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Arizona Corporation Commission

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Commissioner Bob Burns
Arizona Corporation Commission
Commissioners' Wing
1200 W. Washington - 2nd Floor
Phoenix, Arizona 85007

Subj: Workshop to Explore Political Spending & Compelled Speech

Dear Commissioner Burns:

We understand that you are currently seeking information from the regulated utilities to determine whether and to what extent ratepayer funds are used for political activity.

It is our opinion that the use of ratepayer funds for any political activities implicates the First Amendment rights of ratepayers.

The Goldwater Institute has been involved for several years in litigation and policy measures to ensure that First Amendment rights are respected by protecting individuals from compelled speech — that is, edicts that force people to fund political advocacy without their consent. *See, e.g., Fleck v. North Dakota*, No. 1:15-CV-13 (D.N.D. 2015); *ASA v. Regents*, 2:13-CV-306 (D. Ariz. 2013).

Individuals and groups — including the regulated utilities — have the right to engage in political speech without unreasonable burdens such as undue disclosure requirements. *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958); *see also In re First Nat. Bank*, 701 F.2d 115, 118 (10th Cir. 1983) (“The chilling effect of a summons served by an IRS agent to obtain membership records of a tax protester group has been said to be “readily apparent”).

But no one has a constitutional right to use the power of law to force people to subsidize speech with which they may disagree. The point was put best by Thomas Jefferson, when he said, “to compel a man to furnish contributions of money for the propagation of opinions, which he disbelieves is sinful and tyrannical.”

The U.S. Supreme Court has held in a variety of contexts that people cannot be forced to fund political speech of private groups without their consent. *See, e.g., Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217 (2000); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012).

Courts throughout the country have applied this bedrock First Amendment principle against compelled funding specifically in the context of political spending by utilities. *See, e.g., Edison Co. v. Pub. Serv. Comm'n of New York*, 107 A.D.2d 73 (N.Y. 1985); *Boushey v. Pac. Gas & Elec. Co.*, 10 P.U.R.4th 23 (June 3, 1975); *El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n*, 706 P.2d 511 (N.M. 1985).

Arizona law is even more protective of individual rights than is the federal First Amendment. It stands to reason that if the federal Constitution forbids compelled speech, the Arizona Constitution is even more protective of individual rights.

As you are well aware, state and local laws provide exclusive territorial monopolies to the regulated utilities. *See, e.g., ARIZ. REV. STAT. §§ 40-202(B)(3), 40-281, 9-501, et seq.* The Arizona Constitution and state statute confer on the ACC the authority to set just and reasonable rates to be charged by the regulated utilities. *See ARIZ. CONST. ART. 15, § 2-3.*

This creates a circumstance where consumers located within the territorial monopoly of a regulated utility are legally forced to do business with that utility and to pay the rates that utility charges. A serious constitutional problem arises if the regulated utility diverts any portion of such compelled funds to political spending without the consent of ratepayers. An individual should not be forced by the government to subsidize another's speech against his will—whether through tax dollars, or in the form of a government-created monopoly.

In light of the precedents cited above, and the numerous and recent reports of political spending by regulated utilities, we support your efforts to ensure that such spending does not originate from rates that consumers are compelled by law to pay.

We appreciate your thoughtful consideration of this matter.

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