

STATE OF ARIZONA
CITIZENS CLEAN ELECTIONS COMMISSION

MUR 14-007

Legacy Foundation Action Fund

STATEMENT OF REASONS OF THE EXECUTIVE DIRECTOR

On behalf of the Citizens Clean Elections Commission (“Commission”), the Executive Director hereby provides the following Statement of Reasons why there is reason to believe that a violation of the Citizens Clean Elections Act and Commission rules (collectively, the “Act”) may have occurred.

I. Procedural Background

On July 1, 2014, Kory A. Langhofer (“Complainant”) filed a complaint (“Complaint”) with the Commission and with the Arizona Secretary of State’s Office against a gubernatorial campaign and the Legacy Foundation Action Fund (“LFAF”) alleging that respondents had violated Arizona’s campaign finance laws.¹ On July 31, 2014, the Commission voted to accept jurisdiction over the Complaint. On August 21, 2014, the Commission voted to take no further action related to the gubernatorial campaign identified in the Complaint.

The remaining issues involve whether or not LFAF made public communications that required it to file certain reports that are required under the Clean Elections Act. In my initial recommendation for the July 31, 2014 meeting, I recommended that the Commission find that the television advertisement

1. The Secretary of State’s Office referred the Complaint to the Maricopa County Recorder’s Office. This is discussed further later in this memorandum.

identified in the Complaint was “express advocacy” under Arizona law. However, at that time, because of an outstanding matter in the Arizona Court of Appeals I did not recommend finding reason to believe that a violation had occurred. That decision, *Comm. for Justice & Fairness v. Arizona Sec’y of State’s Office*, 1 CA-CV 13-0037, 2014 WL 4109517 (Aug. 7, 2014) (“CJF”), was issued last month.

II. Supplemental Legal Analysis

As the Commission knows, my July 31, 2014 Recommendation concluded that the television advertisement identified in the Complaint constituted express advocacy under Arizona law.² Subsequently, the Court of Appeals issued its opinion in CJF. The purpose of this supplemental legal analysis is to evaluate whether that decision affects the prior recommendation and to address supplemental arguments made by LFAF in its August 13, 2014 letter to the Commission. Taken with my prior recommendation, I conclude there is reason to believe a violation of A.R.S. §§ 16-941(D) and -958(A) and (B) occurred.

The CJF Opinion Confirms that Arizona’s “Express Advocacy” Statute is Constitutional and Does Not Alter the Prior Recommendation Regarding “Express Advocacy.”

The CJF matter involved an advertisement against then-candidate for Attorney General Tom Horne in 2010. The Maricopa County Attorney’s Office,

2. The Complaint includes evidence of radio advertisements and asserts there were other advertisements that were in print. During an investigation, staff may discover these other advertisements and the question of whether they are express advocacy may ripen.

which was assigned responsibility of the case after Horne was elected Attorney General, found that CJF was required to comply with certain registration and disclosure requirements. Following an administrative appeal and an appeal to superior court, the superior court determined that the advertisements in question were “issue-oriented speech rather than express advocacy” and that the statutes on disclosure were unconstitutional. *Comm for Justice & Fairness*, *1. at ¶ 2. The Court of Appeals unanimously reversed the superior court and vacated its ruling. *Id.* at ¶ 3.

First, the Court of Appeals determined that the advertisements in question—which critically focused on Horne in his then-position as Superintendent of Public Instruction, his alleged actions as a legislator, and “as an occupant of the post he would soon vacate”—were targeted to the electorate of the Attorney General race. *Id.* at *7, ¶ 26. The ads specifically referred to Mr. Horne, who was a clearly identified candidate for Attorney General, even though the ads did not refer to him as a candidate for that office. Although the advertisements urged viewers to call Horne’s office in the Department of Education, the court found that the ads could only be viewed as advocating against Horne’s election. *Id.*

Next, the court rejected all of CJF’s constitutional arguments. *Id.* at *8-13, ¶¶ 31-48. The court explained that where a statute implicates only disclosure obligations, rather than prohibitions on speech, it is subjected to a lower exacting scrutiny review. *Id.* at *8, ¶ 33. In such situations, the U.S. Supreme Court has

long recognized a number of valid state interests including “(1) providing voters with information to aid them in evaluating candidates and the sources of candidates support, (2) deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to public light, and (3) providing the means of gathering the data to detect violation. *Id.* at *8, ¶ 33; *13, ¶ 48.

Likewise, considering the timing of the advertisements, which is included in Arizona’s definition of express advocacy, is constitutional. *Id.* at *12, ¶ 44.

Despite the thrust of the opinion affirming both the constitutionality and application of Arizona’s express advocacy statute, LFAF argues in its supplemental filing that the CJF opinion should alter the conclusion that LFAF’s advertisement regarding Scott Smith was “express advocacy.”

First, LFAF argues that the “timing” considered under Arizona’s definition is the “timing of the election—and not the timing of Mayor Smith’s resignation as the initial Executive Director’s report suggested.” This point is not well taken. Although the CJF opinion notes that the advertisement in that case ran “within days of the election,” the opinion does not turn on that fact. *See CJF*, 2014 WL 4109517 at *7, ¶¶ 28-30. Rather, the critical issue is whether “in context [the advertisement] could have no reasonable meaning other than to advocate the defeat of that candidate.” *Id.* at ¶ 30.

Narrowing the reasoning as LFAF proposes rips the Court’s analysis out of context. For example, its argument ignores that the CJF opinion expressly agreed

with the administrative law judge’s conclusion that no reasonable person would spend such significant sums of money on an advertisement whose purpose was to tell voters to call Tom Horne about an issue in a “post he would soon vacate.” *Id.* at ¶ 26. This analysis is indistinguishable from my earlier recommendation.

Furthermore, LFAF’s continued reliance on *Federal Election Commission v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007) is misplaced. See LFAF Supplemental Filing at 2. There, although the Court held that “subjective” evidence based on timing was irrelevant, it expressly analyzed objective timing of an advertisement to determine whether it was the “functional equivalent” of express advocacy. *Id.* at 476. Indeed, the Court expressly stated that “Courts [and presumably administrative agencies] 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.” *Id.* at 474 (internal quotations omitted). This is the analysis the July recommendation conducted.³

Finally, LFAF’s reference to the Ninth Circuit’s decision in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), is unavailing. LFAF Supplemental Filing at 1. In *Furgatch*, the court concluded that an advertisement,

3. *Wisconsin Right to Life* addressed an absolute ban on corporate expenditures that no longer exists. This matter deals exclusively with disclosure. The CJF court correctly recognized these are entirely different constitutional issues. *CJF*, 2014 WL 4109517 at *8-9, ¶¶ 32-34 (applying more relaxed standard of review to disclosure than laws that prevent expenditures).

although written vaguely, unambiguously advocated for President Carter's defeat.. That the advertisement was published one week before the election was *not* the determinative factor in the Court's analysis. *Id.* at 865.

III. Recommendation

Because LFAF made an express advocacy communication and filed no reports, it is subject to enforcement under the Citizens Clean Elections Act and Rules for violating A.R.S. §§ 16-941(D) and -958(A) and (B). If the Commission determines by an affirmative vote of at least three (3) of its members that it has reason to believe LFAF has violated a statute or rule over which the Commission has jurisdiction, the Commission shall notify LFAF of the Commission's finding setting forth: (i) the sections of the statute or rule alleged to have been violated; (ii) the alleged factual basis supporting the finding; and (iii) an order requiring compliance within fourteen (14) days. During that period, the Respondent may provide any explanation to the Commission, comply with the order, or enter into a public administrative settlement with the Commission. A.R.S. § 16-957(A) & Ariz. Admin. Code R2-20-208(A).

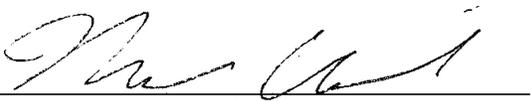
After the Commission finds reason to believe that a violation of a statute or rule over which the Commission has jurisdiction has occurred, the Commission shall conduct an investigation. Ariz. Admin. Code R2-20-209(A). The Commission may authorize the Executive Director to subpoena all of the

Respondent's records documenting disbursements, debts, or obligations to the present, and may authorize an audit.

Upon expiration of the fourteen (14) days, if the Commission finds that the alleged violator remains out of compliance, the Commission shall make a public finding to that effect and issue an order assessing a civil penalty in accordance with A.R.S. § 16-942, unless the Commission publishes findings of fact and conclusions of law expressing good cause for reducing or excusing the penalty. A.R.S. § 16-957(B).

After fourteen (14) days and upon completion of the investigation, the Executive Director will recommend whether the Commission should find probable cause to believe that a violation of a statute or rule over which the Commission has jurisdiction has occurred. Ariz. Admin. Code R2-20-214(A). Upon a finding of probable cause that the alleged violator remains out of compliance, by an affirmative vote of at least three (3) of its members, the Commission may issue of an order and assess civil penalties pursuant to A.R.S. § 16-957(B). Ariz. Admin. Code R2-20-217.

Dated this 9th day of September, 2014.

By: 
Thomas M. Collins, Executive Director