



Arizona State Senate Issue Brief

December 17, 2014

Note to Reader:

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CITIZENS' CLEAN ELECTIONS ACT

INTRODUCTION

Arizona's Citizens' Clean Elections Act (Act), proposed by initiative petition, was approved in the November 1998 general election. The Act establishes a system to limit campaign spending and fundraising for political candidates in statewide and legislative elections. Those who wish to be "participating" Clean Elections candidates receive public financing for their election campaigns.

In 2007, the Act was amended for the first time. The 2007 amendments include a nonseverability clause binding the provisions of the 2007 amendments so that if any of the 2007 provisions are invalidated by the court, the amendments in their entirety are void.

In 2012, the Act was further amended. The 2012 amendments eliminated references to the matching fund provisions of the Act that were found to be unconstitutional, modified certain related reporting requirements, and eliminated tax credits and tax reductions for clean elections donations. Additionally, the 2012 amendments included provisions that prohibit certification of a candidate as eligible for clean elections funding if the candidate has been removed from office by the Clean Elections Commission (Commission), or if the candidate is delinquent on a debt plan with the Commission.

In 2013, the Act was amended to prohibit a participating Clean Elections candidate from using Clean Elections monies to purchase goods or services that bear a distinctive trade name, trademark or trade dress item, including a logo, that is owned by a business or other entity owned by the candidate, or in which the candidate has a controlling interest. Additionally, the 2013 amendments modified the formula utilized by the SOS to determine if a candidate qualifies for Clean Elections funding.

CLEAN ELECTIONS COMMISSION STRUCTURE

The Act is administered by the Commission, consisting of five members, no more than two of whom can be from the same political party or same county. The Act provides detailed criteria for Commission applicants, who were initially screened by the Commission on Appellate Court Appointments and grouped into

“slates” for appointment by the Governor or other designated statewide officeholders. In 2000, the Supreme Court held that the portions of the Act that expanded the duties of the Commission on Appellate Court Appointments beyond the scope of judicial appointment were unconstitutional. The 2007 amendments removed the authority of the Commission on Appellate Court Appointments to nominate candidates for vacant Commissioner positions and instead provides that the Commission applicants will be selected directly by the appointing officer. The Commissioners serve five-year staggered terms.

Enforcement

The Act establishes that the Commission enforce its voter education duties. The Commission's voter education duties include providing for a voter education guide, sponsoring debates and adopting rules. The 2007 amendments altered the complaint process to provide a time limitation for the filing of external complaints: 90 days after the postelection report is filed or 90 days after completion of the canvass of the election, whichever is later. Additionally, the Commission is prohibited from requiring a candidate to use a reporting system other than the system jointly approved by the Commission and the Secretary of State's (SOS) office.

Rule Making Authority

Although statutorily exempt from Arizona's Administrative Procedure Act, the Commission is required to adopt rules to govern and carry out its duties. Proposed rules must be filed with the SOS's office and heard in public meetings, with at least 60 days allowed for comment before adoption in an open meeting. The final rule must also be filed with the SOS's office for publication in the Arizona Administrative Register.

Final rules take effect immediately except, beginning January 1, 2010, a rule will be immediately effective only upon the unanimous vote of the Commission. A less than unanimous vote will suspend implementation of the final rule until January 1 in the year following

adoption of the rule. Similarly, a unanimous vote by the Commission is required before a final rule, that was proposed due to the action of a particular candidate or committee, is adopted by the Commission; a less than unanimous vote by the Commission will result in an effective date for the next election cycle.

FUNDING SOURCES

The Act is funded by a ten percent surcharge on certain civil penalties and criminal fines and by any other person who donates to pay for public financing of candidates. The monies are deposited into a Clean Elections Fund administered by the State Treasurer that is audited every four years by the Auditor General.

The Commission cannot spend more than \$5 multiplied by the number of Arizona resident personal income tax returns filed during the previous calendar year. The Commission may use up to ten percent of the monies for reasonable and necessary administration and enforcement expenses and may apply up to ten percent of the monies for public education regarding participation as a candidate or contributor, or regarding the functions, purpose and technical aspects of the Act

Proposition 106

In 2004, Proposition 106 qualified for the November ballot. If passed, Proposition 106 would have removed the dedicated funding source for the Commission. The de-funding of the Commission would have prevented it from regulating campaign finance laws, holding debates and publishing voter guides. Proposition 106 also would have provided that the surcharge, penalty and other money in the Clean Elections Fund on and after the effective date of the proposition would be deposited in the state General Fund.

In August 2004, the Arizona Supreme Court upheld a superior court ruling to remove Proposition 106 from the ballot because it violated the “separate amendment rule.” Under Arizona's Constitution, a ballot measure to further amend the Constitution may only contain one subject. The Supreme Court agreed with the

lower court that a voter might reasonably agree with one part of the initiative, such as eliminating publicly financed political campaigns, but might support the Commission's other duties.

Lobbyist Fee

As originally enacted, the Act included additional funding through a \$100 annual fee on lobbyists representing for-profit entities, including trade groups of for-profit entities. In 2002, former State Representative Steve May was fined for violating a civil parking ordinance. On top of his \$27 fine, among other surcharges, appeared a ten percent surcharge to support Clean Elections, which he refused to pay. He and Rick Lavis, a lobbyist who had been assessed a \$100 fee under the Act, challenged the constitutionality of the Act as violating their free speech rights.

A federal court dismissed the original lawsuit for lack of subject matter jurisdiction under the Tax Injunction Act (a federal statute) because it determined that this action challenged a state tax. Lavis and May then sought declaratory and injunctive relief in superior court. A superior court judge held the lobbyist fee was unconstitutional and severed that provision of the Act; it upheld the surcharge on civil and criminal fines.

On appeal, the Arizona Court of Appeals reversed the trial court decision and found that the portion of the law relating to fees and surcharges was an unconstitutional restraint on the exercise of free speech. On October 11, 2002, the Arizona Supreme Court unanimously upheld the funding system, ruling that it was constitutional, overturning the Court of Appeals decision. On March 24, 2003, the United States Supreme Court refused to hear an appeal of the Arizona Supreme Court decision and, in 2007, the Legislature repealed the language requiring the \$100 annual fee from lobbyists.

QUALIFICATION AS A PARTICIPATING CANDIDATE

All political candidates running for election in Arizona are subject to statutory contribution

limitations. Limits are subject to inflationary adjustments made biennially by the SOS based on the U.S. Department of Labor's consumer price index. Candidates who do not receive public Clean Elections money, commonly called "nonparticipating" or "traditional" candidates, are subject to a 20 percent reduction of the regular contribution limits.

Candidates who wish to receive public financing can submit an application to the SOS for certification as a participating candidate in order to receive money from the Commission. The Commission is prohibited from certifying a candidate as eligible for funding if the candidate has been removed from office by the Commission or if the candidate is delinquent on a debt plan with the Commission, except a candidate is eligible for certification if the debt is paid in full or the candidate is current on a payment plan.

To qualify, candidates must receive a specified number of \$5 contributions from registered voters, limit the spending of their personal monies for their candidacy, limit their campaign spending to the dollar amounts received from the Commission and comply with controls on their campaign account. The election spending limits are determined by statute. Candidates who agree to limit their fundraising and spending qualify as a participating candidate.

At the beginning of the primary election period, the Commission pays an amount equal to the primary election spending limit to a participating candidate's campaign account in a party primary election. The process is repeated at the beginning of the general election period with the participating candidate receiving an amount equal to the general election spending limit. However, the Act permits a participating candidate for the legislature in a one-party-dominant legislative district to choose to reallocate a portion of funds from the general election period to the primary election period. Other specified amounts are available for participating candidates who are independent or are unopposed.

Table 1
Adjusted Spending Limits for Participating
Candidates – A.R.S. §§ 16-959, 16-961

	<u>Primary</u>	<u>General</u>
Mine Inspector	\$ 48,825	\$ 73,238
Treasurer/ Superintendent of Public Instruction/ Corporation Commissioner	\$ 97,620	\$ 146,430
Secretary of State/ Attorney General	\$ 195,280	\$ 292,920
Governor	\$ 753,616	\$ 1,130,424
Legislature	\$ 15,253	\$ 22,880

Participating candidates who fail to qualify for the ballot must return unspent public monies. These “disqualified” participating candidates must return public monies above an amount to pay any unpaid bills for expenditures made prior to the date the candidate failed to qualify for the primary ballot and return payments made to a family member if the candidate is unable to account that the goods or services provided by the family member were at fair market value. Additionally, a disqualified participating candidate must return to the Commission, within 14 days, all remaining assets purchased with public monies.

The Act also establishes reporting requirements for participating candidates in addition to other campaign finance laws and provides various penalties, including forfeiture of office, for violations of its provisions.

CAMPAIGN FINANCE PENALTIES

Former Representative David Burnell Smith was elected to serve in the House of Representatives during the 47th Legislature. He ran as a publicly funded candidate and signed a form promising to adhere to the provisions of the Act and to the campaign finance rules established by the Commission.

The Commission investigated Smith’s campaign expenditures and found that Smith

violated campaign finance rules by spending approximately 17 percent more on his election than permitted by law. The Commission determined that his sanction was removal from office and Smith appealed this decision.

There were many procedural aspects of the case, but the Arizona Supreme Court evaluated Smith’s likelihood of success on the merits of his case. Smith claimed that he could only be impeached or recalled from office, and only for reasons set forth in the Constitution. The Court had previously concluded that the constitutional provisions providing for means of removal from office do not limit the power of the Legislature from creating additional ways or causes for removal from public office. The Court found that the public, acting in its legislative capacity, authorized the removal from public office through the Act, which specifically authorizes removal from office as a sanction for serious violations of the campaign finance laws. The Court also found that Smith agreed to abide by those terms and nothing in the Arizona Constitution precluded his removal from office. Smith was the first state legislator to be removed from office for violating a publicly financed campaign system.

Former Representative Doug Quelland was elected in November 2008 to serve in the House of Representatives during the 49th Legislature. He ran as a publicly funded candidate.

Shortly after taking office, Quelland was investigated by the Commission for alleged violations to campaign finance law. The Commission concluded that Quelland ran afoul of the Clean Elections system when he hired a private consultant for his 2008 campaign and did not report the expenditures on campaign finance reports. As noted above in the Smith case, the Act authorizes removal from office as a sanction for serious violations to the campaign finance laws. In May 2009, the Commission ordered that Quelland be removed from office.

Quelland subsequently brought the decision before an Administrative Law Judge (ALJ), who ruled in favor of the Commission. Quelland then brought that ruling before the Maricopa County Superior Court. The Superior

Court found in favor of the ALJ and the Commission. Quelland vacated his House seat on May 27, 2010.

LITIGATION

Davis v. Federal Election Commission (FEC), 128 S. Ct. 2759 (2006)

Jack Davis, Democratic candidate for the House of Representatives from New York's 26th Congressional District in 2004 and 2006 filed suit against the FEC, requesting that portions of the Bipartisan Campaign Reform Act (BCRA) of 2002 be declared unconstitutional and that the FEC be enjoined from enforcing it during the 2006 election. Specifically, Davis challenged:

- 1) the "Millionaire's Amendment," which allows a non-self-financing candidate to receive individual contributions at three times the normal limit and accept coordinated party expenditures without limit until the receipts exceed \$350,000 when a self-financing candidate expends personal funds that exceed \$350,000.
- 2) the requirement that self-financing candidates make three types of disclosures: a) a declaration of intent specifying the amount of personal funds the candidate intends to spend in excess of \$350,000; b) an initial notification, within 24 hours, after the candidate crosses the \$350,000 mark; and c) an additional notification, within 24 hours, of expending \$10,000 or more in personal funds.

The U.S. District Court for the District of Columbia granted summary judgment in favor of the FEC and Davis appealed. The U.S. Supreme Court reversed the judgment and held that the BCRA's expenditure thresholds and disclosure requirements were unconstitutional because the thresholds imposed a substantial burden on the First Amendment right to use personal funds for campaign speech and the burden was not justified by any governmental interest in eliminating corruption or the perception of corruption.

McComish v. Brewer, 2010 WL 2292213 (D.Ariz.); McComish v. Bennett, 2010 WL 2595288 (C.A. 9(Ariz.))¹; Arizona Free Enterprise Club's Freedom Club PAC v. Bennett (564 U.S. ____ (2011), 131 S.Ct. 2806)²

On August 21, 2008, a lawsuit was filed in the United States District Court for Arizona asserting that the matching funds provisions of the Act impermissibly burden plaintiff's (non-participating candidates) First Amendment rights to freedom of speech. The losing party has challenged the courts decision at each step in the adjudicatory process. The procedural history is delineated in the paragraphs below.

On January 20, 2010, the District Court concluded that the matching funds provision of the Act violated the First Amendment to the U.S. Constitution. The District Court held that matching funds impermissibly burden non-participating candidates First Amendment rights to freedom of speech.

On May 21, 2010, the United States Court of Appeals for the Ninth Circuit reversed and ruled that the matching funds provision of the Act imposes only a minimal burden on non-participating candidates First Amendment rights. The Ninth Circuit concluded that the Act conforms to the requirements of freedom of speech in the First Amendment and, as such, must be upheld.

On June 8, 2010, the United States Supreme Court issued an order in the pending case that had the effect of preventing participating candidates from receiving additional matching funds. On June 27, 2011, the Supreme Court held that the matching funds provision is unconstitutional. According to the Court, "Arizona's matching funds scheme substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny." The Court noted,

¹ Jan Brewer was the Secretary of State when the lawsuit was initially filed. As the litigation progressed through the appellate process, Ken Bennett became the Secretary of State.

² *McComish v. Bennett* was consolidated with *Arizona Free Enterprise v. Bennett*.

however, that the First Amendment does not prohibit all public financing.

ADDITIONAL RESOURCES

- Clean Elections Act Statutes:
Arizona Revised Statutes §§ 16-940-16-961
- Citizens' Clean Elections Commission
www.azcleelections.gov
- Arizona Secretary of State
www.azsos.gov
- 2007 Amendments: Laws 2007, Chapter 277
(H.B. 2690)
- 2012 Amendments: Laws 2012, Chapter 257
(H.B. 2779)
- 2013 Amendments: Laws 2013, Chapter 254
(H.B. 1454)
- Supreme Court of the United States
<http://www.supremecourt.gov/>