ENDING DARK MONEY IN ARIZONA

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"*Sometimes corruption is slowed by shedding light into what was previously shadowed.*"

—Paul Wolfowitz[1]

I. INTRODUCTION

"Arizona [is] ground zero for 'dark money' campaigns."[2] That line appeared in a 2016 article in the *Arizona Republic* after New York University released a study detailing the explosion of "dark money" in state and local politics.[3] That study found that Arizona saw "by far the biggest surge in dark money"[4] in the four years following the Supreme Court's decision in *Citizens United v. FEC*.[5] During the 2014 election cycle, Arizona had approximately $10.3 million in dark money coursing through its political veins—more than any other state examined by the study.[6]

"Dark money" is the money spent on political campaigns from undisclosed donors. To illustrate, suppose that Exxon wants to give $1

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[2] Laurie Roberts, *Will Arizona Stand Up to Dark Money?*, ARIZ. REPUBLIC, June 29, 2016, available at http://www.azcentral.com/story/opinion/op-ed/laurieroberts/2016/06/29/roberts-arizona-read-you-stand-up-dark-money/86493966/.

[3] CHISUN LEE ET AL., SECRET SPENDING IN THE STATES (2016) (published by NYU Law School's Brennan Center for Justice).

[4] *Id.* at 7.

[5] Citizens United v. FEC, 558 U.S. 310 (2010).

[6] Lee et al., *supra* note 3, at 7, 10.

million to Senator X from Arizona because Exxon thinks Senator X will be sympathetic to the needs of the fossil fuel industry in the Southwest. Exxon cannot give $1 million directly to Senator X in exchange for favorable votes—that exceeds direct campaign contribution limits and would likely amount to *quid pro quo* bribery, which, for now, is still illegal. In the post-*Citizens United* world, however, there are three easy ways Exxon can use that money to get Senator X reelected: (1) it can donate to an already-existing Political Action Committee, which will in turn spend that money to get Senator X reelected; (2) it can set up its own Political Action Committee, which will in turn spend that money to get Senator X reelected; or (3) it can donate to a politically-minded 501(c)(4) organization, which will in turn spend that money to get Senator X reelected.

If Exxon chooses option one or two, it will be forced to disclose its donation to Arizona's Secretary of State, so that voters will realize—in theory—that Senator X received large donations from an Exxon-funded PAC. If, however, Exxon were to go with option three, it would *not* have to disclose its donation. Exxon can spend $1 million to get Senator X elected and the public would be none the wiser. This is dark money. It is the money funneled into political campaigns by anonymous, wealthy donors.[7]

Loose campaign finance regulations can result in political candidates benefiting from enormous sums of dark money from unknown corporations, labor unions, and wealthy individuals. For example, Arizona Governor Doug Ducey benefited from $8.2 million in spending by dark money groups during his 2014 campaign.[8] Unsurprisingly, in 2016, Governor Ducey signed into law Senate Bill 1516,[9] which loosened state control over anonymous campaign donations and made numerous changes to Arizona campaign finance law.[10] Governor Ducey says this law is "the first step in simplifying our laws and regulations to provide more opportunity for participation in the political process and increased freedom of speech."[11] Opponents of the bill, such as Democratic State Senator Steve Farley, believe "[i]t quashes [political] participation for

[7] When I say the donors are "anonymous," I only mean to say that the public at-large does not know who made the donation. The politician receiving the donation is often fully aware of the donor's identity.

[8] Mary Jo Pitzl, *Arizona Gov. Doug Ducey Signs 'Dark-Money' Bill*, ARIZ. REPUBLIC, (March 31, 2016), available at http://www.azcentral.com/story/news/politics/arizona/2016/03/31/arizona-gov-doug-ducey-signs-darkmoney-bill/82492558/.

[9] *See generally* S.B. 1516, 52d Leg. 2d Reg. Sess. (Ariz. 2016).

[10] Pitzl, *supra* note 8.

[11] *Id.*

anyone who. . .doesn't have the 'price of admission.'"[12]

In most States, little can be done to deter dark money donations. The only recourse would be to change state law to require disclosure from 501(c)(4) organizations. However, that route is often a dead-end: why would a politician benefiting from these tax-exempt super-donors want to encumber his cash flow? Arizona, however, is not like most states. Under the title "Campaign Contributions and Expenditures; Publicity," Article 7, § 16 of the Arizona Constitution requires "[t]he legislature, at its first session, [to] enact a law providing for a general publicity . . . of all campaign contributions to, and expenditures of campaign committees and candidates for public office."[13] I will often refer to Article 7, § 16 as the "General Publicity Clause."

The Arizona courts never had an opportunity to interpret this provision. However, this is one of the many provisions in Arizona's Constitution designed to "ensure that the citizen's right to cast his vote [is] meaningful and [that] elections [are] pure."[14] It is clear from the text of the Arizona Constitution that the framers were fearful of corruption in government.[15] And they were especially concerned about the influence corporations could have on elections.[16] Unlike most state charters, Arizona's Constitution makes it "unlawful for any corporation . . . to make any contribution of money or anything of value for the purpose of influencing any election . . . ."[17]

The framers, however, could not have imagined the intricacy of today's campaign finance laws, and they certainly could not have foreseen the rise of dark money, emanating from tax-exempt social welfare organizations. This is why they placed a continuing duty on the State's Legislature to "enact . . . law[s] providing for a general publicity. . .of all

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[12] *Id.*

[13] Ariz. Const. art. VII, § 16.

[14] John Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 68 (1988) (further noting that the framers were especially concerned about corporate influence on elections).

[15] *See* Ariz. Const. art. VIII (allowing for liberal recall of public officials); Ariz. Const. art. IV, § 1(3) (giving the People referendum power); Ariz. Const. art. IV, § 1(2) (giving the people the power of initiative); Ariz. Const. art. IV, § 1(6) (protecting voter initiatives and referenda from government veto, repeal, amendment, and diversion of funds); Ariz. Const. art. IV, § 23 (forbidding "any person holding public office" from accepting a special pass or privilege from a corporation); Ariz. Const. art. XXII, § 14 ("Any law which may be enacted by the Legislature. . .may be enacted by the people under [an] Initiative."). *See also* Leshy, *supra* note 14, at 65–70.

[16] Leshy, *supra* note 14, at 68–69.

[17] Ariz. Const. art. XIV, § 18. Today, this provision is undoubtedly invalid given the Supreme Court's rulings in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Citizens United v. FEC*, 558 U.S. 310 (2010).

campaign contributions . . . and expenditures . . . ."[18]

The Legislature, however, has woefully shirked this duty. Rather than enacting laws requiring "publicity" of campaign contributions, the Legislature has made Arizona "ground zero for dark money campaigns."[19] This Article argues that several of Arizona's pro-dark-money statutes violate Article 7, § 16 of the Arizona Constitution. More specifically, this Article argues that A.R.S. § 16-901(43) and A.R.S. § 16-911(B) are unconstitutional under the General Publicity Clause.

This Article proceeds in five Parts. Campaign finance law is littered with terms of art and unnecessary legal jargon—*e.g.*, 501(c)(4)s, PACs, super-PACs, etc. To make this Article as readable as possible, Part I provides "definitions and explanations" of recurring legal terms. Part II gives an overview of the history of Arizona campaign finance law. Part III shows how several of Arizona's campaign finance statutes violate the Arizona Constitution. Part IV discusses potential justiciability concerns that may arise when challenging these dark money statutes. And Part V addresses likely counterarguments to this Article.

The political philosopher Ronald Dworkin once said, "Our politics are a disgrace, and money is the root of the problem."[20] My hope is that this Article will contribute, in some way, no matter how small, to reigning in dark money in Arizona elections.

II. DEFINITIONS & EXPLANATIONS

Campaign finance law—especially as it relates to the tax code—is a notoriously convoluted subject. For this reason, this section defines several important terms used throughout this Article in (somewhat) easy-to-understand language.

A. Political Action Committees (PACs)

A product of the Federal Election Campaign Act of 1971, PACs are political organizations that directly support a candidate or ballot measure.[21] PACs are the primary financing mechanisms for the political activity of all politicians.[22] "They are the vehicles through which money is collected and

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[18] *See* Ariz. Const. art. VII, § 16.

[19] Roberts, *supra* note 2.

[20] RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 351 (2000).

[21] *See* Gregory J. Krieg, *What is a Super PAC? A Short History*, ABC NEWS, Aug. 9, 2012, available at http://abcnews.go.com/Politics/OTUS/super-pac-short-history/story?id=16960267.

[22] *See* JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 652 (2012).

through which money is spent" in political campaigns.[23]

Under Arizona law, an entity must register as a PAC if (1) it is organized for the primary purpose of influencing elections and (2) it receives or spends over $1,000 in connection with any election during a calendar year.[24] A PAC is any group that spends an above-average amount of money in election cycles. Prior to 2010, individuals were not allowed to give more than $2,500 to PACs, and corporations and labor unions were strictly forbidden from making donations.[25] In 2010, however, *Citizens United* and *SpeechNow* cleared the way for "independent-expenditure-only" groups, or super-PACs, to spend vast amounts of money in election cycles.

B. Super-PACs & Mega-PACs

Super-PACs (or, in Arizona, mega-PACs) are political organizations that do not make *direct* contributions to candidates or political parties, but instead make *independent expenditures* in an effort to support or defeat a candidate or ballot measure.[26] These groups may *raise* unlimited sums of money from corporations, unions, and wealthy individuals and may *spend* unlimited sums of money to influence the outcomes of elections.[27] They may not, however, coordinate with a candidate for political office.[28] Super-PACs are the product of the D.C. Circuit Court of Appeals decision *SpeechNow v. FEC*,[29] which relied heavily on the Supreme Court's ruling in *Citizens United*.[30] In Arizona, super-PACs are called "mega-PACs."[31] A PAC qualifies for mega-PAC status if it "receives at least ten dollars in contributions from at least five hundred individuals" over a four-year period.[32]

Mega-PACs can raise and spend unlimited money to influence election outcomes.[33] The downside to being labeled a mega-PAC, however, is that, as opposed to traditional PACs, mega-PACs cannot

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[23] *Id.*

[24] ARIZ. REV. STAT. § 16-905(B) (2016).

[25] Krieg, *supra* note 21.

[26] McCutcheon v. FEC, 572 U.S. 185, 193 n. 2 (2014).

[27] Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1647 (2012).

[28] *See generally* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88 (2013).

[29] SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

[30] *See id.* at 692–96.

[31] ARIZ. REV. STAT. § 16-908 (2016). Mega-PACs used to be called super-PACs. But in 2016, SB 1516 changed the names without explanation. One reason may be because of the negative connotation associated with the term "super-PAC."

[32] ARIZ. REV. STAT. § 16-908(B) (2016).

[33] *Id.*

coordinate with candidates and cannot donate money directly to a candidate's campaign—all expenditures must be *independent*.[34]

This non-coordination requirement, however, is largely unenforceable.[35] The FEC does not have the time, resources, or inclination to enforce this non-coordination requirement. For this reason, supposedly independent super-PACs can be run by a candidate's close associates, friends, and former staff.[36] For example, when Stephen Colbert ran for "President of South Carolina," his close friend Jon Stewart was in charge of running his super-PAC, which was sarcastically—and appropriately—renamed the "Definitely Not Coordinating with Stephen super PAC."[37]

C. 501(c)(4) Organizations

A 501(c)(4) organization is a tax-exempt organization that is meant to promote "social welfare."[38] These organizations can collect and spend unlimited amounts of money on political campaigns, so long as the organization's primary purpose is not to influence the outcomes of elections.[39] They do not have to disclose their donors.[40]

There are certain organizations that are—at least in theory—so intrinsically valuable that we as a society have decided to provide them with certain tax breaks. Organizations that meet certain qualifications earn "tax-exempt" status in the eyes of the almighty Internal Revenue Service (IRS). Those qualifications, in large part, are laid out in 26 U.S.C. § 501(c).[41] "Teachers' retirement fund associations," for example, are tax-exempt under 26 U.S.C. § 501(c)(11).

In the campaign finance world, the most important 501(c) organizations are those which receive tax-exempt status under § 501(c)(4). Section 501(c)(4) tax-exempt status is reserved for non-profit "[c]ivic

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[34] Gardner & Charles, *supra* note 22, at 654.

[35] *See, e.g.*, Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 591 (2016) (noting that "campaign finance observers . . . widely agree . . . that the legal definition of formal coordination is entirely opaque at the moment and laughably easy to circumvent . . . .").

[36] *See, e.g.*, Trevor Potter, *Here's What I Learned When I Helped Stephen Colbert Set Up his Super PAC*, WASH. POST, Jan. 21, 2015.

[37] Neda Ulaby, *Stephen Colbert Wants You To Know: That's Definitely Not His SuperPAC*, NPR, (Jan. 20, 2015), available at http://www.npr.org/sections/monkeysee/2012/01/20/145475089/stephen-colbert-wants-you-to-know-thats-definitely-not-his-superpac.

[38] 26 U.S.C. § 501(c)(4)(A) (2016).

[39] *See* 26 C.F.R. § 1.501(c)(4)–1(a).

[40] INTERNAL REVENUE SERVICE, COMPLIANCE GUIDE FOR TAX-EXEMPT ORGANIZATIONS 22 (2014), available at http://www.irs.gov/pub/irs-pdf/p4221nc.pdf (last accessed Nov. 28, 2019).

[41] Title 26 of the United States Code is dedicated to the "Internal Revenue Code."

leagues or organizations" that operate "exclusively for the promotion of social welfare."[42] Some well-known 501(c)(4) organizations are the National Rifle Association (NRA), Planned Parenthood, and the Sierra Club. Spending by 501(c)(4) organizations has exploded in recent years.[43] During the 2006 presidential election, for example, 501(c)(4) groups spent approximately $5 million; and during the 2012 election, they spent approximately $310 million.[44]

For the purposes of this Article, 501(c)(4) social welfare organizations are important in at least two respects: (1) they may collect and spend unlimited amounts of money on political campaigns, so long as influencing elections is not the group's "primary purpose"; and (2) they do not have to disclose their donors' identities.[45] These organizations are the source of "dark money" (defined below).

For example, one of the most notorious 501(c)(4) organizations is Karl Rove's Crossroads GPS.[46] Since the Supreme Court's ruling in *Citizens United*, Crossroads GPS has raised more than $330 million from unknown donors, and it has spent approximately $112 million for the explicit purpose of influencing the outcomes of elections.[47] Critics of Rove's Crossroads GPS correctly note that it is "anything but a 'social welfare' organization; it is a political organization formed and operated to influence federal elections."[48]

Under federal law, a 501(c)(4) organization loses its tax-exempt status if its "primary purpose" is to influence the outcomes of political elections.[49] (As referenced above, it is no coincidence that Karl Rove raised $330 million but spent only $112 million—if the organization spent much more, it could potentially lose its tax-exempt status.). This is very important for the purposes of this Article, because, as of 2016, Arizona chose to exempt 501(c) organizations from the "primary purpose" requirement under state law.[50] Under Arizona law, so long as the organization "has tax exempt

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[42] 26 U.S.C. § 501(c)(4)(A) (2016).

[43] Thomas B. Edsall, *Dark Money in Politics*, N.Y. TIMES, June 12, 2013.

[44] *Id.*

[45] Sean Sullivan, *What is a 501(c)(4), Anyway?*, WASH. POST, May 13, 2013.

[46] *Id.*

[47] Matea Gold, *IRS Approves Tax-Exempt Status of Crossroads GPS After More than Five Years*, WASH. POST, Feb. 9, 2016.

[48] *Id.*

[49] *See* Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J. L. ETHICS & PUB. POL'Y 383, 419, 463 (2013) (citing *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)). If an organization's "primary purpose" was to influence elections, it would be considered a "political committee" and would be forced to disclose its donors. *Id.*

[50] ARIZ. REV. STAT. § 16-901(43) (2016) ("[A]n entity is not organized for the primary purpose of influencing an election if . . . [t]he entity has tax exempt status under [§] 501(a)

status under [§] 501(a) of the internal revenue code," it is, by definition, "not organized for the primary purpose of influencing . . . election[s]."[51]

This statute—A.R.S. § 16-901(43)—serves as a welcome mat for dark money in Arizona. Now, so long as an organization remains in good standing with the IRS, it can spend unlimited amounts of money to influence Arizona elections and never have to report a single donor.[52] Part III of this Article explains why this law is unconstitutional.

D. Hard Money

Hard money is money donated directly to politicians. Hard money is strictly regulated: donors must be disclosed; donations are capped; and donations may not be accepted in exchange for an "official action."[53] Hard money, in other words, is the money that goes directly into a candidate's political war chest.[54] Hard money—at least when properly regulated—is not a bad thing. For many, making a hard-money donation is the most effective way to show their support for a candidate or to support a ballot measure.

E. Soft Money

Soft money is money that is not given directly to a politician but is still used to benefit their campaign. The money spent by independent expenditure committees (super-PACs) and 501(c)(4) organizations is soft money.[55] This money does not go directly into the candidate's campaign coffers, but it still benefits the candidate. During campaign season, if one sees an attack ad that ends with "this message was paid for by Americans for Prosperity," or something similar, that is a perfect example of soft money. It is money spent by politically minded groups to influence the outcome of an election but is not given directly to a candidate. Super-PACs and 501(c)(4) organizations, essentially, always spend "soft" money on political campaigns.

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of the internal revenue code.").

[51] *Id.*

[52] As an aside, this law was passed strictly along partisan lines, with only Republicans voting in favor of its passing. Republicans, in turn, gave the power to regulate these non-profit political organizations back to the federal government—not only to the federal government, but to the IRS: the organization that was recently entangled in a scandal for directly targeting conservative 501(c) groups. Arizona Republicans, generally, have an overwhelming distrust for the federal government. Yet Arizona Senate Republicans have chosen to give the federal government ultimate oversight over the transparency of our election process? Is this real life?

[53] *Dark Money Basics*, OPENSECRETS.ORG, http://www.opensecrets.org/dark-money/basics (last visited July 3, 2017).

[54] *See id.*

[55] *Id.*

F. Dark Money

Dark money is money that is spent on political campaigns from undisclosed donors, usually through tax-exempt 501(c)(4) organizations. Former Arizona House Majority Whip Chris Herstam called dark money "the most corrupting influence [he'd] seen" in his thirty-three-year stint in Arizona politics.[56] Dark money works like this: a corporation, union, or wealthy individual donates large sums of money to a 501(c)(4) organization.[57] That 501(c)(4) then donates that money to a super-PAC.[58] That super-PAC then spends that money to influence the outcome of an upcoming election.[59] And because 501(c)(4)s do not have to disclose their donors, the public will never know where this money came from.[60] The super-PAC would have to report the contribution *from* the 501(c)(4), but not the contributions made *to* the 501(c)(4).[61] Thus, dark money is created.[62]

III. A BRIEF HISTORY OF ARIZONA'S CAMPAIGN FINANCE LAWS

The "Four Walls" of Arizona Campaign Finance Regulations

Fear of money's corrupting influence is not a novel concept. As Claudius said in *Hamlet*, "In the corrupted currents of this world, [o]ffense's gilded hand may shove by justice, [a]nd oft . . . [b]uys out the law."[63] Similarly, in 1910, in his famous speech in Osawatomie, Kansas, Teddy Roosevelt said:

> There can be no effective control of corporations while their political activity remains. To put an end to it will be neither a short nor an easy task, but it can be done . . . . Corporate expenditures for political purposes, and especially such expenditures by public-service corporations, have supplied one of the principal sources of corruption in our political affairs.[64]

The term "dark money" may be new, but the governed always feared it.

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[56] Lee et al., *supra* note 3, at 2.

[57] David J. Cantelme, *Arizona Campaign Finance Laws are Teetering*, 51 AZ ATTORNEY 36, 36 (2015); *see also Dark Money Basics*, OPENSECRETS.ORG, http://www.opensecrets.org/dark-money/basics (last visited July 3, 2017).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *See, e.g.*, *id.*

[63] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 3.

[64] The full text of Roosevelt's speech can be found at Eric Black, *Teddy Roosevelt's Attack on Excessive Concentration of Wealth*, MINN. POST, Dec. 7, 2011.

As such, Arizona had a sturdy edifice of campaign finance regulations prior to the Roberts Court's dismantling of traditional campaign finance law.[65] The integrity of Arizona's elections was protected by four statutory walls: (1) registration requirements; (2) contribution limits; (3) strict disclosure requirements; and (4) publicly funded resource-matching laws.[66]

The *campaign registration* laws required all candidates and committees to register with Arizona's Secretary of State. The State also imposed relatively low *contribution limits* (which increased over time to account for inflation). Non-candidate political committees—today, what we would call PACs and super-PACs—were required to file *disclosure* reports with the Secretary of State, listing their donors, the donors' contributions, and how that money was spent influencing the election(s). Further, Arizona's *fund-matching provisions* publicly financed certain eligible candidates to ensure that elections were financially competitive. Several of these walls, however, have been demolished; and those that remain rest on a shaky foundation.

A. Political Spending & Citizens United

The first of these walls to crumble was Arizona's campaign-contribution limits. In 2009, one year before *Citizens United*, Arizona law forbade super-PACs from donating more than $1,664 to a legislative campaign, and individual contributions were capped at $410 per candidate.[67] Then came *Citizens United*.[68] There, the Supreme Court, unprompted, held that the First Amendment prohibits the government from setting caps on independent expenditures.[69] "[I]ndependent expenditures," the Court held, "do not give rise to corruption or the appearance of corruption."[70] Because candidates are not allowed to coordinate with independent expenditure committees, Justice Kennedy argued, that negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption the government can legitimately prohibit.[71] With that, corporations, unions, and wealthy individuals were free to spend unlimited

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[65] *See* Cantelme, *supra* note 57, at 36.

[66] *Id.* at 36.

[67] *2009–2010 Contribution Limits*, ARIZ. SECRETARY OF STATE (Aug. 14, 2009), http://apps.azsos.gov/election/2010/Info/Campaign_Contribution_Limits_2010.htm.

[68] Citizens United v. FEC, 558 U.S. 310 (2010).

[69] *Id.* at 357–61.

[70] *Id.* at 357. This holding is one of the most criticized in the history of the Supreme Court. *See, e.g.*, *id.* at 393–480 (Stevens, J., dissenting); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Erwin Chemerinsky, *Conservatives Embrace Judicial Activism in Campaign Finance Ruling*, L.A. TIMES, Jan. 22, 2010.

[71] *Citizens United*, 558 U.S. at 357–61.

amounts of money to influence the outcomes of elections.[72]

B. Fund-Matching & Bennett

The second of these walls to fall was Arizona's fund-matching program. Arizona, like most states, discovered that contribution limits, standing alone, are not enough to quell political corruption. Five years after the enactment of these limits, Arizona suffered "the worst public corruption scandal in its history."[73] In that scandal, known as "AZ Scam," nearly 10% of Arizona's legislators were caught accepting campaign contributions or bribes in exchange for supporting legislation.[74] Following that incident, Arizona voters decided that further reform was necessary.

Accordingly, in 1998, Arizonans, through initiative, passed the Citizens Clean Elections Act.[75] That Act, in part, allowed certain eligible candidates running for political office to receive "equalizing" funds from the State Treasury.[76] In many instances, the Act required the State to equalize the candidates' campaign war chests (for example, if privately-funded "Candidate A" raised $1 million and super-PACs ran $500,000 worth of ads supporting him, the State would give publicly-funded "Candidate B" $1.5 million to level the playing field).[77]

In 2011, however, in *Arizona Free Enterprise v. Bennett*, the U.S. Supreme Court gutted Arizona's fund-matching program. "Laws like Arizona's matching funds provision that inhibit robust and wide-open political debate without sufficient justification cannot stand," the Court held.[78] Because spending and raising money could cause a privately-financed candidate's opponent to receive additional state money, the law forced these privately-financed candidates to "shoulder a special and potentially significant burden when choosing [whether] to exercise [their] First Amendment right to spend funds on behalf of [their] candidacy."[79] And with that, the primary provision of the Citizens Clean Elections Act was declared unconstitutional, and Arizona's second wall of

[72] In 2016, for example, George Soros alone spent over $2 million in a successful effort to dethrone Maricopa County Sherriff Joe Arpaio. Scott Bland, *Soros Spends $2 Million to Defeat Arpaio*, POLITICO, Nov. 4, 2016.

[73] Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 761 (2011) (Kagan, J., dissenting).

[74] *Id.*

[75] *Id.* at 728.

[76] *Id.* at 729 (citing ARIZ. REV. STAT. §§ 16-952(A), (B), and (C)(4)–(5), which provided for the "[e]qual funding of candidates").

[77] *See id.* at 729–32.

[78] *Id.* at 755. It is wholly unclear how making elections more competitive "inhibit[s] robust and wide-open political debate," and it blinks reality to baldly assert that Arizona lacked a "sufficient justification" for its fund-matching provisions.

[79] *Id.* at 737 (internal quotes omitted).

protection fell.

C. Disclosure Requirements & SB 1516

The Supreme Court has consistently held that the government has a compelling interest in preventing corruption or the appearance of corruption in our democratic processes.[80] As such, the states can—and should—require the disclosure of political donors. Even the *Citizens United* Court noted that "disclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[81]

Prior to 2016, Arizona's disclosure laws were not perfect, but they were at least reasonably tailored to ensure the public knew who financed Arizona's political campaigns.[82] In 2016, Governor Ducey signed Senate Bill 1516[83] into law. If allowed to stand, SB 1516 could effectively tear down a third campaign finance wall: the disclosure requirement. In short, SB 1516—which is currently codified in Title 16 of the Arizona Revised Statutes—is one of the most pro-dark-money statutes imaginable.[84]

SB 1516 overhauled Arizona's campaign finance law in three ways. First, it changed the definition of "contribution" to exclude things such as travel expenses,[85] the use of real or personal property,[86] or the payment of legal expenses.[87] Thus, under a plain reading of this statute, a corporation could fly a politician to the CEO's house on a private jet, wine and dine him, and send him back with the knowledge that the corporation plans to make a hefty donation to a politically-minded 501(c)(4) that supports him—and none of this would have to be disclosed.[88]

Second, it raised the standard for proving coordination between

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[80] *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 369 (2010); Davis v. FEC, 554 U.S. 724, 741 (2008); FEC v. Nat'l Conservative PAC, 470 U.S. 480, 496–97 (1985); Buckley v. Valeo, 424 U.S. 1, 67, 72 (1976).

[81] *Citizens United*, 558 U.S. at 370.

[82] *Cf.* Cantelme, *supra* note 57, at 36–37.

[83] 2016 Ariz. ALS 79, 2016 Ariz. Sess. Laws 79, 2016 Ariz. Ch. 79, 2016 Ariz. SB 1516. The text of SB 1516 can be found at http://www.azleg.gov/legtext/52leg/2r/bills/sb1516s.pdf.

[84] *See, e.g.*, Ann M. Ravel, *States Can Bring Political 'Dark Money' Into the Light*, L.A. TIMES, July 20, 2016 (noting that Arizona's dark money problem is "particularly egregious" and that SB 1516 shows "Arizona doesn't recognize how [the rise in dark money] is undermining its elections"); Laurie Roberts, *Roll Call: Who Supported Expanding Dark Money in Arizona*, ARIZ. REPUBLIC, July 18, 2016; Mary Jo Pitzl, *Arizona 'Dark Money' Bill on its Way to Gov. Doug Ducey*, ARIZ. REPUBLIC, March 29, 2016.

[85] ARIZ. REV. STAT. § 16-911(B)(1)(a) (2016).

[86] ARIZ. REV. STAT. § 16-911(B)(1)(b) (2016).

[87] ARIZ. REV. STAT. § 16-911(B)(6)(c) (2016).

[88] *Cf.* Pitzl, *supra* note 84.

politicians and independent expenditure committees.[89] Prior to SB 1516, prosecuting agencies needed only "reasonable cause" of wrongdoing to charge a politician for coordinating with an independent expenditure committee.[90] SB 1516, added an "intent" element to this burden of proof.[91] This makes proving—and stopping—unlawful coordination much more difficult.

Finally, it removed the "primary purpose" requirement for 501(c)(4) organizations. The federal government only determines whether a non-profit organization gets "tax-exempt" status under the Internal Revenue Code; it is not a political regulatory agency.[92] The IRS is concerned only with collecting taxes, not policing organizations' political activities.[93] The states, accordingly, are primarily in charge of regulating these organizations through their police powers.[94]

SB 1516, however, gave much of this regulatory power back to the IRS. Now, under Arizona law, a 501(c)(4), by definition, is not organized for the primary purpose of influencing an election if it remains in good standing with the IRS.[95] In other words, Arizona is asking the IRS to act as the overseer of its dark money groups. The IRS, however, is not capable of such a regulatory task,[96] nor does it have the inclination to do so given its recent regulatory scandals.[97] In 2013, the IRS was wrapped in scandal for its treatment of conservative "Tea Party" organizations.[98] As a result, the IRS has largely stepped aside as a political regulator—and has made this fact publicly known.[99]

What this statute means in practice is that it is open season for dark money groups in Arizona. In an op-ed for the *Los Angeles Times*, former FEC Commissioner Ann Ravel chastised Arizona for failing to see the extent to which dark money is undermining the integrity of its electoral

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89 *Id.*

90 *Id.*

91 ARIZ. REV. STAT. § 16-922(B)(2)(b).

92 Linda Sugin, *Nonprofit Oversight Under Siege: Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895, 896–97 (2016).

93 *Id.*

94 *Id.*

95 ARIZ. REV. STAT. § 16-901(42).

96 Sugin, *supra* note 92, at 897 (noting that the IRS is a revenue-collector, not a political regulator).

97 *See generally* Evelyn Brody & Marcus Owens, *Exile to Main Street: The IRS's Diminished Role in Overseeing Tax-Exempt Organizations*, 91 CHI.-KENT L. REV. 859 (2016).

98 *Id.*

99 *See* Eric Lichtblau, *I.R.S. Expected to Stand Aside as Nonprofits Increase Role in 2016 Race*, N.Y. TIMES, July 5, 2015.

process.[100] Ravel cited SB 1516 as evidence that the Arizona Legislature either does not know or does not care about the corrupting effect of dark money.[101]

Being from California, Ravel had good standing to level these accusations, because in 2014, Arizona prompted California to adopt the most expansive political disclosure requirements in the country, designed to shed light on politically-minded 501(c)(4) organizations.[102] These statutes were prompted by the overreach of Arizona dark money groups into California politics.[103] In 2013, two Arizona 501(c)(4) organizations—Americans for Responsible Leadership and the Center to Protect Patient Rights—contributed $11 million to a California-based PAC to support a ballot measure that would curb unions' political fundraising capabilities.[104] Thanks to this funding, that initiative passed. Because the money was filtered through a 501(c)(4), Californians remained unaware of the revenue's source.

In response to this out-of-state meddling, California passed SB 27, requiring "multipurpose organizations"—such as 501(c)(4)s—to disclose the identity of their donors in mandatory state filings.[105] The Bill's sponsor stated that its purpose was to prohibit "[the] laundering [of] campaign cash through nonprofits to hide one's true identity."[106] Arizona's dark money problem is so bad that its spillover is causing neighboring states to pass laws to protect the integrity of their political processes.[107] The Arizona

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100 Ravel, *supra* note 84.

101 *Id.*

102 *See* Cal. Gov. Code § 84222; Sugin, *supra* note 92, at 904.

103 Patrick Ford, *Chapter 16: Combating Dark Money in California Politics*, 46 MCGEORGE L. REV. 335, 339–40 (2014).

104 Sugin, *supra* note 92, at 904, n.61. The Center to Protect Patient Rights is a 501(c)(4) organization funded by the infamous Koch brothers. DAVID R. BERMAN, DARK MONEY IN ARIZONA: THE RIGHT TO KNOW, FREE SPEECH AND PLAYING WHACK-A-MOLE 4 (2014) (published by Arizona State University's Morrison Institute for Public Policy), available at https://morrisoninstitute.asu.edu/sites/default/files/content/products/DarkMoney.pdf.

105 S.B. 27, 2014 Leg., Reg. Sess. (Cal. 2014). More importantly, the law "attempts to follow the daisy chain of contributions from one exempt organization to another," requiring disclosure by each organization in the chain. Sugin, *supra* note 92, at 905. S.B. 27 is now codified, in part, in Cal. Gov. Code § 84222.

106 Brian Joseph, *O.C. Senator Introduces Bill to Illuminate "Dark Money"*, ORANGE COUNTY REG. (Dec. 4, 2012). The Bill's sponsor was Sen. Lou Correa. The California Political Practices Commission also commented that this Bill's "disclosure of donors provides voters with vital information on who is funding campaigns [and] increases transparency to deter actual or perceived corruption. . ." Cal. Fair Political Practices Comm'n, Multipurpose Organizations Reporting Political Spending 1 (2014), available at http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/Multipurpose%20Organizations.pdf.

107 *See generally* Sugin, *supra* note 92, at 904–07; Ford, *supra* note 103, at 339–54.

Legislature, however, has remained recalcitrant, despite its constitutional obligation to act.

IV. A.R.S. § 16-901(43) AND A.R.S. § 16-911(B) VIOLATE ARTICLE 7, § 16 OF THE ARIZONA CONSTITUTION

The Arizona Legislature has not only shirked its duty to provide for a "general publicity" of campaign expenditures and contributions, it has passed legislation that further obscures and conceals the source of campaign funding. A.R.S. § 16-901(43) emboldens and deregulates 501(c)(4) organizations, thereby setting the stage for a surge in dark money. A.R.S. § 16-911(B) sets forth an extremely narrow definition of what amounts to a political "contribution," thereby allowing bribe-like activity to go undisclosed. These two provisions are directly contradict the General Publicity Clause.

A. The Text of the Unconstitutional Statutes

1. A.R.S. § 16-901(43)

A.R.S. § 16-901(43) provides the definition of an organization's "primary purpose." (Remember, an organization's primary purpose determines whether that organization receives tax-exempt status in the eyes of the IRS. More specifically, a 501(c)(4) organization loses its tax-exempt status if its primary purpose is to influence election outcomes.) Section 16-901(43) provides: "[A]n entity is not organized for the primary purpose of influencing an election if . . . [t]he entity has tax exempt status under [§] 501(a) of the internal revenue code."[108] In other words, all 501(c)(4) organizations, by definition, are not organized for the primary purpose of influencing elections. This means that 501(c)(4) organizations—like Karl Rove's Crossroads GPS, the NRA, and Planned Parenthood—can spend unlimited amounts of money on Arizona campaigns as long as the IRS does not say otherwise. Further, as the Arizona Legislature knew when they passed this law, the IRS has largely abdicated its enforcement responsibilities.[109]

2. A.R.S. § 16-911(B)

Under Arizona law, politicians must disclose any "contributions" they receive. A.R.S. § 16-911(B), however, changed the definition of what qualifies as a "contribution." Section 16-911(B) provides, in part: "The following are not contributions: (1) The value of an individual's volunteer

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108 ARIZ. REV. STAT. § 16-901(43)(a) (2016).

109 Potter & Morgan, *supra* note 49, at 466–67; Lichtblau, *supra* note 99.

services . . . including . . . : (a) travel expenses; (b) use of real or personal property; (c) cost of invitations, food or beverages; . . . ."[110]

Under a plain reading of this statute, a corporation could fly a politician to a private fundraiser ("travel expenses") on a private jet (the "use of personal property"), wine and dine him (the "cost of . . . food [and] beverages"), and inform him that the corporation intends to make a sizeable donation to a supportive 501(c)(4) organization, yet none of this would ever have to be reported because the corporation did not "contribute" to him. Something is wrong with this picture.

Contrast this with the federal government's definition, which defines a "contribution" as any "gift, subscription, loan, advance, or deposit of money or *anything of value* made . . . for the purpose of influencing any election for Federal office."[111]

B. Interpreting Article 7, § 16

The courts have never had an opportunity to interpret Article 7, § 16.[112] The section's meaning, therefore, is not precisely known. Judges, however, have a set of legal tools they can employ to determine what is required by a constitutional provision. Specifically, when determining the proper meaning of a constitutional provision, judges should look to the provision's (i) text, (ii) history, and (iii) purpose, along with (iv) the potential consequences of a particular interpretation.[113] Each of these considerations will be discussed in turn.

1. The text of Article 7, § 16

Article 7, § 16 reads as follows:

The legislature, at its first session, shall enact a law providing for a general publicity, before and after election, of all campaign contributions to, and expenditures of campaign committees and candidates for public office.[114]

Most of this provision's requirements can be gathered from its text: it requires the Legislature to "enact a law" that provides for "a general

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110 ARIZ. REV. STAT. § 16-911(B) (2016).

111 2 U.S.C. § 431(8)(A)(i) (emphasis added).

112 JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 244 (2d ed. 2013).

113 Hayes v. Continental Ins. Co., 872 P.2d 668, 672 (Ariz. 1994) (noting that the courts will use a provision's "context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose" when interpreting ambiguous language); Wyatt v. Wehmueller, 806 P.2d 870, 873 (Ariz. 1991) (same); State v. Korzep, 799 P.2d 831, 834 (Ariz. 1990) (same); *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 74 (2010) (arguing that a judge's interpretational tools are text, history, tradition, precedent, purpose, and consequences).

114 Ariz. Const. art. VII, § 16.

publicity" of "campaign contributions. . .and expenditures." Campaign "contributions" and "expenditures" are quite well-defined.[115] Contributions are money donations made directly to a political campaign, and expenditures refer to the campaign's spending of money to win the election. Ambiguity arises, however, when determining what is meant by the "general publicity" requirement. To determine what is meant by "a general publicity," we must look to the provision's history and purpose.

2. The history of the General Publicity Clause

The General Publicity Clause was ratified as an original part of the Arizona Constitution in 1912. Throughout the century preceding ratification, the costs of elections had risen dramatically mirroring the rise of corporations in American economic life.[116] Further, in many states, politicians and corporate executives had an unsettling symbiotic relationship. Several years before Arizona was admitted to the Union, Senator Boies Penrose, a prominent Republican from Pennsylvania, said of the corporation/politician relationship:

> I believe in the division of labor: You send us to Congress; we pass laws under which you make money . . . and out of your profits, you further contribute to our campaign funds to send us back again to pass more laws to enable you to make more money.[117]

The framers of the Arizona Constitution were keenly aware of corrupt behavior like Penrose's when they authored the General Publicity Clause—indeed, all of Article 7.[118]

Just five years before Arizona became a state, Congress passed the Tillman Act, which prohibited "any corporation" from "mak[ing] a money contribution in . . . any election to any political office . . . ."[119] Two years before Arizona was admitted to statehood, Congress passed the Federal Corrupt Practices Act (FCPA), which required candidates for Congress to disclose the names of their contributors and amounts of expenditures before and after their elections.[120]

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115 *See generally* Buckley v. Valeo, 424 U.S. 1, 12–36 (1976) (defining and distinguishing "contributions" and "expenditures" for First Amendment purposes).

116 Gardner & Charles, *supra* note 22, at 638.

117 *Id.*

118 *See* Leshy, *supra* note 14, at 68 (noting that the framers were particularly worried about corporations' corrupting influences in elections). *See also* Ariz. Const. art. XIV, § 18 (forbidding corporations from contributing to political campaigns); Ariz. Const. art. IV, § 19(13) (forbidding politicians from accepting any special pass or privilege from a corporation).

119 Gardner & Charles, *supra* note 22, at 638–39.

120 *Id.* at 639.

Shortly after Arizona was admitted to statehood, Senator Joe Robison made the following statement on the Senate floor:

> We all know . . . that one of the great political evils of the time is the apparent hold on political parties [that] business interests and certain organizations . . . obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions . . . .[121]

Put simply, the framers drafted the Arizona Constitution during a revolutionary period in the history of campaign finance reform; and the language of Article 7 reflects that.

3. The Purpose of the General Publicity Clause

Article 7, § 16 is meant to create "a general publicity" of campaign contributions and expenditures. But what was this provision meant to accomplish? John Leshy—who is arguably the leading authority on the Arizona Constitution—has noted that Article 7 is generally meant to "ensure that the citizen's right to cast his vote [is] meaningful and that elections [are] pure."[122] When read in light of the other provisions of Article 7, it is apparent that the General Publicity Clause is meant to serve as a mechanism for keeping the voting public informed as to who is financing Arizona's political campaigns.

The framers of the Arizona Constitution were particularly fearful of corporations influencing Arizona elections.[123] Arizona has a distinct fourth branch of government—the Corporation Commission—whose primary purpose is to regulate and monitor corporate activity.[124] The crux of Article 7 is to limit corporate influence of Arizona elections, and the only fair reading of the General Publicity Clause is the one that concludes that the framers wanted to make Arizona elections as transparent as possible.

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[121] United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers Of America, 352 U.S. 567, 576 (1957) (citing 65 Cong. Rec. 9507–08).

[122] Leshy, *supra* note 14, at 68.

[123] *Id.* (noting that the framers were particularly worried about corporations' corrupting influences in elections). *See also* Ariz. Const. art. XIV, § 18 (forbidding corporations from contributing to political campaigns); Ariz. Const. art. IV, § 19(13) (forbidding politicians from accepting any special pass or privilege from a corporation).

[124] *See generally* Ariz. Const. art. XV (entitled "The Corporation Commission").

4. The Consequences of Leaving the Contested Statutes in Place

Continuing to allow dark money to flood Arizona elections could further erode the public's trust in government. In a democracy where representatives were beholden to their constituents, voting for SB 1516 would have been political suicide. In Arizona, however, where dark money reigns, voting for this Bill was politically prudent—it further allowed anonymous donors to funnel millions of dollars into politicians' campaign coffers.

Polling data shows that the *vast* majority of Arizonans opposed SB 1516 and other similar bills. In March 2016, several months before SB 1516 was signed into law, ProgressNow Arizona conducted a survey to gauge public opinion on SB 1516 and similar bills being considered in the State House of Representatives. That survey found that just 17% of Arizona voters supported SB 1516 after hearing the arguments against it, and 81% of voters said they would be less likely to vote for a candidate who supported the Bill.[125] In a *New York Times* poll, over 80% of those interviewed believed money played too large a roll in state and federal elections, and 67% said that wealthy Americans have a disproportionate chance of influencing elected representatives.[126] That poll further noted that 75% of self-identified *Republicans* supported stronger disclosure laws.[127] Yet in both Arizona and Washington, D.C., "Republican leaders in [the Legislature] have blocked legislation to require more disclosure by political nonprofit groups, which do not reveal the names of their donors."[128]

Dark money and its corrupting influence are clearly problems in desperate need of correction. Because the political branches are ill-suited—perhaps incapable—of solving this problem, the courts have a duty to act. These laws must be struck down as unconstitutional to protect the integrity and transparency of Arizona's democratic processes.

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[125] PUBLIC POLICY POLLING, ARIZONA SURVEY RESULTS 1 (2016), available at http://progressnowarizona.org/wp-content/uploads/2016/03/NewPoll_Dark-Money-Citizen-Referendum-and-Redistricting.pdf.

[126] *See* Nicolas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES, June 2, 2015.

[127] *Id.*

[128] *Id.*; Roberts, *supra* note 84 (noting that SB 1516 was passed on strictly partisan lines, with only Republicans voting for its passage).

V. JUSTICIABILITY CONCERNS

A. Standing

If these laws were challenged in a federal court, there is a low chance the court would grant the plaintiff(s) standing. That is because the federal courts are bound by the Supreme Court's standing doctrine, which restricts the federal courts only to plaintiffs who have suffered a "distinct and palpable injury"[129] that is not too "general"[130] in nature.

For example, in *Lujan v. Defenders of Wildlife*, the Court held that environmental protection groups do not have standing to challenge environmental policies unless its members have suffered a "concrete and particularized" injury.[131] This requires the plaintiff to have more than a "general interest" in the outcome of the suit, and that she make more than a generalized grievance about the government.[132] Similarly, in *Los Angeles v. Lyons*, the Court held that the victim of a police chokehold did not have standing to challenge the police department's "chokehold policy" because there was no evidence that there was a "real and immediate threat of future injury [to] the [victim]."[133]

For many, achieving Article III standing is an insurmountable task.[134] The Arizona courts, however, are not bound by the strictures of Article III.[135] Rather, as the Arizona Supreme Court has noted, Arizona's justiciability doctrine "is a prudential consideration rather than a jurisdictional one."[136] For this reason, the Arizona courts waived the traditional standing requirements when a case (1) presents an "issue[] of great public importance" and (2) the parties to that case are "true adversaries."[137] Both of these two prongs will be discussed in turn.

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129 Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978).

130 Lujan v. Defenders of Wildlife, 504 U.S. 555, 575–76 (1992).

131 *Id.* at 560.

132 *Id.* at 573–76.

133 City of Los Angeles v. Lyons, 461 U.S. 95, 107 n.8 (1983).

134 *See id.* at 113–137 (Marshall, J., dissenting); *see also* Spokeo, Inc. v. Robins, 136 S. Ct. 1543 (2016); Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013); Gene Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

135 Dobson v. State, 309 P.3d 1289, 1292 (Ariz. 2013) (recognizing that the Arizona courts are not bound by the "case or controversy" requirement of Art. III, § 2 of the U.S. Constitution). *Compare* Massachusetts v. Mellon, 262 U.S. 447 (1923) (prohibiting taxpayer standing), *with* Ethington v. Wright, 189 P.2d 209 (Ariz. 1948) (allowing taxpayer standing in Arizona when the taxpayer asserts a sufficiently important interest related to the expenditure of her tax dollars).

136 Biggs v. Cooper, 341 P.3d 457, 460 (Ariz. 2014).

137 Sears v. Hull, 961 P.2d 1013, 1019 (Ariz. 1998).

1. Issues of "Great Public Importance"

Arizona's prudential standing requirements are in place, in part, to lighten the courts' caseload. These requirements, however, are not inexorable commandments that prevent judges from hearing truly important cases. In *Rios v. Symington*, for example, the court disregarded "potential standing issues" because the dispute involved issues central to the healthy functioning of Arizona's state government.[138] In *Rios*, the President of the State Senate challenged the constitutionality of the Governor's use of a line item veto.[139] Typically, members of the Legislature do not have standing if they allege only an "institutional injury."[140] However, because *Rios* involved "a dispute at the highest levels of [Arizona's] state government," the court ignored traditional standing requirements.[141]

Similarly, in *Goodyear Farms v. Avondale*, the court heard a case challenging the constitutionality of municipal annexation ordinances without addressing whether the plaintiffs had standing to sue.[142] Because the action raised issues of great public importance that were likely to recur, addressing standing was not necessary.[143]

The constitutionality of state campaign finance laws is surely an issue of great public importance worthy of receiving relaxed justiciability standards. *Rios* and *Goodyear* illustrate that constitutional challenges are likely to be treated as "more important" for justiciability purposes. Further, issues that touch upon the proper functioning of our state government are treated with special deference under Arizona standing doctrine.[144] A constitutional challenge to Arizona's dark money statutes would satisfy both of these factors and should therefore be thought of as an "issue of great public importance" for justiciability purposes.

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138 *See* Rios v. Symington, 833 P.2d 20, 22 n.2 (Ariz. 1992).

139 *Id.*

140 *See* Raines v. Byrd, 521 U.S. 811, 821, 830 (1997) (dismissing several Senators' challenge to President Clinton's line item vetoes because members of the Legislature do not have standing to challenge an "institutional injury"); Bennett v. Napolitano, 81 P.3d 311, 317–18 (Ariz. 2003) (same).

141 *Rios*, 833 P.2d at 22.

142 Goodyear Farms v. City of Avondale, 714 P.2d 386 (Ariz. 1986).

143 *Id.* at 387 n.1.

144 *See* Biggs v. Cooper, 341 P.3d 457 (Ariz. 2014); Forty-Seventh Legislature v. Napolitano, 143 P.3d 1023 (Ariz. 2006); *Rios*, 833 P.2d at 22.

2. Parties That Are "True Adversaries"

In addition to reducing caseload, Arizona's prudential standing requirements seek to "sharpen the legal issues" by only allowing cases between "true adversaries."[145] By requiring the parties to be truly adversarial, the courts increase the likelihood that the issues will be fully briefed and zealously argued because the parties will have a stake in the outcome of the litigation.[146]

For this reason, the courts typically do not allow plaintiffs to make "generalized grievances"—i.e., claims that do not affect the plaintiff personally, but that are made on behalf of society generally.[147] In many instances, however, the party who was "injured" may have fewer resources or poorer arguments than other potential plaintiffs.[148] Accordingly, to ensure the sharpest possible issues, the Arizona courts have allowed plaintiffs to air generalized grievances if (1) the plaintiff has "a legitimate interest" in the controversy and (2) "judicial economy and administration would be promoted" by allowing the case to proceed.[149]

The proliferation of dark money does not "injure" any one person—just as a Governor accepting a bribe would not injure any one person. Corruption affects the political system, and it would behoove the Arizona courts to put a stop to it, even if it means relaxing their justiciability requirements. If the plaintiff has a "legitimate interest" in the healthy functioning of Arizona's campaign finance system, the courts should grant that party standing to sue.

B. The Political Question Doctrine

As a matter of prudence, the Arizona courts have refused to decide cases that amount to a "nonjusticiable political question."[150] Many cases involve issues that touch on hot-button political topics—but that does not

[145] Bennett v. Brownlow, 119 P.3d 460, 463 (Ariz. 2005); Sears v. Hull, 961 P.2d 1013, 1019 (Ariz. 1998).

[146] *See* Strawberry Water Co. v. Paulsen, 207 P.3d 654, 659 (Ariz. 2008).

[147] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 499 (1975); Ariz. Ass'n of Providers for Persons with Disabilities v. State, 219 P.3d 216, 223 (Ariz. Ct. App. 2009); Home Builders Ass'n of Cent. Ariz. v. Kard, 199 P.3d 629, 632–33 (Ariz. Ct. App. 2008).

[148] For example, if the issue to be litigated concerned the government's environmental regulations, the Sierra Club would be a great litigant to have on one side of the issue. But the Sierra Club is seldom "injured" by the government's environmental policies, and therefore often lacks standing to sue. *See* Sierra Club v. Morton, 405 U.S. 272 (1972).

[149] Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712 P.2d 914, 919 (Ariz. 1985). This two-part test is just a fancy way of saying the Arizona courts will ignore the standing requirements if the issue is important enough and there are two good lawyers on each side.

[150] *See, e.g.*, Kromko v. Ariz. Bd. of Regents, 165 P.3d 168, 170–71 (Ariz. 2007); Fogliano v. Brain, 270 P.3d 839, 846–47 (Ariz. Ct. App. 2011).

necessarily mean the cases involve a "political question." A nonjusticiable political question arises when either (1) there is a "textually demonstrable constitutional commitment" of the issue to a coordinate branch of government, or (2) there is "a lack of judicially discoverable and manageable standards" for resolving the issue.[151]

For example, Article 11, § 6 of the Arizona Constitution requires the Arizona State Legislature to make university tuition "as nearly free as possible."[152] However, in *Kromko v. Arizona Board of Regents*, the Arizona Supreme Court held that interpreting this language would amount to a nonjusticiable political question.[153] Because the duty to make tuition as free as possible was constitutionally committed to the Legislature and there was no manageable way to determine whether the tuition was "as free" as it could be, the Arizona Supreme Court refused to decide the case.[154]

In contrast, the court held in *Roosevelt v. Bishop* that the courts could determine whether the state's school districts were sufficiently "general and uniform," as required by Article 11, § 1 of the Arizona Constitution.[155] Determining whether school districts received roughly equal funding was a "judicially manageable" question—the court could simply compare and contrast the funding received by each school district.[156]

Similarly, determining whether the Arizona Legislature has "enact[ed] a law providing for a general publicity . . . of all campaign contributions. . .and expenditures" is not a political question.[157] The Arizona Constitution expressly directs the Legislature to enact a variety of laws. Article 10, § 10 requires the Legislature to provide laws for the sale of state lands.[158] Article 18, § 1 requires the Legislature to enact laws instituting an eight-hour workday for public employees.[159] Article 11

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[151] *Kromko*, 165 P.3d at 170 (quoting Nixon v. United States, 506 U.S. 224, 228 (1993)).

[152] Ariz. Const. art XI, § 6.

[153] *Kromko*, 165 P.3d at 173.

[154] *Id.*

[155] Roosevelt Elementary School District No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994).

[156] *Kromko*, 165 P.3d at 173 (noting that there were "judicially discoverable and manageable standards" for resolving the issue in *Roosevelt*).

[157] *Cf.* Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 5 (2017) (arguing that the political question doctrine should be applied in a way that "preserve[s] space for substantive policy debates" without "shielding the government from proper scrutiny").

[158] Ariz. Const. art. X, § 10 ("The legislature shall provide by proper laws for the sale of all state lands or the lease of such lands, and shall further provide . . . laws for the protection of the . . . residents and lessees of said lands . . . .").

[159] *Id.* at art. XVIII, § 1 ("Eight hours and no more, shall constitute a lawful day's work in all employment by, or on behalf of, the state or any political subdivision of the State. The legislature shall enact such laws as may be necessary to put this provision into effect, and shall prescribe proper penalties for any violations of said laws.").

requires the Legislature to enact laws that adequately fund the public-school system.[160]

These provisions are surely enforceable.[161] In fact, under Article 2, § 32, they are "mandatory."[162] For example, if the Legislature refused to enact a law instituting an eight-hour workday (as required by Article 18, § 1), but instead passed a law requiring all public employees to work fifteen-hour days, the people would expect—perhaps demand—the courts to strike down this law. Similarly, if the Legislature refused to enact a law requiring public disclosure of campaign contributions (as required by Article 7, § 16), but instead passed laws that allowed millions of undisclosed dollars to flood our political elections, no one would doubt the courts' authority to remedy this problem.

The Arizona courts, moreover, not only have the *authority* to strike down these corrupt campaign finance laws, they have a *duty* to do so.[163] In *Roosevelt*, for example, the Arizona Supreme Court required the Legislature to "enact appropriate laws to finance education in the public schools" and tasked the Superior Court with "determin[ing] whether . . . [appropriate] legislative action ha[d] been taken."[164] Concededly, *Roosevelt* put the courts in a precarious position—if the Legislature ignored the court order, there would be no practical way to enforce it.[165] However, given the importance of public education and the constitutional

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[160] *Id.* at art. XI, § 1 ("The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system . . . ."); *id.* at art. XI, § 9 ("[T]he legislature shall enact such laws as will provide for increasing the county fund sufficiently to maintain all the public schools of the county for a minimum term of six months in every school year . . . ."); *id.* at art. XI, § 10 ("[T]he legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all state educational institutions, and shall make such special appropriations as shall provide for their development and improvement . . . .").

[161] In fact, the Arizona courts have consistently and explicitly required the Legislature to enact laws that better provide for Arizona's public school system pursuant to Article 11. *See* Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994).

[162] Ariz. Const. art. II, § 32 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.").

[163] Mapp v. Ohio, 367 U.S. 643, 663 (1961) ("It is the duty of the courts to be watchful of constitutional rights and against any stealthy encroachments thereon.") (citing Boyd v. United States, 116 U.S. 616, 635 (1886)); Rural/Metro Corp. v. Ariz. Corp. Comm'n, 629 P.2d 86, 89 (Ariz. Ct. App. 1980) ("It is the duty of the courts, not the legislature, to interpret and construe ambiguous constitutional provisions."), *rev'd on other grounds*, 629 P.2d 83 (Ariz. 1981). *See also Roosevelt*, 877 P.2d at 815 (striking down Arizona's statutory financing scheme for public education because "the laws chosen by the legislature to implement its constitutional obligation" were insufficient).

[164] *Roosevelt*, 877 P.2d at 816.

[165] Perhaps the Executive branch could have enforced the order by force. But what would that look like: the state police ordering legislators to pass appropriate school-funding bills?

implications of the issue, the *Roosevelt* Court had no choice but to enter the fray. The same is true of these campaign finance statutes. If the Legislature continues to shirk its duty to make Arizona elections transparent, public confidence in our state democracy will gradually eroded, and our governing bodies would cease to have proper legitimacy.

As *Roosevelt* illustrates, the courts will direct the Legislature to fulfill its constitutional obligations if the case is sufficiently important and judicially manageable.[166] Like the plaintiffs in *Roosevelt*, a plaintiff challenging the Legislature's failure to "enact a law providing for a general publicity . . . of . . . campaign contributions" is merely asking the State to "enact laws necessary to establish and maintain a system that will transform that right from dry words on paper to a reality, bringing to fruition the progressive views of those who founded this state."[167]

C. Conclusion to Part IV

The courts usually do not allow plaintiffs to air "generalized grievances." However, they will hear certain generalized cases when the issues are sufficiently important, and the parties are truly adversarial. The constitutionality of Arizona campaign finance laws is an issue of great public importance. Therefore, if there are two adversarial parties willing to fully brief the issues, the Arizona courts should grant the plaintiffs standing.

Additionally, interpreting the General Publicity Clause would not amount to a nonjusticiable political question. As *Roosevelt* illustrates, the courts will not allow the Legislature to completely shirk its constitutional obligations. If the Legislature passes laws that "create substantial disparities among [the public] schools," the courts will strike those laws down under Article 11, § 1.[168] Similarly, when the Legislature passes laws that allow millions of dollars in dark money to flood our state elections, the courts should not hesitate to strike down these laws under Article 7, § 16.[169]

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166 *See Roosevelt*, 877 P.2d at 823 (Feldman, J., concurring) (noting that the Art. XI, § 1 issue was very important); *Kromko*, 165 P.3d at 173 (noting that there were "judicially discoverable and manageable standards" for resolving the issue in *Roosevelt*). *See also* Cohen, *supra* note 157, at 58 (arguing that, despite the current political question doctrine, the courts will still decide hard, politically salient cases when necessary).

167 *Roosevelt*, 877 P.2d at 823 (Feldman, J., concurring).

168 *Id.* at 816.

169 The political question doctrine, moreover, should not be applied in a way that would insulate the Legislature from proper scrutiny or discourage political participation. Cohen, *supra* note 157, at 5; *see also* STEPHEN BREYER, ACTIVE LIBERTY (2005) (arguing that the Constitution should be interpreted in a way that promotes democratic participation).

VI. COUNTER-ARGUMENTS CONSIDERED

A. Counterargument: Requiring 501(c)(4)s to Disclose Their Donors Would Violate the Constitutional Principles Set Forth in NAACP v. Alabama and McIntyre v. Ohio

1. Background

The courts have rightfully been wary of laws requiring political disclosure. Throughout the twentieth century, the States employed dozens of strategies in an effort to suppress the black vote.[170] In 1927, for example, the Court struck down a Texas law preventing black voters from participating in primary elections.[171] In 1944, the Court was forced to strike down a "reenacted" version of this same Texas law.[172] In 1953, the Court held that Texas could not delegate its control over polling stations to private, racially discriminatory organizations.[173] Racially discriminatory voting regulations such as these "infected the electoral process in parts of [the] country for nearly a century."[174] This served as the backdrop for *NAACP v. Alabama*.

In *NAACP v. Alabama*, the NAACP was charged with violating an Alabama law requiring out-of-state corporations to "qualify" with the Secretary of State before doing business in the state.[175] During the discovery process, the state served the NAACP with a subpoena, requesting the names and addresses of all the association's Alabama members.[176] Compelled disclosure of this sort, the Court held, impermissibly curtailed the members's freedom of association.[177] Requiring a revelation of membership could likely lead to the sort of reprisals that would chill core First Amendment activity, such as "loss of employment, threat[s] of physical coercion, and other manifestations of public hostility."[178] For this reason, the state cannot compel the disclosure of an advocacy group's members.

The Court further extended this holding in *McIntyre v. Ohio Elections Commission*, where the Court held that private citizens have a First Amendment right to disseminate anonymous campaign literature.[179] The

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170 *See* Shelby Cty. v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting).
171 Nixon v. Herndon, 273 U.S. 536, 541 (1927).
172 Smith v. Allwright, 321 U.S. 649, 658 (1944).
173 Terry v. Adams, 345 U.S. 461, 469 (1953).
174 South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).
175 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 451 (1958).
176 *Id.* at 453.
177 *Id.* at 462–63.
178 *Id.* at 462.
179 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

state cannot indiscriminately outlaw anonymous speech, the Court held.[180] To do so would chill the freedom of speech and would disallow pamphleteers to express their ideas without "fear of retaliation."[181]

2. NAACP and McIntyre Do Not Prevent States from Requiring 501(c)(4) Organizations to Disclose Their Donors's Identities.

Requiring 501(c)(4) organizations to disclose their political donors would not run afoul of the First Amendment.[182] In 2011, the federal DISCLOSE Bill reached the House Floor.[183] This Bill, which was ultimately defeated, would have required 501(c)(4) organizations to disclose their contributors if the organization made independent expenditures for express advocacy or electioneering communications.[184] By limiting disclosure requirements to only those organizations that engage in overtly political activity, Congress likely ensured this law was sufficiently tailored to withstand First Amendment scrutiny.[185] In fact, this Bill was tailored to conform with the Supreme Court's language in *Citizens United*, which endorsed such disclosure requirements.[186]

Citizens United and its ilk demonstrate the Court's *encouragement* of these disclosure requirements.[187] "It is undoubtedly true," the Court stated in *Buckley*, that certain disclosure requirements "will deter some individuals" from engaging in expressive activity,[188] but the courts have consistently upheld disclosure requirements that are sufficiently tailored to serve the government's compelling interest in preventing corruption or the appearance of corruption in government.[189] Any good disclosure law, accordingly, would ensure it does not require more disclosure than

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180 *Id.* at 357.

181 *Id.* at 343, 357.

182 *See, e.g.*, Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After* Citizens United, 10 ELECTION L.J. 363, 401–06 (2011) (listing several ways in which Congress could constitutionally require tax-exempt organizations to disclose their political donors).

183 "DISCLOSE" was an acronym standing for Democracy Is Strengthened by Casting Light On Spending in Elections. Despite having a cringe-worthy title, this Bill would have been a very positive step toward reigning in dark money in federal elections.

184 Aprill, *supra* note 182, at 403.

185 *Id.* at 401–06.

186 *See id.* at 403.

187 *Id.* at 405.

188 *Buckley*, 424 U.S. at 68.

189 *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1459–60 (2014); *Citizens United*, 558 U.S. at 366–71; *Buckley*, 424 U.S. at 68.

necessary. The Court has made clear that disclosure cannot be compelled when doing so would cause the group to be subjected to unwanted reprisals.[190] A properly tailored law, therefore, should also include exceptions for minor political parties and disfavored minority groups.[191]

In addition to the Court "signing-off" on political disclosure requirements, scholars have also called for stricter disclosure requirements from both the States and the federal government.[192] Disclosure often makes political communications more informative and less misleading.[193] Disclosure prohibits nothing and assumes that people can process information and make better choices if they have more information. And the underlying appeal of disclosure is that it will produce informed decisions by the public, whether as voters, donors, or shareholders.[194]

B. Counterargument: Even If the Legislature Required 501(c)(4)s and Other Dark Money Organizations to Disclose Their Donors, This Still Would Not Enlighten the Electorate—Voters Would Not Research Which Candidate was Financed by Which Organization, and Even If They Did, the Vast Majority of Donors Would be Unknown to the Voter[195]

There is no denying that this objection is—at least in some part—true. The last thing on a mother's mind as she picks her kids up from soccer practice is who financed her State Senator's last campaign—she does not know, and she probably does not care. Most people do not have the time, wherewithal, or inclination to look up campaign finance disclosures. But reporters do.

This same argument could have been made to suppress the Pentagon Papers—those documents were thousands of pages in length, and no average person would have been able to comprehend those documents without the aid of the reporters at the *New York Times* and the *Washington Post*. Almost all-important political issues are too complicated and

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190 Brown v. Socialist Workers '74 Campaign Comm'n, 459 U.S. 87, 93 (1982) (citing *Buckley*, 424 U.S. at 74).

191 *See* Canyon Ferry Rd. Baptist Church v. Unsworth, 556 F.3d 1021, 1031–35 (9th Cir. 2009) (striking down a Montana law requiring the disclosure of de minimis in-kind contributions).

192 Aprill, *supra* note 182, at 401–06; Roger Colinvaux, *Political Activity Limits and Tax Exemption: A Gordian's Knot*, 34 VA. TAX REV. 1, 47–49 (2014); *see generally* Sugin, *supra* note 92.

193 Sugin, *supra* note 92, at 919.

194 *Id.* at 919–20.

195 *See* Lloyd Hitoshi Mayer, *Disclosures on Disclosure*, 44 IND. L. REV. 255, 265–67 (2010).

nuanced for the average person to understand without the help of journalists. However, that is no reason to suppress the information. We trust—at least we used to trust[196]—in our journalistic institutions to shed light into these complicated political areas. We should continue to keep this faith.

VII. CONCLUSION

In the early 1990s, Arizona's public-school system was a disgrace. Arizona had one of the lowest per-pupil spending rates, the lowest teacher salaries, and some of the largest class sizes in the country. In 1994, the Arizona Supreme Court decided *Roosevelt v. Bishop*, where the Court required the Legislature to fulfill its constitutional obligation to "establish minimum adequate facility standards and [to] provide funding to ensure that no district falls below them."[197] In response to *Roosevelt* and its progeny, the Legislature (1) substantially increased its funding of the public school system; (2) created the School Facilities Board, and charged it with developing minimum school facility adequacy guidelines; and (3) provided the school districts with "soft" funds for the purchase of textbooks, computers, school buses, and other equipment.

The time has come for the courts to require the State Legislature to meet another one of its constitutional obligations: the obligation to "provid[e] for a general publicity . . . of all campaign contributions . . . and expenditures . . . ."[198] To quote Justice Elena Kagan: "Arizonans deserve better. Like citizens across this country, Arizonans deserve a government that represents and serves them all. And no less, Arizonans deserve the chance to reform their electoral system so as to attain that most American of goals."[199] I agree.

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196 *See* Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP, Sept. 14, 2016 (finding that less than one-third of Americans have "a fair amount" of trust in the media), available at http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspxhttp://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx.

197 Hull v. Albrecht, 960 P.2d 634, 637 (Ariz. 1998) (*Albrecht II*).

198 Ariz. Const. art VII, § 16.

199 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 785 (2011) (Kagan, J., dissenting).