

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-020916

03/21/2012

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
T. Nosker
Deputy

NO TAXPAYER MONEY FOR POLITICIANS,
et al.

CHRISTINA M SANDEFUR

v.

TODD LANG, et al.

MICHAEL K GOODWIN

RULING MINUTE ENTRY

This matter came before the Court on two motions: (1) defendants' motion to dismiss, and (2) plaintiffs' amended motion for order to show cause. Having considered the parties' papers and arguments, along with the amicus brief, the Court rules as follows.

This is a special action. Pursuant to Rule 3, Rules of Procedure for Special Actions, only three questions may be raised: (a) whether defendant has failed to exercise discretion which he has a duty to exercise, or has failed to perform a duty non-discretionary duty required by law; (b) whether defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority, and (c) whether a determination was arbitrary and capricious or an abuse of discretion. Plaintiffs' complaint claims that defendants have spent beyond their public authority (Count 1 and 2), and illegally attempted (or will so attempt) to influence the outcome of an election (count 3). In addition, plaintiffs seek damages for past expenditures (count 4).

Plaintiffs originally submitted a proposed order to show cause which would require defendants to "appear and show cause, if there is any, why the Court should not enter an order enjoining them from illegally expended (sic) public funds and attempted (sic) to influence the

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outcome of an election.” This proposed order was problematic because using the term “illegally” begged the question—the Court is always happy to enjoin illegal conduct (and as the Court suspected, defendants disclaimed any interest in engaging in illegal acts), but the challenge is in setting forth what constitutes illegal conduct. Accordingly, plaintiffs submitted an amended order to show cause which provided:

Defendants shall appear and show cause, if there is any, why the Court should not enter an order enjoining and prohibiting them from the following conduct, either personally or by their subordinates, agents or lobbyists, in their official capacities as officials and employees of the Citizens Clean Elections Commission:

1. Engaging in any activity to promote the Commission or the idea or practice of public funding for political campaigns or to oppose ending public funding for political campaigns.
2. Communicating with any member of Arizona Advocacy Network Foundation, Campaign Finance Institute, Rodel Foundation, Proteus Fund and Piper Fund, Public Campaign or other special interest group that takes a position on public funding for political candidate campaigns, about any activity, effort or strategy to promote the Citizens Clean Elections Commission or public funding for political campaigns, or oppose the repeal of public funding for political campaigns;
3. Providing Commission funds to any special interest group as described above;
4. Expending funds for advertising unless such advertising is strictly limited to providing information about how to run for office, secure public campaign funding, voter pamphlets, or candidate forums, and provided that such advertising contains no editorial commentary about the Citizens Clean Elections Commission, including characterization of the Commission or its mission and activities, or about public funding for political campaigns;
5. Conducting surveys or other public opinion research about the Commission or about ending or promoting public funding for political campaigns;
6. Stating that the Commission does not receive money from the state’s General Fund; and
7. Spending more than 10% of the Commission’s budget on activities the Commission considers “voter education” pursuant to A.R.S. §§ 16-949 & 16-956.

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Prefatory Note

This case is not about the wisdom of public funding for candidates. People of good will and ordinary charity can and do disagree about such (and, indeed, the voters of Arizona in fact disagreed about it, as evidenced by their votes on the proposition that established the Citizen's Clean Elections Act). Rather, this case is about whether plaintiffs can, through a special action, obtain the relief they have sought.

The First Amendment

First, a few words about general principals. The First Amendment to the Constitution provides, "Congress shall make no law ... abridging the freedom of speech . . . or the right of the people peaceably to petition the Government for a redress of grievances." It is beyond debate that the First Amendment now applies to the states, and regardless, the Arizona Constitution contains similar provisions. *See* Arizona Constitution art. II, §§ 5 and 6. As a general matter, government employees are entitled to speak to whoever they want if they wish, so long as they do not inappropriately undermine their employer. *E.g. Pickering v. Board of Education*, 88 S. Ct. 1731 (1968). "Under the First Amendment there is no such thing as a false idea," and although "there is no constitutional value in false statements of fact," the First Amendment nonetheless often protects such so as to not chill speech with value. *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974). Prior restraints on speech are almost always inappropriate. *State v. Tolleson*, 160 Ariz. 385, 733 P.2d 490 (1989). Indeed, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 911 (2010). And, of course, the government itself has the right to speak (although the government's right to speak raises different First Amendment concerns). *Johanns v. Livestock Marketing Assoc.*, 125 S. Ct. 2055 (2005).

Analysis

Plaintiffs seek to prohibit defendants from engaging in speech "in their official capacities." *See* Amended Order to Show Cause. Presumably the reason that plaintiffs have so limited their request is that they recognize that the First Amendment allows the individual defendants to speak their minds on whatever topic they wish when they are not acting in their official capacities. But, under the statutes, the individual commissioners have only one role: to act as voting members of the Citizens Clean Elections Commission, which acts as a single body. *See* A.R.S. §§ 16-955, 16-956 and 16-957. Accordingly, it would be inappropriate to enter any injunctive or declaratory relief against the individual commissioners. And Mr. Lang, the executive director "shall serve at the pleasure of the commission." A.R.S. § 16-955(J). By rule, he is responsible for directing the day-to-day operations of the Commission. R2-20-101(10).

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As to what the Commission can do, the statutes are broad. A.R.S. § 16-940(A) indicates that one purpose of the clean elections system is to “encourage citizen participation in the political process.” *See also Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241 (2004) (describing the Commission’s powers and duties). A.R.S. § 16-949 sets forth its spending authority. In particular, it:

- Puts a cap on total spending during a particular year based on the number of tax returns filed, but then allows flexibility by providing that “[t]he commission may exceed this limit during a calendar year” . . . if adjustments are made for a subsequent period. § 16-949(A).
- Allows the commission to use “up to ten percent of the amount specified in subsection A for reasonable and necessary expenses of administration and enforcement...” § 16-949(B).
- Provides that the commission “shall apply ten percent of the amount specified in subsection A of this section for reasonable and necessary expenses associated with voter education, **including** the activities specified in § 16-956, subsection A.” § 16-949(C).

As one can readily see from the above, plaintiffs’ request for an injunction prohibiting the committee from “[s]pending more than 10% of the Commission’s budget on activities the Commission considers “voter education” pursuant to A.R.S. §§ 16-949 & 16-956” (Order to Show Cause ¶ 7) necessarily fails, because A.R.S. § 16-949(A) allows the Commission to do so if adjustments are made in subsequent years.

Regarding plaintiffs’ request for an injunction prohibiting the Commission from stating that “it does not receive money from the state’s General Fund (Order to Show Cause ¶ 6), the Supreme Court has already found this to be a true statement. *Clean Elections Institute*, 209 Ariz. at 245 (“Under the Act, campaign funding for participating candidates, as well as funding for the Commission to carry out its various duties, comes not from the general fund, but rather from the Clean Elections Fund (the Fund), which receives monies from a variety of explicitly dedicated sources.”). Perhaps this is dicta, but it is legally correct dicta. Although the general fund would have more money if clean elections did not exist (just as it would have more money if any number of deductions and tax credits were eliminated), this does not mean that the Commission receives money from the General Fund.

As to plaintiffs’ request that the Court prohibit the Commission from communicating with what it labels “special interest groups” who favor clean elections, the Court is unaware of

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any other situation in which a person or entity has sought to preclude a government commission from communicating with the citizenry—that’s not how government works. Indeed, the criticism generally leveled at government is that it is not responsive to the members of the public, not that it responds to them.

As to the Commission conducting surveys, it should go without saying, but the state has a valid interest in encouraging voter participation in elections, and the Act specifically states that interest. *See* A.R.S. § 16-940(A) (one purpose of the Act is to “encourage citizen participation in the political process”). Conducting surveys so that the Commission can learn how to better encourage voter participation is one method of fulfilling that directive.

Exercising special action jurisdiction is discretionary. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92 (App. 1979). As noted above, many of plaintiffs’ requests are contrary to the statutory scheme and First Amendment principles. The remainder of the proposed orders (as encompassed in the revised Order to Show Cause) are an invitation for the Court to micro-manage the Commission because of things plaintiffs fear it might do. And, as to plaintiffs’ apparent principal concern (that the Commission will contest plaintiffs’ proposed ballot measure to eliminate the Commission), the Commission acknowledged at argument that it cannot use its funds to take sides regarding ballot measures. It can, however, engage in voter education, including encouraging people to exercise their franchise.

Having fully considered the matter, the Court has determined that it should not accept jurisdiction over this special action. Accordingly, the motion to dismiss is GRANTED.¹

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

¹ The Court is aware that the Complaint contains a claim for damages. Such a claim is not properly brought in a Special Action. See Rule 3, Arizona Rules of Procedure for Special Actions. Plaintiffs may file an appropriate complaint if seeking damages if they wish.