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Commissioner

ARIZONA CORPORATION COMMISSION

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September 8, 2015

Arizona Corporation Commission
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RE: Docket No. AU-00000A-15-0309

SEP 08 2015

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Dear Colleagues:

Based on the submission of a proposed Commission policy on candidate contributions by Commissioner Burns and Chairman Bitter Smith, I felt it important to make clear my views on that proposal by submitting this letter to the official docket.

The genesis of this conversation appears to be the frequent, unrelenting and unsupported allegations by the news media and other organizations that certain regulated entities inappropriately expended monies in the last election cycle using independent expenditure committees.

I'd like to begin my discussion of this matter by quoting the First Amendment to the United States Constitution. It states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The right to engage in free speech, with particular emphasis on political speech, and the right of free association¹ are two of this nation's most important founding principles. In the First Amendment, the framers recognized that freedom of speech not only serves to protect the rights of the individual, but also serves to protect our society as a whole. They also categorically rejected the notion that government gets to decide *who is allowed to speak and who is not*.

The Supreme Court has upheld this interpretation of the First Amendment many times. Justice Powell summarized these sentiments succinctly when he stated, "the inherent worth of speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union or individual."² Justice Marshall's statement that, "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"³ is also highly relevant here. Any attempt to control who speaks or what is said runs counter to the First Amendment.

¹ The text of the First Amendment does not specifically mention the right to association. However, the United States Supreme Court held in NAACP v. Alabama that the freedom of association is an essential part of the freedom of speech because, in many cases, people can engage in effective speech only when they join with others.

² First National Bank of Boston v. Bellotti (1978)

³ Police Department of City of Chicago v. Mosley (1972)

In the 2010 Citizens United case the Supreme Court addressed several issues relating to the First Amendment and political speech and found that restrictions on organizations' (including corporations) involvement in political advocacy are a clear violation of the First Amendment. The Court also recognized that organizations are associations of individuals and those individuals do not lose their right to free expression just because they choose to associate with other individuals. The Citizen's United decision affirms the freedom to discuss public issues and debate the qualifications of candidates during campaigns for public office. The Court clearly stated that the First Amendment protects political speech and by inference, spending money to engage in political speech.

I believe this is one of the core rights guaranteed by the First Amendment.

Moreover, political speech about candidates prior to an election is also a core Constitutional value. To attempt to prohibit people or organizations from spending money to engage in political speech is the same as prohibiting them from speaking.

In my personal view, more political speech, whether it comes from corporations, unions, associations, self-appointed "watch dog" groups or individuals is a good thing because the ability to engage in robust discussion about the qualifications of candidates in an election is a good thing.

It is also worth noting that corporations do not speak in one voice. In recalling my own recent campaign, there were many corporations, organizations and associations that held widely divergent views regarding who were the best qualified candidates for the office of Corporation Commissioner.

The Court also rejected the claim that independent expenditures by corporations or organizations cause corruption by their advocacy. In its decision the Court stated "The fact that speakers may have influence or access to elected officials does not mean those officials are corrupt." More importantly, "The fact that a corporation, or any other speaker is willing to spend money to try and persuade voters *presupposes that the people have the ultimate influence over elected officials.*" (emphasis added) In other words, "The First Amendment confirms the freedom to think for ourselves."

Citizens United allows *all* corporations and organizations free speech, small or large, non-profit or for profit. They are free to present their views in the marketplace of free expression.

Some will argue that these competing messages serve to confuse the voter or attempt to unfairly influence the voters. In my view, we need to respect the voter's ability to discern the truth of the various arguments and filter out the misrepresentations, distortions and outright lies that may be presented.

I also find it ironic that many in our local media, including members of the Arizona Republic editorial board, are perfectly content to argue to deprive Arizona corporations of their First Amendment rights as well as deprive the voters of all available information on candidates. One would think that the press, one of the primary beneficiaries of the First Amendment, would be more vigorously defending the First Amendment rights of all others. That does not seem to be the case here.

The point that my two colleagues and the news media seem to be missing is this: political discourse in a constitutional republic like the United States can be raucous, messy and sometimes very contentious.

Elections provide an open forum for the discussion and examination of issues and debate on the qualifications of candidates for public office. Voters have the right to know about every piece of information

that might be relevant to their decision making process. And individuals, associations, unions and corporations have the right to inform the voters by independent issue or candidate advocacy.

In addition to these fundamental constitutional issues, there are real legal and practical issues with the proposed policy. The Arizona Corporation Commission simply does not have the legal jurisdiction to enforce the voluntary compliance sought in the proposal.

Given the breadth of organizations that would be effected by the proposed policy, the Commission would have no practical means of knowing whether compliance was universal. I believe the proposed policy would have the practical effect of silencing the political speech of some, while allowing full-throated dialogue by others.

As a result of carefully considering the arguments above, I have reached several conclusions:

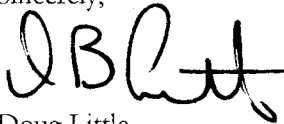
1. Campaign advocacy is fully permitted under the guarantees provided by the First Amendment and fully affirmed by the Supreme Court in the Citizens United case.
2. Any company, association, union or organization is entitled to engage in political speech, including independent advocacy for candidates and issues.
3. As written, the proposed policy would have the effect of violating the constitutional rights of any entity appearing before the Commission. This would include regulated entities, un-regulated entities, interveners, issue advocacy groups and virtually anyone else that would be a part of the regulatory process.
4. Any adoption of a policy by the Corporation Commission regarding campaign spending by any entity, whether they are regulated or not, is not a proper action by this Commission and if adopted would have a chilling effect on free speech by those entities and by direct implication would violate their First Amendment rights.
5. The proposed policy is legally and practically unenforceable.

It is for the reasons stated above that I cannot and will not support the proposal offered by Commissioner Burns and Chairman Bitter-Smith.

I believe that supporting such a proposal would be a violation of my oath of office in which I swore to protect and defend the Constitutions of the United States and of the State of Arizona.

Respectfully submitted this 8th day of September 2015.

Sincerely,



Doug Little
Commissioner
Arizona Corporation Commission

cc: See Service List