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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-096705 12/03/2018

HONORABLE DAVID J. PALMER

CLERK OF THE COURT
I. Ostrander
Deputy

ARIZONA ADVOCACY NETWORK, et al. JAMES E BARTON II

v.

STATE OF ARIZONA, THE, et al. TIMOTHY BERG

TIMOTHY A LASOTA
MARY R O'GRADY
JUDGE PALMER

UNDER ADVISEMENT RULING

The Court has read and considered the Motion for Summary Judgment filed in this matter on April 23, 2018, by Plaintiffs, which consists of Arizona Advocacy Network[1] ("AAN"), a number of state legislators, and a labor union. Plaintiffs were represented by attorneys the Torres Law Group, with James Barton on oral argument for the Plaintiffs.

The Court has also read and considered the responses to that Motion for Summary Judgment filed by Defendants the State of Arizona, Michele Reagan in her capacity as Secretary of State, (collectively "the State"), the Citizens Clean Elections Commission ("the Commission"), and the Governor's Regulatory Review Council ("GRRC"). Snell and Wilmer represented the State, with Timothy Berg on oral argument; Timothy LaSota represented GRRC and argued on their behalf.

[1] Arizona Advocacy Network is a successor organization to the ballot measure committee that promoted the Act in 1998 and has standing to defend the act in legal proceedings.

Osborn Maledon represented the Commission, with Mary O'Grady on oral argument, who although a nominal defendant, took positions on the issues that largely aligned with the Plaintiffs' positions on the issues presented.

BACKGROUND

In 1998, two initiative petitions were placed on the ballot by the citizens of the State of Arizona. Though clearly intertwined in this action, the two propositions that were passed by a majority of voters who cast ballots in that 1998 election are independent of each another.

The first was known as the Clean Elections Act ("the Act"), the purpose of which is described below, and was codified at A.R.S. §§ 16-940 – 961.

Also passed at that time was another citizens' initiative known commonly as the Voter Protection Act, which became Article IV, pt. 1, Sec. 14 of the Arizona Constitution.

The parties agree there are no significant factual disputes and that the matter may be resolved via Motion/Cross-Motion for Summary Judgment as a matter of law.

CLEAN ELECTIONS ACT

At the outset, it is noted that when the Arizona Constitution was established, it contained a provision directing the first legislature to "enact a law providing for the general publicity of campaign contributions to and expenditures of campaign committees and candidates for public office."

While the legislature has never complied with that directive, citizens of this state did to a degree further that objective through passage of the Act. The Act is the result of a citizens' initiative placed on the general election ballot in 1998. It was approved by a majority of voters who cast votes on the initiative. It was codified to Article 2 of Title 16, Arizona Revised Statutes. Its purpose and origin is in the stated "findings and declarations" at A.R.S. § 16-940:

A. The people of Arizona declare our intent to create a clean elections system that will improve the integrity of Arizona state government by diminishing the influence of special-interest money, will encourage citizen participation in the political process, and will promote freedom of speech under the U.S. and Arizona Constitutions. Campaigns will become more issue-oriented and less negative because there will be no need to challenge the sources of campaign money.

B. The people of Arizona find that our current election-financing system:

1. Allows Arizona elected officials to accept large campaign contributions from private interests over which they have governmental jurisdiction;
2. Gives incumbents an unhealthy advantage over challengers;
3. Hinders communication to voters by many qualified candidates;
4. Effectively suppresses the voices and influence of the vast majority of Arizona citizens in favor of a small number of wealthy special interests;
5. Undermines public confidence in the integrity of public officials;
6. Costs average taxpayers millions of dollars in the form of subsidies and special privileges for campaign contributors;
7. Drives up the cost of running for state office, discouraging otherwise qualified candidates who lack personal wealth or access to special-interest funding; and
8. Requires that elected officials spend too much of their time raising funds rather than representing the public.

A.R.S. § 16-940

The Act specified several provisions aimed at campaign finance reforms including, but not limited to:

- A system of public financing of candidates for statewide office that was available under certain conditions, which included foregoing most other forms of contributions; A.R.S. § 16-941(A);
- A reduction in the amount of contributions that candidates not participating in public funding via the Act may accept; A.R.S. § 16-941(B);
- Reporting obligations for certain campaign-related expenditures known as "independent expenditures"; A.R.S. § 16-941(D);
- Penalties for violations of certain campaign finance reporting obligations; A.R.S. § 16-942(B);
- The creation of the Citizens' Clean Elections Commission under A.R.S. § 16-955, which was given enforcement authority under A.R.S. §§ 16-956 & 957 and included the authority to impose civil penalties per A.R.S. § 16-942 for violations of reporting requirements previously required under A.R.S. § 16-926.

The Act defines relevant terms that are parts of the Act in Article 2, A.R.S. § 16-961, which of course is in Article 2 of Title 16.

The Act, as passed in 1998, also undoubtedly defines several crucial specific terms relevant to the aims of the Act by explicit reference to terms as they were found at that time in Article 1, Section 16-901, then in effect in 1998 when the Act was approved by the voters.

Such defined terms included "candidate's campaign committee," "contribution," "expenditures," "exploratory committee," "independent expenditure," "personal monies," "political committee," and "statewide office."

SENATE BILL 1516

The legislature passed Senate Bill 1516 by a majority of both houses of the legislature and went into effect in November of 2016, which was codified at A.R.S. § 16-938.

SB 1516 changed many of the definitions that were incorporated by reference from then-existing A.R.S. § 16-901 upon its passage by the voters in 1998. Plaintiffs and the Commission argue that the alteration of those terms as previously incorporated completely changes the meaning of the Act, largely gutting key provisions that are essential enables it to the Act achieving its stated purpose as passed by the voters in 1998.

The Commission and the Plaintiffs are correct.

After the passage by the legislature of SB 1516, Plaintiffs and the Commission argue that the following changes left the Act void of much of its authority and power to achieve its stated purposes:

The definition of a filing officer was completely altered. Specifically, the Commission was designated by the Act as the sole public officer authorized to initiate an investigation into alleged violations of requirements governing the establishment of a committee, contribution limits, expenditure limits, reporting requirements, and committee termination requirements. By way of contrast, under SB 1516, the Secretary of State is now the filing officer for such issues involving statewide and legislative elections, including retention elections for Supreme Court Justices and Court of Appeals Judges. The result is that the Commission is prohibited from enforcing requirements as defined in Title 16, Chapter 6, Articles 1 – 1.6. This is in complete contravention of the Act, which requires the Commission to enforce those sections.

The Act also had restrictions on the amount of contributions that "non-participating candidates" could accept, with that amount being limited to not in excess of 20 percent less than the limits specified in A.R.S. § 16-905. Also, the Act provided that candidates, participating or not, could enter a binding agreement with their opponent that spending in an election could be limited. A.R.S. § 16-941(B).

SB 1516 almost completely changed requirements on amounts that could be donated or received, on disclosure requirements regarding where donations came from, on what constituted donations, on how such contributions could be used, and many other terms that significantly change the provisions of the Act.

The net result was that contribution limits, what constituted a contribution, to whom such contributions could be made and how they could be used, and reporting and enforcement requirements found in the Act, previously defined for purposes of the Act by reference to Article 1 of Arizona Revised Statutes, Chapter 6, Section 16-901 and in other places, have largely been changed.

Specifically, SB 1516 changes the act in the following ways:

Enforcement

SB 1516 restricts the authority the voters gave the Commission by naming the filing officer, which is the Secretary of State, as the public officer who is authorized to initiate investigations into violations of the requirements relative to establishing political committees, contribution limits, expenditure limits, and committee termination requirements relative to statewide elections. (A.R.S. § 16-928(a)(1)).

Regulation of Contributions and Expenditures

The definitions of contributions and expenditures are altered. Specifically, SB 1516 redefines the term "contribution" to NO LONGER include a contribution to pay for legal or accounting services provided to a committee. A.R.S. § 16-921(B)(4)(c), (7). Furthermore, the value of any such payment is exempt from the definition of contribution as it relates to any limits on payments by a contributor to a political committee. A.R.S. § 16-911(B)(6)(c), which was added via SB 1516.

The exemption for legal fees previously found in Article 1 is much narrower (see A.R.S. § 16-901(5)(b)(ix) (2015). The payment of fines or civil penalties was also a previously prohibited use of Clean Election funds. A.R.S. § 16-948(D). That is no longer the case since the passage of SB 1516.

In addition, SB 1516 included a new category of exemptions not previously present under the Act that is virtually wide open. This new category, which was passed by the legislature under A.R.S. § 16-901(14), is titled "Coordinated party expenditures." Under this and related provisions (see A.R.S. § 16-916, 922(E)), a corporation, limited liability company, or labor organization may make unlimited contributions to persons other than candidate committees. A.R.S. § 16-916. That

would not prohibit contributions to political parties, which can be used for unlimited coordinated party expenditures, including contributions to candidates.

VOTER PROTECTION ACT

As noted, in the same 1998 election where the Clean Elections Act was voted into law by a majority of those who voted, an amendment to the Arizona Constitution, found at Article 4, Part 1, Section 1, Paragraphs (6)(B) & (C), which became known as the Voter Protection Act ("VPA"), also was voted into law.

The VPA gave Arizona Constitutional protection from legislative attack to initiative or referendum measures approved by voters.

Specifically, under paragraph (6)(B) of this provision, the legislature was expressly prohibited from repealing initiative or referendum measures approved by a majority of votes cast thereon. (Emphasis added.)

Paragraph (6)(C) states that the legislature has "no power to amend an initiative or referendum measure approved by a majority of the votes cast thereon, "unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature . . . vote amend such measure." (Emphasis added.)

The VPA was to protect any such citizen driven legislation beginning with the 1998 election and thereafter. Therefore, the VPA protected the Act completely from any legislative attempt at repeal, insulated the Act against any amendment that was not passed by three-fourths of both houses of the legislature, and is designed to "further the purposes" of the Act.

Plaintiffs claim that the provisions of SB 1516 specifically violate the terms of the VPA as it pertains to both the three-fourths vote and the furthering of the provisions of the Act. They claim this happened primarily not through the amendment of the language of the Act itself (which is in Article 2), but by the changes made to definitions that apply to the Act, as found in A.R.S. § 16-901 and other places in Article 1.

Defendants accurately point out that Article 1 was enacted long before the passage by Arizona voters of the VPA and that therefore its provisions are not applicable to the sections of Article 1 referenced here, specifically A.R.S. § 16-901 that are referenced by the Act.

Plaintiffs and the Commission take the position that by changing the definitions of A.R.S. § 16-901 and other sections in Article 1 incorporated into the Act by reference upon ITS passage, the legislature has impliedly effectively changed the very essence of the Act, amending significantly most of its meaningful provisions.

The State Defendants take the view that essentially states, *inter alia*, that the use of such a canon of statutory construction permanently incorporates the terms from the 1998 version of A.R.S. § 16-901, impermissibly freezes the Act in time, and puts a "straight jacket" on the legislature, preventing them from dealing with anything, even constitutional infirmities, and thus jeopardizing the statutory scheme imposing campaign finance limits and regulations." (GRRC'S response to Plaintiffs' Motion for Summary Judgment, p. 3).

The Defendants rely on the holding in *Arizona Citizens Clean Elections Commission v. Brain*, 234 Ariz. 322, 322 P.3d 139 (2014) to support their position.

In *Brain*, the Commission sought to enjoin a provision of the Act that was modified by the legislature by HB 2593 in 2013. Specifically, HB 2593 modified A.R.S. § 16-905 (from Article 1) by increasing campaign contribution limits for statewide, countywide, and local offices by eliminating the restriction on amounts of money candidates can receive from political committees and by eliminating restrictions on the amount of money individuals can contribute to political committees that give money to candidates.

The specific provision the Defendants sought to amend was A.R.S. § 16-941(B), which provided that non-participating candidates could accept private campaign contributions "up to eighty percent of the limits established by A.R.S. § 16-905,[2] (A)-(E), as adjusted periodically for inflation." *Brain* at 323, 322 P.3d at 140.

In *Brain*, the Commission admittedly made the same "incorporation by reference" argument with respect to the language of A.R.S. § 16-905 and its application to A.R.S. § 16-941(B) that it makes here regarding A.R.S. § 16-901 and its applications to the Act. They specifically argued that the proper limit that a non-participating candidate could receive was 80 percent of the amounts listed in A.R.S. § 16-905 at the time of the passage of the Act.

On the other hand, the Defendants argued that relevant subsection of A.R.S. § 16-905 made reference to a formula for establishing a contribution limit.

In resolving that decision, the Arizona Supreme Court stated that the "primary objective in interpreting a voter-enacted law is to effectuate the will of the voters' intent." *Brain* at 325-326.

[2] A.R.S. § 16-905 also previously contained a "matching funds" provision, "where once expenditures by or on behalf of a non-participating candidate exceeded a publicly funded opponent's initial funding allotment, that an opponent could be given roughly one dollar for every additional dollar spent by or on behalf of the non-participating candidate, capped at three times the initial public funding allotment." *Brain* at 323. That matching funds provision was deemed unconstitutional by the U.S. Supreme Court in *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806 (2011).

In analyzing the provision at issue in that case, the court stated that as it was susceptible to more than one interpretation, it was indeed ambiguous. Therefore, the court would consider secondary principles of statutory construction such as "the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose." *Id*. at 326.

In resolving the *Brain* case, the Supreme Court declined to apply the "incorporation by reference" canon of statutory construction urged by Plaintiffs. In doing so, they found, under their stated objective of ascertaining the will of the voters, that the "incorporation by reference" canon of statutory construction was not helpful in making such a finding.

The court reasoned that (1) since the voters "used a percentage for calculating contribution limits for non-participating candidates" and that the [a]pplication of a formula to a given amount is characteristic of a formula; (2) the voters had treated the limits at issue in that case different than fixed amount limits specified elsewhere in the Act; (3) by fixing the contribution limits for non-participating candidates at eighty percent of 1998 levels would widen the gap between those limits and those not subject to the Act; (4) providing a fixed limit would create confusion the voters did not intend as there were numerous factors to indicate that the provision was contemplated to be subject to be "adjusted for inflation;" and (5) the publicity surrounding the ballot proposal contained no information that would be consistent with the Commission's argument that fixed contribution levels should be imposed. *Id*. at 325-327.

The court specifically raised the issue of the "incorporation by reference" canon of statutory construction but declined to follow it as it failed to "help ascertain the voters' intent, and in light of the evidence," which indicated the voters intended no such result. *Id*. at 328.

The court finds in the instant case a distinct contrast to the facts in *Brain*, as well as a distinct difference in the context of the statute, the language used, the subject matter, its historical background, its effects and consequences, and its spirit and purpose.

Here, the voters had an opportunity to vote on the Act in 1998, the terms of which were incorporated from a non-Article 2 section of the statute, specifically, A.R.S. § 16-901, as well as other provisions.

The purpose of the Act was essentially two-fold: (1) to address issues and concerns regarding the integrity of our elections system by diminishing the influence of special interest money and the influence of large sums of money on the elections process; and (2) to encourage citizen participation in running for elective office by making limited and regulated public funds available to citizens for that purpose.

In *Brain*, the court found that given the context, language used, subject matter, and historical background, incorporation by reference was not applicable to determine the intent of the voters in the passage of the Act. The court properly concluded that the most reasonable interpretation of A.R.S. § 16-941(B), given the context, the reason for, and the spirit of the law, was that a formula was contemplated and that the voters reasonably expected that under the formula the limitation at issue would change over time.

However, the provisions of the Act that are at issue here concern the very basic nuts and bolts reasons for its use and the underpinnings of the Clean Elections System, i.e., the issues of reporting, enforcement and regulation of campaign finances, who may contribute and who may receive such public funding, and what limitations are in place on the amounts and uses of such funds.

Given the different considerations that are in play in this case, the result has to be different. One cannot determine in this case, given the purposes behind the Act, that voters intended that the legislature would in essence eradicate the very core of the Act, which is exactly what is happening if the definitions that in actuality define what the act is about when passed are eliminated.

It is true that nothing in SB 1516 specifically states that it is repealing, amending, or superseding the Act. Furthermore,

> "the VPA itself does not define the words 'repeal,' 'amend,' or 'supersede' in Article 4, Part 1, Section 1 of the Arizona Constitution. But we have recognized that a statute can be implicitly repealed or amended by another through 'repugnancy' or inconsistency [citations omitted]. (An implied amendment is an act which purports to be independent, but which in substance alters, modifies or adds to a prior act."). Although the finding of an implied repeal or amendment is generally disfavored, it is required when conflicting statutes cannot be harmonized to give each other meaning."

Cave Creek Unified School Dist. v. Ducey, 233 Ariz. 1, 7, 308 P.3d 1152, 1158 (2013).

It is clear that the legislature has effectively amended the provision of the Citizens Clean Elections Act by altering key definitions that apply to the Act. Those amendments were not approved by a three-fourths vote of either house of the Arizona Legislature, and they certainly do not further the purposes of the Act, which purposes are stated above.

"The legislature may not do indirectly, what it is prohibited from doing directly." *Id., quoting Caldwell v. Bd. of Regents of Univ. of Arizona*, 54 Ariz. 404, 410 (1939).

That is exactly what the legislature has done in this case by impermissibly altering terms outside of the Act that are key definitions for purposes of the Act. Therefore,

THE COURT FINDS the enactments of several provisions of SB 1516 are violations of the Voter Protection Act by virtue of their significant, meaningful changes to key provisions of the Clean Elections Act, altering the Commission's powers unconstitutionally and changing critical terms of the act relative to the very basic elements of its purpose and operation.

THE COURT FURTHER FINDS there are no genuine issues of material fact and the Plaintiffs are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED granting Plaintiffs' Motion for Summary Judgment.

IT IS FURTHER ORDERED finding unconstitutional Senate Bill 1516, as codified at Arizona Revised Statutes Sections 16-911(B)(4), (B)(6)(c), 16-921(B)(4)(c), (B)(7), 16-928(A)(1), and 16-938(A), as violations of the Voter Protection Act.

IT IS FURTHER ORDERED enjoining the enforcement of those provisions.

IT IS FURTHER ORDERED granting Defendants' Cross-Motion for Summary Judgment regarding Plaintiffs' equal protection, which Plaintiffs concede as moot.

Given the circumstances of the action,

IT IS FURTHER ORDERED Plaintiffs may submit to the Court and opposing counsel memoranda regarding the propriety of an award of attorney's fees and costs to Plaintiffs pursuant to the Private Attorney General Doctrine under the circumstances of this case, as well as an application for fees and costs in the event such an award is deemed appropriate. Defendants may submit to the Court a response to the legal memoranda regarding the propriety of a fee award and any objection to the fee application itself.

DATED this 3rd day of December 2018.

/S/ HONORABLE DAVID J. PALMER

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HONORABLE DAVID J. PALMER
JUDICIAL OFFICER OF THE SUPERIOR COURT