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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-009646 10/24/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

ARIZONA ADVOCACY NETWORK FOUNDATION, et al.

PAUL F ECKSTEIN
JAMES A AHLERS

v.

KEN BENNETT, et al.

JAMES E BARTON II

CLINT BOLICK
PETER A GENTALA
DENNIS P MCLAUGHLIN
JOSHUA M CRUM

UNDER ADVISEMENT RULING

The Court took this matter under advisement following oral argument on October 17, 2011. The Court has considered Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motions for Summary Judgment and finds as follows.

On its face, SCR 1025 would have four immediate known effects: (a) abolishing the Arizona Clean Elections system for financing political campaigns, (b) abolishing the City of Tucson matching funds program, (c) transferring funds designated for Clean Elections to the state general fund, and (d) transferring funds designated for the Tucson program to the state general fund.[1] The first three of these constitute a single subject; the fourth does not.

[1] Below, the Court will utilize each effect's letter designation as shorthand (e.g., abolishing the City's matching funds program may be referred to simply as "(b)").

It is long established law that a constitutional amendment must deal with a single subject. *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 8 (2010). "When a proposed amendment consists of multiple provisions, the proposal constitutes one amendment under the terms of the constitution only if its provisions are sufficiently related to a *common purpose or principle* that the proposal can be said to constitute a consistent and workable whole on the general topic embraced, that, logically speaking, should stand or fall as a whole." *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, 244 ¶ 10 (2004) (internal quotation marks omitted). The controlling case applying this test is *Arizona Together v Brewer*, 214 Ariz. 118 (2007); *McLaughlin* "faithfully applies" the law of the earlier case. *Id*. at 356 ¶ 20 (Hurwitz, V.C.J., concurring). Under it, the Court must "analyze (1) whether a proposition's provisions are '*topically related*,' and (2) whether they are '*sufficiently interrelated* so as to form a consistent and workable proposition.'" *Id*. at 354 ¶ 8 (quoting *Arizona Together*, *supra* at 121 ¶ 6).

It is clear to the Court that (a) and (b) share a common purpose or principle: that public funds should not be used in elections. Municipalities like Tucson, although governed by a different article of the constitution than the state and its other political subdivisions, share the defining characteristic that they are government entities; *contrast McLaughlin*, *supra* at 355 ¶ 14 (finding no historical link between government elections and labor union elections). Should the voters accept the overarching principle, it must necessarily apply to city elections as to all other elections. The *Arizona Together* test is easily met.

With respect to (c) and particularly to (d), the common purpose or principle is less obvious. *Clean Elections Institute* examined a situation with similarities to both, a proposed constitutional amendment which both eliminated state funding of political campaigns and transferred to the state general fund all Clean Elections Commission funds, including funds designated for voter education and administrative/enforcement responsibilities. The Supreme Court, in distinguishing the purpose of the latter from that of the former, suggested without formally holding that a transfer made "simply to assure that dollars no longer used for public funding of political campaigns be returned to the general fund," would satisfy the single subject rule. *Supra* at 246 ¶ 20. Such is the impact of (c), and it is a logical one: plainly, if the use of public funds in elections is prohibited, that money may be used by the government entity for other programs of its choosing, and money already designated for now-proscribed purposes must be reassigned for use elsewhere. Transferring state Clean Elections funds into the state general fund is thus topically related to its abolition and is sufficiently interrelated to form a consistent and workable proposition. The Court does not believe that the contrary result of *Clean Elections Institute* applies to the different facts here.

Transferring City of Tucson funds into the state general fund, on the other hand, is not so related. That money is not being "returned" to its source, the common fund of the municipality and its taxpayers, for them to dedicate to other uses. Instead, it is being taken from Tucson and

given to the state: it is, in effect, not a reallocation but a retrospective forfeiture. The principle implicated in depriving municipal taxpayers of money they had chosen to spend on campaign funding is very different from the principle that public funding of campaigns should be prohibited, even if the latter is extended to include provision for the reassignment of previously committed funds.[2] That the amount of money affected may be relatively small is of no consequence; *see id*. at 247 ¶ 22. Nor is the City's ability to avoid forfeiture by not dedicating money to campaign funding.[3] Finally, nor is the receipt by the City of Tucson of revenue from the state; while the state is certainly free to attach conditions on spending the funds it transfers, it may not take them back based on a retroactive decision to impose a new restriction.

If a proposed amendment fails the single subject requirement, it falls in its entirety. *Clean Elections Institute*, *supra* at 244 ¶ 8. Because SCR 1025 contains more than one subject, it cannot be placed on the ballot.

Accordingly,

IT IS ORDERED granting Plaintiffs' Motion for Summary Judgment on Their Third Claim for Relief, filed August 15, 2011.

IT IS FURTHER ORDERED denying the respective Cross-Motions for Summary Judgment filed by Intervenors-Defendants on August 15, 2011.

The Court agrees with Intervenors-Defendants, however, that Plaintiffs' entitlement to attorneys' fees, and the appropriate amount of any such fee award, should be the subject of separate briefing now that the Court has made its ruling on the merits.

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[2] Both sides understandably focused their arguments on the effect the amendment would have on Tucson. The Court takes note, however, that residents of the rest of the state outnumber Tucsonans by more than ten to one. To them, the amendment means funding for state programs by a raid on the Tucson city treasury, costing them nothing. This strikes the Court as classic logrolling: it is easy to imagine that a voter indifferent to the mechanics of Tucson municipal elections might well be inspired to vote for "free" money. Thus, merely educating the voters of the amendment's effect, as suggested by the intervenors in support of the proposed amendment, will not alleviate all constitutional concerns.

[3] However, as the Court noted at oral argument, the temporal scope of the fund sweep is unclear. The text reads, "any public funds that may have been designated to provide campaign support for candidates for public office *before the effective date of this section* shall be deposited in the state general fund on the effective date of this section" (emphasis added). It appears to the Court that it would extend at least to funds designated but not spent prior to the effective date, even if the designation is revoked before then; indeed, although the result would be impractical, it might very well apply to *all* designated funds, even if already (legally) spent on campaigns. Although the legislative history of a constitutional amendment may be used to clarify an otherwise ambiguous meaning and prevent unconstitutionality, *Hernandez v. Lynch*, 216 Ariz. 469, 474 ¶ 15-16 (App. 2007), the Court doubts that a pre-election "stipulation" by the legislative leadership would be of any force in a lawsuit to enforce the terms of the amendment.

As counsel are undoubtedly aware, our rules discourage entry of a final, appealable judgment prior to resolution of claims for attorneys' fees. Rule 58(g), Ariz. R. Civ. P. The nature of this case, however, may militate against the typical practice. Thus, the parties should consider whether a Rule 54(b) judgment allowing an immediate appeal of the merits of this matter is appropriate.

Along those lines,

IT IS FURTHER ORDERED that no later than November 11, 2011, Plaintiffs shall lodge with the Court a proposed form of judgment (or, preferably, a stipulated form of judgment). Applications for attorneys' fees and any Statement of Taxable Costs shall be due in the normal time frames under the Rules of Civil Procedure.

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.