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July 15, 2014

Thomas M. Collins
Executive Director
Citizens Clean Elections Commission
1616 West Adams, Suite 110
Phoenix, AZ 85007

HAND-DELIVERED

'14 JUL 15 PM 4:12 CCEC

Re: Ducey 2014's Response to MUR 14-007

Dear Mr. Collins:

This letter serves as Ducey 2014's response to MUR 14-007, initiated by the letter from Scott Smith's campaign lawyer, Kory Langhofer. Ducey 2014 is a non-participating political committee, registered with the Arizona Secretary of State, formed by Doug Ducey, who is a candidate for the Republican Party nomination for governor.

As we explain in detail below, the Citizens Clean Elections Commission (the "Commission") should take no action on Mr. Smith's complaint because it lacks jurisdiction to investigate questions involving non-participating candidate contributions. Besides this, the Commission should take no action for either of two separate and independent reasons. First, there was no actual coordination between LFAF and Ducey 2014. Second, the Legacy Foundation Action Fund ("LFAF") advertisement complained of is issue advocacy protected by the First Amendment.

Upon information and belief, LFAF produced a television advertisement relating to the U.S. Conference of Mayors' (the "Conference") positions on certain federal issues and identified Mr. Smith as President of the Conference. The advertisement is located at the following You Tube URL: http://www.youtube.com/watch?v=NycZZLOA_OQ.[1] The advertisement identified specific positions that the Conference has taken on those federal issues. The advertisement further encouraged viewers to call Mr. Smith, who was then the president of the Conference and

[1] The letter makes a reference to "radio, internet, and mail advertisements painting Mr. Smith in a misleading and negative light" but only provides evidence of the television advertisement. 7/1/2014 Langhofer Letter at 2 n.1. The letter provides no evidence of any other form of communication. It is, therefore, impossible to respond to any allegation concerning "radio, internet, and mail advertisements" and Smith's alleged portrayal in a "negative light."

the Mayor of the City of Mesa, and ask him to change the Conference's position on those issues. Upon information and belief, the advertisement ran for two weeks in early April 2014 in Phoenix. Upon further information and belief, at approximately the same time period, LFAF ran similar advertisements mentioning the mayors in Sacramento, California and Baltimore, Maryland, both of whom also have leadership positions with the Conference, in those markets.

Legal Argument

I. Burden of Proof

In order to prevent rival campaigns from unfairly using the campaign finance code in a manner that manipulates media coverage and sensationally deceives voters on the eve of an election, Arizona law and this Commission's practice requires that a complainant provide the Commission with actual evidence that a campaign finance violation has occurred. *See* A.A.C. R2-20-203(D); *see also, e.g.*, MUR06-0023 (Munsil) (taking no action on complaint involving common political consultant where complainant failed to provide evidence of actual coordination between candidate and independent expenditure); MUR06-0032 (Napolitano) (similar). Where a complainant provides nothing more than unsupported speculation, innuendo, and conjecture that a violation has occurred, the Commission should determine that no action be taken. *See id.*

II. The Commission Lacks Jurisdiction to Proceed With This Complaint

The Commission's enforcement authority extends only to suspected violations of the Citizens Clean Elections Act, A.R.S. §§ 16-940 to 16-961. A.R.S. §§ 16-956(A)(7) ("The commission shall: . . . Enforce this article [Title 16, Chapter 6, Article 2, Arizona Revised Statutes]."); 16-957(A) (If the commission finds that there is reason to believe that a person has violated any provision of this article [Title 16, Chapter 6, Article 2, Arizona Revised Statutes]."). The Commission does not have wholesale authority to investigate campaign finance violations alleged against non-participating candidates, and it specifically lacks the jurisdiction to move forward with this matter.

The only substantive campaign finance statutes that Mr. Smith alleges to have been violated are A.R.S. §§ 16-901, 16-905, 16-919, and 16-941(B).[2] The first three sections cited are

[2] Smith cites A.R.S. § 16-941(C)(2), stating that 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." This statute does not confer any substantive directive but rather states the obvious. A nonparticipating candidate must follow the campaign finance laws codified in Article I. There can be no independent "violation" of § 16-941(C)(2).

found in Title 16, Chapter 6, Article 1 of the Arizona Revised Statutes and not part of the Citizens Clean Elections Act. The last sentence in A.R.S. § 16-941(B), which is part of the Act, states that "[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.)

Although §§ 16-956 and 16-957 may provide the Commission with general authority to enforce "any provision of this article," these statutes definitely do not confer authority upon the Commission to enforce alleged contribution limit violations and coordination involving nonparticipating candidates. Rather, these statutes are broadly written to give the Commission investigative authority associated with violations of such things as reporting requirements, impermissible use of campaign funds by participating candidates, and expenditures of funds by participating candidates in excess of the Act's limits.

The more specific statute, § 16-941(B), intentionally carves-out alleged violations of non-participating candidate contribution limits from the scope of § 16-956 and 16-957. Under these circumstances, where a specific statute is read in conjunction with a general one, courts consistently hold that the specific statute prevails. *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."). Any other interpretation impermissibly renders the last sentence in § 16-941(B) superfluous. *See May v. Ellis*, 208 Ariz. 229, 231, 92 P.3d 859, 861 (2004) (holding that, when construing two statutes together, the court's "first duty . . . is to 'adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved.'" (Citation omitted.)). Therefore, the Commission does not have the appropriate jurisdiction to review this matter and, in actuality, this matter is already being reviewed by the Maricopa County Recorder, as the Secretary of State has a conflict.

III. Even if the Commission Has Jurisdiction, Which It Does Not, There Was No Coordination Between LFAF and Ducey 2014.

A. The First Amendment and Arizona Law Requires a Complainant to Show Actual Coordination.

Arizona's statute on independent expenditures, A.R.S. § 16-901(14), requires that Mr. Smith show that there was actual coordination, cooperation, arrangement, or direction between a person making an independent expenditure and a candidate for office.

The Secretary of State and this Commission have recently opined on this very statute and concluded that, in order to constitute coordination, there must be actual direction, cooperation, or

consultation, or some similar arrangement between the independent expenditure and the candidate. Specifically, on May 22, 2014, the Commission dismissed a complaint filed against Secretary of State Ken Bennett alleging coordination between an independent expenditure and his gubernatorial campaign, after Secretary Bennett acquired from a political committee a surplus sign advocating in favor of his election as governor. Secretary Bennett argued, and the Commission agreed, that there must be some "cooperation or consultation with any candidate or candidate's agent, . . . made in concert with a request or suggestion of the candidate." Commission 5/22/14 Transcript at 34:20-25 (excerpts attached hereto as Exhibit 1).

Both Secretary Bennett and the Commission went so far as to say that a candidate may freely use the work product of an independent expenditure after the expenditure has been made, because what the statute prohibits is coordination in the making of the expenditure. Secretary Bennett gave the example of an IE committee producing a sign, and the candidate taking a picture of it and "tweeting" it. *Id.* at 30:5-21; *see also* MUR06-0018 (Napolitano) ("Without evidence that Respondent directed the anti-Munsil activities or was otherwise affiliated with these entities or principals, so as to disqualify the activities from treatment as independent expenditures under A.R.S. § 16-901(14), then no charge can lie against Respondent.").

This testimony conforms with the Commission's past dispositions of coordination-based complaints. The Commission has consistently voted to take no action on complaints that provide no substantive evidence of actual coordination. *E.g.*, *id.*; *see also* MUR06-0023 (Munsil) (taking no action on complaint involving common political consultant where complainant failed to provide evidence of actual coordination between candidate and independent expenditure); MUR06-0032 (Napolitano) (similar).

The United States Supreme Court and other courts hold the same position. In order to constitute a coordinated expenditure, there must be some actual direction or cooperation between the person making the expenditure and the candidate. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), for example, the Supreme Court declared unconstitutional a presumption of coordination between a political party and candidates. *Id.* at 619. The Court held that a political party has a constitutional right to engage in independent expenditure activity and that the law cannot prohibit it absent actual coordination between the party and candidate. *Id.*; *see also Republican Party of Minnesota v. Pauly*, 63 F. Supp. 2d 1008 (D. Minn. 1999); *FEC v. Freedom's Heritage Forum*, 1999 WL 33756662 (W.D. Ky Sept. 29, 1999).

Similarly, in *Republican Party of Minnesota*, the court overturned a state statute presuming coordination between a political party and its endorsed candidates. The court invalidated the statute even where "[t]he party coordinated candidate appearances and voter registration drives, and helped to recruit volunteer assistance. [Party] officials conducted 'issue

research,' 'developed campaign plans,' and provided candidates with donor lists from which to solicit campaign contributions." 63 F. Supp. 2d at 1016. Despite this, the court reasoned that "the record in this case provides no support for an inference of actual coordination in conducting independent party expenditures." Moreover, the court observed that the legislative record "is void of any committee findings, legislative debate transcripts, legislative findings, or other empirical evidence to support . . . a legislative determination [that it should be presumed that a party and its nominee work together]." *Id.*

In *Freedom's Heritage Forum*, the court granted a motion to dismiss the FEC's complaint alleging coordination between the candidate and independent expenditure. The court held that "the FEC has failed to plead sufficient factual allegations of coordination under the statute" and that it "fails to tie together the Forum and Hardy's election campaign." 1999 WL 33756662 at *2. In dismissing the complaint, the court found it significant that "[t]he FEC does not allege that Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made.*" *Id.*

It is clear that this Commission, Secretary Bennett, and numerous courts have taken a common-sense approach to coordination statutes. A complainant needs to show some actual coordination between an independent expenditure and candidate in the form of cooperation, consultation, or direction in order to trigger an investigation. This is critical because an overly expansive interpretation of what constitutes coordination will necessarily render a statute unconstitutionally vague and ambiguous or impermissibly sweep in conduct that has nothing to do with making the expenditure. The requirement to show actual coordination weeds out frivolous and meritless claims, such as Mr. Smith's, that are advanced on the eve of an election simply to embarrass and harass a political opponent and third parties or silence constitutionally protected speech.

B. The Letter Fails to Identify Any Evidence of Coordination.

Mr. Smith cannot point to a single piece of evidence that Ducey 2014 engaged in any cooperation or consultation with LFAF in the making of the ad. In fact, Mr. Smith provides no evidence that Copper State was ever engaged by LFAF. Instead, he attempts to manufacture a false connection between a vendor, Copper State, and draw the false conclusion that, through Copper State, Ducey 2014 directed, consulted on, or cooperated with the LFAF ad.

Mr. Smith's entire argument breaks down for its lack of factual support and failure to cite any recognized legal theory under federal or state law to justify its complaint. Mr. Smith has failed to provide any facts – an unsubstantiated allegation (at 1) "upon information and belief" is not a well-pled fact – that there was any common "officer, director, employee, or agent" between LFAF and Ducey 2014. Mr. Smith ignores the teachings of the Supreme Court and Commission

precedent requiring a showing of *actual coordination* between a campaign and independent expenditure. *Colorado Republican Fed. Campaign Cte.*, 518 U.S. at 619.[3]

As demonstrated in Table 1, below, all of the position statements made in the ad are available directly on the Conference's publicly accessible website and were located with a minimal level of Internet searches in order to provide the website links with this letter.

Table 1: Publicly Available Information on the U.S. Conference of Mayors' Website

LFAF Ad Statement	US Conference of Mayors Website Location
"fully endorsed Obamacare from the start"	http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf
"vocally supported the Obama administration's efforts to regulate carbon emission"	http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf http://www.usmayors.org/resolutions/80th_conference/AdoptedResolutionsFull.pdf (page 113) http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf (page 80)
"backed the President's proposal to limit our 2nd amendment rights"	http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf
"Obama's budget was 'a balanced approach'"	http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf

[3] The introductory sentence of § 16-901(14) requires "cooperation or consultation" or that the expenditure is made "in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate." All of the subsidiary elements of Section 16-901(14) must be read in conjunction with this predicate sentence.

In addition, the attached declaration of Shauna Pekau, CEO of Copper State, explains that the documents that she obtained in her public records requests to the City of Mesa are related to completely different subjects than the Conference's federal lobbying agenda. [Declaration of Shauna Pekau ("S. Pekau Decl.") at ¶¶ 7-14 attached hereto as Exhibit 2.] The declaration further explains that she has no connection to LFAF whatsoever and that, to the best of her knowledge, none of the information that she obtained from the City of Mesa has any relation to the LFAF advertisement. In fact, the documents obtained from the City of Mesa have absolutely nothing to do with the public positions taken by the Conference on the four federal issues identified in the advertisement.

Also attached hereto as Exhibit 3 is a declaration from Gregg Pekau, who Mr. Smith's complaint suggests of providing "opposition research" to LFAF. In it, Mr. Pekau's declaration explains that he has no connection to LFAF whatsoever. [Declaration of Gregg Pekau ¶¶ 2-4, (Exhibit 3)].

Worse yet is Mr. Smith's use of the already discredited "connection" involving Larry McCarthy. Mr. McCarthy had *no* involvement in the LFAF Smith ad. [Declaration of Lawrence McCarthy ¶¶ 3-4, attached hereto as Exhibit 4.] It is well known, and it is a matter of public record with the Federal Election Commission, that in March 2014 Mr. McCarthy worked on a television ad for LFAF involving a United States Senate candidate in Nebraska. This does not even come close to coordination on an entirely *separate* project sponsored by LFAF, at a completely different time, in a completely different state, on a totally unrelated matter.

Similarly, there is no evidence linking Direct Response Group ("DRG"), a direct mail vendor, to LFAF and Ducey 2014. DRG is a vendor that provides printing and mailing services. It has had no involvement in the *LFAF* advertisement complained of here. [Declaration of J. Padovano ¶¶ 3-5, attached hereto as Exhibit 5.]

Finally, attached hereto as Exhibit 6 is a declaration from Jonathan P. Twist, campaign manager for Ducey 2014, explaining that there has been no coordination whatsoever between Ducey 2014 and LFAF.

IV. The LFAF Advertisement is Issue Advocacy and Cannot Be Classified as an "Independent Expenditure."

Although Mr. Smith cannot provide a scintilla of actual evidence showing actual unlawful coordination, the Commission should also determine that there is no reason to believe that an alleged violation occurred because the LFAF advertisement is pure issue advocacy falling

outside of the statutory definition of an "independent expenditure." Under A.R.S. § 16-901(14), only an advertisement "that ***expressly advocates*** the election or defeat of a clearly identified candidate" constitutes an "independent expenditure."[4] (Emphasis added.)

A. Under Controlling Supreme Court Precedent, the Advertisement is Unmistakably Issue-Based and Protected by the First Amendment.

The First Amendment prohibits government regulation of issue advocacy. The United States Supreme Court has held that government may regulate a message as express advocacy only where an advertisement (i) uses express advocacy magic words such as "vote for" or "vote against" a candidate[5] or (ii) is the functional equivalent of express advocacy where "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Federal Election Comm'n v. Wis. Right to Life*, 551 U.S. 449, 469 (2007) ("*WRTL*"); *accord Kromko v. City of Tucson*, 47 P.3d 1137, 202 Ariz. 499 (2002) (holding that municipal literature informing the public of the projected impact of road improvement ballot propositions was not express advocacy).[6]

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[4] The term "expressly advocates," defined under A.R.S. § 16-901.01(A), has been ruled unconstitutional by the Arizona Superior Court. *See* Final Judgment, *Committee or Justice & Fairness v. Arizona Secretary of State's Office, et al.*, No. LC-2011-000734 (Ariz. Superior Court Maricopa County Nov. 28, 2012) (attached hereto as Exhibit 7). This case is pending review at the Arizona Court of Appeals. Ducey 2014 agrees that A.R.S. § 16-901.01 is unconstitutional under the First Amendment of the United States Constitution and Article II § 6 of the Arizona Constitution and asserts this argument as a reason why the Commission should take no action on the complaint.

[5] The advertisement here does not use the express advocacy "magic words."

[6] *Kromko* explored a "second, alternative test" focusing on whether a communication "'taken as a whole[,] unambiguously urge[s]' a person to vote in a particular manner." 202 Ariz. at 503, 47 P.3d at 1141. The court held that the communication "must clearly and unmistakably present a plea for action, and identify the advocated action; it is not express advocacy if reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action." *Id.* The court clarified that it was "not suggesting that [the] timing or other circumstances independent of the communication itself[] may be considered . . . ." *Id.* As this Response explains, the LFAF advertisement exerts all of the indicia of issue advocacy and, given its context, it cannot be said that it "clearly and unmistakably present[s] a plea for action, and identif[ies] the advocated action." *Id.*

This second category of express advocacy "has the potential to trammel vital political speech, and thus regulation of speech 'as the functional equivalent of express advocacy' warrants careful judicial scrutiny." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) ("NCRTL"). In the context of examining whether an advertisement is the functional equivalent of express advocacy, the Supreme Court has held that the regulator must examine the advertisement itself without straying into circumstantial arguments about the intent of the speaker, the effect of the advertisement on the viewing public, and other "contextual factors" such as the timing of the advertisement. *WRTL*, 551 U.S. at 474 n.7. The Court further explained that the government cannot regulate advertisements on public issues "merely because the issues might be relevant to an election." *Id.* Finally, and importantly, the Court held that "in a debatable case, the tie is resolved in favor of protecting speech." *Id.*

Following its "no reasonable interpretation" test, the Court in *WRTL* held that advertisements that mentioned then-Senator Feingold, who was running for reelection, and that criticized the Senate's failure to act on judicial nominees were issue advocacy communications. The Court reasoned that the advertisements "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter." *Id.* at 470.

Here, the LFAF's Conference advertisement includes those elements:

- The ad identifies Mr. Smith as president of the Conference. This statement is true, as Mr. Smith was president of that organization from June 24, 2013 until April 15, 2014.

- The ad states that the Conference supports the federal Patient Affordable Care Act ("PACA" a/k/a "Obamacare"), federal proposals to regulate carbon emissions, and federal proposals to enact gun control and firearm restrictions. It also states that the Conference supported President Obama's proposed budget. These statements are true, and the Conference's policy positions are available on its website.

- The ad states that "these policies are wrong for Mesa," questions "why does Mayor Scott Smith support policies that are wrong for Mesa," and urges viewers to call Mr. Smith on the provided City of Mesa phone number and "make his organization more like Mesa, not the other way around."

Like the advertisement in *WRTL*, the LFAF advertisement focused on federal legislative issues: PACA, carbon emissions, gun control, and the budget. All of the issues identified in the

advertisement are federal issues, which the Conference attempts to influence through its federal lobbying activities.

Like the advertisement in *WRTL*, the LFAF advertisement took a position on the issues – "policies that are wrong for Mesa" – and urged the public to adopt that position. Finally, like the advertisement in *WRTL*, the LFAF advertisement provided a City of Mesa government phone number and urged viewers to contact Mayor Smith and tell him to change the policies advocated by the national organization that he leads.

In addition to this, the *WRTL* opinion provided a deeper analysis of the advertisement, observing that "[t]he ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office." *Id.* The LFAF advertisement here displays the same characteristics. Nowhere does the advertisement mention an election, anyone's candidacy, a political party, or any challenger. There is no appeal to vote. The advertisement does not take a position on Mr. Smith's character, qualifications, or fitness for any office.

Rather, the focus of the advertisement is on Mr. Smith's position as president of a national organization, public positions that organization has taken on federal legislation, and on urging viewers to contact Mr. Smith and adopt different positions. All of these factors are the traditional indicia of issue advocacy. *Id.*; *see also FEC v. Cent. Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 50-51 n.6, 53 (2d Cir. 1980) (rejecting FEC's argument that a committee's "bulletin" showing twenty-four votes cast by the identified congressman, analyzed in terms of whether they were "for lower taxes and less government," and concluding with the statement "since *you* are paying the tax bills, *you* are the boss. And don't let your Representative forget it!" was issue advocacy).

B. The Contextual Factors Cited in Mr. Smith's Letter are Irrelevant but Nevertheless Fail to Re-Classify the Advertisement as Express Advocacy.

In *WRTL*, the Supreme Court stated that the government cannot examine "contextual factors" surrounding an advertisement to determine whether it is express advocacy. Mr. Smith's letter ignores this and instead asks that this Commission entertain certain speculative theories to re-classify the advertisement. This attempt should be rejected.[7]

[7] The Executive Director's Report analyzing Secretary Bennett's request for a no action letter re voter advertisements (at 6) quotes part of a sentence from *WRTL*, that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context." *WRTL*, 551 U.S. at 474. The full quote is as follows: "Courts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad 'describes a legislative

Mr. Smith first contends (at 2) that LFAF should have limited its advertisement to City of Mesa voters. He argues that the advertisement was actually targeted to "the gubernatorial primary electorate" and that it was aired "on channels watched disproportionately by Republic [sic] primary voters." This argument wrongly uses a homespun contextual argument that speculates into LFAF's intent. The First Amendment prohibits this factor's consideration. In *NCRTL*, the Fourth Circuit overturned a North Carolina statute that took into account "the distribution of the communication to a significant number of registered voters for that candidate's election." 525 F.3d at 281, 284 (holding that contextual factor relating to distribution of advertisement violated First Amendment and asking "how many voters would be considered 'significant'?"). In any event, the fact is that broadcast and radio advertisements cannot be limited within the "Phoenix Market" to specific municipalities. Mr. Smith provides no evidence whatsoever that certain channels are "disproportionately" viewed by Republican primary voters. And he fails to provide any evidence of mailers or internet advertisements.

Next, Mr. Smith admits (at 2) that public information about the Conference's public positions "has been publicly available for a long time," but argues that because the advertisements ran in April 2014 it indicates LFAF's intent to run an express advocacy message. Mr. Smith's contextual argument goes to the intent of the speaker in a manner that impermissibly attempts to second-guess the timing of the advertisement. This is irrelevant to the analysis and ultimately wrong. *See NCRTL*, 525 F.3d at 281, 284 ("[H]ow is a speaker—or a regulator for that matter—to know how the 'timing' of his comments 'relate to the 'events of the day?'"). The fact of the matter is that the advertisement ran almost five months before the primary election date, well before the election.

Mr. Smith then contends that the ads were run "just days before [his] last day in office as Mayor of the City of Mesa (*i.e.*, April 15, 2014). No rational actor would spend more than $275,000 to influence the last two weeks of [his] term as mayor . . . ." This is exactly the kind of sophistry that the *WRTL* Court warned against. How a "rational actor" would spend $275,000 is far beyond what the Commission may constitutionally consider and an inquiry into "intent" that is not permissible in this area of the law. *See NCRTL*, 525 F.3d at 283 (holding that the

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issue that is either currently or the subject of legislative scrutiny or likely to be the subject of such scrutiny in the future.'" *Id.* (quoting *WRTL v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006) (emphasis added)). The Court added that "the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns." *Id.* That "broader inquiry" includes the contextual factors rejected in *WRTL*, such as timing, and those overturned in *NCRTL* and in *Committee for Justice & Fairness v. Ariz. Secretary of State's Office*. The "basic background information" here is the fact that PACA, gun control, carbon regulation, and the federal budget are all prominent national legislative issues.

North Carolina statute "runs directly counter to the teaching of *WRTL* when it determines whether speech is regulable based on how a 'reasonable person' interprets a communication in light of four 'contextual factors'" and asking "at what 'cost' does political speech become regulable?").

Indeed, in *WRTL*, the Supreme Court specifically declined to consider the timeliness of advertisements mentioning Senator Feingold that were run "30 days prior to the Wisconsin primary" and that "WRTL did not run the ads after the elections." 551 U.S. at 460. Similarly, the Supreme Court has weighed against the exact type of intent-based test urged by the complainant in this matter because it would "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." *Id.* at 486. Such tests also "lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another." *Id.*; *see also infra*, Part IV.C.

Mr. Smith further contends that the City of Mesa public records requests submitted by Copper State "tracks the content of the public records requests submitted by Pekau." They do not. The Copper State document requests relate to completely different subject matters than the Conference's federal legislative agenda. [S. Pekau Decl. at ¶¶3-15 (Exhibit 2).] For example, the documents show:

- Mr. Smith has approximately $97,427.49 in travel reimbursements billed to the City of Mesa taxpayers. [S. Pekau Decl. Exh. B]
- Twenty-five trips involved expenses covered by other entities, including Italy, China, Saudi Arabia, Morocco, Canada and Mexico. [*Id.* Exh. B]
- Photographs of Mr. Smith sitting next to, laughing with, and hugging Vice President Joe Biden during and after Mr. Biden delivered a speech. [*Id.* Exh. C]
- Direct non-travel charges to Mr. Smith's City of Mesa credit card. [*Id* Exh. B]
- Mr. Smith's City of Mesa calendars from 2008 to 2014. [*Id.* Exh. E]

The City of Mesa responded to Copper State's public records requests in late March and April, 2014. Not only are the documents produced far afield of the LFAF advertisement's content, they were produced too late to validate the complainant's speculative timeline alleging an overlap between the requests and the advertisement's production.

Finally, Mr. Smith argues that LFAF "has been reported to have very close ties to the Ducey Campaign." The fact that Mr. Smith resorts to citing to bloggers, gossip publications, and other unsubstantiated Internet reports is hardly evidence. The fact is that there are no ties between LFAF and Ducey 2014 whatsoever. [*See* Declarations attached hereto as Exhibits 2-6 .]

C. Arguments Advanced by Mr. Smith's Attorney in Another Matter Reinforce the Conclusion that LFAF's Advertisement is Issue Advocacy.

The LFAF ads are remarkably similar in nature to those recently defended by Mr. Langhofer, who is the author of Mr. Smith's letter and the complainant in this matter. Attached hereto as Exhibits 8 and 9 are letters from Mr. Langhofer to the Arizona Secretary of State explaining that his client's ads in that other matter, remarkably similar to the one complained of here, are issue advertisements.[8] In defending his client's advertisements, Mr. Langhofer took the following positions:

- An advertisement that identifies a candidate as a government official "may not be deemed electioneering activities solely because the individual happens to be a candidate for elected office." Langhofer June 2, 2014 letter at 2 (citing IRS Rev. Rul. 2004-6).

- An advertisement distributed to "'civic-minded adults,' as might be expected of advertising concerning issues of social importance," does not indicate express advocacy. *Id.*

- The timing of an advertisement should not be considered. On behalf of his client, Mr. Langhofer argued "that the ad was aired three months before the primary election cycle is coincidental." *Id.* at 3

- Singling out a single elected official for criticism "is entirely contextual; an issue-based communication is not transmuted into 'express advocacy' or its equivalent merely because it has the incidental effect of embarrassing a public official who may someday run for reelection. . . . By the Complaint's logic, all criticism of

[8] The Secretary of State agreed and dismissed one complaint against the Arizona Public Integrity Alliance, with the second still under consideration. See Exhibit 10 hereto. We also note an April 9, 2014, letter from the Secretary of State, attached hereto as Exhibit 11, dismissing a complaint filed by Mr. Langhofer alleging an illegal campaign expenditure in which the Secretary's office noted that "you have consistently stated that AZPIA is involved in issue advocacy and therefore does not have to register as a political committee. Accepting your assertions as true in those complaints against AZPIA [we dismiss your complaint]."

government officials in the three months before an election—regardless of whether the ad is or can reasonably be interpreted as an issue-based criticism—would constitute electioneering subject to campaign finance and reporting and disclosure requirements. ***That is not the law under either WRTL or the Arizona statutes; express advocacy is required, and citizens remain free to criticize their government on issues even during election season***." *Id.* at 4 (emphasis added).

The very arguments made by Mr. Smith's attorney in defending a separate campaign finance law complaint filed against a different client strongly reinforce the conclusion that the LFAF advertisements are issue advocacy and that Mr. Smith's complaint fails factually and as a matter of law.

Conclusion

The Commission should take no action on this complaint for any one of three reasons: (i) the Commission lacks jurisdiction in a campaign finance matter involving a non-participating candidate, (ii) Mr. Smith and his lawyer have failed to produce any evidence of actual coordination between LFAF and Ducey 2014, and the evidence produced with this response shows conclusively that there was none, and (iii) the LFAF advertisement is pure issue advocacy.

Respectfully submitted,

Snell & Wilmer

Michael T. Liburdi

Michael T. Liburdi

State of Arizona)
)
County of Maricopa)

Subscribed and sworn (or affirmed) before me this 15th day of July, 2014 by Michael T. Liburdi.

Cynthia J. Tassielli
Notary Public

CYNTHIA J. TASSIELLI
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires
June 1, 2015

(seal)

cc: Karen Osborne
Jeffrey Messing
Kory Langhofer

ML/ct

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