IN THE ARIZONA SUPREME COURT

LEGACY FOUNDATION ACTION FUND, Plaintiff/Appellant, v. CITIZENS CLEAN ELECTIONS COMMISSION, Defendant/Appellee.	Arizona Court of Appeals No. 1 CA-CV 15-0455 Maricopa County Superior Court No. LC2015-000172-001

PLAINTIFF/APPELLANT LEGACY FOUNDATION ACTION FUND'S PETITION FOR REVIEW

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INTRODUCTION

The Citizens Clean Election Commission ('Commission') lacked jurisdiction to penalize the Legacy Foundation Action Fund ('LFAF') for its speech. Rather than follow the consistent precedent of the Court of Appeals permitting jurisdictional challenges at any time, and ignoring this Court's precedent that a tribunal cannot accrete jurisdiction through laches, the courts below dismissed LFAF's jurisdictional challenge as untimely. This Court should grant this Petition to reinstate the uniformity in the Court of Appeals precedent that jurisdiction may be challenged at any time. This Court should also grant this Petition to reaffirm its precedent that the passage of time cannot vest a tribunal with jurisdiction.

ISSUES PRESENTED FOR REVIEW

1. Until the Court of Appeals ruling below, both the First And Second Divisions of the Arizona Court of Appeals were in agreement that A.R.S. § 12-902(B) permitted challenges to an agency's jurisdiction even after the time to seek judicial review had lapsed. Under *State ex rel. Dandoy v. Phoenix*, 133 Ariz. 334 (App. 1982) and *Arkules v. Board of Adjustment*, 151 Ariz. 438 (App. 1986), did the Maricopa County Superior Court and the Court of Appeals err when it dismissed as untimely LFAF's appeal challenging the Commission's jurisdiction over LFAF's speech?

ADDITIONAL ISSUES PRESENTED BUT NOT DECIDED

1. Under *FEC v. Wis. Right. To Life, Inc.*, 551 U.S. 449 (2007), does the Commission's determination that LFAF's advertisement constituted express advocacy—asserting jurisdiction over a statute whose enforcement authorities are confined to the Secretary of State's office—create unconstitutional ambiguity and conflicting regulatory authorities within the state when LFAF's advertisement was aired 134 days before the primary election, discussed only issues, educated listeners about issues the organization that Mayor Smith served as president espoused, urged listeners to contact Mayor Smith to express disapproval of those issues, and did not discuss Mayor Smith's qualification for governor or mention another candidate's name?

STATEMENT OF MATERIAL FACTS AND PROCEDURAL HISTORY

Exercising its First Amendment right to speak about salient fiscal, tax, and civil rights issues, LFAF disseminated television advertisements to the citizens of Mesa, Arizona, concerning the then Mayor Scott Smith's support of policies inimical to LFAF's policy agenda. Index of Record ("IR") 28 at ¶¶9-13. These advertisements began airing in the Phoenix metropolitan area[1] in March of 2014 and ceased on April 14, 2014, 108 days before early voting began in the Republican gubernatorial primary and 134 days before the Republican

[1] It is not feasible to purchase airtime solely in Mesa. IR-59 at Ex. A, ¶14.

gubernatorial primary election was held on August 26, 2014. IR-28 at ¶¶14, 20-23. During the television advertisement campaign, Smith served as Mayor of Mesa and as President of the U.S. Conference of Mayors. IR-28 at ¶¶5-7. Although the advertisements aired after Smith announced his *intention* to campaign for Governor of Arizona, the advertisement *ceased* two weeks before potential candidates could file official paperwork declaring their candidacy. *See* IR-28 at ¶¶7, 15, 19.

The advertisement described Smith as "Obama's Mayor" because while serving as the President of the U.S. Conference of Mayors, the Conference supported profligate spending, limits on Second Amendment rights, Obamacare, and the regulation of carbon emissions. The advertisement closes with an exhortation for the listeners to call Mayor Smith to tell him to support policies that are good for Mesa. *See* IR-28 at ¶13; IR-41.

Similar radio advertisements were disseminated in Sacramento, California and Baltimore, Maryland because the mayors of those cities were the incoming president and vice-president of the Conference. IR-28 at ¶¶10-11.

Seventy-eight days later, on July 1, 2014, Smith, through counsel, filed his complaint against LFAF with the Citizens Clean Election Commission ("Commission") and the Maricopa County Elections Department. IR-28 at ¶25. Smith alleged—*inter alia*—that LFAF's advertisement was subject to no other

reasonable interpretation other than an exhortation to vote against Smith in the Republican gubernatorial primary election, an election that took place 134 days *after* the last advertisement aired. IR-28 at ¶¶20-21.

Twenty days later, the Maricopa County Elections Department—acting on behalf of the Arizona Secretary of State—dismissed the Complaint. IR-28 at ¶28. But then, ten days later, on July 31, 2014, the Commission arrived at the opposite conclusion applying the same statutes, asserting jurisdiction over the Complaint to determine whether LFAF had violated the Citizens Clean Election Act. IR-28 at ¶33.

In September, the Commission found reason to believe that LFAF committed a violation because it did not file independent expenditure reports. IR-28 at ¶¶33-35. The Commission ordered LFAF to file the reports. IR-28 at ¶36. After LFAF filed two letters contending that the Commission lacked jurisdiction, IR-28 at ¶¶36-37, Smith filed a letter withdrawing his Complaint. IR-28 at ¶40.

Undaunted, the Commission pressed forward. On November 28, 2014, the Commission found that LFAF's speech constituted express advocacy. Because LFAF did not file reports with the Secretary of State, the Commission imposed a $95,460 fine. IR-28 at ¶41.

After LFAF timely requested a hearing by an Administrative Law Judge, IR-28 at ¶44, the ALJ issued his recommendations on March 4, 2015. Like the

Maricopa County Department of Elections, the ALJ concluded that LFAF's speech did not expressly advocate and thus was not an independent expenditure. IR-69 at Conclusions of Law Section ("COL") ¶¶16, 21.

The ALJ concluded that LFAF's advertisement was not express advocacy because:

- Timing: LFAF's speech occurred while Smith still served as mayor of Mesa and President of the Conference. IR-69 at COL ¶16.
- Timing: Although ten weeks after Smith declared his *intention* to campaign for governor, LFAF's speech was before Smith filed official campaign paperwork and thus was under no obligation to resign as mayor. IR-69 at COL ¶16,
- Timing: LFAF's speech occurred more than four months before early voting began and more than five months before the primary election. IR-69 at COL ¶16.

Although adopting the ALJ's factual findings, the Commission, on March 27, 2015, rejected the ALJ's conclusions of law by holding that LFAF's speech did expressly advocate and therefore was an independent expenditure. IR-70. The Commission found that the advertisement expressly advocated the defeat of Mayor Smith because it was aired after Smith announced his candidacy for

governor, portrayed Smith in a negative light, and discussed generic national issues and not local issues. IR-70 at pg. 4-5. Consequently, the Commission reinstated the $95,460 penalty. IR-70 at pg. 7.

Because the Commission noted its decision was final under A.R.S § 41-1092.08(F), IR-70 at pg. 7, LFAF followed the directions in the notice and applied the 35-day appellate time frame. LFAF filed its notice of appeal to the Maricopa County Superior Court 18 days after the Commission's order. Court of Appeals Memorandum Decision ("App. Dec.") at ¶5. In its appeal, LFAF contended that the Commission lacked jurisdiction because LFAF's speech did not constitute express advocacy. *See* A.R.S. § 16-901.01.

On June 12, 2015 the superior court concluded that it did not have jurisdiction, agreeing that the fourteen-day time period applied. IR-76; App. Dec. at ¶5. Three days later, LFAF timely appealed the superior court's ruling to the Arizona Court of Appeals. IR-77.

On November 15, 2016, the Arizona Court of Appeals, First Division, affirmed the superior court's ruling. App. Dec. at ¶13.

Despite LFAF's challenge to the Commission's jurisdiction, the Court of Appeals held that the jurisdictional challenge was also barred from adjudication. The court distinguished *Arkules* stating that it was a special action by a non-party, not a direct appeal. App. Dec. at ¶11. The court further held that A.R.S. § 12-

902(B) barred absolutely all untimely administrative appeals. App. Dec. at ¶12. Finally, the Court of Appeals concluded that the portion of the *Arkules* holding that A.R.S. § 12-902(B) permits otherwise untimely jurisdictional challenges was dicta. App. Dec. at ¶12.

LFAF now timely files this Petition for review. *See* Ariz. R. Civ. App. P. 23(b)(2)(A).

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition because the ruling creates a conflict with other appellate decisions in Arizona permitting jurisdictional challenges that are otherwise untimely. Furthermore, the ruling below contains an error of law in a case that infringed LFAF's rights guaranteed under the First Amendment. *See* Ariz. R. Civ. App. P. 23(d)(3).

Before the ruling below in this case, A.R.S. § 12-902(B) permitted aggrieved persons to challenge a tribunal's jurisdiction at any time. Now, the ruling below has limited the jurisdictional challenge exception in A.R.S. § 12-902(B) to only those parties who were not diligent in prosecuting their claims and suffered a default judgment or were non-parties. The ruling here diverges from prior rulings also diverges from this Court's precedent that an agency does not accrete jurisdiction by laches.

I. THE COURT OF APPEALS RULING BELOW CREATES A CONFLICT WITH PRIOR COURT OF APPEALS PRECEDENT AND THE PRECEDENT OF THIS COURT.

A. The Superior Court And The Court Of Appeals Committed An Error Of Law Permitting The Commission To Penalize LFAF For Its Speech.

The courts below committed errors of law determining first that LFAF's jurisdictional challenge was untimely. This error resulted in the courts upholding the Commission's $95,460 penalty to LFAF's speech.

The courts below declined to permit LFAF to challenge the Commission's jurisdiction to impose this fine because, the courts contended, LFAF's jurisdictional challenge was untimely. But this conclusion is contrary to this Court's longstanding precedent that tribunals cannot acquire jurisdiction through laches. *See, e.g., In re Milliman's Estate*, 101 Ariz. 54, 58 (1966) ("The theory underlying the concept of a void judgment is that it is legally ineffective -- a legal nullity; *and may be vacated by the court which rendered it at any time*. Laches of a party can not cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life.") (emphasis added) (quoting 7 Moore's Federal Practice § 60.25[4] (2d ed. 1955), p. 274). If the Commission lacked jurisdiction to penalize LFAF's speech, LFAF's alleged four day delay in challenging the Commission's jurisdiction does not vest the Commission with jurisdiction.

The lower courts erred in first ruling that LFAF's appeal was untimely. The lower courts were required to answer the prerequisite question: whether the Commission had jurisdiction to penalize LFAF for its speech in the first place. This error vested the Commission with jurisdiction solely because of LFAF's alleged delay. This Court should grant this Petition to correct this error that resulted in the Commission penalizing LFAF's speech.

B. Motions To Set Aside Judgments As Void Are Available At Any Time.

The Arizona Court of Appeals has consistently ruled that Rule 60 motions attacking a judgment as void because the court lacked jurisdiction are permissible even when brought beyond the six month deadline and even where the movant delayed unreasonably. *See, e.g., National Inv. Co. v. Estate of Bronner*, 146 Ariz. 138, 140 (App. 1985). Similarly, the Arizona Court of Appeals has ruled that untimely challenges to an administrative agency's jurisdiction brought in a special action are permissible where the challenge is to the administrative agency's jurisdiction. *See, e.g., Arkules*, 151 Ariz. 438, 440 (App. 1986) ("Under the provisions of A.R.S. § 12-902(B), an appeal from an administrative agency may be heard even though untimely to question the agency's personal or subject matter jurisdiction in a particular case."). Here, LFAF asserts that the Commission did not have personal or subject matter jurisdiction over LFAF or its advertisements because LFAF's speech concerning the issues Smith supported did not constitute

express advocacy. IR-28 at ¶¶31-32. LFAF should be permitted to make that challenge.

In *National Investment Company*, the appellant there purchased property from appellee for delinquent taxes. *National Inv. Co.*, 146 Ariz. at 138-39. Later, on July 26, 1982, a default judgment was entered after the appellee did not file a formal answer. The court granted possession of the property to appellant. *Id.* at 139.

On April 28, 1983, the representative of appellee's estate filed a motion to set aside the judgment. *Id.* The appellant contended that the appellate courts should give the default judgment preclusive effect because the appellee did not file the motion to set aside the verdict within six months of the default judgment. *Id.* The Court of Appeals rejected this argument stating that because the judgment was void, it was subject to attack even after the six month deadline to file a Rule 60 motion expired. *Id.* at 140. The appellant further contended that the time the motion to void the default judgment was filed was unreasonable. The court of appeals rejected this argument too because "the reasonable time requirement of Rule 60(c) does not apply when a judgment is attacked as void." *Id*; *see also Martin v. Martin*, 182 Ariz. 11, 14-15 (App. 1994) ("[T]here is no time limit in which a motion under Rule 60(c)(4) may be brought; the court must vacate a void judgment or order '*even if the party seeking relief delayed unreasonably*.'") (citing

accord In re Milliman's Estate, 101 Ariz. at 58 (emphasis added)); *Ruiz v. Lopez*, 225 Ariz. 217, 222 (App. 2010) (same).

The courts below were in error when they concluded that jurisdictional challenges must still be filed within any statutory or court rule time frame to appeal. App. Dec. at ¶12. Cases from both divisions of the Court of Appeals, *supra*, and this Court, hold that jurisdictional challenges were permitted well after the time to file those motions under Ariz. R. Civ. P. 60 had passed. Movants are therefore permitted to move a court to set aside a judgment for lack of jurisdiction at any time, even when delay was unreasonable. *See, e.g., In re Milliman's Estate*, 101 Ariz. at 58.

C. Both The First And Second Divisions Of The Arizona Court of Appeals Recognizes That Challenges To An Agency's Jurisdiction Are Available At Any Time.

Prior to the ruling below, there was unanimity between the two divisions of the Arizona Court of Appeals. Both appellate divisions have recognized that challenges to an agency's jurisdiction are permitted, even after the time to appeal an agency order has expired. *See State ex rel. Dandoy v. Phoenix*, 133 Ariz. 334, 336 (App. 1982). This is an exception to the general rule that untimely appeals challenging the legal or factual error of an agency decision are barred. *Id.* at 337; *see also Guminski v. Ariz. State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 182 (App. 2001).

In *Dandoy*, the City of Phoenix contended that a court order enjoining the City from committing violations listed in a cease and desist order that the Appellee Arizona Department of Health Services issued was void. *See Dandoy*, 133 Ariz. at 335-36. Appellee claimed regulatory jurisdiction over sanitary landfill operations and cited the City for four violations at certain City owned landfills. *Id.* Appellee's cease and desist order demanded the City bring the landfills into compliance. *Id.* The City requested an administrative hearing that resulted in a consent decree. *Id.* Shortly thereafter, an amended consent decree was entered and, pursuant to A.R.S. § 12-902(B), the consent decree was final and not subject to judicial review. *Id.*

Seven months later, the Department filed a Complaint in Maricopa County Superior Court and successfully sought an injunction against the City for alleged violations of the consent decree. *Id.* The City defended itself claiming that the consent decree was void because the Department lacked the jurisdiction to enter it. *Id.*

In addressing this argument, the court of appeals stated: "However, as expressly provided in A.R.S. § 12-902(B), an exception to this statutorily declared finality exists for the purpose of questioning the jurisdiction of the administrative agency over the persons or subject matter involved in the controversy." *Id.* Although the court ultimately rejected the jurisdictional argument, the court thoroughly considered it. *Id.* at 337.

Similarly, in *Arkules*, a resident of the Town of Paradise Valley successfully petitioned the Town for a variance from a building variance. *See Arkules*, 151 Ariz. at 439. More than thirty days later, the Arkules filed a special action in superior court to reverse the Board's decision. *See id.* The Arkules contended that the notice of the hearing was defective and that the Board acted beyond its rules, regulations, and statutes in granting the variance. *See id.*

The resident filed a motion to dismiss for lack of jurisdiction because the Arkules' special action was brought after the expiration of the 30 day time limit to challenge the Adjustment Board's grant of a variance pursuant to A.R.S. § 9-462.06(J). *Id.* at 439-40. The superior court sustained the variance and the Arkules appealed. *Id.*

The Court of Appeals rejected the resident's argument that the special action was untimely. *Id.* at 440. Like the court in *Dandoy*, the Court of Appeals again held that A.R.S. § 12-902(B) permits an untimely appeal "to question the agency's personal or subject matter jurisdiction in a particular case." *Id.* The Court of Appeals continued ruling that "the effect of a void decision by the Board of Adjustment is the same as that of any void decision by a court: 'the mere lapse of time does not bar an attack on a void judgment.'" *Id.* (citing *Wells v. Valley National Bank of Arizona*, 109 Ariz. 345, 347 (1973)). The Court of Appeals cited its own precedent for the proposition that a "void judgment does not acquire

validity because of laches." *Id.* (citing *Int'l Glass & Mirror, Inc. v. Banco Ganadero Y Agricola, S.A.*, 25 Ariz. App. 604, 545 (1976)). Furthermore, the court ruled that both statutes of limitations *and rules of court* are not applicable to jurisdictional challenges. *Id.* (emphasis added) (citing *Preston v. Denkins*, 94 Ariz. 214 (1963)). The court of appeals then concluded:

> "There *Arkules* was not bound by the 30 day limit....This special action brought within a reasonable time of learning of the variance was timely, and the court properly denied [the resident's] motion to dismiss for lack of jurisdiction."

Id.

D. <u>The Court Of Appeals Ruling Below Creates A Split In Authority With *Dandoy* And *Arkules*.</u>

Similar to those who challenged their respective agency's jurisdiction in *Arkules* and *Dandoy*, LFAF challenged the Commission's jurisdiction. After exhausting its administrative remedies, LFAF challenged the Commission's jurisdiction in Maricopa County Superior Court, four days after the statutory deadline to file challenges to the Commission's orders. App. Dec. at ¶5. Under *Dandoy* and *Arkules*, the Maricopa Superior Court should have entertained the merits of LFAF's argument that the Commission lacked jurisdiction.

Here, however, the Court of Appeals below characterized this portion of the *Arkules'* ruling as dicta. App. Dec. at ¶12. This was in error because *Arkules*'s holding that A.R.S. § 12-902(b) permits an otherwise untimely jurisdictional

challenge was necessary to dismiss the residents' motion to dismiss for lack of jurisdiction for filing a special action after the 30 day deadline. *See Arkules*, 151 Ariz. at 140.

Further, contrary to the ruling below, the holding is not limited to non-parties or special actions. App. Dec. at ¶12. Those facts played no role in the court's holding. In fact, the ruling in *Dandoy* confirms that 12-902(b) applies to parties bringing jurisdictional challenges. *See Dandoy*, 133 Ariz. at 335-36. Additionally, and contrary to the court of appeals stating that the jurisdictional challenge exception in A.R.S. 12-902(b) is not applicable to the time to appeal the Commission's decisions, the First Division recognizes this in the Rule 60 context holding that motions to void the judgment filed after the six month deadline or otherwise unreasonable delays are permissible if the challenge is to the court's jurisdiction. *See Martin*, 182 Ariz. at 14-15; *National Inv. Co.*, 146 Ariz. at 140. Moreover, the *Arkules* court noted that both statutes of limitations *and* rules of court are not applicable when challenging a tribunal's jurisdiction. *See id.*

The ruling of the court of appeals below creates inconsistency where there was once consistency. Prior rulings interpreted the jurisdictional challenge exception in 12-902(B) as permitting a challenge to an agency's jurisdiction at any time. Now, the Court of Appeals has ruled—seemingly for the first time—that the jurisdictional challenge exception is only for those aggrieved parties who either

had not exhausted their administrative remedies or who were subject to a default judgment. App. Dec. at ¶12. This new rule diverges from prior consistent court of appeals precedent, creates a windfall for parties who slept on their rights, and violates this Court's precedent that tribunals cannot accrete jurisdiction through laches. *See In re Milliman's Estate*, 101 Ariz. at 58.[2]

REQUEST FOR ATTORNEYS FEES AND COSTS

Pursuant to Ariz. R. Civ. App. P. 23(d)(4), and Rule 21(a), LFAF hereby gives notice that under A.R.S. § 12-348, LFAF respectfully requests that this Court award to it its reasonable attorneys' fees and expenses incurred herein.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

RESPECTFULLY SUBMITTED this 13th day of December, 2016.

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[2] Additionally, challenges to state action brought under the First Amendment are not subject to traditional statutes of limitations. *See Maldonado v. Harris*, 370 F.3d 945, 956 (9th Cir. 2004); *see also 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996).

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