an advertisement discusses national issues rather than local issues "invit[es] complex argument in a trial court and a virtually inevitable appeal." *Id*. at 336 (*quoting Fed. Election Comm'n*, 551 U.S. at 469) (alteration in original).

The CCEC—like the FEC—applied an ambiguous test against LFAF's advertisement, aired in 2014, to determine whether LFAF's advertisement was issue advocacy or express advocacy, subject to a nearly $100,000 fine. The First Amendment needs breathing room to survive and it cannot tolerate case-by-case determinations. *See id*. at 329.

CONCLUSION

For the aforementioned reasons, this Court should grant Legacy Foundation Action Fund's Motion to Dismiss the Complaint.

DATED this 11th day of July, 2018.

Bergin, Frakes, Smalley & Oberholtzer, PLLC

/s/ Brian M. Bergin
Brian M. Bergin
4343 East Camelback Road, Suite 210
Phoenix, Arizona 85018
Attorneys for Plaintiff

Holtzman, Vogel, Josefiak, Torchinsky, PLLC

/s/ Jason Torchinsky
Jason Torchinsky
45 N. Hill Drive, Suite 100
Warrenton, VA 20186
Co-Counsel for Plaintiff
Admitted Pro Hac Vice

ORIGINAL of the foregoing e-filed
this 11th day of July, 2018 at:

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

COPY of the foregoing mailed
this 11th day of July, 2018 at:

Osborn Maledon, P.A.
Mary R. O'Grady
Joseph N. Roth
Nathan T. Arrowsmith
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

By: */s/ Iulia Taranu*