Campaign Finance Laws

The Arizona Legislature Should Restore Clarity to Our Campaign Finance Laws

BY JOSEPH KANEFIELD

Disclosure and transparency in our elections have been paramount since statehood. Our founders saw fit to include a provision in the Arizona Constitution directing the first Legislature to enact laws requiring the "general publicity, before and after election, of all campaign contributions to, and expenditures of campaign committees and candidates for public office."[1] Thus, Arizonans have always had a right to know who is contributing money to influence their elections.

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The recent summary judgment ruling by the federal district court in *Galassini v. Town of Fountain Hills*[2] casts an unfortunate cloud over Arizona's campaign finance system and therefore undermines this fundamental principle. The court held that the definition of "political committee" in A.R.S. § 16-901(19) is vague and overbroad in violation of the First Amendment of the U.S. Constitution as applied to an individual who was organizing a protest via email to oppose a bond measure in the Town of Fountain Hills.[3]

Because many but not all of the campaign finance registration and reporting requirements are grounded in the definition of "political committee," this decision, if allowed to stand, could have a dramatic impact on the Arizona public's constitutional right to know who is financing our elections and how the money is being spent.

The *Galassini* decision's reach arguably extends only to the parties involved in the case, but that issue remains subject to debate and litigation. This is because the court granted declaratory judgment relief to the plaintiff and against the State of Arizona, which intervened early in the case to defend the constitutionality of the "political committee" definition. The court, however, declined to issue a permanent injunction because there was no evidence in the record that the State was likely to enforce the laws against the Plaintiff.

Because the holding was specific to the Plaintiff and her future campaign activity at the local or state level, any party with standing who wishes to extend the reach of *Galassini* will have to bring a separate lawsuit. However, the uncertainty created by the decision, coupled with Arizonans' right to know who is financing their elections, suggests the Arizona Legislature should take action this session to address the district court's concerns even while the State seeks appellate review.

The debate over "dark money" illustrates the public's desire to know who is financing our elections. But what is dark money?

Dark money is money used to influence elections whose original source wishes to remain anonymous. There are no doubt reasons why some individuals and corporations would prefer to anonymously exercise their rights to speak for or against candidates. However, the framers of the Arizona Constitution decided long ago that was not how it was going to be done in Arizona, and that wish can easily be respected within the parameters of the First Amendment.

Our constitutional framers were ahead of their time. The U.S. Supreme Court held in *Citizens United v. Federal Election Commission* in 2010 that although disclosure and disclaimer requirements may burden the ability to speak in accordance with the First Amendment, they "impose no ceiling on campaign-related activities," and "do not prevent anyone from speaking."[4] Thus, the Court subjects disclosure and disclaimer requirements to "exacting scrutiny," which only requires the government to demonstrate a substantial relation between the disclosure requirement and a sufficiently important government interest.[5] Although the district court in *Galassini* applied this lower scrutiny, it nevertheless found that the registration and reporting requirements are not substantially related to the State's proffered interest in disclosure.[6]

The Arizona Legislature should take action this session to address the district court's concerns even while the State seeks appellate review.

It is questionable whether the district court decision will survive appellate scrutiny or the extent to which it will affect disclosure. For decades, hundreds if not thousands of candidates and groups have found little ambiguity in our state's campaign finance laws.

Nevertheless, the real issue seems not so much the alleged vagueness of the political committee definition, but rather the extent to which small groups of individuals who gather together to collectively exercise their right to influence elections and who spend minimal amounts of money should be burdened with the process of registering and reporting their contributions and expenditures. Arguably, there is little harm in exempting these citizens from the campaign finance registration and reporting requirements or simply requiring them to disclose their identities. The district court even suggested the latter might satisfy the State's important interest of keeping the voters informed of who is trying to influence them.[7]

The Arizona Legislature took steps in 2012 to address this concern by exempting from the registration and reporting requirements citizen groups who spend less than $250.[8] Thus, if a person such as Plaintiff organizes a group of citizens in Fountain Hills to influence a bond election and the group collectively spends less than $250, they are exempt from the campaign finance registration and reporting requirements.[9] The federal court, however, seemed unimpressed by this effort and struck down the political committee definition despite the exemption. The Ninth Circuit may likely have a different view given its recent campaign finance disclosure precedent.[10]

The good news is the legislative fix is quite simple and, if done quickly, will moot the negative effect of the *Galassini* decision. Because the court was primarily concerned with the length of the "political committee" definition (183 words), it can be clarified by simply breaking the long sentence into subsections that set forth precisely the triggering thresholds required to register as a political committee, including the minimum expenditure required (now $250) to form a political committee. And, as noted above, the law should also require that small-group speakers disclose their identities prior to an election. This will keep the law in compliance with the Arizona Constitution's disclosure requirement and would likely survive judicial scrutiny.

Fortunately, the citizens will not be deprived of all disclosure until a legislative fix or reversal of the *Galassini* decision. The Citizens Clean Elections Commission recently released a statement to the public and candidates advising that the *Galassini* decision has no effect on provisions of the Clean Elections Act and Rules that apply to candidates and other persons who participate financially in state and legislative candidate elections.[11] And the Commission strongly recommends those

candidates and other persons who participate financially in state and legislative candidate elections continue to make filings as required by law, subject to enforcement under the Clean Elections Act and Rules.

The Clean Elections Act requires any person who makes independent expenditures related to a particular office cumulatively exceeding $5,000 in an election cycle, with limited exceptions, to file reports with the Secretary of State identifying the office and the candidate or group of candidates whose election or defeat is being advocated and indicating whether the person is advocating election or advocating defeat.[12] Thus, any person, whether a group or individual, wishing to influence a candidate election is obligated to file these disclosure reports regardless of how "political committee" is defined.

Moreover, other important campaign finance laws remain unaffected by the *Galassini* decision. For example, the statute that limits the amount of contributions that can be given to candidates by individuals and political committees remains in full force and effect.[13] Contribution limits often come to light when reported on campaign finance reports, and *Galassini*'s reach does not extend to candidate committees.[14] And election officials, including the Citizens Clean Elections Commission, have the statutory authority to compel disclosure of candidate records, including authorization to issue subpoenas.[15]

All who participate in the democratic process are entitled to certainty and clarity in the laws that govern them. However, the *Galassini* decision has questionably invoked this principle to justify striking down a core campaign finance law that was clearly enforced, applied, administered and understood for decades by the election officials, candidates, political parties, political committees and participating citizens.

The Arizona Legislature should provide clarity without delay by reinstituting the core principle of disclosure in elections, which has been embodied in Article 7, Section 16 of the Arizona Constitution since statehood. By doing so this session, the confusion already caused by the *Galassini* decision itself will be eliminated and hopefully forgotten well in advance of next year's statewide and legislative elections.

endnotes

1. ARIZ. CONST. art. 7, § 16.
2. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 WL 5445483 (D. Ariz. Sept. 30, 2013).
3. *Id.* at *19, 24.
4. 588 U.S. 310, 366 (2010).
5. *Id.* at 366-67.
6. *Galassini*, 2013 WL 5445483, at *24.
7. *Id.* at 40, ll. 1-5.
8. Laws 2012, Ch. 361, § 16.
9. A.R.S. § 16-901(19).
10. *See Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (2009); *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773 (9th Cir. 2006).
11. Available at www.azcleanelections.gov/docs/default-source/announcements/statement-on-galassini-v-fountain-hills.pdf?sfvrsn=0.
12. *See* A.R.S. § 16-941(D).
13. *See id.* §§ 16-905, -941(B).
14. *See id.* § 16-901(3), which separately defines a "candidate's campaign committee."
15. *See id.* §§ 16-904(I); -956(a)(7); Ariz. Admin. Code R2-20-211.