



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

| | |
|---|---|
| ATTORNEY GENERAL OPINION by DAVID R. COLE SOLICITOR GENERAL* July 7, 2011 | No. I11-003 (R11-005) Re: Application of Title 16 to Recall Committees |
|---|---|

To: The Honorable Russell K. Pearce
Arizona State Senate

Questions Presented

You have asked for an opinion on the following questions:

1. Does Arizona law prohibit corporate or labor union contributions to a committee supporting or opposing the qualification of a recall petition? If so, does that prohibition violate the First Amendment?
2. Do the provisions of Arizona Revised Statutes ("A.R.S.") §§ 16-912.01 and -914.01 apply to recall committees?

Summary Answers

1. Yes. Under current law, corporations and labor unions may not contribute to recall committees. It would, however, be contrary to the United States Supreme Court's *Citizens*

* Attorney General Horne has recused himself from this matter. Accordingly, Arizona Solicitor General David R. Cole is authorized to sign this Opinion.

United decision to enforce this prohibition if the corporation or labor union is contributing to a recall committee that has not coordinated with a potential candidate for the office that is the subject of the recall election. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

2. No. Statutes such as A.R.S. §§ 16-912.01 and 16-914.01, which explicitly apply to ballot measure committees, do not apply to recall committees.

Background

Article 14, section 18 of the Arizona Constitution provides that “[i]t shall be unlawful for any corporation, organized or doing business in this state, to make any contribution of money or anything of value for the purpose of influencing any election or official action.” Section 16-919 makes it “unlawful for a corporation or a limited liability company [or a labor organization] to make an expenditure or any contribution of money or anything of value for the purpose of influencing an election.” State and federal court decisions have caused election officials to limit how they apply these prohibitions and have caused the Arizona Legislature to amend Arizona law in response. As a result, some of Arizona’s campaign contribution and expense laws refer either directly or indirectly to recall committees, while others explicitly apply only to certain political committees named in the statute.

The *Mecham Recall Committee, Inc. v. Corbin* Decision and the Legislature’s Response

In *Mecham Recall Committee, Inc. v. Corbin*, the Arizona Supreme Court held that “a recall committee is not controlled by the provisions of §§ 16-901, *et seq.*,” explaining that “[s]ince the statute does not mention recall committees, they are not included.” 155 Ariz. 203, 205, 745 P.2d 950, 952 (1987). Following the decision, the Arizona Attorney General issued two opinions that were consistent with the court’s ruling on recall committees. The first

Attorney General Opinion was issued after the court issued its order in *Mecham* but before the court published its opinion. It quotes the court's order as follows.

IT IS ORDERED that A.R.S. § 16-901 thru 16-924 do not apply to the activities of the Mecham Recall Committee, Inc. in its circulation of the recall petitions and activities connected therewith.

Opinion to follow.

Ariz. Att'y Gen. Op. I87-111 at 2. This opinion concluded that neither A.R.S. § 16-905 nor § 16-919 applied to recall committees. *Id.* at 3. Six months later, a second opinion concluded that

[a]pplying a strict interpretation to the election statutes, as did the Arizona Supreme Court in *Mecham Recall Committee*, we find no mention of an anti-recall committee in the campaign contributions and expenses statutes. We, therefore, conclude that the raising and expenditure of funds for the purpose of defeating a recall petition drive . . . is not subject to the provisions of A.R.S. §§ 16-901 to -924.

Ariz. Att'y Gen. Op. I88-43 at 3.

In *Mecham*, the Arizona Supreme Court concluded its opinion by noting that if not having the State's campaign contribution and expense laws apply to recall committees "is believed to be a serious omission, then it is up to the legislature to cure the defect, not the courts." 155 Ariz. at 206, 745 P.2d at 953. In 1993, the Arizona Legislature addressed this potential defect, along with many others, in Senate Bill 1039. 1993 Ariz. Sess. Laws, ch. 226. Senate Bill 1039 generally revamped the election code and added recall elections to Title 16. It amended A.R.S. § 16-901 to define "election" as "an election for an initiative, referendum or other measure or proposition or a primary, general, recall, special or runoff election," and replaced the term "campaign committee" with "political committee," which it defined to include "[a] committee organized to circulate or oppose a recall petition or to influence the result of a

recall election.” *Id.* § 1. The bill added A.R.S. § 16-913, which required that recall committees’ campaign finance reports be filed within the same deadlines as other political committees’ reports. *Id.* § 10. Then, in 1997, the Legislature amended A.R.S. § 16-901 again to define “contribution” and “expenditure” to include those made in support of or in opposition to recall elections. 1997 Ariz. Sess. Laws, ch. 201, § 1; *see also id.* § 11 (amending A.R.S. § 16-916 to identify the office in which filings for various recall committees should be filed).

The *Citizens United v. FEC* Decision and the Legislature’s Response

In *Citizens United*, the United States Supreme Court struck down “[f]ederal law [that] prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an ‘electioneering communication’ or for speech expressly advocating the election or defeat of a candidate.” 130 S. Ct. 876, 886 (2010). The Court found that the federal government had no interest in discriminating against speakers based on their corporate identity. *Id.* at 913. The Court explained that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy” because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” *Id.* at 910; *see also id.* at 902 (“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976))); *id.* at 909 (quoting the same passage in *Buckley*). Thus, the Court “conclude[d] that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 909.

Just weeks after the Court announced its *Citizens United* decision, Governor Brewer signed House Bill 2788. 2010 Ariz. Sess. Laws, ch. 4. The bill added A.R.S. § 16-914.02, which provided details on how corporations, limited liability companies, and labor organizations could make independent expenditures “in an attempt to influence the outcome of a candidate election.” *Id.* § 1. The bill also amended A.R.S. § 16-919 to expand the prohibition against corporate political action to include expenditures as well as contributions and to exempt actions taken in accordance with the new A.R.S. § 16-914.02. *Id.* § 2. Finally, the Legislature expanded the exceptions to A.R.S. § 16-919 that are found in A.R.S. § 16-920 to include independent expenditures made pursuant to A.R.S. § 16-914.02 by adding subsection (A)(6). *Id.* § 3.

The Structure of Title 16, Chapter 6, Article 1

Because Title 16, chapter 6 incorporates the recall process in its definitions of “contribution,” “election,” “expenditure” and “political committee,” A.R.S. § 16-901(5), (7), (8), (19), many statutes in Title 16 explicitly apply to recalls. The following sections either refer to the recall process directly or use one of these terms without limitation: A.R.S. §§ 16-901.01 (express advocacy), -902 (political committee organization), -902.01 (political committee registration), -902.02 (out-of-state political committees), -904 (treasurer duties), -907 (earmarks), -913 (campaign finance reports), -914 (termination statements), -915 (campaign finance reports), -915.01 (surplus money), -916 (filing reports), -916.01 (electronic filing), -918 (campaign finance reports; penalties), and - 924 (enforcement).

Other statutes by their terms apply only to certain types of political committees. The following sections fall into this category: A.R.S. §§ 16-903 (candidate and exploratory committees), -905 (candidate and exploratory committees), -906 (candidate committees), -912 (candidate and independent expenditure committees), -912.01 (ballot measure committees),

-914.01 (ballot measure committees), and -917 (independent expenditure committees). Finally, a handful of statutes apply directly to entities other than political committees, although they impact all political committees. These sections are A.R.S. §§ 16-914.02 (corporations and labor organizations), -919 (prohibition on corporate/labor organization contributions), -920 (permitted corporate/labor organization expenditures), -921 (unlawful corporate/labor organization contributions), and -923 (volunteers). As to this last category of statutes, the Arizona Supreme Court has recognized that an election law can prohibit corporations or labor organizations from making a contribution without making it illegal for the recipient to receive the contribution. *Ariz. State Democratic Party v. Arizona*, 210 Ariz. 527, 530, ¶ 12, 115 P.3d 121, 124 (2005) (holding that A.R.S. § 16-919 does not “make it a violation for the Party to *accept* contributions from corporations, LLCs or labor organizations,” and concluding “[i]n short, the State seems to have brought this action against the wrong party”).

Analysis

I. Arizona Law Prohibits Corporate and Labor Union Contributions to a Committee Supporting or Opposing the Qualification of a Recall Petition.

As discussed above, Article 14, section 18 of the Arizona Constitution and A.R.S. § 16-919(A) make it unlawful for corporations, limited liability companies, and labor unions to make contributions or expenditures in order to influence elections. Title 16 defines “contribution” as “any gift . . . or anything of value made for the purpose of influencing an election including supporting or opposing the recall of a public officer,” and “expenditure” as “any purchase . . . or anything of value made by a person for the purpose of influencing an election in this state including supporting or opposing the recall of a public officer.” A.R.S. § 16-901(5), (8). Thus, by using the terms “expenditure” and “contribution,” A.R.S. § 16-919 explicitly applies to recall elections. Indeed, the phrase used in the definitions of both “contribution” and “expenditure” is

“anything of value made by a person for the purpose of influencing an election in this state *including* supporting or opposing the recall of a public officer.” A.R.S. § 16-901 (5), (8) (emphasis added). A committee’s effort in supporting or opposing a recall election, therefore, constitutes “influencing an election” as that term is used in A.R.S. § 16-901.

In your letter, you suggest that because the statute prohibits only certain entities from *accepting* contributions from corporations and limited liability companies, corporations and limited liability companies are prohibited from *making* contributions only to those entities. It is true that it is unlawful for “the designating individual who formed an exploratory committee, an exploratory committee, a candidate or a candidate’s campaign committee to accept” contributions from corporations, and that it is not unlawful for recall committees to accept contributions from corporations. A.R.S. § 16-919(A). It does not, however, follow from this premise that corporations and limited liability companies may lawfully contribute to recall committees. First, A.R.S. § 16-919(B) does not prohibit any entity from receiving contributions from labor organizations. To assume that labor organizations can contribute to any group because no group is prohibited from accepting their contributions would lead to an absurd result. Second, the Arizona Supreme Court rejected a similar argument in *Democratic Party*, where the State argued that, because A.R.S. § 16-919 prohibited corporations from making contributions for the purpose of influencing an election, the statute must also prohibit all entities, even those not listed in the statute, from receiving contributions. 210 Ariz. at 530, ¶ 12, 115 P.3d at 124. Explaining that it “must defer to the plain language of the statute,” the court refused to “include within [those restricted by the statute] entities not named by the legislature.” *Id.* Likewise, in this instance, the plain language of the statute determines the scope of the prohibition on corporate and labor union donations. Third, a plain reading of A.R.S. § 16-920 (A)(5) and (6),

which explicitly exempt contributions to certain political committees from the restrictions of A.R.S. § 16-919 but do not list recall committees among those exempted, supports the position that A.R.S. § 16-919 applies to contributions to recall committees.

You have also asked whether a committee formed for the purpose of supporting or opposing the recall of a public officer is attempting to influence an election. This is similar to the issue raised in *Democratic Party* where an administrative order required the Democratic Party to return corporate and union donations made to defer the party's operating expenses. 210 Ariz. at 528, ¶ 1, 115 P.3d at 122. Although the Arizona Supreme Court did "not decide whether the donations at issue were 'contributions,'" *id.* at 530, ¶ 14, 115 P.3d at 124, it noted that the judge who dissented from the opinion issued by the Arizona Court of Appeals would have found that monies provided by labor unions and corporations were not "contributions" within the meaning of A.R.S. § 16-919 because the entities in question were not attempting to influence an election, *id.* at 529, ¶ 6, 115 P.3d at 123. The dissenting opinion

noted that A.R.S. § 16-919(F)(1) resolves any perceived ambiguity in § 16-919(A) and (B) by defining the term 'election' as relating to the election of an individual person to a particular office. [The dissenting judge] therefore reasoned that the contributions at issue were not given to influence an election and thus did not violate § 16-919."

Id. (citations omitted). First, the court did not adopt this reasoning in its opinion. 210 Ariz. at 530, ¶ 14, 115 P.3d at 122. Second, even applying that reasoning, the funds at issue in *Democratic Party* had been given to the party and had not been targeted to the election of an individual person to a particular office. *Id.* The efforts of a recall committee, by contrast, are directed at the election of an individual person to a particular office.

Your letter also notes the two-step recall process and questions whether there is "any election to any political office" that the committee may be trying to influence before the recall

petition qualifies for the ballot. Arizona law treats gathering signatures to put a candidate or a proposition on the ballot as an effort to influence the election that will follow if the effort is successful. For example, a ballot measure committee must register and file campaign finance reports before it can start collecting contributions or signatures to put a measure on the ballot. A.R.S. § 16-902, -902.01, -913. It is true that if the committee is unsuccessful, there will not be any election for that committee to influence. The same is true of candidates for regular elections who must form a campaign or exploratory committee before they collect the necessary signatures to be on the ballot, and therefore before it is assured that there will be an option to elect those candidates to a particular position. A.R.S. § 16-903. Nonetheless, taking the first step to getting a measure passed or a candidate elected—that is, getting the measure or the candidate before the voters—is still an effort to influence an election. Similarly, when a recall committee begins to collect signatures for the recall or when a recall committee opposes this effort, it is attempting to influence a specific election, even though the election may never happen.

Finally, the Arizona Supreme Court's holding in *Mecham* was abrogated by legislative amendments to Title 16. As mentioned previously, in *Mecham*, the court explained why it concluded that A.R.S. §§ 16-901 through -924 did not apply to recall elections. 155 Ariz. at 204-05, 745 P.2d at 951-52. It noted that there were no references to recall elections in A.R.S. § 16-901. *Id.* Now there are several. It noted that there was no mention of recall committees in the statutes requiring committees to file campaign finance reports. 155 Ariz. at 205, 745 at 952. Now A.R.S. § 16-913 requires political committees, which by definition include recall committees, to file reports. By adding these provisions, the Legislature responded to the court's invitation to "cure the defect" in the statute. *Id.* at 206, 745 P.2d at 953.

II. Arizona Law Prohibiting Corporate and Labor Union Contributions Cannot Be Applied to Committees that Do Not Coordinate with a Candidate.

The United States Supreme Court held that when considering independent expenditures by corporations and labor organizations, “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy,” because “[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” *Citizens United*, 130 S. Ct. at 910. Hence, a corporation or union cannot be prevented from making donations to a recall committee that does not coordinate with an individual who intends to run for the targeted office.¹ In your letter, you expressed concern that this results in an unlevel playing field in which the committee opposing the recall cannot accept contributions from corporations or labor organizations, but the committee supporting it can. That is not the case. A committee opposing the recall can do so without coordinating with the candidate. Moreover, if the committee supporting the recall is working with an individual who intends to run for the office being targeted, that committee could not accept contributions from corporations or labor organizations. Put another way, no one working on a recall committee that accepts corporate or labor union contributions is eligible to run for the targeted public office.

III. Recall Committees Are Not Ballot Measure Committees.

Your letter asks whether recall committees must comply with the requirements of A.R.S. §§ 16-912.01 and -914.01. Section 16-914.01 applies only to political committees “acting in support of or opposition to the qualification, passage or defeat of an initiative or referendum or any other ballot measure, question or proposition.” A.R.S. § 16-914.01(A). Similarly, A.R.S. §

¹ The holdings of the United States Supreme Court limit state constitutions to the same extent they limit state statutes. *See, e.g., Am. Fed’n of Labor v. Am. Sash & Door Co.*, 67 Ariz. 20, 26, 189 P.2d 912, 916 (1948) (holding that “an amendment [to the Arizona Constitution] has no greater validity and stands on no higher plane than legislative enactment insofar as being subject to attack for failure to square with the Federal Constitution”).

16-912.01 applies only to “[a] political committee that makes an expenditure in connection with any literature or advertisement to support or oppose a ballot proposition.” A.R.S. § 16-912.01(A). A recall committee is “organized to circulate or oppose a recall petition or to influence the result of a recall election.” A.R.S. § 16-901(19)(d). A recall election is an election to political office, not an election on a ballot measure. In the recall election, “[t]he candidate receiving the largest number of votes shall be declared elected for the remainder of the term and shall begin serving the remainder for the term on his qualification for the office and on completion of the canvass.” A.R.S. § 19-216(A). “The form of the ballot shall conform as nearly as practicable to the ballot prescribed for general elections.” A.R.S. § 19-213. There is no reason to apply the restrictions placed uniquely on ballot measure committees to recall committees.

Conclusion

Pursuant to Article 14, section 18 of the Arizona Constitution and A.R.S. § 16-919, corporations, limited liability companies and labor unions are prohibited from contributing to recall committees. Under the Supreme Court’s *Citizens United* decision, the State cannot enforce this prohibition against committees that do not coordinate with candidates. Finally, recall committees are not required to comply with requirements that apply only to ballot measure committees.

David R. Cole
Arizona Solicitor General