COURT OF APPEALS
STATE OF ARIZONA
DIVISON ONE

ARIZONA ADVOCACY NETWORK; et al., Plaintiffs/Appellees, v. CITIZENS CLEAN ELECTIONS COMMISSION; et al., Defendants/Appellees v. THE STATE OF ARIZONA, a body politic, Defendant/Appellant.	Court of Appeal Division One No. 1 CA-CV 19-0489 Maricopa County Superior Court No. CV2017-096705

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF DEFENDANT/APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions **Pages**

Statutes **Pages**

Session Laws **Pages**

Other **Pages**

INTEREST OF AMICUS

This amicus curiae brief is submitted by the Institute for Justice (IJ) pursuant to Rule 16 of the Arizona Rules of Civil Appellate Procedure.[1] IJ is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic liberty, educational choice, and the free exchange of ideas.

As part of its mission, IJ has litigated cases across the country challenging laws that restrict the ability of Americans to associate to finance political speech, including *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012); *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010); and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). IJ's litigation experience has also led it to submit amicus briefs in most of the other most important campaign finance cases of the last twenty years, including *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). As is most relevant here, IJ litigated *Galassini v. Town of*

[1] The parties have consented to the filing of this amicus brief. No person or entity other than the Institute for Justice has made a monetary contribution to the preparation or submission of this brief, and no counsel for any party has written this brief in whole or in part.

Fountain Hills, No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122 (D. Ariz. Sept. 30, 2013), the case that found the core definition of Arizona's campaign finance laws—"political committee"—unconstitutional and ultimately prompted S.B. 1516, which is now challenged here. IJ also submitted amicus briefing in *Arizona Citizens Clean Elections Commission v. Brain*, 234 Ariz. 322 (2014), the most recent decision from the Arizona Supreme Court dealing with the interplay between the Voter Protection Act, the Citizens Clean Elections Act, and the Legislature's ability to amend campaign finance laws not enacted by the Citizens Clean Elections Act.

IJ believes that its legal perspective will provide this Court with valuable insights regarding the free speech and free association implications of a ruling that could re-impose Arizona's unconstitutional campaign-finance scheme and strip from the Legislature its ability to protect constitutional rights by amending or abolishing unconstitutional laws.

ARGUMENT

Laws regulating "campaign finance" regulate political speech and association at the very core of constitutional protections. This appeal concerns the Arizona Legislature's comprehensive revision of outdated and unconstitutional campaign finance laws. In 2013, a federal judge declared Arizona's definition of "political committee" in then A.R.S. § 16-901(19) to be unconstitutionally vague

and overbroad. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, U.S. Dist. LEXIS 142122 (D. Ariz. Sept. 30, 2013). In response, the Legislature took the only step it could consistent with the Supremacy Clause: It amended the definition. And recognizing that the entirety of the state's campaign finance scheme was similarly outdated and difficult to understand, the Legislature revised those laws in 2016 Ariz. Sess. Laws ch. 79 (2d Reg. Sess.) ("S.B. 1516") to make them easier to understand and better aligned with decades of court decisions dictating the constitutional limits of campaign finance regulations.

Plaintiffs and the Citizens Clean Elections Commission now argue that S.B. 1516 fails because, following the adoption of the Voter Protection Act (VPA) and the Citizens Clean Elections Act (CCEA), the Legislature lacked the power to substantively change the Legislature's campaign-finance laws as they existed in 1998. This argument would mean the Legislature—and Arizonans—are stuck with campaign finance laws as they existed nearly a quarter-century ago, no matter how outdated or unconstitutional those laws are.

In adopting this argument, the superior court failed to address the constitutional implications of its ruling. As a result, the decision has created a Constitution-free zone where the First Amendment does not exist and cannot protect Arizonans' free speech and association rights. Instead, apparently, the VPA and CCEA are the final words on regulation affecting political speech in Arizona.

This court should not repeat the superior court's error. The VPA and CCEA cannot require something that is unconstitutional. While courts might need to determine whether some new laws comport with one or both of those acts, they cannot do so without considering the constitutional implications of those rulings. Because the superior court did not consider free speech and association rights, it ruled that Arizona's definitions of "political committee," "expenditures," and "contributions" can be only what they were in 1998. But this ruling forces the re-adoption of provisions already declared unconstitutional by a federal court.

This amicus brief proceeds as follows. First, Section I serves to remind that the types of laws at issue here implicate the fundamental rights of free speech and association, which are protected by the First Amendment. Next, Section II examines the history of Arizona's campaign finance statutes before the decision in *Galassini*. Section III then discusses *Galassini* and the changes to Arizona's laws that had to be made to address that decision. Section IV describes how the Legislature took a fresh look at the entirety of Arizona's campaign finance scheme following *Galassini* and comprehensively revised it though S.B. 1516. Finally, Section V demonstrates that the superior court below erred in striking down S.B. 1516 and reinstating unconstitutional campaign finance statutes.

I. Campaign Finance Regulations—Including Definitions—Implicate Fundamental Rights of Free Speech and Association.

When the Arizona Legislature first adopted a comprehensive campaign finance regulation scheme in 1991, it did not do so on a blank slate. Since 1976, the Supreme Court has decided numerous cases dealing with the First Amendment implications of campaign finance laws, resulting in a complicated doctrine designed to ensure that these laws comply with the constitutional protections for political speech and association. No discussion of laws regulating political speech and activity can occur without this constitutional backdrop.

Modern campaign finance regulation and jurisprudence finds their genesis in the U.S. Supreme Court's decision, forty-four years ago, in *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Court recognized that "[t]he First Amendment protects political association as well as political expression," such that citizens have the right to "associate with others for the common advancement of political beliefs and ideas." 424 U.S. at 15 (internal citations and quotation marks omitted). Thus, when faced with broadly defined regulations and restrictions in the Federal Election Campaign Act (FECA), the Court applied the doctrine of constitutional avoidance to rewrite various provisions of FECA to save it from invalidation and protect political speech. Among the provisions the Court rewrote to save were the definitions of "political committee," "contribution," and "expenditure." *Id.* at 76-81. However, the Court's rewrite of FECA has sown confusion for years, leaving

political speakers and speech regulators to continually revise their understanding of what political speech and association can be regulated.

In the years since *Buckley*, the courts have had to repeatedly face the constitutional ramifications of various campaign finance regulations, keeping who, what, when, where, why, and how the government may regulate political speech and association in flux. Some of the Court's more notable holdings include:

- The government may not regulate speakers in issue elections the same as in candidate elections, as "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) (internal citations omitted).
- Groups that do not have the "major purpose" of influencing the outcome of elections cannot be subjected to "the full panoply of regulations that accompany status as a political committee." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).
- Pure speech about ballot measures presents no threat of corruption, therefore regulation of such speech rests on "different and less powerful state interests" than regulation of speech about candidates. Accordingly, disclosure rules could not constitutionally be applied to ordinary grassroots political activity, like leafletting about a ballot

measure. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995).

- Very low contribution limits unconstitutionally restrict political association, especially because the definition of "contribution" included expenses incurred by volunteers who had "to keep careful track of all miles driven, postage supplied . . . , pencils and pads used, and so forth. And any carelessness in this respect [could] prove costly . . . ." *Randall v. Sorrell*, 548 U.S. 230, 259-60 (2006).
- Being forced to form a political committee under federal law is "burdensome," as political committees are "expensive to administer and subject to extensive regulations," such that requiring even for-profit corporations, unions, and nonprofit interest organizations to form them to speak about politics is unconstitutionally burdensome. *Citizens United v. FEC*, 558 U.S. 310, 337-38 (2010).

In addition to cases from the Supreme Court, the lower federal courts have issued a plethora of additional decisions affecting the constitutionality of campaign finance regulations. As is most relevant here, the Tenth Circuit held that political committee requirements could not constitutionally be applied to a small ad hoc group formed to oppose a ballot measure given the "significantly attenuated" government interests in disclosure about such groups compared to the "substantial"

burden of Colorado's PAC regulations. *Sampson v. Buescher*, 625 F.3d 1247, 1259-60 (10th Cir. 2010). Similarly, the Ninth Circuit held it was unconstitutional to force a church to become a political committee based on (1) the minimal amount of "contributions" or "expenditures" the church had made with regard to a ballot measure and (2) the vagueness of "contributions" or "expenditures" that included de minimis "in-kind" contributions or expenditures. *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009).

As the courts have continued to strike down onerous restrictions, legislatures across the country have had to continually amend their campaign finance laws to ensure they do not unconstitutionally burden protected speech and association.

II. A Brief History of Arizona Campaign Finance Statutes Prior to *Galassini*.

Between 1991 and 2011, Arizona's campaign finance laws evolved. As discussed first in Section II.A., between 1991 and 1998 the statutes were continually evolving as the Legislature tinkered with their language and, therefore, the scope of its laws. As set forth in Section II.B., the VPA and CCEA came onto the scene in 1998, further complicating an already complicated body of law. Thereafter, as described in Section II.C., there were some additional changes before *Galassini* upended the regulatory system and forced substantial changes.

A. The 1991-1998 Statutes

In 1991 the Legislature adopted a comprehensive campaign finance regulation scheme. 1991 Ariz. Sess. Laws, ch. 241 (1st Reg. Sess.). Although the 1991 scheme extensively regulated political committees, contributions, and expenditures, none of "political committee," "contribution," or "expenditure" was defined, except that "expenditures" did not include any expenditure for personal or travel expenses not paid for from campaign funds.

Not until 1994 did the Legislature get around to adopting definitions for "political committee," "contribution," or "expenditure." 1994 Ariz. Sess. Laws, ch. 379 (2d Reg. Sess.). In these "campaign finance corrections," the Legislature adopted (1) a broad definition of "contribution" with seventeen explanatory subparts running nearly 1100 words; (2) a broad definition of "expenditures" with various exceptions; and (3) a definition of "political committee" consisting of one 151-word-long sentence and further containing eight subparts.

The Legislature amended these definitions again in 1997. 1997 Ariz. Sess. Laws, ch. 201 (1st Reg. Sess.). At this time, Arizona's contribution and expenditure definitions were expanded to include "supporting or opposing the recall of a public officer or supporting the circulation of a petition for a ballot measure, question, proposition or recall of a public officer" among the list of "purposes" triggering regulation in Arizona. *Id.* at § 1. And the Legislature

amended the definition of "political committee" in numerous ways, the most relevant (for now) of which was to delete a $250 threshold from the definition of "political committee" so that it encompassed, for the first time, *anyone* engaging in any political activity amounting to even a penny of "contributions" or "expenditures." *Id.* Notably, in amending these definitions, the Legislature simply continued to add additional clauses and subclause to existing definitions, rendering each even more ponderous and inscrutable than before. Thus, following these amendments, the definition of "political committee" was a single 176-word-long sentence containing another nine subparts and subjecting essentially all political activity to significant regulation.

One more legislative change was made during the 1997 Second Special Session. 1997 Ariz. Sess. Laws, ch. 5, § 37 (2d Spec. Sess.). That change, which took effect in 1998, yet again expanded the definitions of "contribution" and "expenditure" to include "opposing" the circulation of a petition among the list of "purposes" triggering regulation in Arizona. *Id*.

Thus, as of November 1998, the Arizona definitions of "contribution," "expenditures," and "political committee"—the definitions at the heart of the regulation of core political speech and association, and applicable to both candidate and ballot measure elections at the state, county, local, and special district levels, A.R.S. § 16-901(7) (1998)—had grown unwieldy and

incomprehensible, demanding a great deal of ink (more than 1,800 words in just those three definitions). Each of these definitions is set out in a footnote below to fully accommodate their nearly five pages of unrelenting abstruseness.[2] These are the statutes that ordinary Arizonans had to understand just to speak about elections.

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[2] 5. "Contribution" means any gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing an election including supporting or opposing the recall of a public officer or supporting or opposing the circulation of a petition for a ballot measure, question or proposition or the recall of a public officer and:
(a) Includes all of the following:
(i) A contribution made to retire campaign debt.
(ii) Money or the fair market value of anything directly or indirectly given or loaned to an elected official for the purpose of defraying the expense of communications with constituents, regardless of whether the elected official has declared his candidacy.
(iii) The entire amount paid to a political committee to attend a fund-raising or other political event and the entire amount paid to a political committee as the purchase price for a fund-raising meal or item, except that no contribution results if the actual cost of the meal or fund-raising item, based on the amount charged to the committee by the vendor, constitutes the entire amount paid by the purchaser for the meal or item, the meal or item is for the purchaser's personal use and not for resale and the actual cost is the entire amount paid by the purchaser in connection with the event. This exception does not apply to auction items.
(iv) Unless specifically exempted, the provision of goods or services without charge or at a charge that is less than the usual and normal charge for such goods and services.
(b) Does not include any of the following:
(i) The value of services provided without compensation by any individual who volunteers on behalf of a candidate, a candidate's campaign committee or any other political committee.
(ii) Money or the value of anything directly or indirectly provided to defray the expense of an elected official meeting with constituents if the elected official is engaged in the performance of the duties of his office or provided by the state or a political subdivision to an elected official for

communication with constituents if the elected official is engaged in the performance of the duties of his office.

(iii) The use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, that is obtained by an individual in the course of volunteering personal services to any candidate, candidate's committee or political party, and the cost of invitations, food and beverages voluntarily provided by an individual to any candidate, candidate's campaign committee or political party in rendering voluntary personal services on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of the invitations, food and beverages provided by the individual on behalf of any single candidate does not exceed one hundred dollars with respect to any single election.

(iv) Any unreimbursed payment for personal travel expenses made by an individual who on his own behalf volunteers his personal services to a candidate.

(v) The payment by a political party for party operating expenses, party staff and personnel, party newsletters and reports, voter registration and efforts to increase voter turnout, party organization building and maintenance and printing and postage expenses for slate cards, sample ballots, other written materials that substantially promote three or more nominees of the party for public office and other election activities not related to a specific candidate, except that this item does not apply to costs incurred with respect to a display of the listing of candidates made on telecommunications systems or in newspapers, magazines or similar types of general circulation advertising.

(vi) Independent expenditures.

(vii) Monies loaned by a state bank, a federally chartered depository institution or a depository institution the deposits or accounts of which are insured by the federal deposit insurance corporation or the national credit union administration, other than an overdraft made with respect to a checking or savings account, that is made in accordance with applicable law and in the ordinary course of business. In order for this exemption to apply, this loan shall be deemed a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors, the loan shall be made on a basis that assures repayment, evidenced by a written instrument, shall be

subject to a due date or amortization schedule and shall bear the usual and customary interest rate of the lending institution.

(viii) A gift, subscription, loan, advance or deposit of money or anything of value to a national or a state committee of a political party specifically designated to defray any cost for the construction or purchase of an office facility not acquired for the purpose of influencing the election of a candidate in any particular election.

(ix) Legal or accounting services rendered to or on behalf of a political committee or a candidate, if the only person paying for the services is the regular employer of the individual rendering the services and if the services are solely for the purpose of compliance with this title.

(x) The payment by a political party of the costs of campaign materials, including pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs, used by the party in connection with volunteer activities on behalf of any nominee of the party or the payment by a state or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by the committee if the payments are not for the costs of campaign materials or activities used in connection with any telecommunication, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising.

(xi) Transfers between political committees to distribute monies raised through a joint fund-raising effort in the same proportion to each committee's share of the fund-raising expenses and payments from one political committee to another in reimbursement of a committee's proportionate share of its expenses in connection with a joint fund-raising effort.

(xii) An extension of credit for goods and services made in the ordinary course of the creditor's business if the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation and if the creditor makes a commercially reasonable attempt to collect the debt, except that any extension of credit under this item made for the purpose of influencing an election which remains unsatisfied by the candidate after six months, notwithstanding good faith collection efforts by the creditor, shall be deemed receipt of a contribution by the candidate but not a contribution by the creditor.

(xiii) Interest or dividends earned by a political committee on any bank accounts, deposits or other investments of the political committee.

. . .

8. “Expenditures” includes any purchase, payment, distribution, loan, advance, deposit or gift of money 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 or supporting or opposing the circulation of a petition for a ballot measure, question or proposition or recall of a public officer and a contract, promise or agreement to make an expenditure resulting in an extension of credit and the value of any in-kind contribution received. Expenditure does not include any of the following:
(a) A news story, commentary or editorial distributed through the facilities of any telecommunications system, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by a political committee, political party or candidate.
(b) Nonpartisan activity designed to encourage individuals to vote or to register to vote.
(c) The payment by a political party of the costs of preparation, display, mailing or other distribution incurred by the party with respect to any printed slate card, sample ballot or other printed listing of three or more candidates for any public office for which an election is held, except that this subdivision does not apply to costs incurred by the party with respect to a display of any listing of candidates made on any telecommunications system or in newspapers, magazines or similar types of general public political advertising.
(d) The payment by a political party of the costs of campaign materials, including pins, bumper stickers, handbills, brochures, posters, party tabloids and yard signs, used by the party in connection with volunteer activities on behalf of any nominee of the party or the payment by a state or local committee of a political party of the costs of voter registration and get-out-the-vote activities conducted by the committee if the payments are not for the costs of campaign materials or activities used in connection with any telecommunications system, newspaper, magazine, billboard, direct mail or similar type of general public communication or political advertising.
(e) Any deposit or other payment filed with the secretary of state or any other similar officer to pay any portion of the cost of printing an argument in a publicity pamphlet advocating or opposing a ballot measure.
. . .
19. “Political committee” means a candidate or any association or combination of persons that is organized, conducted or combined for the purpose of influencing the result of any election or to determine whether

B. The VPA and CCEA Are Both Adopted in 1998.

In 1998, through a state-wide initiative, Arizona voters enacted the Citizens Clean Elections Act and the Voter Protection Act. As explained more fully below, the CCEA created a set of campaign finance regulations governing elections for

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> an individual will become a candidate for election in this state or in any county, city, town, district or precinct in this state, that engages in political activity in behalf of or against a candidate for election or retention or in support of or opposition to an initiative, referendum or recall or any other measure or proposition and that applies for a serial number and circulates petitions and, in the case of a candidate for public office except those exempt pursuant to section 16-903, that receives contributions or makes expenditures in connection therewith, notwithstanding that the association or combination of persons may be part of a larger association, combination of persons or sponsoring organization not primarily organized, conducted or combined for the purpose of influencing the result of any election in this state or in any county, city, town or precinct in this state. Political committee includes the following types of committees:
> (a) A candidate's campaign committee.
> (b) A separate, segregated fund established by a corporation or labor organization pursuant to section 16-920, subsection A, paragraph 3.
> (c) A committee acting in support of or opposition to the qualification, passage or defeat of a ballot measure, question or proposition.
> (d) A committee organized to circulate or oppose a recall petition or to influence the result of a recall election.
> (e) A political party.
> (f) A committee organized for the purpose of making independent expenditures.
> (g) A committee organized in support of or opposition to one or more candidates.
> (h) A political organization.
> (i) An exploratory committee.

A.R.S. § 16-901 (5), (8), & (19) (1998).

people running for state office and a public-financing mechanism for those candidates. The VPA placed a limitation on the Legislature's ability to amend voter initiative and referenda.

The CCEA established an "alternative campaign financing system" for "political candidates in statewide and state legislative elections." *Ariz. Citizens Clean Elections Comm'n v. Brain*, 234 Ariz. 322, 323 ¶¶ 1-3 (2014). Over the years, various parts of the CCEA have been declared unconstitutional. *E.g.*, *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (declaring triggered matching funds unconstitutional); *see also May v. McNally*, 203 Ariz. 425, 427 ¶ 4 (2002) (recognizing that CCEA fees charged to registered lobbyists has been declared unconstitutional).

In support of its public-financing system, the CCEA (which is found in Article 2 of Title 16, Chapter 6) created a set of campaign-finance regulations parallel to the general campaign-finance regulations found in Article 1 of the same title and chapter. There is some overlap between CCEA and the general campaign-finance laws found in Article I, but that overlap is incomplete. Most obviously, the CCEA applies only to candidates for statewide office and the state legislature; it does not apply to candidates at the county, local, or special district level, nor does it apply to ballot-issue elections at any level, including statewide, as does Article I. The CCEA does refer to the definition of "political committee" in Article I, *see*

A.R.S. § 16-961(A), but it does not regulate political committees at all. Instead, CCEA references them merely in passing. A.R.S. § 16-955(I) (prohibiting members of the Citizens Clean Elections Commission from serving as officers of any political committee during a set time); A.R.S. § 16-958(E) (providing that the Secretary of State is to distribute computer software to political committees).

In addition to the CCEA, the voters passed another initiative in 1998, the Voter Protection Act. The VPA limits the Legislature's authority to amend voter initiatives and referenda by requiring a three-fourths vote of each house and, even then, its action must "further[] the purposes" of the initiative or referendum. Ariz. Const. art. 4, pt. 1, § 1(6)(C). The Arizona Supreme Court has apparently assumed the VPA applies to other initiatives adopted in 1998, *see Brain*, 234 Ariz. at 323 ¶ 4, even though nothing the Court has cited supports that assertion, *cf. id.*, and the Court has also recognized that "those who voted to enact the CCEA might or might not have supported the VPA and could not have counted on its simultaneous enactment," *id.* at 325 ¶ 12.

C. Post-1998, pre-*Galassini* Amendments

Between 1998 and 2011, the Legislature enacted some, but not many, changes to the Article I campaign finance laws. Among the changes, the Legislature amended or added definitions for "political party" and "standing political committee." 2000 Ariz. Sess. Laws, ch. 235, § 1 (2d Reg. Sess.). And the

Legislature increased the contribution limits found in Title 16, Article 1 in 2007, notwithstanding the CCEA and VPA. 2007 Ariz. Sess. Laws ch. 277 (1st Reg. Sess.); *see also Brain*, 234 Ariz. at 323 ¶ 2.

* * *

Between 1991 and 2011, Arizona's campaign finance laws became substantially more complex, sweeping in more and more people engaged in less and less political activism. This set Arizona on a collision course with the precedent discussed in Section I above. That collision happened in *Galassini*.

III. The *Galassini* Case Forces Amendments to Arizona's Campaign Finance Statutes.

The ever-increasing scope and complexity of Arizona's campaign finance laws added ever more burdens on ever more political speech and association. These laws became so broad and complex that they threatened even the most ordinary grassroots political activity. This situation ensured that Arizona's laws would violate Arizonans' constitutional rights, as Fountain Hills resident Dina Galassini learned the hard way.

In 2011, Dina, "[u]pset over the tax consequences of an upcoming bond proposal by the Town of Fountain Hills . . . decided to exercise the rights of an ordinary citizen and organize a protest" only to "feel the heavy hand of government regulation." *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 U.S. Dist. LEXIS 142122, at **1-2 (D. Ariz. Sept. 30, 2013).

Dina, who had attended town council meetings and spoke out against the bond proposal, "sent an email to 23 of her friends and neighbors in an effort to organize a rally to oppose the bond." *Id.* at *2. Dina asked these friends and neighbors to create homemade signs against the bond and join her at one of two protest rallies. *Id.* at **3-5. But when the Town learned of Dina's plans, it sent her a threatening letter demanding she form a political committee "prior to **any** electioneering taking place" and "'strongly encourag[ing her] to cease any campaign related activities until the requirements of the law have been met.'" *Id.* at **6-7 (emphasis in original).

As the Town's letter recognized, Dina stumbled into Arizona's campaign finance regulations—which apply in state, county, and municipal elections—because of the vagueness and overbreadth of the definitions of "contribution," "expenditures," and "political committee" in A.R.S. § 16-901. Because "contribution" and "expenditures" included literally "anything of value," Dina's and her friends' homemade signs, which had at least de minimis value, were contributions or expenditures. *Id.* at *49. And because two or more people who made or accepted *any* contributions or expenditures became a political committee by law, Dina and her friends were a political committee. *Id* at **40-41. Becoming a political committee "triggers various requirements," which are backed up with civil penalties. *Id.* at **27-28. These sorts of requirements chill political speech

and association, and indeed Dina cancelled her protests to avoid violating the law. *Id.* at **57-73.

In response, Dina filed a federal lawsuit, represented by the Institute for Justice, to protect her free speech and association rights against Arizona's campaign finance laws. Shortly thereafter, in September 2011, the court recognized the above-described problems with Arizona's regulatory scheme, and Dina obtained a preliminary injunction that allowed her to hold a protest rally before the election. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2011 U.S. Dist. LEXIS 128294 (D. Ariz. Nov. 3, 2011). A dozen or so people showed up and joined Dina in waving homemade signs at cars and passersby. *Galassini*, 2013 U.S. Dist. LEXIS 142122, at *10. The bond proposal was defeated at the election. *Id.* at *11.

After the court entered the preliminary injunction, the Legislature amended the definition of "political committee" in 2012. 2012 Ariz. Sess. Laws, ch. 361, § 16 (2d Reg. Sess.). This amendment added "of more than two hundred fifty dollars" to the definition, which now read, in relevant part:

> "Political committee" means a candidate or any association or combination of persons that is organized, conducted or combined for the purpose of influencing the result of any election or to determine whether an individual will become a candidate for election in this state or in any county, city, town, district or precinct in this state, that engages in political activity in behalf of or against a candidate for election or retention or in support of or opposition to an initiative, referendum or recall or any other measure or proposition and that

> applies for a serial number and circulates petitions and, in the case of a candidate for public office except those exempt pursuant to section 16-903, that receives contributions or makes expenditures OF MORE THAN TWO HUNDRED FIFTY DOLLARS in connection therewith, notwithstanding that the association or combination of persons may be part of a larger association, combination of persons or sponsoring organization not primarily organized, conducted or combined for the purpose of influencing the result of any election in this state or in any county, city, town or precinct in this state.

Id. This amendment thus attempted to add back into the definition of "political committee" a $250 threshold—which the Legislature had removed in 1997—to exempt from regulation very small groups speaking on political issues. *Cf.* 1997 Ariz. Sess. Laws, ch. 201, § 1.

The *Galassini* litigation continued, however, and the court ultimately held that that the challenged laws were unconstitutional. At that point, following the 2012 amendment, "political committee" was defined in a single 183-word-long sentence, *Galassini*, 2013 U.S. Dist. LEXIS 142122, at *56, that could not be diagrammed, let alone understood. *Id.* at **57-59 ("[I]t is not clear that even a campaign finance attorney would be able to ascertain how to interpret the definition of 'political committee.' As such, people of common intelligence must guess at the law's meaning and will differ as to its application. Such vagueness is not permitted by the Constitution."). Moreover, the definitions swept into Arizona's complicated regulatory scheme for "political committees" even small

groups of speakers that the State has no real interest in regulating. *Id.* at **63-73.[3] Thus, the court held that the definition of "political committee," including after the 2012 amendment, was both unconstitutionally vague and overbroad. *Id.* at **58-59, 72-73. Having declared the "political committee" definition unconstitutional, the court declined to further address whether the definitions of "contribution" and "expenditure" were similarly unconstitutional or acted as a prior restraint on speech. *Id.* at **73-74 & n.6.

Thereafter, the Legislature made another amendment in 2013 that did not affect the issues involved in the *Galassini* litigation but did further expand the definitions of "contribution" and "in-kind contribution" to include a candidate's own money. 2013 Ariz. Sess. Laws, ch. 254, § 6 (1st Reg. Sess.).

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[3] The district court offered a hypothetical neatly illustrating the breadth of Arizona's law. Given the nature of the definitions,

> two people that have never met before could go to a street corner with signs that protest a bond measure in the next election . . . realize that they are protesting the same election and make an agreement that one will face north on the street and one will face south. Although neither is aware of the fact, one of the people has spent $245 dollars on his sign and the other has spent $20 on his sign. The two people have organized to influence the results of an election and made expenditures of more than $250 and have, thus, become a political committee unbeknownst to either of them. Further, they have already violated Arizona's campaign finance scheme because they have not registered as a political committee *before* organizing to influence the results of an election.

Galassini, 2013 U.S. Dist. LEXIS 142122, at *69 & n.5 (emphasis in original).

The court entered a final judgment incorporating its declaratory judgment on December 4, 2014. *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2014 U.S. Dist. LEXIS 168772, at *17 (D. Ariz. Dec. 4, 2014). This judgment made clear that the State was bound by the declaration. *Id.* at *14.

The effect of this ruling was immediately clear: If the definition of "political committee" was unconstitutional, Arizona did not have an enforceable campaign finance regulatory system. Mary Jo Pitzl, *Ruling Guts Campaign Finance Rules*, Ariz. Republic (Dec. 8, 2014), https://www.azcentral.com/story/news/politics/2014/12/08/judge-tosses-key-campaign-law-news-arizona-politics/20104819/.[4] In response, the State appealed to the Ninth Circuit.

While that appeal was pending, in 2015 the Legislature took the only step it could to bring its laws into compliance with the *Galassini* ruling: It substantially revised the definition of "political committee." This revision struck the ponderous, unconstitutional, single-sentence definition of "political committee"—and its various subsections—that had existed since before 1998. Instead, the Legislature replaced that definition with a more easily understood definition, which did not include small grassroots groups, in order to comply with the *Galassini* decision.

[4] This reaction was, however, a bit overblown, at least to the extent that it had no effect on the CCEA, which does not regulate political committees or use that definition in its statutes.

2015 Ariz. Sess. Laws, ch. 297, § 1 (1st Reg. Sess.). Following this amendment, the definition now read:

> "Political committee" means any of the following:
> (a) A candidate or a candidate's campaign committee.
> (b) A separate, segregated fund established pursuant to section 16-920, subsection A, paragraph 3.
> (c) An association or combination of persons that circulates petitions in support of the qualification of a ballot measure, question or proposition.
> (d) An association or combination of persons that circulates a petition to recall a public officer.
> (e) A political party.
> (f) An association or combination of persons that meets both of the following requirements:
> (i) Is organized, conducted or combined for the primary purpose of influencing the result of any election in this state or in any county, city, town or other political subdivision in this state, including a judicial retention election.
> (ii) Knowingly receives contributions or makes expenditures of more than five hundred dollars in connection with any election during a calendar year, including a judicial retention election.
> (g) A political organization.
> (h) An exploratory committee.

A.R.S. § 16-901(19) (as amended by 2015 Ariz. Sess. Laws, ch. 297 § 1).

Following this amendment, the State voluntarily dismissed its appeal on October 6, 2015. This dismissal left the district court's judgment in place to govern the unconstitutionality of the old definition of "political committee," which applied to political speech and association that occurred prior to the effective date of 2015 Ariz. Sess. Laws, ch. 297, § 1, while leaving the new definition to cover political speech and activity occurring after the effective date.

IV. Following *Galassini*, the Legislature Adopted S.B. 1516 to Rework Its Campaign-Finance Laws to Better Comply with the First Amendment.

The *Galassini* case demonstrated an overarching problem with Arizona's campaign finance laws: They were complex, convoluted, often did not reflect developing constitutional case law, and had not been systematically reviewed since their 1991 adoption. Following the changes to the definition of "political committee" in 2015 to comply with the *Galassini* decision, the Legislature undertook a wholesale revision of the Article I statutes in 2016 that resulted in S.B. 1516.

The revisions in S.B. 1516 made Arizona's campaign finance statutes—including the definitions—shorter, easier to understand, and compliant with the judicial decisions governing the constitutionality of campaign finance laws. "Contribution" now consists of four subparts (down from seventeen), more clearly delineating what is and is not included. "Expenditure" is similarly clarified. And "political committee" has been replaced with "political action committee," which requires reference to the registration requirements found in new A.R.S. § 16-905. Section 16-905, in turn, much more clearly requires registration for candidates and groups that speak in elections consistent with *Galassini* and the state of the case law described in Part I. Although Arizona's campaign finance scheme may continue to suffer from other constitutional flaws, it at least now uses definitions that are understandable.

V. The VPA Cannot Require Campaign Finance Laws That Violate the First Amendment.

As shown above, when drafting campaign finance laws, legislatures must carefully consider constitutional protections for free speech and association as explicated by the federal and state courts. And legislatures must continue to reconsider and readjust these laws as judicial decisions continue to be handed down. Here, however, the Plaintiffs and Clean Elections Commission ignore the constitutional implications of these laws. Instead, they argue that the VPA and CCEA set in stone Arizona's campaign finance regulations as they existed in 1998. But that cannot be. A law that violates the Constitution is not law, and a judicial decision that seeks to "protect" a law that violates the First Amendment violates both the First Amendment and the Supremacy Clause.

Even assuming the VPA applies to the definitions found in A.R.S. § 16-901—an assumption that is not well founded in the text or history of the VPA or the CCEA—the VPA cannot require Arizona to have campaign finance laws that violate the First Amendment. The Legislature is prohibited from enacting unconstitutional laws. Similarly, the Legislature cannot be bound by a voter initiative to have unconstitutional laws. Ariz. Const. art. 22, § 14 ("Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people."). "[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions

reflect the will of the majority." *Ariz. Free Enter. Club*, 564 U.S. at 754. And where a state law violates the U.S. Constitution, the Supremacy Clause demands that the Constitution takes priority over it. *See* U.S. Const. art. VI, § 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Here, the definitions of "political committee," "contribution," and "expenditure" that the Plaintiffs and the Clean Elections Commission argue are "protected" by the VPA are unconstitutional under the First Amendment. This means the Legislature cannot, consistent with the Constitution, be prohibited by VPA from amending them to comply with the Constitution.

Most obviously, the VPA cannot "protect" the definition of "political committee" because that definition was declared unconstitutional. At the time the CCEA and VPA were adopted, the definition of "political committee" was a single 176-word sentence that swept in any political activity having any value (a zero-dollar threshold). As set explained above, the *Galassini* court declared that definition both unconstitutionally vague and overbroad and the Legislature amended the definition in 2012 and completely revised it in 2015 in light of the *Galassini* rulings. Accordingly, by the time the Legislature enacted S.B. 1516 in 2016, there was nothing left of the 1998 version of the definition to "protect," unconstitutional laws being a nullity. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137,

177 (1803) (legislation "repugnant to the constitution, is void"); *State ex rel. Davis v. Osborne*, 14 Ariz. 185, 190-91 (1912) (legislation that is unconstitutional is "not the law"). The amendments to the definition of "political committee" in S.B. 1516 could not have violated the VPA.

The amendments to the definitions of "contribution" and "expenditure" should be similarly analyzed. True, the *Galassini* court chose not to address those definitions given its ruling as to the unconstitutionality of political committee. 2013 U.S. Dist. LEXIS 142122, at **73-74 & n.6. However, as *Galassini* demonstrated, Arizona's definitions captured even de minimis in-kind contributions and expenditures from volunteers. And the regulation of such "contributions" and "expenditures" had been recognized by the courts as an unconstitutional burden on political speech and association since the adoption of CCEA and VPA in 1998. *Randall v. Sorrell*, 548 U.S. at 259 (recognizing, in 2006, that defining expenses incurred by volunteers as contributions burdens association); *Sampson v. Buescher*, 625 F.3d at 1259-60 (recognizing, in 2010, that regulating small in-kind "contributions" burdens speech and association); *Canyon Ferry Rd. Baptist Church*, 556 F.3d at 1034 (recognizing, in 2009, that definitions of "contributions" and "expenditures" that included de minimis "in-kind" contributions or expenditures are unconstitutionally vague and threaten speech and association). Accordingly, a ruling that the Arizona Legislature could not amend

these definitions to reflect developing judicial decisions limiting the regulation of contributions or expenditures threatens to reimpose definitions in obvious conflict with the constitutional protections for free speech and association.

Indeed, the history of the Clean Elections Act itself demonstrates the folly of writing campaign finance regulations in stone. *Buckley* squarely rejected the idea that government could regulate speech and association to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections." 424 U.S. at 48-49 (citations omitted). But in 1990 the Court suggested that government could restrict political speech to level the playing field in elections. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), *overruled by Citizens United*, 558 U.S. at 365. This was the state of the law in 1998, when the CCEA was proposed and adopted, and the overriding purpose of the CCEA was to level the playing field of political speech. *Ariz. Free Enter. Club*, 564 U.S. at 748-49 & n.10. But after the CCEA was adopted, the Court reaffirmed that speech restrictions to "level the playing field" have "ominous implications" and are unconstitutional. *Davis v. FEC*, 554 U.S. 724, 742 (2008). The Court later expressly overruled *Austin* in *Citizens United*. 558 U.S. at 365. And, of course, in *Arizona Free Enterprise Club*, the Court found that the CCEA's "equalizing" funds provision was unconstitutional. 564 U.S. at 750 ("[I]t is not legitimate for the government to attempt to equalize electoral opportunities in this manner. And such

basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values."). Given that the CCEA's "purpose" is itself unconstitutional, VPA cannot protect that purpose, and the Legislature cannot be required to "further"[] the purpose[]" of the CCEA, Ariz. Const. art. 4, pt. 1, § 1(6)(C), in violation of the First Amendment. Instead, the Legislature must be free to amend or abolish the laws to comply with the higher law of the U.S. Constitution.

CONCLUSION

A ruling for the Plaintiffs and CCEA in this case has significant ramifications for the exercise of First Amendment rights by people like Dina Galassini. The superior court ignored these ramifications. This court should reverse the judgment so that the Legislature's efforts to bring Arizona's campaign finance laws into alignment with constitutional protections for free speech and association are allowed to be effective. A ruling to the contrary will necessarily revert Arizona's laws to an unconstitutional state.

Respectfully submitted this 3rd day of February, 2020, by:

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