STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By MARK BRNOVICH ATTORNEY GENERAL September 30, 2021	No. I21–008 (R21-003) Re: Constitutionality of Phoenix City Code § 12–217(a)–(b)

To: Michelle Udall, Representative
Arizona House of Representatives

Question Presented

Section 12–217 of the Phoenix City Code prohibits: (a) any candidate for nomination or election to any office of the city to "receive" from any City employee, "either directly or indirectly," "any money or thing of value whatever for the purpose of defraying the expenses of or furthering such candidate's nomination," and (b) any City employee, aside from elected City officials, "to take part in the political management or affairs of any candidate's campaign for nomination or election to any City office other than to vote or privately express opinions."

Does Section 12–217(a) and (b) violate City employees' rights under the federal and state constitutions?

Summary Answer

Subsection (a) of Phoenix City Code § 12–217—which prohibits employees from making any contributions to candidates for nomination or election to any City office—violates City

employees' constitutional rights under the First Amendment to the United States Constitution and article II, § 6 of the Arizona Constitution. Moreover, subsection (c)—which prohibits employees from engaging in political activities "on City property"—is overly broad, and on that basis, violates City employees' constitutional rights. Subsection (b) of Phoenix City Code § 12–217—which prohibits employees from taking part in the political management or affairs of any City candidate's campaign—does not violate City employees' state or federal constitutional rights.

Background

In 2016, the Phoenix City Council proposed changes to the prior version of Phoenix City Code § 12–217 (2009), which regulates political activities of City of Phoenix ("City") employees. *See* City of Phoenix City Council Policy Session Minutes (September 27, 2016). The City Attorney explained that the changes were intended to eliminate duplicative provisions found in the City's Charter and City Code. *Id*. at 7. Several members of the public who attended the meeting emphasized that the City Council, in deciding whether to adopt the proposed amendments, should be mindful of City employees' First Amendment rights. For example, one attendee noted "the importance of freedom of speech" and "urged the Council to adopt [changes that] would allow City employees to participate in City elections during their off-duty time." *Id*. at 8. Mayor Greg Stanton explained he supported the proposed amendments, believing (incorrectly) they "would give City employees rights similar to those granted to Maricopa County employees and employees for the State of Arizona." *Id*. at 10.

During the Council's discussion, one Councilman stated that "he felt City employees should be allowed to donate money to a candidate's campaign[.]" *Id*. at 9. Nonetheless, the City Council voted unanimously to approve the proposed amendments. *Id.* at 11. Accordingly, the

City passed Ordinance No. G-6212, which amended § 12–217 of the City's Code and took effect in November 2016.

Section 12–217 provides in full as follows:

Soliciting or contributing to campaign funds; membership in political organization; political activity.

(a) It shall be unlawful for any candidate for nomination or election to any office of the City to solicit or receive, either directly or indirectly, from any employee of the City, any money, or other thing of value whatever, for the purpose of defraying the expenses of or furthering such candidate's nomination for or election to any City office.

(b) It shall be unlawful for any employee of the City, with the exception of elected City officials, to take part in the political management or affairs of any candidate's campaign for nomination or election to any City office other than to vote or privately express opinions. Except for City staff that conduct or give advice concerning City elections, privately expressing an opinion includes, but is not limited to, off-duty activities such as signing nominating or recall petitions, posting on personal or nongovernmental social media accounts, displaying a sign on nongovernment property, and communicating with another person or group of people when the employee does not do so in an official capacity.

(c) Notwithstanding the foregoing, it shall be unlawful for any City employee to engage in political activities while on City time, in uniform, on City property, or using City resources.

Phoenix City Code § 12–217 (2016).[1]

Subsection (a) broadly prohibits a candidate from "receiv[ing], either directly or indirectly … any money[] or other thing of value whatever" from City employees. This restriction on candidates, however, operates as a complete ban on City employees—prohibiting them from giving "any money" or "thing of value," directly or indirectly, to "any candidate" for "any City office" ("Contribution Ban"). Subsection (b) precludes employees, aside from elected City officials, from "tak[ing] part in the political management or affairs of any candidate's campaign"

[1] *Available at* https://phoenix.municipal.codes/CC/12-217 (last visited September 27, 2021).

for election to "any City office" ("Candidate Campaign Restriction"). Finally, subsection (c), in relevant part, prohibits City employees from engaging in any political activities while "on City property" ("City Property Restriction").

You have asked whether these provisions violate City employees' rights under the federal and state constitutions.

Analysis

Arizona law protects "the civil and political liberties of any [city] employee as guaranteed by the United States and Arizona Constitutions." A.R.S. § 9–500.14(G). For the reasons that follow, the City's Contribution Ban violates city employees' rights under the First Amendment to the U.S. Constitution and under article II, § 6 of the Arizona Constitution. And the City Property Restriction is overly broad, and therefore, invalid. The Candidate Campaign Restriction, however, passes constitutional muster.

I. The Contribution Ban Violates City Employees' Rights Under The Federal And State Constitutions

The act of contributing money to a candidate is a significant form of political expression that involves substantial First Amendment rights. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 203 (2014) (political contributions implicate "an individual's right to participate in public debate through political expression and political association"); Ariz. Att'y Gen. Op. No. I20–012, 2020 WL 7769744 (Dec. 17, 2020) ("The right to make political campaign contributions is at the core of political speech and is protected by the First Amendment.") (quoting Ariz. Att'y Gen. Op. No. I88–063, 1988 WL 249652 (June 9, 1988)). This Office recently opined that an Arizona county's employment policy forbidding county employees from making political contributions to candidates for any elected county office violates county employees' constitutional rights guaranteed under the First Amendment and article II, § 6 of the Arizona Constitution. *See* Ariz.

Att'y Gen. Op. No. I20–012. Applying the same analysis here, the City's Contribution Ban likewise violates City employees' First Amendment rights and their right to freely speak under the Arizona Constitution.

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

The First Amendment prohibits the enactment of laws abridging the freedom of speech. U.S. Const. amend. I. The United States Supreme Court has stated that when government restricts the speech of its employees, the government "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." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id*.

The Supreme Court has applied a balancing test (the "*Pickering* test") to analyze public employees' First Amendment claims, explaining that "[t]he problem in any case is to arrive at a balance between 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 though its employees." *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968); *see also United States v. Nat'l Treasury Emps.' Union*, 513 U.S. 454, 480 (1995) *("NTEU")* (O' Connor, J., concurring in part) ("The time-tested *Pickering* balance … provides the governing framework for analysis of all manner of restrictions on speech by the government as employer.").

In *NTEU*, the Supreme Court clarified how courts should apply *Pickering* when, as here, a restraint on a government employee's speech silences a "broad category of expression by a massive

number of potential speakers" on a matter of public concern and "chills potential speech before it happens." 513 U.S. at 467–68. In such circumstances, the government must demonstrate that its "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id*. at 475 (citation omitted). To demonstrate "real, not merely conjectural" harms, a government must provide evidence that the government's concerns exist. *Id.*; *see also City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) ("the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification 'far stronger than mere speculation' in regulating it") (quoting *NTEU*, 513 U.S. at 465).

Here, as noted above, Phoenix City Code § 12–217(a) prohibits a candidate from "receiv[ing], either directly or indirectly … any money[] or other thing of value" from City employees.[2] Accordingly, for all City employees, this restriction operates as a complete ban, prohibiting them from directly or indirectly giving "any money" or "other thing of value" to "any candidate" for "any City office." Phoenix City Code § 12–217(A). City employees undoubtedly have an interest in making political campaign contributions. *See Pickering*, 391 U.S. at 568. As

[2] Section 12–217(a) also prohibits a candidate from "solicit[ing]" money or "other thing of value" from a City employee. Because the restriction disallowing candidates from "receiv[ing]" money goes too far as an outright ban on City employees' ability to make any political contributions, it is unnecessary to decide whether the solicitation restriction, in isolation, is constitutionally permissible. Notably, state law is more narrowly tailored than the City's solicitation restriction. State law allows employees to solicit contributions to candidates or campaign committees, A.R.S. § 41–752(C)(7), but prohibits *improper* solicitation, such as soliciting a political contribution while using or promising to use "any official authority or influence for the purpose of influencing the vote or political action of any person or for any consideration." *Id*., § 41–752(B)(2), (D)(1). In this way, the state law protects both state employees' civil and political liberties, *see* § 41–752(J), and the state's public policy of administering government programs "in an unbiased manner and without favoritism for or against any political party or group" to "promote public confidence in government, governmental integrity and the efficient delivery of governmental services" and "ensure that all employees are free from … any political or other pressure," § 41–752(K).

the United States Supreme Court has emphasized, "[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." *McCutcheon*, 572 U.S. at 191. An outright ban on all political contributions, no matter how small, constitutes a substantial burden on public employees' First Amendment rights. *See Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (finding $1,000 independent expenditure limitation "heavily burdens core First Amendment expression"), *superseded by statute on other grounds as stated in McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Lodge No. 5 of Fraternal Order of Police ex rel. McNesby v. City of Philadelphia*, 763 F.3d 358, 367–68 (3d. Cir. 2014) ("*Lodge No. 5*") (reasoning that a ban on political contributions "constitutes a substantial burden" on First Amendment rights).[3]

Recognizing that the Contribution Ban imposes a substantial burden on City employees' First Amendment rights to participate in the political process, we now address the City's purported interests. Nothing in the City Council's 2016 meeting minutes indicate what government interests are furthered by the Contribution Ban. The minutes approving § 12–217 offer no mention of past wrongdoing by any City employee or any suggestion that the Contribution Ban was aimed to combat any perceived harm to government efficiency. *See* City of Phoenix City Council Policy Session Meeting Minutes (September 27, 2016). It is therefore not apparent how City employees' right to make political contributions is outweighed by that expression's "necessary impact on the actual operation" of the government. *See NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571). But even assuming the City approved the Contribution Ban to promote public confidence in government, ensure governmental integrity, avoid discrimination to City employees based on their

[3] Notably, unlike the City's Contribution Ban, state law expressly allows state employees to "[m]ake contributions to candidates, political parties or campaign committees contributing to candidates or advocating the election or defeat of candidates." A.R.S. § 41–752(C)(4).

political activities, or achieve similar goals (undoubtedly important government interests), it is the City's burden to show the "harms" are real, not merely conjectural, and that the Contribution Ban will in fact alleviate those harms in a "direct and material way." *See NTEU*, 513 U.S. at 475. The City fails to meet this burden.

Further, the Contribution Ban is not "closely drawn" to avoid unnecessary infringement on First Amendment rights because there are other targeted alternatives that would serve the government's interests. *See McCutcheon*, 572 U.S. at 218, 221; *Lodge No. 5*, 763 F.3d at 376 (holding a contribution ban "is poorly tailored" to the government's "articulated interests"). For example, Arizona law already prohibits City employees from using "the authority of their positions to influence the vote or political activities of any subordinate employee." A.R.S. § 9–500.14(D). And the City Code makes it unlawful for any City employee to influence, directly or indirectly, any City employee to vote or refrain from voting for any particular person for nomination or election to any office of the city. Phoenix City Code § 12–218. Additionally, a state statute sets a limit on individual contributions to city candidates. *See* A.R.S. § 16–912(A)(1) (setting a limit of $6,250 on individual contributions to candidates for city office).[4] These laws and policies reduce the likelihood that a candidate for a city office will improperly influence or reward a city employee who contributed to the official's campaign, and undercut the strength of any purported interest in preserving integrity and public trust in the government. Indeed, 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." *See Patterson v. Maricopa Cty. Sheriff's Off.*, 177 Ariz. 153, 158–59 (App. 1993) (applying *Pickering* test to strike the "appropriate balance between employees' First Amendment rights and the interests of government in avoiding political

[4] Base contributions limits are increased every two years under A.R.S. § 16–931(A)(2).

patronage" while holding a county could not forbid county employee from seeking an unpaid and nonpartisan position).

Any speculative benefits associated with the Contribution Ban "are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities." *NTEU*, 513 U.S. at 477. Because the *Pickering* balancing of interests does not weigh in the City's favor, the Contribution Ban violates City employees' First Amendment rights. *See Lodge No. 5,* 763 F.3d at 384 (holding contribution ban imposed on police department employees violates the First Amendment for similar reasons).

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

Because the Contribution Ban is unconstitutional under the First Amendment, it likewise violates the Arizona Constitution's more stringent safeguards of the right to "freely speak." Ariz. Const. art. II, § 6. The Arizona Constitution's "Freedom of Speech and Press" provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." *Id*. Our supreme court has emphasized that "whereas 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). Arizona courts have repeatedly held that "the Arizona Constitution provides broader protections for free speech than the First Amendment." *Id*. at 281–82, ¶ 45 (collecting authorities). Therefore, "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).

Although the validity of the Contribution Ban here presents an issue of first impression in Arizona, aspects of this issue have been addressed by Arizona courts. When a government regulation burdens the right to freely speak, Arizona courts must examine whether the regulation "unduly burdens speech," whether the government's substantial interest may be satisfied without the regulation, and whether "ample alternative means of communication exist." *State v. Stummer*, 219 Ariz. 137, 145, ¶ 30 (2008). The proponent must show "a close fit or nexus between the ends sought and the means employed for achieving those ends." *Id*. As discussed above, other existing Arizona laws and City policies adequately protect the City's conceivable interests here without creating such a great burden on employees' rights. Accordingly, the City's Contribution Ban here also violates City employees' state constitutional right to freely speak.

II. The City Property Restriction Is Unconstitutionally Overbroad Under The Federal And State Constitutions

Next, the City's Code states that "it shall be unlawful for any City employee to engage in political activities while on City time, in uniform, *on City property*, or using City resources." Phoenix City Code, § 12–217(c) (emphasis added). As discussed below, the City Property Restriction is unconstitutionally overbroad because it forbids First Amendment activities on all City property and its deterrent effect on legitimate expression is both real and substantial. *See State v. Weinstein*, 182 Ariz. 564, 565–66 (App. 1995) ("A statute is unconstitutionally overbroad if it proscribes expression protected by the First Amendment" and is "facially overbroad" when the law's "deterrent effect on legitimate expression" is "'not only real, but substantial as well'") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

The United States Supreme Court "has articulated a three-part test for determining whether a given time, place, and manner regulation is reasonable: is the regulation content-neutral, does it serve a significant governmental interest, and does it leave open ample alternate channels for

communication." *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 357-58 (1989) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Significantly, our supreme court has held that "any restriction on first amendment rights 'must be drawn with narrow specificity.'" *Mountain States Tel.*, 160 Ariz. at 358 (quoting *New Times, Inc. v. Ariz. Bd. of Regents*, 110 Ariz. 367, 371 (1974)).

In *New Times*, for example, our supreme court considered the constitutionality of a public university's regulations that limited the distribution of off-campus newspapers to a total of six locations on the college campus. 110 Ariz. at 369. The regulations also imposed a fee of $2.00 per news stand "for each issue" and required the off-campus newspaper to register with "the appropriate campus authorities." *Id*. The purpose of these regulations was "to limit the amount of litter resulting from the disposal of such newspapers and to cover the additional costs of litter removal involved." *Id*. In evaluating the reasonableness of this time, place, and manner restriction, the Arizona Supreme Court stated, "[w]e must begin with the proposition that the state has already opened the campus to the public generally and may not arbitrarily restrict the freedom of individuals, lawfully on the property to exercise their [F]irst [A]mendment rights." *Id*. at 371-72. The supreme court explained that First Amendment rights "may be regulated where such exercise will unduly interfere with the normal use of public property by other members of the public with an equal right to access to it." *Id*. at 371. However, the college's newspaper regulations were "overbroad and unreasonable, going beyond the permissible limits" because the college required the newspapers to "take numerous and cumbersome steps" to distribute on-campus and had "arbitrarily limited" the distribution locations to six places, "solely within the discretion of the University officials." *Id*. at 373. The supreme court further found the imposition of the $2.00 distribution fee was "constitutionally impermissible" because it amounted to "a license on the right

to distribute printed material." *Id*. at 373. The court explained, "a person may not have his rights of freedom of expression abridged in appropriate places on the grounds that they may be exercised in some other place." *Id*.

Here, the City Property Restriction prohibiting City employees from engaging in all political activities on any City property encompasses city streets and parks—First Amendment forums. *See Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). It is also written to ban employees from engaging in protected activities even when they are doing so on their own, off-duty personal time. Phoenix City Code, § 12–217(c). Like the regulation deemed unconstitutional in *New Times*, the City Property Restriction infringes on real and substantial First Amendment activities. *See People v. Fogelson*, 577 P.2d 677, 678-80 (Cal. 1978) (holding a Los Angeles ordinance prohibiting solicitation of contributions on public property without a permit is "invalid on its face because it gives administrative officials unlimited discretion to grant or deny permission to engage in constitutionally protected forms of solicitation" and reasoning, "[t]here can be little question" that the ordinance "lends itself to a substantial number of unconstitutional applications"). The City's ostensible interest advanced by the City Property Restriction is to prohibit employees from engaging in political activities while working on City property in the scope of their employment. But that interest is adequately served by the remaining language of § 12–217(c), which does not allow engaging in political activities "while on City time, in uniform, … or using City resources." *Cf.* A.R.S. § 41–752(A) ("Except for expressing an opinion or pursuant to § 16–402, [a state] employee shall not engage in any activities permitted by this section while on duty, while in uniform or at public expense."). Thus, the City Property Restriction is not narrowly drawn to serve a significant governmental interest. *See Mountain States Tel.*, 160 Ariz. at 357-58.

In sum, under the First Amendment and article II, § 6 of the Arizona Constitution, the City cannot justify prohibiting its employees from engaging in political activities on City property. *See id.* at 358 ("narrow specificity" is required under the First Amendment and "under the more stringent protections of the Arizona Constitution").

III. The Candidate Campaign Restriction Does Not Violate City Employees' Federal Or State Constitutional Rights

Finally, the City's Candidate Campaign Restriction—prohibiting City employees from "tak[ing] part in the political management or affairs of any candidate's campaign for nomination or election to any City office"—is constitutional under the First Amendment to the United States Constitution and article II, § 6 of the Arizona Constitution. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973) (stating that "[n]either the right to associate nor the right to participate in political activities is absolute") (citation omitted). Importantly, § 12–217 does not prohibit City employees from participating in all forms of political activity. Subsection (b) provides a non-exhaustive list of permissible activity, for example, "privately expressing an opinion," "signing nominating or recall petitions," "posting on personal or nongovernmental social media accounts," "displaying a sign on nongovernment property," and "communicating with another person or group of people" in an unofficial capacity. Phoenix City Code, § 12–217(b). Permissible political activities would also include, *inter alia*, casting a vote, attending meetings about political issues, candidates, and topics, and making political contributions to candidates, political parties or campaign committees. *See, e.g.,* A.R.S. § 41–752(C).

Notably, the Candidate Campaign Restriction, unlike the Contribution Ban and City Property Restriction, is similar to the restrictions governing state employees' political activities under state law. *See* A.R.S. § 41–752(C) (prohibiting state employees from "tak[ing] any part in the management or affairs of any political party or in the management of any partisan or

nonpartisan campaign or recall effort," subject to several statutory exceptions). The Office presumes this state law is constitutional. *See* Ariz. Att'y Gen. Agency Handbook, Ch. 1, § 1.5.3 ("When called upon to address the constitutionality of a statute, the Attorney General presumes a statute is constitutional and will find otherwise only when the statute is clearly or patently unconstitutional."); *see also State v. Arevalo*, 249 Ariz. 370, 373, ¶ 9 (2020) ("[a]n act of the Legislature is presumed constitutional") (citation omitted). As further explained below, the City's Candidate Campaign Restriction is constitutional.

A. The Candidate Campaign Restriction Is Constitutional Under The First Amendment

As relevant here, under the federal Hatch Act, certain government employees are prohibited from engaging in certain partisan political activities, including campaigning for office, soliciting campaign contributions for political office, and using official authority to influence the result of an election. *See generally* 5 U.S.C. §§ 1501-08, 7321-26. The United States Supreme Court has upheld facial challenges to the Hatch Act's restrictions on public employees' political activities, reasoning that a public employer may constitutionally limit the political activities of its employees in some instances.

For example, the Supreme Court has upheld the Hatch Act's restriction that prohibited federal employees from "tak[ing] an active part in political management or political campaigns." *Letter Carriers*, 413 U.S. at 554–67 (interpreting 5 U.S.C. § 7324(a)(2) (1988)); *see also 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"). Similarly, in *Broadrick*, the Supreme Court rejected a vagueness and overbreadth challenge to an Oklahoma statute that

restricted civil servants' political activities "in much the same manner that the Hatch Act proscribes partisan political activities of federal employees." 413 U.S. at 602, 616-17.

In *Letter Carriers*, the Supreme Court discussed four "obviously important interests" served by the Hatch Act's political-activity limitations. 413 U.S. at 564. First, government employees "are expected to enforce the law and execute the programs of the government without bias or favoritism for or against any political party or group or the members thereof." *Id*. at 565. Second, the employees should avoid even the appearance of "political justice" so as to instill public confidence. *Id*. Third, "the rapidly expanding Government work force should not be employed to build a powerful, invincible and perhaps corrupt political machine." *Id*. Fourth, "employment and advancement in the Government service [should] not depend on political performance, and at the same time ... Government employees [should] be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their supervisors rather than to act out their own beliefs." *Id*. at 566. As this Office has previously opined, these four interests justify the Arizona law that restricts state employees' campaigning activity in the same way as the Hatch Act. *See* A.R.S. § 41–752(C); Ariz. Att'y Gen. Op. No. I83–134, 1983 WL 42798 (Dec. 2, 1983).

Likewise, the Candidate Campaign Restriction here—which restricts the City's employees from "tak[ing] part in the political management or affairs of any candidate's campaign for nomination or election to any City office"—is justified by the City's substantial interests.[5]

[5] Given that the plain language of the Candidate Campaign Restriction narrowly prohibits City employees from taking part in any *candidate's* campaign, it cannot be interpreted to prohibit City employees from participating in *initiative* campaigns. *See* Ariz. Att'y Gen. Op. No. I90–054, 1990 WL 484060 (June 26, 1990) (concluding the phrase "political campaign" as used in former version of state law governing political activities of state employees "does not include initiative campaigns"). "To conclude otherwise would impermissibly restrict the First Amendment rights of [City] employees without serving any substantial purpose." *Id*.

Importantly, the City's Code makes clear that, except for this restriction, City employees are otherwise free to express their political views while engaging in other activities off-duty, "such as signing nominating or recall petitions, posting on personal or nongovernmental social media accounts, displaying a sign on nongovernment property, and communicating with another person or group of people when the employee does not do so in an official capacity." Phoenix City Code § 12–217(b); *see Letter Carriers*, 413 U.S. at 575–76 (emphasizing the Hatch Act's restriction "specifically provides that the employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates"). City employees also retain the right to take part in the affairs of any campaign for a candidate who is not seeking election to a City office or in other nonpartisan campaigns. *See Letter Carriers*, 413 U.S. at 576 (noting the Hatch Act's restriction still allowed government employees to engage in nonpartisan political activity involving "issues with respect to constitutional amendments, referendums, approval of municipal ordinances, and the like").

To be sure, *Letter Carriers* and *Broadrick* addressed political-activity restrictions in the context of *partisan* elections. *Letter Carriers*, 413 U.S. at 557–67; *Broadrick*, 413 U.S. at 606. The City's candidate elections here are nonpartisan. However, "[t]he line between partisan and nonpartisan politics" is often "blurred or arbitrary" because "[a] nominally nonpartisan campaign may be conducted with substantial party involvement." Ariz. Att'y Gen. Op. No. I83–134, 1983 WL 42798. The City's interests served by restricting its employees' political activity in candidate elections in this limited fashion are no less harmful if such activity occurs in connection with a nonpartisan candidate's campaign. *See id.* (reasoning that "employee participation in nonpartisan political campaigns can create the same threats to the integrity and efficiency of state government as those which arise from partisan campaigning"); *see also Wachsman v. City of Dallas*, 704 F.2d

160, 164–69 (5th Cir. 1983) ("[f]or purposes of judging the validity of restrictions on election-related activity in the light of [F]irst [A]mendment considerations, we believe it more meaningful to distinguish between elections on the basis of whether they are candidate elections or noncandidate elections, such as referenda and constitutional amendment elections").

Accordingly, the nonpartisan nature of the City's candidate elections neither weakens the governmental interests served by the Candidate Campaign Restriction nor alters the legal conclusion here. *See* Ariz. Att'y Gen. Op. No. I83–134, 1983 WL 42798 (broadly interpreting the restriction against taking any part in the management or affairs of a "political campaign" in A.R.S. § 41-772(B) (1983) to include partisan and non-partisan federal, state, and local political campaigns).[6] The City's Candidate Campaign Restriction is a constitutional restriction under existing Supreme Court precedent.

B. The Candidate Campaign Restriction Is Not Facially Unconstitutional Under Article II, § 6 Of The Arizona Constitution

Although an issue of first impression in Arizona, the City's prohibition against employees taking part in the political management or affairs of a City candidate's campaign is not facially unconstitutional under article II, § 6 of the Arizona Constitution. *See State v. Wein*, 244 Ariz. 22, 31, ¶ 34 (2018) (facial challenge to a regulation or statute generally requires the challenger to satisfy a high burden of "establish[ing] that no set of circumstances exists under which the [law] would be valid") (citation omitted).

Again, the Arizona Constitution provides broader free speech protections than the First Amendment. *Brush & Nib Studio*, 247 Ariz. at 281, ¶ 45 (collecting cases). However, the extent

[6] Arizona law has since been amended consistent with this broad interpretation; Section 41–752(C) now precludes state employees from "tak[ing] any part in the management or affairs of any political party or in the management of any *partisan or nonpartisan* campaign[.]" (Emphasis added.)

to which the Arizona Constitution is broader than its federal counterpart has not yet been defined for all circumstances. *See id*. at 282, ¶ 46 ("[a]lthough article 2, section 6 does, by its terms, provide greater speech protection than the First Amendment, we have rarely explored the contours of that right."). As discussed above, the Supreme Court has repeatedly upheld similar restrictions on government employees' political activities against First Amendment challenges. Although such precedent is not dispositive in interpreting the Arizona Constitution, Arizona courts would likely consider Supreme Court precedent on this topic and afford it persuasive value in interpreting article II, § 6. *See id*. (observing Arizona courts "have often relied on federal case law in addressing free speech claims under the Arizona Constitution"); *see, e.g., Coleman v. City of Mesa*, 230 Ariz. 352, 357–61, ¶¶ 14–34 (2012). Moreover, as noted above, the City's Candidate Campaign Restriction is consistent with state law, which this Office presumes does not run afoul of the Arizona Constitution.

In evaluating a challenge to the Candidate Campaign Restriction under the Arizona Constitution, Arizona courts would likely characterize the City's employment regulation as a restriction on expressive conduct protected by article II, § 6. *Cf. Coleman*, 230 Ariz. at 360, ¶ 31 (finding that the "business of tattooing is constitutionally protected" under the Arizona Constitution). Because the City is acting in its capacity as an employer, Arizona courts would presumably apply a balancing approach, factoring in the City's important interests (such as those articulated in *Letter Carriers*), to analyze the validity of the Candidate Campaign Restriction under article II, § 6.

On balance, the City's narrowly-crafted Candidate Campaign Restriction is not unconstitutional on its face under the Arizona Constitution. The City's Code includes a non-exhaustive list of permissible political activities. *See* Phoenix City Code § 12–217(b). The

Candidate Campaign Restriction does not prohibit speech outright in the same way that the Contribution Ban or the City Property Restriction prohibits speech. Although the precise contours of article II, § 6 in this government-employment context have not yet been defined, the Candidate Campaign Restriction is not facially unconstitutional.

Conclusion

Section 12–217(a) of the City's Code, which prohibits City employees from making political contributions in any amount to any candidate for any elected City office, violates City employees' rights under the First Amendment and article II, § 6 of the Arizona Constitution. And § 12–217(c)'s restriction disallowing any political activities of employees on City property is overly broad, and therefore, unconstitutional. However, § 12–217(b), which prohibits City employees from "tak[ing] part in the political management or affairs of any [City] candidate's campaign for nomination or election," does not violate City employees' federal or state constitutional rights.

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