ARIZONA COURT OF APPEALS

DIVISION ONE

THE ARIZONA ADVOCACY NETWORK FOUNDATION, et al.,

Plaintiffs/Appellees,

v.

CITIZENS CLEAN ELECTIONS COMMISSION,

Defendant/Appellee,

and

STATE OF ARIZONA, et al.,

Defendants/Appellants.

Court of Appeals
Division One
No. 1 CA-CV 19-0489

Maricopa County
Superior Court
No. CV2017-096705

CITIZENS CLEAN ELECTIONS COMMISSION'S RESPONSE TO INSTITUTE FOR JUSTICE AMICUS BRIEF

Mary R. O'Grady, 011434
Joseph N. Roth, 025725
OSBORN MALEDON, P.A.
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012
(602) 640-9000
mogrady@omlaw.com
jroth@omlaw.com

Attorneys for Defendant/Appellee
Citizens Clean Elections Commission

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INTRODUCTION

The Institute for Justice's amicus brief is an unhelpful distraction. The question for this Court is one the brief sidesteps: if applied to the Citizens Clean Elections Act, do portions of S.B. 1516 violate the Arizona Constitution because they amend that Act but were not passed with the required number of votes under the Voter Protection Act, Ariz. Const. art. IV, pt. 1, § 1(6)(c).

Rather than aid the Court's assessment of the issue actually on appeal, the Institute raises issues that the parties have not themselves raised or briefed, and which are not necessary to decide this appeal. Shed of its lengthy background and wind-up, the Institute's argument is this: the definitions of "political committee," "expenditure," and "contribution" in the 1998 version of § 16-901 violate the First Amendment; therefore, the legislature's amendments to those definitions "could not have violated the VPA." Institute Br. at 27-28.

The Institute's First Amendment arguments, whatever their merit, are misplaced. If there are constitutional claims to be made about existing legislation, a proper plaintiff may bring a case. But the need for curative legislation, if one exists, does not excuse noncompliance with the Arizona Constitution. The Institute's novel argument—that the legislature can

bypass the Arizona Constitution's requirement that legislation obtain a sufficient number of votes to become law—is incorrect.

ARGUMENT

I. This case has nothing to do with the *Galassini* litigation.

The Institute spends many pages explaining its work in the *Galassini* litigation and suggesting that S.B. 1516 at least in part addresses the supposed flaws the Institute sees in Arizona's campaign finance laws. *See* Institute Br. at 18-25. The reality is that *Galassini* and its holding have nothing to do with the claims plaintiffs/appellees raised in this case or the judgment below.

This appeal is from a judgment enjoining a handful of subsections in S.B. 1516 because they amended the Clean Elections Act without complying with the Voter Protection Act. *See* IR-74. Specifically, the court enjoined the following in S.B. 1516: (1) an amendment to the definition of "primary purpose" as it relates to who must register as a political action committee (A.R.S. § 16-901(43) and § 16-905(D)); (2) the new exemption of "coordinated party expenditures" from the definition of "contribution" (A.R.S. § 16-911(B)(4)(b)); (3) the new exemption of payment of legal and accounting expenses from "contribution" and "expenditure" (A.R.S. § 16-911(B)(6)(c)

and § 16-921(B)(4)(c), (B)(7)); and (4) amendments to the definition of which public officials can enforce certain campaign finance reporting requirements (A.R.S. § 16-938(A)).

These legislative amendments have nothing to do with the Institute's claims or the court's ruling in *Galassini*. In that case, the plaintiff challenged the constitutionality of various aspects of Arizona's campaign finance law, including that the definitions of "political committee," "contribution," and "expenditure" are "vague and overly broad." *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 WL 5445483, at *18 (D. Ariz. Sept. 30, 2013) (describing plaintiff's claims).

The district court agreed with the plaintiff on one part of the claim, holding that the definition of "political committee" was unconstitutionally vague and "overbroad because it sweeps in a substantial amount of protected speech that the State does not have an important interest in regulating." *Id.* at *24. While the district court's ruling was on appeal, the legislature amended the definition of "political committee" so that it would more clearly not apply to the type of "small grassroots groups" at issue in *Galassini*. *See* Institute Br. at 23 (discussing amendment); *see* 2015 Ariz. Sess. Laws, ch. 297, § 1 (1st Reg. Sess.). The legislation led to the voluntary

dismissal of the case on appeal before the Ninth Circuit could consider the case. *Galassini v. Town of Fountain Hills*, Case No. 14-17541, Doc. 16 (9th Cir. Oct. 6, 2015).

The holding in *Galassini* and the subsequent 2015 amendment to the definition of "political committee" do not relate to the language at issue in this case. S.B. 1516 repealed "political committee" and replaced it with "political action committee," and also included a carve out based on an entity's tax-exempt status. *Compare* 2015 Ariz. Sess. Laws, ch. 297, § 1 at § 16-901(19)(f)(i) (defining "political committee" as, among other requirements, a group "organized . . . for the primary purpose of influencing the result of any election") *with* 2016 Ariz. Sess. Laws, ch. 79, § 11 (repealing "political committee," creating "political action committee," and further defining "primary purpose" to exclude any organization with "tax exempt status" under federal law). The judgment below enjoins the carve out of tax-exempt entities in the new definition, which did not exist when *Galassini* was decided and is not relevant to the holding in that case. *See* IR-74.

Even less relevant to *Galassini* are the enjoined sub-parts of S.B. 1516's definitions of "contribution" and "expenditure." As the Institute's brief eventually concedes (at 28), *Galassini* does not address the arguments related

to the definitions of expenditures and contributions or plaintiff's other constitutional claims. 2013 WL 5445483 at *24 n.6.

The Institute nevertheless implies that the legislature adopted S.B. 1516, including its amendments to contribution and expenditure, as a legislative fix in response to *Galassini* to "rework" the law "to better comply with the First Amendment." Institute Br. at 25. It cites no evidence in the legislative history and there is none. The fact is, *Galassini* has nothing to do with the enjoined sections of S.B. 1516.

The Institute goes on to contend (at 25) (without much evidence) that S.B. 1516 is "shorter, easier to understand, and compliant with the judicial decisions governing the constitutionality of campaign finance laws." The Commission takes no position here on the constitutional issues discussed in the Institute's brief. The Commission questions the value of much of this analysis, however. For example, the Institute states (at 11) that the pre-S.B. 1516 definitions had "more than 1,800 words" and then contends (at 25) that S.B. 1516 shortens and clarifies the definitions of "contribution" and "expenditure." But the definitions are not shorter or clearer. The fact is the new S.B. 1516 definitions have *more* words than before (more than 1,900) and span across multiple sections rather than being kept together in § 16-901. *See*

A.R.S. § 16-901(10)-(11), (14), (25) (defining "committee," "contribution," "coordinated party expenditure," and "expenditure"); § 16-905 (defining "political action committee" requirements); § 16-911 (defining exemptions to the definition of "contribution"); § 16-921 (defining exemptions to the definition of "expenditure").

It is evident that the judgment below does not overlap at all with the order in *Galassini* or the constitutional issues that take up the bulk of the Institute's brief. The brief is not helpful to the Court's analysis of the narrow judgment in this case.

II. The Institute's argument is a plea to ignore the Arizona Constitution.

Much of the Institute's brief is filled with a recitation of its litigation in *Galassini* and the Institute's views of various campaign finance legal issues. The argument related to this case comes in the brief's last few pages. The Institute argues (at 27-28) that because S.B. 1516 fixes supposed constitutional problems with the previous law, the Voter Protection Act cannot be a bar to those amendments. Otherwise, the Institute contends that the Voter Protection Act and the Clean Elections Act create a "Constitution-free zone where the First Amendment does not exist" and that the law is "stuck" in place and is "set in stone." Institute Br. at 3, 26. The Institute

further contends that the judgment below, if affirmed, would "revert Arizona's laws to an unconstitutional state." *Id*. at 30.

The Institute's argument does not help the Court decide this appeal. **First**, the Institute misapprehends the scope of the judgment below. The argument proceeds as though the judgment totally undoes S.B. 1516 and reinstitutes the law as it was in 1998. But the judgment is narrow, enjoining only a few subsections from becoming the law. IR-74 at 3 ¶ 2. Despite the lengthy abstract discussion of constitutional law, the Institute does not explain why enjoining those few sections would "reimpose definitions in obvious conflict with the constitutional protections for free speech and association." Institute Br. at 28-29. How so? The enjoined subsections *did not exist before*. How does their absence "reimpose" an unconstitutional law? Is it constitutionally required to exempt legal and accounting expenses (*see* A.R.S. § 16-911(B)(6)(c)) from the definition of "contribution"? If so, the Institute should bring a claim, but that is not part of this case.

Second, the Institute's premise—that the Voter Protection Act has frozen the law in 1998—is incorrect. The Voter Protection Act is not a bar to legislation. The law can change under the Voter Protection Act just as it can under the generally applicable rules requiring a majority vote. Indeed, when

the United States Supreme Court held in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), that part of the Clean Elections Act was unconstitutional, the legislature amended the law to conform the Act to the Court's ruling and did so in compliance with the Voter Protection Act. *See* 2012 Ariz. Sess. Laws, ch. 257, § 10 (amending § 16-952's "matching funds" provisions "[s]ubject to the requirements of article IV, part 1, section 1" of the Arizona Constitution).

The question is thus not whether the law is "set in stone" or is "stuck" as the Institute argues.[1] The question is whether the legislature's effort to change the law in S.B. 1516 complies with the Arizona Constitution. For the reasons discussed in the Commission's brief, if applied to the Clean Elections Act, S.B. 1516 amends the Clean Elections Act and therefore must comply with the Arizona Constitution's Voter Protection Act.

Third, the Institute's conclusion—that the Voter Protection Act cannot bar legislation that purports to fix flawed statutes—is also meritless. *See* Institute Br. at 28-29 (arguing that legislature should not be prohibited from

[1] The State's brief contains the same flaw. The State repeatedly argues that the law should not be "frozen." *See* Op. Br. at 7, 31, 39.

"amend[ing] these definitions to reflect developing judicial decisions"). The Voter Protection Act "imposes heightened constitutional restrictions" on the legislature's ability to change voter-approved laws. *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 4, ¶ 9 (2013). The Act helps preserve the power of the electorate to enact laws without undue interference from the legislature. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2660 (2015) ("The Arizona Constitution establishes the electorate of Arizona as a coordinate source of legislation . . . ." (internal quotation marks, alteration, and citation omitted)).

Regardless of the nobility of the legislature's motive, it cannot disregard the Voter Protection Act any more than any other constitutional requirement. All legislation must meet certain procedural requirements to become law, including receiving an adequate number of votes. *See* Ariz. Const. art. IV, pt. 2, § 15 ("A majority of all members . . . shall be necessary to pass any bill . . . ."). If S.B. 1516 received a 49% vote, would the Institute agree the bill nevertheless could become law if it cures some constitutional flaw in the existing code? Surely not. But that is effectively the Institute's argument.

The Commission takes no position on the constitutionality of pre-S.B. 1516 law here. That has nothing to do with whether the legislature must pass laws in compliance with the Arizona Constitution. The Institute urges the Court to ignore the requirements of the Arizona Constitution. That position is as unhelpful as it is incorrect and should not influence the Court's decision in this appeal.

CONCLUSION

The Institute's brief should not influence the Court's decision on appeal.

RESPECTFULLY SUBMITTED this 24th day of February, 2020.

OSBORN MALEDON, P.A.

By /s/ Joseph N. Roth
Mary R. O'Grady, 011434
Joseph N. Roth, 025725
2929 North Central Avenue, Ste. 2100
Phoenix, Arizona 85012

Attorneys for Defendant/Appellee
Citizens Clean Elections Commission