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July 30, 2014

Thomas Collins  
Executive Director  
Arizona Citizens Clean Election Commission  
1616 West Adams, Suite 110  
Phoenix, AZ 85007

**Re: MUR 14-007**

Dear Mr. Collins,

We are scheduled to appear before the Commission's public meeting tomorrow to discuss this matter, but we wanted to provide our initial responses to your recommendation in writing, in the hope that you will distribute this letter to the Commissioners in advance of the public session. We hope that this letter will aid the conduct of tomorrow's session.

**A. Legacy Foundation Action Fund Has Initiated Litigation Against the Commission**

The Recommendation mentions litigation related to this matter including *Committee for Justice and Fairness v. Arizona Secretary of State* (1 CA-CV 13-0037 (Ariz. Ct. App. Div. 1)) pending at the Court of Appeals, and *Horne v. Citizens Clean Elections Commission* (CV2014-009404 (Maricopa Cnty. Sup. Ct.)). It appears that the Recommendation fails to mention the lawsuit filed by Legacy Foundation Action Fund on July 18, 2014. That case is *Legacy Foundation Action Fund v. Citizens Clean Elections Commission* (CV2014-003968 (Maricopa Cnty. Sup. Ct.)), and directly challenges both the Commission's jurisdiction in this matter and the statutory definition of "express advocacy." The Court has scheduled a return hearing for 9:30am on August 7, 2014. We believe this litigation is important for the Commission to consider as it evaluates your Recommendation.

**B. Interpretation and Analysis of the Statute is Incorrect**

**a. Supreme Court Limited the Use of Contextual Factors in Citizens United**

The Recommendation cites to Wisconsin Right to Life ("WRTL"), *Wisconsin Right to Life v. Fed. Elec. Comm'n*, 127 S.Ct. 2652, 2669 (2007)[sic], for the proposition that 'context' can be considered when determining what constitutes the functional equivalent of express advocacy. The Recommendation fails to address, however, significant

portions of WRTL that limit the ‘context’ application as well as other issues that are highly relevant to the matter at hand. As Chief Justice Roberts wrote:

As should be evident, we agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. It is why we emphasize that (1) there can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of “contextual” factors highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election and (4) in a debatable case, the tie is resolved in favor of protecting speech. And keep in mind this test is only triggered if the speech meets the brightline requirements of BCRA §203 in the first place. [broadcast ads within 30 days of a primary or 60 days of a general election]

*FEC v. Wis. Right to Life, Inc.*, 127 S.Ct. 2652, 2669 n.7 (2007). Furthermore, the Supreme Court in *Citizens United* further clarified its meaning. As Chief Justice Roberts wrote about the FEC’s regulations adopted after WRTL:

...[T]he FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11 factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.

*Citizens United v. FEC*, 130 S.Ct 876, 896 (2010). We believe it is important that the Commission have a full understanding of the Supreme Court’s application of the First Amendment in this area.

**b. The Recommendation’s Attempts at “Objective” Analysis is Actually an Impermissible “Intent” Analysis**

While the Recommendation purports to contain “objective” analysis, it appears that this “objective” analysis in fact reflects an application of a free-ranging “intent and effects” test that the Supreme Court has ruled impermissible in both WRTL and *Citizens*

United. On page 8, the Recommendation begins its journey down a path prohibited by the Supreme Court as it proceeds to analyze the ads' images and the specific words. At the top of page 9, the Recommendation discusses a perception of who might vote in the Republican primary election to be held nearly five months after the advertisement aired, and ignores other matters such as the fact that in Arizona persons who are independent or claim no party affiliation may vote in the primary elections. In contrast to the Recommendation's purported "objective" analysis of what it claims is the express message of the advertisement, we would like to point the Commission to comments made by ordinary citizens commenting on the advertisement at the Legacy Foundation Action Fund's YouTube channel. Some of the comments 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....

(sic).

So, while the Recommendation claims that the advertisement can only have one "objective" meaning, this simply is not the case. Rather, the allegedly "objective" assessment reflects the Recommendation's analysis of intent and effect – when that intent and effect may not be true. Additionally, these comments demonstrate that there is more than one reasonable interpretation of the advertisement, and demonstrates how the same advertisement can reasonably create different perceptions and analysis based on the viewer.

Additionally, we take serious issue with the Recommendation's assertion that health care, the environment and Second Amendment rights are not pending legislative and policy issues. None of these issues are settled, and all three of these issues are the subject of vigorous and ongoing national policy debates. A brief review of the U.S. Conference of Mayors' own press release website at <http://www.usmayors.org/pressreleases/> demonstrates that the Conference regularly issues statements or press releases related to these very policies.

The Supreme Court has "long recognized that the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application.'" *Buckley v. Valeo*, 96 S.Ct. 612, 646 (1976). The Court has also long recognized that distinguishing between discussions of issues and discussions of candidates cannot be based on an intent-and-effect test without jeopardizing free political discourse. *Id.* The First Amendment is meant to protect uninhibited and robust public debate on issues of national importance; a test that focuses on the intent of the speaker does not "remotely" reflect the country's "profound national commitment" to that principle. *Id.* at 632.

An intent-based test is inherently uncertain and unpredictable. Intent-based tests “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.” *Wis. Right to Life, Inc.* at 2666. 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.* Regulations of speech therefore require objective standards that focus on the substance of communications rather than “amorphous considerations of intent and effect.” *Id.*

In the Recommendation’s “objective” analysis it fails to point to a single word that relates to voting or elections, or any word that would be a call to action for any activity related to voting in the primary that was nearly five months away when the advertisement aired.

**c. Even if Constitutional, the Arizona Statute’s Reference to Timing Must be to Timing Related to the Election**

The Recommendation discusses the various factors in the multi-factor test that comprises A.R.S. § 16-901.01. While we disagree as to the constitutionality of this statute for the reasons outlined *supra* and *infra*, even if it is accepted as constitutional, the Recommendation’s analysis of the factors is seriously flawed.

First, with respect to a “favorable or unfavorable” light, the Recommendation makes assumptions about targeting of the ad not supported by facts. It then takes this assumption and concludes that, for those persons, the advertisement presents Mayor Smith in a “negative” light based on the Recommendation’s perception of the outlook of those persons. In fact, the advertisement was aired on broadcast media in the entire Phoenix market (the only way to broadcast to the residents of Mesa), and was received by a variety of individuals some of whom have favorable views of President Obama and some of whom have negative views of President Obama. As demonstrated by the comments cited above, some individuals who viewed the advertisement believe that the advertisement had positive things to communicate about Mayor Smith. Second, with respect to targeting, we note that the advertisement ran only in the media market covering the City of Mesa, and was not a statewide media buy.

Third, the Recommendation makes much of the timing of the advertisement with respect to Mayor Smith’s resignation as Mayor of Mesa. The timing reference in the statute has to be related to the timing of the election, and we note that this advertisement was aired nearly five months out from the state’s primary election. This significant fact is not noted in the Recommendation at all. Furthermore, we note that the Secretary of State’s office recently accepted Complainant Langhofer’s assertion in another matter that an advertisement aired only three months out from an election was not sufficient to

satisfy the timing prong of this statute. Additionally, we note that the WRTL decision relied upon in the Recommendation applied very clearly only to broadcast ads within 30 days of a primary and 60 days of a general election. *See Wis. Right to Life, Inc.* at 2660.

Finally, we note that the advertisement contains no reference to an election, voting or the statements of any of Mr. Smith's primary opponents.

**C. The Maricopa County Superior Court Decision Regarding the Constitutionality of A.R.S. Stat. § 16-901.01 Is Binding On the Commission by Operation of the State Constitution and Rulings of the Arizona Supreme Court**

While the Recommendation notes that we have already highlighted for the Commission that the Maricopa County Superior Court has declared A.R.S. § 16-901.01 unconstitutional, it makes the stunning claim that the court's opinion is not binding on the Commission. The Recommendation's position flies directly in the face of long-standing precedent dating back to *Marbury v. Madison*, 5 U.S. 137 (1803), and relied upon by the Supreme Court of Arizona. *See Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482 (2006) (recognizing *Marbury v. Madison* – "it is emphatically the province and duty of the judicial department to say what the law is"). Additionally, we cite the Commission to Article 6 of the Arizona Constitution, providing for a Superior Court for each county in the state. Being that the Maricopa County Superior Court made the ruling that the statute is unconstitutional, it is without question that the Commission is bound by such decision. When a judge of the court having jurisdiction declares a law unconstitutional, no person may apply that statute and be consistent with the basic principles of our governmental structures.

Under the Arizona Rules of Civil Procedure and the Arizona Rules of Appellate Procedure, there are no automatic stays pending appeal. In *Kelley v. Arizona Dept. of Corrections*, 744 P. 2d 3 (Ariz. Supreme Court 1987), the Arizona Supreme Court concluded that in cases that did not involve monetary judgments, there is no automatic stay pending appeal. In *Committee for Justice and Fairness*, there was no stay sought before the trial court and no stay sought from the Court of Appeals. As a result, it is axiomatic that the Superior Court's declaration that A.R.S. § 16-901.01 is unconstitutional remains in force and effect until such time the decision is either stayed by the trial court or a ruling is issued by the Court of Appeals.

**D. Coordination Count of the Complaint Should be Dismissed**

While the Recommendation barely addresses the coordination allegations, we believe the coordination count should be summarily dismissed by the Commission. The Complaint itself contains nothing other than an assertion of an association between a vendor to the Ducey campaign and that vendor's clearly unrelated work for Legacy Foundation Action Fund in another state. In response, both the Ducey campaign and the

Legacy Foundation Action Fund have provided sworn affidavits indicating that there was no involvement of the vendor in the ad in question, and no discussion between Legacy Foundation Action Fund and that vendor about Arizona. As a result, the Commission should find No Reason to Believe that any violation of coordination prohibitions occurred here.

**E. Conclusion**

We thank you for the opportunity to provide this additional analysis to the Commission, and we look forward to appearing before you tomorrow to address these and other issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian Bergin', with a long horizontal flourish extending to the right.

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A handwritten signature in black ink, appearing to read 'Jason Torchinsky', with a long horizontal flourish extending to the right.

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