STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL December 17, 2020	No. I20-012 (R20-014) Re: Constitutionality of Pima County's Policy Prohibiting Employees From Making Political Contributions For Any Candidates For Any Elected County Office

To: Vince Leach, Senator
Arizona State Senate

Question Presented

Pima County has an employment policy that prohibits County employees from "mak[ing] a political contribution" for "any candidates for any elected County office." *See* Pima County Board of Supervisors' Policy No. D 23.9 and Pima County Personnel Policy 8-119(Z)(9).

Does this policy violate County employees' state or federal constitutional rights?

Summary Answer

Yes, Pima County's employment policy prohibiting County employees from making political contributions for any candidates for any elected County office violates employees' constitutional rights guaranteed under the First Amendment to the U.S. Constitution and article II, § 6 of the Arizona Constitution.

Background

Arizona law permits the Pima County Board of Supervisors ("Board") to "adopt a limited county employee merit system" that "may be applied to county-appointed officers and employees." A.R.S. § 11-352(A); *see also* A.R.S. § 11-351(1) (defining "[b]oard" as "the board of supervisors" for purposes of a county employee merit system). Elected county officials are exempted from the system. *See* A.R.S. § 11-352(A).

The Board adopted the Pima County Employee Merit System in 1975 by Pima County Ordinance No. 1975-36. In March 1992, the Board discussed the political-contribution employment policy at issue here and voted 3-2 to adopt the policy. *See* Pima County Board of Supervisors' Meeting Minutes (March 17, 1992). The employment policy states as follows:

> Employees have the right to participate in partisan political activities but those activities cannot influence or interfere with the conduct of official County business or activities. Notwithstanding this provision, County employees shall not a) make a political contribution and/or b) solicit or collect political contributions for any candidates for any elected County office. Nothing in this section shall prohibit Elected County officials from making contributions to political campaigns.

Pima County Board of Supervisors Policy No. D 23.9;[1] *see also* Pima County Personnel Policies, No. 9-119(Z)(9) (prohibiting county employees from making a political contribution "for any candidates for any elected County office").[2]

Thus, Pima County prohibits its employees from making political contributions for any candidates for any elected County office ("Contribution Ban") and prohibits employees from

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[1] *Available at* https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Clerk%20of%20the%20Board/Policies/D23-9.pdf.

[2] *Available at* https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Human%20Resources/MSRPP/8-119.pdf.

soliciting or collecting political contributions for any candidates for any elected County office ("Solicitation Ban"). Your question relates only to the Contribution Ban, which is the subject of this opinion.

Analysis

Arizona law broadly protects "the civil and political liberties of any [county] employee as guaranteed by the United States and Arizona Constitutions." A.R.S. § 11-410(G). The constitutionality of a policy that prohibits county employees from making political contributions for any candidate for any elected county office presents an issue of first impression in Arizona. Nonetheless, Pima County's Contribution Ban is invalid under the First Amendment to the U.S. Constitution as well as under article II, § 6 of the Arizona Constitution.

A. The Contribution Ban Violates County Employees' First Amendment Rights

The Contribution Ban violates county employees' right to freedom of speech under the First Amendment to the U.S. Constitution. "The right to make political campaign contributions is at the core of political speech and is protected by the First Amendment." Ariz. Att'y Gen. Op. No. I88-063, 1988 WL 249652 (June 9, 1988) (citing *Buckley v. Valeo*, 424 U.S. 1, 15-19 (1976)); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) ("[t]here is no right more basic in our democracy than the right to participate in electing our political leaders" and exercising that right includes "contribut[ing] to a candidate's campaign") (plurality opinion).

First Amendment rights are not absolute, however. When the government restricts the speech of its employees, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994). Nonetheless, the Supreme Court "has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a

public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

The Arizona Court of Appeals has recognized, consistent with Supreme Court precedent, that limitations on employees' political activities serve four governmental interests:

> (1) They enable government employees to enforce the law and execute government programs without bias or favoritism for or against any political party or group; (2) They instill public confidence in government by avoidance of even the appearance of 'political justice'; (3) They prevent the government work force from being employed to build a political machine; and (4) They prevent political performance from being a factor in the employment and advancement of government employees and free public employees from pressure to vote in a certain way or perform political chores to curry favor. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 564-66, [] (1973).

Patterson v. Maricopa Cnty. Sheriff's Off., 177 Ariz. 153, 157-58 (App. 1993); *see also Broadrick v. Okla.*, 413 U.S. 601, 611-612 (1973) (holding, in companion case to *Letter Carriers*, that states may enact restrictions on political activities of their civil servants that are akin to those found in the Hatch Act, 5 U.S.C. § 7324(a)(2)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010) (emphasizing the continued validity of *Letter Carriers* and its proposition that "there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech").

As relevant here, the Third Circuit Court of Appeals has held that a contribution ban imposed on police department employees, which "aim[ed] to insulate the police from political influence" and prohibited employees from contributing to their union's political action committee, violated the First Amendment. *See Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Philadelphia*, 763 F.3d 358, 361-62, 376 (3d Cir. 2014). In so holding, the Third Circuit applied the framework of *Pickering v. Board of Education*, 391 U.S. 563 (1968), which required balancing "the interests of the [public employee], as a citizen, in commenting

upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*. at 368 (quoting *Pickering*, 391 U.S. at 568).[3] The Third Circuit reasoned that a ban on political contributions "constitutes a substantial burden" on First Amendment rights. *Id*. at 367. "[S]uch restrictions significantly curtail the exercise of an individual's right to participate in the electoral process through both political expression and political association." *Id*. at 367-68.

The Third Circuit observed that the United States Supreme Court "clarified how courts should apply *Pickering* when a restriction operated as an ex ante prohibition on speech" in *United States v. NTEU*, 513 U.S. 454, 467 (1995). *Id*. at 368. When a ban "chill[s] speech before it occur[s]," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *NTEU*, 513 U.S. at 475 (citation omitted). To demonstrate "real, not merely conjectural" harms, a government must provide evidence that those concerns exist. *Id.* at 472.

Here, the Board expressly noted the lack of "any evidence of specific wrong doing on the part of [c]ounty employees" in 1992 when it debated whether to impose the Contribution Ban. *See* Pima County Board of Supervisors' Meeting Minutes (March 17, 1992). The Supervisor who moved to approve the Contribution Ban explained that the purpose of the ban was "*not* to correct a scandalous behavior of the past," but to "create a healthier environment while focus[]ing on ethics." *Id*. (emphasis added). Pima County therefore cannot establish the first prong of the *NTEU* test, i.e., that the government's "recited harms are real, not merely

[3] While Arizona courts have not previously addressed the exact type of regulation presented here, they do acknowledge *Pickering*'s applicability in First Amendment challenges to the state's authority "to regulate the conduct of public employees[.]" *See, e.g., Barlow v. Blackburn*, 165 Ariz. 351, 357 (App. 1990). Accordingly, the Third Circuit's examination of a contribution ban under the *Pickering* framework is persuasive.

conjectural." *See* 513 U.S. at 475. As the Third Circuit recognized, "when regulation has succeeded, it is often difficult to discover evidence that the targeted abuses continue to exist," but Pima County lacks Philadelphia's history of a political machine with "reach [] so pervasive that citizens' access to basic services … depended on their political support for machine candidates." *Lodge No. 5*, 763 F.3d at 363, 373. Nevertheless, even assuming, *arguendo*, that Pima County had established real harms—the potential for corruption in county politics is not merely the stuff of imagination—it cannot establish that the Contribution Ban "addresses these harms in a 'direct and material way.'" *Id.* at 370 (citing *NTEU*, 513 U.S. at 475).

The Contribution Ban especially does not satisfy the second prong (that the regulation will alleviate the alleged harms) in light of other, less obtrusive Arizona laws and Pima County policies that are designed to prevent corruption, protect county employees from improper influences, and maintain a politically-neutral office. Indeed, state law prohibits county employees from "us[ing] the authority of their positions to influence the vote or political activities of any subordinate employee." A.R.S. § 11-410(D).

State law also places limits on individual contributions to candidates for county elected office. *See* A.R.S. § 16-912(A)(1) (setting a $6,250 limit on individual contributions to a candidate for county office).[4] And Pima County's other personnel policies prohibit county employees from holding financial or personal interests that could negatively impact the interest of the County, "[using] or attempt[ing] to use their official positions … for financial gain or for personal advantage[,]" or accepting or soliciting "anything of economic value" designed to influence the employee's official conduct. Pima County Personnel Policy No. 8-119(Z). These laws and policies reduce the likelihood that an elected county official will improperly influence

[4] Base contribution limits are increased every two years pursuant to A.R.S. § 16-931(A)(2).

the vote or reward any county employee who contributed to the official's campaign. Thus, any potential conflicts of interest "can be addressed by means other than" imposing the Contribution Ban, including "anti-corruption and conflict of interest recusal rules and laws" such as those found in A.R.S. § 38-503. *See Patterson*, 177 Ariz. at 159.

Accordingly, the Contribution Ban will not alleviate those asserted harms "in a direct and material way." *See Lodge No. 5*, 763 F.3d at 375 (finding a contribution ban "is poorly tailored to the City's articulated interests" and "unconstitutionally restricts" the plaintiffs' participation in the political process).[5] The "Supreme Court recently stated in *McCutcheon* that a contribution restriction is not 'closely drawn' if there are more targeted alternatives that would serve the government's interests." *Id*. at 383 (citing *McCutcheon*, 572 U.S. at 221). Pima County cannot justify its Contribution Ban in the current climate of other, less restrictive regulations applicable to its employees at the state and county level that also serve to alleviate its concerns. This is especially true "in the Internet age, [where] disclosure of the identities of campaign donors provide[s] robust protections against corruption." *Id.* at 384.

[5] It is notable that *Lodge No. 5* distinguishes the regulation it examines—banning contribution to political action committees—from one upheld by the Eighth Circuit in *Reeder v. Bd. of Police Comm'rs*, 733 F.2d 543 (8th Cir. 1984), which banned direct contributions to candidates. *Lodge No. 5*, 763 F.3d at 378. But as the Third Circuit notes, *Reeder* "predates *NTEU*, which imposed a higher burden on the government to justify *ex ante* restrictions on employee speech, and demanded that the government articulate a tighter fits between its means and ends." *Lodge No. 5*, 763 F.3d at 378 n.19. Moreover, the legal standard does not present a question of what conduct, exactly, is proscribed, but instead, whether the specific regulation in question is narrowly crafted to address the government's concerns in the specific environment to which it is applied. *See id.* at 379 ("we face a unique regulatory scheme forged from Philadelphia's experience with political patronage, at a different point in the development of campaign finance regulation") (internal quotation marks omitted). As the jurisdictions examined by these courts do not have the exact same set of other laws and policies that Arizona does, the appropriate analysis will not focus on whether one type of contribution or another is prohibited, but instead, on whether the specific prohibition is appropriately tailored to the needs of the government in light of other applicable laws and circumstances.

Ultimately, *Pickering* interests do not balance in Pima County's favor. The Contribution Ban is a "substantial burden" on county employees' First Amendment rights, yet it is not drawn with sufficient "narrow specificity" to justify its imposition in light of other, more appropriate safeguards of the county's interests. *Id.* at 367. Here, "the interests of the [public employee], as a citizen," in exercising First Amendment rights outweighs Pima County's interest in proscribing the exercise of those rights where other regulations already achieve its interests in a less burdensome manner. *Id*. at 368 (quoting *Pickering*, 391 U.S. at 568). Therefore, Pima County's Contribution Ban cannot pass constitutional muster under the First Amendment.

B. The Contribution Ban Violates County Employees' Right to "Freely Speak" Under Article II, § 6 of the Arizona Constitution

The above First Amendment analysis is sufficient to demonstrate that Pima County's Contribution Ban likewise violates the Arizona Constitution's even more stringent safeguards of the right to "freely speak." ARIZ. CONST. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). "[W]hereas the First Amendment is phrased as a constraint on government … our state's provision, by contrast, is a guarantee of the individual right to 'freely speak, write, and publish,' subject only to constraint for the abuse of that right." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281, ¶ 45 (2019) (internal citations omitted); *see also* ARIZ. CONST. art. II, § 6. "Thus, by its terms, the Arizona Constitution provides broader protections for free speech than the First Amendment." *Brush & Nib*, 247 Ariz. at 281-82, ¶ 45 (collecting authorities). "[A] violation of First Amendment principles 'necessarily implies' a violation of the broader protections of article 2, section 6 of the Arizona Constitution[.]" *Id*. at 282, ¶ 47 (citation omitted).

As noted above, the validity of the Contribution Ban presents an issue of first impression in Arizona, but aspects of this issue have been addressed by Arizona courts. The ban prohibits

county employees from even beginning to speak through political contributions, and the Arizona Supreme Court has ruled against prior restraint under article II, § 6, even where the right to freely speak was in "direct confrontation with the equally important constitutional right to a fair trial by an impartial jury." *Phoenix Newspapers Inc. v. Jennings*, 107 Ariz. 557, 559 (1971); *see also Phoenix Newspapers, Inc. v. Superior Court In & For Maricopa County*, 101 Ariz. 257, 259 (1966) ("It is patent that this right to speak, write, and publish cannot be abused until it is exercised") (quoting *Dailey v. Superior Court of City & County of San Francisco*, 44 P. 458, 459 (Cal. 1896)). Additionally, where a government justifies a regulation that burdens the right to freely speak based on the regulation's purpose in protecting against secondary effects, the Arizona Supreme Court has established a balancing test that examines, in part, whether "the government's substantial interest would be less effectively achieved without the regulation and ample alternative means of communication exist." *State v. Stummer*, 219 Ariz. 137, 145, ¶ 30 (2008). As set out above, there are many other state laws and county policies that may prevent such negative effects as political corruption and patronage without creating such a great burden upon employees' rights. These rulings lend support to a conclusion that the County's blanket Contribution Ban violates article II, § 6 of the Arizona Constitution. And examining other persuasive authority confirms this conclusion.

The Arizona Supreme Court's recent decision in *Brush & Nib* makes clear that, once a First Amendment violation exists, no further analysis is required to conclude that Pima County's Contribution Ban violates the Arizona Constitution. *See* 247 Ariz. at 282, ¶ 47. Nonetheless, it is instructive to conduct a separate state-constitutional analysis and examine how similarly situated states have viewed such a ban. Indeed, the Arizona Supreme Court has historically underscored the breadth of article II, § 6 by reference to interpretations of similar provisions in

other states' constitutions by their respective courts. *See, e.g., Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 355 (1989) ("our recognition of the broad protection for speech in Arizona conforms with the Washington Supreme Court's reading of Washington Constitution art. I, § 5, the model for Arizona's art. 2, § 6"); *Phoenix Newspapers, Inc.*, 101 Ariz. at 259 (noting Texas cases expanding free speech under similar provisions in the Texas Constitution).

Courts in states with a constitutional provision protecting free speech similar to article II, § 6 of the Arizona Constitution have determined whether to uphold the constitutionality of a state statute restricting a public employee's free speech rights by determining whether the state's interests justify the restriction. In *Oregon State Police Officers Ass'n, Inc. v. State*, for example, the issue was whether a state law that proscribed state police officers from "in any way be[ing] active or participat[ing] in any political contest of any general or special election, except to cast the ballot" violated the state's constitutional provision protecting free speech. 783 P.2d 7, 9-10 (Or. 1989). The Oregon Supreme Court first found that "political speech" is an "essential form of expression" protected by the Oregon Constitution and the state statute "prohibits state police officers from engaging in any manner in the political election process." *Id*. at 9. The state claimed that the statute's purpose was to "maintain[] a nonpolitical police force," but the Oregon Supreme Court found that there was nothing in the record to suggest that the "promotion of the efficiency, integrity, and discipline" of the state police required the statute's prohibition. *Id*. The Oregon Supreme Court held that the statute was an impermissible limitation on the state police officers' free speech rights, but noted that the state could "regulate" rather than "proscribe" the political activity of state police officers. *Id*. at 9-10.

In *United Auto Workers, Local Union 1112 v. Philomena*, the issue was whether a state statute that only prohibited public employers from administering political contribution payroll deductions for their employees violated the Ohio Constitution's free speech protections. 700 N.E.2d 936, 947 (Ohio Ct. App. 1998). The Ohio Court of Appeals started its analysis by noting that the Ohio Supreme Court has interpreted the Ohio Constitution's free speech protections as matching those of the First Amendment. *Id*. at 944. The State of Ohio put forth several justifications for the statute that the U.S. Supreme Court has recognized in upholding the Hatch Act's prohibition of partisan political activity, including: "[1] [p]revent[ing] political corruption and appearance of corruption in the public workplace, [2] ensur[ing] that public employees are not coerced into making contributions,[ ] [3] avoid[ing] entangling alliances between public sector employment and political parties, and [4] prevent[ing] politicization of government offices." *Id*. at 946. The Ohio Court of Appeals went through each of the state's justifications and found that the state had put forth "no rationale or evidence" that allowing public employers to offer political contribution payroll deductions to their employees posed a "genuine threat" to the state's interests. *Id*. at 946. The Ohio court held that the Ohio statute violated the state constitution's free speech protections because the statute infringed on the free speech rights of public employees and the government did not meet its burden of establishing that the prohibition in the statute was necessary to further compelling state interests or will "directly and materially" prevent harm to those interests. *Id*. at 946-47.

For similar reasons that the state statutes were struck down in Oregon and Ohio, Pima County's Contribution Ban here is unconstitutional under the Arizona Constitution because the restriction on county employees' free speech rights is not justified by the County's interests. Applying the analysis of *Oregon State Police Officers Ass'n* and *Philomena*, and consistent with

Stummer, 219 Ariz. at 145, ¶ 30, the relevant question is whether the government's interests justify the restrictions placed on its employees' free speech rights. Examination of the potential justifications for the Contribution Ban reveals that the ban unduly burdens speech.

As described above, the County's asserted interest in promoting an ethical work environment, as well as any theoretical interests (i.e., preventing political corruption and maintaining a politically-neutral office free of conflicts-of-interest), are already protected by numerous other measures at the state and county level without requiring an outright ban on political contributions. These include direct prohibitions on county employees "us[ing] the authority of their positions to influence the vote or political activities of any subordinate employee" and a statutory limit on individual contributions to candidates for county elected office. A.R.S. §§ 11-410(D), 16-912(A)(1). The small limit on individual contributions means that no one individual is likely to earn patronage or other special reward for donating to a particular candidate given the high financial cost of modern political campaigns. Nor would a candidate in a management position be likely to extract multiple small donations from a great number of subordinates without the fact of such illegal activity becoming public. Therefore, the inclusion of a complete ban on contributions does little to further address the County's concerns but much to burden its employees' constitutional right to freely speak.

Accordingly, the Contribution Ban cannot stand under article II, § 6 of the Arizona Constitution. *See Brush & Nib*, 247 Ariz. at 282, ¶ 47; *cf. Oregon State Police Officers Ass'n*, 783 P.2d at 9 (reasoning the Oregon statute prohibiting political speech "imposes restrictions that go far beyond any permissible limitation that the state may place on state police officers' [state constitutional] rights").

Conclusion

Pima County's blanket ban on political contributions for candidates for any elected county officials is inconsistent with First Amendment principles, Arizona law, and the text of the Arizona Constitution.

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