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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Legacy Foundation Action Fund, Petitioner/Appellant, v. Arizona Citizens Clean Elections Commission, Respondent/Appellee.	)	No. 15F-001-CCE **ANSWERING BRIEF OF RESPONDENT ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION** (Assigned to the Honorable Thomas Shedden)

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INTRODUCTION

The Arizona Citizens Clean Elections Commission ("CCEC") is responsible for implementing and enforcing various campaign-finance laws set forth in the Clean Elections Act, a voter-approved initiative designed to promote "public confidence in the integrity of public officials." A.R.S. § 16-940(B)(5).

Among other things, the Act imposes modest reporting and disclosure requirements on some campaign-related advertisements. This case concerns the disclosures that the law requires of entities that make so-called "independent expenditures" – expenditures related to a campaign made by an entity that is independent from any of the candidates. Consistent with First Amendment requirements, Arizona law permits such expenditures, and does not put any cap on the amounts that can be spent on them.

Arizona law does not broadly treat any expenditure (such as spending money on an advertisement) as a reportable "independent expenditure" merely because it has something to do with politics or public policy. Among other things, for an advertisement to qualify as an "independent expenditure," the advertisement must "expressly advocate" the election or defeat of a candidate for office. A.R.S. § 16-901(14); -901.01(A)(2).

At issue here is a television advertisement Petitioner Legacy Foundation Action Fund ("LFAF") aired in the Phoenix-metro market in April 2014 at a cost of more than $260,000. The advertisement criticizes then-Mayor of Mesa Scott Smith for his involvement with the U.S. Conference of Mayors and certain policy positions that

organization had apparently adopted, such as favoring "Obamacare," favoring certain environmental regulations, and approving President Obama's budget policy. At the time of the advertisement, Smith had already announced that he would be resigning as mayor to run as a Republican candidate for the office of Governor.

A complaint was later filed with the CCEC alleging that LFAF did not make any of the disclosures required for independent expenditures. After several public meetings, the CCEC's commissioners unanimously agreed that the advertisement "expressly advocated" against Mr. Smith's candidacy for Governor and therefore constituted an "independent expenditure" subject to the disclosure requirements of Article 2, Chapter 6 of Title 16. The CCEC further concluded that probable cause existed to believe LFAF had failed to comply with the Clean Elections Act and therefore penalties should be assessed against LFAF.

LFAF challenges the CCEC's findings and the penalties assessed. LFAF's arguments fail for the following reasons.

First, the CCEC plainly has jurisdiction over a complaint presented to it alleging violations of the reporting obligations in the Clean Elections Act.

Second, LFAF's advertisement was express advocacy. The fact that the advertisement did not contain an explicit "plea for action" such as "vote against Smith" or other set of "magic words" does not change the fact that, in context, the only reasonable meaning of the advertisement was to advocate for Smith's defeat in the upcoming Republican primary.

Third, LFAF is wrong to suggest that it reasonably relied on the superior court's now-reversed ruling that the statute's definition was unconstitutional. Neither LFAF nor the CCEC were parties to the action, and the judge issued no injunction.

Fourth, the CCEC has authority to assess civil penalties against LFAF' for its violations of the Clean Elections Act.

ISSUES

I. The CCEC has Jurisdiction to Enforce the Clean Elections Act.

II. LFAF's Advertisement Expressly Advocated for the Defeat of Scott Smith in the Republican Gubernatorial Primary.

III. LFAF's Alleged Reliance on a Since-Overturned Superior Court Decision Declaring A.R.S. §16-901(A) Unconstitutional is Unfounded and Improper.

IV. The Commission has the Authority to Impose Civil Penalties for Violations of the Act's Reporting Requirements for Independent Expenditures.

STATEMENT OF THE CASE

The Advertisement

In January 2014, Scott Smith, then mayor of the City of Mesa, announced that he would seek the Republican nomination for Governor in the 2014 election. (Joint SOF ¶ 5.) At the time, Smith was also serving as President of the U.S. Conference of Mayors (the "Conference of Mayors"), an organization whose members include the mayors of cities with populations of 30,000 or more. (*Id.* ¶ 5; *see also* www.usmayors.org/about/overview.asp (last visited on Jan. 21, 2015)). In preparation for the campaign, Smith established his candidate campaign committee, Smith for

Governor 2014, and announced that he would be resigning from his position as mayor and as president of the Conference within 2-3 months. (Joint SOF ¶¶ 5-6.)[1]

Beginning on March 31, 2014, just two weeks before Smith formally resigned from the mayor's office and his role at the Conference of Mayors, LFAF spent over $260,000 to purchase airtime in the metro-Phoenix television market to run an advertisement critical of Smith. (*Id.* ¶¶ 7, 9, 12.)

The Complaint to the CCEC

On July 1, 2014, attorney Kory Langhofer filed a complaint ("Citizen Complaint") with the Arizona Secretary of State and the CCEC alleging, among other things, that LFAF failed to file required campaign finance disclosure reports as required by Arizona law. Specifically, the Complaint alleged that the advertisement constituted "express advocacy" under A.R.S. §§ 16-901.01 and therefore triggered disclosure requirements under A.R.S. §§ 16-914.02, -941(D) and -958(A)-(B). (Joint SOF ¶¶ 25-26.)

The Proceedings Before the Commission

Following procedures set forth in rules and statute, the CCEC considered the allegations in the complaint concerning LFAF's failure to disclose its advertisement expenditures. LFAF responded to the complaint by filing a special action in the Superior Court, alleging that the CCEC was proceeding in excess of its jurisdiction. (Joint SOF ¶ 31.) The CCEC moved to dismiss based on LFAF's failure to exhaust

[1] Candidate nominations for the Office of Governor for the 2014 election had to be filed at the Secretary of State's Office between April 28, 2014 and May 28, 2014. (Joint SOF ¶ 19.) Early voting for the primary election began on July 31, 2014 (*Id.* ¶ 20), and the primary election took place on August 26, 2014. (*Id.* ¶ 21.)

administrative remedies and on the grounds that the CCEC properly exercised jurisdiction over the Citizen Complaint's allegations that LFAF violated the Act's reporting requirements for independent expenditures. The superior court granted CCEC's motion to dismiss. (*Id.* ¶ 31.)

On November 20, 2014, after proceeding through the various stages of its administrative process (as described in the Joint SOF, ¶¶ 29-43) the CCEC found probable cause to believe that LFAF had violated the Act and authorized an assessment of civil penalties against LFAF for that violation. (*Id.* ¶ 41.) The following week, pursuant to its statutory authority to enforce the Act, the CCEC issued an order assessing civil penalties against LFAF. (*Id.* ¶ 43.) LFAF then filed a timely request for this hearing. (*Id.* ¶ 44.)

ARGUMENT

This case involves an out-of-state special interest group's flawed attempt to evade the Clean Elections Act's disclosure and reporting obligations. The Administrative law judge should determine: (I) The CCEC had jurisdiction to investigate and enforce the violations of the Clean Elections Act alleged in the Citizen Complaint; (II) LFAF's advertisement was the functional equivalent of express advocacy, which required it to comply with the Clean Elections Act's independent expenditure reporting requirements; (III) LFAF could not have reasonably relied on the superior court's decision in *Comm. for Justice & Fairness v. Ariz. Sec'y of State's Office*, 235 Ariz. 347, 332 P. 3d 94 (App. 2014), as a basis for its failure to comply with

the Act's reporting requirements; and (IV) the CCEC properly assessed civil penalties for violations of the Act's reporting obligations.

I. The CCEC has Jurisdiction to Consider the Complaint Alleging that LFAF Violated the Clean Elections Act.

LFAF first contends (at 7-8) that the CCEC lacks jurisdiction to consider the complaint filed against. The CCEC's jurisdiction in this case is straightforward and none of LFAF's arguments have any merit.

A. The CCEC Enforces Violations of the Clean Elections Act.

The Citizen Complaint alleged, among other things, that LFAF's failure to make disclosures in connection with the advertisement violated A.R.S. §§ 16-941(D) and 16-958. There can be no suggestion that the CCEC lacks jurisdiction over violations of those statutes.

Both statutes plainly are part of the Clean Elections Act, which is contained in Article 2, Chapter 6 of Title 16 (A.R.S. §§16-940 to 16-961). The Clean Election Act, in turn, commands that "[t]he [CCEC] shall . . . [e]nforce *this article*." A.R.S. § 16-956(A)(7) (emphasis added); *see also* A.R.S. § 16-957(A) (setting forth procedures that apply "[i]f the commission finds that there is reason to believe that a person has violated any provision of *this article*" (emphasis added)). In other words, the Citizen Complaint alleged a violation of several statutory "provision[s] of this article" – Article 2 of Chapter 6 of Title 16. The CCEC plainly had jurisdiction to "[e]nforce this article" by adjudicating the claims that the Citizen Complaint alleged.

B. LFAF's Arguments Against Jurisdiction are Meritless.

LFAF does not contest that A.R.S. §§ 16-941 and 958 come within the Clean Elections Act, or that the CCEC has statutory authority to enforce the Act. LFAF nonetheless asserts that the CCEC cannot consider the complaint for three separate reasons, each of which fails.

First, LFAF argues (at 8) that the CCEC has no "enforcement authority" because the advertising expenditure in question qualifies for a statutory exemption from disclosure requirements. The complaint alleges that LFAF failed to issue reports required in A.R.S. § 16-941(D). That section exempts from the reporting requirement "any expenditure listed in Section 16-920." A.R.S. § 16-941(D). Section 16-920, in turn, lists several types of exempt independent expenditures, including those made "for use to support or oppose an initiative or referendum measure or amendment to the constitution." A.R.S. § 16-920(A)(5).

LFAF asserts (at 8) that its advertisement is exempt under (A)(5) because the "content of the Advertisement" touches on "public policy issues of national import." LFAF's reading of the statute is incorrect and unreasonable. Section 16-920(A)(5) does not exempt advertisements related to "relevant public policy issues" or issues of "national import." If "public policy issues," triggered the (A)(5) exemption, it is hard to imagine an independent expenditure that would not be exempt. Instead, the language in (A)(5) is plainly intended to apply to exactly what it states: expenditures used "to support or oppose ballot measures (i.e., an "initiative or referendum" proposing statutory or constitutional amendments). *See* Ariz. Const. art. IV, pt. 1, § 1 (describing

initiatives and referenda); *id*. art. XXI, § 1 (setting forth method for amending constitution via ballot proposal). The LFAF advertisement has nothing to do with any ballot proposal and thus does not fall under the exemption in A.R.S. § 16-920(A)(5).

Second, LFAF contends (at 7) that the CCEC lacks jurisdiction to enforce the Clean Elections Act's disclosure rules because the "statute's purpose . . . is no longer relevant." LFAF asserts—without citation to authority—that the purpose of the disclosure rules was to "track independent expenditure spending" so that the CCEC could know how much in so-called "matching funds" to provide to the candidates who received public financing (called "participating" candidates). That purpose is irrelevant, LFAF contends, because the United States Supreme Court held the "matching funds" system unconstitutional. *See* LFAF Opening Brief ("OB") at 7 (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828-2829 (2011)).

LFAF is simply incorrect. The disclosure rules serve "substantial governmental interests," including voter education and deterrence of corruption or the appearance of corruption through disclosure of large contributions and expenditures. *Comm. for Justice & Fairness*, 235 Ariz. at 360 ¶ 48, 332 P.3d at 107 (citing *Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976)). Educating voters is one of the CCEC's primary responsibilities. *See* A.R.S. § 16-956(A) (listing CCEC's "voter education and enforcement duties"). There is no support for LFAF's interpretation of the "purpose" of the disclosure rule other than LFAF's own conclusory assertion.

Third, the fact that a "lawyer representing the Maricopa County Elections Department found no reasonable cause to believe" (OB at 8) that LFAF violated

disclosure requirements is not relevant to the CCEC's jurisdiction. The County made a determination because the complainant also submitted the complaint to the Secretary of State, which administers other disclosure requirements other than the ones in the Clean Elections Act, and the Secretary of State referred the matter to the County because of a conflict. The Secretary of State's jurisdiction over certain campaign finance reporting obligations outside the Clean Elections Act does not impact the CCEC's authority over enforcement of the Clean Elections Act. To the contrary, the CCEC's authority is clear from the plain language of the Clean Elections Act, A.R.S. §§ 16-956(A)(7); -956(C); -957, and the decision of the Arizona Supreme Court. *See Clean Elections Inst., Inc. v. Brewer*, 209 Ariz. 241, 245 ¶ 13, 99 P.3d 570, 574 (2004), *abrogated on other grounds* by *Save Our Vote Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 291 P.3d 242 (2013) (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.").

II. LFAF's Advertisement Expressly Advocated for the Defeat of Scott Smith in the Republican Gubernatorial Primary.

Turning to the merits, the key question in this case is whether LFAF's advertisement constituted a reportable "independent expenditure" because it "expressly advocated" for the defeat of Smith for the office of Governor.

By definition, Article 2's independent expenditure reporting obligations apply only to communications that expressly advocate the election or defeat of a candidate. Arizona law defines "expressly advocates," in relevant part, as:

> 1. Conveying a communication containing a phrase such as "vote for," "elect," "reelect," "support," "endorse," "cast your ballot for," "(name of candidate) in (year)," "(name of candidate) for (office)," "vote against," "defeat," "reject" or a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of one or more clearly identified candidates.
>
> 2. Making a general public communication, such as in a broadcast medium, newspaper, magazine, billboard or direct mailer referring to one or more clearly identified candidates and targeted to the electorate of that candidate(s) 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).

The parties agree that § 16-901.01(A)(1) does not apply. The parties also agree that an advertisement may "expressly advocate" even when it does not use the "magic words" listed in subsection (A)(1). (OB at 12-13.) Thus, to be deemed express advocacy, LFAF's advertisement must satisfy the four elements of § 16-901.01(A)(2). The advertisement must be:

(1) a general public communication;

(2) referring to one or more clearly identified candidate;

(3) targeted to the electorate of that candidate; and,

(4) that, in context, can have no reasonable meaning other than to advocate the election or defeat of the candidate.

LFAF's advertisement easily satisfies the first three statutory elements. The advertisement appeared on broadcast television, it referred to Smith, a clearly-identified candidate for Governor, and was broadcast in the metro-Phoenix television market,

home to over three-fourths of the State's population. (OB Exhibit A at 5.) Even though the advertisement did not expressly refer to Smith's candidacy for governor, Smith had by that time, publicly identified himself as a Republican candidate for governor. *See* A.R.S. § 16-901(4) (defining clearly identified candidate as the appearance of "the name, a photograph or a drawing of the candidate"). With respect to the third factor, LFAF's advertisement was broadcast in the metro-Phoenix television market, which includes the City of Mesa but also encompasses an area many times larger than Mesa.[2] In fact, the metro-Phoenix television market reaches approximately 76% of the state's population (OB Exhibit A at 5).

Accordingly, the only remaining factor at issue before this Court is whether the advertisement had no reasonable meaning other than to advocate the election or defeat of a candidate. Viewed "in context," as the law requires, the only reasonable conclusion is the one that the CCEC reached: LFAF's advertisement had no reasonable meaning other than advocate for the defeat of Smith in the Republican primary.

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[2] LFAF contends (at 18), without any evidence, that a person looking to purchase broadcast television airtime in Mesa, AZ, cannot target its purchase to that city alone but must purchase airtime in the metro-Phoenix market. Whether or not this is true, LFAF's argument is a red-herring. LFAF was not limited to purchasing broadcast television advertising, or television advertising, for that matter, at all. Indeed, LFAF spent over $108,000 to purchase advertisements on cable television in the Phoenix market. (Joint SOF Exhibit 4 at 1.)

And in any event, the targeting issue is resolved as a matter of law because advertisements aired in the metro-Phoenix area can be presumed to be targeted to the electorate of a statewide candidate. *See Comm. for Justice & Fairness*, 235 Ariz. at 354, ¶ 27, 332 P.2d at 101.

A. The Objective Context of LFAF's Advertisement Confirms the Meaning of its Advertisement.

"Words derive their meaning from what the speaker intends and what the reader understands." *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987). In defining the term "expressly advocates," Section 16-901.01(A)(2) asks whether the advertisement can have any other reasonable meanings, "in context." The statute then identifies several objective contextual considerations that aid in this determination including (1) the presentation of the candidate in a favorable or unfavorable light, (2) the targeting of the electorate, and (3) the timing of the communication. *Id. See also Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474 (2007) ("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 issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future . . . .'") (citation omitted).

Here, the CCEC based its decision on the objective facts: the content of the advertisement, the timing of the advertisement, and the target market for the advertisement. The ad ran in an election year, a few months after Smith announced his candidacy for governor and just before his resignation as Mesa's mayor. Smith announced his candidacy for Governor on January 9, 2014, and filed paper work with the Secretary of State's Office creating a campaign committee that same day. (Joint SOF ¶ 5.) At the time, Smith publicly declared that he would resign as Mayor of Mesa two to three months later. (*Id.* Exhibit 3.) Smith did, in fact, resign as Mayor of Mesa and as president of the U.S. Conference of Mayors on April 15, 2014. (*Id.* ¶ 7.)

Beginning on March 31, 2014, just two weeks before Smith was to resign as mayor and months after it was known he would resign to run for Governor, LFAF spent over $260,000 to purchase television advertising space in the metro-Phoenix market, which is home to a majority of the State's electorate. (*Id.* ¶ 9.) While the advertisement was ostensibly critical of Mayor Smith and the U.S. Conference of Mayors' policy positions on certain issues, none of the issues addressed in the advertisement were pending, or likely pending, legislative issues at the time before Smith in his role as mayor. *Wis. Right To Life, Inc.*, 551 U.S. at 474. The advertisement aired for approximately two weeks, from March 31, 2014, to April 14, 2014, running only during Smith's last two weeks in office. The video clip of the advertisement, along with a transcript and screen shots is submitted as Exhibit 6 to the Joint Statement of Facts.

1. LFAF's Advertisement Presented Smith in an Unfavorable Light.

The plain language of LFAF's advertisement (text, video, and voice over) informed voters in the metro-Phoenix area that Smith was closely associated with President Barack Obama, a democrat, and several of his policy positions. The advertisement opens and closes by referring to Smith as "Obama's favorite mayor":

Screenshot of LFAF Advertisement at :02.

Screenshot of LFAF Advertisement at :28.

In between, the ad presents both men in a series of mocking illustrations, and links Smith with several generic non-local policy issues supported by the Obama

administration that many Republican primary voters object to, including "Obamacare," limits on gun rights, environmental regulations, and "Obama's tax & spend proposals."[3]

Screenshot of LFAF Advertisement at :08.

[3] The advertisement also addresses issues that had little to do with Smith's leadership of the Conference. Only one of the Conference positions identified in the advertisement was issued in Smith's name and that was in 2009. See Joint SOF Exhibit 21 at 69-70 [Exhibit 11]. 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.

Screenshot of LFAF Advertisement at :21.

Although it does not use magic words such as "Vote against Smith," the advertisement objectively urges viewers to vote against Smith for governor. In *Comm. for Justice & Fairness*, the court of appeals found that an advertisement that referred to Tom Horne as Superintendent of Public Instruction and called upon viewers to contact Horne at his office in the Department of Education nonetheless expressly advocated for his defeat as a candidate for attorney general:

> Contrary to CJF's argument that the advertisement 'addressed the important issue of protecting Arizona['s] school children from statutory rape and from teachers who view pornographic materials in the classroom,' the only reasonable purpose for running such an advertisement immediately before the election was to advocate Horne's defeat as candidate for Attorney General.

235 Ariz. at 355, ¶ 29, 332 P.3d 94 at 102. *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010) ("[T]here is no reasonable interpretation of [the film] Hillary other than as an appeal to vote against Senator Clinton."); *Furgatch*, 807

F.2d at 864–65 (9th Cir. 1987) ("There is vagueness in Furgatch's message, but no ambiguity.")

2. LFAF's Advertisement Was Targeted to Arizona Voters.

Section 16-901.01(A)(2)'s second objective consideration looks at whether the communication is targeted to the voters. The *Comm. for Justice & Fairness* court held that an advertisement broadcast in the greater Phoenix metropolitan area clearly targeted a major portion of the electorate for a statewide office. 235 Ariz. at 354, ¶ 27, 332 P.3d at 101. The same is true here. LFAF's advertisement was broadcast in the metro-Phoenix television market, reaching approximately 76% of the state's population (OB Exhibit A at 5). Further, Maricopa County, which makes up a large portion of the metro-Phoenix television market, is home to 62% of the registered Republicans in the state.[4] These objective facts all compel the conclusion that LFAF's advertisement was targeted to reach a large portion of the eligible voters in the Republican primary.

3. LFAF's Advertisement was Timed to Negatively Impact Smith's Campaign for Governor.

Established First Amendment doctrine recognizes that "words take part of their meaning and effect from the environment in which they are spoken." *Furgatch*, 807 F.2d at 863. The statutory definition of "expressly advocates" captures this by asking whether a communication/advertisement "***in context*** can have no reasonable meaning other than to advocate" for or against a candidate's election or defeat. A.R.S. § 16-901.01(A)(2) (emphasis added).

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[4] *See* Micah Cohen, *Political Geography: Arizona*, New York Times, Feb. 28, 2012, http://fivethirtyeight.blogs.nytimes.com/2012/02/28/political-geography-arizona/?_r=0 (last visited on Jan 21, 2015).

In this case, the timing of the advertisement constitutes an important part of its environment or objective context. LFAF's advertisement ran during the final two weeks of Smith's term as Mayor of Mesa and as President of the U.S. Conference of Mayors, when any informed observer knew his resignation from both posts was imminent. At the time, Smith had publicly announced his intentions to enter the Republican primary race and was winding down his leadership responsibilities both in Mesa and as President of the U.S. Conference of Mayors.

LFAF has not identified any federal policy issues mentioned in the advertisement that were pending before Mayor Smith at the time. And with his resignation imminent, it is not reasonable to interpret LFAF's advertisement as advocating for Smith to make policy changes in his role as mayor. Yet LFAF contends (at 15), that the fact that the advertisement was broadcast in the days leading up to Smith's pre-announced resignation is irrelevant because Smith had not yet actually resigned. This argument is objectively unreasonable.

According to LFAF, "[c]ommon 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 organizations' decision making." (OB at 17-18.) Taking LFAF's statement as true, the leadership of the U.S. Conference of Mayors at the time LFAF decided to run its advertisement was comprised of Mayor Smith of Mesa (President), Mayor Kevin Johnson of Sacramento (First Vice President), and Mayor Stephanie Rawlings-Blake of Baltimore (Second Vice President). Of the three, only Smith had announced plans to immediately vacate his position and begin campaigning

for a new political office. *See* About the U.S. Conference of Mayors Organizational Leaders, http://www.usmayors.org/about/orgleaders.asp, attached as Exhibit A. Mayor Johnson, who succeeded Smith as President of the Conference, and Mayor Rawlings-Blake, the new First Vice-President, both continue to serve as mayors of their respective cities. *Id.*

Despite this, LFAF only meaningfully targeted Smith, spending over $260,000 on television advertisements critical of Smith, almost 100 times as much as it spent against any other person associated with the U.S. Conference of Mayors. (Joint SOF ¶¶ 10-11.) In contrast with the sums spent targeting Smith just before his resignation, LFAF spent only $3,395 on radio ads in Sacramento and $2,595 on similar ads in Baltimore. Applying LFAF's "common sense" argument, and viewed objectively, the only reasonable purpose LFAF would spend over $260,000 to run an advertisement, during an active election campaign, to critique Smith's decisions as Mayor of Mesa or as President of the U.S. Conference of Mayors—positions he was imminently set to vacate—was to advocate for his defeat as candidate for the Republican nomination for Governor. *Comm. for Justice & Fairness*, 235 Ariz. at 354, ¶ 26, 332 P.3d at 101 (holding that advertisement referring to Attorney General candidate only "in his then-position of Superintendent" could only be reasonably interpreted as express advocacy for his defeat when the advertisement was run during an election campaign, cost more than $1 million to run, and criticized his actions taken in "a post he would soon vacate").

LFAF tries to minimize the relevance of the timing of its advertisement by focusing (at 19) only on the advertisement's proximity to the date of an election, rather than the date of Smith's announcement of his candidacy. LFAF misapprehends the nature of the inquiry into "context." The statute states that the relevant context may be "evidenced by . . . the . . . timing of the communication," not the "timing in relation to the election date." A.R.S. § 16-901.01(A)(2). Although the proximity of an advertisement to an election date surely is relevant, it is not the only relevant timing. Indeed, the cases LFAF points to state nothing more than that the proximity to an election was relevant in those cases, not that proximity to an election is the only relevant timing. *See Comm. for Justice & Fairness*, 235 Ariz. at 353-54, ¶¶ 26-27. 332 P.3d at 100-01 (fact that ads ran close to election one of many factors supporting conclusion that communication was "express advocacy"); *Furgatch*, 807 F.2d at 864-65 (conclusion that advertisement was express advocacy "reinforced by" fact that ad ran during the week before the election).[5]

Here, the advertisement's timing in proximity to the launch of Smith's primary campaign and resignation from the office of Mayor helps define the objective context and purpose of the advertisement. That timing wipes away any reasonable doubt as to whether the advertisement should be interpreted to advocate for a change in policies in the city of Mesa (from which Smith was resigning and would have no official

[5] LFAF's citation (at 19) to *Wis. Right to Life*, 551 U.S. at 472, in this context has little relevance because the statute there applied only to advertisements aired "just before a primary or general election".

influence), or, instead, to advocate against Smith's Republican primary campaign (which was already underway).

Finally, LFAF's contention (at 19) that its advertisement aired long enough before an election that its effect may have been vastly diminished is equally unavailing. Other than its opinion, LFAF does not and cannot cite any legal authority for this proposition. Arguably, political advertisements aired early in a primary campaign could certainly play a significant role in shaping the public's perception of a candidate. Here, at the time the advertisement was broadcast, there was reportedly no Republican front-runner, with over 50% of Republicans claiming to be unsure about which candidate to support.[6] Several of the early polls showed the candidates in a close race, making the importance of the advertisement even more significant.[7]

Moreover, the issue is not whether an advertisement could have been more effective in advocating for a candidate's defeat had it aired later. The issue is whether, in context, the advertisement has no reasonable meaning other than to advocate for the defeat of candidate Smith. And in this case, if it had aired any closer to the primary – after Smith resigned as mayor—LFAF would have none of the legal arguments that it is making here to attempt to avoid complying with disclosure requirements. In short, given the objective timing of LFAF's advertisement, it cannot be interpreted as having

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[6] *See* Yvonne Wingett Sanchez, *Polls: Ariz. GOP gubernatorial primary race wide open*, Arizona Republic, May 8, 2014, http://www.azcentral.com/story/news/politics/2014/05/08/polls-ariz-gop-gubernatorial-primary-race-wide-open/8837617/ (last visited on Jan 21, 2015).

[7] *Id*.

any reasonable meaning other than to advocate for his defeat in the Republican primary race for Governor.

B. LFAF's Proposed Alternative Meanings are Objectively Unreasonable.

LFAF argues (at 16-17) that its advertisement should be reasonably interpreted to be "genuine issue advocacy" rather than advocacy against Smith's candidacy for the Republican nomination for Governor because: (1) the advertisement lacks any "clear plea for action"; and (2) the advertisement's content references only policy positions, not the governor's race, voting, or political parties. LFAF's arguments are flawed. "Although the ad may be evasively written, its meaning is clear." *Furgatch*, 807 F.2d at 865.

First, the law does not require an express "plea for action" or magic words such as "vote against Smith." A.R.S. § 16-901.01(A)(2) sets out a definition for what has been called the "functional equivalent" of express advocacy. "The functional-equivalent test is objective: 'a court should find that a communication is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."' *Citizens United*, 558 U.S. at 324-25 (quoting *Wis. Right to Life*, 551 U.S. at 469-70). The need for such a test is plain: if the law demanded "magic words" such as "Vote against Smith," campaign finance disclosure rules would be easily evaded.

Second, the advertisement's criticism of Smith's policy positions as mayor (or his role in the U.S. Conference of Mayors) do not prove LFAF's case. LFAF's argument depends on stripping "context" out of the definition of express advocacy in

A.R.S. § 16-901.01, unless the context cuts in LFAF's favor. For instance, LFAF contends (at 20) that its "organizational views and broader campaign to combat policies" of the U.S. Conference of Mayors should have changed the analysis. But the objective context is that LFAF used more than $260,000 to attack Smith for his association with U.S. Conference of Mayors at a time Smith was running for governor, yet LFAF spent less than $10,000 on its purported "broader campaign." The only objective conclusion was that the advertisement was intended to persuade Republican primary voters not to vote for Smith in the upcoming primary.

This is essentially the holding in *Comm. for Justice & Fairness*, 235 Ariz. at 354, ¶¶ 26-27, 332 P.3d at 101. There, like here, the advertisement only referred to the advertisement's target (Mr. Horne), with reference to Horne's then-current position and not the office for which he was hoping to be elected. Like here, the advertisement did not identify Horne as a candidate for a different office and "called upon viewers to contact" Horne's current office, criticizing past actions in "a post he would soon vacate." *Id.* Taken together, the court of appeals held that it would have been "unnecessary for the advertisement to further identify the position [Horne] sought" and that "the only reasonable purpose for running [the] advertisement" would have been to advocate for Horne's defeat. *Id.* at 354-55, ¶¶ 26, 28, 332 P.3d at 101-02. The same conclusion applies here.

In this case, each of the key objective factors—the portrayal of Smith in a negative light, the targeting of the Arizona voters, the timing of the advertisement in relation to Smith's impending resignation, and the lack of any connection between the

advertisement and a pending policy decision in Mesa—support a finding that the only reasonable meaning of the advertisement was to advocate for Smith's defeat in the Republican gubernatorial primary.[8]

III. LFAF's Alleged Reliance on a Since-Overturned Superior Court Decision Declaring A.R.S. §16-901(A) Unconstitutional is Unfounded and Improper.

LFAF argues (at 9) that when it composed and aired its advertisement, it did so in reliance on the Superior Court's "Final Judgment," in *Comm. for Justice & Fairness*, No. LC-2011-000734-001 ("*CJF*"). That decision was subsequently overturned by the Arizona Court of Appeals and is pending review in the Arizona Supreme Court. (Joint SOF ¶ 8.) LFAF's reliance argument fails.

CJF involved independent expenditure disclosure requirements relating to the purchase of television airtime by a national advocacy organization against then-candidate for Attorney General, Tom Horne. The Maricopa County Attorney's Office, which was assigned responsibility of the case after Horne was elected Attorney General determined that CJF was required to comply with certain registration and disclosure requirements in Title 16, Chapter 6, Article 1 of the Arizona Revised Statutes. In an

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[8] LFAF's citation to three YouTube comments (at 17) as evidence for alternative "objective" interpretations of the advertisement goes nowhere. The comments are unauthenticated, their source is unknown, and on their face they shed little light on the meaning of the advertisement beyond showing that viewers obviously understood that the advertisement was intended to be critical of Smith as a Republican candidate. The objective purpose of the advertisement was not lost on the public. *See, e.g.*, Laurie Roberts, *Who's behind anonymous smear on Scott Smith*, azcentral.com (April 10, 2014), http://www.azcentral.com/story/laurie-roberts/2014/04/10/arizona-governor-smith-ducey-dark-money-campaign-finance/7551739/ (last visited on Jan 21, 2015); Laurie Roberts, *First dark money target: Scott Smith (now who's next?)*, azcentral.com, (April 14, 2014), http://www.azcentral.com/story/laurie-roberts/2014/04/13/scott-smith-dark-money-attack-ad/7613465/ (last visited on Jan 21, 2015).

appeal from a final administrative decision, the superior court determined that the advertisements in question were issue-oriented speech and declared the statutory definition of "expressly advocates" in A.R.S. § 16-901.01(A) unconstitutional. The court did not issue any injunction.

A. Trial Court Decisions Are Not Binding On Non-Parties.

As a general rule, a person is not bound by a trial court's judgment in litigation in which he or she is not a party. *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd*, 484 U.S. 97, 104 (1987); *State ex rel. Thomas v. Grant*, 222 Ariz. 197, 201, ¶ 12, 213 P.3d 346, 350 (App. 2009) ("It is a basic principle of law that a person who is not a party to an action is not bound by the judgment in that action.") (quoting Restatement (Second) of Judgments § 62 cmt. a (1982)). Stated differently, a trial court does not have jurisdiction or power over a non-party. Since neither LFAF nor the CCEC were parties to the CJF case,[9] trial court's determination that the statutory definition was unconstitutional had no effect on either LFAF or the CCEC.[10]

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[9] The CCEC attempted to intervene in *CJF* but was denied leave to do so. (Joint SOF ¶ 8.)

[10] LFAF's reference (at 11) to the Secretary of State's decision not to enforce campaign finance obligations that rely on the definition of "political committee" in Article 1 after that statutory definition was recently declared unconstitutional in *Galassini v. Town of Fountain Hills*, 2014 WL 6883063 (D. Ariz. Dec. 4, 2014), is unavailing. The Secretary of State's decision does not impact the CCEC's ability to enforce separate disclosure obligations under Article 2. Moreover, unlike the Secretary of State's Office, the CCEC did ***not*** announce that it would cease enforcing disclosure obligations after the CJF decision. Rather, the CCEC's position has been and remains that it has independent authority to enforce the independent expenditure reporting requirements of Article 2, the Clean Elections Act.

B. LFAF has Not Demonstrated any Actual Reliance that Could Constitute a Defense to the Agency's Enforcement Action.

Turning to the issue of LFAF's alleged reliance, at no point in the administrative process has LFAF demonstrated any actual reliance on the trial court's decision in *CJF*. In any event, LFAF does not cite a single Arizona case standing for the proposition that reliance on a subsequently overruled trial court decision may constitute a valid defense to an agency enforcement action. And each of the federal cases LFAF cites in which courts allowed a defendant to successfully assert reliance on previous judicial determinations as a defense to prosecution can be distinguished on the grounds that they involved specific acts of reliance.

United States v. Brady, 710 F. Supp. 290, 291 (D. Colo. 1989), involved a defendant accused of certain firearm violations. As a defense to the violations, which required proof that the defendant knew he was committing a crime, the defendant pointed to the fact that a judge with criminal jurisdiction over the defendant specifically told him that "he could continue to possess a firearm when hunting and trapping." *Id.* at 294. The court found that convicting the defendant in light of the fact that his conduct conformed to the judge's statement of law would violate due process. *Id.* Likewise, in *United States v. Albertini*, 830 F.2d 985, 990 (9th Cir. 1987) *overruled by United States v. Qualls*, 172 F.3d 1136 (9th Cir. 1999), the Ninth Circuit reversed a defendant's criminal conviction for acts taken in conformity with a previous decision by the same court directed at the same defendant.

C. Even if LFAF Could Demonstrate Reliance on the Superior Court's Decision, such Reliance is Objectively Unreasonable.

Lastly, even if LFAF were to somehow establish that it relied on the trial court's decision in CJF in order to avoid having to comply with the CCEC's disclosure requirement, its reliance should not constitute a defense to the CCEC's enforcement action because that reliance would not have been reasonable. *See United States v. Moore*, 586 F.2d 1029, 1033 (4th Cir. 1978) ("Of course, one ought not to be punished if one *reasonably* relies upon judicial decision later held to have been erroneous.") (emphasis added).

As described above, reliance on a state trial court's decision to which one is not a party is not reasonable as trial court decisions do have precedential value upon non-parties. LFAF was aware that the CJF case was on appeal and that the court of appeals would soon rule on the constitutionality of the statute. In fact, the court of appeals' decision vacating the trial court's judgment was issued on August 7, 2014, (Joint SOF ¶ 18), during the initial stages of the CCEC investigation, giving LFAF plenty of time before the CCEC ultimately made its findings to come into compliance. Not only that, even if the court of appeals had upheld the trial court's decision, the CCEC could have continued to enforce the disclosure obligations of Article 2 based upon controlling federal First Amendment case law that defines the term "express advocacy." *See, e.g.*, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201 (2003), *overruled in part on other grounds* by *Citizens United*, 558 U.S. 310); *Wis. Right to Life, Inc.*, 551 U.S. at 456. As described above, under both the statutory definition and the Supreme Court's

jurisprudence, LFAF's advertisement had no reasonable meaning, in context, other than to advocate for Smith's defeat in the Republican Gubernatorial primary.

IV. The Commission has the Authority to Impose Civil Penalties for Violations of the Act's Reporting Requirements for Independent Expenditures.

The Commission has broad authority to enforce the Act and issue orders assessing civil penalties for violations. A.R.S. § 16-957(B) (authorizing the Commission to find violations and assess civil penalties "in accordance with § 16-942 . . . ."). Because LFAF violated the reporting requirement in A.R.S. §§16-941(D) and -958, the Commission imposed penalties pursuant to A.R.S. § 16-942(B), which authorizes civil penalties for "any reporting requirement imposed by this chapter."

Despite the Act's broad enforcement provisions, LFAF argues that it is not subject to any penalty at all for violating the Act's reporting requirements for independent expenditures. LFAF's argument should be rejected because (1) the statutory language provides for civil penalties for any violation of the Act (§ 16-957(B)), (2) section 16-942(B) applies to "any reporting requirement," and (3) the Arizona Supreme Court has long recognized enforcing regulations concerning reporting of independent expenditures as one of the Commission's basic responsibilities, *Brewer*, 209 Ariz. at 244, ¶ 13, 99 P.3d at 573.

In the enforcement process that applies to any allegation that the Act has been violated, A.R.S. § 16-957(A), the Commission is authorized to "issue an order assessing a civil penalty in accordance with § 16-942," A.R.S. § 16-957(B). The only exception to this authorization to impose civil penalties for violations of the Act is if the commission finds good cause "for reducing or excusing the penalty." *Id.* This plain

statutory language of 16-957 flatly contradicts LFAF's argument that it is not subject to any civil penalty at all for violating the Act's reporting requirements for independent expenditures.

Section 16-942 also fails to support LFAF's argument that it is subject to no civil penalties for violating the Act. This statute establishes a variety of civil penalties for violations of the Act. Subsection (B) of 16-942 establishes the "civil penalty for a violation by or on behalf of any candidate of *any* reporting requirement imposed by this chapter." (emphasis added.) The penalty under subsection B is "one hundred dollars per day for candidates for the legislature and three hundred dollars per day for candidates for statewide office, adjusted for inflation, (A.R.S. § 16-959(A)), and doubled if the amount not reported exceeds ten percent of the adjusted spending limits for the election. A.R.S. § 16-942(B). Penalties are capped at twice the amount of expenditures or contributions that are not reported. This penalty structure is incorporated in Commission rule 2-20-109(F)(3), which explicitly addresses the penalties for failing to file independent expenditure reports. The Commission's rule applying the penalties in A.R.S. § 16-942(B) to independent expenditures is consistent with the language and purpose of the Act as a whole. It permits the Commission to impose a civil penalty for all violations of the Act, as the Act plainly contemplates in § 16-957(D). *See, e.g., Metzler v. BCI Coca-Cola Bottling Co. of L.A.*, 235 Ariz. 141, ¶ 13, 329 P.3d 1043, 1047 (2014) ("We seek to harmonize, whenever possible, related statutory and rule provisions."); *State v. Gaynor-Fonte*, 211 Ariz. 516, 518, ¶ 13, 123

P.3d 1153, 1155 (App. 2005) ("When we interpret a statute, we examine its individual provisions 'in the context of the entire statute' to achieve a consistent interpretation.").

The phrase "a violation by or on behalf of a candidate of any reporting requirement imposed by this chapter" in A.R.S. § 16-942(B) limits the Commission's jurisdiction to impose penalties for reporting issues that arise in candidate elections, rather than reporting issues that may arise in ballot measure campaigns. "[A] violation by [a] candidate of any reporting requirement," A.R.S. § 16-942(B), refers to a violation of reporting requirements by candidate campaign committee, or a candidate who is not required to have such a committee. "[A] violation . . . on behalf of any candidate of any reporting requirement," *id.*, captures any other reporting violation involving a candidate campaign. Admittedly, the phrase "a violation . . . on behalf of any candidate of any reporting requirement" is ambiguous. *Id.* But the Commission's interpretation of this phrase is consistent with the Act as a whole and avoids the absurd result promoted by LFAF that would permit people making independent expenditures to avoid any penalty for violating reporting requirements.

The Commission's interpretation also does not render meaningless the last sentence of A.R.S. § 16-942(B), which states "[t]he candidate and the candidate's campaign account shall be jointly and severally responsible for any penalty imposed pursuant to this subsection." This sentence applies to penalties imposed against the candidate or a candidate's campaign committee, but does not apply to other types of committees that may be subject to penalties under that section. This sentence can apply only to a penalty that is imposed against a candidate or a candidate campaign committee

since they are the only individuals and entities that may be jointly and severally liable for a penalty under the statutory language. This language makes the candidate responsible for penalties against his or her campaign committee, but it does not mean groups making independent expenditures are subject to no penalties at all.

LFAF argues (at 22) that "[b]ecause 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 erred in applying Section 16-942(B) against LFAF." The fact that the CCEC found no coordination between LFAF and the Ducey 2014 Campaign merely means that LFAF's expenditure on the advertisements was not an in-kind contribution to the Ducey 2014 Campaign. By definition, independent expenditures cannot be coordinated with candidates. A.R.S. § 16-901(14). A finding of no coordination has nothing to do with the penalty for violating the independent expenditure reporting requirements in A.R.S. §§ 16-941(D) and –958.

Independent expenditures are "on behalf of" the candidates in the same race for the purposes of the penalty provision in § 16-942(B). An independent expenditure is necessarily made in support or opposition of a candidate. A.R.S. § 16-901(14). Thus, an independent expenditure supporting a candidate would be "on behalf of" that candidate. And an independent expenditure opposing a candidate would be "on behalf of" that candidate's opponents. This is true in a two-person race, or a multi-candidate race. *Cf.* A.R.S. § 1-214(B) (singular word includes the plural). Here, the independent expenditure opposing Smith was "on behalf of" the other candidates in the Republican primary for the purposes of the penalty provision in A.R.S. § 16-942(B).

Although it is not entirely clear, LFAF seems to argue that penalties are permitted for some, but not all, violations of the reporting requirements for independent expenditures because some independent expenditures may be "on behalf of" a candidate and others may not be. That interpretation contradicts A.R.S. § 16-957, which makes it very clear that all violators of the Act are subject to civil penalties. It contradicts the broad reference to violations of "any reporting requirement" in § 16-942(B). And it also contradicts the mandate in §§ 16-941(D) and -958 establishing reporting requirements for all independent expenditures.

In contrast, under the Commission's analysis, any violation of the independent expenditure reporting requirements is "a violation . . . on behalf of a candidate of [a] reporting requirement imposed by this chapter." A.R.S. § 16-942(B). This analysis is consistent with the language and purpose of § 16-942 and the Act as a whole and provides for consistent penalties for violating the independent expenditure reporting requirements. Because LFAF made an independent expenditure concerning a candidate for governor and violated the relevant reporting requirements, it is subject to penalties under A.R.S. § 16-942(B).

The Commission imposed penalties of $95,460 for LFAF's violation. (Joint SOF ¶ 41.) The penalty assessment was calculated as follows: The daily fine for failure to report expenditures in a statewide race is $430. A.R.S. 16-959(A); (Joint SOF Exhibit 22.) That penalty is doubled if the amount of the expenditure is greater than ten percent of the adjusted primary elections spending limit. A.R.S. 16-942(B). The adjusted primary election spending limit for the office of Governor in the 2014 race was

$753,616. (Joint SOF Exhibit 22.) Ten percent of that amount is $75,362. LFAF's unreported advertisement related expenditures were at least $260,000. (Joint SOF ¶ 12.)

Because the amount of LFAF's expenditure was greater than ten percent of the adjusted primary spending limit for the governor's race, the CCEC calculated the penalty at $860 per day for 111 days, which is the number of days between the Commission's assessment of penalties and its assertion of jurisdiction on July 31, 2014. (Joint SOF ¶ 41.)[11]

Based on this analysis, the CCEC recommends an identical civil penalty of $95,460 against LFAF for violating the reporting requirements that apply to independent expenditures.

CONCLUSION

The Administrative Law Judge should conclude that LFAF failed to make disclosures for independent expenditures required in the Clean Elections Act and that a civil penalty of $95,460 is appropriate.

[11] The Executive Director's Penalty Recommendation (Joint SOF Exhibit 22) suggested that the penalty amount should have been calculated for 234 days, which was the number of days between the Commission's assessment of penalties and the date that the Reports were first due (April 1, 2014). (Joint SOF Exhibit 25 at 55.) Under that calculation, the penalty amount would have been $201, 240. The CCEC ultimately determined that the lower amount of $95,460 was appropriate.

DATED this 21st day of January, 2015.

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EXHIBIT A

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