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19 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
20 **IN AND FOR THE STATE OF ARIZONA**

21 In the Matter of
22 LEGACY FOUNDATION ACTION
23 FUND,
24
25 Petitioner/Appellant,
26
27 vs.
28 ARIZONA CITIZENS CLEAN
29 ELECTIONS COMMISSION
30
31 Respondent/Appellee.

Case No. 15F-001-CCE

**OPENING BRIEF OF
PETITIONER/APPELLANT
LEGACY FOUNDATION
ACTION FUND**

(Assigned to the Honorable Thomas
Shedden)

INTRODUCTION

1
2
3 The First Amendment declares that “Congress shall make no law... abridging
4 the freedom of speech...” U.S. Const. amend. I. This is so because “Speech is an
5 essential mechanism of democracy, for it is the means to hold officials accountable to
6 the people.” *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Therefore, the right
7 of citizens to disseminate and receive information is a prerequisite to an
8 “[e]nlightened self-government and a necessary means to protect it.” *Id.* Because of
9 this, “The First Amendment has its fullest and most urgent application’ to speech
10 uttered during a campaign for political office.” *Id.* (internal quotation marks omitted).

11 The U.S. Supreme Court has ruled that the application of intent or purpose
12 based tests to determine whether speech constitutes express advocacy does not serve
13 the “[v]alues the First Amendment...[because they open] the door to a trial on every
14 ad...on the theory that the speaker actually intended to affect an election, no matter
15 how compelling the indications that the ad concerned a pending legislative or policy
16 issue.” *FEC v. Wis. Right to Life, Inc.*, (“WRTL”) 551 U.S. 449, 468 (2007). A
17 subjective, intent based, test chills speech because the test “blankets with
18 uncertainty” whether the speech in question is express advocacy subject to regulation
19 or issue advocacy. *Id.* Rather, issue advocacy speech deserves special protections
20 because “In a republic where the people are sovereign, the ability of the citizenry to
21 make informed choices among candidates for office is essential.” *Buckley v. Valeo*,
22 424 U.S. 1, 14-15 (1976) (per curiam).

23 This case is about the Citizens Clean Elections Commission (“CCEC”) stepping beyond its statutory authority by asserting jurisdiction and applying an
24 unconstitutional subjective, intent based, test to an advertisement aired by Legacy
25 Foundation Action Fund (“LFAF”) and finding that such advertisement constituted

1 express advocacy. Instead of heeding to well-established First Amendment
2 jurisprudence, the CCEC erred when it interpreted and applied the Arizona statutory
3 definition of “expressly advocates” in such a way to effectively eliminate nearly all
4 issue advocacy speech, which is in clear contradiction to Supreme Court Precedent.
5 Additionally, the CCEC violated the U.S. Constitution when it applied a statute
6 against LFAF that had been declared unconstitutional by the Superior Court of
7 Maricopa County at the time LFAF acted.

8
9 **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

10 **I. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY**
11 **IN ASSERTING JURISDICTION OVER LFAF.**

12 **II. WHETHER THE CCEC ERRED WHEN IT MADE FINDINGS OF**
13 **FACT AND LAW WHEN IT WAS UNDISPUTED THAT, AT THE**
14 **TIME LFAF RAN ITS ADVERTISEMENT, THE ARIZONA**
15 **SUPERIOR COURT HAD RULED A.R.S § 16-901.01(A)’S**
16 **DEFINITION OF ‘EXPRESSLY AVOCATES’**
17 **UNCONSTITUTIONAL.**

18 **III. WHETHER THE CCEC VIOLATED THE FIRST AMENDMENT**
19 **WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING**
20 **LFAF’S ADVERTISEMENT CONSTITUTED EXPRESS ADVOCACY.**

21 **IV. WHETHER THE CCEC EXCEEDED ITS STATUTORY AUTHORITY**
22 **WHEN IT IMPOSED CIVIL PENALTIES AGAINST LFAF UNDER**
23 **A.R.S. § 16-942(B).**

24 **STATEMENT OF THE CASE**

25 Petitioner/Appellant, Legacy Foundation Action Fund (“LFAF”) is a tax-
exempt, nonprofit, social welfare organization organized under Internal Revenue
Code Section 501(c)(4). (Joint Stipulation of Facts ¶ 1). Since its inception in 2011,

1 LFAF has maintained a primary purpose to further the common good and general
2 welfare of the citizens of the United States by educating the public on public policy
3 issues including state fiscal and tax policy, the creation of an entrepreneurial
4 environment, education, labor-management relations, citizenship, civil rights, and
5 government transparency issues. (Exhibit 1).

6 Over the past four years, LFAF has run many issue advocacy advertisements
7 in different mediums. Being familiar with the First Amendment protections afforded
8 to issue advocacy speech, LFAF ran a television advertisement in late March and
9 early April of 2014 in Arizona referencing policy positions supported by the U.S.
10 Conference of Mayors and its President, former Mesa Mayor Scott Smith. (Joint
11 Stipulation of Facts ¶ 9). LFAF's Arizona advertisement was a part of a larger
12 campaign regarding the U.S. Conference of Mayors as evidenced by advertisements
13 airing not only in Mesa, AZ but also in Baltimore, MD and Sacramento, CA. (Joint
14 Stipulation of Facts ¶¶ 9-11) (Exhibit 4).

15 The Arizona advertisement ran between March 31 and April 14, 2014, and
16 discussed the U.S. Conference of Mayors' policy positions regarding the
17 environment, Second Amendment, tax and spending, and federal budget. (Joint
18 Stipulation of Facts ¶ 14) (Exhibit 6). Consistent with LFAF's mission and tax-
19 exempt purpose, the advertisement provided viewers with a call to action to contact
20 Scott Smith to tell him "The U.S. Conference of Mayors should support policies that
21 are good for Mesa." (Exhibit 6).

22 Several months before LFAF aired this advertisement, Arizona's statutory
23 definition of "expressly advocates" had been declared unconstitutional by the
24 Maricopa County Superior Court. (Joint Stipulation of Facts ¶ 8).

25 Over two and a half months after LFAF's advertisement stopped running, Mr.
Kory Langhofer, a lawyer representing Mr. Smith, filed a complaint against LFAF,
amongst other parties, alleging that LFAF's advertisement constituted express

1 advocacy, thereby subjecting LFAF to the registration and reporting requirements of
2 both Articles 1 and 2 of Title 16 Chapter 2 of the Arizona Revised Statutes. (Joint
3 Stipulation of Facts ¶¶ 25, 26). Mr. Langhofer filed his complaint with the CCEC as
4 well as with the Arizona Secretary of State’s Office. (Joint Stipulation of Facts ¶ 25).
5 On July 16, 2014, LFAF filed its response to the complaint with the CCEC, arguing
6 the CCEC did not have jurisdiction over the matter and, even if it did, LFAF was not
7 subject to registration or reporting requirements because its advertisement did not
8 “expressly advocate” as the then-unconstitutional provision defined the term.¹ (Joint
9 Stipulation of Facts ¶ 30) (Exhibit 10).

10 The Arizona Secretary of State’s Office referred the complaint to the Maricopa
11 County Elections Department. (Joint Stipulation of Facts ¶ 27). On July 21, 2014
12 Jeffrey Messing, a lawyer representing the Department, issued a letter indicating that
13 the Department “does not have reasonable cause to believe that a violation of
14 Arizona Revised Statutes A.R.S. § 16-901.01 *et seq.* has occurred.” (Joint
15 Stipulation of Facts ¶ 28) (Exhibit 8).

16 On July 31, 2014, the CCEC held a public meeting and discussed, as an
17 agenda item, the complaint against LFAF. (Joint Stipulation of Facts ¶ 30). At that
18 hearing the CCEC decided not to make a finding as to reason to believe a violation
19 occurred, but instead limited its determination to establishing jurisdiction over the
20 matter. (Joint Stipulation of Facts ¶ 33) (Exhibit 15). Over a month later, on
21 September 11, 2014, the CCEC revisited the issue and declared it had reason to
22 believe that LFAF violated the Act and ordered an investigation. (Joint Stipulation of

23 ¹ Several months before LFAF produced and aired the Arizona advertisement, the Arizona Superior Court ruled A.R.S. §
24 16-901.01(A) unconstitutional. *Committee for Justice & Fairness v. Arizona Secretary of State*, No. LC-2011-000734-
25 001. Therefore, as argued *infra*, the CCEC could not enforce this unconstitutional statute defining “expressly advocates”
against LFAF. The express advocacy definition in A.R.S. § 16-901.01(A) has been ruled unconstitutional by the
Arizona Superior Court on November 28, 2012, overturned by the Arizona Court of Appeals on August 7, 2014, and is
currently on appeal before the Arizona Supreme Court, CV-14-0250-PR. LFAF believes that § 16-901.01(A) is
unconstitutional and has been permitted by the appellants and appellees in the appellate case to submit an amicus curiae
brief arguing that the statute is unconstitutional.

1 Facts ¶ 35) (Exhibit 17). On September 26, 2014, the CCEC sent LFAF a
2 Compliance Order asking LFAF to provide written answers to the following
3 questions under oath:

- 4 1. Please provide how much money was expended to create
5 and run the television advertisement identified in the
6 Compliance Order.
- 7 2. Please identify any other advertisements pertaining to
8 Scott Smith that ran Arizona.
- 9 3. With regard to any advertisements identified in LFAF's
10 response to question 2, please provide information on the
11 scope of the purchase, including how much money was
12 spent to create and run any such advertisements and where
13 they ran.

14 (Joint Stipulation of Facts ¶ 36) (Exhibit 18). LFAF responded to the CCEC's
15 Compliance Order by letter arguing that the CCEC's request for additional
16 information was not only irrelevant to the matter at hand because it exceeded the
17 scope of the original complaint, but was also outside the scope of the CCEC's
18 jurisdiction. (Exhibit 19). Further, LFAF provided a detailed request to the CCEC in
19 its response, asking the CCEC, when assessing civil penalties under A.R.S. § 16-
20 942(B), to identify the candidate the advertisement was "by or on behalf of" and
21 which candidate or candidate's campaign account shall be "jointly and severally
22 liable" for any civil penalty assessment. (Exhibit 19).

23 At its November 20, 2014 public meeting, the CCEC found probable cause to
24 believe LFAF violated the Clean Elections Act. (Joint Stipulation of Facts ¶ 41)
25 (Exhibit 25). On November 28, 2014 the CCEC issued its "Order and Notice of
Appealable Agency Action" in which it deemed LFAF's Arizona advertisement to be
express advocacy and assessed a penalty against LFAF in the amount of \$95,460.
(Joint Stipulation of Facts ¶ 43) (Exhibit 26).

1 LFAF filed its request for an administrative hearing timely on December 1,
2 2014. (Joint Stipulation of Facts ¶ 44) (Exhibit 27).

3
4 **ARGUMENT**

5 **I. WHETHER THE CCEC EXCEEDED ITS STATUTORY**
6 **AUTHORITY IN ASSERTING JURISDICTION OVER LFAF.**

7 The CCEC’s jurisdiction is limited to A.R.S. Title 16, Chapter 6, Article 2,
8 which is delineated in the Act at A.R.S. §§ 16-940 to 16-961. In fact, A.R.S. §§ 16-
9 956(A)(7) and 16-957(A), explicitly limit the reach of the Commission to enforcing
10 “this article” (Title 16, Chapter 6, Article 2).

11 The CCEC’s declaration of jurisdiction through the independent expenditure
12 reporting requirements outlined in A.R.S. § 16-941(D) is misguided as the statute’s
13 purpose in Article 2 is no longer relevant. The independent expenditure reporting
14 requirements found in A.R.S. Title 16, Chapter 6, Article 2 were implemented to
15 provide the CCEC a means to track independent expenditure spending so that it
16 would be able to subsidize participating candidates for such expenditures.² *See*
17 *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806,
18 2828-2829 (2011). The CCEC is without a legal foothold to enforce the independent
19 expenditure reporting requirements, however, since the United States Supreme Court
20 held that scheme to be unconstitutional in *Bennett. Bennett*, at 2828-2829. (“the
21 whole point of the First Amendment is to protect speakers against unjustified
22 government restrictions on speech, even when those restrictions reflect the will of the
23 majority.”). Because independent expenditures are already subject to registration and

24 ² The Citizens Clean Elections Act provided for subsidies to candidates choosing to opt-in to the statute’s public
25 financing provisions. As originally adopted, but later declared unconstitutional, such candidates were given subsidies
from the state for independent expenditures run against such candidates. To track these expenditures, the Citizens Clean
Elections Act provided a registration and reporting mechanism (in addition to the one already existing under Title 16,
Chapter 6, Article 1) for the CCEC. Because such purpose is no longer constitutional, such a duplicative registration and
reporting requirement exceeds CCEC’s statutory authority.

1 reporting requirements in Article 1, which are enforced by the Arizona Secretary of
2 State, Article 2's requirements are duplicative and any attempt to make such
3 requirements applicable, through rulemaking or otherwise, impermissibly deviates
4 from the statute's original intent and purpose, and is the result of an agency seeking
5 to expand its jurisdiction.³

6 Furthermore, Section 16-941(D) requires persons making qualifying
7 independent expenditures to otherwise report such expenditures to CCEC "with the
8 exception of any expenditure listed in Section 16-920..." A.R.S. § 16-941(D).
9 Section 16-920 outlines certain reporting requirements under Article 1 to the Arizona
10 Secretary of State and specifically exempts from reporting, and subsequently, the
11 CCEC's enforcement authority, expenditures in the form of "[c]ontributions for use
12 to support or oppose an initiative or referendum measure or amendment to the
13 constitution." A.R.S. § 16-920(A)(5). LFAF's advertisement addressed relevant
14 public policy issues of national import including: (1) the environment; (2) healthcare;
15 (3) the Second Amendment; and (4) the Federal Budget, which fit squarely in Section
16 16-920(A)(5)'s exemption. (Exhibit 6). The content of the Advertisement, therefore,
17 rendered the reporting requirements of § 16-941(D) and 16-958(A), (B) inapplicable.

18 Finally, as noted *supra*, upon referral by the Arizona Secretary of State's
19 Office, the lawyer representing the Maricopa County Elections Department found no
20 reasonable cause to believe that a violation of Title 16, Chapter 6, Article 1 occurred.
21 (Joint Stipulation of Facts ¶ 38) (Exhibit 8). In other words, after review of the very
22 same complaint at issue here, the Maricopa County Elections Department determined
23 unequivocally that LFAF's advertisement did not constitute express advocacy under
24 A.R.S. 16-901.01 and was, therefore, not subject to independent expenditure
25 registration and reporting requirements. *Id.* The Maricopa County Elections

³ As evidence of the CCEC's attempt to provide itself broader authority, the CCEC, in the summer and fall of 2013 implemented new regulations giving the CCEC authority beyond that which is contained in the text of the Citizens Clean Elections Act. *See* Ariz. Admin Reg./Secretary of State. Vol. 19 Issue 45 (Nov. 8, 2013).

1 Department's decision, standing in for the Arizona Secretary of State, renders the
2 CCEC's attempt to apply Section 16-941(D) to LFAF meritless and without legal
3 authority.⁴

4 **II. WHETHER THE CCEC ERRED WHEN IT MADE FINDINGS OF**
5 **FACT AND LAW WHEN IT WAS UNDISPUTED THAT, AT THE**
6 **TIME LFAF RAN ITS ADVERTISEMENT, THE ARIZONA**
7 **SUPERIOR COURT HAD RULED A.R.S § 16-901.01(A)'S**
8 **DEFINITION OF 'EXPRESSLY AVOCATES'**
9 **UNCONSTITUTIONAL.**

10 On November 28, 2012, well before LFAF aired its advertisement, the
11 Maricopa County Superior Court entered its "Final Judgment" in *Committee for*
12 *Justice & Fairness v. Arizona Secretary of State's Office*, No. LC2011-000734-
13 001. (Joint Stipulation of Facts ¶ 8). In its ruling, the Superior Court declared as
14 unconstitutional, A.R.S. § 16-901.01, the statute defining "expressly advocates."
15 *Id.* While the Secretary of State appealed the Superior Court's decision, a stay was
16 not granted, nor was any other type of legal action imposed that stalled or reversed
17 the Superior Court's ruling. The CCEC entertained discussion as to the effect of the
18 Superior Court's ruling at its November 20 open meeting and admitted the Superior
19 Court's ruling controlled at the time LFAF aired its advertisement. (Exhibit 25 at
20 39:5-40:8 and 57:22-58-22, attempting to diminish the effect of the Superior Court's
21 ruling by referring to it as a "minute entry").

22 Therefore, when LFAF composed and aired its advertisement, it did so relying
23 on the fact that an Arizona court of competent jurisdiction deemed Arizona's
24 statutory definition of "expressly advocates" to be unconstitutional. The U.S.
25 Supreme Court recognized that unconstitutional laws are unenforceable against those

⁴ It is a severe burden on First Amendment rights afforded to issue advocacy speakers in Arizona to have to expend money and resources fighting legal challenges before two separate agencies that may, as they have in this case, render two very different interpretations of the very same statutory provision. These complicated procedures most certainly chill speech by making any attempt to exert one's First Amendment right to air an issue advertisement prohibitively unpredictable and potentially costly, a result the U.S. Supreme Court explicitly cautions against.

1 who act in reliance on the law's status by establishing the *void ab initio* doctrine,
2 which Justice Field described in *Norton v. Shelby County*. "An unconstitutional
3 statute is not law; it confers no rights; it imposes no duties; it affords no protection; it
4 creates no office; it is, in legal contemplation, as inoperative as though it had never
5 been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886). While the U.S.
6 Supreme Court's direct application of the *void ab initio* doctrine has been softened
7 through the years to accommodate those who become unjustly effected by the
8 retroactive application of an unconstitutional law, the general premise and legal
9 doctrine holds true today for those who reasonably act in reliance on a law's status as
10 being unconstitutional. *See Beatty v. Metropolitan St. Louis Sewer Dist.*, 914
11 S.W.2d 791, 794 (Mo.S.Ct. 1995) (citing *Norton*, at 442) ("The modern view,
12 however, rejects this rule to the extent that it causes injustice to persons who have
13 acted in good faith and reasonable reliance upon a statute later held
14 unconstitutional.").

15 Additionally, federal courts have recognized "that a federal judgment, later
16 reversed or found erroneous, is a defense to a federal prosecution for acts
17 committed while the judgment was in effect." *Clarke v. United States*, 915 F.2d
18 699, 702 (D.C. Cir. 1990) (*en banc*) (quotation marks omitted) (decision based on
19 mootness). This finding is rooted in the notion that legitimate reliance on an
20 official interpretation of the law is a defense. *See United States v. Brady*, 710
21 F.Supp. 290, 294 (D.Colo.1989) citing *United States v. Durrani*, 835 F.2d 410, 422
22 (2d Cir. 1987); *United States v. Duggan*, 743 F.2d 59, 83 (2d Cir. 1984) (although
23 there are few exceptions to the rule that ignorance of the law is no excuse, there "is
24 an exception for legitimate reliance on official interpretation of the law"). "The
25 doctrine is applied most often when an individual acts in reliance on a statute or an
express decision by a competent court of general jurisdiction . . ." *United States v.*
Albertini, 830 F.2d 985, 989 (9th Cir. 1987); *United States v. Moore*, 586 F.2d

1 1029, 1033 (4th Cir. 1978) ("Of course, one ought not be punished if one
2 reasonably relies on a judicial decision later held to have been erroneous").

3 By parallel analogy, the CCEC is, in this instance, attempting to enforce a
4 state law that had been declared by a court of competent jurisdiction with power
5 over the CCEC to be unconstitutional. It was not until several weeks *after* the
6 CCEC decided to pursue this matter that the Court of Appeals reversed the
7 judgment of the trial court. *Comm. for Justice & Fairness (CJF) v. Ariz. Secy. of*
8 *State's Office*, 235 Ariz. 347, 332 P.3d 94 (App. 2014).⁵ In fact, the CCEC's
9 position appeared to be that it was LFAF's "burden" to demonstrate how a valid
10 declaratory judgment of the Maricopa County Superior Court was in fact "binding"
11 on the CCEC. *See* (Exhibit 25 at 58:9-20).

12 It is undisputed that A.R.S. § 16-901.01 was considered unconstitutional by
13 the Maricopa County Superior Court at the time LFAF aired its advertisement.
14 CCEC, therefore, cannot enforce the statute's express advocacy reporting
15 requirements upon LFAF, as doing so would violate the legal doctrine of *void ab*
16 *initio* and the constitutional due process requirements of not permitting an agency to
17 enforce an unconstitutional law. The Arizona Secretary of State's office is in fact
18 following this doctrine in a similar case where a federal court has declared the State's
19 definition of "political committee" to be so vague as to be unenforceable. *Galassini*
20 *v. Town of Fountain Hills*, 2014 U.S. Dist. LEXIS 168772 (D. Ariz. Dec. 4, 2014).
21 See also "Galassini Impact on Campaign Finance Law" ("Our office is currently
22 not enforcing the compliance provisions of campaign finance law due to the
23 district court order.") available at <http://www.azsos.gov/cfs/Galassini.htm> (visited
24 December 27, 2014).

25 ⁵ As noted at fn 1, supra, a Petition for Review of the CJF decision is pending before the Arizona Supreme Court.
Committee for Justice & Fairness v. Arizona Secretary of State, CV-14-0250-PR (Ariz.S.Ct.).

1 The CCEC’s position is strikingly different from that of the Secretary of
2 State – while presumably being advised by the same Attorney General’s Office –
3 and is a position that cannot be upheld.

4 **III. WHETHER THE CCEC VIOLATED THE FIRST AMENDMENT**
5 **WHEN IT RELIED ON SUBJECTIVE ANALYSIS IN FINDING**
6 **LFAF’S ADVERTISEMENT CONSTITUTED EXPRESS**
7 **ADVOCACY.**

8 Longstanding First Amendment jurisprudence requires a court to apply an
9 objective standard when assessing whether speech constitutes the functional
10 equivalent of express advocacy. *See Citizens United* 558 U.S. at 324-325, (citing
11 *WRTL* at 474 n.7 (noting “the functional-equivalent test is objective: [A] court should
12 find that [a communication] is the functional equivalent of express advocacy only if it
13 is susceptible of no reasonable interpretation other than as an appeal to vote for or
14 against a specific candidate.” (*internal quotations omitted*)). If the Arizona statutory
15 definition allows for a subjective analysis of context, then this statute has to be
16 unconstitutional following the Supreme Court decisions in *Citizens United* and
17 *WRTL*.

18 The U.S. Supreme Court has held that only express advocacy or its functional
19 equivalent is subject to regulation through campaign finance laws. *See McConnell v.*
20 *FEC*, 540 U.S. at 93, 105 (2003); *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976) (per
21 curiam). In *Buckley*, the Supreme Court emphasized the unique nature of “explicit
22 words of advocacy of election or defeat of a candidate.” *Buckley*, 424 U.S. at 43
23 (finding the following words constituted express advocacy: “vote for, elect, support,
24 cast your ballot for, Smith for Congress, vote against, defeat, reject”).

25 *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

1 in total, and with limited reference to external events, are susceptible of “[n]o other
2 reasonable interpretation but as an exhortation to vote for or against a specific
3 candidate.” *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987). A later Ninth
4 Circuit opinion clarified and narrowed *Furgatch* by noting when interpreting express
5 advocacy, the Ninth Circuit presumes express advocacy “must contain some explicit
6 words of advocacy.” *California Pro-Life Counsel v. Getman*, 328 F.3d 1088, 1098
7 (9th Cir. 2003); *also Furgatch*, 807 F.2d. at 864 (“context cannot supply a meaning
8 that is incompatible with, or simply unrelated to, the clear import of the words”).
9 While express advocacy may not be limited to “circumstances where an
10 advertisement only uses so-called magic words...,” Supreme Court precedent
11 explicitly confines the contours of express advocacy to protect the speaker’s
12 legitimate right to engage in issue advocacy speech. *Getman* and *Furgatch*
13 demonstrate that the most expansive definition of express advocacy requires that
14 speech only qualifies as express advocacy if it “presents a clear plea for action, and
15 thus speech that is merely informative is not covered by the Act.” *Furgatch*, 807
16 F.2d. at 864.

17 The CCEC erred in its analysis of LFAF’s advertisement by failing to apply an
18 objective standard. *See WRTL*, 551 U.S. at 470 (requiring a standard that “focus[es]
19 on the substance of the communication rather than amorphous considerations of
20 intent and effect.”). In rendering its decision, the CCEC overlooked two critical
21 components of LFAF’s advertisement. First, LFAF’s advertisement did not proffer a
22 clear plea for action in conjunction with Mr. Smith’s campaign for Arizona
23 Governor. Second, the substance of LFAF’s advertisement, when viewing the four
24 corners of the advertisement, shows that it was: (i) targeted to effectuate a legitimate
25 issue advocacy message, and (ii) part of a broader issue advocacy campaign.

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

2 Contrary to well established U.S. Supreme Court precedent, the CCEC erred
3 when it ruled that LFAF’s advertisement constituted the functional equivalent to
4 express advocacy. Such a reading of the advertisement required the CCEC to exert a
5 subjective, intent-based analysis of the facts; a chore that flies directly in the face of
6 Justice Roberts and the Supreme Court in *WRTL*. *See WRTL* 551 U.S. at 467
7 (declining to adopt a test “turning on the speaker’s intent to affect an election.”).

8 At the heart of the CCEC’s decision is its reliance on the CCEC Executive
9 Director’s Probable Cause Recommendation (“Recommendation”) presented to the
10 Commission from Tom Collins, CCEC’s Executive Director. Instead of applying an
11 objective analysis of the facts, the Recommendation veils its findings in subjective,
12 intent-based assertions. The instances are numerous and appear frequently
13 throughout the Recommendation. On page 6 and continuing on to page 7 of the
14 Recommendation, it suggests that LFAF’s advertisement is meant to carry a message
15 that sways Republican primary voters. (Exhibit 21 at pp. 6-7). On page 10, the
16 Recommendation states “the advertisement places Mr. Smith in a negative light with
17 Republican primary voters.” (Exhibit 21 at p. 10). Absent from the
18 Recommendation, however, is empirical evidence of such an impact. The basis for
19 the Recommendation’s statements are even more mysterious when considering the
20 fact that Arizona does not have closed primaries, which leads one to believe that the
21 advertisement most certainly may have been interpreted differently by different
22 primary election voters; Republicans, Independents and those who register without a
23 party preference.

23 Furthermore, the CCEC on multiple occasions pressed to discern the intent
24 behind LFAF’s advertisement through questioning during its public meetings. *See*
25 (Exhibit 14 at 58:10-59:4), (Exhibit 17 at 22:9-23:16), (Exhibit 25 at 29:14-34:25).

1 Instead of focusing on the four corners of the ad itself, the CCEC obscured and
2 confused the ad’s meaning with contextual and intent-based rhetoric. While context
3 may be considered when determining whether an advertisement constitutes the
4 functional equivalent of express advocacy, the U.S. Supreme Court does not support
5 the CCEC’s considerable reliance on contextual considerations. *See WRTL 551 U.S.*
6 *at 473-474.* In fact, the Supreme Court concluded that contextual considerations
7 “should seldom play a significant role” in determining whether speech is express
8 advocacy. *WRTL, 551 U.S. at 473-474.* While “basic background information that
9 may be necessary to put an ad in context” may be considered, the Court noted that
10 courts should not allow basic background information to “become an excuse for
discovery.” *Id.*

11 Thus, the Recommendation’s argument, which was relied upon by the CCEC,
12 that the advertisement’s call to action “is belied by the context of the advertisement”
13 in that the advertisement does not relate to pending legislation in the City of Mesa
14 runs counter to Supreme Court precedent. (Exhibit 21 at p. 9). The reality of the
15 matter is that the federal policy issues mentioned in the advertisement (environment;
16 healthcare; the Second Amendment; and the Federal Budget) are relevant issues of
17 national importance.

18 References throughout the Recommendation, as well as comments made
19 during public Commission meetings, assume that statements affixed to policy
20 positions of the U.S. Conference of Mayors were purposed to undermine Mayor
21 Smith’s efforts to be elected as governor. *See* (Exhibit 25 40:10-20, 44:4-16, 48:3-
22 50:2). The reality is that Mayor Smith held the highest position within the U.S.
23 Conference of Mayors and bore the burden of being associated with the issues of
24 public importance promulgated by the Conference. In many ways, the federal public
25 policy issues addressed in LFAF’s advertisement constituted matters of greater
importance than Mayor Smith’s personal ambitions for higher office. Under the

1 CCEC’s analysis, there can be no such thing as a genuine issue advertisement when
2 that ad mentions a candidate for public office at anytime before an election (even five
3 months in advance of a primary and before candidate filings even occurred) even in
4 cases where that candidate maintains a public position and the ad articulates a clear
5 policy statement. Justice Roberts dismissed such an attempt outright in saying,

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

14 *WRTL*, 551 U.S. at 471 (citing *McConnell* 540 U.S. at 206).

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

17 Arizona defines express advocacy to mean only those communications that
18 explicitly urge the election or defeat of a particular candidate or that “in context can
19 have no reasonable meaning other than to advocate the election or defeat of the
20 candidate(s), as evidenced by factors such as the presentation of the candidate(s) in a
21 favorable or unfavorable light, the targeting, placement or timing of the
22 communication or the inclusion of statements of the candidate(s) or opponents.”
23 A.R.S. § 16-901.01(A).

24 When objectively analyzed, LFAF’s advertisement is seen for what it is, an
25 issue advocacy communication. A reasonable person reviewing the advertisement
will notice that there is no mention of any election whatsoever. First, the ad does not
mention a candidate for office. Second, 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

1 advertisement is genuine issue advocacy that has a reasonable meaning other than to
2 defeat Mr. Smith in the Arizona primary election.

3 In contrast to the CCEC's purported "objective" analysis of LFAF's
4 advertisement, are comments made by ordinary citizens made in response to the ad
5 and posted to the Legacy Foundation Action Fund's YouTube channel, and the
6 differing conclusion reached by the Maricopa County Department of Elections
7 referenced, *supra*. Some of the comments from ordinary citizens include the
8 following:

- 9 • I live in Chandler (the city bordering Mesa to the southwest) this
10 ad made me want to volunteer for Scott Smith's Mayoral
11 Campaign.
- 12 • Wow! Scott Smith is supportive of health care for everyone,
13 reducing pollution to stop global warming and keep guns out of
14 the hands of lunatics? Sounds like a great mayor to me! Go Scott!
- 15 • ...[T]his ad actually makes Mesa's Mayor, Scott Smith sound
16 wonderful. Mayor Smith supports great ideas that are beneficial
17 to common Americans....

18 Therefore, while the CCEC claims that the advertisement can only have one
19 "objective" meaning, this simply is not the case. These comments and the conclusion
20 of the Maricopa County Department of Elections demonstrate that there is more than
21 one reasonable interpretation of the advertisement, thereby rendering CCEC's order
22 and assessed penalty in error.

23 Without mere mention of the reasonable alternative interpretations highlighted
24 above, the CCEC repeatedly suggested that the *only* reasonable meaning of the ad
25 was to advocate the defeat of Mayor Smith. However, the CCEC in a biased fashion
never appreciated LFAF's larger mission, which required it to be critical of the policy
positions supported by the U.S. Conference of Mayors. Common sense dictates that,
when airing an advertisement that seeks to oppose the policy positions of an

1 organization, it makes sense to identify those individuals responsible for the
2 organization's decision making. Mayor Smith, at the time the advertisement aired,
3 was the President of the U.S. Conference of Mayors and, therefore, served as the
4 figurehead of that organization.⁶ Whether Mr. Smith liked it or not, when he
5 assumed that role, he undertook the public persona of being responsible for the public
6 positions and policies of the Conference. This holds true for past positions of the
7 Conference as well. Therefore, the fact that the advertisement aired during the last
8 two weeks of Mayor Smith's term as mayor and President of the U.S. Conference of
9 Mayors is irrelevant since the language in the advertisement very clearly criticized
10 the policy positions of the U.S. Conference of Mayors.

11 **i. LFAF's Advertisement Was Targeted To Be Effective For Its
12 Issue Advocacy Purpose.**

13 LFAF's advertisement ran in Mesa, AZ. However, a person looking to
14 purchase television airtime in Mesa, AZ, cannot simply target its purchase to the city
15 of Mesa. Instead, because of the configuration of television stations and coverage
16 areas, LFAF had to purchase airtime in the Phoenix, AZ market. *See* DMA analysis
17 attached hereto as Exhibit A. *See also* attached Ducey Response 7/15/14 attached
18 hereto as Exhibit B at p. 11 and Exhibit 10 at p. 6. The Recommendation cited the
19 fact that LFAF targeted an audience greater than Mesa to suggest that such targeting
20 was purposed to sway voters rather than to address policy issues to Mr. Smith's
21 constituents. (Exhibit 21 at p. 6). Such an assertion is not taking into consideration
22 the practical aspect of buying television airtime. LFAF was forced to purchase its
23 airtime in the Phoenix, AZ market, the most narrow market available. This fact in no
24 way takes away from the advertisement's issue advocacy message. To find

25 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 mentioning other leaders in that organization in Sacramento, CA and Baltimore, MD, and continues to criticize that body and its current leadership on its website. <http://legacyaction.us/mayors>.

1 otherwise would stifle protected First Amendment Free Speech rights in most any
2 situation where such precise targeting is made unfeasible at no fault of the speaker.

3 **ii. LFAF's Advertisement Was Part Of A Broad Issue Advocacy**
4 **Campaign.**

5 LFAF's advertisement aired nearly five months before any election, a span of
6 time great enough to vastly diminish any alleged influence the ad may have had on
7 any election. (Joint Stipulation of Facts ¶ 14). The timing, in terms of airing of an ad
8 to the date of the election, proved vital in many courts' decisions, contrary to the
9 Recommendation's assertion otherwise. *See WRTL*, 551 U.S. at 472 (finding that
10 every ad covered by BCRA § 203 will, by definition, air just before an election –
11 specifically 30 days in advance of a primary or 60 days in advance of a general
12 election); *Furgatch*, 807 F.2d at 865 (finding it determinative that the newspaper
13 advertisement was run one week prior to the general election); *Committee for Justice*
14 *& Fairness v. Arizona Secretary of State's Office*, 325 P.3d 94, 101, 102 (App. 2014)
15 (noting the ad was aired within days of the election and immediately before the
16 election).

17 Both the Recommendation and the CCEC emphasized that LFAF's
18 advertisement began airing after Mr. Smith announced his candidacy for governor.
19 The Recommendation suggested that the CCEC should believe that Mr. Smith's role
20 as President of the U.S. Conference of Mayors was not applicable or for some reason
21 did not carry as much significance as Mr. Smith's newly-proclaimed role as
22 candidate for governor. It is simply not the case that once Mr. Smith announced his
23 candidacy for governor he relinquished his roles as Mayor of Mesa or President of
24 the U.S. Conference of Mayors. In fact, Mr. Smith remained as Mayor of Mesa and
25 President of the U.S. Conference of Mayors until April 15, 2014, which was after
LFAF's advertisement was last broadcast. Therefore, for Commissioner Hoffman to
remark that "I feel confident that it – that this ad would not have been run had [Mr.

1 Smith] not announced a – gubernatorial campaign” shows just how shortsighted the
2 Commission’s analysis truly was and how focused the Commission was on its
3 subjective analysis of its perception of LFAF’s intent. (Exhibit 25). This statement
4 does not even consider LFAF’s organizational views and broader campaign to
5 combat policies promulgated by the U.S. Conference of Mayors.

6 By focusing on the timing of LFAF’s advertisement relative to Mr. Smith’s
7 announcement of his candidacy rather than to the date of the election nearly five
8 months away, the CCEC turned a blind eye to established First Amendment
9 jurisprudence. Under the CCEC’s analysis, a public official who announces his
10 candidacy for another public office cannot be the subject of an issue advocacy
11 advertisement concerning actions taken by the public official during his tenure in his
12 existing office. Such a standard does not support the notion that “[s]peech is an
13 essential mechanism of democracy, for it is the means to hold officials accountable to
14 the people.” *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

15 **IV. WHETHER THE CCEC EXCEEDED ITS STATUTORY**
16 **AUTHORITY WHEN IT IMPOSED CIVIL PENALTIES AGAINST**
17 **LFAF UNDER A.R.S. § 16-942(B).**

18 The CCEC may not assess a penalty against LFAF because it has failed to
19 identify the candidate the advertisement was “by or on behalf of” and the “candidate
20 or candidate’s campaign account” that shall be “jointly and severally liable” for any
21 civil penalty assessment. A.R.S. § 16-942(B).

22 The CCEC relied on A.R.S. §16-957 as well as A.A.C. R2-20-109(F)(3) as its
23 bases for asserting and applying a civil penalty against LFAF for delinquent
24 independent expenditure reports. (Exhibit 28). Both the statute and regulation point
25 to A.R.S. § 16-942(B) as the sole means of assessing any civil penalty. However, the
CCEC lacked the ability to exact a civil penalty under A.R.S. § 16-942(B), or any

1 other statute for that matter, because the statute’s enforcement provisions are clear in
2 that they refer to candidates or organizations making expenditures “by or on behalf of
3 any candidate.” A plain language reading of the statutory section below clearly
4 illustrates this requirement,

5 In addition to any other penalties imposed by law,
6 the civil penalty for a violation *by or on behalf of*
7 *any candidate* of any reporting requirement imposed
8 by this chapter shall be one hundred dollars per day
9 for candidates for the legislature and three hundred
10 dollars per day for candidates for statewide office.
11 The penalty imposed by this subsection shall be
12 doubled if the amount not reported for a particular
13 election cycle exceeds ten percent of the adjusted
14 primary or general election spending limit. No
15 penalty imposed pursuant to this subsection shall
16 exceed twice the amount of expenditures or
17 contributions not reported. *The candidate and the*
18 *candidate's campaign account shall be jointly and*
19 *severally responsible* for any penalty imposed
20 pursuant to this subsection.

21 A.R.S. § 16-942(B) (emphasis added) (*See Exhibit W p. 13*). Before the CCEC is
22 able to impose the statutory penalties provided in Section 16-942(B) against LFAF, it
23 must: (1) identify the candidate for which LFAF’s advertisement was “by or on
24 behalf of,” and (2) hold that candidate and the candidate’s campaign jointly and
25 severally responsible.

26 The CCEC failed to identify the statutorily-required candidate and attribute
27 such to LFAF in light of its findings at its August 21, 2014 meeting as well as its
28 November 20, 2014 meeting. At its August 21, 2014 meeting, the Commission voted
29 to find no reason to believe that coordination between LFAF and Ducey 2014

1 Campaign existed.⁷ Then, during its November 20, 2014 meeting, commissioners
2 engaged in a series of questions from which it is clear the Commission does not fully
3 grasp the notion that legislative language cannot be superfluous. See (Exhibit Z
4 40:10-24) (“So, I don’t – I don’t quite understand why you’re saying a campaign has
5 to be identified or who would benefit from.”).

6 The principles of statutory construction are grounded in the goal of giving
7 effect to the Legislature’s intent, or in the case of the Citizens Clean Elections Act,
8 the people’s intent. *People’s Choice TV Corp. v. City of Tuscon*, 202 Ariz. 401, 403,
9 P7, 46 P.3d 412, 414 (2012). It is only when the language of a statute is ambiguous
10 that principles of statutory construction are applied. *Aros v. Beneficial Ariz., Inc.*,
11 194, Ariz. 62, 66, 977 P.2d 784, 788 (1999). If a statute is unambiguous, the statute
12 is applied without applying such principles. *Id.* See *In the Matter of: Joel Fox dba*
13 *SCA*, 2009 AZ Admin. Hearings LEXIS 1307, 25-27 (holding “The County’s
14 position is not consistent with principles of statutory construction” when it
15 interpreted statutory language to be inapplicable in contradiction to legislative intent).

16 A.R.S. § 16-942(B) is not ambiguous and, therefore, can only be applied to a
17 candidate or an organization working on behalf of a candidate. Because LFAF is
18 certainly not a candidate and the CCEC already found LFAF not to be working on
19 behalf of (or even in coordination with) the Ducey 2014 Campaign, the CCEC erred
20 in applying Section 16-942(B) against LFAF.

21 Even if the language were to be deemed ambiguous, application of principles
22 of statutory construction command that the statutory language of “candidate” and “on
23 behalf of any candidate” have a meaning and purpose. The CCEC’s failure to
24 consider these mandatory statutory requirements require that CCEC be prohibited
25 from applying this statutory civil penalty provision against LFAF.

⁷ At the time of the Commission’s consideration of this matter on July 31, 2014, there were seven candidates for the Republican nomination for Governor, including now-Governor Ducey and Mayor Smith.

1 The absence of any clearly applicable penalty provision also supports LFAF's
2 argument, outlined *supra*, that the CCEC lacks jurisdiction over this matter in the
3 first instance.

4 CONCLUSION

5 The CCEC, even though it did not have jurisdiction over this matter, applied a
6 subjective, intent based analysis to find LFAF's advertisement constituted the
7 functional equivalent of express advocacy, a finding that runs counter to well
8 established U.S. Supreme Court precedent. LFAF acted in good faith reliance on the
9 fact that Arizona's express advocacy statute had been ruled unconstitutional prior to,
and during, the airing of the advertisement.

10 To the extent there is any overlap between express advocacy and issue
11 advocacy in this matter, the Commission was required to "give the benefit of any
12 doubt to protecting rather than stifling speech." *WRTL*, 551 U.S. at 469. Instead, the
13 Commission actually recognized that this analysis constituted a case of "grayness"
14 but instead of following U.S. Supreme Court precedent, it found that "this one is far
15 enough in the gray zone that it was express advocacy." (Exhibit 25 59:13-14).

16 The CCEC's order and assessed penalties should be reversed. This court
17 should conclude that the CCEC exceeded its statutory authority in asserting
18 jurisdiction over this matter, that LFAF's Arizona advertisement was not express
19 advocacy and was, therefore, not subject to the CCEC's reporting requirements, and
20 that the CCEC has no basis in fact or law for imposing any civil penalty at all in this
21 matter.

22 DATED this 6th day of January, 2015.

23 **Bergin, Frakes, Smalley & Oberholtzer, PLLC**

24 */s/ Brian M. Bergin*

25 Brian M. Bergin

4455 East Camelback Road, Suite A-205

1 Phoenix, Arizona 85018
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4 */s/ Jason Torchinsky (with permission)*
5 Jason Torchinsky
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9 **ORIGINAL** of the foregoing filed this
10 6th day of January, 2015 at:

11 Office of Administrative Hearings
12 1400 West Washington, Suite 101
13 Phoenix, Arizona 85007

14 And a **COPY** emailed/mailed
15 this 6th day of January, 2015 to :

16 Mary R. O'Grady
17 Osborn Maledon
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21 *Attorney for Defendant*

22 By: /s/ Rachell Chuirazzi
23
24
25

EXHIBIT A

POLIDATA ® REGION MAPS

County-Based Regions
and Markets for

ARIZONA

15 Counties and Portions of

5 MSAs (Metropolitan Statistical Areas from OMB for 1999)

4 GMRs (Metro Groups from Polidata and Gary Maloney for 1999)

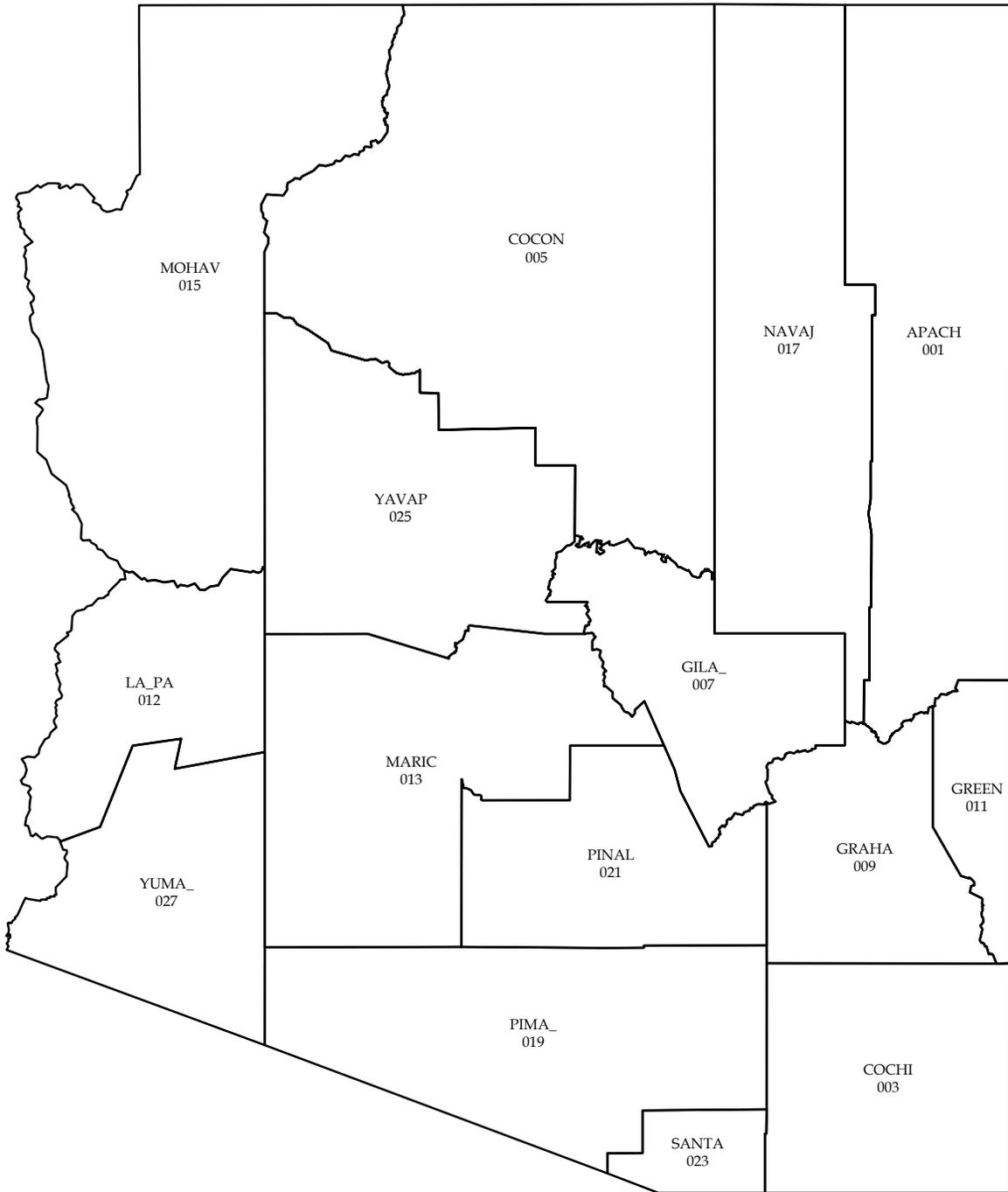
4 DMAs (Designated Markets Areas from Nielsen for 2000)

7 ISRs (Internal State Regions from Polidata for 1996)

ARIZONA, 15 Counties

Polidata County Abbreviations and County FIPS Codes

State FIPS Code is 04

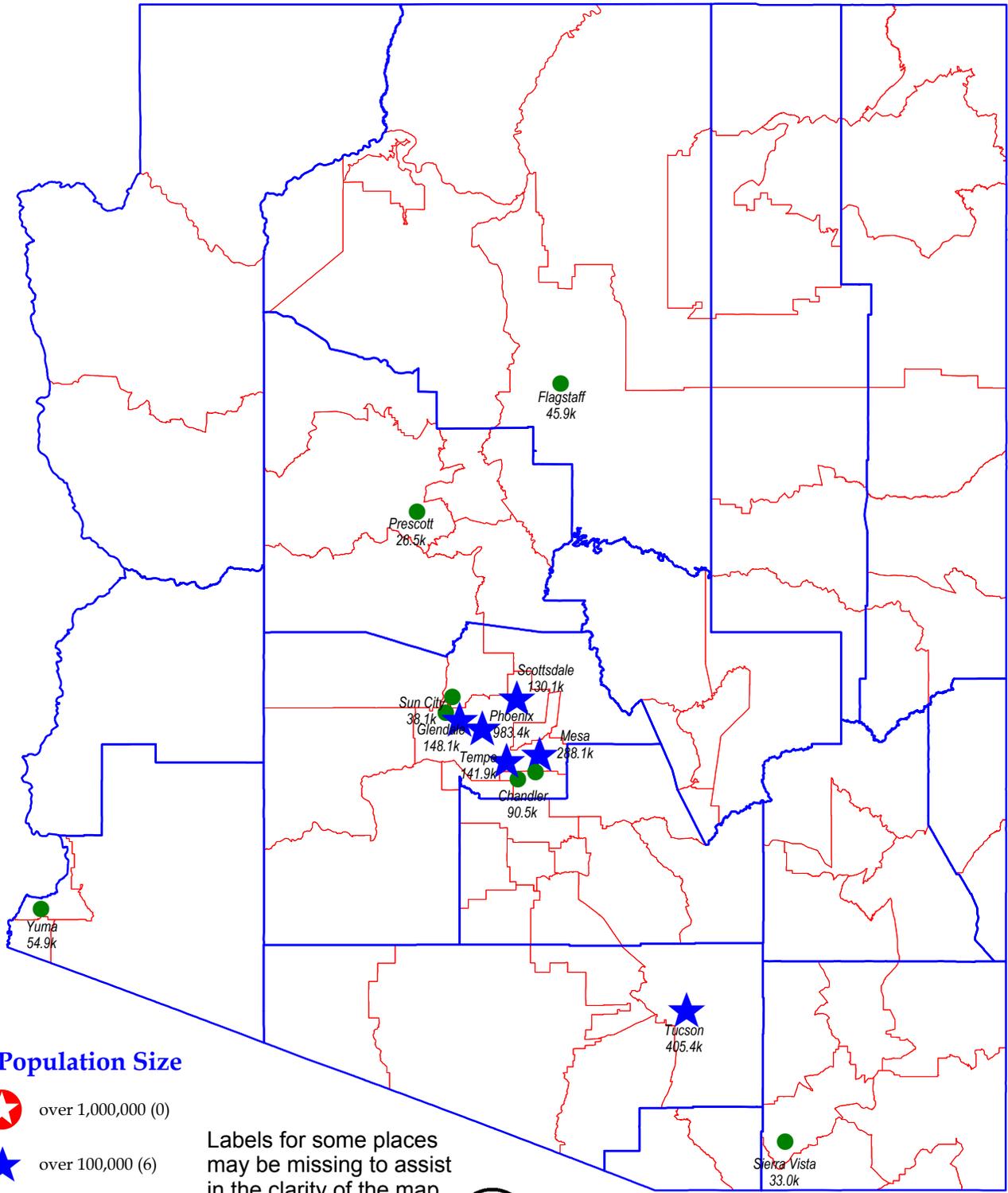


Counties are the primary political subdivisions of states. Equivalents include Parishes, Boroughs and Independent Cities.



ARIZONA, Selected Places

2000 Census of Population and Housing, County Subdivisions



Population Size

-  over 1,000,000 (0)
-  over 100,000 (6)
-  over 25,000 (8)

Labels for some places may be missing to assist in the clarity of the map.



County Code Listing

ARIZONA, 15 Counties

County or Equivalent	Cy Seq	Population Centers	County Seat	1990 Tot. Pop.	2000 Tot. Pop.	FIPS Code	Polidata CyAbb
APACHE	1	Chinle	St. Johns	61,591	69,423	1	APACH
COCHISE	2	Sierra Vista	Bisbee	97,624	117,755	3	COCHI
COCONINO	3	Flagstaff	Flagstaff	96,591	116,320	5	COCON
GILA	4	Payson	Globe	40,216	51,335	7	GILA_
GRAHAM	5	Safford	Safford	26,554	33,489	9	GRAHA
GREENLEE	6	Clifton	Clifton	8,008	8,547	11	GREEN
LA PAZ	7	Parker	Parker	13,844	19,715	* 12	LA_PA
MARICOPA	8	Phoenix	Phoenix	2,122,101	3,072,149	* 13	MARIC
MOHAVE	9	Lake Havasu City	Kingman	93,497	155,032	15	MOHAV
NAVAJO	10	Winslow	Holbrook	77,674	97,470	17	NAVAJ
PIMA	11	Tucson	Tucson	666,957	843,746	19	PIMA_
PINAL	12	Casa Grande	Florence	116,397	179,727	21	PINAL
SANTA CRUZ	13	Nogales	Nogales	29,676	38,381	23	SANTA
YAVAPAI	14	Prescott	Prescott	107,714	167,517	25	YAVAP
YUMA	15	Yuma	Yuma	106,895	160,026	27	YUMA_
ARIZONA		Phoenix	Phoenix	3,665,339	5,130,632	4	STATE

Population by Areas/Markets

ARIZONA



AZ	Seq	2000 Est. Pop.	Net % 90-00	Area/Market	% of State	% of Market
		5,130,632	40.0	ARIZONA		

MSAs-Metropolitan Statistical Areas (OMB, 1999)

1	116,320	20.4	Flagstaff, AZ - UT MSA	2.3	95.1
2	155,032	65.8	Las Vegas, NV - AZ MSA	3.0	9.9
3	3,251,876	45.3	Phoenix - Mesa, AZ MSA	63.4	100.0
4	843,746	26.5	Tucson, AZ MSA	16.4	100.0
5	160,026	49.7	Yuma, AZ MSA	3.1	100.0
6	603,632	30.4	Not Assigned to Metro Area (NAM)	11.8	100.0

GMRs-Metro Groups (Polidata/Maloney, 1999)

1	3,251,876	45.3	Phoenix Metro	63.4	100.0
2	843,746	26.5	Tucson Metro	16.4	100.0
3	431,378	45.3	Other Metro	8.4	100.0
4	603,632	30.4	Non Metro	11.8	100.0

DMAs-Designated Market Areas (Nielsen, 2000)

1	3,901,301	44.4	Phoenix, AZ DMA	76.0	100.0
2	160,026	49.7	Yuma - El Centro, AZ - CA DMA	3.1	52.9
3	999,882	25.9	Tucson (Nogales), AZ DMA	19.5	100.0
4	69,423	12.7	Albuquerque - Santa Fe, NM - AZ - CO DMA	1.4	4.1

ISRs-Internal State Regions (Polidata, 1996)

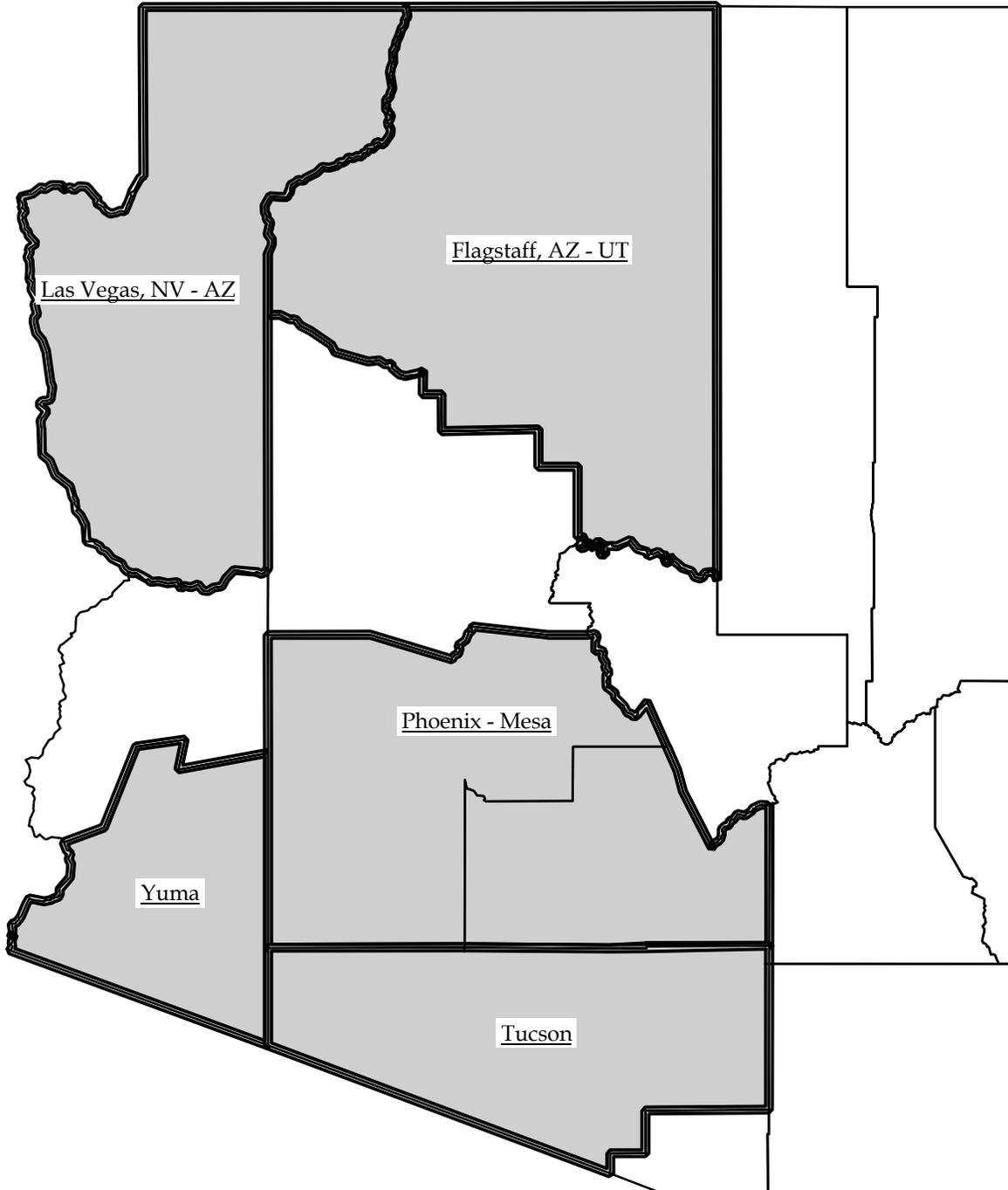
1	116,320	20.4	Canyon Country	2.3	100.0
2	166,893	19.9	Indian Country	3.3	100.0
3	93,371	24.9	High Country	1.8	100.0
4	167,517	55.5	Central Territory	3.3	100.0
5	3,251,876	45.3	Valley of the Sun	63.4	100.0
6	334,773	56.3	Arizona's West Coast	6.5	100.0
7	999,882	25.9	Old West Country	19.5	100.0

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1. Areas/Markets are county-based regions comprised of whole counties or equivalents. This includes Parishes (LA), Independent Cities (MD,MO,NV,VA) Boroughs (AK), and Census Areas (AK).
2. Metropolitan Statistical Areas (MSAs) reflect federal statistical areas. Some counties are not assigned. MSAs are contiguous yet may cross state borders. NECMAs are used in New England.
3. Designated Market Areas (DMAs) reflect television media markets. All counties are assigned to one DMA (a few counties are actually split). DMAs may be noncontiguous and may cross state borders.
4. Internal State Regions (ISRs) reflect geographic regions based largely upon travel regions. All counties are assigned. ISRs are contiguous and internal to state borders.
5. Metro Groups (GMRs) reflect the size and nature of metropolitan counties. They are based upon work done by Dr. Gary Maloney in 1997 and updated/modified/expanded by Polidata.
6. Codes are assigned by either OMB, Nielsen or Polidata to be unique within the nation. Counties unassigned to a metro area are grouped together for consistency purposes.

Metropolitan Statistical Areas, MSAs

Groups of Counties assigned by OMB (1999)

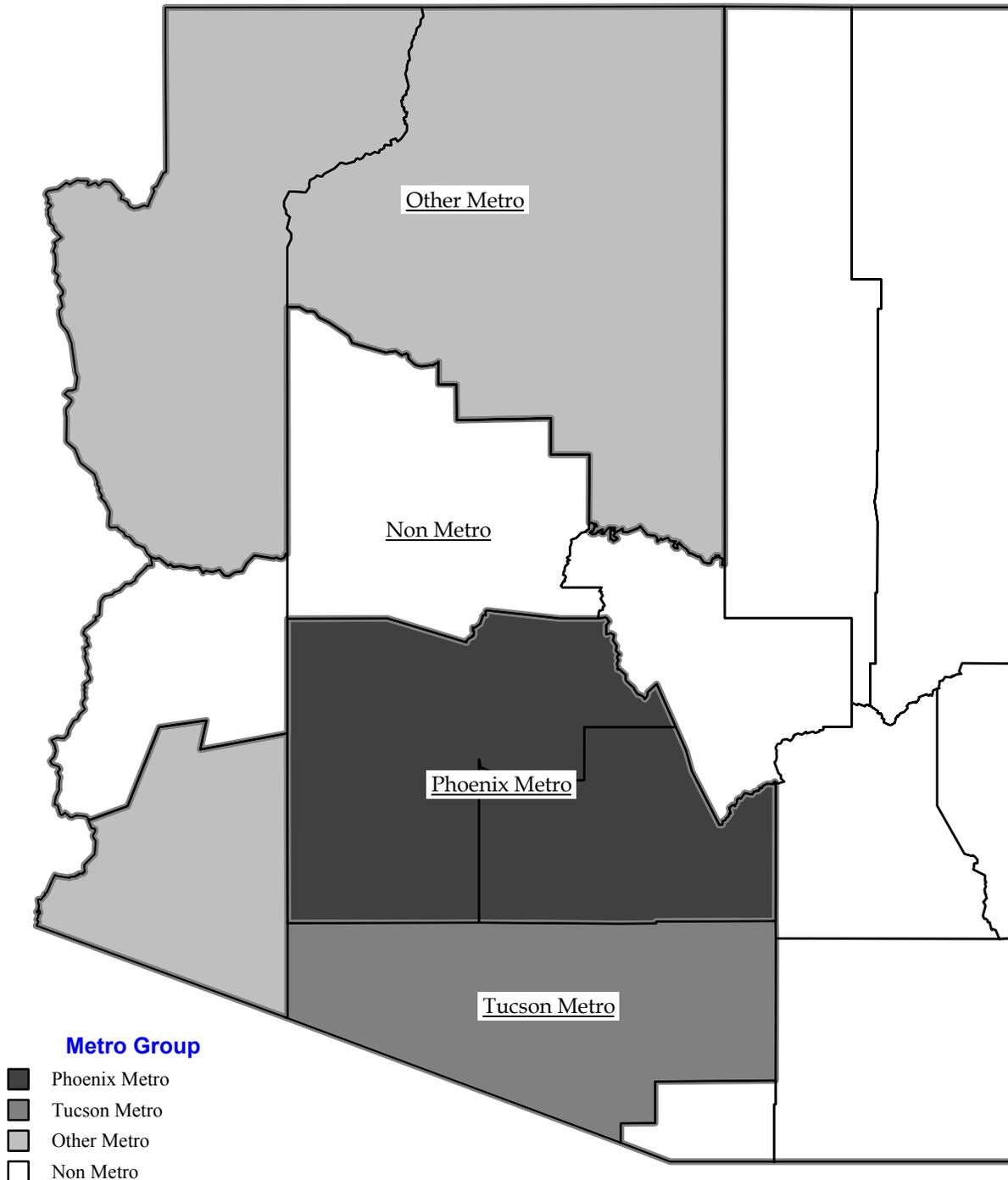


MSAs reflect federal statistical regions. Some counties are not assigned. MSAs are contiguous yet may cross state boundaries.



Metro Groups, GMRs

Groups of Counties assigned by Polidata and Dr. Gary Maloney (1999)

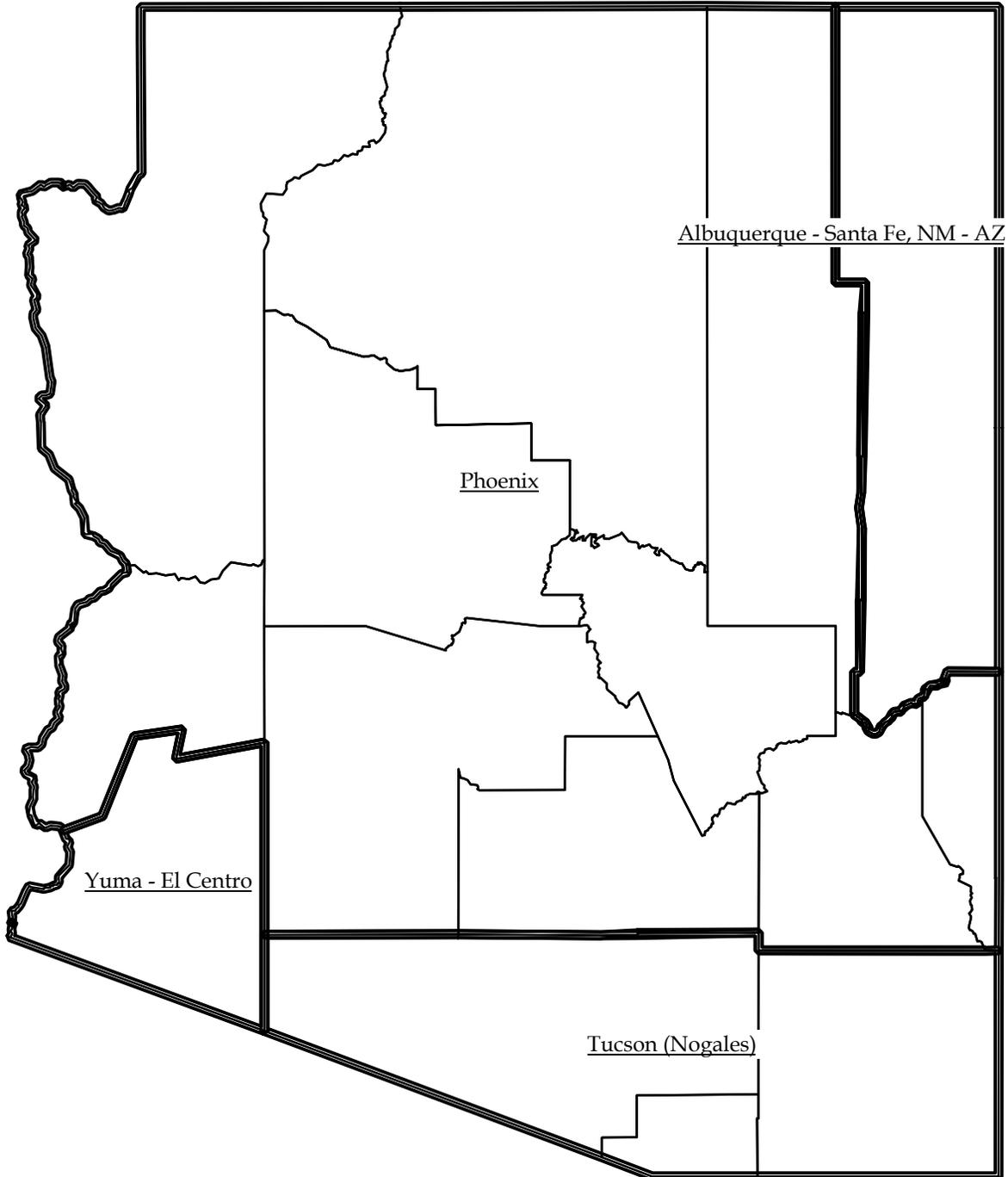


GMRs reflect the size and nature of metropolitan counties. Shaded counties are Metropolitan.



Designated Market Areas, DMAs

Groups of Counties assigned by Nielsen Media Research (2000)

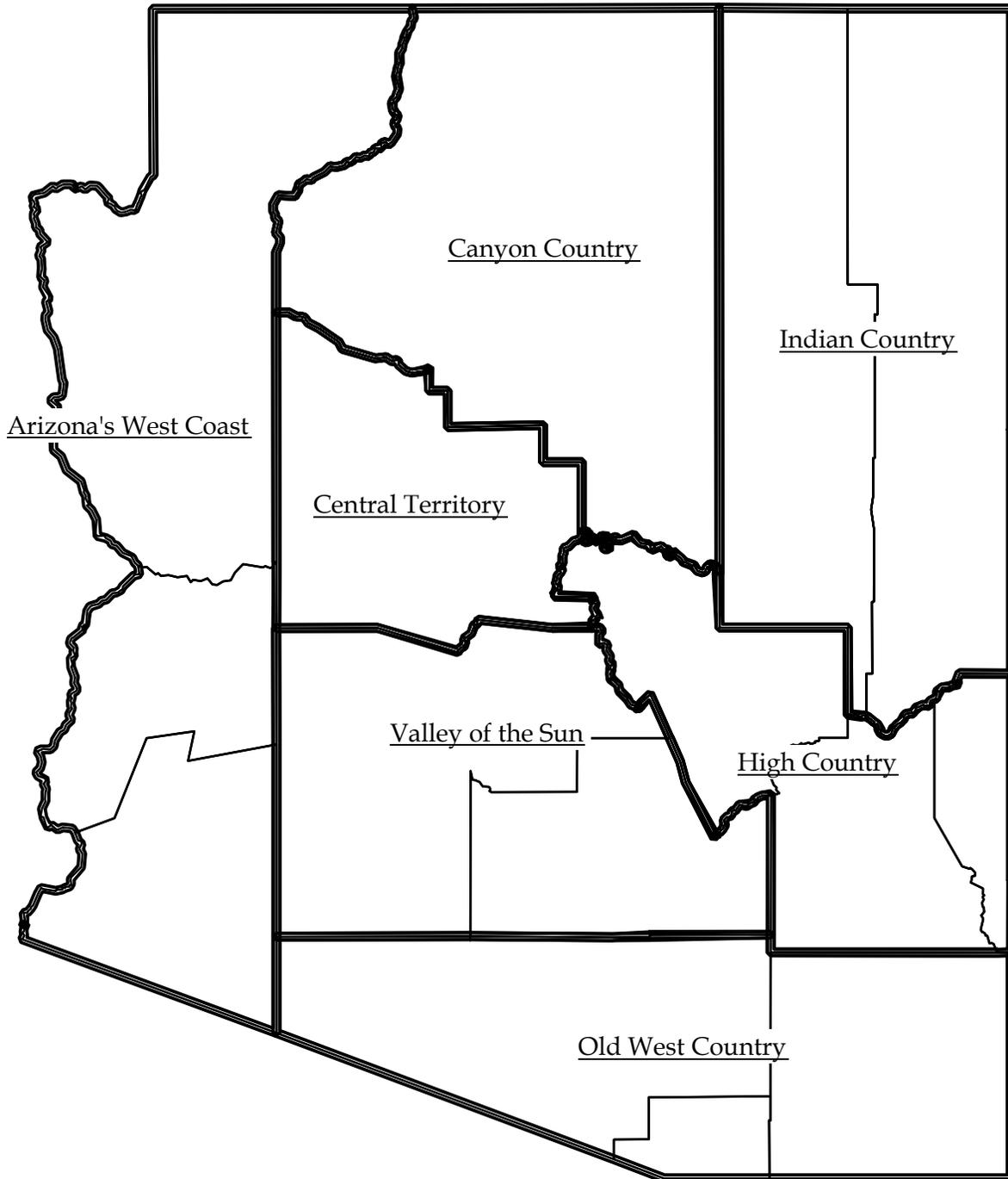


DMAs reflect television media markets. Every county is assigned (very few are split). DMAs may be noncontiguous and cross state borders.



Internal State Regions, ISRs

Groups of Counties assigned by Polidata (1996)



ISRs reflect geographic regions based largely upon travel regions. Every county is assigned and regions are internal to state borders.



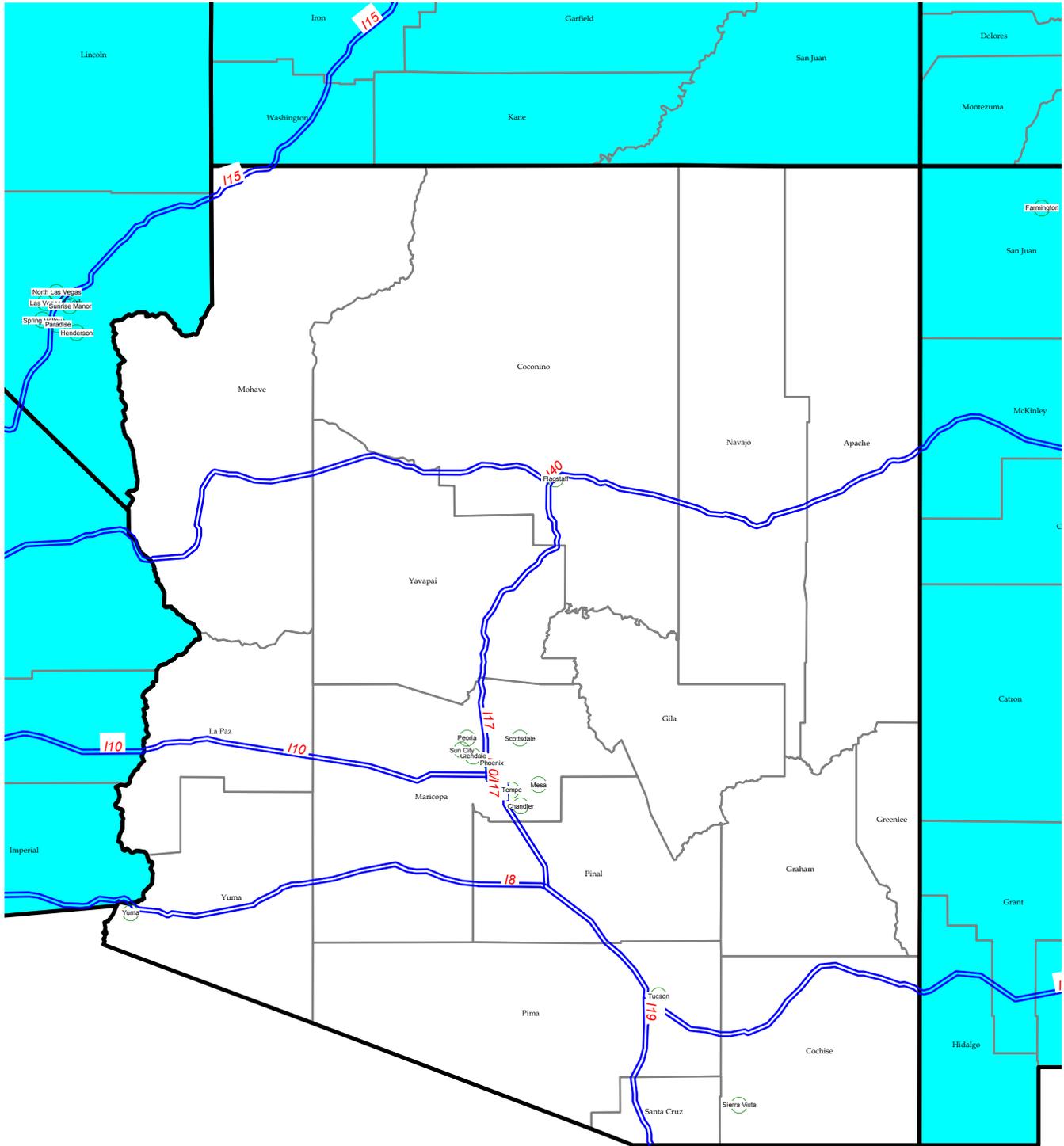
County County-Based Area/Market Assignments

ARIZONA

APACHE	Indian Country ISR; Albuquerque - Santa Fe, NM - AZ - CO DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
COCHISE	Old West Country ISR; Tucson (Nogales), AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
COCONINO	Canyon Country ISR; Phoenix, AZ DMA; Flagstaff, AZ - UT MSA; Other Metro GMR.
GILA	High Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
GRAHAM	High Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
GREENLEE	High Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
LA PAZ	Arizona's West Coast ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
MARICOPA	Valley of the Sun ISR; Phoenix, AZ DMA; Phoenix - Mesa, AZ MSA; Phoenix Metro GMR.
MOHAVE	Arizona's West Coast ISR; Phoenix, AZ DMA; Las Vegas, NV - AZ MSA; Other Metro GMR.
NAVAJO	Indian Country ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
PIMA	Old West Country ISR; Tucson (Nogales), AZ DMA; Tucson, AZ MSA; Tucson Metro GMR.
PINAL	Valley of the Sun ISR; Phoenix, AZ DMA; Phoenix - Mesa, AZ MSA; Phoenix Metro GMR.
SANTA CRUZ	Old West Country ISR; Tucson (Nogales), AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
YAVAPAI	Central Territory ISR; Phoenix, AZ DMA; Not Assigned to Metro Area (NAM); Non Metro GMR.
YUMA	Arizona's West Coast ISR; Yuma - El Centro, AZ - CA DMA; Yuma, AZ MSA; Other Metro GMR.

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Regional Overview Map



See other maps for census geography



Refer to Gazetteer for profile material

EXHIBIT B

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July 15, 2014

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

HAND-DELIVERED

14 JUL 15 PM 4:12 CCEC

Re: Ducey 2014's Response to MUR 14-007

Dear Mr. Collins:

This letter serves as Ducey 2014's response to MUR 14-007, initiated by the letter from Scott Smith's campaign lawyer, Kory Langhofer. Ducey 2014 is a non-participating political committee, registered with the Arizona Secretary of State, formed by Doug Ducey, who is a candidate for the Republican Party nomination for governor.

As we explain in detail below, the Citizens Clean Elections Commission (the "Commission") should take no action on Mr. Smith's complaint because it lacks jurisdiction to investigate questions involving non-participating candidate contributions. Besides this, the Commission should take no action for either of two separate and independent reasons. First, there was no actual coordination between LFAF and Ducey 2014. Second, the Legacy Foundation Action Fund ("LFAF") advertisement complained of is issue advocacy protected by the First Amendment.

Upon information and belief, LFAF produced a television advertisement relating to the U.S. Conference of Mayors' (the "Conference") positions on certain federal issues and identified Mr. Smith as President of the Conference. The advertisement is located at the following You Tube URL: http://www.youtube.com/watch?v=NycZZLOA_OQ.¹ The advertisement identified specific positions that the Conference has taken on those federal issues. The advertisement further encouraged viewers to call Mr. Smith, who was then the president of the Conference and

¹ The letter makes a reference to "radio, internet, and mail advertisements painting Mr. Smith in a misleading and negative light" but only provides evidence of the television advertisement. 7/1/2014 Langhofer Letter at 2 n.1. The letter provides no evidence of any other form of communication. It is, therefore, impossible to respond to any allegation concerning "radio, internet, and mail advertisements" and Smith's alleged portrayal in a "negative light."

Thomas M. Collins
July 15, 2014
Page 2

the Mayor of the City of Mesa, and ask him to change the Conference's position on those issues. Upon information and belief, the advertisement ran for two weeks in early April 2014 in Phoenix. Upon further information and belief, at approximately the same time period, LFAF ran similar advertisements mentioning the mayors in Sacramento, California and Baltimore, Maryland, both of whom also have leadership positions with the Conference, in those markets.

Legal Argument

I. Burden of Proof

In order to prevent rival campaigns from unfairly using the campaign finance code in a manner that manipulates media coverage and sensationally deceives voters on the eve of an election, Arizona law and this Commission's practice requires that a complainant provide the Commission with actual evidence that a campaign finance violation has occurred. *See* A.A.C. R2-20-203(D); *see also, e.g.*, MUR06-0023 (Munsil) (taking no action on complaint involving common political consultant where complainant failed to provide evidence of actual coordination between candidate and independent expenditure); MUR06-0032 (Napolitano) (similar). Where a complainant provides nothing more than unsupported speculation, innuendo, and conjecture that a violation has occurred, the Commission should determine that no action be taken. *See id.*

II. The Commission Lacks Jurisdiction to Proceed With This Complaint

The Commission's enforcement authority extends only to suspected violations of the Citizens Clean Elections Act, A.R.S. §§ 16-940 to 16-961. A.R.S. §§ 16-956(A)(7) ("The commission shall: . . . Enforce this article [Title 16, Chapter 6, Article 2, Arizona Revised Statutes]."); 16-957(A) (If the commission finds that there is reason to believe that a person has violated any provision of this article [Title 16, Chapter 6, Article 2, Arizona Revised Statutes]."). The Commission does not have wholesale authority to investigate campaign finance violations alleged against non-participating candidates, and it specifically lacks the jurisdiction to move forward with this matter.

The only substantive campaign finance statutes that Mr. Smith alleges to have been violated are A.R.S. §§ 16-901, 16-905, 16-919, and 16-941(B).² The first three sections cited are

² Smith cites A.R.S. § 16-941(C)(2), stating that a nonparticipating candidate "[s]hall continue to be bound by all other applicable election and campaign finance statutes and rules, with the exception of those provisions in express or clear conflict with this article." This statute does not confer any substantive directive but rather states the obvious. A nonparticipating candidate must follow the campaign finance laws codified in Article I. There can be no independent "violation" of § 16-941(C)(2).

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found in Title 16, Chapter 6, Article 1 of the Arizona Revised Statutes and not part of the Citizens Clean Elections Act. The last sentence in A.R.S. § 16-941(B), which is part of the Act, states that “[a]ny violation of this subsection [reducing non-participating contribution limits by 20%] *shall be subject to the penalties and procedures set forth in section 16-905, subsections J through M and section 16-924.*” (Emphasis added.)

Although §§ 16-956 and 16-957 may provide the Commission with general authority to enforce “any provision of this article,” these statutes definitely do not confer authority upon the Commission to enforce alleged contribution limit violations and coordination involving nonparticipating candidates. Rather, these statutes are broadly written to give the Commission investigative authority associated with violations of such things as reporting requirements, impermissible use of campaign funds by participating candidates, and expenditures of funds by participating candidates in excess of the Act’s limits.

The more specific statute, § 16-941(B), intentionally carves-out alleged violations of non-participating candidate contribution limits from the scope of § 16-956 and 16-957. Under these circumstances, where a specific statute is read in conjunction with a general one, courts consistently hold that the specific statute prevails. *See, e.g., Clouse v. State*, 199 Ariz. 196, 199, 16 P.3d 757, 760 (2001) (“It is an established axiom of constitutional law that where there are both general and specific constitutional provisions relating to the same subject, the specific provision will control.”). Any other interpretation impermissibly renders the last sentence in § 16-941(B) superfluous. *See May v. Ellis*, 208 Ariz. 229, 231, 92 P.3d 859, 861 (2004) (holding that, when construing two statutes together, the court’s “first duty . . . is to ‘adopt a construction that reconciles one with the other, giving force and meaning to all statutes involved.’” (Citation omitted.)). Therefore, the Commission does not have the appropriate jurisdiction to review this matter and, in actuality, this matter is already being reviewed by the Maricopa County Recorder, as the Secretary of State has a conflict.

III. Even if the Commission Has Jurisdiction, Which It Does Not, There Was No Coordination Between LFAF and Ducey 2014.

A. The First Amendment and Arizona Law Requires a Complainant to Show Actual Coordination.

Arizona’s statute on independent expenditures, A.R.S. § 16-901(14), requires that Mr. Smith show that there was actual coordination, cooperation, arrangement, or direction between a person making an independent expenditure and a candidate for office.

The Secretary of State and this Commission have recently opined on this very statute and concluded that, in order to constitute coordination, there must be actual direction, cooperation, or

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consultation, or some similar arrangement between the independent expenditure and the candidate. Specifically, on May 22, 2014, the Commission dismissed a complaint filed against Secretary of State Ken Bennett alleging coordination between an independent expenditure and his gubernatorial campaign, after Secretary Bennett acquired from a political committee a surplus sign advocating in favor of his election as governor. Secretary Bennett argued, and the Commission agreed, that there must be some “cooperation or consultation with any candidate or candidate’s agent, . . . made in concert with a request or suggestion of the candidate.” Commission 5/22/14 Transcript at 34:20-25 (excerpts attached hereto as Exhibit 1).

Both Secretary Bennett and the Commission went so far as to say that a candidate may freely use the work product of an independent expenditure after the expenditure has been made, because what the statute prohibits is coordination in the making of the expenditure. Secretary Bennett gave the example of an IE committee producing a sign, and the candidate taking a picture of it and “tweeting” it. *Id.* at 30:5-21; *see also* MUR06-0018 (Napolitano) (“Without evidence that Respondent directed the anti-Munsil activities or was otherwise affiliated with these entities or principals, so as to disqualify the activities from treatment as independent expenditures under A.R.S. § 16-901(14), then no charge can lie against Respondent.”).

This testimony conforms with the Commission’s past dispositions of coordination-based complaints. The Commission has consistently voted to take no action on complaints that provide no substantive evidence of actual coordination. *E.g., id.*; *see also* MUR06-0023 (Munsil) (taking no action on complaint involving common political consultant where complainant failed to provide evidence of actual coordination between candidate and independent expenditure); MUR06-0032 (Napolitano) (similar).

The United States Supreme Court and other courts hold the same position. In order to constitute a coordinated expenditure, there must be some actual direction or cooperation between the person making the expenditure and the candidate. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), for example, the Supreme Court declared unconstitutional a presumption of coordination between a political party and candidates. *Id.* at 619. The Court held that a political party has a constitutional right to engage in independent expenditure activity and that the law cannot prohibit it absent actual coordination between the party and candidate. *Id.*; *see also* *Republican Party of Minnesota v. Pauly*, 63 F. Supp. 2d 1008 (D. Minn. 1999); *FEC v. Freedom’s Heritage Forum*, 1999 WL 33756662 (W.D. Ky Sept. 29, 1999).

Similarly, in *Republican Party of Minnesota*, the court overturned a state statute presuming coordination between a political party and its endorsed candidates. The court invalidated the statute even where “[t]he party coordinated candidate appearances and voter registration drives, and helped to recruit volunteer assistance. [Party] officials conducted ‘issue

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research,’ ‘developed campaign plans,’ and provided candidates with donor lists from which to solicit campaign contributions.” 63 F. Supp. 2d at 1016. Despite this, the court reasoned that “the record in this case provides no support for an inference of actual coordination in conducting independent party expenditures.” Moreover, the court observed that the legislative record “is void of any committee findings, legislative debate transcripts, legislative findings, or other empirical evidence to support . . . a legislative determination [that it should be presumed that a party and its nominee work together].” *Id.*

In *Freedom’s Heritage Forum*, the court granted a motion to dismiss the FEC’s complaint alleging coordination between the candidate and independent expenditure. The court held that “the FEC has failed to plead sufficient factual allegations of coordination under the statute” and that it “fails to tie together the Forum and Hardy’s election campaign.” 1999 WL 33756662 at *2. In dismissing the complaint, the court found it significant that “[t]he FEC does not allege that Hardy actually informed Dr. Simon of his plans, projects, or needs *with a view toward having an expenditure made.*” *Id.*

It is clear that this Commission, Secretary Bennett, and numerous courts have taken a common-sense approach to coordination statutes. A complainant needs to show some actual coordination between an independent expenditure and candidate in the form of cooperation, consultation, or direction in order to trigger an investigation. This is critical because an overly expansive interpretation of what constitutes coordination will necessarily render a statute unconstitutionally vague and ambiguous or impermissibly sweep in conduct that has nothing to do with making the expenditure. The requirement to show actual coordination weeds out frivolous and meritless claims, such as Mr. Smith’s, that are advanced on the eve of an election simply to embarrass and harass a political opponent and third parties or silence constitutionally protected speech.

B. The Letter Fails to Identify Any Evidence of Coordination.

Mr. Smith cannot point to a single piece of evidence that Ducey 2014 engaged in any cooperation or consultation with LFAF in the making of the ad. In fact, Mr. Smith provides no evidence that Copper State was ever engaged by LFAF. Instead, he attempts to manufacture a false connection between a vendor, Copper State, and draw the false conclusion that, through Copper State, Ducey 2014 directed, consulted on, or cooperated with the LFAF ad.

Mr. Smith’s entire argument breaks down for its lack of factual support and failure to cite any recognized legal theory under federal or state law to justify its complaint. Mr. Smith has failed to provide any facts – an unsubstantiated allegation (at 1) “upon information and belief” is not a well-pled fact – that there was any common “officer, director, employee, or agent” between LFAF and Ducey 2014. Mr. Smith ignores the teachings of the Supreme Court and Commission

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precedent requiring a showing of *actual coordination* between a campaign and independent expenditure. *Colorado Republican Fed. Campaign Cte.*, 518 U.S. at 619.³

As demonstrated in Table 1, below, all of the position statements made in the ad are available directly on the Conference’s publicly accessible website and were located with a minimal level of Internet searches in order to provide the website links with this letter.

Table 1: Publicly Available Information on the U.S. Conference of Mayors’ Website

LFAF Ad Statement	US Conference of Mayors Website Location
“fully endorsed Obamacare from the start”	http://www.usmayors.org/pressreleases/uploads/STATEMENTHEALTHCAREREFORM32210.pdf
“vocally supported the Obama administration’s efforts to regulate carbon emission”	http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf http://www.usmayors.org/resolutions/80th_conference/AdoptedResolutionsFull.pdf (page 113) http://www.usmayors.org/resolutions/78th_conference/AdoptedResolutionsFull.pdf (page 80)
“backed the President’s proposal to limit our 2 nd amendment rights”	http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-backgroundchecks.pdf http://www.usmayors.org/pressreleases/uploads/2013/0314-release-awbjudiciarysen.pdf http://www.usmayors.org/pressreleases/uploads/2013/0212-statement-sotu.pdf
“Obama’s budget was ‘a balanced approach’”	http://www.usmayors.org/pressreleases/uploads/2013/0410-statement-fy14budgetObama.pdf

³ The introductory sentence of § 16-901(14) requires “cooperation or consultation” or that the expenditure is made “in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate.” All of the subsidiary elements of Section 16-901(14) must be read in conjunction with this predicate sentence.

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In addition, the attached declaration of Shauna Pekau, CEO of Copper State, explains that the documents that she obtained in her public records requests to the City of Mesa are related to completely different subjects than the Conference's federal lobbying agenda. [Declaration of Shauna Pekau ("S. Pekau Decl.") at ¶¶ 7-14 attached hereto as Exhibit 2.] The declaration further explains that she has no connection to LFAF whatsoever and that, to the best of her knowledge, none of the information that she obtained from the City of Mesa has any relation to the LFAF advertisement. In fact, the documents obtained from the City of Mesa have absolutely nothing to do with the public positions taken by the Conference on the four federal issues identified in the advertisement.

Also attached hereto as Exhibit 3 is a declaration from Gregg Pekau, who Mr. Smith's complaint suggests of providing "opposition research" to LFAF. In it, Mr. Pekau's declaration explains that he has no connection to LFAF whatsoever. [Declaration of Gregg Pekau ¶¶ 2-4, (Exhibit 3)].

Worse yet is Mr. Smith's use of the already discredited "connection" involving Larry McCarthy. Mr. McCarthy had *no* involvement in the LFAF Smith ad. [Declaration of Lawrence McCarthy ¶¶ 3-4, attached hereto as Exhibit 4.] It is well known, and it is a matter of public record with the Federal Election Commission, that in March 2014 Mr. McCarthy worked on a television ad for LFAF involving a United States Senate candidate in Nebraska. This does not even come close to coordination on an entirely *separate* project sponsored by LFAF, at a completely different time, in a completely different state, on a totally unrelated matter.

Similarly, there is no evidence linking Direct Response Group ("DRG"), a direct mail vendor, to LFAF and Ducey 2014. DRG is a vendor that provides printing and mailing services. It has had no involvement in the *LFAF* advertisement complained of here. [Declaration of J. Padovano ¶¶ 3-5, attached hereto as Exhibit 5.]

Finally, attached hereto as Exhibit 6 is a declaration from Jonathan P. Twist, campaign manager for Ducey 2014, explaining that there has been no coordination whatsoever between Ducey 2014 and LFAF.

IV. The LFAF Advertisement is Issue Advocacy and Cannot Be Classified as an "Independent Expenditure."

Although Mr. Smith cannot provide a scintilla of actual evidence showing actual unlawful coordination, the Commission should also determine that there is no reason to believe that an alleged violation occurred because the LFAF advertisement is pure issue advocacy falling

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outside of the statutory definition of an “independent expenditure.” Under A.R.S. § 16-901(14), only an advertisement “that *expressly advocates* the election or defeat of a clearly identified candidate” constitutes an “independent expenditure.”⁴ (Emphasis added.)

A. Under Controlling Supreme Court Precedent, the Advertisement is Unmistakably Issue-Based and Protected by the First Amendment.

The First Amendment prohibits government regulation of issue advocacy. The United States Supreme Court has held that government may regulate a message as express advocacy only where an advertisement (i) uses express advocacy magic words such as “vote for” or “vote against” a candidate⁵ or (ii) is the functional equivalent of express advocacy where “the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Federal Election Comm’n v. Wis. Right to Life*, 551 U.S. 449, 469 (2007) (“*WRTL*”); accord *Kromko v. City of Tucson*, 47 P.3d 1137, 202 Ariz. 499 (2002) (holding that municipal literature informing the public of the projected impact of road improvement ballot propositions was not express advocacy).⁶

⁴ The term “expressly advocates,” defined under A.R.S. § 16-901.01(A), has been ruled unconstitutional by the Arizona Superior Court. See Final Judgment, *Committee on Justice & Fairness v. Arizona Secretary of State’s Office, et al.*, No. LC-2011-000734 (Ariz. Superior Court Maricopa County Nov. 28, 2012) (attached hereto as Exhibit 7). This case is pending review at the Arizona Court of Appeals. Ducey 2014 agrees that A.R.S. § 16-901.01 is unconstitutional under the First Amendment of the United States Constitution and Article II § 6 of the Arizona Constitution and asserts this argument as a reason why the Commission should take no action on the complaint.

⁵ The advertisement here does not use the express advocacy “magic words.”

⁶ *Kromko* explored a “second, alternative test” focusing on whether a communication “‘taken as a whole[,] unambiguously urge[s]’ a person to vote in a particular manner.” 202 Ariz. at 503, 47 P.3d at 1141. The court held that the communication “must clearly and unmistakably present a plea for action, and identify the advocated action; it is not express advocacy if reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.” *Id.* The court clarified that it was “not suggesting that [the] timing or other circumstances independent of the communication itself[] may be considered . . .” *Id.* As this Response explains, the LFAF advertisement exerts all of the indicia of issue advocacy and, given its context, it cannot be said that it “clearly and unmistakably present[s] a plea for action, and identif[ies] the advocated action.” *Id.*

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This second category of express advocacy “has the potential to trammel vital political speech, and thus regulation of speech ‘as the functional equivalent of express advocacy’ warrants careful judicial scrutiny.” *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) (“*NCRTL*”). In the context of examining whether an advertisement is the functional equivalent of express advocacy, the Supreme Court has held that the regulator must examine the advertisement itself without straying into circumstantial arguments about the intent of the speaker, the effect of the advertisement on the viewing public, and other “contextual factors” such as the timing of the advertisement. *WRTL*, 551 U.S. at 474 n.7. The Court further explained that the government cannot regulate advertisements on public issues “merely because the issues might be relevant to an election.” *Id.* Finally, and importantly, the Court held that “in a debatable case, the tie is resolved in favor of protecting speech.” *Id.*

Following its “no reasonable interpretation” test, the Court in *WRTL* held that advertisements that mentioned then-Senator Feingold, who was running for reelection, and that criticized the Senate’s failure to act on judicial nominees were issue advocacy communications. The Court reasoned that the advertisements “focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.” *Id.* at 470.

Here, the LFAF’s Conference advertisement includes those elements:

- The ad identifies Mr. Smith as president of the Conference. This statement is true, as Mr. Smith was president of that organization from June 24, 2013 until April 15, 2014.
- The ad states that the Conference supports the federal Patient Affordable Care Act (“*PACA*” a/k/a “Obamacare”), federal proposals to regulate carbon emissions, and federal proposals to enact gun control and firearm restrictions. It also states that the Conference supported President Obama’s proposed budget. These statements are true, and the Conference’s policy positions are available on its website.
- The ad states that “these policies are wrong for Mesa,” questions “why does Mayor Scott Smith support policies that are wrong for Mesa,” and urges viewers to call Mr. Smith on the provided City of Mesa phone number and “make his organization more like Mesa, not the other way around.”

Like the advertisement in *WRTL*, the LFAF advertisement focused on federal legislative issues: *PACA*, carbon emissions, gun control, and the budget. All of the issues identified in the

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advertisement are federal issues, which the Conference attempts to influence through its federal lobbying activities.

Like the advertisement in *WRTL*, the LFAF advertisement took a position on the issues – “policies that are wrong for Mesa” – and urged the public to adopt that position. Finally, like the advertisement in *WRTL*, the LFAF advertisement provided a City of Mesa government phone number and urged viewers to contact Mayor Smith and tell him to change the policies advocated by the national organization that he leads.

In addition to this, the *WRTL* opinion provided a deeper analysis of the advertisement, observing that “[t]he ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.” *Id.* The LFAF advertisement here displays the same characteristics. Nowhere does the advertisement mention an election, anyone’s candidacy, a political party, or any challenger. There is no appeal to vote. The advertisement does not take a position on Mr. Smith’s character, qualifications, or fitness for any office.

Rather, the focus of the advertisement is on Mr. Smith’s position as president of a national organization, public positions that organization has taken on federal legislation, and on urging viewers to contact Mr. Smith and adopt different positions. All of these factors are the traditional indicia of issue advocacy. *Id.*; see also *FEC v. Cent. Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 50-51 n.6, 53 (2d Cir. 1980) (rejecting FEC’s argument that a committee’s “bulletin” showing twenty-four votes cast by the identified congressman, analyzed in terms of whether they were “for lower taxes and less government,” and concluding with the statement “since *you* are paying the tax bills, *you* are the boss. And don’t let your Representative forget it!” was issue advocacy).

B. The Contextual Factors Cited in Mr. Smith’s Letter are Irrelevant but Nevertheless Fail to Re-Classify the Advertisement as Express Advocacy.

In *WRTL*, the Supreme Court stated that the government cannot examine “contextual factors” surrounding an advertisement to determine whether it is express advocacy. Mr. Smith’s letter ignores this and instead asks that this Commission entertain certain speculative theories to re-classify the advertisement. This attempt should be rejected.⁷

⁷ The Executive Director’s Report analyzing Secretary Bennett’s request for a no action letter re voter advertisements (at 6) quotes part of a sentence from *WRTL*, that “[c]ourts need not ignore basic background information that may be necessary to put an ad in context.” *WRTL*, 551 U.S. at 474. The full quote is as follows: “Courts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad ‘describes a legislative

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Mr. Smith first contends (at 2) that LFAF should have limited its advertisement to City of Mesa voters. He argues that the advertisement was actually targeted to “the gubernatorial primary electorate” and that it was aired “on channels watched disproportionately by Republican [sic] primary voters.” This argument wrongly uses a homespun contextual argument that speculates into LFAF’s intent. The First Amendment prohibits this factor’s consideration. In *NCRTL*, the Fourth Circuit overturned a North Carolina statute that took into account “the distribution of the communication to a significant number of registered voters for that candidate’s election.” 525 F.3d at 281, 284 (holding that contextual factor relating to distribution of advertisement violated First Amendment and asking “how many voters would be considered ‘significant?’”). In any event, the fact is that broadcast and radio advertisements cannot be limited within the “Phoenix Market” to specific municipalities. Mr. Smith provides no evidence whatsoever that certain channels are “disproportionately” viewed by Republican primary voters. And he fails to provide any evidence of mailers or internet advertisements.

Next, Mr. Smith admits (at 2) that public information about the Conference’s public positions “has been publicly available for a long time,” but argues that because the advertisements ran in April 2014 it indicates LFAF’s intent to run an express advocacy message. Mr. Smith’s contextual argument goes to the intent of the speaker in a manner that impermissibly attempts to second-guess the timing of the advertisement. This is irrelevant to the analysis and ultimately wrong. See *NCRTL*, 525 F.3d at 281, 284 (“[H]ow is a speaker—or a regulator for that matter—to know how the ‘timing’ of his comments ‘relate to the ‘events of the day?’”). The fact of the matter is that the advertisement ran almost five months before the primary election date, well before the election.

Mr. Smith then contends that the ads were run “just days before [his] last day in office as Mayor of the City of Mesa (*i.e.*, April 15, 2014). No rational actor would spend more than \$275,000 to influence the last two weeks of [his] term as mayor” This is exactly the kind of sophistry that the *WRTL* Court warned against. How a “rational actor” would spend \$275,000 is far beyond what the Commission may constitutionally consider and an inquiry into “intent” that is not permissible in this area of the law. See *NCRTL*, 525 F.3d at 283 (holding that the issue that is either currently or the subject of legislative scrutiny or likely to be the subject of such scrutiny in the future.” *Id.* (quoting *WRTL v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006) (emphasis added)). The Court added that “the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.” *Id.* That “broader inquiry” includes the contextual factors rejected in *WRTL*, such as timing, and those overturned in *NCRTL* and in *Committee for Justice & Fairness v. Ariz. Secretary of State’s Office*. The “basic background information” here is the fact that PACA, gun control, carbon regulation, and the federal budget are all prominent national legislative issues.

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North Carolina statute “runs directly counter to the teaching of *WRTL* when it determines whether speech is regulable based on how a ‘reasonable person’ interprets a communication in light of four ‘contextual factors’” and asking “at what ‘cost’ does political speech become regulable?”).

Indeed, in *WRTL*, the Supreme Court specifically declined to consider the timeliness of advertisements mentioning Senator Feingold that were run “30 days prior to the Wisconsin primary” and that “*WRTL* did not run the ads after the elections.” 551 U.S. at 460. Similarly, the Supreme Court has weighed against the exact type of intent-based test urged by the complainant in this matter because it would “open[] the door to a trial on every ad . . . on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue.” *Id.* at 486. Such tests also “lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to . . . penalties for another.” *Id.*; *see also infra*, Part IV.C.

Mr. Smith further contends that the City of Mesa public records requests submitted by Copper State “tracks the content of the public records requests submitted by Pekau.” They do not. The Copper State document requests relate to completely different subject matters than the Conference’s federal legislative agenda. [S. Pekau Decl. at ¶¶3-15 (Exhibit 2).] For example, the documents show:

- Mr. Smith has approximately \$97,427.49 in travel reimbursements billed to the City of Mesa taxpayers. [S. Pekau Decl. Exh. B]
- Twenty-five trips involved expenses covered by other entities, including Italy, China, Saudi Arabia, Morocco, Canada and Mexico. [*Id.* Exh. B]
- Photographs of Mr. Smith sitting next to, laughing with, and hugging Vice President Joe Biden during and after Mr. Biden delivered a speech. [*Id.* Exh. C]
- Direct non-travel charges to Mr. Smith’s City of Mesa credit card. [*Id.* Exh. B]
- Mr. Smith’s City of Mesa calendars from 2008 to 2014. [*Id.* Exh. E]

The City of Mesa responded to Copper State’s public records requests in late March and April, 2014. Not only are the documents produced far afield of the LFAF advertisement’s content, they were produced too late to validate the complainant’s speculative timeline alleging an overlap between the requests and the advertisement’s production.

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Finally, Mr. Smith argues that LFAF “has been reported to have very close ties to the Ducey Campaign.” The fact that Mr. Smith resorts to citing to bloggers, gossip publications, and other unsubstantiated Internet reports is hardly evidence. The fact is that there are no ties between LFAF and Ducey 2014 whatsoever. [See Declarations attached hereto as Exhibits 2-6 .]

C. Arguments Advanced by Mr. Smith’s Attorney in Another Matter Reinforce the Conclusion that LFAF’s Advertisement is Issue Advocacy.

The LFAF ads are remarkably similar in nature to those recently defended by Mr. Langhofer, who is the author of Mr. Smith’s letter and the complainant in this matter. Attached hereto as Exhibits 8 and 9 are letters from Mr. Langhofer to the Arizona Secretary of State explaining that his client’s ads in that other matter, remarkably similar to the one complained of here, are issue advertisements.⁸ In defending his client’s advertisements, Mr. Langhofer took the following positions:

- An advertisement that identifies a candidate as a government official “may not be deemed electioneering activities solely because the individual happens to be a candidate for elected office.” Langhofer June 2, 2014 letter at 2 (citing IRS Rev. Rul. 2004-6).
- An advertisement distributed to “‘civic-minded adults,’ as might be expected of advertising concerning issues of social importance,” does not indicate express advocacy. *Id.*
- The timing of an advertisement should not be considered. On behalf of his client, Mr. Langhofer argued “that the ad was aired three months before the primary election cycle is coincidental.” *Id.* at 3
- Singling out a single elected official for criticism “is entirely contextual; an issue-based communication is not transmuted into ‘express advocacy’ or its equivalent merely because it has the incidental effect of embarrassing a public official who may someday run for reelection. . . . By the Complaint’s logic, all criticism of

⁸ The Secretary of State agreed and dismissed one complaint against the Arizona Public Integrity Alliance, with the second still under consideration. See Exhibit 10 hereto. We also note an April 9, 2014, letter from the Secretary of State, attached hereto as Exhibit 11, dismissing a complaint filed by Mr. Langhofer alleging an illegal campaign expenditure in which the Secretary’s office noted that “you have consistently stated that AZPIA is involved in issue advocacy and therefore does not have to register as a political committee. Accepting your assertions as true in those complaints against AZPIA [we dismiss your complaint].”

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government officials in the three months before an election—regardless of whether the ad is or can reasonably be interpreted as an issue-based criticism—would constitute electioneering subject to campaign finance and reporting and disclosure requirements. *That is not the law under either WRTL or the Arizona statutes; express advocacy is required, and citizens remain free to criticize their government on issues even during election season.*” *Id.* at 4 (emphasis added).

The very arguments made by Mr. Smith’s attorney in defending a separate campaign finance law complaint filed against a different client strongly reinforce the conclusion that the LFAF advertisements are issue advocacy and that Mr. Smith’s complaint fails factually and as a matter of law.

Conclusion

The Commission should take no action on this complaint for any one of three reasons: (i) the Commission lacks jurisdiction in a campaign finance matter involving a non-participating candidate, (ii) Mr. Smith and his lawyer have failed to produce any evidence of actual coordination between LFAF and Ducey 2014, and the evidence produced with this response shows conclusively that there was none, and (iii) the LFAF advertisement is pure issue advocacy.

Respectfully submitted,

Snell & Wilmer

Michael T. Liburdi

Michael T. Liburdi

State of Arizona)
)
County of Maricopa)

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

Cynthia J. Tassielli
Notary Public



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cc: Karen Osborne
Jeffrey Messing
Kory Langhofer

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