

Bergin, Frakes, Smalley & Oberholtzer  
4455 East Camelback Road, Suite A-205  
Phoenix, AZ 85018

Holtzman Vogel Josefiak PLLC  
45 North Hill Drive, Suite 100  
Warrenton, VA 20186

August 13, 2014

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

Dear Mr. Collins:

We write on behalf of Legacy Foundation Action Fund to address last week's decision of the Court of Appeals in *Committee for Justice and Fairness v. Arizona Secretary of State*. *CJF v. Arizona*, 1-CA-CV 13-0037 (Ariz. Ct. App. 2014).

While the Court of Appeals reversed the Superior Court's finding with respect to the constitutionality of the express advocacy decision, the Court of Appeals confirmed that our interpretation of the statute as written is correct.

As the court noted on pages 12 and 13 of the decision, the opinion focused on CJF's advertisement's heavy emphasis on Horne's past actions as Superintendent of Public Education – a position he would soon vacate by operation of law. By contrast, the LFAF advertisement at issue here examined current positions of the organization that Mayor Smith headed at the time the advertisement was run, and about his role in an office that he legally could have held until January of 2017. While it appears from the Complaint that Mayor Smith had announced an intention to resign, there was no legal impediment to Mayor Smith changing his mind at any point and remaining Mayor while running for Governor.

We also direct your attention to Paragraphs 29 and 44 of the opinion where the court focuses on the fact that the advertisement at issue in the CFJ matter was run “immediately before the election.” *CJF* at ¶ 29. The court's observation regarding the close proximity to the election is in line with the position taken by other courts in similar cases. For example, in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the court found it determinative that the newspaper advertisement was run one week prior to the general election. *Id.* at 865. This confirms that our position that the timing referred to in the statute relates to the timing of the election – and not the timing of Mayor Smith's resignation as the initial Executive Director's report suggested. We emphasize for the Commission that LFAF's advertisement was aired more than four months before the primary election.

The Court's opinion evaluated the "no other reasonable interpretation" in the context of the timing of the advertisements in relation to the election and the placement of the advertisement on statewide television. With respect to the targeting of the advertisement, we again note that the LFAF advertisement ran only in Phoenix, the only broadcast market that reaches the population of Mesa. By contrast, the CJF advertisement was aired statewide in multiple media markets.

We also note that the Court of Appeals relied on the standards announced by the Supreme Court in *FEC v. Wisconsin Right to Life* ("WRTL"), 551 U.S. 449 (2007). See *CJF*, 1-CA-CV 13-0037, ¶ 32. We again draw the Commission's attention to fn. 7 of that opinion making clear that the "functional equivalent" test is only applicable in the 30 day pre-primary election and 60 day pre-general election bright line rules of the electioneering communications rules established by BRCA.<sup>1</sup> LFAF's advertisement is distinguishable from the CJF advertisement on this point as well. The 30 day pre-election period for the August 26 primary did not begin until well more than 90 days after LFAF's advertising run was completed. By contrast, the CJF advertisement was aired approximately ten days before the November general election – well within the 60 day time period of the electioneering communication definition in the federal statute at issue in *WRTL*. We draw your attention specifically to paragraph 44 of the Court of Appeals opinion in *CJF* where proximity to the election is specifically addressed.

Additionally, we note that should this matter proceed LFAF will advance an argument that the express advocacy definition is unconstitutional as applied to the advertisement that is the subject of the complaint. The provision of this letter to the Commission in no way intends to indicate that LFAF has waived or intends to waive that argument either before the Commission or before the Superior Court.

The LFAF advertisement is, for these reasons, issue advocacy and not subject to regulation. We respectfully ask that you revise your Executive Director's report to include an analysis of the *CJF* decision and that you recommend that the Commission take no action on the complaint.

Sincerely,

  
Jason Torchinsky

  
Brian Bergin

---

<sup>1</sup> We note that electioneering communications rules under federal law are also limited only to broadcast advertisements, but this limited medium of communication is not at issue here since LFAF does not dispute that its advertisement was broadcast on television.