Campaign Finance Regulations for Candidates Opposing Self-Funded Candidates

McComish v. Brewer

(Roslyn O. Silver, D. Ariz. 2:08-cv-1550)

Eight weeks after the Supreme Court's invalidation on June 26, 2008, of the Millionaire Amendment, which increased contribution limits to candidates opposing candidates who spend large amounts of their own wealth on the campaign,[1] six candidates for election to Arizona's legislature filed a federal complaint in the District of Arizona's Phoenix courthouse, seeking to invalidate the matching funds provisions of the 1998 Arizona Clean Elections Act.[2]

In *Davis v. FEC*, the Supreme Court held that the Millionaire Amendment violated the First Amendment because it created negative consequences for spending a candidate's own money on campaign speech.[3] Arizona's Clean Elections Act provided matching funds to candidates participating in public campaign financing when non-participating candidates' expenditures exceeded a statutory threshold.[4]

On August 26, five days after the complaint was filed, Judge Roslyn O. Silver ordered the plaintiffs to file their motion for a temporary restraining order by 5:00 p.m. that day and set hearing on the motion for two days later.[5]

At the August 28 hearing, Judge Silver's first question was why the case had been filed so recently.[6] The plaintiffs responded that the statute had not applied to the first of them until July 25.[7] On August 29, Judge Silver denied the temporary restraining order.[8] Although the plaintiffs established a constitutional violation, Arizona has a "clear interest in running a smooth and orderly election" and "the length of time Plaintiffs waited to file their TRO also weighs in the balance against the Plaintiffs on the public interest determination."[9]

After an October 9 hearing,[10] Judge Silver denied the plaintiffs a preliminary injunction on October 14.[11] On October 17, Judge Silver explained that again

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1. Davis v. FEC, 554 U.S. 724 (2008).

2. Complaint, McComish v. Brewer, No. 2:08-cv-1550 (D. Ariz. Aug. 21, 2008), D.E. 1; *see* Ariz. Rev. Stat. §§ 16-940 to -961; *see also Funding System Spurs Lawsuit*, Ariz. Republic, Aug. 23, 2008, at B1.

3. *Davis*, 554 U.S. at 736–44.

4. §§ 16-941, -952.

5. Order, *McComish*, No. 2:08-cv-1550 (D. Ariz. Aug. 21, 2008), D.E. 10; *see* Temporary Restraining Order Motion, *id.* (Aug. 26, 2008), D.E. 13.

For this report, Tim Reagan interviewed Judge Silver and her law clerk Mike Newman by telephone on September 11, 2012.

6. Transcript at 3, *McComish*, No. 2:08-cv-1550 (D. Ariz. Aug. 28, 2008, filed Sept. 10, 2008), D.E. 89.

7. *Id.*

8. Order, *id.* (Aug. 29, 2008), D.E. 30.

9. *Id.* at 7–8

10. Transcript, *id.* (Oct. 9, 2008, filed Nov. 4, 2008), D.E. 192; Minutes, *id.* (Oct. 9, 2008), D.E. 170.

"[p]laintiffs have shown a very strong likelihood of success on the merits. However, given the extraordinary balance of the harms required in the context of an ongoing election, Plaintiffs have not met their burden in showing that they are entitled to a preliminary injunction."[12]

A serious difficulty with the plaintiffs' case was the crafting of a suitable remedy.[13] Would campaign contributions have to be returned? The plaintiffs did not propose to the court a plan for workable relief.[14]

After full litigation of the plaintiffs' second amended complaint,[15] Judge Silver declared, on January 20, 2010, that Arizona's matching scheme for participating candidates opposing non-participating candidates was unconstitutional.[16] The court of appeals reversed on May 21.[17] The Supreme Court, however, agreed with Judge Silver, on June 27, 2011.[18]

The parties stipulated to awards totaling $2 million in attorney fees and costs.[19]

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11. Order, *id.* (Oct. 14, 2008), D.E. 181; *see Challenge to Clean Elections Is Rejected*, Ariz. Republic, Oct. 15, 2008, at B1.

12. Findings of Fact and Conclusions of Law at 18, *McComish*, No. 2:08-cv-1550 (D. Ariz. Oct. 17, 2008), D.E. 185, *available at* 2008 WL 4629337.

13. Interview with Hon. Roslyn O. Silver and her law clerk Mike Newman, Sept. 11, 2012.

14. *Id.*

15. Second Amended Complaint, *McComish*, No. 2:08-cv-1550 (D. Ariz. May 11, 2009), 260; *see also* First Amended Complaint, *id.* (Sept. 4, 2008), D.E. 56.

16. Opinion, *id.* (Jan. 20, 2010), D.E. 454, *available at* 2010 WL 2292213; *see U.S. Judge: End Part of Clean Elections*, Ariz. Republic, Jan. 21, 2010, at A1.

17. McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) (amended opinion); *see Arizona Funding Law Is Upheld*, Ariz. Republic, May 22, 2010, at A1.

18. Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, ___ U.S. ___, 131 S. Ct. 2806 (2011); *see* McComish v. Bennett, 653 F.3d 1106 (9th Cir. 2011) (affirming summary judgment for the plaintiffs); *see also* Robert Barnes, *High Court Strikes Matching Funds in Ariz. Campaign Law*, Wash. Post, June 28, 2011, at A4; Adam Liptak, *Justices Reject Another Campaign Finance Law*, N.Y. Times, June 28, 2011, at A15; *Matching Funds Rejected*, Ariz. Republic, June 28, 2011, at A1.

19. Order, *McComish*, No. 2:08-cv-1550 (D. Ariz. Sept. 12, 2011), D.E. 528; Stipulation, *id.* (Sept. 9, 2011), D.E. 526 (intervenors); Order, *id.* (Aug. 17, 2011) (approving plaintiffs' stipulation), D.E. 519; Stipulation, *id.* (Sept. 2, 2011), D.E. 521 (plaintiffs).