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MUR 14-007 (Legacy Foundation Action Fund)

OPPOSITION TO MR. COLLINS'
PROBABLE CAUSE RECOMMENDATION

We are responding to the Executive Director's Recommendation ("Recommendation") to the Arizona Citizens Clean Elections Commission (the "CCEC") concluding there is probable cause to find that Legacy Foundation Action Fund ("LFAF") violated the Citizens Clean Elections Act and Commission rules (the "Act") and requesting the CCEC to authorize the Executive Director to assess civil penalties of over \$200,000 against LFAF.

LFAF's initial response to Mr. Langhofer's complaint argued it was not bound by the Act for two straightforward reasons¹: (1) the CCEC lacks jurisdiction over the matter; and (2) LFAF's advertisement constituted genuine issue advocacy outside the purview of Arizona Revised Statutes ("A.R.S.") Title 16, Chapter 6, Article 2. LFAF reasserts its prior arguments herein, paying particular attention to the Executive Director's misconstrued legal analysis and his impermissible subjective application of contextual factors. Furthermore, if the CCEC should adopt the faulty Recommendation, the CCEC

¹ In its initial response to the CCEC, LFAF asserted a third position, arguing that LFAF did not coordinate with the Ducey 2014 Campaign Committee. At its August 21, 2014 public meeting, the CCEC voted to find no reasonable cause to believe that LFAF and the Ducey 2014 Campaign engaged in coordination and therefore LFAF's argument against coordination is no longer relevant.

may not assess civil penalties against LFAF because it is without statutory authority to do so.

In light of LFAF's previous arguments, taken together with the representations made herein, LFAF respectfully asks the CCEC to make a finding that LFAF engaged in issue advocacy, not express advocacy and, therefore, determine there is no probable cause to find that LFAF violated the Act.

MEMORANDUM OF POINTS AND AUTHORITY

FACTUAL BACKGROUND

LFAF is a social welfare organization with a primary purpose 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. [Exhibit A – Rants Affidavit ¶ 5].² To further its mission, LFAF operates grassroots issue advocacy campaigns. *Id.* at ¶ 6. One such campaign, which is at issue before the CCEC, consisted of advertisements that opposed certain policy positions held by the U.S. Conference of Mayors and endorsed by the Conference's mayoral leadership including then President and Mesa Mayor Scott Smith.³ *Id.* ¶¶ 6-7.

On July 1, 2014 Mr. Kory Langhofer filed a complaint against LFAF, amongst other parties, alleging that LFAF's advertisement constituted express advocacy, thereby

² The Recommendation contradicts itself in that it heavily relies on Mr. Rants' Affidavit to establish the facts and procedural posture of the case, but later dismisses Mr. Rants' Affidavit with direct citation as containing "subjective intent." [Recommendation pp. 2 and 12].

³ LFAF's advertisement campaign opposing policy initiatives of the U.S. Conference of Mayors ran in the cities and surrounding areas of three mayors (Sacramento, CA, Baltimore, MD and Mesa, AZ) each of whom held leadership positions within the U.S. Conference of Mayors. [Exhibit A - Rants Affidavit].

subjecting LFAF to the registration and reporting requirements of both Articles 1 and 2 of Title 16 Chapter 6. [Langhofer Complaint p. 1] Mr. Langhofer filed his complaint with the CCEC as well as the Arizona Secretary of State's Office. *Id.* LFAF responded to the complaint on July 16, 2014 arguing that the CCEC did not have jurisdiction over the matter and, if it did, LFAF was not subject to registration or reporting requirements because its advertisement was not express advocacy. [LFAF Response July 16, 2014].

The Arizona Secretary of State's Office referred the complaint to the Maricopa County Elections Department. Thereafter, on July 21, 2014, Jeffrey Messing, a lawyer representing the Department, issued a letter indicating that the Department "does not have reasonable cause to believe that a violation of Arizona Revised Statutes A.R.S. § 16-901.01 *et seq.* has occurred." [Messing Letter]

On July 31, 2014, the CCEC held a public meeting and discussed, as an agenda item, the complaint against LFAF. At that hearing the CCEC decided not to make a finding as to reason to believe a violation occurred but, instead, limited its determination to establishing jurisdiction over the matter. [7/31/14 CCEC Minutes at 74:16-76:25]. Over a month later, on September 11, 2014, the CCEC revisited the issue and declared it had reason to believe that LFAF violated the Act and ordered an investigation. [9/11/14 CCEC Minutes at 30:3 – 31:7]. On September 26, 2014, the CCEC sent LFAF a Compliance Order asking LFAF to provide written answers to the following questions under oath:

1. Please provide how much money was expended to create and run the television advertisement identified in the Compliance Order.
2. Please identify any other advertisements pertaining to Scott Smith that ran Arizona.

3. With regard to any advertisements identified in LFAF's response to question 2, please provide information on the scope of the purchase, including how much money was spent to create and run any such advertisements and where they ran.

[CCEC Compliance Order]. LFAF responded to the CCEC's Compliance Order by letter outlining in argument form with legal citations why the CCEC's request for additional information was not only irrelevant to the matter at hand but also outside the scope of the CCEC's jurisdiction. [LFAF Response to Compliance Order, October 3, 2014]. Further, LFAF provided a detailed request to the CCEC in its response, asking the CCEC, when assessing civil penalties under A.R.S. § 16-942(B), to identify the candidate the 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. [LFAF Response to Compliance Order, October 14, 2014]. To date, LFAF has not received a response from CCEC regarding its inquiry and the Executive Director's Recommendation neglects to address LFAF's inquiry.

LEGAL ARGUMENT

I. The Commission Lacks Jurisdiction

Although CCEC determined it had jurisdiction over the matter at hand at its July 31, 2014 meeting, LFAF maintains its position that the CCEC lacks enforcement jurisdiction and takes issue with the biased Recommendation, calling LFAF's jurisdictional argument "a non-sequiter" without sufficient justification. [See Recommendation p. 13]. The CCEC is bound by A.R.S. Title 16, Chapter 6, Article 2, which is delineated in the Act at A.R.S. §§ 16-940 to 16-961. In fact, A.R.S. §§ 16-

956(A)(7) and 16-957(A), explicitly limit the reach of the Commission to enforcing “this article” (Title 16, Chapter 6, Article 2).

The CCEC’s attempt to draw LFAF into its jurisdiction through the independent expenditure reporting requirements outlined in A.R.S. § 16-941(D) is misguided as the statute’s purpose in Article 2 is no longer relevant. The independent expenditure reporting requirements found in A.R.S. Title 16, Chapter 6, Article 2 were implemented to provide the CCEC a means to track such spending so that it would be able to subsidize participating candidates for such expenditures. *See Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-2829 (2011). As the CCEC is well aware, the United States Supreme Court held that scheme to be unconstitutional in *Arizona Free Enterprise Club*, at 282-2829 (noting that “the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority.”). Because independent expenditures are already subject to registration and reporting requirements in Article 1, Article 2’s requirements are duplicative and any attempt to make such requirements applicable through rulemaking or otherwise impermissibly deviates from the statute’s original intent and purpose.

Furthermore, Section 16-941(D) requires persons making qualifying independent expenditures to otherwise report such expenditures to CCEC “with the exception of any expenditure listed in Section 16-920....” A.R.S § 16-941(D). Section 16-920 outlines certain reporting requirements under Article 1 to the Arizona Secretary of State and specifically exempts from reporting, and subsequently, the CCEC’s enforcement authority, 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 relevant public policy issues of national import including: (1) the environment; (2) healthcare; (3) the Second Amendment; and (4) the Federal Budget, which fit squarely in Section 16-920(A)(5)’s exemption, thereby rendering the reporting requirements of § 16-941(D) and 16-958(A), (B) unenforceable.

Finally, as noted *supra*, upon referral by the Arizona Secretary of State’s Office, the lawyer representing the Maricopa County Elections Department found no reasonable cause to believe that a violation of Title 16, Chapter 6, Article 1 occurred. [Messing Letter July 21, 2014]. In other words, after review of the very same complaint currently before the CCEC, the Maricopa County Elections Department determined unequivocally that LFAF’s advertisement did not constitute express advocacy under A.R.S. 16-901.01 and was, therefore, not subject to the independent expenditure registration and reporting requirements. *Id.* The Maricopa County Elections Department’s decision, standing in for the Arizona Secretary of State, makes the CCEC’s attempt to apply Section 16-941(D) to LFAF meritless.

As an attempt to dispel LFAF’s lack of jurisdiction arguments, the Recommendation relies on *Clean Elections Institute, Inc. v. Brewer*. What the Recommendation fails to address is that the 2004 *Brewer* decision occurred roughly seven years prior to the U.S. Supreme Court’s decision in *Bennett*. Therefore, the assertion for which the Recommendation uses the *Brewer* decision, i.e. to establish that the CCEC has “broad authority to enforce the Act,” is rendered conditional on the fact that the Act’s independent expenditure scheme was found to be unconstitutional. *See Bennett* at 2828 (noting that Act’s matching funds scheme is unconstitutional because it

substantially burdened political speech without serving a compelling state interest in violation of established First Amendment jurisprudence).

Furthermore, reliance on *Brewer* for the purpose of establishing CCEC's specific authority to enforce an independent expenditure regime already granted to the Arizona Secretary of State's Office is being unfaithful to the *Brewer* holding. *Brewer* dealt with the issue of whether an initiative petition seeking to qualify Proposition 106 for a general election ballot violated the separate amendment rule. *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, 243 (2004). The portion of the *Brewer* opinion for which the Executive Director relies on page 12 of his Recommendation is simply a passing description of the Act's independent expenditure reporting regime, which at the time, was constitutional. [Recommendation p. 12]. Following the *Bennett* decision, however, the Recommendation cannot – based on the language of the authorizing statute - sustain an argument that the voters intended for a independent expenditure registration and reporting regime to remain in place when the rationale behind such a regime (i.e. to account for independent expenditures so that the CCEC could subsidize participating candidates) no longer exists.

II. LFAF's Advertisement Is A Genuine Issue Advertisement, Protected By the First Amendment Under Controlling United States Supreme Court Precedent.

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). In *Buckley*, the Supreme Court emphasized the unique nature of "explicit words of advocacy of election or defeat of a candidate." *Buckley*, 424 U.S. at 43 (finding the

following words constituted express advocacy: “vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, reject”).

Buckley’s “magic words” test had been upheld in courts throughout the country until recently when the Ninth Circuit expanded the definition to include not only communications containing magic words, but also communications when read in total, and with limited reference to external events, are susceptible of “[n]o other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). A later Ninth Circuit opinion clarified and narrowed *Furgatch* by noting when interpreting express advocacy, the Ninth Circuit presumes express advocacy “must contain some explicit words of advocacy.” *California Pro-Life Counsel v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003); *See also Furgatch*, 807 F.2d. at 864 (“context cannot supply a meaning that is incompatible with, or simply unrelated to, the clear import of the words”). LFAF, hereby recognizes, as it has in prior responses, that express advocacy is not limited to “circumstances where an advertisement only uses so-called magic words...” *See* Recommendation p. 11 (inaccurately suggesting LFAF limits its application of express advocacy to “circumstances where an advertisement only uses so-called magic words....”). Instead, LFAF relies on Supreme Court precedent to define the confines of express advocacy to protect its legitimate right to engage in issue advocacy speech. Thus, *Getman* and *Furgatch* demonstrate that the most expansive definition of express advocacy requires that speech only qualifies as express advocacy if it “[p]resents a clear plea for action, and thus speech that is merely informative is not covered by the Act.” *Furgatch*, 807 F.2d. at 864.

Determining whether a clear plea for action exists within an advertisement requires the Court to apply an objective standard, “focusing on the substance of the communication rather than amorphous considerations of intent and effect.” *WRTL*, 551 U.S. at 470. To further clarify the Court’s standard, Justice Roberts wrote, “our test affords protection unless an ad is susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL*, at 474 n.7. The Court emphasized 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. *Id.* Additionally, Justice Roberts indicated that this test was only applicable to broadcast ads aired within 30 days of a primary or 60 days of a general election. *Id.*

A. LFAF’s Advertisement Lacks A Clear Plea For Action

Contrary to well established U.S. Supreme Court precedent, the Recommendation urges the CCEC to believe that LFAF’s advertisement acts as the functional equivalent to express advocacy, calling on viewers to oppose Mr. Smith in his election for Arizona governor. Such a reading of the advertisement, however, would require the CCEC to adopt the Recommendation’s subjective, intent-based analysis of the facts; a chore that flies directly in the face of Justice Roberts and the Supreme Court’s direction articulated in *WRTL*. See *WRTL* at 467 (declining to adopt a test “turning on the speaker’s intent to affect the election.”).

While claiming to be objective,⁴ the Recommendation, makes assertions that impart the Executive Director's subjective analysis of LFAF's advertisement. The instances are numerous and appear frequently throughout the Recommendation. On page 6 and continuing on to page 7 of the Recommendation, it suggests that LFAF's advertisement is meant to carry a message that sways Republican primary voters. [Recommendation pp. 6-7]. On page 10, the Recommendation states "the advertisement places Mr. Smith in a negative light with Republican primary voters." [Recommendation p. 10]. LFAF is curious, as should be the CCEC, as to how the Recommendation has reached the conclusion that the advertisement had such an effect on Republican voters. Absent from the Recommendation is empirical evidence of such an impact. Such outlandish assumptions bear no place in the *WRTL* standard for analyzing whether a message equates to express advocacy. The Recommendation's statements are even more outrageous when considering the fact that Arizona does not have closed primaries, which leads one to believe that the advertisement most certainly may have been interpreted differently by different people; Republicans, Independents and Democrats alike.

Furthermore, the Recommendation chooses to disregard LFAF's justification for its issue advocacy advertisement by suggesting that that the "context of advertisement" trumps the actual content of the advertisement. [Recommendation p. 9]. While LFAF agrees with the Recommendation that context may be considered when determining the functional equivalent of express advocacy, the U.S. Supreme Court does not support the Recommendation's considerable reliance on contextual considerations. *See WRTL* at 473-

⁴ The Recommendation asserts on five separate occasions that it is objective in its analysis. However, simply because the Recommendation uses the term "objective" to describe its analysis does not in fact make its analysis objective.

474. In fact, the Supreme Court concluded that contextual considerations “should seldom play a significant role” in determining whether speech is express advocacy. *WRTL*, 551 U.S. at 473-474. While “basic background information that may be necessary to put an ad in context” may be considered, the Court noted that courts should not allow basic background information to “become an excuse for discovery.” *Id.*

Thus, the Recommendation’s argument that the advertisement’s call to action “is belied by the context of the advertisement” in that the advertisement does not relate to pending legislation in the City of Mesa runs counter to Supreme Court precedent. [Recommendation p. 9]. The reality of the matter is that the federal policy issues mentioned in the advertisement (environment; healthcare; the Second Amendment; and the Federal Budget) are extremely relevant issues of national importance. LFAF’s advertisement sought to persuade the people in Mesa, AZ to oppose the U.S. Conference of Mayors’ policy positions. The fact that the Recommendation finds LFAF’s advertisement “contradictory” on this point, once again, shows that the Recommendation is impermissibly reading a subjective intent into the advertisement. [Recommendation p. 9].

The recommendation assumes that negative statements affixed to policy positions of the U.S. Conference of Mayors were purposed to undermine Mayor Smith’s efforts to be elected as governor. The reality is that Mayor Smith held the highest position within the U.S. Conference of Mayors and bore the burden of being associated with the issues of public importance promulgated by the Conference. In many ways, the federal public policy issues addressed in LFAF’s advertisement constituted matters of greater importance than Mayor Smith’s personal ambitions for higher office. Under the

Recommendation's analysis, there can be no such thing as a genuine issue advertisement when that ad mentions a candidate for public office at anytime before an election (even five months) even in cases where that candidate maintains a public position and the ad articulates a clear policy statement with a legitimate call to action. Justice Roberts dismissed such an attempt outright in saying,

“[t]his ‘heads I win, tails you lose’ approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads, contrary to our conclusion in *WRTL I* that as-applied challenges to § 203 are available, and or assumption in *McConnell* that ‘the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.’”

WRTL, at 471 (citing *McConnell* 540 U.S. at 206).

B. LFAF's Advertisement Does Not Constitute The Functional Equivalent Of Express Advocacy Under A.R.S. § 16-901.01.

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).⁵

On page 3 and in Exhibit 3 of the Recommendation, the Recommendation provides true and accurate representations of LFAF's advertisement. [Recommendation p. 3] [Exhibit 3]. What is continually confusing, however, is the justification asserted by

⁵ The express advocacy definition in A.R.S. § 16-901.01(A) has been ruled unconstitutional by the Arizona Superior Court, overturned by the Arizona Court of Appeals and is currently on appeal before the Arizona Supreme Court. LFAF believes that § 16-901.01(A) is unconstitutional and has received consent from the appellants and appellees in the appellate case to submit an amicus curiae brief arguing that the statute is unconstitutional.

the Recommendation as to why LFAF's advertisement can have no reasonable meaning other than to advocate for the defeat of Mr. Smith. A reasonable person reviewing the advertisement will notice that there is no mention of any election whatsoever. Further, the ad does not mention a candidate for office. Furthermore, the ad does not reference voting and certainly does not mention any political party. Therefore, a simple, objective application of the factors proffered in Section 16-901.01 shows that LFAF's advertisement is genuine issue advocacy that has a reasonable meaning other than to defeat Mr. Smith.

i. LFAF's Advertisement Conveys A Genuine Issue Advocacy Message.

The Recommendation subjectively mischaracterizes LFAF's advertisement as an "anti-Smith" advertisement. [Recommendation p. 5]. Casting LFAF's advertisement as an anti-Smith advertisement in an introductory statement before assessing the facts shows the subjectivity and bias behind the Recommendation. The Recommendation provides scant evidence supporting the proposition that the advertisement cast Mr. Smith in a supposed negative light. Instead, the Recommendation merely asserts that LFAF's advertisement showed pictures of Mr. Smith and President Obama on the same screen and drew similarities between policy positions that President Obama supported and the same policy positions that the U.S. Conference of Mayors supported. [Recommendation pp.6-7]. The Recommendation states that the ad "links Smith with non-local policy issues supported by the Obama administration and likely opposed by many Republican primary voters." [Recommendation pp.10-11].

Common sense dictates that when airing an advertisement that seeks to oppose the policy positions of an organization, it makes sense to identify those individuals responsible for the organization's decision making. Mayor Smith, at the time the advertisement aired, was the President of the U.S. Conference of Mayors and, therefore, served as the figure head of that organization.⁶ Whether Mr. Smith liked it or not, when he assumed that role, he undertook the public persona of being responsible for the public positions and policies of the Conference. This holds true for past positions of the Conference as well.

The Recommendation points out that only one of the Conference positions identified in the advertisement was issued with Mr. Smith's name. [Recommendation p. 9] [Exhibit 11] [Ducey 2014 July 15, 2014 Response at 6]. As the CCEC is most certainly aware, an organization that makes a public pronouncement remains responsible for that pronouncement years removed from the original action. Simply because Mayor Smith did not author every policy position referenced in the advertisement, does not mean that, as President of the U.S. Conference of Mayors, Mr. Smith escaped responsibility for those positions.

ii. LFAF's Advertisement Was Targeted To Be Effective For Its Issue Advocacy Purpose.

LFAF's advertisement ran in Mesa, AZ. However, a person looking to purchase television airtime in Mesa, AZ, cannot simply target its purchase to the city of Mesa. Instead, because of the configuration of television stations and coverage areas, LFAF had to purchase airtime in the Phoenix, AZ market. [Rants Affidavit ¶¶ 12-13]. The

⁶ LFAF's advertisement at issue was not aired in isolation. As mentioned *supra*, LFAF attacked the policies of the U.S. Conference of Mayors by running advertisements with footage of other leaders in that organization in Sacramento, CA and Baltimore, MD.

Recommendation cites the fact that LFAF targeted an audience greater than that of Mesa to suggest that such targeting was purposed to sway voters rather than to address policy issues to Mr. Smith's constituents. [Recommendation p. 6]. As LFAF pointed out in its July 16, 2014 Response, and as outlined in Christopher Rants' affidavit, LFAF was forced to purchase its airtime in the Phoenix, AZ market, the most narrow market available. [Rants Affidavit ¶¶ 12-13]. This fact in no way takes away from the advertisement's issue advocacy message. To find otherwise would stifle protected First Amendment Free Speech rights in most any situation where such precise targeting is made unfeasible at no fault of the speaker.

iii. LFAF's Advertisement Was Part Of A Broad Issue Advocacy Campaign.

The timing of the LFAF's advertisement is a key focus in the Recommendation. The Recommendation emphasizes at various points that LFAF's advertisement began airing after Mr. Smith announced his candidacy for governor. The Recommendation suggests that the CCEC should believe that Mr. Smith's role as President of the U.S. Conference of Mayors was not applicable or for some reason did not carry as much significance as Mr. Smith's newly proclaimed role as candidate for governor. It is simply not the case that once Mr. Smith announced his candidacy for governor he relinquished his roles as Mayor of Mesa or President of the U.S. Conference of Mayors. In fact, Mr. Smith remained as Mayor of Mesa and President of the U.S. Conference of Mayors until April 16, 2014, which was two days after LFAF's advertisement stopped running.

Importantly, LFAF's advertisement aired nearly five months before any election, a span of time great enough to vastly diminish any alleged influence the ad may have had

on any election. [Rants Affidavit ¶ 16]. The timing, in terms of airing of an ad to the date of the election, proved vital in many courts' decisions, contrary to the Recommendation's assertion otherwise. *See WRTL*, 551 U.S. at 472 (finding that every ad covered by BCRA § 203 will by definition air just before an election); *Furgatch*, 807 F.2d at 865 (finding it determinative that the newspaper advertisement was run one week prior to the general election); *Committee for Justice & Fairness v. Arizona Secretary of State's Office*, 325 P.3d 94, 101, 102 (App. 2014) (noting the ad was aired within days of the election and immediately before the election).

By requesting the CCEC focus on the timing of LFAF's advertisement relative to Mr. Smith's announcement of his candidacy, the Recommendation is turning a blind eye to established First Amendment jurisprudence. Under the Recommendation's analysis, a public official who announces his candidacy for another public office cannot be the subject of an issue advocacy advertisement for the positions held in the public official's initial position. Such a standard does not support the notion that "[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

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

Should the CCEC determine that it has probable cause in this matter, it may not assess a penalty against LFAF unless it can identify the candidate the advertisement was "by or on behalf of" and the "candidate or candidate's campaign account" that shall be "jointly and severally liable" for any civil penalty assessment. A.R.S. § 16-942(B).

The Recommendation 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 against LFAF for delinquent independent

expenditure reports. [Recommendation p. 14]. 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." It is, therefore, perplexing as to why the Recommendation would refer to LFAF's argument questioning the CCEC's authority to assess a penalty as "absurd" when 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) [See Recommendation p. 13]. 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. 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 P.2d 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.

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) The CCEC cannot enforce its penalty provision against LFAF since it is unable to identify the candidate the advertisement was "by or on behalf of" and which "candidate or candidate's campaign account" is "jointly and severally liable."

Respectfully submitted,

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

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

Jason Torchinsky
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EXHIBIT A

AFFIDAVIT OF CHRISTOPHER RANTS

STATE OF Iowa)
COUNTY OF Woodbury)

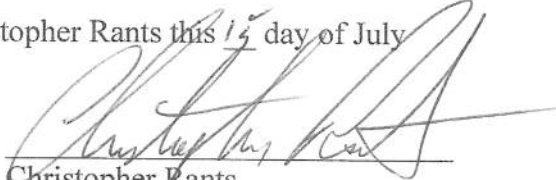
BEFORE ME, the undersigned appeared Christopher Rants, who, being first duly sworn, deposes and says:

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 LFAF'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