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**IN THE SUPERIOR COURT OF ARIZONA**
**IN AND FOR THE COUNTY OF MARICOPA**

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| NO TAXPAYER MONEY FOR POLITICIANS, *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>LANG, *et al.*,<br><br>Defendants. | Case No. CV2011-020916<br><br>**COMBINED RESPONSE TO DEFENDANTS' MOTION TO DISMISS**<br><br>**and**<br><br>**BRIEF IN SUPPORT OF AMENDED ORDER TO SHOW CAUSE**<br><br>*Hon. Mark H. Brain*<br><br>Hearing set Feb. 2, 2012 at 9:45 a.m. |

This is a civil lawsuit that seeks to stop the Citizens Clean Elections Commission from illegal spending and attempts to influence voters, and seeks to order repayment of public funds illegally spent.[1] Defendants moved to dismiss the action on the basis of lack of jurisdiction over the special action and failure to state a claim. For the reasons presented below, the motion

[1] Plaintiffs sued Defendants in their personal capacities for repayment of illegal expenditures and in their official capacities as officials and officers of the Commission. Plaintiffs did not sue the Commission itself because the Commission is not an entity that can sue or be sued. *See* A.R.S. Const. Art. IV, Pt. 2, § 18.

should be denied, and Defendants' illegal conduct should be immediately enjoined.[2] Pursuant to the Court's order dated December 15, 2011, Plaintiffs address Defendants' motion to dismiss the claims regarding illegal spending and attempts to influence voters, and demonstrate why the Court must immediately enjoin Defendants' conduct.

**Response to Motion to Dismiss**

Defendants neglected to state the standard by which their motion to dismiss should be reviewed. That is not surprising given that "motions to dismiss for failure to state a claim are not favored under Arizona law." *Sensing v. Harris*, 217 Ariz. 261, 262, 172 P.3d 856, 857 (App. 2007). "When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein. . . . Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). Taking the allegations and inferences as true, Plaintiffs' complaint states a claim for relief over which this Court has jurisdiction, and Defendants' motion to dismiss should be denied.

## I. Special Action Jurisdiction is Appropriate.

Defendants correctly set forth the questions that may be raised in a special action, including whether the defendant failed to exercise discretion or has proceeded or is threatening to proceed without legal authority (Rule 3, Ariz. R. for Special Actions). Defendants do not appear to deny that the complaint raises these questions; they simply note that the complaint also

[2] Defendants also moved to dismiss the claim for repayment, but Plaintiffs do not address those arguments here pursuant to the Court's December 15, 2011 order to table that issue.

raises questions of declaratory and injunctive relief. Although Plaintiffs seek to accomplish the same objective by special action as by declaratory and injunctive relief, a complaint for only declaratory and injunctive relief would not be equally as adequate. Unless the Court orders otherwise, only by special action with a show cause proceeding can Plaintiffs secure a more speedy remedy than what the rules require for ordinary declaratory and injunctive complaints. *See* Rule 4(c), Ariz. R. for Special Actions ("the court *shall* set a speedy return date") (emphasis added); *compare* Rule 6(d), Ariz. R. Civ. P. (the court may make an order to show cause returnable "at such time as the judge designates"). Speed is paramount, and unhurried relief is no relief at all. Defendants are currently engaging in conduct and illegally spend public money in attempt to influence voters, and the election is fast-approaching. Plaintiffs properly filed their complaint as a special action.

If this Court permits equally speedy relief by way of a complaint for declaratory and injunctive relief alone, then the Court may exercise its discretion to simply decline to accept jurisdiction over the special action. In that case, Plaintiffs' complaint for declaratory and injunctive relief would remain intact, and Defendants' motion to dismiss should be denied.

## II. Unauthorized Spending for Self-Promotion

Defendants also move to dismiss the complaint for failure to state a claim. Defendants' arguments are without merit, and the motion should be denied. For all conduct, Defendants must cite a statute authorizing the challenged spending, but no such statute exists. Because state agencies are created by statute, a state agency "has no powers other than those the legislature has delegated to it" by statute. *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767

(2003). If the power is not defined in a statute, then Defendants cannot exercise it. *Cox v. Pima County*, 27 Ariz.App. 494, 495, 556 P.2d 342, 343 (1976). There is no statute authorizing or implying a Commission power to spend taxpayer money for self-promotion, and the complaint properly states a cause for relief.

Defendants claim broadly that "the language of the Act, along with its structure and purpose" authorize them to make expenditures that "in [their] judgment, encourage participation" in the Clean Elections Act (MTD p. 6; *see also* MTD p. 9). Although Defendants do not cite it, we presume this is a reference to the Findings and Declarations of the Clean Elections Act, which states, "The people of Arizona declare our intent to create a clean elections system that will . . . encourage citizen participation in the political process." A.R.S. § 16-940(A). Yet this statement of intent does not, and cannot, independently confer any powers on Commission officials and officers—and certainly not spending power. A similar statement of intent was at issue in *Stanson v. Mott*, 551 P.2d 1, 7 n. 3 (Ca. 1976), where the code provided, "It is the responsibility of the state to provide and *to encourage* the provision of outdoor recreational opportunities" (emphasis in original). The court held there was "no indication that state 'encouragement' may take the form of the expenditure of public funds for promotional campaign purposes." *Id.* The same is true here. A statement of intent neither confers nor implies powers for Defendants to spend for self-promotion.

Moreover, Defendants' spending goes beyond encouraging "citizen participation in the political process" – they are spending to promote the Commission itself (*see, e.g.*, Compl. ¶¶ 23, 25-26, 28, 37). The Commission, for example, may set forth the steps for candidates to track

their campaign funding pursuant to the Commission's voter education authority and consistent with the intent to encourage participation. *See* A.R.S. § 16-956(A)(3). However, the Commission may not, for example, air commercials to advertise that "80% of voters believe Clean Elections is important" (*see* Compl. ¶ 23) or embark on a marketing plan to "[i]ncrease the percentage of voters" with a "favorable impression of Clean Elections" (*see* Compl. ¶ 26(e)). The latter is self-promotion, not "promoting participation," and is beyond Defendants' authority. Plaintiffs state a claim for relief, and Defendants' motion to dismiss should be denied.

## III. Unauthorized Spending for Voter Education

Defendants concede (MTD p. 4) that their spending is subject to statutory limitations. *Clean Elections Inst., Inc. v. Brewer*, 209 Ariz. 241, 246, 99 P.3d 570, 575 (2004). However, they assert (MTD p. 4) that the statute requires the Commission to spend "at least" 10% of its budget for voter education. In fact, the statute (titled "Caps on spending from citizens clean elections fund") provides that Defendants "shall apply ten percent," and not more. A.R.S. § 16-949(C). Had the Legislature wanted to set a spending floor, they could have done so. Instead, the 10% mandate obviously reflects legislative judgment on the relative functions of the Commission. While Plaintiffs would not object to spending close to 10%, the Commission is spending approximately double that amount (Compl. ¶ 41). The complaint plainly states a cause of action.

In a separate provision cited by Defendants, Defendants are permitted, in their discretion, to spend up to 10% on administration and enforcement. A.R.S. § 16-949(B).[3] This is not at

[3] That statute provides,

odds with the provision that Defendants "shall apply ten percent" for voter education. Defendants may simultaneously be permitted in their discretion to use up to 10% on administration, and be required without discretion to spend 10% on voter education. Defendants' argument for dismissing this count is without merit.

## IV. Illegal Attempt to Influence the Outcome of an Election

Defendants' arguments prove that they fundamentally misunderstand the law and their powers, and their motion to dismiss should be denied. In their motion (p. 12), they improperly characterize Plaintiffs' complaint as an "attack on the government's right to speak, a *sub silentio* First Amendment claim," and they assert that "Plaintiffs do not cite any bar on . . . communications" to lobby or coordinate lobbying efforts. The government has no First Amendment "right to speak." The First Amendment *limits* the government and guarantees *private* speech.[4] This case does not implicate any speech rights. In the absence of a "bar on such communications," state agencies do *not* have a presumed right to make them. Quite the

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> The commission *may use up to ten percent* of the amount specified in subsection A of this section for reasonable and necessary expenses of administration and enforcement, including the activities specified in § 16-956, subsection A, paragraphs 3 through 7 and subsections B and C. Any portion of the ten percent not used for this purpose shall remain in the fund.

(emphasis added).

[4] *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), which Defendants cite (MTD p. 12), is in accord. In that case, a private person asserted that public spending for government speech violated his First Amendment free speech right *not* to speak because the government forced him to pay for speech with which he disagreed. Here, Plaintiffs do not assert that they are forced to pay for Commission speech with which they disagree; they challenge the Commission spending taxpayer money without statutory authority.

contrary. Defendants are presumed *not* to have a power unless a statute confers it. Taking the complaint as true for purposes of a motion to dismiss, Plaintiffs state a claim for relief and should be permitted to prove their case.

Defendants' lobbying efforts (*see* Compl. ¶¶ 23-31, 47) are among their illegal actions attempting to influence voters.[5] None of the three statutes offered by Defendants authorize lobbying. First, A.R.S. § 41-1232.01 provides that "before any public body causes any lobbying to occur on its behalf, the public body shall register with the secretary of state." A.R.S. § 41-1232.01(A). This does not authorize the Commission to lobby. It simply states that any public body that *does* have the power to lobby, and desires to exercise that power, must register first.

Second, A.R.S. § 16-956(A)(5) does not authorize the Commission to lobby. That statute requires the Commission to "[p]roduce a yearly report describing the commission's activities and any recommendations for changes of law, administration or funding amounts and accounting for monies in the fund." *Id.* A statute for an annual report of recommendations for changes in law does not authorize Defendants to, for example, spend $6,500 per month on a lobbying firm (*see* Compl. ¶ 24) or suggest ways that a special interest group should attempt to influence legislative votes (*see* Compl. ¶¶ 30(d) & 31(b)).[6]

Finally, A.R.S. § 16-949(B) does not authorize Defendants to lobby for or against votes on a proposed ballot measure. That statute permits the Commission to spend up to 10% of its

[5] Plaintiffs use "lobbying" in the broad and ordinary sense of the term, to attempt to influence or sway toward a desired action (*see* http://www.merriam-webster.com/dictionary/lobbying).

[6] In the Commission's most recent Annual Report (*see* Ex. 1), Defendants did not exercise their opportunity to recommend any changes of law. The Court may take judicial notice of the report as a matter of public record.

budget for "administration and enforcement." *Id.* No reasonable reading of the statute could confer a power to "administer" and "enforce" the Clean Elections Act as a power to lobby against a proposed ballot measure to limit Defendants' power. Additionally, administration and enforcement activities are expressly defined in A.R.S. § 16-956 and do not include lobbying. Nothing in the statutes authorize Defendants to lobby, and lobbying is one of several methods by which Defendants are illegally attempting to influence voters. The complaint properly states a claim for relief, and Defendants' motion to dismiss should be denied.

Defendants (MTD p. 10) assert that "Plaintiffs must do more than merely show that the government is providing information on a topic generally related to a measure that is on the ballot." First, Defendants' statement is premature – Plaintiffs cannot "show" anything because Defendants, by filing a motion to dismiss, seek to deny them the opportunity to prove their case. At this stage, to survive a motion to dismiss, Plaintiffs need only present allegations, and the complaint expressly alleges that the Commission has done more than merely "provided information" about a measure – the Complaint expressly alleges that instead of offering neutral information (Compl. ¶ 35), Defendants are spending public funds, lobbying, coordinating, and engaging in other efforts to sway voters against the measure (Compl. ¶¶ 23-32). Defendants (MTD p. 11) admit that excerpts from the Commission's Education and Marketing Plans quoted in the complaint "give rise to an inference that the Commissioners and staff attempted to influence the result of an election." On a motion to dismiss, inferences must be indulged in Plaintiffs' favor. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).

Defendants effectively concede that the complaint states a claim, and their motion to dismiss should be denied.

Defendants' meaning is unclear when they claim (MTD p. 11) that any and all communications and conduct are permissible as a matter of law as long as Defendants do not "refer to a particular ballot measure." Defendants offer no legal authority for this assertion, and it appears to contradict defense counsel's previously published legal conclusion. *See* Ariz. Op. Atty. Gen. No. I00-020, 2000 WL 1364213 at *5 (Sept. 11, 2000) (even "materials that do not expressly advocate for or against a ballot issue may fall within" the statutory prohibitions against influencing elections). At any rate, Defendants' communications did refer to the ballot measure. *See, e.g.*, Compl. ¶ 30(a) ("We need your help on the SCR"); Compl. ¶ 30(c) (coordinating efforts to push three particular Legislators to vote no on SCR 1025); Compl. ¶ 28 (referencing op-eds "that support and encourage public funding of campaigns," the subject matter of the ballot measure).

Defendants do not dispute that it is illegal to attempt to influence voters; rather, they assert (MTD p. 11) that their intent to influence voters is not relevant to the claim. Defendants rely on a federal case, and defense counsel's own opinions citing it, to argue that their intent is not determinative. *See Fed. Elect. Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464-69 (2007). However, the holding on intent of communications in that case has no bearing here. That case analyzed a private party's right of free speech under the First Amendment. *Id.* at 455-56. Here, federal law does not control, and there are no First Amendment free speech rights, nor does the case involve a private speaker. This is a case under state law against the government

for unauthorized lobbying and spending public funds to influence an election. Intent to influence voters is relevant. At any rate, the complaint should not be dismissed because Defendants' concede (MTD p. 11) that an attempt to influence voters is "implied" by Defendants' conduct as outlined in the complaint.

The transitional status of the ballot measure does not affect an immediate complaint for urgent relief to stop Defendants from attempting to influence the outcome of an election. Although the measure was invalidated and ordered by the trial court not to be placed on the ballot, there was no final judgment at the time Plaintiffs filed their complaint (*see* Compl. ¶ 21). Since then, a judgment was filed (Dec. 13, 2011), but the time to appeal has not run (*see Ariz. Advocacy Network Fnd'n v. Bennett*, CV2011-009646 (Maricopa County Super. Ct. May 6, 2011). Regardless, Plaintiffs intend to cure the proposed measure of the defect that caused the trial court to invalidate it, and pursue a revised referendum in the 2012 legislative session to accomplish the same purpose, to repeal public funding for political campaigns (*see* Compl. ¶ 22). Arizona voters will be asked in the November 2012 election to approve it (*see* Compl. ¶ 45). In the meantime, Defendants are continuing to engage in illegal conduct to thwart the passage of that measure (*see* Compl. ¶ 48).

Defendants are aware that time is of the essence, as their 2010 and 2011 marketing and education plans recognized that Defendants needed to "begin laying the groundwork now" to counter public efforts to limit the Commission's functions (*see* Compl. ¶ 26(a)) and "address" "threats" to the system "heading into the 2010 election cycle" (*see* Compl. ¶ 26(c)). Their

illegal conduct has continued, and with the 2012 election right around the corner, it must be stopped immediately. Plaintiffs should be permitted the opportunity to prove their case.

**Brief in Support of Amended Order to Show Cause**

This case touches on one of the most fundamental rights of citizens in a democracy: fair elections. Plaintiffs are pursuing a referendum to repeal public funding for political candidate campaigns, which voters will consider at the November 2012 election (*see* Compl. ¶¶ 20-22, 45, Compl. p. 16 (Verification in Support of Complaint and Order to Show Cause)). Meanwhile, Defendants are actively campaigning and spending to oppose the passage of that measure. This case is not just about interpreting Defendants' statutory authority to engage in conduct. It is about government tipping the scales against citizens engaged in the political process. "When residents within a state seek to participate in this [political] process by proposing a [ballot measure]" as Plaintiffs have here, "the expenditure of public funds in opposition to that effort violates a basic precept of this nation's democratic process." *Mntn. States Legal Fndn. v. Denver Sch. Dist. No. 1,* 459 F.Supp. 357, 361 (D. Colo. 1978). Particularly in Arizona, where the referendum is a key part to our state constitution, Defendants' powers cannot be construed to permit interference with democratic elections.

The evidence before the Court suggests no interpretation other than that the Commission is engaged in lobbying and marketing efforts to defeat a measure that would substantially limit its functions and budget, and that the Commission is spending funds without statutory authority.

## I. Lobbying and Coordinating with Special Interests to Thwart Ballot Measure

Defendants' unauthorized lobbying efforts include $78,000 in Commission expenditures during fiscal year 2011, and $6,500 each month in professional services, to lobby against Plaintiffs' ballot measure (*see* Compl. ¶ 24 (Ex. 2 at p. 4)[7]; *see also*, *e.g.*, Compl. ¶ 30(c) (Ex. 3 at Bates p. 538), ¶ 30(d) (Ex. 3 at Bates p. 537), ¶ 30(e) (Ex. 4)).[8] Defendants, in their official capacities and using public resources, corresponded and coordinated with special interest groups including Arizona Advocacy Network Foundation ("Foundation"), Public Campaign, and Common Cause to oppose Plaintiffs' ballot measure (*see*, *e.g.*, Compl. ¶ 30(g) (Ex. 5), ¶ 30(h) (Ex. 6), ¶ 31(d) (Ex. 7), ¶ 31(e) (Ex. 8), ¶ 31(f) (Ex. 9)). They helped the Foundation file a lawsuit to strike the measure from the ballot (*see* Compl. ¶ 30(i) (Ex. 10)) and worked with special interest groups on legislative language (Compl. ¶ 31(d) (Ex. 7) (Defendant Lang requesting Foundation approval of his "more limited proposals"), ¶ 31(e) (Ex. 8) (referring to joint meetings to "map out the hybrid bill")).

Using his official Commission email address, Defendant Lang enlisted the Foundation for "help" on Plaintiffs' ballot measure (*see* Compl. ¶ 30(a) (Ex. 11)). He also coordinated conversations and strategies to "push" votes of specific legislators against the measure (*see* Compl. ¶ 30(c) (Ex. 3 at Bates p. 538); *see also* Compl. ¶ 30(d) (Ex. 3 at Bates p. 537) (Defendant Lang suggesting a "positive, friendly communication with [Rep.] Heinz will be more

[7] Each paragraph cited from the complaint is supported by the exhibit that follows it. All exhibits are matters of public record of which the Court may take judicial notice.

[8] Plaintiffs request that the Court set an expedited schedule for discovery to supplement the public records cited here as necessary to prove their case.

effective"), ¶ 31(a) (Ex. 12) (sharing a spreadsheet of names of individuals and their votes), ¶ 31(b) (Ex. 13) (sharing information about the opinion of Rep. Barnes on the measure, and the Foundation asking Defendant Lang for a Republican former commissioner to call him), ¶ 31(c) (Ex. 14 at Bates p. 68) (Defendant Lang applauding the Foundation's "[g]ood work" to identify a legislator who opposed the measure), ¶ 30(e) (Ex. 4) (referencing Defendant Lang's discussion with the Foundation about the "plan" of the Commission's lobbyist for Plaintiffs' ballot measure)).

Also in his official capacity, Defendant Lang edited the Foundation's draft press release regarding the subject matter of the ballot measure (*see* Compl. ¶ 30(b), (Ex. 15)), applauded the Foundation's press release "strongly oppos[ing] any attempts to repeal or de-fund" the Commission, and reminded the Foundation to promote the release on social networking websites Facebook and Twitter (*see* Compl. ¶ 31(f) (Ex. 9)). Using his Commission email address, Defendant Lang solicited online comments from the Foundation on a radio program on which he appeared, in his official capacity, to discuss the subject matter of the ballot measure (*see* Compl. ¶ 30(f) (Ex. 16)). At a Commission meeting, he characterized the Foundation as doing "a lot of work" on the Commission's behalf "fighting against" the ballot measure (Compl. ¶ 33 (Ex. 17 at p. 43:15-19)). It also appears Defendants may have been responsible for providing a $12,500 grant in Commission funds for the Foundation to conduct "door-to-door canvass campaigns in Tucson and Phoenix . . . and enrolling more than 150 as members" of the Foundation (Compl. ¶ 32 (Ex. 18 at p. 2 ¶ 28 & Arizona Advocacy Network Profit & Loss)).

## II. Marketing Plan to Influence Voters

In addition to lobbying, Defendants spent and continue to spend millions in public funds to promote the Commission with messages such as "Everybody Wins" with Clean Elections and "80% of voters believe Clean Elections is important" (*see* Compl. ¶ 23 (Ex. 19-20)). Defendants hired media firm Moses Anshell, at a $5.5 million expense to the Commission, to develop annual "marketing" and "education" plans to promote the Commission and public funding for political campaigns (*see* Compl. ¶ 25 (Ex. 21), ¶ 26 (Ex. 22-24)). The firm conducted surveys "to determine the public's support for the Clean Elections system" (*see* Compl. ¶ 28 (Ex. 22 at Bates p. 244)), and then engaged in marketing efforts to expand that support (*see* Compl. ¶ 26(e) (Ex. 23 at Bates p. 259)). The firm recommended "monthly op-eds that support and encourage public funding of campaigns throughout the country" (*see* Compl. ¶ 28 (Ex. 22 at Bates p. 245)) and other methods to "reach politically aware voters" and counter opposition to the Commission and those trying to limit its scope (*see* Compl. ¶ 26(d) (Ex. 23 at Bates p. 254), ¶ 26(a) (Ex. 23 at Bates pp. 254-55 & Ex. 24 at Bates p. 322)).

In response to political "threats" to limit Commission powers and funding, particular efforts were made for messaging and "PR steps" to advertise that the Commission does not spend or receive General Fund money (*see* Compl. ¶ 26(c) (Ex. 23 at Bates p. 252) ("heading into the 2010 election cycle . . . Clean Elections is faced with numerous threats, including both legal and political challenges," which "need to be addressed by increasing awareness of CCEC, better educating the public on the effectiveness and importance of Clean Elections . . . and working to dispel any myths, regarding funding, etc."); *see also*, *e.g.*, Compl. ¶ 26(b) (Ex. 24 at

Bates p. 317 & Ex. 23 at Bates p. 251) ("If the voter is not educated about Clean Elections, there is a chance to be swayed by misunderstandings of the funding system, negative press, etc."), ¶ 27(c) (Ex. 23 at Bates p. 256) ("Specific PR steps we would take include: Educating the public and press about the funding source for Clean Elections, clarifying that this is not General Fund money"), ¶ 27(a) (Ex. 24 at Bates p. 320) (messaging that "[n]ot a single dollar of Clean Elections funds comes from Arizona's General Fund" and the Commission does not take money from taxpayers)).

## III. Unauthorized Spending for Voter Education

Although the Legislature expressly provided that the Commission "shall apply" 10% of its budget for voter education, A.R.S. § 16-949(C), the Commission believes it must spend more than that (*see* Compl. ¶ 42 (Ex. 25 at p. 48:2-3) (Defendant Lang stating to Defendant Commissioners, "[a]s you know, we're required to spend more than 10 percent for education")). In its 2010 Annual Report, the Commission reported spending over 35% of its budget on voter education (*see* Compl. ¶ 41 (Ex. 1 at p. 31; *see also* Ex. 25 at p. 22:21-25 & p. 23:2-17 (Defendant Lang stating "obviously we're exceeding" 10% of the budget for voter education).

## IV. Arguments in Support of Amended Order to Show Cause

Plaintiffs' proposed amended order to show cause (*see* Ex. 26) identifies Commission activities that should be immediately enjoined to stop irreparable harm to Plaintiffs. Paragraphs one through six identify Defendants' ongoing spending and lobbying efforts for self-promotion and to influence voters on a measure to limit the Commission's functions. The Commission cannot exercise any powers beyond those conferred by statute. *Hibbs*, 206 Ariz. at 488, 80 P.3d

at 767; *Cox*, 27 Ariz.App. at 495, 556 P.2d at 343. No statute confers power to promote the Commission or the idea or practice of public funding for political campaigns or to oppose ending public funding for political campaigns (*see* Ex. 26 ¶ 1). Likewise, there is no statute granting the power to spend public funds to advertise except for certain permitted purposes, like providing information about how to run for office and candidate forums (*see* Ex. 26 ¶ 4); *see* A.R.S. § 16-956(A)). Ads for permitted purposes must be limited to advertising only the permitted information, and not to promote the Commission with taglines such as "Everybody Wins" with Clean Elections, or to garner public support for the Commission's functions with statements like "80% of voters believe Clean Elections is important" (*see* Compl. ¶ 23 (Ex. 19-20)).

There is also no statute conferring power for the Commission to spend public funds for surveys and research about ending or promoting public funding for political campaigns (the subject matter of the ballot measure), or about voter opinions of the Commission, whose functions stand to be substantially limited by the ballot measure (*see* Ex. 26 ¶ 5; *see also, e.g.*, Compl. ¶ 28 (Ex. 22 at Bates p. 244)). Defendants' ongoing advertising, use of taglines, and public opinion polls are all unauthorized actions for the purpose of attempting to influence voters, and the activities must be immediately enjoined.

Defendants' commercials, publications, and other statements claiming—falsely—that the Commission receives no money from the state's General Fund (*see* Ex. 26 ¶ 6) are also made for the purpose of influencing voters against a ballot measure (*see, e.g.*, Compl. ¶ 26(c) (Ex. 23 at Bates p. 252), ¶ 27 (Ex. 24 at Bates pp. 319-20)). Defendants understand that more voters

oppose the use of General Fund money for political candidates, and they are likely to vote in favor of a measure to end such funding (*see id.*) – which will curtail Defendants' powers. To discourage this outcome, the Commission is engaged in an ongoing media campaign insisting that the Commission does not receive or spend money from the General Fund. Aside from the fact that the Commission has no statutory authority to spend its budget to produce and air commercials telling voters where its budget comes from, the Commission's funding statement is false. The Commission *does* receive and spend money from the General Fund. For every taxpayer who checks the optional box on their income tax form, five dollars are transferred from the General Fund to the Commission. A.R.S. § 16-954(A).[9] The Arizona Joint Legislative Budget Committee estimated that for fiscal year 2011, "$8.5 million is transferred from the General Fund to the Citizens Clean Election Fund" (*see* Ex. 27 at p. 5).

Finally, Defendants' communications with and possible payments to the Arizona Advocacy Network Foundation (*see* Ex. 26 ¶¶ 2-3) are indirect lobbying efforts for the purpose of attempting to influence voters (*see, e.g.*, Compl. ¶¶ 30-33 (Ex. 3-20)). Arizona Advocacy Network Foundation is a private special interest group that has actively lobbied and litigated against the proposed measure to end public funding for political campaigns, and Defendants' communications with the Foundation expressly include "helping" on the proposed measure, "pushing" legislative votes, tracking and following up with legislators, and finding plaintiffs to challenge the proposed measure in court (*see* Compl. ¶¶ 29-31 (*e.g.*, Ex. 3 at Bates p. 538; Ex.

[9] The Arizona Supreme Court's statement in *Clean Elections Inst., Inc. v. Brewer*, 209 Ariz. 241, 245, 99 P.3d 570, 574 (2004), that the Commission is not funded by the General Fund, is erroneous. The source of the Commission's funding was not an issue in that case, and the Commission does receive and spend general funds. *See* A.R.S. § 16-954(A).

10-11). These communications occurred in Defendants' official capacities – using Commission offices, email addresses and phone lines, and on Commission work time (*see*, *e.g.*, Compl. ¶ 30(g) (Ex. 5)). Similar activities that have occurred during non-working hours by volunteers have been held unauthorized merely because public facilities were used. *See Mntn. States Legal Fndn. v. Denver Sch. Dist. No. 1*, 459 F.Supp. 357, 358 (D. Colo. 1978).

Defendants are not authorized to lobby, or coordinate lobbying efforts with special interest groups, in their official capacities. Nor are Defendants permitted to spend Commission funds to pay such groups for "door-to-door canvass campaigns" (*see* Compl. ¶ 32 (Exh. 18 at p. 2 ¶ 28 & Arizona Advocacy Network Profit & Loss)). This unauthorized activity must be enjoined immediately.

**Conclusion**

The lobbying, spending, and advertising activities outlined in the Amended Order to Show Cause are beyond the Commission's statutory authority and represent illegal attempts to influence voters. One district court put it best:

> The funds collected from taxpayers theoretically belong to proponents and opponents of [government] action alike. To favor one side of any such issue by expending funds obtained from those who do not favor that issue turns government on its head and is the antithesis of the democratic process. . . . If government, with its relatively vast financial resources, access to the media and technical know-how, undertakes a campaign to favor or oppose a measure placed on the ballot, then by so doing government undercuts the very fabric which the constitution weaves to prevent government from stifling the voice of the people.

*Palm Bch. Cty. v. Hudspeth*, 540 So.2d 147, 154 (Fla. D. Ct. App. 1989). Other courts agree:

> A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair

> advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office.

*Mntn. States Legal Fndn.*, 459 F.Supp. at 360; *Stanson v. Mott*, 551 P.2d 1, 9 (Ca. 1976). Here, a perpetuation of Defendants' power is precisely at issue for voters to decide. They should be immediately enjoined from activities and spending that promote themselves over Plaintiffs' proposed measure. Defendants' Motion to Dismiss should be denied, and Defendants should be immediately enjoined from the illegal conduct itemized in the Amended Order to Show Cause.

**RESPECTFULLY SUBMITTED** this 23rd day of December, 2011 by:

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