

Janice K. Brewer  
Governor

Thomas Collins  
Executive Director



Timothy J. Reckart  
Chair

Louis J. Hoffman  
Thomas J. Koester  
Mitchell C. Laird  
Steve M. Titla  
Commissioners

State of Arizona  
**Citizens Clean Elections Commission**  
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### **PROBABLE CAUSE RECOMMENDATION**

**To:** Commissioners  
**From:** Thomas M. Collins, Executive Director  
**Date:** November 3, 2014  
**Subject:** MUR 14-007 (Legacy Foundation Action Fund)

I am writing in reference to the Citizens Clean Elections Commission's (the Commission) finding that there is reason to believe Legacy Foundation Action Fund (LFAF or Respondent) may have committed violations of the Citizens Clean Elections Act and Commission rules (collectively, the Act). I recommend that the Commission find probable cause that the Respondent violated the Act.

#### **I. Question Presented and Brief Answers**

**Question:** Did Respondent's activities constitute express advocacy and require filings under the Act?

**Answer:** Because LFAF's advertisements expressly advocate for the defeat of Scott Smith for Governor and it filed no reports, LFAF violated A.R.S. §§ 16-941(D), -942(B), -958 and A.A.C. R2-20-109.

## **II. Factual and Procedural Background**

On January 9, 2014, Scott Smith, then Mayor of the City of Mesa, established his candidate campaign committee, Smith for Governor 2014, with the Secretary of State's office. At the time, Smith was also the President of the U.S. Conference of Mayors (the Conference). Before Smith resigned as mayor and thus ended his term as president of the Conference, LFAF aired over \$260,000 in television advertisements in the Phoenix market. Exhibit 1 [Complaint Exhibit D]; Exhibit 2 [LFAF Response Affidavit of LFAF President Christopher Rants at ¶¶ 12, 15 (stating advertisements aired between March 31 and April 14)]; Exhibit 3 [FCC Political File, LFAF Order, dated 4/7/2014 with KPNX Channel 12, Phoenix, *available at* [https://stations.fcc.gov/collect/files/35486/Political%20File/2014/Non-Candidate%20Issue%20Ads/Legacy%20Foundation%20Action%20Fund/Legacy%20Foundation%20%20Ord%20870256%20REV%202%20\(13968914147795\).pdf](https://stations.fcc.gov/collect/files/35486/Political%20File/2014/Non-Candidate%20Issue%20Ads/Legacy%20Foundation%20Action%20Fund/Legacy%20Foundation%20%20Ord%20870256%20REV%202%20(13968914147795).pdf)]. These advertisements coincided with Smith's last two weeks in office as mayor and Conference president.

The Smith-related television advertisement, which remains available on youtube.com ([http://www.youtube.com/watch?v=NycZZLOA\\_OQ](http://www.youtube.com/watch?v=NycZZLOA_OQ)) was as follows:

[Text on Screen]: Obama's Favorite Mayor Scott Smith

Voice Over [VO]: Obama's favorite Mayor Scott Smith is president of the U.S. Conference of Mayors.

[Text on Screen]: What are their views

VO: What does his organization support?

[Text on Screen]: U.S. Conference of Mayors Supports Obamacare

VO: Well they fully endorsed Obamacare from the start.

[Text on Screen]: U.S. Conference of Mayors Supports Regulation of Carbon Emissions, Cap and Trade!

VO: They vocally supported the Obama administration's efforts to regulate carbon emissions.

[Text on Screen]: U.S. Conference of Mayors Supports Obama Stance on 2d Amendment

VO: And they backed the president's proposal to limit our second amendment rights.

[Text on Screen]: U. S. Conference of Mayor's Supports Obama's Tax & Spend Proposals

VO: Smith's conference also said Obama's budget was quote a balanced approach.

[Text on Screen]: Why does Mayor Scott Smith support policies that are wrong for Mesa?

[Text on Screen]: Tell Scott Smith (Obama's Favorite Mayor) (480) 644-2388. The US Conference of Mayors should support Policies that are good for Mesa.

Paid for by Legacy Foundation Action Fund.

VO: These policies are wrong for Mesa. Tell Scott Smith to make his organization more like Mesa, not the other way around.

Most of the screens show unflattering pictures of Mr. Smith and President Obama. Exhibit 4.

On July 1, 2014, Kory Langhofer (“Complainant”) filed this Complaint against LFAF and others alleging violations of Arizona’s campaign finance laws. Exhibit 5. Following notice on July 8, 2104, LFAF filed a response with the Commission on July 16, 2014 and a supplemental response July 30, 2014. Exhibits 6, 7.

On July 31, 2014, the Commission found that it had jurisdiction to determine whether Respondent had complied with the Clean Elections Act. LFAF provided additional supplemental information to the Commission August 13, 2014. Exhibit 8. On September 11, 2014, the Commission found reason to believe that a violation of the Act may have occurred and authorized an investigation. On September 26, 2014, the Commission issued a Compliance Order along with written questions to be answered under oath. In response, LFAF refused to answer the questions, claiming that the Commission had no authority to ask about its independent expenditures in Arizona. Exhibit 9. On October 14, 2014, LFAF provided its response to

the Compliance Order, again asserting the Commission has no authority over independent expenditures. Exhibit 10.<sup>1</sup>

### **Investigation and Analysis**

#### **A. Violation of A.R.S. §§ 16-941(D), -958 and A.A.C. R2-20-109.**

##### **1. *The advertisement is express advocacy.***

Arizona law defines “expressly advocates” as:

- [1.] Making a general public communication, such as in a broadcast medium, newspaper, magazine, billboard or direct mailer
- [2.] referring to one or more clearly identified candidates and
- [3.] targeted to the electorate of that candidate(s)
- [4.] 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)(2).

The anti-Smith advertisement easily satisfies the first two parts of the statutory definition: the advertisement appeared in a broadcast medium and it referred clearly to Mr. Smith, a candidate for governor. *See* A.R.S. § 16-901(4) (defining clearly identified candidate as the appearance of “the name,

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<sup>1</sup> When the Complaint was filed, LFAF immediately sought injunctive relief in Superior Court to prevent the Commission from even considering the Complaint. That lawsuit was dismissed on September 26, 2014, and LFAF’s time to appeal has expired. *See* Ariz. R. Civ. App. P. 9 (establishing a 30-day deadline to appeal the superior court judgment).

a photograph or a drawing of the candidate.”). In addition, the advertisement fulfills the third part of the test because, although the broadcast audience included Mesa, the advertisement was broadcast to an audience that is substantially larger than Mesa.

**i. In context, the advertisement’s only reasonable meaning was to advocate the defeat of Smith for governor.**

The legal question for the Commission is whether the advertisement satisfies the fourth part of the statute, whether “in context [the advertisement] can have no reasonable meaning other than to advocate” for Mr. Smith’s defeat for Governor. Based on a review of the text, video, voice-over, and timing of the advertisement in relation to Mr. Smith’s candidacy for governor and resignation as mayor, we find that the advertisement had no reasonable meaning other than to advocate for the defeat of Mr. Smith for governor. *See Comm. for Justice & Fairness v. Arizona Sec’y of State’s Office*, 235 Ariz. 347 ¶ 26, 332 P.3d 94, 101 (App. 2014) (holding that plaintiff’s advertisement constituted express advocacy under the Arizona statute).

The advertisement’s plain language (text, video, and voice over) informed voters that Mr. Smith is closely associated with the Democratic President and his initiatives and that Mr. Smith supports federal policies that

many Republican primary voters object to, including “Obamacare,” limits on gun rights, and environmental regulations. It presents both men in a series of mocking illustrations that highlights and links the two men and their policy positions to one another. Although it does not use magic words such as “Vote against Smith,” it objectively urges viewers to vote against Mr. Smith for governor. *See Comm. for Justice & Fairness*, 235 Ariz. at \_\_\_, ¶ 30, 332 P.3d at 102.

**ii. Context confirms that the advertisement has no other reasonable meaning than to advocate Smith’s defeat for governor.**

In context, the advertisement has no other reasonable meaning other than to advocate for the defeat of Mr. Smith. There is no dispute that Mr. Smith announced his candidacy for Governor on January 9, filed paper work with the Secretary of State’s Office creating a campaign committee that day, and announced his resignation plans. *See, e.g.*, Jeremy Duda, Smith announces candidacy, says he has the track record to succeed as governor, Ariz. Capitol Times January 9, 2014, *available at* <http://azcapitoltimes.com/news/2014/01/09/mesa-mayor-scott-smith-running-for-arizona-governor/>. The advertising campaign commenced on or about March 31, 2014, and concluded on or about April 14, 2014. *See* Exhibit 2 [Rants Affidavit]. Mr. Smith resigned as Mayor (and thus

president of the U.S. Conference of Mayors) on April 16, 2014. *See* Scott Smith, Leadership requires us to be bold, Ariz. Capitol Times April 17, 2014, *available at* <http://azcapitoltimes.com/news/2014/04/17/scott-smith-leadership-requires-us-to-be-bold/> (stating resignation letter signed April 16, 2014). The advertisement was broadcast only during the last weeks of Mr. Smith's service, well-after his announced candidacy and on the eve of him stepping down as mayor.

Section 16-901.01(A)(2) asks whether the advertisement can have other reasonable meanings, "in context." The objective context here is that the advertisement was run after Smith's announcement of his candidacy for governor, after he had made it known that he would be resigning as mayor of Mesa, and therefore from his position as President of the Conference of Mayors. In short, the advertisement was precisely timed to affect Mr. Smith's gubernatorial campaign and was not intended for any other purpose other than to encourage the public to vote against Mr. Smith for governor.

Respondents claim that the "purpose of the ads was to draw attention to [Mayor Smith's] involvement/support of the agenda promulgated by the U.S. Conference of Mayors" and that the advertisement simply "made a call to action asking viewers to tell Mayor Smith the 'U.S. Conference of Mayors should support policies that are good for Mesa.'" Exhibit 2 [Rants



Affidavit at ¶¶ 8-10]; Exhibit 6 [LFAF July 16, 2014 Response at 6]. This assertion, however, is belied by the context of the advertisement. None of the statements in the advertisement support the conclusion that the advertisement relates to any pending, or likely pending legislative issue before Mayor Smith. *See, e.g., Wisconsin Right to Life v. Fed. Elec. Comm’n*, 127 S. Ct. 2652, 2669 (2007) (in determining express advocacy, courts may consider context “such as whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future”) (internal citations and quotation omitted). Only one of the Conference positions identified in the advertisement was issued in Smith’s name and that was in 2009. *See* Exhibit 11 [Table]; *see also* Exhibit 12 [Ducey 2014 July 15, 2014 Response at 6]. The others involve resolutions apparently adopted by the Conference at meetings in 2010 and 2012 or are based upon 2013 Press Releases featuring an entirely different Mayoral Conference President, Michael Nutter of Philadelphia. *See* Exhibit 11 [Table]; *see also* Exhibit 12 [Ducey 2014 July 15, 2014 Response at 6]. Further, the advertisement itself is contradictory, with the text appearing to urge a call to Smith about the Conference, while other text and the voice over informs voters that Mayor Smith sought to impose the U.S. Conference’s agenda (and President Obama’s) on Mesa,

noting that Smith “support[s] policies that are *wrong for Mesa*” and that he should “make his organization more like Mesa, *not the other way around*.”

Another alternative interpretation is that the advertisement was intended to criticize Smith’s decisions as mayor of Mesa. Given that the advertisement was set to coincide with Smith’s last weeks as mayor, however, this argument is not reasonable either. Although the call to action asked voters to tell Smith not to impose Conference policies on Mesa, Respondent does not identify a single policy pending or potentially pending before the Mesa City Council or the Mayor’s office that relates to the issues identified in the ad. *Wisconsin Right to Life*, 127 S. Ct. at 2669.

**iii. Objective evaluation leads to the conclusion that the advertisements only reasonable meaning was to advocate against Smith’s candidacy for governor.**

The only reasonable meaning of the advertisement was to advocate for Mr. Smith’s defeat in the Republican primary for governor. This is true even though the advertisement does not mention the governor’s race.

*Comm. for Justice & Fairness*, 235 Ariz. at \_\_ ¶ 28, 332 P.3d at 101.

Objectively, the advertisement places Mr. Smith in a negative light with Republican primary voters. It opens and closes by referring to Smith as “Obama’s favorite mayor,” uses pictures of both Smith and Obama to link the two together, and links Smith with non-local policy issues supported by the Obama administration and likely opposed by many Republican primary

voters. Given the negative light in which the advertisement casts Mr. Smith with many GOP primary voters, this context confirms, objectively, the advertisement is the functional equivalent of express advocacy against Smith's gubernatorial candidacy. In context, there is no other reasonable explanation for the ad. *Id.* at \_\_\_\_ ¶ 30, 332 P.3d at 102.

LFAF has argued that its advertisement aired too far from the election to constitute express advocacy. It has cited, however, no legal authority that supports this proposition, but instead has misstated and misapplied cases such as *Wisconsin Right to Life*. But misstated and misapplied precedent is not precedent at all. Here, the key factors are the timing of the advertisement relative to Smith's announcement of his candidacy for governor and his planned resignation as mayor of Mesa and the lack of any connection between the advertisement and a pending policy decision in Mesa relating to the issues mentioned in the advertisement. To conclude otherwise is to limit express advocacy to circumstances where an advertisement only uses so-called magic words such as "Vote Against Smith for Governor," a position that Section 16-901.01 does not support and that the Supreme Court and the Arizona Court of Appeals have rejected or artificially impose a timing requirement that is not supported by the statute .

**iv. Subjective considerations offered by Respondents do not alter the conclusion.**

This conclusion is based on an objective analysis of the advertisement under the standard established in A.R.S. § 16-901.01. It is not based on the subjective intent described in Mr. Rants' declaration submitted on behalf of respondent LFAF, although those arguments were evaluated as part of this analysis. LFAF Response at 6 (citing Rants affidavit to explain "the advertisement was part of a larger project to oppose the policy measures supported by the U.S. Conference of Mayors.").

2. *The Commission has jurisdiction over the Complaint and the authority to order compliance and penalties.*

LFAF argues that the Commission lacks jurisdiction over this matter. At a minimum, the conclusion that the advertisement in question constitutes express advocacy makes it subject to enforcement by the Commission pursuant to Article 2 of Chapter 6, Title 16. The Act is plain on this point, and the Arizona Supreme Court's binding interpretation of the Act confirms its text. *See Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, 245 ¶ 13, 99 P.3d 570, 574 (2004) (interpreting the Clean Elections Act and concluding that enforcement of provisions related to independent expenditures as a "paramount" duty that "do[es] not relate to the public financing of political campaigns.").

Respondent LFAF argues that the Commission lacks authority over corporations that make independent expenditures by virtue of A.R.S. § 16-920. But this argument is a non-sequiter. That statute only applies to corporations that make such expenditures pursuant to A.R.S. § 16-914.02, which is an additional reporting statute, and “[a]ny person making independent expenditures cumulatively exceeding the amount prescribed in A.R.S. § 16-941(D) in an election cycle shall file campaign finance reports in accordance with A.R.S. § 16-958 and Commission rules.” A.A.C. R2-20-109(F). LFAF filed no such reports and requested no exemption from § 16-941(D) pursuant to rule.

Likewise, LFAF’s assertion in response to the Compliance Order that the Commission has no authority to enforce A.R.S. § 16-942(B) is absurd and contrasts with the holdings of the Arizona Supreme Court, which has recognized the Commission’s broad authority to enforce the Act against those who make independent expenditures. *Brewer*, 209 Ariz. at 245 ¶ 13, 99 P.3d at 574.

Finally, LFAF objects to the Commission’s jurisdiction on the grounds that the same Complaint was already referred by the Secretary of State to the Maricopa County Recorder, who apparently referred the matter to private attorney hired to evaluate it. Although the Secretary of State’s

statutory basis for this delegation is not clear, *see* A.R.S. § 16-924 (providing for reasonable cause by the *state* filing officer for *state* elections), the Recorder's Office had an attorney review the Complaint and responses and the office declined to issue a reasonable cause determination. The Recorder's Office's outside counsel did not include the basis for the Recorder's Office decision in a letter issued to Complainant. Exhibit 13. There is no evidence that the Secretary of State will take up the matter. Nevertheless, neither of those government agencies purports to enforce Article 2 of Chapter 6, Title 16. Only the Commission has the authority to enforce the Act.

### **III. Recommendations**

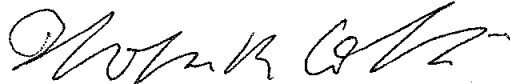
There is probable cause to conclude that Respondent has violated A.R.S. §§ 16-941(D), -942(B), -958, and R2-20-109. On or about March 31, 2014, Respondent made an expenditure in the amount of \$260,000 and has never filed a required report. Therefore, I recommend that the Commission find probable cause that Respondent violated the provisions identified above

### **IV. Conclusion**

If the Commission determines by an affirmative vote of at least three of its members that there is probable cause to believe that Respondent has violated the Act, the Commission shall authorize the Executive Director to

so notify Respondent by an order that states the nature of the violation, and assesses civil penalties pursuant to A.R.S. § 16-957. A.A.C. R2-20-215(A) & -217.

Dated this 7th day of November, 2014

By:   
Thomas M. Collins  
Executive Director

# EXHIBIT 1





Arizona

	Market	Campaign	Length	Cpp	4/4-4/16		TOTAL	
					GRP's	\$	Grp's	Spent
Broadcast	Phoenix	LFAF	:30	\$400	403	\$161,262	403	\$161,262
Cable	Phoenix AEN,AMC,DISC,ESPN,FOOD,FX,FXN C,HGTV,HIST,SYFY,TBSC,TNT,USA	LFAF	:30			\$108,089		\$108,089
Radio	Phoenix	LFAF		\$205	27	\$5,575	27	\$5,575
	Baltimore	LFAF		\$236	11	\$2,595	11	\$2,595
	Sacramento	LFAF		\$171	20	\$3,395	20	\$3,395
Legacy Foundation Action Fund Broadcast						\$161,262		\$161,262
Legacy Foundation Action Fund Cable						\$108,089		\$108,089
Legacy Foundation Action Fund Radio						\$11,565		\$11,565
Grand Total Legacy Foundation Action Fund						\$280,916		\$280,916

**Legacy Foundation Action Fund - Smart Media**

<b>Market</b>	<b>Station</b>	<b>Rep</b>	<b>4/4-4/16</b>	<b>Total</b>
<b>Phoenix</b>	<b>KNXV</b>	Scripps	\$29,350	<b>\$29,350</b>
	<b>KSAZ</b>	FOX	\$14,750	<b>\$14,750</b>
	<b>KUTP</b>	FOX	\$0	<b>\$0</b>
	<b>KPHO</b>	HRP	\$64,085	<b>\$64,085</b>
	<b>KAZT</b>	Petry	\$0	<b>\$0</b>
	<b>KASW</b>	Telerep	\$0	<b>\$0</b>
	<b>KTVK</b>	Telerep	\$18,652	<b>\$18,652</b>
	<b>KPNX</b>	Telerep	\$34,425	<b>\$34,425</b>
			<b>\$161,262</b>	<b>\$161,262</b>
<b>Total</b>			<b>\$161,262</b>	<b>\$161,262</b>

**Legacy Foundation Action Fund - Smart Media  
Radio**

<b>Market</b>	<b>Station</b>	<b>Rep</b>	<b>4/4-4/16</b>	<b>Total</b>
<b>Phoenix</b>	<b>KFYI-AM</b>	<b>Clear Channel</b>	<b>\$5,575</b>	<b>\$5,575</b>
				<b>\$0</b>
			<b>\$5,575</b>	<b>\$5,575</b>
<b>Baltimore</b>	<b>WCBM-AM</b>	<b>Katz</b>	<b>\$2,595</b>	<b>\$2,595</b>
				<b>\$0</b>
			<b>\$2,595</b>	<b>\$2,595</b>
<b>Sacramento</b>	<b>KRBK-AM</b>	<b>Clear Channel</b>	<b>\$3,395</b>	<b>\$3,395</b>
				<b>\$0</b>
			<b>\$3,395</b>	<b>\$3,395</b>
<b>Total</b>			<b>\$11,565</b>	<b>\$11,565</b>



## CableTrack System Profile Cox Media/East Valley, AZ

Date : 4/11/14  
Last Updated: 2/28/14

SysCode: 2641      System HHs (000): 114.43      System Penetration: %

Rep: NCC  
MSO: COX MEDIA  
Turnkey:  
Type: Cable System

DMA: Phoenix  
DMA Rank: 12

Spot Length :30

Included in: 0746, 5116, 6468, 6900, 8946, 9275

### AREAS SERVED

State	County	City	Zip	State	County	City	Zip
AZ	Maricopa	Gilbert	85233	AZ	Maricopa	Gilbert	85234
AZ	Maricopa	Gilbert	85295	AZ	Maricopa	Gilbert	85296
AZ	Maricopa	Gilbert	85297	AZ	Maricopa	Gilbert	85298
AZ	Maricopa	Mesa	85201	AZ	Maricopa	Mesa	85202
AZ	Maricopa	Mesa	85203	AZ	Maricopa	Mesa	85204
AZ	Maricopa	Mesa	85205	AZ	Maricopa	Mesa	85206
AZ	Maricopa	Mesa	85207	AZ	Maricopa	Mesa	85208
AZ	Maricopa	Mesa	85209	AZ	Maricopa	Mesa	85210
AZ	Maricopa	Mesa	85212	AZ	Maricopa	Mesa	85213
AZ	Maricopa	Mesa	85215	AZ	Maricopa	Queen Creek	85142
AZ	Pinal	Apache Junction	85120	AZ	Pinal	Coolidge	85128
AZ	Pinal	Florence	85132	AZ	Pinal	San Tan Valley	85140
AZ	Pinal	San Tan Valley	85143				

### SYSTEMS INCLUDED

[Note]: Not applicable for the selected syscode.

# EXHIBIT 2

**AFFIDAVIT OF CHRISTOPHER RANTS**

STATE OF Iowa )  
COUNTY OF Woodbury )

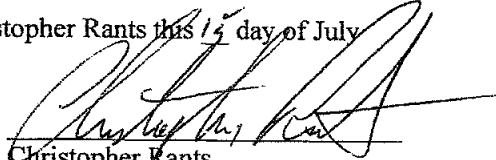
BEFORE ME, the undersigned appeared Christopher Rants, who, being first duly sworn, deposes and says:

1. My name is Christopher Rants. I am over the age of eighteen (18) years and I have personal knowledge of the matters set forth in this affidavit.
2. I reside in Sioux City, Iowa.
3. I am currently the President for Legacy Foundation Action Fund, a nonprofit corporation organized in Iowa and operating as a social welfare organization under Section 501(c)(4) of the Internal Revenue Code. In that role, I oversee LFAP's daily business operations.
4. I have been the President of Legacy Foundation Action Fund since its inception in 2011.
5. Legacy Foundation Action Fund was established 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.
6. One of Legacy Foundation Action Fund's projects involves motivating individuals through grassroots issue advocacy to oppose certain policy positions taken by the U.S. Conference of Mayors.
7. In furtherance its mission, Legacy Foundation Action Fund produced and aired television advertisements in March and April of 2014.
8. The advertisements highlighted the three mayors (all of whom held leadership roles with the U.S. Conference of Mayors) in Mesa, AZ, Baltimore, MD and Sacramento, CA and were run in each of the mayors' respective cities and surrounding viewing area. The purpose of the ads was to draw attention to the mayors' involvement/support of the agenda promulgated by the U.S. Conference of Mayors.

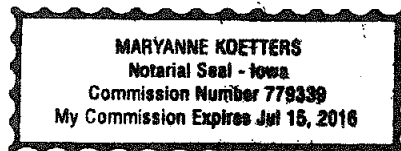
9. The Mesa, AZ advertisement focused on Mesa, AZ Mayor Scott Smith and referenced his position as the President of the U.S. Conference of Mayors. The advertisement noted that under Mayor Smith's leadership, the U.S. Conference of Mayors supported certain policy initiatives that run counter to the mission of Legacy Foundation Action Fund.
10. The advertisement made a call to action asking viewers to tell Mayor Smith "the U.S. Conference of Mayors should support policies that are good for Mesa." At the end of the advertisement, the screen showed text providing a phone number viewers could call to contact Mayor Smith.
11. To validate all content used in the advertisements, Legacy Foundation Action Fund conducted its own research which consisted of the information made publicly available on the U.S. Conference of Mayors website.
12. Legacy Foundation Action Fund purchased airtime in the Phoenix, Sacramento and Baltimore media markets and ran the advertisement from March 31 to April 14.
13. Legacy Foundation Action Fund's decision to air the advertisement in the markets referenced above was made based on the fact that those media markets covered the cities of the three mayors who constituted the Conferences' leadership.
14. The U.S. Conference of Mayors is a national organization, which often takes policy positions that are counter to the policy positions of Legacy Foundation Action Fund. In keeping with the mission and purpose of the organization, Legacy Foundation Action Fund determined that one of the ways to influence the policy positions taken by the U.S. Conference of Mayors was to educate the citizens of the cities represented by mayors holding leadership positions with the U.S. Conference of Mayors. When purchasing the time to run the advertisement in focusing on Mesa, AZ Mayor Smith, Legacy Foundation Action Fund had to purchase airtime for the entire Phoenix market, of which the City of Mesa is included.
15. After all, Legacy Foundation Action Fund opposes the policy positions taken and supported by Mayor Smith while he was serving as the President of the U.S. Conference of Mayors.
16. Additionally, I want to highlight for the Commission that Mayor Smith resigned from office on April 16th, and the advertisement ceased to run on April 14th.
17. At no time during the research, production or airing of the advertisement did I or any employee or any vendor of Legacy Foundation Action Fund discuss the advertisement, strategize about advertisement's publication or otherwise coordinate with Ducey 2014.

18. At no time did Legacy Foundation Action Fund hire or retain the services of Direct Response Group for this project. Direct Response Group worked on a project involving a federal election in Nebraska in early 2014 for Legacy Foundation Action Fund.
19. Legacy Foundation Action Fund did not involve Larry McCarthy in the production of advertisements noted herein. Mr. McCarthy did produce one other advertisement for Legacy Foundation Action Fund in 2014 involving a federal election in Nebraska.

Subscribed and sworn to before me by Christopher Rants this 15 day of July 2014.

  
Christopher Rants

  
Notary Public, State of Iowa



Commission Number: 779339  
Commission Expires: 7/15/16

Personally known, or  
☒ Produced identification  
Type: Drivers License



# EXHIBIT 3

# ORDER



**Orders**  
**Order / Rev:** 870256  
**Alt Order #:** 07140383  
**Product Desc:** LFAF 4.4-4.16  
**Estimate:** 404416  
**Flight Dates:** 04/04/14 - 04/16/14  
**Original Date / Rev:** 04/07/14 / 04/07/14  
**Order Type:** Political

**KPNX**

**Primary AE:** Jim Quinn  
**Sales Office:** T-PHI  
**Sales Region:** NAT

**Agency**  
**Name:** Smart Media Group Inc/ POL  
**Buying Contact:**  
**Billing Contact:**  
 814 King Street Suite 400  
 Alexandria, VA 22314

**Billing Type:** Cash  
**Billing Calendar:** Broadcast  
**Billing Cycle:** WEEKLY  
**Agency Commission:** 15%

**Advertiser**  
**Name:** Legacy Foundation Action Fund  
**Demographic:** A50+  
**Product Codes:** IS-Candidate/Local Misc  
**Priority:** P-2  
**Revenue Codes:** AGY, GEN, POL

**New Business Thru:**  
**Order Separation:** 00:15:00  
**Advertiser External ID:**  
**Agency External ID:**

**Bill Plan**

Start Date	End Date	# Spots	Gross Amount	Net Amount
03/31/14	04/06/14	4	\$5,600.00	\$4,760.00
04/07/14	04/13/14	12	\$15,895.00	\$13,510.75
04/14/14	04/20/14	6	\$13,170.00	\$11,194.50

**Totals**

Month	# Spots	Gross Amount	Net Amount	Rating
April 2014	22	\$34,665.00	\$29,465.25	43.00
<b>Totals</b>	<b>22</b>	<b>\$34,665.00</b>	<b>\$29,465.25</b>	<b>43.00</b>

**Account Executives**

Account Executive	Sales Office	Sales Region	Start Date / End Date	Order %
Jim Quinn			Start Of Order - End Of Order	100%

**Order Share**

Order Share	Share	Total
KPNX	20%	\$34,665.00
Market	100%	\$173,325.00

**Competitive Share**

Competitive Share	Share	Total
CABLE	0%	\$0.00
KAET	0%	\$0.00
KASW	0%	\$0.00
KBCZ	0%	\$0.00
KBPX	0%	\$0.00
KDRX	0%	\$0.00
KMCC	0%	\$0.00
KNAZ	0%	\$0.00
KNXV	19%	\$32,931.75
KPAZ	0%	\$0.00
KPHO	40%	\$69,330.00
KPPX	0%	\$0.00
KSAZ	9%	\$15,599.25
KTFL	0%	\$0.00
KTVK	12%	\$20,799.00
KTVW	0%	\$0.00
KUSK	0%	\$0.00
KUTP	0%	\$0.00
UNKWN	0%	\$0.00

Order / Rev: 870256  
 Alt Order #: 07140383  
 Flight Dates: 04/04/14 - 04/16/14

Advertiser: Legacy Foundation Action Fund  
 Product Desc: LFAF 4.4-4.16  
 Estimate: 404416  
**KPNX**

Ln	Ch	Start	End	Inventory Code	Break	Start/End Time	Days	Len	Spots	Rate	Pri	Rtg	Type	Spots	Amount
1	KPNX	04/04/14	04/11/14	M-F 12-1230p 12 News at Noon	CM	12-1230p	----F--	:30	1	\$250.00	P-2	1.10	NM	2	\$500.00
12 NEWS @ NOON															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		03/31/14	04/06/14	----F--			1		\$250.00			1.10			
Week:		04/07/14	04/13/14	----F--			1		\$250.00			1.10			
2	KPNX	04/04/14	04/04/14	Days of Our Lives Days of Our Lives	CM	Days of Our Lives	----F--	:30	1	\$350.00	P-2	1.80	NM	1	\$350.00
DAYS OF OUR LIVES															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		03/31/14	04/06/14	----F--			1		\$350.00			1.80			
3	KPNX	04/07/14	04/14/14	Days of Our Lives Days of Our Lives	CM	Days of Our Lives	M-----	:30	1	\$350.00	P-2	1.80	NM	2	\$700.00
DAYS OF OUR LIVES															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		04/07/14	04/13/14	M-----			1		\$350.00			1.80			
Week:		04/14/14	04/20/14	M-----			1		\$350.00			1.80			
4	KPNX	04/06/14	04/06/14	1035pm - Sports Tonight Sports Tonight	CM	1035-1105p	-----S	:30	1	\$375.00	P-2	2.00	NM	1	\$375.00
SPORTS TONIGHT															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		03/31/14	04/06/14	-----S			1		\$375.00			2.00			
<u>Spot</u>	<u>Ch</u>	<u>Date Range</u>	<u>Description</u>		<u>Start/End Time</u>		<u>Weekdays</u>	<u>Length</u>		<u>Rate</u>		<u>Rtg</u>	<u>Type</u>		
1	KPNX	03/31/14-04/06/14	1035pm - Sports Tonight		1035-1105p		-----Su	:30		<del>(\$375.00)</del>		2.00	NM		
See MG 4.2 [NA/Oversold]															
2	KPNX	04/07/14-04/11/14	Late Night		1135p-1235a		MTWThF----	:30		\$375.00		2.00	NM		
Ⓜ MG for 4.1 04/06 [HRA]															
5	KPNX	04/06/14	04/13/14	Sun Prime A Dateline	CM	6-7p	-----S	:30	1	\$2,000.00	P-1	3.00	NM	2	\$4,000.00
DATELINE 1 HOUREFF 0															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		03/31/14	04/06/14	-----S			1		\$2,000.00			3.00			
Week:		04/07/14	04/13/14	-----S			1		\$2,000.00			3.00			
6	KPNX	04/06/14	04/13/14	Sun Prime B American Dream Build	CM	7-8p	-----S	:30	1	\$3,000.00	P-2	6.00	NM	2	\$6,000.00
AMERICAN DREAM BUILD															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		03/31/14	04/06/14	-----S			1		\$3,000.00			6.00			
Week:		04/07/14	04/13/14	-----S			1		\$3,000.00			6.00			
7	KPNX	04/10/14	04/10/14	M-F 12-1230p 12 News at Noon	CM	12-1230p	---T---	:30	1	\$250.00	P-2	1.10	NM	1	\$250.00
12 NEWS @ NOON															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		04/07/14	04/13/14	---T---			1		\$250.00			1.10			
N 8	KPNX	04/10/14	04/10/14	Days of Our Lives Days of Our Lives	CM	Days of Our Lives	---T---	:30	1	\$320.00	P-2	0.00	NM	1	\$320.00
DAYS OF OUR LIVES- rr from \$350 to \$320 to cover sales tax on add to sked.															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		04/07/14	04/13/14	---T---			1		\$320.00			0.00			
9	KPNX	04/08/14	04/15/14	M-F 12-1230p 12 News at Noon	CM	12-1230p	-T-----	:30	1	\$250.00	P-2	1.10	NM	2	\$500.00
12 NEWS @ NOON															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		04/07/14	04/13/14	-T-----			1		\$250.00			1.10			
Week:		04/14/14	04/20/14	-T-----			1		\$250.00			1.10			
N 10	KPNX	04/15/14	04/15/14	Days of Our Lives Days of Our Lives	CM	Days of Our Lives	-T-----	:30	1	\$320.00	P-2	1.80	NM	1	\$320.00
DAYS OF OUR LIVES-RR from \$350 to \$320 to cover sales tax on add to sked.															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>			<u>Spots/Week</u>		<u>Rate</u>			<u>Rating</u>			
Week:		04/14/14	04/20/14	-T-----			1		\$320.00			1.80			

Order / Rev: 870256  
 Alt Order #: 07140383  
 Flight Dates: 04/04/14 - 04/16/14

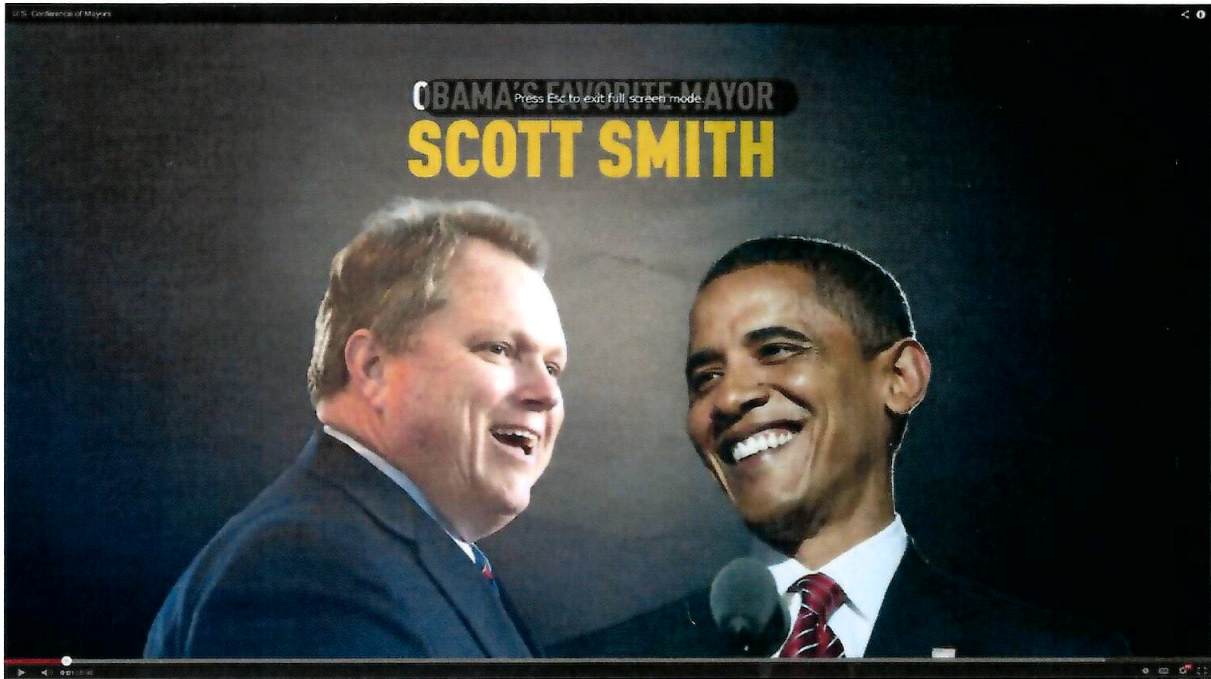
Advertiser: Legacy Foundation Action Fund  
 Product Desc: LFAF 4.4-4.16  
 Estimate: 404416

KPNX

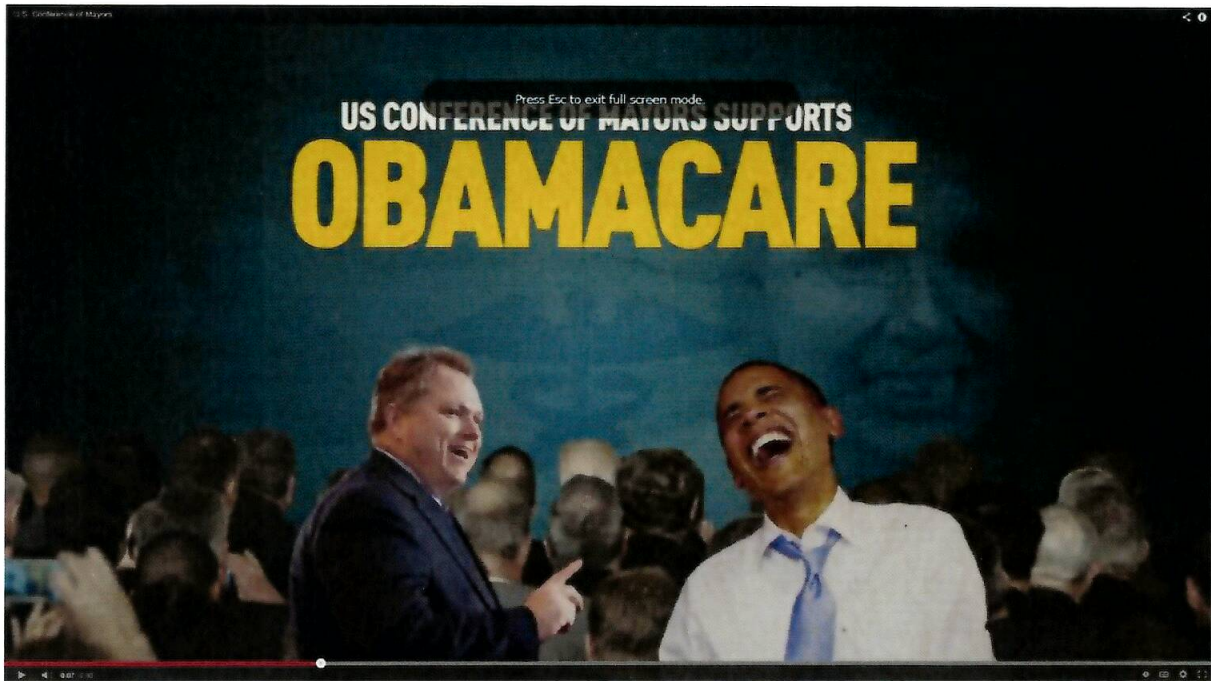
Ln	Ch	Start	End	Inventory Code	Break	Start/End Time	Days	Len	Spots	Rate	Pri	Rtg	Type	Spots	Amount
12	KPNX	04/09/14	04/16/14	M-F 12-1230p 12 News at Noon	CM	12-1230p	--W----	:30	1	\$250.00	P-2	1.10	NM	2	\$500.00
12 NEWS @ NOON															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>		<u>Spots/Week</u>				<u>Rate</u>		<u>Rating</u>			
Week:	04/07/14	04/07/14	04/13/14	--W----		1				\$250.00		1.10			
Week:	04/14/14	04/14/14	04/20/14	--W----		1				\$250.00		1.10			
13	KPNX	04/09/14	04/09/14	Days of Our Lives Days of Our Lives	CM	Days of Our Lives	--W----	:30	1	\$350.00	P-2	1.80	NM	1	\$350.00
DAYS OF OUR LIVES															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>		<u>Spots/Week</u>				<u>Rate</u>		<u>Rating</u>			
Week:	04/07/14	04/07/14	04/13/14	--W----		1				\$350.00		1.80			
14	KPNX	04/15/14	04/15/14	Tue Prime B Tue Prime B	CM	8-9p	-T-----	:30	1	\$4,000.00	P-2	6.30	NM	1	\$4,000.00
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>		<u>Spots/Week</u>				<u>Rate</u>		<u>Rating</u>			
Week:	04/14/14	04/14/14	04/20/14	-T-----		1				\$4,000.00		6.30			
15	KPNX	04/08/14	04/08/14	Tue Prime B Tue Prime B	CM	8-9p	-T-----	:30	1	\$4,000.00	P-2	0.00	NM	1	\$4,000.00
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>		<u>Spots/Week</u>				<u>Rate</u>		<u>Rating</u>			
Week:	04/07/14	04/07/14	04/13/14	-T-----		1				\$4,000.00		0.00			
16	KPNX	04/14/14	04/14/14	Mon Prime C Blacklist	CM	9-10p	M-----	:30	1	\$8,000.00	P-2	0.00	NM	1	\$8,000.00
add															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>		<u>Spots/Week</u>				<u>Rate</u>		<u>Rating</u>			
Week:	04/14/14	04/14/14	04/20/14	M-----		1				\$8,000.00		0.00			
17	KPNX	04/13/14	04/13/14	Sun Prime D Crisis	CM	9-10p	-----S	:30	1	\$4,500.00	P-2	0.00	NM	1	\$4,500.00
add															
		<u>Start Date</u>	<u>End Date</u>	<u>Weekdays</u>		<u>Spots/Week</u>				<u>Rate</u>		<u>Rating</u>			
Week:	04/07/14	04/07/14	04/13/14	-----S		1				\$4,500.00		0.00			
													Totals	22	\$34,665.00
*Tax 1 Note: Tax 0.5%.															

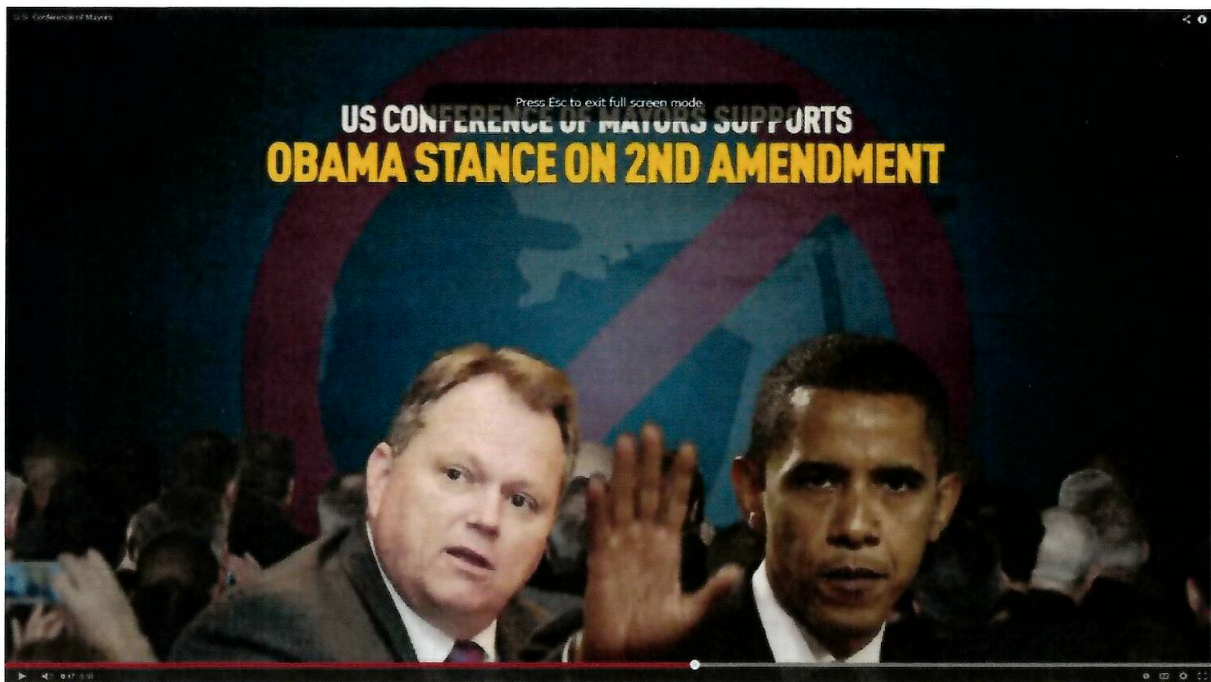
\*Tax 1 Note: Tax 0.5%.

# EXHIBIT 4

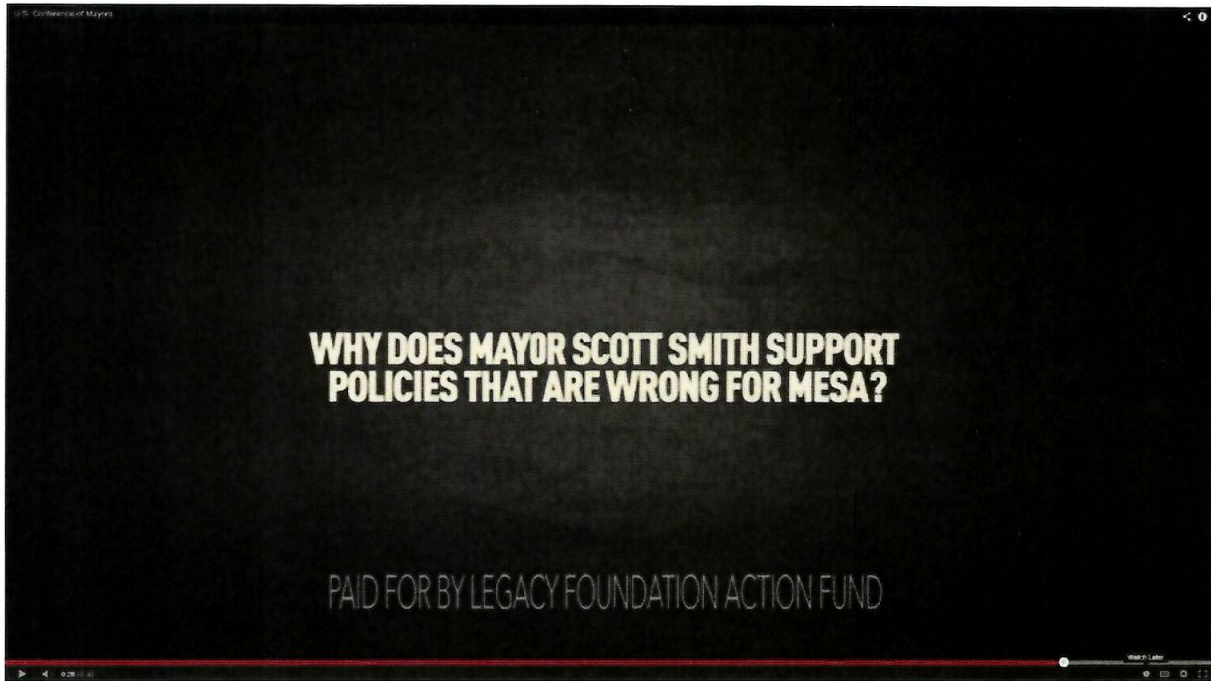












# EXHIBIT 5

July 1, 2014

Kory A. Langhofer  
Attorney at Law  
602.382.4078 tel  
602.382.4020 fax  
klanghofer@bhfs.com

**BY E-MAIL**

Arizona Secretary of State  
c/o Christina Estes-Werther, Elections Director  
1700 West Washington Street, 7th Floor  
Phoenix, Arizona 85007  
[cwerther@azsos.gov](mailto:cwerther@azsos.gov)

Clean Elections Commission  
c/o Tom Collins, Executive Director  
1616 West Adams Street, Suite 110  
Phoenix, Arizona 85007  
[thomas.collins@azcanelections.gov](mailto:thomas.collins@azcanelections.gov)

**RE: Illegal Coordination and Other Campaign Finance Violations by the Doug Ducey Campaign**

Ms. Estes-Werther and Mr. Collins:

I am writing to report serious campaign finance violations by Ducey 2014 – Primary and Ducey 2014 – General (together, the “Ducey Campaign”); Copper State Research and Strategy, LLC (“Copper State”); the Legacy Foundation Action Fund (the “LFAF”); Larry McCarthy; and Gregg Pekau. There is substantial evidence showing that both McCarthy and Pekau are or very recently have been agents of both the Ducey Campaign and organizations making independent expenditures benefitting the Ducey Campaign, including Copper State and the LFAF. Additionally, the LFAF has failed to file the necessary registration and campaign finance disclosure forms and exemption application with the Arizona Secretary of State and the Clean Elections Commission. I therefore respectfully request that the Secretary of State’s office refer this matter to the Arizona Solicitor General, and that the Clean Elections Commission investigate the matter.

**I. Factual Background**

**A. Engagement of Gregg Pekau**

On information and belief, in February 2013 Gregg Pekau (or a company he controls, Copper State) was hired by a nonprofit organization or a private company to conduct “opposition research” against Scott Smith, who was then the Mayor of the City of Mesa and is now a candidate for Governor of the State of Arizona. Based on the nature of the research conducted, it is apparent that Pekau’s research was conducted in anticipation of running attack ads against Mr. Smith during the 2014 gubernatorial election; Pekau submitted numerous public records requests seeking information that could be used to paint Mr. Smith in a negative light with voters in a Republican primary election in Arizona. See, e.g., Exhibit A. The public records requests were in some cases submitted in the name of Copper State, which is owned by Pekau’s wife. See Exhibits A-B. Pekau’s research was not funded by the Ducey Campaign. See Exhibit C. On information and belief, the Ducey Campaign has recently retained Pekau as the Director of Research, effectively internalizing the benefit of all the opposition research that Pekau conducted on the payroll of the nonprofit organization or private company—without paying for the research from Ducey Campaign accounts.

One East Washington Street, Suite 2400  
Phoenix, AZ 85004  
main 602.382.4040



**B. Advertisements Paid for by Legacy Foundation Action Fund**

On April 4, 2014, the out-of-state LFAF purchased television, radio, internet, and mail advertisements painting Mr. Smith in a misleading and negative light.<sup>1</sup> Although the advertisements ostensibly urge voters to call Mr. Smith and ask him to “run [the U.S. Conference of Mayors] more like Mesa,” for five reasons the advertisements in context can have no reasonable meaning other than to advocate the defeat of Mr. Smith:

1. The advertisements were targeted at the gubernatorial primary electorate (*i.e.*, through broadcast channels accessible around the state, and to IP addresses and physical mailing addresses outside the City of Mesa), and not Mr. Smith’s constituents at the time of the advertisements (*i.e.*, just Mesa voters) or the constituents of the U.S. Conference of Mayors (*i.e.*, voters nationally). See, e.g., Exhibit D. Although approximately 2% of the total advertising buy (\$5,000 of \$280,000) was spent on advertisements outside Arizona, see *id.*, the extreme disparity between advertising dollars reaching Arizona voters and out-of-state voters, plus the LFAF’s decision to purchase cable television advertising space on channels watched disproportionately by Republican primary voters, and to target non-Mesa voters for broadcast, internet, and mailed advertisements, show that the LFAF advertisements were targeting the Arizona primary electorate in the gubernatorial campaign and not Mr. Smith’s current constituents.
2. Although the information underlying the advertisement (*i.e.*, the U.S. Conference of Mayors’s support for certain policies and its effect on the City of Mesa) has been publicly available for a long time, the advertisements only began shortly after Mr. Smith announced his gubernatorial candidacy and just as polling showed Mr. Smith significantly outperforming Doug Ducey among the Republican primary electorate. See Exhibit E.
3. The advertisements began just days before Mr. Smith’s last day in office as Mayor of the City of Mesa (*i.e.*, April 15, 2014). See Exhibit F. No rational actor would spend more than \$275,000 to influence the last two weeks of Mr. Smith’s term as mayor, when no major issues were expected to be decided in that time. See Exhibit D. This demonstrates that the true purpose of the advertisements is not to influence Mr. Smith’s governance of the City of Mesa.
4. The content of the advertisements tracks the content of the public records requests submitted by Pekau when he is believed to have been engaged by a nonprofit organization or private company to conduct “opposition research” against Mr. Smith as a potential gubernatorial candidate. See Exhibit A.
5. The LFAF, which is sponsoring the advertisements, has been reported to have very close ties to the Ducey Campaign. See Exhibit G; *infra* Section I(C)-(D).

In this context, the advertisements can have no reasonable meaning other than to advocate the defeat of Mr. Smith and, therefore, constitute express advocacy under Arizona law. See Ariz. Rev. Stat. § 16-901.01.

**C. Engagement of Larry McCarthy**

Larry McCarthy, a negative advertising consultant for Republican candidates, is working for both the Ducey Campaign and the LFAF. See Exhibits H-J.

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<sup>1</sup> The television advertisement can be accessed at [http://www.youtube.com/watch?v=NycZZLOA\\_OQ](http://www.youtube.com/watch?v=NycZZLOA_OQ).

**D. Engagement of Direct Response Group**

Direct Response Group, a political consulting firm serving primary Republican candidates, is working for or has recently worked for both the Ducey Campaign and the LFAF. See Exhibits C, G.

**II. Legal Violations**

The facts as set forth above give rise to very serious violations of Arizona campaign finance laws.

**A. Failure to Register as an Independent Expenditure Committee**

Arizona law requires any corporation spending more than \$5,000 on express advocacy in a statewide election to register with the Arizona Secretary of State, apply to the Clean Elections Commission for a registration exemption, and to file campaign finance reports within 24 hours after each expenditure. See Ariz. Rev. Stat. §§ 16-914.02, -941(D), -958(A)-(B). The LFAF is a corporation, see Exhibit K, and because its advertisements constitute express advocacy, see Ariz. Rev. Stat. § 16-901.01; *supra* Section I(B), it was subject to the registration, application, and reporting requirements of Sections 16-914.02, -941(D), and 958(A)-(B). Its failure to do so constitutes a violation of Arizona law.

This is not the first time that the LFAF has failed to comply with campaign finance reporting requirements. The LFAF failed to timely file a year-end campaign finance report with the Federal Election Commission for 2013. See Exhibit L.

**B. Illegal Coordination by the Ducey Campaign**

Arizona law provides that an expenditure is not an "independent expenditure," and is instead a campaign contribution, if there is any "cooperation or consultation [by the party paying for the expenditure] with any candidate or committee or agent of the candidate" benefitting from the expenditure. See Ariz. Rev. Stat. § 16-901(14). Such cooperation or consultation arises, without limitation, whenever "[i]n the same election the person making the expenditure, including any officer, director, employee or agent of that person, is or has been: (i) Authorized to raise or expend monies on behalf of the candidate or the candidate's authorized committees[; or] (ii) Receiving any form of compensation or reimbursement from the candidate, the candidate's committees or the candidate's agent." *Id.* § 16-901(14)(c).

In this case, coordination between the Ducey Campaign and third parties is evidenced by:

1. the engagement of Pekau by both the Ducey Campaign and the nonprofit organization or private company that funded Pekau's opposition research,
2. the engagement of McCarthy by both the Ducey Campaign and the LFAF, and
3. the engagement of Direct Response Group by both the Ducey Campaign and, at least recently, the LFAF.

Because these facts establish coordination between the Ducey Campaign and third parties, all the third parties' expenditures constitute contributions to the Ducey Campaign. See *id.* § 16-901(5), (14). Such contributions appear to violate the following provisions:

1. the ban on contributions in excess of \$2,000 per election, see *id.* §§ 16-905, -941(B);
2. the ban on contributions from corporations, see *id.* §§ 16-919(A), -941(C)(2); and

3. the requirement that all contributions be timely reported in campaign finance reports, see *id.* §§ 16-913(C), -915(A)(4), and -941(C)(2).

### III. Conflict of Interests at Maricopa County Elections

I am aware that the Arizona Secretary of State's Office previously referred a campaign finance complaint against the Ducey Campaign to Maricopa County Elections for processing. If the Arizona Secretary of State's Office wishes to refer this complaint to a third party, a referral to Maricopa County Elections would not be appropriate. It is my understanding that, in reviewing campaign finance matters, Maricopa County Elections relies on legal advice provided by the Maricopa County Attorney's Office. Because the Maricopa County Attorney has publicly endorsed and continues to publicly support the Ducey Campaign, see Exhibit N, Maricopa County Elections would not be an impartial arbiter of the issues raised in this complaint. In fact, the ethical rules governing attorneys in Arizona likely prevent the Maricopa County Attorney's Office from providing legal advice to Maricopa County Elections in this context. See Ariz. Ethical R. 1.7(a)(2). I therefore respectfully request that, if the Arizona Secretary of State's Office must refer this matter to a third party for review, the matter be referred to an elections office that would not be impeded by a legal advisor with a conflict of interests.

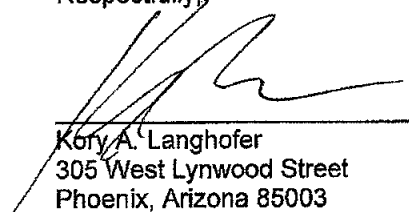
### IV. Conclusion

In sum, there is reasonable cause to believe the Ducey Campaign has coordinated with outside organizations including Copper State and the LFAF in connection with the 2014 gubernatorial election, and that the LFAF has failed to register and file campaign finance reports as required by Arizona law. Thus, referral of this matter to the Arizona Solicitor General's office, and investigation and enforcement by the Clean Elections Commission, are required pursuant to Sections 16-924(A), -941(B), and -941(C)(2) of the Arizona Revised Statutes.

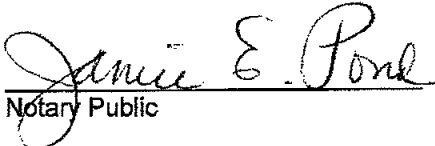
If I can provide any additional information regarding this matter, please do not hesitate to contact me.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Respectfully,

  
Kory A. Langhofer  
305 West Lynwood Street  
Phoenix, Arizona 85003

Subscribed and sworn to before me on July 1, 2014 by Kory A. Langhofer.

  
Notary Public

11-19-2014  
My commission expires



# EXHIBIT 6

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

July 16, 2014

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

**Re: Legacy Foundation Action Fund's Response to MUR 14-007**

Dear Mr. Collins:

Holtzman Vogel Josefiak PLLC and Bergin, Frakes, Smalley & Oberholtzer represent the Legacy Foundation Action Fund ("LFAF") and hereby submits this letter and attached Affidavit in response to MUR 14-007, initiated by the letter from Scott Smith's campaign lawyer, Kory Langhofer. The Citizens Clean Elections Commission (the "Commission") should take no action regarding Mr. Langhofer's complaint for three reasons. First, the Commission does not have jurisdiction over the matter. Second, LFAF is not required to register as an independent expenditure committee because the advertisement complained of contains issue advocacy protected by the First Amendment and not express advocacy as defined the U.S. Supreme Court or Arizona law. Third, with respect to the complained of advertisement, LFAF and the Ducey 2014 campaign committee never engaged in conduct that even comes close to the Arizona statutory definition of "coordination."

We have had the opportunity to review Ducey 2014's response letter. In addition to the factual statements below, we adopt Ducey 2014's legal analysis by reference and apply it to the legal arguments included herein.

**I. LFAF is a Social Welfare Organization**

LFAF is a social welfare organization organized under Section 501(c)(4) of the Internal Revenue Code. The organization's primary purpose is 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. Rants Aff. ¶ 5. As a social welfare organization, LFAF is concerned with the policy initiatives that affect its mission. Rants Aff. ¶ 15.

14 JUL 16 PM 4:05 CCEC



Since LFAF's inception, Christopher Rants served as its President, overseeing the daily business operations of the organization. Rants Aff. ¶¶ 3, 4. Mr. Rants played an active role establishing and carrying out the issue advocacy advertisement with which Mr. Langhofer takes issue. Rants Aff. ¶ 6. In support of its purpose to facilitate public policy issue education, and effectuate policy change, LFAF bought airtime and ran advertisements critical of the U.S. Conference of Mayors' policy positions. Rants Aff. ¶ 14.

The policy-based advertisements targeted citizens in the districts of three mayors (Mesa, AZ, Baltimore, MD and Sacramento, CA) who held leadership roles with the U.S. Conference of Mayors. Rants Aff. ¶¶ 8,12. The advertisements aired for roughly two weeks and were aimed in the media markets in and around the cities represented by the three mayors. Rants Aff. ¶¶ 13, 15.

In his complaint, Mr. Langhofer takes issue with LFAF's television advertisement mentioning then U.S. Conference of Mayors President Mayor Scott Smith.<sup>1</sup> LFAF purchased airtime in the Phoenix, AZ media market critical of the policy positions<sup>2</sup>, of the organization for which Mayor Smith served as President. Rants Aff. ¶¶ 9,14. At its conclusion, the advertisement makes a call to action asking viewers to tell Mayor Smith that "the U.S. Conference of Mayors should support policies that are good for Mesa." Rants Aff. ¶ 10.

The advertisement ran for a period of two weeks, from March 31 to April 14. Rants Aff. ¶¶ 12, 16. As a practical matter, LFAF ceased airing the advertisement before Mayor Smith's resignation due to the fact that once out of office, Mayor Smith would no longer function as President of the U.S. Conference of Mayors and therefore LFAF would no longer be able to address Mayor Smith as a focus of its campaign against the U.S. Conference of Mayor's policy positions.

As a social welfare organization, LFAF is very much aware of the fact that it cannot engage in political activity as a primary function of its organization. Rants Aff. ¶ 3. Therefore, LFAF carefully navigates state and federal laws to ensure that it does not

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<sup>1</sup> Mr. Langhofer makes references to "television, radio, internet, and mail advertisements painting Mr. Smith in a misleading and negative light" but only provides evidence in the form of a YouTube hyperlink to the television advertisement. See 7/1/2014 Langhofer Letter at 2. Because Mr. Langhofer failed to include any evidence to support his claim for other communications or how such communications cast Mayor Smith in a misleading or negative light, it is wholly unfeasible for us to address the radio, internet and mail communications.

<sup>2</sup> The policy positions presented in the advertisement were all federal policy positions including the federal Patient Affordable Care Act, federal energy policy, federal gun control and firearm restrictions, and support for President Obama's budget. See You Tube URL: [http://www.youtube.com/watch?v=NycZZLOA\\_OQ](http://www.youtube.com/watch?v=NycZZLOA_OQ).

unintentionally engage in an improper amount of political activity so it may retain its tax-exempt status. That is a critical reason why LFAF is focused on policy initiatives, specifically those of the U.S. Conference of Mayors. Rants Aff. ¶¶ 5, 8, 15.

## II. The Commission Lacks Jurisdiction

LFAF adopts the legal arguments of Ducey 2014 with regard to the Commission's lack of jurisdiction of this matter. We also note that a court hearing is set for August 11, 2014 to consider a similar argument with respect to the Commission's jurisdiction in a case filed by Attorney General Tom Horne.<sup>3</sup> To the extent the allegations against LFAF raise issues of law that are different from those also raised against Ducey 2014, LFAF addresses those issues below.

The Citizens Clean Elections Act, A.R.S. §§ 16-940 to 16-961 proscribes the duties and further limits the enforcement authority of the Commission to candidates that participate in the Citizens Clean Elections Act campaign finance regime. The Commission's enforcement authority is found in A.R.S. §§ 16-956(A)(7) and 16-957(A), which explicitly limit the reach of the Commission to enforcing "this article" (Title 16, Chapter 6, Article 2). Such an explicit limitation requires the Commission to enforce only the statutes in the Citizens Clean Elections Act. Mr. Langhofer's complaint referencing violations of A.R.S. §§ 16-901, 16-905, 16- 16-914.02 clearly reside in Title 16, Chapter 6, Article 1 which fall outside the Commission's jurisdiction.

Mr. Langhofer's complaint also alleges that LFAF's actions violated provisions in the Citizens Clean Elections Act, namely A.R.S. §§ 16-941(B), (C)(2), (D), 16-958(A), (B). The Commission 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), § 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 Commission has no enforcement authority under A.R.S. § 16-941(C)(2) because the statute 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.").

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<sup>3</sup> At the very least, if the Commission does not determine on its own that it has no jurisdiction over LFAF, the Commission should hold consideration of any further action in this matter pending the outcome of the August 11, 2014 hearing before the Superior Court of Maricopa County. If the court determines that this Commission has no jurisdiction over Attorney General Horne, then clearly this Commission has no jurisdiction over LFAF.

Furthermore, Mr. Langhofer erroneously suggests that the Commission has jurisdiction over LFAF under the independent reporting requirements of A.R.S. §§ 16-941(D) and 16-958(A), (B). Such reporting requirements are limited in that they exempt expenditures made by corporations for purposes listed in § 16-920(A). *See* A.R.S. § 16-941(D) (persons making qualifying independent expenditures are otherwise subject to reporting “with the exception of any expenditure listed in section 16-920...”). Exempted from the reporting requirements, and subsequently, the Commission’s enforcement authority, are expenditures in the form of “[c]ontributions for the use to support or oppose an initiative or referendum measure or amendment to the constitution. A.R.S. § 16-920(A)(5). LFAF’s advertisement opposed policy initiatives supported by the U.S. Conference of Mayors. Rants Aff. ¶ 14. Therefore, the Commission cannot subject LFAF to the reporting requirements of § 16-941(D) and 16-958(A), (B).

To the extent that the Citizens Clean Elections Act grants the Commission enforcement authority, such grant is expressly limited in §§ 16-956 and 16-957 to “any provision of this article” and does not reach to allegations involving nonparticipating candidates. Instead of reading a broad grant of authority from §§ 16-956 and 16-957, the Commission must adhere to the specific statute granting enforcement authority. That specific grant, as noted above is found in § 16-941(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.”).

### **III. LFAF’s Advertisement Does Not Expressly Advocate The Election Or Defeat Of A Clearly Identified Candidate.**

LFAF adopts the legal argument of Ducey 2014 supporting the fact that the advertisement complained of is an issue advocacy advertisement, and does not constitute express advocacy. To the extent the allegations against LFAF raise issues of law that are different from those also raised against Ducey 2014, LFAF addresses those issues below.

The First Amendment “guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). 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). Issue ads, because they “may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, [] are not the functional equivalent of express advocacy...” *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 476 (2007) (“WRTL”). Therefore, issue ads are not subject to campaign finance regulation. Just recently, the U.S. District Court for the

Eastern District of Wisconsin noted that “[i]ssue ads by a 501(c)(4) corporation ‘are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them.’” *O’Keefe v. Schmitz*, --- F.3d ---, 2014 LEXIS 63066 (E.D. Wis. May 6, 2014) (citing *WRTL* 449 at 478-79).

Where express advocacy is alleged not because of the so called “magic words test”<sup>4</sup> but because of the narrowly drawn functional equivalent to express advocacy test,<sup>5</sup> such speech must be scrutinized as being “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL* at 470. Where there may be a close determination, the Court has held “the tie is resolved in favor of protecting speech.” *Id.*

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).<sup>6</sup>

Contextual considerations “should seldom play a significant role” in determining whether speech is express advocacy. *WRTL*, 551 U.S. at 474. In *WRTL* the Supreme Court recognized that while courts may consider “basic background information that may be necessary to put an ad in context,” courts should not allow such basic background information to “become an excuse for discovery. *Id.*

Counter to Supreme Court precedent, Mr. Langhofer relies solely on contextual factors to support his allegation that LFAF’s advertisement can have no reasonable meaning other than to advocate against Mayor Smith. Mr. Langhofer concedes in his complaint that the language used in LFAF’s advertisement does not make use of any of the phrases that would constitute “expressly advocating the election or defeat of a clearly identified candidate” in § 16-901.01(A), 7/1/2014 Langhofer Letter at 2. Instead, Mr. Langhofer concocts five unsubstantiated contextual theories centering around his perception of the organization’s intent as to why he believes the Commission should find

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<sup>4</sup> Speech, in express terms, that advocates the election or defeat of a clearly identified candidate. See *Buckley*, 424 at 44.

<sup>5</sup> Speech that can be reasonably interpreted to be the “functional equivalent of express advocacy.” See *McConnell*, 540 at 206.

<sup>6</sup> Mr. Langhofer relies on the definition of “express advocacy” found in Arizona statute § 16-901.01(A). This definition has been ruled unconstitutional by the Arizona Superior Court. See Final Judgment, *Committee for Justice & Fairness v. Arizona Secretary of State’s Office, et al.*, No. LC-2011-000734 (Ariz. Superior Court Maricopa County Nov. 28, 2012). The case is on appeal before the Arizona Court of Appeals. We agree with the court that § 16-901.01(A) is unconstitutional.

that the advertisements equate to express advocacy. Not only should the Commission reject Mr. Langhofer's theories for the mere fact that they unjustly attempt to mislead the Commission, but also because they are solely grounded in impermissible context and intent, a justification not recognized by the Supreme Court.

Nonetheless LFAF identifies herein the inconsistencies and inaccuracies of Mr. Langhofer's contextual arguments.

**A. LFAF's Advertisement Was Aptly Targeted To Be Effective For Its Issue Advocacy Purpose.**

Mr. Langhofer suggests that LFAF targeted an audience greater than that of the City of Mesa and that such targeting therefore was meant to influence "the gubernatorial electorate." 7/1/2014 Langhofer Letter at 2. Mr. Langhofer's targeting allegation is improper for determining whether speech constitutes express advocacy and is solely without merit.

In striking down a state law because of its vague standard for determining express advocacy or the functional equivalent thereof, the Fourth Circuit reasoned that, much like Mr. Langhofer's alleged targeting theory, North Carolina's law runs counter to *WRTL* in that provides for ambiguous interpretations such as "how many voters should be considered 'significant'?" *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 284 (4th Cir. 2008) ("*NCRTL*").

Christopher Rants, President of LFAF, states in his affidavit that the television advertisement was part of a larger project to oppose the policy measures supported by the U.S. Conference of Mayors. Rants Aff. ¶¶ 6, 14. LFAF ran advertisements targeting three mayors who constituted the leadership of the U.S. Conference of Mayors (i.e. mayors for Mesa, AZ, Baltimore, MD and Sacramento, CA). Rants. Aff. ¶¶ 8, 13. Each advertisement, including the advertisement mentioning Mayor Smith, was distributed based on the media market or markets that covered the mayors' respective cities. Rants Aff. ¶ 3.

Mr. Langhofer's Exhibit D supports the fact that LFAF bought television advertising in the Phoenix market, which, in the very same Exhibit, clearly shows is made up predominantly by the City of Mesa, AZ. See 7/1/2014 Langhofer Letter at 2, Exhibit D, NCC Cox Media CableTrack System Profile. Furthermore, LFAF sought to effectuate a grassroots issue advocacy campaign to oppose policy positions supported by Mayor Smith and the U.S Conference of Mayors. Rants Aff. ¶ 14. To successfully run its campaign LFAF needed to appeal to Arizonians in and around the Mesa area that would be willing and able to call Mayor Smith to tell him "the U.S. Conference of Mayors should support policies that are good for Mesa." Rants Aff. ¶¶ 9, 10. Not only does the advertisement's call to action make it clear LFAF sought to oppose policies, but

Christopher Rants' affidavit also notes that the text of the advertisement educates the public as to policies supported by the U.S. Conference of Mayors. Rants Aff. ¶¶ 10, 15.

**B. LFAF's Advertisement Was Run As Part Of A Broad Campaign Focused On Policies Supported By The U.S. Conference Of Mayors.**

Mr. Langhofer in his second and third points claim that LFAF was motivated by Mayor Smith's gubernatorial ambitions rather than his policy positions when airing the advertisement. Specifically, Mr. Langhofer calls into question the timing of LFAF's advertisements, alleging that the advertisement was motivated by a public gubernatorial poll and meant to capitalize on Mayor Smith's last days as Mesa's mayor. Such allegations, however, are unfounded.

As stated in Christopher Rants' affidavit, LFAF opposes the policy positions of the U.S. Conference of Mayors. Rants Aff ¶ 14. To effectuate a grassroots education initiative to counter such policies, LFAF ran advertisements targeting mayors who, by virtue of their position, constituted the U.S. Conference of Mayors' leadership. *Id.* It is undeniable that while serving as Mesa's Mayor, Mayor Smith held the position of President for the U.S. Conference of Mayors." Rants Aff. ¶ 15. In such role, Mayor Smith proved an appropriate and arguably, the best representative to use in highlighting the policy positions of the U.S. Conference of Mayors.

If Mr. Langhofer is asserting that a public official cannot be the subject of an issue advocacy message in the last two weeks of office, then Mr. Langhofer is proposing such a strong restriction on First Amendment free speech that would make even the harshest free speech critics cringe. LFAF even recognized that it could not continue running the advertisement critical of the U.S. Conference of Mayors involving Mayor Smith after Mayor Smith left office, so it pulled the advertisement on April 14, two days before Mayor Smith resigned. Rants Aff. ¶ 16

Where Mr. Langhofer lacks any actual evidence to implicate LFAF's decision to air its advertisement, he rests on an argument that calls for the Commission to determine LFAF's intent. Unfortunately for Mr. Langhofer, the U.S. Supreme Court specifically rejected the intent-based standard for determining whether speech constitutes express advocacy rather than issue advocacy. *See WRTL* 551 U.S. at 467. (citing *Buckley* 424 U.S. at 43-44). The Court has deemed it difficult to distinguish "between discussions of issues on the one hand and advocacy of election or defeat of candidates on the other," but reasoned that "analyzing the question in terms of 'intent and of effect' would afford 'no security for free discussion.'" *Id.*, (citing *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945))).

**C. LFAF Used Independently Sourced Public Information To Support The Content Of The Advertisement**

Mr. Langhofer's fourth point suggests that LFAF used content that was obtained by Gregg Pekau. Again, without any basis or evidence to connect LFAF with Mr. Pekau's research, Mr. Langhofer is asking the Commission to draw conclusions that are untenable. This is especially the case here since the information sourced for LFAF's advertisement was conducted based on research from the U.S. Conference of Mayor's website. Rants Aff. ¶ 11. Furthermore, the information referenced by Mr. Langhofer regarding the types of public records requests made by Mr. Pekau has nothing to do with the content of the LFAF advertisement. See 7/1/2014 Langhofer Letter at 2, Exhibit A. This is a significant and obvious error that can be assessed solely from the material included in the complaint itself.

**D. LFAF Has No Relationship With The Ducey Campaign That Would Trigger Arizona's Definition of Coordination**

Mr. Langhofer's fifth point broadly references a relationship between LFAF and Ducey 2014, yet provides no evidence other than news reports and blogs that attempt to draw circumspect conclusions about the relationships of certain vendors, LFAF and Ducey 2014. See 7/1/2014 Langhofer Letter at 2. Such conjecture is unfounded and completely without merit.

Importantly, the information provided by Mr. Langhofer does not even suggest that LFAF used the referenced vendors in the production of the advertisement at issue in his complaint. Christopher Rants states in his affidavit that LFAF retained neither Direct Response Group nor Larry McCarthy in relation to the advertisement. Rants Aff. ¶¶ 18, 19. To the extent LFAF worked with either of these vendors it did so on federal issues, in Nebraska and wholly independently of Ducey 2014. *Id.*

**IV. LFAF Did Not Coordinate With Ducey 2014.**

LFAF adopts the legal argument of Ducey 2014 supporting the fact that LFAF and Ducey 2014 did not coordinate to produce LFAF's advertisement. To the extent the allegations against LFAF raise issues of law that are different from those also raised against Ducey 2014, LFAF addresses those issues below.

Mr. Langhofer alleges that LFAF and Ducey 2014 coordinated in the production of LFAF's advertisement, thereby resulting in an impermissible contribution from LFAF to Ducey 2014. In order for Mr. Langhofer to succeed with his allegation that LFAF made a contribution to the Ducey Campaign, he must show that there was actual coordination, arrangement, or direction between LFAF and the Ducey Campaign. See A.R.S. § 16-901(14).

Recently, Arizona Secretary of State Ken Bennett as well as the Commission had occasion to add clarity to the Arizona coordination statute. In dismissing an action alleging coordination between Secretary Bennett and an independent expenditure organization, the Commission agreed with Secretary Bennett's position 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." CCEC5/22/14 Transcript at 34:20-25.

Furthermore, the United States Supreme Court upholds the same principle of actual coordination. It takes more than mere allegation for a court to find actual coordination. See *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (explaining [a]n agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one). See, e.g., *NAACP v. Button*, 371 U.S. 415, 429 (1963)). The Court recognized that all party expenditures are not "coordinated" and that even political party committees, may engage in independent expenditure activity. *Id.* at 619.

In order for a complaint to properly assert coordination between a candidate and an independent expenditure, it must allege actual coordination. Under the guidance of both the CECC, Secretary Bennett and the U.S. Supreme Court, actual coordination must be something amounting to cooperation, consultation, or direction between the parties. A standard less than actual coordination cannot withstand scrutiny for being vague or ambiguous, allowing for frivolous claims of improper coordination into perpetuity.

Such is the case in Mr. Langhofer's complaint. There is not a single alleged act that would amount to LFAF coordinating with the Ducey Campaign. Mr. Langhofer conveniently chooses to ignore that § 16-901(14) requires a candidate and an independent expenditure work in "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." Instead Mr. Langhofer suggests that merely a common officer, director, employee, or agent between the candidate and the independent expenditure suffices for coordination.

The fact that LFAF used certain vendors that may have provided work for Ducey 2014 is insufficient because there is simply no showing that any of the alleged vendors were connected with work specific to the advertisement at issue or that anyone connected with LFAF ever discussed the advertisement with these vendors. Mr. Langhofer's attempt to connect Copper State Research & Strategy and Mr. Pekau to LFAF falls short on the basis that Copper State's public records requests had nothing substantively to do with the advertisement. Further, production of the requested records occurred on April 9, 2014, more than a week into the running of the advertisement. To suggest that Copper State's research would be in the slightest bit useful to LFAF is completely unfounded.



Mr. Langhofer also attempts to connect LFAF and Ducey 2014 through Larry McCarthy and Direct Response Group. The news report provided as Exhibit G to Mr. Langhofer's complaint attempts to describe the relationships between Mr. McCarthy, Direct Response Group and LFAF but fails on account that the parties had *nothing* to do with the advertisement at issue in this matter. Having absolutely no correlation to the matter at hand, Direct Response Group and Mr. McCarthy were hired by LFAF to work on a wholly separate project involving a federal election in Nebraska. See Rants Aff. ¶¶ 18, 19.

## V. Conclusion

We respectfully request the Commission take no action in the foregoing matter for three reasons: 1) The Commission lacks jurisdiction over the alleged violations; 2) LFAF's advertisement constituted pure issue advocacy rendering any independent expenditure statutory requirements for registration and reporting obsolete; and 3) LFAF and Ducey 2014 did not coordinate in the production of the advertisement and therefore no contribution was provided from LFAF to Ducey 2014.

Respectfully submitted,

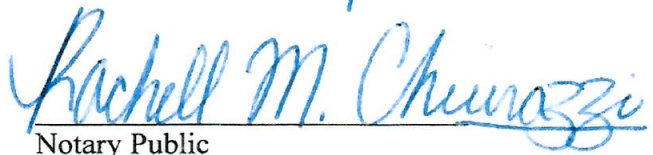


Brian Bergin  
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STATE OF ARIZONA                    )  
  ) ss.  
COUNTY OF MARICOPA            )

SUBSCRIBED AND SWORN to before me this 16th day of July, 2014  
by Brian M. Bergin.



  
Notary Public

My Commission expires: December 8, 2016

Thomas M. Collins  
July 16, 2014  
Page 11 of 11

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

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

cc: Korey Langhofer

# EXHIBIT 7

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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.

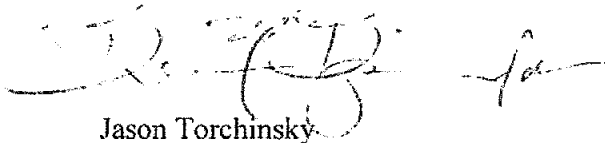
**E. Conclusion**

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,



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



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

# EXHIBIT 8

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

Holtzman Vogel Josefiak PLLC  
45 North Hill Drive, Suite 100  
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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.

# EXHIBIT 9

Bergin, Frakes, Smalley & Oberholtzer  
4455 East Camelback Road, Suite A-205  
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Holtzman Vogel Josefiak PLLC  
45 North Hill Drive, Suite 100  
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14 OCT 6 AM 11:15 CCEC

October 3, 2014

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

**Re: Legacy Foundation Action Fund's Response to MUR 14-007**

Dear Mr. Collins:

We are in receipt of your letter and attached Compliance Order dated September 26, 2014, in which you request that Legacy Foundation Action Fund ("LFAF") provide sworn written answers to three questions. This letter serves as our response to your inquiry, in which we make three points: (1) LFAF objects to your request for additional information on the grounds of relevance since the daily statutory fine for late reporting is substantially lower than the statutory maximum penalty regardless of any additional costs incurred related to the advertisement at issue; (2) LFAF objects to your request for additional information because we reassert our belief that the Citizens Clean Elections Commission (the "CCCE" or "Commission") lacks jurisdiction over LFAF and any communications it made; and (3) Even if the CCEC were to attempt to enforce a civil penalty against LFAF, there is no statutory provision authorizing any such penalty.

**I. Any Additional Costs Related To The Advertisement At Issue is Irrelevant To The Potential Penalty**

LFAF objects to your request for additional information pertaining to the amount of money expended to create and run the television advertisement at issue on the grounds of relevance. The statutory penalty scheme relied upon by the CCEC and cited in your email to us about the potential penalty calculation is Section 16-942(B). It provides a daily penalty of \$300 per day (\$430 adjusted for inflation) for each day the reporting is overdue. The daily penalty is doubled (\$860) if the amount not reported exceeds 10% of the adjusted primary or general election spending limit (\$75,361). Civil penalties enforced by the CCEC under Section 16-942(B) cannot exceed twice the amount of the expenditures reported.

Applying the \$860 per day penalty for roughly 160 days of alleged delinquent filing, the total penalty would amount to \$137,600. As a result, because the potential penalty under your calculations does not even come close to approaching any claimed

applicable statutory maximum, we fail to see the relevance of your inquiry. There is no relevant information the CCEC could gain at this point from knowing information such as the production cost of the advertisement.

## **II. The CCEC Lacks Jurisdiction**

In our July 16, 2014 response to Mr. Langhofer's complaint, and in subsequent filings we argued that the CCEC lacks jurisdiction over LFAF. LFAF has maintained that position and it reasserts that argument here as a basis to decline CCEC's request for additional information. Because LFAF's advertisement at issue in MUR 14-007 was a policy-based, issue advertisement, it was not subject to the independent expenditure reporting regime of either Arizona Revised Statutes ("A.R.S.") Title 16, Chapter 6, Article 1 or Article 2. The Secretary of State, acting through the Maricopa County Elections Division recognized this fact on July 16, 2014 in its finding that no reasonable cause existed to believe that LFAF violated A.R.S. § 16-901.01.

Furthermore, the CCEC does not have jurisdiction over LFAF under A.R.S. §§ 16-941(D) and 16-958(A), (B). Such reporting requirements are limited in that they exempt expenditures made by corporations for purposes listed in § 16-920(A). *See* A.R.S. § 16-941(D) (persons making qualifying independent expenditures are otherwise subject to reporting "with the exception of any expenditure listed in section 16-920..."). Exempted from the reporting requirements, and subsequently, the Commission's enforcement authority, are expenditures in the form of "[c]ontributions for the use to support or oppose an initiative or referendum measure or amendment to the constitution." A.R.S. § 16-920(A)(5). LFAF's advertisement opposed policy initiatives supported by the U.S. Conference of Mayors. Rants Aff. ¶ 14. Therefore, the Commission cannot subject LFAF to the reporting requirements of § 16-941(D) and 16-958(A), (B).

Because CCEC does not have jurisdiction over LFAF, LFAF declines CCEC's request for additional information.

## **III. A.R.S. §16-942(B) Is Unenforceable Against LFAF**

In support of LFAF's position that it is not subject to the registration and reporting requirements of Article 2's independent expenditure requirements, we bring to your attention the absence of any applicable statutorily authorized penalty provision to enforce the CCEC's claimed independent expenditure reporting requirement against LFAF.

The CCEC relies on A.R.S. §16-957 as well as A.A.C. R2-20-109(F)(3) to assert and apply a civil penalty on LFAF for delinquent independent expenditure reports. 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 lacks the ability to exact a civil penalty under A.R.S. § 16-942(B) or any other statute for that matter since 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 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 cannot conceivably identify the statutorily required candidate and attribute such to LFAF in light of its finding at its August 21, 2014 meeting. At that meeting the Commission voted to find no reason to believe that coordination between LFAF and Ducey 2014 Campaign existed. As you are aware, 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 Tuscon*, 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.*

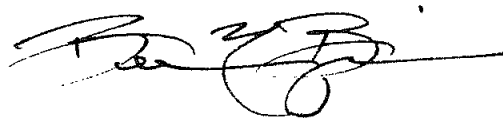
A.R.S. § 16-942(B) is not ambiguous and therefore can only be applied to a candidate or an organization working on behalf of a candidate. Because LFAF is certainly not a candidate and the CCEC already found LFAF not to be working on behalf of (or even in coordination with) the Ducey 2014 Campaign, the CCEC cannot apply Section 16-942(B) 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 “on behalf of any candidate” have a meaning and purpose. Further, the purpose for the registering and reporting of independent expenditures under the Arizona Citizens Clean Elections Act was to track such funds so that participating candidates would be subsidized for the expenditures. That scheme has been deemed unconstitutional by the Supreme Court of the United States in *Arizona Free Enterprise*



*Club Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) in 2011. This bolsters LFAF's position that CCEC does not have jurisdiction nor the ability to impose civil enforcement over LFAF.

Please accept this letter in response to your September 26, 2014 request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Brian Bergin', with a stylized flourish at the end.

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

A handwritten signature in black ink, appearing to read 'Jason Torchinsky', with a stylized flourish at the end.

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

# EXHIBIT 10

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

October 14, 2014

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

**Re: Legacy Foundation Action Fund's Response to MUR 14-007**

Dear Mr. Collins:

This letter is in response to the compliance order issued by the Arizona Citizens Clean Elections Commission ("CCEC"), dated September 26, 2014. The compliance order indicated that Legacy Foundation Action Fund ("LFAF") had 14 days under A.A.C. R2-20-208(A) to comply with the CCEC's alleged violations of Arizona campaign finance law. Please accept this letter as confirmation that LFAF believes that the CCEC is violating the First Amendment rights of LFAF and is exceeding the scope of its authority under Arizona's statutes both to investigate this matter and to issue any fines or penalties.

As LFAF initially indicated in its response to Mr. Langhofer's complaint, the CCEC should dismiss the matter at hand for two straightforward reasons: (1) the CCEC lacks jurisdiction over the matter; and (2) LFAF's advertisement constituted genuine issue advocacy outside the purview of A.R.S. § 16-940(D). LFAF's arguments made before the CCEC in its initial and supplemental responses to Mr. Langhofer's complaint, oral arguments and most recently its response to Mr. Collins' request for additional information are all reasserted by reference herein and remain applicable to LFAF's belief that it is not bound by the CCEC findings.

LFAF reiterates its belief that Jeffrey Messing, the attorney for the Maricopa County Elections Department representing the Arizona Secretary of State's Office, correctly found that the Arizona Secretary of State's Office did not have reasonable cause to believe a violation of A.R.S. § 16-901.01 occurred.

However, should the CCEC determine that it has reasonable cause to proceed in this matter, the CCEC may not issue any fines or penalties because we believe that the CCEC has no statutory authority to do so. As we have previously noted in correspondence, A.R.S. § 16-942(B) which the CCEC's compliance order relies upon to threaten penalties, by its own clear language, does not appear to apply to this matter. If the CCEC determines that it should assess a penalty, LFAF respectfully requests that the

14 OCT 15 PM 4:03 CCEC

CCEC's penalty assessment identify the candidate LFAF's 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. Without doing so, LFAF maintains that the language and penalty provisions of A.R.S. § 16-942(B) simply cannot apply here. We believe that the lack of any applicable civil penalty provision in the CCEC's authorizing statutes are further evidence that the CCEC has no jurisdiction over this matter in the first instance.

Throughout the process before the CCEC, LFAF has remained consistent in its arguments and will continue to fight to preserve its protected First Amendment right to engage in unencumbered issue advocacy speech. As evidence of its belief that Arizona's express advocacy law is facially unconstitutional at worst, and unconstitutional as applied in this case at best, LFAF has received permission from all parties and will submit an *amicus curiae* brief in support of the Committee for Justice & Fairness' Petition for Review before the Arizona Supreme Court in *Committee for Justice & Fairness v. Arizona Secretary of State's Office, et. al*, 332 P.3d 94 (Ariz. App. 2014).

Please accept this letter in response to your September 26, 2014 compliance order.

Respectfully submitted,



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



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

# EXHIBIT 11

Advertisement	Conference of Mayors	Date and Reference
“fully endorsed Obamacare from the start”	<a href="http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf">http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf</a>	March 2010, Tom Cochran, Executive Director of the Conference.
“vocally supported the Obama administration’s efforts to regulate carbon emissions”	<ul style="list-style-type: none"> <li>a. <a href="http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf">http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf</a></li> <li>b. <a href="http://www.usmayors.org/resolutions/80th_conference/adoptedresolutionsfull.pdf">http://www.usmayors.org/resolutions/80th_conference/adoptedresolutionsfull.pdf</a> (p. 113)</li> <li>c. <a href="http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf">http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf</a></li> </ul>	<ul style="list-style-type: none"> <li>a. 2009, Mayor Scott Smith.</li> <li>b. 2012, Conference President L.A. Mayor Antonio Villaraigosa.</li> <li>c. 2010, Conference President Burnsville Mayor Elizabeth Kautz.</li> </ul>
“backed the president’s proposal to limit our Second Amendment rights.”	<ul style="list-style-type: none"> <li>a. <a href="http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf</a></li> <li>b. <a href="http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf</a></li> <li>c. <a href="http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf</a></li> </ul>	<ul style="list-style-type: none"> <li>a. 2013, Philadelphia Mayor Michael Nutter.</li> <li>b. 2013, Philadelphia Mayor Michael Nutter.</li> <li>c. 2013, Philadelphia Mayor Michael Nutter.</li> </ul>
“Obama’s budget was ‘balanced approach’”	<a href="http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf</a>	2013, Philadelphia Mayor Michael Nutter.

See also Ducey 2014 July 15, 2014 Response.

# EXHIBIT 12

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Michael T. Liburdi  
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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](http://www.youtube.com/watch?v=NycZZLOA_OQ).<sup>1</sup> 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

<sup>1</sup> 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."



Thomas M. Collins  
July 15, 2014  
Page 2

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).<sup>2</sup> The first three sections cited are

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<sup>2</sup> 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).

Thomas M. Collins  
July 15, 2014  
Page 3

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

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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

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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

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

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"	<a href="http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf">http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf</a>
"vocally supported the Obama administration's efforts to regulate carbon emission"	<a href="http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf">http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf</a>  <a href="http://www.usmayors.org/resolutions/80th_conference/AdoptedResolutionsFull.pdf">http://www.usmayors.org/resolutions/80th_conference/AdoptedResolutionsFull.pdf</a> (page 113)  <a href="http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf">http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf</a> (page 80)
"backed the President's proposal to limit our 2 <sup>nd</sup> amendment rights"	<a href="http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf</a>  <a href="http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf</a>  <a href="http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf</a>
"Obama's budget was 'a balanced approach'"	<a href="http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf">http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf</a>

<sup>3</sup> 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.

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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

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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.”<sup>4</sup> (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<sup>5</sup> 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).<sup>6</sup>

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<sup>4</sup> 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.

<sup>5</sup> The advertisement here does not use the express advocacy “magic words.”

<sup>6</sup> *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.*

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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



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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.<sup>7</sup>

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<sup>7</sup> 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

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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 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.

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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.

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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.<sup>8</sup> 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

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<sup>8</sup> 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].”

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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,

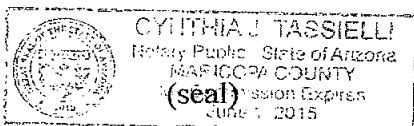
Snell & Wilmer

*Michael T. Liburdi*

Michael T. Liburdi

State of Arizona                     )  
  )  
County of Maricopa                )

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



*Cynthia J. Tassielli*  
Notary Public

cc: Karen Osborne  
Jeffrey Messing  
Kory Langhofer

ML/ct

19669583.4

# EXHIBIT 13

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July 21, 2014

Kory A. Langhofer, Esq.  
Brownstein Hyatt Farber Schreck, LLP  
One East Washington Street  
Phoenix, Arizona 85004

Re: Complaint – Ducey 2014 Campaign

Dear Mr. Langhofer:

As you know, this office has been retained as counsel for the Maricopa County Elections Department to which your Complaint was referred by the Arizona Secretary of State. After carefully considering your Complaint, Ducey 2014's July 3, 2014 Response, Ducey 2014's July 15, 2014 Response, and Legacy Foundation Action Fund's July 16, 2014 Response to the Clean Elections Commission, the Department has determined that it does not have reasonable cause to believe that a violation of A.R.S. § 16-901 *et seq.* has occurred.

Respectfully,



Jeffrey Messing

Copy to: Michael T. Liburdi, Esq.  
Brian Bergin, Esq.  
Christina Estes-Werther