

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Diane Wickberg,)	
)	Civil Action No. _____
Plaintiff,)	
)	
v.)	
)	COMPLAINT
Candace D. Owens in her)	
individual capacity and in her official)	
capacity as Coconino County Recorder;)	
and Coconino County,)	<u>Jury Demand</u>
)	
Defendants.)	

Plaintiff Diane Wickberg, by and through her undersigned counsel, brings
this Complaint against the above-named Defendants. In support of this
Complaint, Plaintiff alleges the following upon information and belief:

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a) and 42
U.S.C. § 1983.

1 polls.” (Correspondence from Amy Bjelland, Arizona Secretary of State Election
2 Director, 7/1/2010, Exhibit 2).

3
4 7. Defendant Owens acted under color of law at all times material to this
5 complaint.

6 8. Defendant Coconino County is a subdivision of the State of Arizona,
7 organized pursuant to A.R.S. §§ 11-101, 11-105 and 11-201. Defendant County is
8 a jural entity that can sue and be sued. A.R.S. §11-201(A)(1). It exists for
9 purposes of self-governance and to aid in the administration of Arizona law. The
10 powers of Coconino County are exercised by the Coconino County Board of
11 Supervisors, as well as agents and officers acting under the Board’s authority.
12 A.R.S. § 11-201(A)(1).
13
14

15 9. Coconino County Board of Supervisors consists of officers created by
16 the Arizona Constitution, art. XII, § 3 (2010). The Board’s “duties, powers, and
17 qualifications” are prescribed by law. *Id.* at § 4. Among other things, the Board is
18 responsible for appointing “for each election precinct one inspector, one marshal,
19 two judges and not less than two clerks of election.” A.R.S. § 16-531(A). The
20 Board of Supervisors or other authority in charge of elections is required to
21 conduct a class for the instruction of inspectors and judges. A.R.S. §16-532(A).
22
23

24 10. In Coconino County, by custom and practice, the Recorder is
25 responsible for appointing and training poll workers for each election precinct,
26 including the inspector, marshal, judges and clerks. *See*
27
28

1 <http://www.coconino.az.gov/elections.aspx?id=1982> (last visited September 15,
2 2010).

3
4 11. Coconino County is responsible for the policy, practices and customs
5 of the Board of Supervisors and County Recorder.

6 **GENERAL ALLEGATIONS**

7 **May 18, 2010, Special Election Day**

8
9 12. On Tuesday May 18, 2010, the State of Arizona held a special election.
10 On that date, Plaintiff Diane Wickberg went to vote at her designated polling
11 station located at the Bethel Baptist Church on Lake Mary Road, in Flagstaff,
12 Arizona, County of Coconino.

13
14 13. Also on that day, Plaintiff wore a white t-Shirt with an emblem
15 featuring “We the People,” a depiction of the U.S. flag and Constitution, and the
16 words “Flagstaff Tea Party-Reclaiming Our Constitution Now.” Plaintiff wore
17 this shirt as she does every Tuesday, because that is the day Flagstaff tea party
18 meetings are held. The same emblem appears on the front and back of the shirt
19 and has a yellow background, white writing, with a touch of blue. The front
20 emblem is approximately four inches by four inches, and the back emblem is
21 approximately twelve inches by twelve inches.
22

23
24 14. The Flagstaff tea party is a local, decentralized, non-partisan, civic
25 organization that does not endorse candidates or ballot measures. The group
26 focuses on education and promoting involvement from its members and the
27 general public on issues of public concern.
28

1 15. Upon her arrival at the polling station, Plaintiff checked in by showing
2 her driver's license and signing the register. As she waited to be given a ballot, an
3 employee at the poll told Plaintiff that she must change her shirt, turn it inside out,
4 "go out and get a jacket" or otherwise cover it with another article of clothing
5 before voting.
6

7 16. One of the other poll employees warned Plaintiff in a loud voice to
8 change or cover her shirt, stepping right in front of her and invading her personal
9 space in an intimidating manner.
10

11 17. Plaintiff was shocked and intimidated by this poll employee, who made
12 Plaintiff feel like she had done something wrong and that the police would be
13 called.
14

15 18. Eventually, after harassing Plaintiff about her shirt, the poll employees
16 advised Plaintiff that she could vote without having to cover her shirt "but only
17 because" no other voters were in the polling station.
18

19 19. After returning home from the polling station, Plaintiff called the
20 Coconino County Recorder's Office and was connected to Defendant Owens.
21 After Plaintiff explained the situation, Owens responded that "of course you were
22 told to cover up . . . it's a political statement . . . I don't know what your tea party
23 shirt looks like but clearly the tea party has an agenda." Owens further warned
24 Plaintiff that if she wears the tea party t-shirt again, she will not be allowed to vote
25 and suggested that she seek an early ballot instead of voting at the polling station
26 on the next election day.
27
28

Plaintiff's June 2, 2010 Correspondence to Arizona Secretary of State and County Recorder

20. On June 2, 2010, counsel for Plaintiff sent correspondence to Amy Bjelland, Director of the Elections Division of the Arizona Secretary of State (sometimes referred to herein as "SOS"), and Defendant Owens.

21. The Secretary of State is the Chief Election Officer of the State of Arizona. A.R.S § 16-142(A)(1). As the State's Chief Election Officer, the Secretary "prescribe[s] rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting." *Id.*

22. The June 2 correspondence described the May 18 incident at the Bethel Baptist church polling station involving Plaintiff and cited to the applicable state and local electioneering rules and the reasons why Plaintiff's shirt did not constitute electioneering. Further, the correspondence requested that Plaintiff be provided an assurance within thirty days that she would not be turned away from her polling place if she wears the tea party t-shirt in question the next time she votes.

Defendant Owens' June 17, 2010 Correspondence

23. On June 17, 2010, Defendant Owens responded to Plaintiff's June 2 letter. In her response, Defendant acknowledged that Plaintiff's experience at the Bethel Baptist polling place on May 18, 2010, was brought to her attention; however, she provided no assurance to Plaintiff that she would not be turned away

1 from the polling place. Instead, she provided a vague and general statement that
2 her office is tasked with “preserving First Amendment Rights and enforcing
3 statutory prohibitions on electioneering, displaying political materials and
4 influencing others in a polling place.”

6 **Secretary of State’s July 1, 2010 Correspondence to Plaintiff**

7 24. In a letter dated July 1, 2010, addressed to Plaintiff and copied to
8 Defendant Owens, SOS State Elections Director Amy Bjelland stated that she
9 “took the opportunity to review and discuss this matter with Coconino County
10 Recorder Candace Owens” and thereafter determined that “the shirt did not
11 attempt to persuade or influence voters to vote for or against a particular
12 candidate, party or proposition in the election.” Bjelland further stated that
13 “[w]hile we support our county elections workers wherever possible, our first
14 obligation is to the voters of Arizona.”

17 **Plaintiff’s July 6, 2010 Correspondence**

18 25. Because Plaintiff never received a response from Defendant Owens to
19 her July 6, 2010 request for an assurance that she would not seek to prevent
20 Plaintiff from voting in future elections as had been done previously, counsel for
21 Plaintiff sent another letter to Defendant Owens requesting this assurance. The
22 letter further reminded Defendant of the Secretary of State’s conclusion (set forth
23 in the SOS letter of July 1, 2010), which opined that Plaintiff’s tea party shirt “did
24 not attempt to persuade or influence voters to vote for or against a particular
25 candidate, party or proposition” in the election.
26
27
28

August 2, 2010 Correspondence from Defendant Owens and SOS's Office

26. On August 2, 2010, Defendant Owens and SOS Election Director Bjelland sent correspondence to counsel for Plaintiff stating they would be unable to provide any assurance that "wearing „tea party“ apparel will always be permitted at the polls . . . because every election is unique and every evaluation of a claim of electioneering must be fairly analyzed in the context of each election." The letter further stated that "if a candidate posts political signs or issues direct mail pieces that read „tea party candidate“, then wearing a shirt to the polls that says „tea party“ could be construed to be advocacy in support of or opposition to a candidate."

Week Leading Up to August 24, 2010 Election Day

27. In or about the week preceding the August 24, 2010 election, Defendant Owens advised two members of the Flagstaff tea party that the Secretary of State's July 1st letter to Plaintiff was rescinded and that anyone wearing the Flagstaff tea party shirt to the polling stations would not be allowed to vote even if the Flagstaff tea party was not supporting any candidate or initiative in the election.

August 24, 2010 Election Day

28. On August 24, 2010, Arizona held a state-wide election. On that date, Plaintiff went to vote at her same designated polling station at the Bethel Baptist Church. Plaintiff wore the same tea party shirt that she wore on May 18, 2010, as described above.

1 29. The circumstances of the August 24 election were the same as the May
2 18 election in that there were no “tea party” candidates on the ballot or candidates
3 or ballot measures that had been endorsed by the Flagstaff tea party, nor were
4 there signs or any other indications that the Flagstaff tea party was endorsing any
5 candidate or measures on the ballot.
6

7 30. Upon arriving at the polling station, Plaintiff signed in and proceeded
8 through the registration process in order to obtain a ballot. As she waited, one of
9 the poll employees looked at Plaintiff’s shirt and told her that her shirt was not
10 allowed in the polling place. At that point, Plaintiff advised the poll employee that
11 she had a letter from the Secretary of State regarding the shirt, but the poll
12 employee responded with words to the effect of: “All I know is that I was told
13 that tea party shirts needed to be covered up.”
14

15 31. After that, Plaintiff put on a sweater that covered up her shirt and was
16 then allowed to vote.
17

18 32. On information and belief, on the same day, other voters who wore
19 Flagstaff tea party t-shirts to other Coconino County polling stations were allowed
20 to vote without covering their shirts.
21

22 33. Before Plaintiff left the polling station, poll employees admonished
23 Plaintiff that if she wore that shirt again, she would not be allowed to vote.
24

25 34. As a direct result of the above conduct of Defendants, Plaintiff suffered
26 emotional distress, anguish, humiliation and loss of freedom.
27
28

Count I

**Violation of Plaintiff's First Amendment Rights of Freedom of Expression
and Association Against Candace Owens in her Individual Capacity**

35. Plaintiff realleges, adopts and incorporates by reference paragraphs 1 through 34, as though fully set forth herein.

36. The First Amendment to the United States Constitution guarantees individuals the right to free speech and association.

37. Defendant Owens, either by evil motive or intent, or through reckless or callous indifference to the federally protected rights of Plaintiff, harassed, threatened, silenced, and chilled Plaintiff's rights to freedom of speech and association by improperly enforcing electioneering law against Plaintiff despite the Secretary of State's conclusion that "the shirt did not attempt to persuade of influence voters to vote for or against a particular candidate, party or proposition in th[e] [May 18, 2010] election."

38. Defendant Owens, either by evil motive or intent, or through reckless or callous indifference to Plaintiff's federally protected rights, caused poll workers under her supervision to harass, threaten, silence, and chill Plaintiff's speech and association by directing the workers to enforce electioneering laws against Plaintiff and/or failing to train them in the proper enforcement of state electioneering laws.

39. As a direct and proximate cause of the above conduct by Defendant Owens, Plaintiff suffered injuries and damages, including, but not limited to,

1 emotional distress, anguish, humiliation, impairment of reputation, and loss of
2 freedom.

3
4 **WHEREFORE**, pursuant to 42 U.S.C. §1983, Plaintiff requests
5 compensatory and punitive damages against Defendant Owens because her
6 conduct was malicious, oppressive and in reckless disregard of Plaintiff's rights.
7 Plaintiff further seeks costs, equitable relief, attorneys' fees and such other relief
8 as this Court deems equitable and just.
9

10 **Count II**

11 **Retaliation for Plaintiff's Exercise of her First Amendment Rights**
12 **Against Candace Owens in her Individual Capacity**

13 40. Plaintiff realleges, adopts and incorporates by reference paragraphs 1
14 through 39, as though fully set forth herein.

15
16 41. Defendant Owens was aware of, and participated in many of the various
17 communications between the County Recorder's office, Plaintiff, Plaintiff's
18 attorneys, and the Secretary of State's office regarding the County poll employees'
19 erroneous decision to enforce electioneering law against Plaintiff during the May
20 18, 2010 special election.
21

22 42. But for Defendant Owens' desire to punish Plaintiff for exercising her
23 constitutional rights and chill the future exercise of those rights, Defendant Owens
24 would not have classified Plaintiff's tea party shirt as electioneering within the
25 context of the August 24, 2010, election or continued to direct her employees to do
26 the same.
27
28

1 43. Defendant Owens' actions chilled and will continue to chill Plaintiff's
2 speech and association. Because Arizona law allows for the arrest, imprisonment
3 and fine of one who "knowingly" electioneers, threats from the Recorder would
4 chill or silence a person of ordinary firmness from future First Amendment
5 activities.
6

7 44. As a direct and proximate cause of the above conduct by Defendant
8 Owens, Plaintiff suffered injuries and damages, including, but not limited to,
9 emotional distress, anguish, humiliation, impairment of reputation, and loss of
10 freedom.
11

12 **WHEREFORE**, pursuant to 42 U.S.C. §1983, Plaintiff requests
13 compensatory and punitive damages against Defendant Owens because her
14 conduct was malicious, oppressive and in reckless disregard of Plaintiff's rights.
15 Plaintiff further seeks costs, equitable relief, attorneys' fees and such other relief
16 as this Court deems equitable and just.
17
18

19 **Count III**

20 **Due Process Claim against Defendant Owens**

21 45. Plaintiff realleges, adopts and incorporates by reference paragraphs 1
22 through 34, as though fully set forth herein.
23

24 46. Plaintiff has the Fourteenth Amendment right to Due Process of Law
25 before government deprives her of life, liberty or property.
26
27
28

1 47. Plaintiff has protectable liberty interests—fundamental rights in fact—in
2 free speech and association under the First Amendment, due process of law under
3 the Fourteenth Amendment, and the right to vote.
4

5 48. Defendant Owens, either by evil motive or intent, or through reckless or
6 callous indifference to Plaintiff’s federally protected rights, exercised standardless
7 discretion over what expressive conduct is characterized as electioneering, leaving
8 her free to censor ideas and enforce her own personal preferences.
9

10 49. Defendant Owens failed to develop objective standards to ensure that
11 citizens such as Plaintiff are not disenfranchised, harassed, or otherwise deprived
12 of constitutional rights without due process of law. “The mandate to decide „in
13 each case” does not prevent [an official] from supplanting the original
14 discretionary chaos with some degree of order, and the principal instruments for
15 regularizing the system of deciding „in each case” are classifications, rules,
16 principles, and precedents. *Sensible men could not refuse to use such instruments*
17 *and a sensible [government] would not expect them to.” Am. Hosp. Ass’n v.*
18 *NLRB*, 499 U.S. 606, 612 (1991) (quoting K. DAVIS, ADMINISTRATIVE LAW TEXT,
19 § 6.04, p. 145 (3d ed. 1972)) (emphasis added).
20
21
22

23 50. As a direct and proximate cause of the above conduct by Defendant
24 Owens, Plaintiff suffered injuries and damages, including, but not limited to,
25 emotional distress, anguish, humiliation, impairment of reputation, and loss of
26 freedom without due process of law.
27
28

1 **WHEREFORE**, pursuant to 42 U.S.C. §1983, Plaintiff requests
2 compensatory and punitive damages against Defendant Owens because her
3 conduct was malicious, oppressive and in reckless disregard of Plaintiff's rights.
4 Plaintiff further seeks costs, equitable relief, attorneys' fees and such other relief
5 as this Court deems equitable and just.
6

7 **Count IV**

8 **Equal Protection Claim against Defendant Owens**

9
10 51. Plaintiff realleges, adopts and incorporates by reference paragraphs 1
11 through 34, as though fully set forth herein.

12 52. Plaintiff's Fourteenth Amendment right to equal protection under the
13 law protects her from intentional and arbitrary discrimination.
14

15 53. Defendant Owens admits that she has a blanket policy prohibiting
16 Flagstaff tea party apparel at the polls but uses a different standard to assess the
17 legality of other groups' apparel.
18

19 54. Defendant Owens, by evil motive or intent, intentionally discriminated
20 against Plaintiff by using electioneering laws to impose barriers that thwarted the
21 exercise of Plaintiff's constitutional rights based on her membership in the
22 Flagstaff tea party.
23

24 55. Defendant Owens discriminated against Plaintiff with the intent to
25 deprive Plaintiff of equal protection under the laws of Arizona and the United
26 States.
27
28

1 **WHEREFORE**, pursuant to 42 U.S.C. §1983, Plaintiff requests
2 compensatory and punitive damages against Defendant Owens because her
3 conduct was malicious, oppressive and in reckless disregard of Plaintiff's rights.
4 Plaintiff further seeks costs, equitable relief, attorneys' fees and such other relief
5 as this Court deems equitable and just.
6

7 **Count V**

8 ***Monell Claim against Coconino County***

9
10 56. Plaintiff realleges, adopts and incorporates by reference paragraphs 1
11 through 55, as though fully set forth herein.

12 57. Defendant Owens' policies and practices as County Recorder represent
13 official policy of Coconino County.
14

15 58. Defendant Owens is the final policymaker who possesses final authority
16 to establish County policy with respect to enforcing electioneering laws at the
17 Bethel Baptist Church polling station and other stations in Coconino County, City
18 of Flagstaff, Arizona.
19

20 59. Defendant Owens deliberately violated Plaintiff's constitutional rights
21 through her own conduct and by directing her employees to engage in the same or
22 similar conduct.
23

24 60. County liability may be imposed for the single decision by a
25 policymaker. Further, if the decision to adopt a particular course of action is
26 directed by those who establish governmental policy, the municipality is equally
27 responsible whether that action is to be taken only once to be taken repeatedly.
28

1 61. Defendant Owens' acts represent the county's official policy with
2 respect to enforcing the electioneering laws at polling sites.

3
4 62. Defendant Owens was aware of her office's difficult task of preserving
5 the First Amendment rights and enforcing statutory prohibitions on electioneering
6 in the polling sites in her county, but failed to train county poll workers in these
7 tasks and was deliberately indifferent to their conduct in their carrying out of these
8 tasks. Accordingly, Owens actions or omissions were the moving force being the
9 violation of Plaintiff's constitutional rights.
10

11 63. Defendant Owens' conduct was the direct and proximate cause of
12 Plaintiff's injuries.

13
14 64. Defendant Owens' conduct was the moving force and direct proximate
15 cause of the unconstitutional acts committed by the poll workers.

16 65. As a direct result of the above conduct of Defendant Owens, Plaintiff
17 suffered emotional distress, anguish, humiliation and loss of freedom.
18

19 **WHEREFORE**, Plaintiff demands judgment against Coconino County for
20 compensatory damages, equitable relief, plus costs and attorneys' fees, and such
21 further relief as this Court deems equitable, just and proper.
22

23 **JURY DEMAND**

24 Plaintiff demands a trial by jury.

25 **REQUEST FOR RELIEF**

26 66. Plaintiff has no adequate legal, administrative, or other remedy by
27 which to prevent or minimize the continuing and/or threatened irreparable harm
28

1 from Defendants' current and threatened irreparable harm to her constitutional
2 rights.

3
4 67. An actual live controversy exists between Plaintiff and Defendants, in
5 which the parties have genuine and opposing interests, interests that are direct and
6 substantial, and of which a judicial determination will be final and conclusive.

7 68. Plaintiff has a likelihood of success on the merits of her claims.

8
9 69. The public interest and equities favor entry of a court order granting
10 Plaintiff the following described declaratory relief, as well as temporary,
11 preliminary and permanent injunctive relief.

12 **WHEREFORE**, Plaintiff respectfully requests that the Court:

13
14 A. Declare Defendants are acting in violation of the Constitution by
15 improperly and discriminatorily enforcing and threatening to continue to enforce
16 the electioneering laws against Plaintiff.

17
18 B. Enjoin Defendants and any other employee acting on behalf of
19 Defendants, from harassing Plaintiff or further violating her rights secured by the
20 First and Fourteenth Amendments, including carrying out threats that they will
21 deny Plaintiff the right to vote at the next election or subsequent elections if she
22 wears her Flagstaff tea party t-shirt.

23
24 C. Order Defendant Owens to create and publish objective classifications,
25 rules and/or principles to ensure that electioneering law is enforced impartially and
26 uniformly within Coconino County.
27
28

1 D. Order Defendant Owens to provide additional training to election
2 workers to ensure that the enforcement of electioneering law within Coconino
3 County is uniform and impartial and does not infringe on a citizens' constitutional
4 rights.
5

6 E. Award Plaintiff her reasonable attorneys' fees, litigation expenses and
7 costs, pursuant to 42 U.S.C. § 1988 and other applicable law, and grant such other
8 relief as the Court may deem just and proper.
9

10 **SEPTEMBER 20, 2010**

11 **RESPECTFULLY SUBMITTED,**

12 s/Clint Bolick

13 Clint Bolick (Arizona Bar No. 021684)

14 Diane S. Cohen (Arizona Bar No. 027791)

15 Gustavo E. Schneider (Arizona Bar No. 027213)

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