

**STATE OF ARIZONA**  
**CITIZENS CLEAN ELECTIONS COMMISSION**  
MUR No. 14-007 Doug Ducey & Doug Ducey Candidate Campaign Committee(s)  
and Legacy Foundation Action Fund  
**SUPPLEMENTAL RECOMMENDATION ON COORDINATION**

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On behalf of the Citizens Clean Elections Commission (“Commission”), the Executive Director hereby provides the following Recommendation on the allegation of Coordination between Respondent Legacy Foundation Action Fund and Respondents Gubernatorial candidate Doug Ducey and the Doug Ducey Candidate Campaign Committee(s) (“Ducey 2014”).

**I. Procedural Update**

On August 15, 2014, Ducey 2014 provided supplemental materials on the issue of coordination as alleged in the Complaint filed by Kory Langhofer. **(Exhibit A)** The supplemental materials expand upon the sworn statements previously provided and provide new arguments on whether the legal and factual circumstances of the relationship of vendors (including individuals), LFAF and Ducey 2014 are sufficient to warrant further action by the Commission. *See* Ariz. Admin. Code R2-20-205; R2-20-206(C).

The new factual materials address whether the expenditure by LFAF “is based on information about the candidate’s plans, projects or needs, or those of his campaign committee, provided to the expending person by the candidate or by the candidate’s agents or any officer, member, or employee of the committee with a view toward having the expenditure made.” A.R.S. § 16-901(14)(d)(2013). The affidavits by Ducey 2014 affiliates Lawrence McCarthy, Gregg Pekau, Shauna Pekau, Jack Padovano, and Jonathan Twist all categorically deny providing any such information to LFAF.

The new legal materials highlight that McCarthy’s direct work for LFAF was on a political ad in a Nebraska Senate contest, a fact which has never been in dispute. The supplemental letter argues that because the terms “in the same election” as used in 16-901(14)(c) include only elections in this state, any activity by LFAF and McCarthy in an election in another

state does not trigger coordination. *See* A.R.S. § 16-901(7)(defining election as “any election for any initiative, referendum or other measure or proposition or a primary, general, recall, special or runoff election for any office *in this state* other than the office of precinct committeeman and other than a federal office.”).

These supplemental arguments are evaluated below.

## II. Analysis and Recommendation

### A. No action is warranted on the allegation of coordination under A.R.S. § 16-901(14)(D).

As noted above, an expenditure “is not independent if. . . [it] is based on information about the candidate’s plans, projects or needs, or those of his campaign committee, provided to the expending person by the candidate” or others. Here, all of the individuals mentioned in the Complaint deny such communications. Accordingly, I recommend the Commission take no further action on the Complaint on this basis.<sup>1</sup>

### B. No action is warranted on the allegation of coordination under A.R.S. § 16-901(14)(C) because there is no evidence that any vendor was an agent for LFAF for expenditures on behalf of a candidate for election in this state.

As noted above, Ducey 2014 argues that in order for 16-901(14)(C) to apply certain relationships must occur “in the same election.” Election is a defined term under Arizona law meaning an election “in this state.” A.R.S. § 16-901(7). Ducey 2014 argues that the election in which McCarthy worked for LFAF was a Nebraska election and that this means it was not in the same election. This is not correct.

Section 16-901(14)(C) provides that “[i]n the same election *the person making the expenditure*, including any officer, director, employee or agent of that person, is or has been”

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<sup>1</sup> Because the Complaint does not allege that LFAF is a political committee the Commission need not address whether A.R.S. § 16-901(14)(a) applies. If LFAF is a political committee under Arizona law the result of this recommendation may be affected. For more details about A.R.S. § 16-901(14) please see footnote 1 of the Recommendation in MUR 14-007.

involved in certain ways with the candidate. The same election thus refers to the expenditures made by LFAF in the governor's election, not some other election.

Nevertheless, no further action is warranted for a different reason. Section 16-901(14)(C) provides that coordination arises where a person, such as LFAF, makes an expenditure, and one of its officers, directors, employees or agents has had a certain relationship with the candidate or his affiliates. Here, there is no claim that McCarthy or his company were officers, directors, or employees of LFAF. The issue is whether he was an agent.

In relevant part, an agent under Chapter 6 of Title 16 is a person who has authority to make expenditures "on behalf of a candidate." Candidate, in turn, is defined as "an individual who receives . . . contributions for his nomination or election to any office *in this state* other than a federal office." In view of the expanded affidavits, there is no evidence that any of Ducey 2014 vendors, including individuals, also had such authority from LFAF.<sup>2</sup> Thus, A.R.S. § 16-901 (14)(C) does not apply. Consequently, I recommend the Commission take no further action and dismiss the Complaint as to Ducey 2014.

If the Commission chooses to authorize an inquiry of Ducey 2014, it must vote to do so and an inquiry will commence pursuant to A.R.S. §§ 16-956(A)(7), -956(B) & Ariz. Admin. Code R2-20-206(C).

Dated this 19 day of August, 2014.

By:   
Thomas M. Collins, Executive Director

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<sup>2</sup> The definition of agent also includes a "political consultant for a candidate or political committee." A.R.S. § 16-901(1). As noted above LFAF is not alleged to be a political committee. If LFAF is a political committee, the result of this recommendation could change. To the extent this creates an inconsistency in the treatment of political committees and entities that at least claim other statuses is a policy problem that may require a rule amendment or a legislative change.

# EXHIBIT A

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August 14, 2014

DENVER  
LAS VEGAS  
LOS ANGELES  
LOS CABOS  
ORANGE COUNTY  
PHOENIX  
RENO  
SALT LAKE CITY  
TUCSON

**VIA EMAIL AND U.S. MAIL**  
Thomas.Collins@azcleaselections.gov

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

**Re: Ducey 2014 - MUR 14-007**

Dear Mr. Collins:

This letter shall serve as a second supplemental response to MUR14-007 that clarifies our earlier submissions that no coordination has occurred between Legacy Foundation Action Fund (“LFAF”) and Ducey 2014 under A.R.S. § 16-901(14).<sup>1</sup>

The predicate sentence of A.R.S. § 16-901(14) states that an expenditure is not independent if there is any “cooperation or consultation with any candidate or committee or agent of the candidate” or if the expenditure is “made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate.” The predicate sentence informs how the various examples of coordination that are listed in subparts (a) through (d) should be interpreted, that there needs to be a showing of actual coordination in order to find a violation of § 16-901(14). That is the position taken by this Commission in previous matters, by the Arizona Secretary of State, the Maricopa County Recorder, and the federal courts.

We would like to specifically address the allegation that coordination exists simply because Larry McCarthy, an advertising vendor associated with Ducey 2014, worked on an advertisement for LFAF in a U.S. Senate race in Nebraska. In addition to the lack of actual coordination between Ducey 2014 and LFAF, a second reason exists to preclude Mr. McCarthy’s situation from A.R.S. § 16-901(14)(c)(ii). The Nebraska U.S. Senate race is not “the same election” as any election in Arizona. A.R.S. § 16-901(14)(c) states that an expenditure is not

<sup>1</sup> The independent expenditure statute was amended by the Legislature during the 2014 legislative session, and is now codified in both A.R.S. §§ 16-901(14) and 16-911. Because MUR14-007 alleges conduct prior to the amendments’ effective date, we focus on the statute prior to its amendment.

Thomas M. Collins  
August 14, 2014  
Page 2

independent if, “[i]n the *same election* the person making the expenditure, including any officer, director, employee or agent of that person is or has been . . . (ii) [r]eceiving any form of compensation or reimbursement from the candidate, the candidate’s committees or the candidate’s agent.” (Emphasis added.) The term “election” is defined in § 16-901(7) as “any election for any initiative, referendum or other measure or proposition or a primary, general, recall, special or runoff election for any office *in this state* . . . .” (Emphasis added.) The Nebraska U.S. Senate race is not an election “in this state,” and therefore cannot trigger the coordination factor under subpart (c)(ii) in the absence of actual coordination.

Moreover, Mr. McCarthy never had any authority whatsoever to act as an agent for Ducey 2014 outside of the narrow scope of his duties to produce advertisements for the Arizona Republican gubernatorial primary. For example, in Advisory Opinion 2003-10 (Reid), the Federal Election Commission held that “agency,” as that term is used in the Bipartisan Campaign Reform Act’s (“BCRA”) prohibition on a federal officeholder’s “agent” raising non-federal funds for state parties, should focus on whether the person is acting within the scope of his or her agency. In this particular Advisory Opinion, the FEC held that Rory Reid, son of Nevada Senator Harry Reid, would not violate the BCRA prohibition simply by raising federal funds as an “agent” of his father’s senate campaign while also raising non-federal funds as an “agent” of the Nevada State Democratic Party. Nevada’s contribution limits are significantly higher than the federal limits, and Nevada law allows contributions from sources prohibited by federal law, including corporations and labor organizations. According to the FEC, Rory Reid would not violate BCRA because his state-level fundraising activity was conducted as an agent of the State Party, not as an agent of his father’s senate campaign. The FEC recognized that a single individual can have agency relationships with multiple principles, but that alone does not violate the law.<sup>2</sup>

The facts are that (i) Mr. McCarthy had no discussions whatsoever with any person associated with LFAF about Ducey 2014 and (ii) no other person named or otherwise referred to in the complaint had any conversations with LFAF about Ducey 2014 whatsoever. We have obtained the supplemental declarations of Mr. McCarthy, Shauna Pekau, Gregg Pekau, Jack Padovano, and Jonathan Twist to underscore the fact that there was absolutely no communication between Ducey 2014 and LFAF whatsoever. See Exhibits A – E hereto.

For all of the reasons presented, we urge the Commission to dismiss the complaint against Ducey 2014 forthwith.

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<sup>2</sup> See also FEC Advisory Opinion 2007-05 (Iverson) (holding that “Mr. Iverson may solicit, direct and spend non-Federal funds as Chairman of the [Montana] State Committee, while continuing to serve as Chief of Staff to Congressman Rehberg. He must, however, refrain from soliciting, directing, or spending non-Federal funds as an agent of the Congressman.” (Emphasis added.)).

Respectfully submitted,

Snell & Wilmer

*Michael T. Liburdi*

Michael T. Liburdi

cc: Brian Bergin  
Jason Torchinsky

ML/ct  
19892088.1

# EXHIBIT A

IN THE  
ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

In re:  
MUR14-007

SUPPLEMENTAL DECLARATION OF SHAUNA PEKAU

I, Shauna Pekau, declare as follows:

1. I provide this supplemental declaration in response to the July 1, 2014 letter submitted to the Arizona Clean Elections Commission by the Scott Smith campaign and its attorney, which I have reviewed. The contents herein are based on my personal knowledge.
2. I am the Owner and Chief Executive Officer of Copper State Research & Strategy, LLC ("Copper State"). I am the sole member of Copper State.
3. Copper State has never done business with Legacy Foundation Action Fund ("LFAF").
4. Neither I nor, to the best of my knowledge, any person associated with Copper State has provided any information to any person associated with LFAF, including any known agent of LFAF, relating to Ducey 2014 in any manner whatsoever.
5. Neither I nor, to the best of my knowledge, any person associated with Copper State has had any communication with any person from LFAF, including any known agent of LFAF, relating to the Advertisement in any manner whatsoever.

I declare under penalty of perjury that the foregoing is true and correct.

Dated August 12, 2014

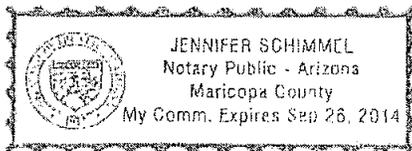
Shauna Pekau  
Shauna Pekau

State of Arizona )

)

County of Maricopa )

Subscribed and sworn (or affirmed) before me this 12th day of August, 2014 by Shauna Pekau.



(seal)

Jennifer Schimmel  
Notary Public

# EXHIBIT B

IN THE  
ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

In re:  
MUR14-007

**SUPPLEMENTAL DECLARATION OF GREGG PEKAU**

I, Gregg Pekau, declare as follows:

1. I provide this supplemental declaration in response to the July 1, 2014 letter submitted to the Arizona Clean Elections Commission by the Scott Smith campaign and its attorney, which I have reviewed. The contents herein are based on my personal knowledge.
2. I have never done business with Legacy Foundation Action Fund ("LFAF").
3. I have never provided any information to any person associated with LFAF, including any known agent of LFAF, relating to Ducey 2014 in any manner whatsoever.
4. I have never had any communication with any person from LFAF, including any known agent of LFAF, relating to Ducey 2014 in any manner whatsoever.

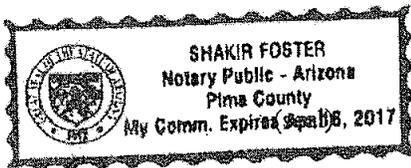
I declare under penalty of perjury that the foregoing is true and correct.

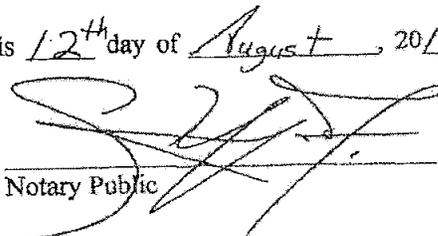
Dated August 12, 2014

  
\_\_\_\_\_  
Gregg Pekau

State of Arizona            )  
                                  )  
                                  Pima  
County of Maricopa        )

Subscribed and sworn (or affirmed) before me this 12<sup>th</sup> day of August, 2014 by  
Gregg Pekau.



  
\_\_\_\_\_  
Notary Public

# EXHIBIT C

IN THE  
ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

In re:

MUR14-007

SUPPLEMENTAL DECLARATION OF LAWRENCE McCARTHY

I, Lawrence McCarthy, declare as follows:

1. I provide this supplemental declaration in response to the July 1, 2014 letter submitted to the Arizona Clean Elections Commission by the Scott Smith campaign and its attorney, which I have reviewed. The contents herein are based on my personal knowledge.

2. I am president of McCarthy Hennings Whalen, Inc. ("MHW").

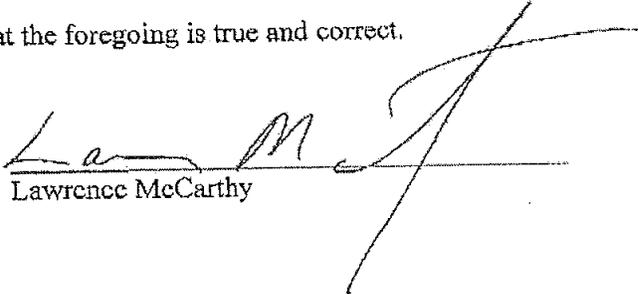
3. Neither I nor, to the best of my knowledge, anyone associated with MHW have provided any information to any person associated with Legacy Foundation Action Fund ("LFAF"), including any known agents of LFAF, relating to the Ducey 2014 campaign in any manner whatsoever.

4. Neither I nor, to the best of my knowledge, anyone associated with MHW have ever had any communication with any person from LFAF, including any known agents of LFAF, relating to Ducey 2014 in any manner whatsoever.

5. I have never acted as an agent on behalf of Ducey 2014 in any manner with respect to LFAF.

I declare under penalty of perjury that the foregoing is true and correct.

Dated August 14, 2014

  
Lawrence McCarthy

# EXHIBIT D

IN THE  
ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

In re:  
MUR14-007

SUPPLEMENTAL DECLARATION OF JACK PADOVANO

I, Jack Padovano, declare as follows:

1. I provide this supplemental declaration in response to the July 1, 2014 letter submitted to the Arizona Clean Elections Commission by the Scott Smith campaign and its attorney, which I have reviewed. The contents herein are based on my personal knowledge.

2. I am President of Direct Response, LLC ("DR"). The letter refers to my company as "Direct Response Group, LLC." The company changed its name to DR in January 1, 2009.

3. Neither I nor, to the best of my knowledge, anyone associated with DR have provided any information to or had any communication with any person associated with Legacy Foundation Action Fund ("LFAF"), or any of its known agents, relating to the Ducey 2014 campaign in any manner whatsoever.

4. Neither I nor, to the best of my knowledge, anyone associated with DR has had any communication with any person from LFAF, including any known agents of LFAF, relating to the Ducey 2014 campaign in any manner whatsoever.

5. I have never acted as an agent on behalf of Ducey 2014 in any manner with respect to LFAF.

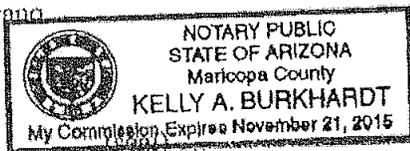
I declare under penalty of perjury that the foregoing is true and correct.

Dated August 12, 2014

  
\_\_\_\_\_  
Jack Padovano

State of Arizona )  
County of Maricopa )

Subscribed and sworn (or affirmed) before me this 12<sup>th</sup> day of August, 2014 by Jack Padovano



  
\_\_\_\_\_  
Notary Public

# EXHIBIT E

IN THE  
ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION

In re:  
MUR14-007

SUPPLEMENTAL DECLARATION OF JONATHAN P. TWIST

I, Jonathan P. Twist, declare as follows:

1. I provide this declaration in response to the July 1, 2014 letter submitted to the Arizona Clean Elections Commission by the Scott Smith campaign and its attorney, which I have reviewed. The contents herein are based on my personal knowledge.
2. I am the campaign manager for Ducey 2014.
3. To the best of my knowledge, nobody associated with Ducey 2014 has provided any information to any person associated with LFAF, or any known agents of LFAF, relating the Ducey 2014 campaign in any manner whatsoever.
4. To the best of my knowledge, nobody associated with Ducey 2014 has had any communication with any person from LFAF, including any known agents of LFAF, relating to the Ducey 2014 campaign in any manner whatsoever.

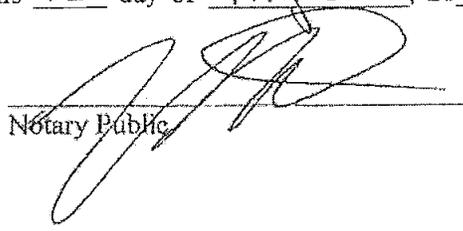
I declare under penalty of perjury that the foregoing is true and correct.

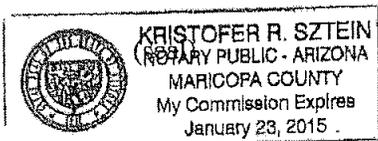
Dated August 12, 2014

  
Jonathan P. Twist

State of Arizona )  
County of Maricopa )

Subscribed and sworn (or affirmed) before me this 12<sup>th</sup> day of August, 2014 by  
Jonathan P. Twist.

  
Notary Public



# EXHIBIT B

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

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<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.