

2013 AG Opinions

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STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>December 2, 2013</p> | <p>No. I13-012 (R13-018)</p> <p>Re: Charging Copying Fees Under Arizona's Public Records Law</p> |
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To: Dennis Wells
Arizona Ombudsman-Citizens' Aide

Questions Presented

You asked for clarification as to what constitutes appropriate fees for inspecting and copying public records under Arizona Revised Statutes ("A.R.S.") § 39-121. Specifically, you requested guidance as to the following:

1. May a public body charge a copying fee for a public records request if the requesting party has not specifically asked for a copy of the record but the public body must make a copy to allow for inspection?
2. May a public body charge a copying fee when a requesting party copies public records using a personal device, provided that the copying is not disruptive to public business?

Summary Answers

1. No. Pursuant to Arizona's public records law, a member of the public is entitled to inspect public records at all times during a public body's office hours. Although a public body

may charge a fee to copy and mail public records when that action is requested, the statute does not expressly permit charging a fee when the requesting party wants merely to inspect public records. If, for whatever reason, the public body must make a copy of a public record to properly provide the record to the requesting party for inspection, then charging a copying fee is not appropriate.

2. No. A public body may charge copying fees under Arizona’s public records law only if the public body itself makes the copies using public resources and furnishes them to the requesting party. In the event that a member of the public seeks to inspect public records and make copies using his or her own personal device, Arizona’s public records law does not allow a public body to charge a fee.

Background

Arizona’s public records law requires that “[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.” A.R.S. § 39-121. The public records law applies to any agency, branch, department, board, bureau, commission, council, or committee of the State or any political subdivision of the State. A.R.S. § 39-121.01(A)(2).¹ The purpose of Arizona’s public records law is to “open government activity to public scrutiny.” *Lake v. City of Phx.*, 222 Ariz. 547, 549, ¶ 7, 218 P.3d 1004, 1006 (2009) (emphasis and internal quotation marks omitted).

In addition to the public’s right to inspect public records at all times during office hours, Arizona’s public records law allows public bodies to provide copies of public records upon

¹ Arizona’s public records law applies to any officer of any “public body.” A.R.S. § 39-121.01(A)(1). The statute defines the term “public body” to include “this state, any county, city, town, school district, political subdivision or tax-supported district in this state, any branch, department, board, bureau, commission, council or committee of the foregoing, and any public organization or agency, supported in whole or in part by monies from this state or any political subdivision of this state, or expending monies provided by this state or any political subdivision of this state.” A.R.S. § 39-121.01(A)(2). Because the statute uses the term “public body,” this Opinion refers throughout to the rights and responsibilities of Arizona’s “public bodies” under the Arizona public records law.

request. A.R.S. § 39-121.01(D). Public bodies may charge certain fees when responding to a request for copies of public records. A public body may charge different fees depending on whether the requesting party intends to use the public records for a “commercial” or a “noncommercial” purpose. *Compare* A.R.S. § 39-121.01(D) *with* A.R.S. § 39-121.03(A). The law defines a “commercial purpose” as “the use of a public record for the purpose of sale or resale,” use of the record to obtain “names and addresses from public records for the purpose of solicitation,” or “for any purpose in which the purchaser can reasonably anticipate the receipt of monetary gain from the direct or indirect use of the public record.” A.R.S. § 39-121.03(D).

When a requesting party intends to use the public records for a commercial purpose, the public body may charge fees for all of the following;

1. A portion of the cost to the public body for obtaining the original or copies of the documents, printouts or photographs.
2. A reasonable fee for the cost of time, materials, equipment and personnel in producing such reproduction.
3. The value of the reproduction on the commercial market as best determined by the public body.

A.R.S. § 39-121.03(A). In contrast, A.R.S. § 39-121.01(D) provides that when a requesting party does not intend to use the public record for a commercial purpose, the custodian may charge fees only for “copying and postage.” Because you do not specify that you are asking about a request for public records intended for a commercial purpose, this Opinion addresses only issues related to appropriate fees for responding to requests for public records that are not intended to be used for a commercial purpose.

Analysis

Section 39-121.01(D) provides as follows:

Any person may request to examine or be furnished copies, printouts or photographs of any public record during regular office

hours or may request that the custodian mail a copy of any public record not otherwise available on the public body's website to the requesting person. The custodian may require any person requesting that the custodian mail a copy of any public record to pay in advance for any copying and postage charges. The custodian of such records shall promptly furnish such copies, printouts or photographs and may charge a fee if the facilities are available, except that public records for purposes listed in section 39-122 or 39-127 shall be furnished without charge.

This plain language indicates that a public body may charge a fee for responding to a public records request for a noncommercial purpose for (1) postage charges to mail copies of public records to the requesting party or (2) copying public records and furnishing them to the requesting party if the proper facilities are available.

The questions addressed here concern the scope of what it means to "copy" a public record so that a fee is appropriate. Under the first question, if the requesting party wants only to *inspect* specific public records, but the public body must first print a paper copy of the record to enable the requesting party to inspect the record, does this qualify as a "copy" of the record so that a copying fee is appropriate? The second question is whether a public body may charge a fee for "copying" the record when the requesting party wants to copy the record using his or her own personal device?

- A. A public body may not charge a copying fee when a member of the public asks only to inspect the record.

When a member of the public asks to inspect a public record during office hours, the custodian of the record may need to print out a paper copy to facilitate inspection. For example, a public body may keep certain records in electronic format that are not easily accessible for inspection by a requesting party. *See Lake*, 222 Ariz. at 551, ¶ 14, 218 P.3d at 1008 (acknowledging a public body's right to store public records in electronic format). Or the record may require redactions prior to public inspection, and redaction may necessitate copying the

document. *See Phx. Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (App. 2007) (providing that if portions of a public record merit confidentiality, redaction of that information is appropriate before allowing inspection).

To determine whether a public body can impose a fee for inspecting public records, we examine the language of Arizona’s public records statutes, which is the best and most reliable index of their meaning. *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 303, ¶ 9, 93 P.3d 501, 503 (2004). Pursuant to A.R.S. § 39-121.01(D)(1), if the requesting party specifically asks the custodian to “mail a copy” of the public record, the custodian may charge postage and copying fees. Additionally, the statute authorizes the custodian to “charge a fee” for “furnish[ing] . . . copies, printouts or photographs” if the necessary “facilities are available.” *Id.* Accordingly, although the law explicitly authorizes a public body to pass along the cost of making copies of public records, it does not explicitly authorize charging a fee for taking the necessary measures to make public records available for inspection.

The Arizona Court of Appeals previously analyzed Arizona’s public records law and distinguished a public body’s right to impose a fee for making copies on the requesting party from the right to charge the requesting party for costs that the public body incurs in locating and preparing the public record.² In *Hanania v. City of Tucson*, 128 Ariz. 135, 136, 624 P.2d 332, 333 (App. 1981), the court determined that the public records law allowed a public body to charge a fee for copying a public record, but not for searching for or retrieving the record. *Id.*; *see also* Ariz. Att’y Gen. Op. I86-090 (confirming that amendments to Arizona’s public records law did not authorize a public body to charge a copying fee for searching for records). Under *Hanania*, if a public body cannot charge a fee for searching for or retrieving a public record for

² The court in *Hanania* examined a version of Arizona’s public records law that predated significant 1977 revisions, but those revisions do not affect the court’s analysis for purposes of this Opinion.

inspection, then a public body likewise cannot pass on the cost of its decision to copy a record to facilitate inspection. The purpose of Arizona's public records law is to allow members of the public open access to inspect public records during regular office hours. This purpose would be hindered by imposing fees on members of the public who travel to a public office solely to inspect a public record.

This conclusion is consistent with the Ohio Supreme Court's interpretation of Ohio's public records law. In *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 640 N.E.2d 174, 177 (Ohio 1994), the court interpreted Ohio's public records law to mean that public agencies could not impose fees for having to make internal copies to allow a member of the public to inspect certain records. The court analyzed Ohio Revised Code ("O.R.C.") § 149.43, which required that "[a]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." 640 N.E.2d at 177 (quoting Ohio Revised Code § 149.43(B)). Although Ohio's law allowed fees for copying records, a newspaper publisher who asked to inspect police department public records challenged the department's decision to charge the publisher a fee for the copies that had to be made to redact the original records. *Id.* at 178. The court concluded that the fact that the department needed to make internal copies to make redactions did not support charging copying fees to the publisher, who wanted only to look at the records: "The right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under [O.R.C.] 149.43." *Id.*

So it is under Arizona's public records law, which does not condition the right to inspect records on the payment of a fee either. A public body in Arizona therefore cannot charge copying fees to recoup the cost of copies made internally to allow a member of the public to inspect the records.

- B. A public body may not charge a fee for a member of the public to use a personal device to copy public records.

The above analysis also supports the conclusion that a public body may not charge a fee for a member of the public to use a personal device to copy public records. Because the public body may only charge copying costs and not inspection fees, then the public agency may not charge copying costs when it makes public records available to a requesting party who copies those records with his or her own personal device. This conclusion is also supported by A.R.S. § 39-121.01(D)(3).

Arizona's public records law includes a separate provision addressing a custodian's responsibilities in the event that a party requests a copy of a public record and the custodian "does not have facilities for making copies." Section 39-121.01(D)(3) provides as follows:

If the custodian of a public record does not have facilities for making copies, printouts or photographs of a public record which a person has a right to inspect, such person shall be granted access to the public record for the purpose of making copies, printouts or photographs. The copies, printouts or photographs shall be made while the public record is in the possession, custody and control of the custodian of the public record and shall be subject to the supervision of such custodian.

Section 39-121.01(D)(3) addresses situations in which copying facilities are not available. Unlike the language in section 39-121.01(D)(1), this provision does not explicitly allow the public body to charge a fee when a member of the public must make his or her own copies of public records for lack of "facilities." Section 39-121.01(D)(3) therefore expresses a legislative intent to not authorize a fee for a member of the public to make his or her own copies of public records. When a public body has the facilities to copy records, but the requesting party would rather make copies using a personal device (to avoid a fee), this legislative intent must govern to avoid an absurd result, i.e., charging a fee for a service (copying) that the public body does not provide. *See Norman v. State Farm Mut. Auto Ins. Co.*, 201 Ariz. 196, 200, ¶ 12, 33

P.3d 530, 534 (App. 2001) (holding that statutory interpretation requires that courts “do not conclude that the legislature intended an absurdity”).

Interpreting sections 39-121.01(D)(1) and 39-121.01(D)(3) to preclude copying fees in this circumstance also comports with attorney general opinions from other jurisdictions. *See, e.g.,* Ala. Att’y Gen. Op. 2009-076 (“[I]t is the opinion of this Office that the regular copying fee for public records cannot be charged to individuals using personal cameras or other electronic devices.”); La. Att’y Gen. Op. 08-0179 (“[T]he right of a public entity to charge a fee for producing copies does not entitle a public entity to charge a fee for requestors to view and scan the documents themselves.”); Ohio Att’y Gen. Op. 2004-011 (“A person who is using a digital camera, which is not provided by [the public body], to make copies of records is akin to someone who is merely inspecting the records. The [public body] is providing no photocopying or other service for which he may charge”); Okla. Att’y Gen. Op. 06-35 (“If a person copies a record using his or her own personal recording device we find no statutory authority for the agency maintaining such records to charge a fee for such service.”).

For these reasons, a public body cannot charge a copying fee when a member of the public inspects a record and makes a copy of the record using his or her own personal device.³

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³ The specific question posed, and this Opinion, assume that the requesting party’s use of a personal device to make copies is not “disruptive to public business.” Nothing in this Opinion should be construed to permit a person to use a personal device to make copies when the custodian determines that such use would disrupt public business. Moreover, this Opinion does not require a public body to permit the use of a personal copying device that could destroy, damage, or alter the public documents. *Cf. Adams Cnty. Abstract Co. v. Fisk*, 788 P.2d 1336, 1339-40 (Idaho App. 1990) (precluding a public agency using a personal copying device to copy a public record prior to the record being transferred to microfilm in part because the physical handling of the original document risks altering or damaging the record); *Moore v. Bd. of Chosen Freeholders of Mercer Cnty.*, 184 A.2d 748, 754 (N.J. Super. Ct. App. Div. 1962) (noting that the public’s right to use personal copying devices to copy public records includes a limitation that the device’s “performance be such as not to damage or impair the records”); *Matte v. City of Winooski*, 271 A.2d 830, 832 (Vt. 1970) (recognizing the importance of preserving public records and noting that a custodian of public records has the discretion to decide how best to preserve records).

Conclusion

Arizona's public records law allows a public body to impose copying fees in response to public records requests for noncommercial purposes. Under that law, a public body can impose copying fees to offset copying costs only when a requesting party asks the public body to furnish copies of records. A public body should not impose copying fees on a party making a public records request when the requesting party asks only to inspect records or uses a personal device to make his or her own copies.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL October 7, 2013 | No. I13-011 (R13-016) Re: Voter Registration |
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To: Ken Bennett
Arizona Secretary of State

Question Presented

In light of the recent decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, ___ U.S. ___, 133 S. Ct. 2247 (2013), you have asked the following questions regarding the implementation of the evidence-of-citizenship requirements contained within Proposition 200:

1. Approximately ten percent of applicants who use the Federal Form do not provide sufficient information to enable the county recorders to determine citizenship. Does Arizona law permit those applicants to vote in state and local elections?
2. If the answer to question number 1 is no, does Arizona law authorize the issuance of "federal election only" ballots to those applicants?
3. If the answer to question number 1 is no, are those individuals qualified to sign candidate, initiative, referendum, and recall petitions for state and local matters?

Summary Answer

1. No. Registrants who used the Federal Form and did not provide sufficient evidence of citizenship are not eligible to vote for state and local races. For state and local matters, registration is contingent on each applicant's providing evidence of citizenship.

2. Yes. Arizona law authorizes the issuance of ballots containing only the federal races to the registrants described in the previous question.

3. No. Under Arizona law, only registered voters are qualified to sign candidate, initiative, referendum, and recall petitions.

Background

Since statehood, the State of Arizona has conditioned the right to vote on citizenship:

No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be prescribed by law. The word "citizen" shall include persons of the male and female sex.

Ariz. Const. art. VII, § 2(A). The Arizona Constitution further provides that "[t]here shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, § 12. The Legislature was and is authorized to enact all necessary laws to effectuate the Constitution's provisions. Ariz. Const. art. XX, § 21.

The Legislature enacted numerous statutes that govern voter qualifications and the voter-registration process. Every resident of the State is qualified to register to vote if he or she is a citizen of the United States and meets other requirements. A.R.S. § 16-101(A). No elector shall vote in an election unless the elector has been registered to vote in the particular election district

for which the election is being conducted. A.R.S. § 16-120. A qualified elector is defined as someone who has been properly registered to vote and who is at least eighteen years of age on or before the election date. A.R.S. § 16-121. Registration is a prerequisite to voting. A.R.S. § 16-122.

In 1993, Congress passed the National Voter Registration Act (“NVRA”), which requires each State to permit prospective voters to register to vote in elections for federal office by any of three methods: simultaneously with a driver’s license application, in person, or by mail. 42 U.S.C. § 1973gg-2(a). The Election Assistance Commission (“EAC”) administers the NVRA. The NVRA’s primary stated purpose is to “establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office.” 42 U.S.C. § 1973gg(b)(1).

Under the NVRA, the federal mail registration form (the “Federal Form”) includes a statement that specifies each eligibility requirement, including citizenship, contains an attestation that the applicant meets each such requirement, and requires the applicant’s signature under penalty of perjury. 42 U.S.C. § 1973gg-7(b)(2). The EAC is required to work in consultation with the chief election officers of the States to develop the Federal Form, and the form is to include state-specific instructions. 42 U.S.C. § 1973gg-7(a).

In 2004, Arizona voters passed Proposition 200, a citizens’ initiative that was designed in part “to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day.” *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006). One of Proposition 200’s provisions, codified as A.R.S. § 16-152(A)(22), requires county recorders to reject voter registration forms that are not accompanied by sufficient evidence of citizenship. Another provision of Proposition 200, codified as A.R.S. § 16-166(F), sets forth the following acceptable methods or documents to prove citizenship:

1. The number of the applicant's driver license or nonoperating identification license, if issued after October 1, 1996.
2. A photocopy of the applicant's birth certificate.
3. A photocopy of pertinent pages of the applicant's United States passport.
4. A presentation to the county recorder of the applicant's naturalization documents or the number of the certificate of naturalization.
5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
6. The applicant's Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

Once a registrant submits sufficient evidence of citizenship, the registrant need not do so again unless he or she changes his or her residence to a different county. A.R.S. § 16-166(G). You and former Secretary of State Jan Brewer have both asked the EAC to include information regarding Proposition 200 in the state-specific instructions for the Federal Form, but have not received EAC's approval. EAC issued a prompt denial, which is now being appealed in court.

In 2006, two groups of plaintiffs filed suit against the State of Arizona¹ seeking to enjoin the Proposition 200's voting provisions. After years of litigation, the United States Supreme Court issued its Opinion in *Arizona v. Inter Tribal Council of Arizona, Inc.* (hereinafter "*Inter Tribal Council*"), ___ U.S. ___, 133 S. Ct. 2247 (2013) on June 17, 2013. The Court held that Arizona must accept and use the Federal Form to register voters for elections for federal office. *Id.* at 2259-60. The Court held that the NVRA "precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." *Id.* at 2260. In that decision, the United States Supreme Court noted that determining qualifications for voters in federal elections is a state, not a federal function. The Court stated that "Arizona is correct that it

¹ The plaintiffs also named election officials from Arizona's fifteen counties as defendants. For brevity, this Opinion refers to all of the defendants collectively as the State.

would raise serious constitutional doubts if a federal statute precluded a state from obtaining the information necessary to enforce its voter qualifications.” *Id.* at 2259–60.

The Supreme Court stated that Arizona could apply to the Elections Assistance Commission for a state-specific requirement that potential registrants, using the federal as well as the state form, furnish evidence of citizenship, and if the EAC did not grant the state’s specific requirements, to pursue the constitutional issues in court. Arizona, as instructed by the U.S. Supreme Court, is now in court pursuing those constitutional issues.

In the meantime, although the Court did not specifically address whether a Federal Form applicant could vote in state or local elections, the Court noted that state-developed voter registration forms could be used “in both *state and federal elections*” and that the Federal Form guarantees that a simple means of registering to vote in *federal* elections will be available. *Id.* at 2255 (emphasis added).

The Ninth Circuit Court of Appeals, in its preceding decisions, noted that the NVRA did not preclude Arizona from enforcing its evidence-of-citizenship requirement in state election registrations. *Gonzalez v. Arizona*, 677 F.3d 383, 404 n.30 (9th Cir. 2012); *Gonzalez v. State of Arizona*, 624 F.3d 1162, 1191 n.20 (9th Cir. 2010).

After the Supreme Court issued its mandate, the District Court for the District of Arizona entered its final judgment in the *Gonzalez* matter, stating the following:

For each voter registration applicant who submits a Federal Form that meets the requirement of the Federal Form, but does not contain information required by A.R.S. § 16-166(F), Defendants shall create a record for a successful registration of that individual and promptly notify that registrant of his or her eligibility to vote *in elections for Federal office*.

Gonzalez v. Arizona, Case No. CV06-1268-PHX-ROS (Dkt. 1123) (D. Ariz. Sept. 11, 2013) (emphasis supplied).

Analysis

- A. To implement the provisions of Proposition 200 and the NVRA, Arizona's election officials must establish two distinct voter registration rolls.

Because Arizona law requires a registration applicant to provide evidence of citizenship, registrants who have not provided sufficient evidence of citizenship should not be permitted to vote in state and local elections unless such a dual registration system is invalid under the federal or state constitution. The courts that have examined dual registration systems have not specifically addressed an evidence-of-citizenship requirement.² Instead, the courts have disapproved dual registration systems for reasons distinguishable from the situation presented here.

1. The U.S. Supreme Court has not foreclosed the possibility of a constitutionally acceptable dual registration system.

In *Young v. Fordice*, 520 U.S. 273 (1997), the Supreme Court analyzed Mississippi's conversion to a dual registration system after the NVRA's enactment. Mississippi, a covered jurisdiction subject to the Voting Rights Act's preclearance requirements,³ submitted a plan referred to as the "Provisional Plan," as opposed the "Old System" in place before the NVRA's effective date. *Id.* at 277. The Department of Justice precleared the Provisional Plan. *Id.* at 279. Between January 1, 1995, and February 10, 1995, the Mississippi election officials registered 4,000 new voters under the Provisional Plan. *Id.* at 278. Thereafter, the state attorney general concluded that the Provisional Plan registrations did not meet state requirements and state

² In addition to the cases discussed below in subsections A.1 through A.3, a district court in Mississippi examined the State's dual registration system, which required voters to register separately for county and municipal elections. *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987). Because the case involved allegations of purposeful racial discrimination with significant findings of disparate impact after a full trial and did not involve separate state and federal voter-registration rolls, it is distinguishable from the current scenario. In that case, the court concluded that the Mississippi dual registration system violated Section 2 of the Voting Rights Act. *Id.* at 1268.

³ See Atty. Gen. Op. 113-008 (2013) for a more detailed discussion of the Voting Rights Act's preclearance requirement and its application to Arizona.

officials were then asked to notify those 4,000 registrants that they were not registered to vote in state or local elections. *Id.* On February 10, 1995, Mississippi began using what was called the “New System” to register people for federal elections and went back to the Old System for registration for state elections. *Id.* The State did not seek preclearance of the change from the Provisional Plan to the hybrid Old System/New System plan. *Id.* at 280.

The question presented to the Supreme Court was whether Mississippi’s changes required preclearance, not whether dual registration that differentiates between registration for state and federal elections violated any constitutional provisions. *Id.* at 275. With respect to the propriety of a dual registration system, the Court stated as follows:

Finally, Mississippi argues that the NVRA, because it specifically applies only to registration for federal elections, 42 U.S.C. § 1973gg-2(a), automatically authorizes it to maintain separate voting procedures; hence § 5 cannot be used to force it to implement the NVRA for all elections. If Mississippi means that the NVRA does not forbid two systems and that § 5 of the VRA does not categorically—*without more*—forbid a State to maintain a dual system, we agree. . . . The question here is “preclearance. . . .”

Id. at 290–91 (emphasis in original).

In *Shelby County, Alabama v. Holder*, __ U.S. __, 133 S. Ct. 2612, 2631 (2013), the Supreme Court struck down the Voting Rights Act’s coverage formula. Consequently, Arizona is no longer subject to the preclearance requirement of the Voting Rights Act’s Section 5. The Supreme Court has not addressed another dual registration scenario since *Young*. Justice Alito noted in his dissent in *Inter Tribal Council* that it would be “burdensome for a State to maintain separate federal and state registration processes with separate federal and state voter rolls.” 133 S. Ct. at 2272. Nevertheless, the Supreme Court has not prohibited a State from doing so.

2. If adopted, Arizona's dual registration system will not be based on an unconstitutional distinction.

In *Haskins v. Davis*, 253 F. Supp. 642 (E.D. Va. 1966), the court considered Virginia's enactment of a dual registration system in response to the Twenty-Fourth Amendment's prohibition against poll taxes as a qualification for voting in a federal election.⁴ The court noted that Virginia's poll tax on state and local elections had been held to violate the Equal Protection Clause shortly before the court considered the *Haskins* matter. *Id.* at 642-43 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966)).⁵ Because the basis of the dual registration system was an unconstitutional distinction, the *Haskins* court held that the dual registration system violated the Equal Protection Clause. *Id.* at 643 ("No rational basis exists for distinction between persons registered to vote only in federal elections and those registered to vote in all elections.").

Here, unlike in *Haskins*, there is a legitimate reason for the distinction between state and federal registration systems. The NVRA requires Arizona election officials to accept and use the Federal Form to register voters for federal elections and thereby preempts Proposition 200 with respect to federal elections. But the NVRA does not apply to state and local elections. *See, e.g.*,

⁴ The Twenty-Fourth Amendment to the U.S. Constitution, which was ratified on January 23, 1964, provides as follows:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

⁵ The *Harper* Court addressed Virginia's argument that it could exact fees from citizens for many different kinds of licenses and that voting was no different:

But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.

Harper, 383 U.S. at 668.

42 U.S.C. § 1973gg-2(a) (“[I]n addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for *Federal* office. . . .”) (emphasis supplied). As the courts repeatedly held in the *Gonzalez* cases, requiring registrants to provide evidence of citizenship does not violate their constitutional rights.

First, the Ninth Circuit Court of Appeals held that Proposition 200 is not a poll tax even though some Arizonans may be required to spend money to obtain the necessary documents. *Gonzalez v. Arizona*, 485 F.3d 1041, 1048 (9th Cir. 2007). This case therefore differs from *Haskins* on that basis alone.

Second, in denying the Plaintiffs’ request for a permanent injunction, the district court made numerous significant findings of fact and conclusions of law. The district court held that the plaintiffs had failed to demonstrate that Proposition 200’s evidence-of-citizenship requirement excessively burdened their right to vote. *Gonzalez v. Arizona*, Case No. CV06-1268-PHX-ROS (Dkt. 1041 at 29–34) (D. Ariz. Aug. 20, 2008). The court also held that the State had demonstrated important regulatory interests and actual instances of previous voter fraud. *Id.* at 34–35. The court concluded that “Proposition 200 enhances the accuracy of Arizona’s voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots,” and held that as a result, Proposition 200 did not violate the Equal Protection Clause as an undue burden on the fundamental right to vote. *Id.* at 35. The district court further held that Proposition 200’s registration provisions did not violate the Equal Protection Clause with respect to naturalized citizens, did not violate Section 2 of the Voting Rights Act, did not violate the plaintiffs’ First Amendment speech and associational rights, and did not violate Title VI of the Civil Rights Act of 1964. *Id.* at 35–49.

Unlike the fees invalidated in *Haskins*, Proposition 200 has been upheld as serving a legitimate purpose and only minimally burdening voters. Proposition 200 must be implemented because it does not violate the Equal Protection Clause under the undisturbed district court and Ninth Circuit *Gonzalez* holdings.

3. The Arizona Constitution does not preclude a dual registration system.

In *Orr v. Edgar*, 670 N.E.2d 1243 (Ill. App. 1996), the Appellate Court of Illinois considered whether the State's dual registration system violated the Illinois Constitution. *Id.* at 1245. The Illinois Constitution provides that "[a]ll elections shall be free and equal." Ill. Const. art. III, § 3. The *Orr* court stated that this provision "guarantees the right to vote in Illinois and reflects a broad public policy to expand the opportunity to vote." *Id.* at 1252. The court concluded that the clause prohibited the State's creation of a "confusing system of dual and separate electorates for state and federal elections."

Arizona's Constitution contains a similar provision, but for the reasons set forth below, we believe that Arizona courts would not apply the provision the same way that the *Orr* court did. Article II, § 21 provides as follows: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. Const. art. II, § 21.

Arizona adopted this provision based on the Washington State Constitution.⁶ John D. Leshy, *The Arizona State Constitution: A Reference Guide* 37 (1993). Leshy noted that the meaning of this provision is unclear:

This provision underscores the importance of open and free elections and is effectively implemented by the more specific provisions found in Article VII. What is meant by "equal" elections is unclear. Perhaps it is a more terse form of the prohibition of discrimination in voting on account of race, color, or

⁶ Washington's provision is identical to Arizona's version. Wash. Const. art. I, § 19.

previous condition of servitude contained in section 7 of Article XX; or perhaps it incorporates a notion of equally weighted individual votes, as in a “one person/one vote” formula.

Id. at 66.

Arizona courts rarely cite, much less interpret, this provision. In *Chavez v. Brewer*, 222 Ariz. 309, 214 P.3d 397 (App. 2009), the Arizona Court of Appeals addressed a claim by various electors against then Secretary of State Jan Brewer and the election officials in the fifteen counties that the voting machines certified for use did not satisfy Arizona’s statutory requirements for accuracy and disability access. *Id.* at 313, ¶ 8, 214 P.3d at 401. Among other theories, the plaintiffs alleged that the machines violated Article 2, Section 21 because they are not accessible to individuals with disabilities in a manner that provides them the same opportunity for access and participation, including privacy and independence, as nondisabled voters. *Id.* at 319, ¶ 30, 214 P.3d at 407. They further argued that “requir[ing] some voters to vote on such a flawed and insecure system while others vote on a safer, more accurate system would result in a drastically unequal election.” *Id.*

The Arizona Court of Appeals noted that no previous Arizona cases interpreted the constitutional provision and looked to other States with similar provisions:

Other states with similar constitutional provisions have generally interpreted a “free and equal” election as one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot.

Id. at 319, ¶ 33, 214 P.3d at 407. The Court then concluded that “Arizona’s constitutional right to a ‘free and equal’ election is implicated when votes are not properly counted” and that the appellants might therefore be entitled to relief if they could demonstrate that a significant number of votes would not be counted. *Id.* at 320, ¶ 34, 214 P.3d at 408.

Shortly after the Court of Appeals issued *Chavez*, the Ninth Circuit adjudicated a case in which multiple felons challenged Arizona's disenfranchisement scheme under various provisions of the United States and Arizona Constitutions. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010). The court rejected the plaintiffs' argument that requiring them to pay off their criminal fines and restitution orders violated the Free and Equal Elections Clause, stating that "the best reading of the [provision] is that it does not apply to disenfranchised felons, but only to those who are otherwise qualified to vote." *Id.* at 1081.

These two cases demonstrate that the Free and Equal Elections Clause requires equality for all people who are qualified to vote in a particular election. Proposition 200 requires evidence of citizenship to be a qualified elector for state and local elections. A.R.S. § 16-166(F). Persons who have not provided that evidence are not qualified to vote in the state and local elections. The Free and Equal Elections Clause does not provide such individuals with a cause of action.

Other legal arguments against dual registration systems that parties have raised in other jurisdictions would be inapplicable. Neither the United States Constitution nor the Arizona Constitution forbids dual registration. The only way to give effect to Proposition 200's evidence-of-citizenship requirement is to establish separate voter rolls—one for those who have taken the additional step of providing evidence of citizenship, and another for those who have not. The NVRA requires applicants using the Federal Form to be registered to vote in elections for federal office, but it does not require them to be registered to vote in elections for state and local offices.

B. Arizona elections statutes do not preclude a separate ballot containing federal offices only.

Arizona's election statutes contain many provisions regarding the specific requirements for ballots, including their design, printing, handling, and tabulation. The Legislature has defined the word "ballot" as follows:

[I]n its relation to a voting machine, means that portion of the cardboard, paper or other material within the ballot frames containing the name of the candidate, party designation or a statement of a proposed constitutional amendment, or other question, proposition or measure with the word "yes" for voting in favor of any proposed constitutional amendment, question, proposition or measure, or the word "no" for voting against any thereof.

A.R.S. § 16-422(A)(1). It also is defined as "a paper ballot on which votes are recorded, or alternatively may mean ballot cards and ballot labels." A.R.S. § 16-444. The Legislature has not defined the term "ballot" in a way that requires a combined single ballot for all federal, state, and local elections for candidates and ballot measures.

When the Legislature enacted laws pertaining to ballots for primary elections, it included requirements such as different color designations for political parties, the use of columns, the use of instructions to guide voters regarding how many candidates can be selected for each office, and whether the candidates should be listed in alphabetical order, or rotated, etc. A.R.S. §§ 16-462 to -468. The Legislature provided comparably specific requirements for general election ballots. A.R.S. §§ 16-501 to -507. None of these statutes provide that a single ballot must contain federal, state, and local offices together. And although A.R.S. § 16-502 provides the specific order for listing candidates and ballot measures for a general election ballot, it does not mandate that there can be only one form of ballot.

Although the Legislature has not expressly authorized separate ballots, there is no existing statutory barrier to having one form of ballot containing only federal offices and a second form containing the federal, state, and local offices and ballot measures.

- C. Persons who have registered using the Federal Form without providing evidence of citizenship are not qualified electors for purposes of signing petitions for state and local matters.

Under Arizona law, only registered voters are qualified electors eligible to sign candidate, initiative, referendum, and recall petitions. As set forth above, for state and local matters, registration is contingent on each applicant's providing evidence of citizenship. All of the relevant constitutional provisions and statutes concerning the collection of petition signatures require the signers to be qualified electors. Ariz. Const. art. 4, pt. 1, § 1(7) (qualified electors required to sign a petition for initiative or referendum); Ariz. Const. art. VIII, § 1 (recall of public officers); A.R.S. § 16-314 (candidate nomination petitions); A.R.S. § 19-101 (referendum petitions); A.R.S. § 19-102 (initiative petitions); A.R.S. § 19-115(A) (requiring signers of initiative or referendum petitions to be "legally entitled to vote upon" the proposed measure); A.R.S. § 19-201 (recall petitions).

The Arizona Supreme Court has held that registration is a prerequisite to being a qualified elector for the purposes of signing petitions. First, in *Ahrens v. Kerby*, 44 Ariz. 337, 37 P.2d 375 (1934), the court considered the qualification for signatures on an initiative petition. The court examined all of the Arizona constitutional provisions that mentioned the words "elector" or "qualified elector" and concluded that it was clear that both refer "not to persons who merely have the qualifications entitling them to register, but to those who have registered and by doing so placed themselves in a position to discharge the duty to the state that possession of these qualifications imposes." *Id.* at 345, 37 P.2d at 378. The court then looked at the statutory language concerning qualifications of signers for an initiative or referendum petition

and noted that the Legislature must have felt that every person who had not registered to vote should be denied the right to sign a petition for a ballot measure, and that the registration requirement was in harmony “with the very nature of democratic government itself, because under it the individual is sovereign and exercises his power through the ballot.” *Id.* at 346, 37 P.2d at 379. The court held that it was therefore reasonable to presume that unregistered electors were ineligible to “set in motion the machinery of the law by which measures upon which they themselves could not vote might be brought before those who could.” *Id.*

The Court reiterated this point in *Whitman v. Moore*, stating “[i]t is, of course, absolutely necessary that every petitioner shall be a qualified elector who is entitled to vote” for or against the measure. 59 Ariz. 211, 223, 125 P.2d 445, 452 (1942). There, the Court affirmed the trial court’s findings that signatures by petitioners who were not registered in the correct county or precinct were properly stricken. *Id.* at 227–28, 125 P.2d at 453–54.

The general rule applicable to all types of petitions is that a person who is qualified to vote for the candidate or ballot measure at issue is qualified to sign the petition to help get that candidate or ballot measure on the ballot in the first place. As set forth above, to be a qualified elector for state and local elections, a person must comply with the evidence-of-citizenship requirement established by Proposition 200. Persons who use the Federal Form to register but do not provide evidence of citizenship cannot, as a matter of law, be qualified electors for the purposes of signing state or local candidate, initiative, referendum, or recall petitions.

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Conclusion

Proposition 200 being upheld as a legitimate means of improving the accuracy of Arizona's voter rolls and preventing voter fraud. Those registering only with the federal form, which does not include evidence of citizenship, should not vote in state elections or sign petitions. Persons seeking to register to vote must comply with Proposition 200's evidence-of-citizenship requirement in order to become a qualified elector eligible to vote in state and local elections and to sign candidate, initiative, referendum, or recall petitions. Persons using the Federal Form to register without providing evidence of citizenship are registered and qualified electors for federal offices. Arizona law does not preclude using one form of ballots for federal offices only and another form for all state offices and measures.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL September 25, 2013 | No. I13-010 (R13-012) Re: Preemption of Tucson Ordinances |
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To: Representative Brenda Barton
Arizona House of Representatives

Questions Presented

You have asked for an opinion on the following question:

1. Whether Arizona Revised Statute ("A.R.S.") § 13-3108 preempts the City of Tucson's ("Tucson's") Ordinances 11080 and 11081 of May 29, 2013?

Summary Answers

1. Yes. Ordinances 11080 and 11081 directly contradict A.R.S. § 13-3108. Moreover, Ordinances 11080 and 11081 govern a subject in a field that state law already fully occupies.

Background

In 2000, the Arizona Legislature amended A.R.S. § 13-3108(A) to read as follows:

Except as provided in subsection C of this section, a political subdivision of this state shall not enact any ordinance, rule or tax relating to the transportation, possession, carrying, sale or use of firearms or ammunition or any firearm or ammunition components in this state.

2000 Ariz. Sess. Laws, ch. 376, § 2. The amendment also included the following statement of the Legislature's intent:

It is the intent of the legislature to clarify existing law relating to the state's preemption of firearms regulation in this state. Firearms regulation is of statewide concern. Therefore, the legislature intends to limit the ability of any political subdivision in this state to regulate firearms and ammunition. This act applies to any ordinance enacted before or after the effective date of this act.

2000 Ariz. Sess. Laws, ch. 376, § 4. Since that amendment, the Legislature has made minor additions to § 13-3108(A). 2003 Ariz. Sess. Laws, ch. 162, § 1; 2010 Ariz. Sess. Laws, ch. 19, § 1; 2011 Ariz. Sess. Laws, ch. 349, § 2.

In 2010, the Arizona Legislature added two subsections to A.R.S. § 13-3108. The first subsection (now § 13-3108(D)) provides in relevant part:

A political subdivision of this state shall not enact any rule or ordinance that relates to firearms and is more prohibitive than or that has a penalty that is greater than any state law penalty.

2010 Ariz. Sess. Laws, ch. 19, § 1. The second subsection (now § 13-3108(H)) provides:

For the purposes of this section, "political subdivision" includes a political subdivision acting in any capacity, including under police power, in a proprietary capacity or otherwise.

Id.

On May 29, 2013, Tucson passed two ordinances related to firearms. The first, Ordinance 11080, provides in relevant part:

A law enforcement officer who has probable cause to believe that a person, with criminal negligence, has discharged a firearm within or into the corporate limits of the City of Tucson may request that such person submit to a blood or breath test to determine that person's alcohol concentration. In the event that the person refuses this request, the law enforcement officer may pursue a search warrant, pursuant to Title 13, Chapter 38, Article 8 of the Arizona Revised Statutes, to obtain a blood or breath test to determine that person's alcohol concentration.

The second, Ordinance 11081, provides in relevant part:

A. Any person who owns or possesses a firearm shall report the theft or loss of such firearm to the Tucson Police Department within forty-eight (48) hours of the time he or she knew or should have known the firearm has been stolen or lost, when either the owner or possessor resides in the city, or the theft or loss of the firearm occurs in the city.

...

C. A failure to report the loss or theft of a firearm as required in this section is a violation of the provisions of this section and constitutes a civil infraction, punishable by a civil sanction of one hundred dollars (\$100.00).

You have asked whether A.R.S. § 13-3108 preempts these ordinances.

Analysis

We do not address whether Tucson had an “independent and affirmative source of legislative power” to enact the ordinances at issue, *Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 169, 985 P.2d 1025, 1028 (1999), and our analysis assumes that Tucson had this power. The Arizona Constitution authorizes a city to frame its own charter, *see id.*, which then becomes the city’s “organic law” and authorizes the city to enact ordinances in certain areas, *see id.* We assume that Tucson’s charter authorized Tucson to enact the ordinances at issue.

The preemption question is distinct from the authorization question. *See id.* at 170-71, 985 P.2d at 1029-30 (“Finding the ordinance within the scope of the [city] charter does not conclude our analysis. We must determine as well whether the ordinance, despite authorization by the charter, is preempted by the statutory or constitutional law of the state.”). We address only the preemption question.

“Preemption becomes an issue when the charter city legislates in contradiction to state law or over a subject that is in a ‘field’ already fully occupied by state law.” *Id.* at 171; 985 P.2d

at 1030. Thus, any Tucson ordinance that directly contradicts an Arizona statute or that governs a subject in a field that Arizona statutes fully occupies is thereby preempted.

A. Ordinances 11080 and 11081 directly contradict A.R.S. § 13-3108.

For a city ordinance to contradict a state statute, “the assertedly competing provisions in question must be actually conflicting, rather than capable of peaceful coexistence.” *Jett v. City of Tucson*, 180 Ariz. 115, 121, 882 P.2d 426, 432 (1994) (quoting *City of Prescott v. Town of Chino Valley*, 163 Ariz. 608, 616, 790 P.2d 263, 271 (App. 1989), *vacated in part on other grounds*, 166 Ariz. 480, 803 P.2d 891 (1990)).

1. Ordinance 11080 actually conflicts with A.R.S. § 13-3108(A).

Ordinance 11080 permits a law enforcement officer to “request” a blood or breath test from a person if the officer has probable cause to believe that the person criminally negligently “discharged a firearm” in the Tucson area. If the person refuses, Ordinance 11080 permits the officer to “pursue” a search warrant under the appropriate Arizona statutes. However, A.R.S. § 13-3108(A) prohibits cities from enacting “any ordinance . . . relating to the . . . discharge or use of firearms.”¹ Because Ordinance 11080 relates to the discharge or use of firearms, it conflicts with § 13-3108(A).

This conflict exists even though Ordinance 11080 does not give law enforcement officers more power than they already had under state law. Because no Arizona statute prevents a Tucson police officer from *requesting* a blood or breath test from suspected criminals or from *pursuing* a search warrant for suspects who refuse such a request, Ordinance 11080 does not authorize officers to step beyond state law. Nevertheless, § 13-3108(A) broadly prohibits ordinances “relating” to the discharge of firearms. Ordinance 11080 “relates” to the discharge of firearms and therefore cannot peacefully coexist with § 13-3108(A).

¹ Subsection F lists exceptions to this prohibition, none of which applies here.

2. Ordinance 11081 actually conflicts with A.R.S. §§ 13-3108(A) and 13-3108(D).

Ordinance 11081 requires a person who “owns or possesses a firearm” to report its “theft or loss” to the Tucson Police Department if either the person resides in Tucson or the incident occurs in Tucson. Failure to make a timely report is “punishable by a civil sanction of one hundred dollars.” However, A.R.S. § 13-3108(A) prohibits cities from enacting “any ordinance . . . relating to the . . . possession . . . [or] transfer . . . of firearms.”² Because Ordinance 11081 relates to the possession or transfer of firearms, it conflicts with § 13-3108(A).

Ordinance 11081 also conflicts with A.R.S. § 13-3108(D), which prohibits cities from enacting any “ordinance that relates to firearms and . . . that has a penalty that is greater than any state law penalty.” According to Ordinance 11081’s prefatory language, “Arizona state law does not . . . establish any penalty for a failure to report the loss or theft of a firearm.” Consequently, the civil infraction that Ordinance 11081 imposes is greater than any state law penalty and brings Ordinance 11081 directly into conflict with § 13-3108(D).

B. Ordinances 11080 and 11081 govern subjects in a field that state law already fully occupies.

“When the state has legislated in a particular area, whether that legislation preempts . . . a city from legislating in the same area depends on . . . whether the subject is of statewide concern” *Jett*, 180 Ariz. at 121, 882 P.2d at 432. In addition, “[t]he existence of a preempting policy must be clear. . . . Mere commonality of some aspect of subject matter is insufficient.” *Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 171, 985 P.2d 1025, 1030 (1999) (quoting *Jett*, 180 Ariz. at 121, 882 P.2d at 432)).

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² Again, Subsection F lists exceptions to this prohibition, none of which applies here.

1. Ordinances 11080 and 11081 govern a subject of statewide concern.

Ordinances 11080 and 11081 regulate firearm use and possession, respectively. More specifically, Ordinance 11080 governs how law enforcement may respond to unlawful firearm use, and Ordinance 11081 governs how gun owners must respond to firearm misplacement or theft.

Such subjects invoke statewide concerns. “Possession of firearms and similar weapons . . . presents dangers to the public and the police which have ‘no reference either to time or place’ and which render it a ‘matter of state-wide concern.’” Ariz. Att’y Gen. Op. I78-274 (quoting *Clayton v. State*, 38 Ariz. 135, 148-49, 297 P. 1037, 1042 (1931)). That conclusion applies here.

2. Ordinances 11080 and 11081 govern a subject in a field where the Arizona Legislature has implemented a clear preempting policy.

When a state legislature creates a “comprehensive statutory scheme” regarding a particular field, that scheme implies “an obvious preemptive policy” toward that field. *See Jett*, 180 Ariz. at 122, 882 P.2d at 433. In enacting and amending A.R.S. § 13-3108, the Arizona Legislature has developed a comprehensive statutory scheme regarding firearm regulation, thus adopting a clear preemptive policy.

First, the statute’s comprehensive language implies a preemptive policy. Subsection A prohibits cities from enacting an ordinance even “*relating* to the transportation, possession, carrying, sale, transfer, purchase, acquisition, gift, devise, storage, licensing, registration, discharge or use of firearms” (emphasis added).³ Subsection D also prohibits cities from enacting an ordinance that “*relates* to firearms and . . . that has a penalty that is greater than *any* state law penalty” (emphasis added). Finally, Subsection H clarifies that these prohibitions apply to “a political subdivision acting in *any* capacity” (emphasis added). Such broad language

³ Again, Subsection F lists exceptions to this general prohibition, none of which applies here.

indicates that the Legislature intended to make itself the only decision maker in the state law field of Arizona firearms regulation.

The statute's title also indicates a preemptive policy. The current title of A.R.S. § 13-3108 is "*Firearms regulated by state; state preemption; violation; classification; definition.*" (Emphasis added.) This title evinces the Legislature's clear intent to preempt cities from regulating firearms.

Finally, the Legislature's statement of intent reflects a preemptive policy. Along with the amendment of § 13-3108(A) in 2000, the Legislature included the following statement:

It is the intent of the legislature to clarify existing law relating to the state's preemption of firearms regulation in this state. Firearms regulation is of statewide concern. Therefore, the legislature intends to limit the ability of any political subdivision in this state to regulate firearms and ammunition.

2000 Ariz. Sess. Laws, ch. 376, § 4. Although the Legislature could have conclusively demonstrated its intent to preempt cities from regulating firearms with more explicit and unequivocal language, it nevertheless appears to have effectively preempted the field.

Therefore, Ordinances 11080 and 11081 are preempted because they each govern a subject in a field that state law already fully occupies.

Conclusion

Arizona Revised Statutes Section 13-3108 preempts Tucson Ordinances 11080 and 11081. The ordinances directly contradict § 13-3108, and they govern subjects in a field that state law already fully occupies.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>September 18, 2013</p> | <p>No. I13-009 (R13-014)</p> <p>Re: Lobbying</p> |
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To: Ken Bennett
Arizona Secretary of State

Question Presented

You have asked whether a lobbyist's anonymous contribution to a legal defense fund on behalf of an Arizona legislator constitutes a "gift" to that legislator under Arizona Revised Statute ("A.R.S.") § 41-1231(9).

Summary Answer

A lobbyist's anonymous contribution to a legal defense fund on behalf of an Arizona legislator falls within the broad definition of "gift" in A.R.S. § 41-1231(9). Though somewhat ambiguous and pursuant to the rule of lenity, subsection (9)(d)'s exception to the definition of gift appears to allow this type of contribution. However, subsection (9)(d) allows such contributions to the extent that they are "not rendered to provide a benefit." The term "not rendered to provide a benefit" raises significant factual questions that can only be dealt with on a case-by-case basis.

Analysis

A. An anonymous contribution to a legislator's legal defense fund falls within the broad definition of "gift" in A.R.S. § 41-1231(9).

In 1991, in reaction to the AZSCAM scandal, the Arizona Legislature "establishe[d] a study committee . . . to consider and evaluate a wide variety of . . . proposals in the area of campaign finance and election reform." 1991 Ariz. Sess. Laws, ch. 241, § 1. This study committee addressed, *inter alia*, "[g]ift . . . limitations for lobbyists." ELECTION REFORM STUDY COMMITTEE, FINAL REPORT 2-3 (1991). The committee ultimately recommended, *inter alia*, that the Legislature "prohibit . . . giving a state officer . . . gift(s) worth more than \$100 in one year," "prohibit . . . giving a gift through another person or organization for the purpose of disguising the identity of the person making the gift," and "defin[e] . . . 'gift' to mean, with some exceptions, a payment, distribution, expenditure, advance, deposit or donation of money" *Id.* at 7.

The Legislature adopted most of these recommendations with S.B. 1002 in the Third Special Session of the Fortieth Legislature. This was the first time that the Legislature specifically defined "gift" in the lobbying context. In that version of the statute, a gift was broadly defined as "a payment, distribution, advance, deposit or donation of money or any kind of tangible personal or real property." Laws 1991 Third. Spec. Sess. Ch. 2 (S.B. 1002) § 1, codified as A.R.S. § 41-1231(4). In the 1991 legislation and thereafter, the Legislature enacted numerous exceptions to the definition of gift, which exceptions are discussed later in this Opinion. The threshold question is whether a contribution to a legislator's legal defense fund meets the definition of gift.

In 1993, the Legislature amended that basic definition of gift to include intangible property. Laws 1993 Ch. 146 (S.B. 1367). In 2000, the Legislature again amended the definition of gift to include “expenditures,” which is itself a defined term:

A payment, distribution, loan, advance, deposit or gift of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure that provides a benefit to an individual state officer or state employee and that is incurred by or on behalf of one or more principals, public bodies, lobbyists, designated public lobbyists or authorized public lobbyists.

Laws 2000 Second Reg. Sess. Ch. 364 (H.B. 2554), codified as A.R.S. § 41-1231(6). Since 2000, the basic definition of gift has been unchanged.

You have asked whether an anonymous contribution to a legal defense fund on behalf of an Arizona legislator constitutes a gift to that legislator under A.R.S. § 41-1231(9). If the contribution to the legal defense fund involves a financial donation, then it is a payment and therefore falls within the statutory definition of gift. Additionally, even if the contribution to the fund does not involve a financial donation, it nevertheless falls within the statutory definition of “gift” because the definition encompasses “money” and “*any* intangible personal property” and “*any* kind of tangible personal property or real property.” (Emphasis added.) In addition, any contributions that would also meet the definition of expenditure, such as a loan to the legal defense fund, would qualify as a gift.

B. The contribution qualifies as an exception to the definition of a “gift” under A.R.S. § 41-1231(9)(d) (subject to issues pertaining to “benefit,” discussed below).

Subsections (a) through (l) of A.R.S. § 41-1231(9) identify various exceptions to the statutory definition of “gift,” including among other things family gifts, honorary recognition, and informational materials. Subsection (d) – the only arguable exception under the scenario contemplated by your question – provides that a “gift” does not include:

The value, cost or price of professional or consulting services that are not rendered to obtain a benefit for any registered principal, public body, lobbyist, designated public lobbyist or authorized public lobbyist or the clients of a principal or lobbyist.

This language appears to be open to at least two different interpretations. First, the contribution might be the provision of professional services themselves by the professional, such as time and expertise provided by an attorney. The phrase “value, cost or price” in such a situation would then represent the quantified value of that attorney’s services. Second, the “cost or price” might be reasonably interpreted as money provided in order to retain professional services, such as the legal defense fund contemplated by your question.

Arizona’s lobbying statutes are criminal statutes. A.R.S. § 41-1237 provides that any person who knowingly violates any provisions of the article is guilty of a class 1 misdemeanor and may be investigated and prosecuted by the attorney general or county attorney.

The goal in interpreting statutes is to ascertain and give effect to the legislature’s intent and the plain language is often the best indicator of that intent. *State v. Lockwood*, 222 Ariz. 551, 553 ¶ 4, 218 P.3d 1008, 1010 (App. 2009). But, when the meaning of a criminal statute is unclear or subject to more than one interpretation, the rule of lenity requires the ambiguity to be resolved in favor of a potential criminal defendant. *Id.* The rule of lenity applies because “[t]he first essential of due process is fair warning of the act which is made punishable as a crime.” *Id.* quoting *Vo v. Superior Court*, 172 Ariz. 195, 200, 836 P.2d 408, 413 (App. 1992).

Here, because two reasonable and possible interpretations of A.R.S. § 41-1231(9)(d) exist, the rule of lenity resolves the ambiguity in favor of treating an anonymous contribution as falling within the exception. Accordingly, the statute should be read as manifesting the Legislature’s intent to exclude monetary donations for the purpose of retaining professional

services from the definition of “gift.” As a result, such contributions are not subject to the reporting requirement. A.R.S. § 41-1232.02(E).

But subsection (d) contains another phrase that prompts us to caution lobbyists who seek to establish such a legal defense fund on behalf of a particular legislator — “not rendered to obtain a benefit.” An anonymous contribution to a legislator’s legal defense fund, even viewed as “services” under subsection (d), could be construed as “rendered to obtain a benefit” for a member of the lobbying community,¹ in which case the contribution would not qualify as an exception to “gift” under A.R.S. § 41-1231(9)(d). Whether a particular service is intended to promote the well-being of a member of the lobbying community would require case-specific factual analysis. *Cf.* Ariz. Att’y Gen. Op. I90-076 (concluding that “the determination of when a device is employed to circumvent the campaign contribution limitations . . . can only be made on a case-by-case basis after careful investigation and evaluation”). We decline to answer questions of fact. *See* A.R.S. § 41-193(A)(7) (authorizing the Arizona Attorney General to answer “question[s] of law”); *see also* Ariz. Att’y Gen. Op. I80-236 (declining to answer question requiring “an analysis of individual fact situations”).

If an anonymous contribution to a legislator’s legal defense fund benefits a member of the lobbyist community, and that benefit was intended, the contribution would not qualify as an exception to “gift” under A.R.S. § 41-1231(9)(d) and would be subject to other limitations contained in the article, such as reporting requirements.

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¹ We assume, as the question implies, that the person making the contribution is a lobbyist.

Conclusion

An anonymous contribution by a lobbyist to a legal defense fund on behalf of an Arizona legislator falls within the broad definition of “gift” in A.R.S. § 41-1231(9). However, pursuant to the rule of lenity, such anonymous contributions are within the exception under A.R.S. § 41-1231(9)(d) to the extent they constitute the value, cost or price of professional services. Whether a legal defense fund can be created in such a way as to not be “rendered to obtain a benefit for” the contributor raises factual questions that cannot be resolved in the context of an Attorney General Opinion.

Thomas C. Horne
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>August 29, 2013</p> | <p>No. I13-008 (R13-013)</p> <p>Re: Effect of <i>Shelby County</i> on Withdrawn Preclearance Submissions</p> |
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To: Ken Bennett
Arizona Secretary of State

Questions Presented

You have asked for an opinion on the following questions:

1. Since the United States Supreme Court declared the coverage formula triggering preclearance obligations to be unconstitutional, are previously enacted, but not precleared statutes, valid and enforceable?
2. If the answer to the first question is yes, what are the effective dates of any such statutes that were enacted, but not precleared, and remain in the statute books?
3. What statutes are affected by this scenario?

Summary Answers

1. Yes. The statutes that were duly enacted by the Legislature are valid and enforceable.
2. The effective date for these statutes is June 25, 2013, at the earliest.

3. Six policies and statutes are affected by the preclearance withdrawals and subsequent *Shelby County* decision: (1) 2002 Citizens Clean Election Substantive Policy Statement; (2) Laws 2009 Ch. 134 (H.B. 2101); (3) Laws 2010 Ch. 48 (H.B. 2261); (4) Laws 2010 Ch. 314 (H.B. 2113); (5) Laws 2011 Ch. 105 (S.B. 1412); and (6) Laws 2011 Ch. 166 (S.B. 1471).

Background

The Voting Rights Act of 1965 (“VRA”) and its subsequent reauthorizations created a system by which certain jurisdictions were required to submit any statutory or procedural change that affected voting for preclearance prior to implementing it. The preclearance obligation, set forth in Section 5 of the VRA, shifted the burden of proof to the covered jurisdictions to demonstrate before implementing any statutory or procedural change that affected voting that such change would not have a discriminatory effect. 42 U.S.C. § 1973c. The covered jurisdictions could seek preclearance by either submitting a letter containing the requisite information to the Department of Justice (“DOJ”) or by filing a declaratory judgment action in the District Court for the District of Columbia. *See* 42 U.S.C. § 1973b; 28 C.F.R. § 51.10. Arizona and its sub-jurisdictions¹ were covered jurisdictions by the coverage formula contained within section 4(b) of the VRA.

The procedure for seeking preclearance from the DOJ is set forth in 28 C.F.R. § 51.20, *et seq.* For each voting change affecting a statewide election policy, procedure or statute, the State submitted a letter with the following information:

¹ This Opinion does not address *Shelby County's* effect on preclearance submissions made by Arizona’s counties, cities, towns, or other sub-jurisdictions subject to preclearance. Those jurisdictions independently sought preclearance for changes in their codes, ordinances, policies, procedures, etc. that affected voting. The Arizona Attorney General did not track or monitor those preclearance submissions.

- (a) A copy of the ordinance, enactment, order, or regulation embodying the change affecting voting for which preclearance is sought;
- (b) A copy of the current voting standard, practice, or procedure that is being amended;
- (c) A statement identifying each change between the submitted regulation and the previous practice;
- (d) A statement identifying the authority under which the jurisdiction undertook the change;
- (e) The date the change was adopted;
- (f) The date on which the change takes effect;
- (g) A statement regarding whether the change has already been implemented;
- (h) A statement regarding whether the change affects less than the entire jurisdiction and an explanation, if so;
- (i) A statement of the reasons for the change;
- (j) A statement of the anticipated effect of the change on members of racial or language minority groups;
- (k) A statement identifying any past or pending litigation concerning the change or related voting practices; and
- (l) History of preclearance for the prior practice.

28 C.F.R. § 51.27. The DOJ then had sixty calendar days from the date it received the submission to interpose an objection. 28 C.F.R. § 51.9. The DOJ was also authorized to ask for additional information within that sixty-day period. 28 C.F.R. § 51.37. When the DOJ asked for additional information, a new sixty-day period would begin from the DOJ's receipt of that additional information. *Id.* A jurisdiction could withdraw a submission at any time prior to a final decision by the DOJ. 28 C.F.R. § 51.25.

Since 1967, the State has submitted approximately 773 statutes, policies, forms, and procedures affecting voting to the DOJ for preclearance. According to the Attorney General's

records, the State did not seek preclearance through court action in the D.C. district court for any proposed changes. Of those 773 submissions, only six were partially or fully withdrawn:

- (1) 2002 Citizens Clean Election Substantive Policy Statement
- (2) Laws 2009 Ch. 134 (H.B. 2101)
- (3) Laws 2010 Ch. 48 (H.B. 2261)
- (4) Laws 2010 Ch. 314 (H.B. 2113)
- (5) Laws 2011 Ch. 105 (S.B. 1412)
- (6) Laws 2011 Ch. 166 (S.B. 1471)

Those withdrawals, and the current status of the underlying laws, are discussed below.

In *Shelby County, Alabama v. Holder*, the United States Supreme Court held that Section 4(b)'s coverage formula was unconstitutional. 133 S. Ct. 2612, 2631 (2013). The Court stated that the formula "can no longer be used as a basis for subjecting jurisdictions to preclearance."

Id.

Analysis

1. Because *Shelby County* Eliminated the Coverage Formula and Therefore Arizona's Preclearance Obligation, Duly Enacted Statutes that Were Submitted for Preclearance but Later Withdrawn Are Enforceable.

Section 5 of the Voting Rights Act prohibits the enforcement in any covered jurisdiction of any "change affecting voting" absent preclearance by a declaratory judgment or from the DOJ. 28 C.F.R. §§ 51.1, 51.10, 51.12. As set forth above, this requirement shifted the burden of proof to the State to demonstrate as a prerequisite for implementing a new statute, procedure, rule, or form, that the change did not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. §§ 51.1; 51.10.

The preclearance obligation applied only to jurisdictions covered by the coverage formula set forth in Section 4(b) of the VRA. The United States Supreme Court held that the coverage formula is unconstitutional because current circumstances do not justify it. 133 S. Ct. at 2629 (stating that in the 2006 reauthorization of the VRA, Congress kept the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs). The Court declared Section 4(b) unconstitutional, but issued no holding on Section 5. *Id.* at 2631. The “formula in [Section 4(b)] can no longer be used as a basis for subjecting jurisdictions to preclearance,” but “Congress may draft another formula based on current conditions.” *Id.* Consequently, Arizona is presently not a covered jurisdiction subject to the preclearance obligation.

Until the *Shelby County* decision, Arizona statutes that had not been precleared were unenforceable. Other than preclearance, there was no barrier to implementing those few duly enacted statutes that had been withdrawn from preclearance consideration. Now, under *Shelby County*, the preclearance barrier is removed and such statutes are enforceable.

2. The Effective Date for the Statutes Previously Withdrawn from Preclearance Consideration Is June 25, 2013.

The general effective date for new statutes is the ninety-first day after the Legislature adjourns *sine die*. *Bland v. Jordan*, 79 Ariz. 384, 386, 291 P.2d 205, 206 (1955). Generally, the effective date for Arizona statutes subject to preclearance has been the date of preclearance or the general effective date, whichever comes later.

Under federal jurisprudence, when a court announces a rule of federal law but does not expressly state whether the decision applies prospectively only, the opinion “is properly understood to have followed the normal rule of retroactive application.” *Harper v. Virginia Dept. of Taxation*, 409 U.S. 86, 97 (1993). Retroactivity means that when a court decides a case

and applies a new legal rule to the parties before it, then the new rule must be applied “to all pending cases.” *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).

In *Shelby County*, the Court announced a new rule of law that Section 4(b)’s coverage formula is unconstitutional, but did not expressly limit that ruling to apply prospectively. 133 S.Ct. at 2631. Therefore, under *Harper*, *Shelby County* must have retroactive application.

This interpretation draws additional support from the DOJ’s own statement that it would not make preclearance determinations on any matters awaiting ruling at the time the *Shelby County* decision was issued:

With respect to administrative submissions under Section 5 of the Voting Rights Act, that were pending as of June 25, 2013, or received after that date, the Attorney General is providing a written response to jurisdictions that advises:

On June 25, 2013, the United States Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. 1973b(b), as reauthorized by the Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. *Shelby County v. Holder*, 570 U.S. ___, 2013 WL 3184629 (U.S. June 25, 2013) (No. 12-96). Accordingly, no determination will be made under Section 5 by the Attorney General on the specified change. *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.35. We further note that this is not a determination on the merits and, therefore, should not be construed as a finding regarding whether the specified change complies with any federal voting rights law.

U.S. DOJ: Civil Rights Division: Voting Section, <http://www.justice.gov/crt/about/vot/>.

Therefore, anything that was pending evaluation by the DOJ on June 25, 2013 must be deemed effective as of that date.

But the *Reynoldsville Casket* case instructs that the retroactivity only applies to pending cases. None of the withdrawn submissions were under review at the time *Shelby County* was

issued, and therefore cannot be considered to have been pending. As such, their effective date cannot be earlier than June 25, 2013.

3. Current Status of Previously Withdrawn Preclearance Submissions

Based on a comprehensive review of the Attorney General's records, the Attorney General had withdrawn six preclearance submissions of statewide policies and statutes. The following discussion sets forth their status as of June 25, 2013.

a) *2002 Citizens Clean Election Substantive Policy Statement*

The Arizona Citizens Clean Election Commission ("CCEC") adopted the policy "Candidates Denied Approval for Funding" during its December 11, 2001 public meeting. The Attorney General's Office submitted the policy change to the DOJ for preclearance on January 11, 2002. Under this policy, a candidate who failed to submit a sufficient number of valid contribution slips was not permitted to provide a supplemental submission of additional slips. On February 28, 2002, the Attorney General submitted a letter to the DOJ withdrawing the submission because CCEC had effectively superseded the policy by promulgating a new proposed rule addressing the same subject matter. Because this policy statement has been superseded by subsequent rules embodied in the Arizona Administrative Code, the *Shelby County* decision is irrelevant to the policy's effective date.

b) *Laws 2009 Ch. 134 (H.B. 2101)*

H.B. 2101 made several amendments to the laws governing county supervisor board members. Section 1 of the bill lowered the population threshold (from 200,000 to 175,000) at which counties must have five board members and clarified the number of signatures needed for calling a special election. Section 2 provided that a county with a population exceeding 175,000 based on 2000 census data must begin the process of electing two additional supervisors at the next election and required the current applicable board(s) of supervisors to form five

supervisory districts by adopting the boundaries of five precinct boundaries. According to comments made in the minutes of the House of Representatives Committee on Government, H.B. 2101 was needed to increase county leadership in Pinal County, which had undergone significant population growth. This Attorney General submitted the law to the DOJ for preclearance on August 11, 2009.

On September 24, 2009, a group of registered voters in Pinal County sued the Pinal County Board of Supervisors, the Pinal County Recorder, the Pinal County Election Director, and Pinal County itself in a special action seeking to declare Section 2 of H.B. 2101 unconstitutional. *Robison v. Pinal County Bd. of Supervisors*, Pinal County Superior Court Cause No. S-1100-CV-200903971.

On October 13, 2009, the Attorney General received a request for more information from the DOJ with respect to Section 2 of the bill, but the DOJ precleared Section 1. On October 29, 2009, the Pinal County Superior Court indicated by minute entry that it would enter the form of judgment lodged by Plaintiffs, which stated that Section 2 of H.B. 2101 was unconstitutional and may not be implemented. Specifically, the court held the following:

Section 2 of the Legislation is void and of no effect because it is based on electoral districts that have never been precleared under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c;

Section 2 of the Legislation is void and of no effect because it is an unconstitutional special law in violation of Article 4, Part 2, § 19 of the Arizona Constitution;

Section 2 of the Legislation is void and of no effect because it requires Defendants to establish supervisory districts grossly disproportionate in population in violation of Article 2, §§ 13 and 21 of the Arizona Constitution.

In light of the disposition of that litigation, the Attorney General withdrew the submission for preclearance with regard to Section 2 of H.B. 2101. Under the superior court's decision, Section 2 of H.B. 2101 is void and *Shelby County* does not revive it.

c) *Laws 2010 Ch. 48 (H.B. 2261) 2010 Ch. 314 (H.B. 2113)*

Both Laws 2010 Ch. 48 (H.B. 2261) and Laws 2010 Ch. 314 (H.B. 2113) amended statutes related to governance of community college districts. The Attorney General submitted the two laws separately, but simultaneously, to the DOJ for preclearance, but the subsequent letter from DOJ requesting additional information and the partial withdrawal letter addressed the two bills together.

H.B. 2261 amended A.R.S. § 15-1441 regarding the term of office for board members for community college districts. Preexisting law provided for a staggering of board members from the first general election for board members was held and provided that each member's term is six years. Section 1 of H.B. 2261 changed the term of board members to four years for a county with a population of at least three million, which presently applies only to Maricopa County. This amendment was to take effect in the next election after the statute's effective date, but the effective date was amended subsequently in H.B. 2113 (*see* below). Section 1 also provided for two additional board members, to be elected at-large, in counties with a population of at least three million. At the first general election held to elect the new at-large members, the two candidates having the most votes would be declared elected. The elected member receiving the highest number of votes would serve a four-year term and the elected member receiving the next highest number of votes would serve a two-year term. Thereafter, each member's term would be four years. Sections 2 and 3 of the bill were not subject to preclearance. Section 4 provided that current board members shall continue to serve until the expiration of their normal terms.

The Attorney General submitted Sections 1 and 4 of H.B. 2261 to the DOJ for preclearance on May 28, 2010.

As noted, the DOJ responded with a request for more information that was intertwined with a request for more information on H.B. 2113, and parts of H.B. 2113 superseded parts of H.B. 2261. H.B. 2113 also made changes to the terms of office and number of members for community college district boards. Sections 1 and 6 of H.B. 2113 did not include changes affecting voting and were not submitted for preclearance. Section 2 amended A.R.S. § 15-1441(C) to provide that the change from six year terms to four-year terms would not become effective until June 30, 2012. Section 2 also provided that the addition of two at-large board members would not be effective until July 1, 2012. Sections 3 and 4 repealed A.R.S. § 16-322, which provided for the number of signatures needed for nomination petitions and replaced that statute with identical language except for A.R.S. § 16-322(a)(5), which changed the number of signatures a candidate for community college district must gather. Section 5 amended Section 4 of H.B. 2261 to clarify the effective date.

The Attorney General submitted Sections 2 through 5 of H.B. 2113 to the DOJ on May 28, 2010 for preclearance. On July 27, 2010, the DOJ responded. The DOJ did not make a determination as to H.B. 2261, Sections 1 and 4, because they were superseded by H.B. 2113, Sections 2 and 5. The DOJ also did not make a determination as to the implementation schedule set forth in H.B. 2261, Section 1 and H.B. 2113, Section 2, because they were directly related to the adoption of the two additional proposed at-large board members for which they sought additional information. The information sought included a detailed explanation of the governmental interest to be served by the addition of two members to the college district board and the basis for the state's decision that this interest is better served by electing them on an at-

large basis, as opposed to from single-member districts; a description of alternative proposals; and election returns by voting precinct within Maricopa County for each federal, state, county, and county school board election since 1999 in which minorities have participated as candidates.

On October 27, 2010, the Attorney General wrote to the DOJ summarizing its understanding of what had been precleared as follows:

- H.B. 2261, § 1, to the extent that section changed the terms of office for community college district board members from six years to four years, in a county with a population of at least three million persons;
- H.B. 2113, § 2, to the extent that section amends A.R.S. § 15-1441(C) to provide that the change in the terms of office provided for in H.B. 2261 will become effective on June 30, 2012; and
- H.B. 2113, §§ 3-5.

The Attorney General then withdrew from consideration the following:

- H.B. 2261, § 1, regarding the effective date of that amendment and regarding that section's amendment to A.R.S. § 15-1441(I).
- H.B. 2261, § 4
- H.B. 2113, § 2, except to the extent that section amended A.R.S. § 15-1441(C) to provide that the change in the terms of office provided for in H.B. 2261 would become effective on June 30, 2012.

The Legislature made no further changes to A.R.S. § 15-1441 or 16-322 relevant to this discussion.

The current version of A.R.S. § 15-1441(I) provides:

Beginning in July 1, 2012, in addition to the governing board members who are elected from each of the five precincts in a community college district, a county with a population of at least three million persons shall elect two additional governing members from the district at large. At the first general election held to elect at-large governing board members, the two candidates having the most votes shall be declared elected, if each candidate is a qualified elector who resides in that county. The elected member who receives the highest number of votes of the at-large candidates shall serve a four year term and the elected member who receives

the next highest number of votes shall serve a two year term.
Thereafter each member's term is four years.

Because *Shelby County* removed the preclearance obligation and this law has not been changed since its original passage, the effective date must be June 25, 2013 at the earliest. Therefore, the next applicable election at which time two at-large board members shall be elected is 2014. Candidates seeking to run for that office must therefore comply with A.R.S. § 16-322(A)(5)(b) and all other applicable election statutes. The current members of the applicable community college district boards will continue to serve the remainders of their respective terms.

d) Laws 2011 Ch. 105 (S.B. 1412)

Senate Bill 1412 created new security requirements for early ballots and required photo identification from persons who deliver more than ten early ballots to an election official. Section 1 amended A.R.S. § 16-545 by requiring election officers to ensure that return envelopes for early ballots are tamper evident when properly sealed. Section 2 amended A.R.S. § 16-547 by requiring election officials to provide instructions to voters that early ballots should be returned in the tamper evident envelope enclosed with the ballot and to include a warning that it is a felony to receive or offer compensation for a ballot. Section 3 amended A.R.S. § 16-1005 by including new language to make it a felony to mark a voted or unvoted ballot or ballot envelope with intent to fix an election. Section 3 also added new subsections B through H to A.R.S. § 16-1005 regarding additional forms of ballot abuse and classification for those violations as felonies. Subsection D required a person who delivers more than ten early ballots to provide a copy of his or her photo identification to the election official.

The Attorney General submitted the bill for preclearance on May 18, 2011. On June 27, 2011, the DOJ precleared all of the sections except Subsection D, which created A.R.S. § 16-

1005(D) regarding the requirement to provide a photo identification when delivering more than ten early ballots. As to that section, the DOJ asked for more information, including how that proposed provision was expected to serve the state interest and whether any alternative measures had been considered; a list of the acceptable photographic identification; and a detailed description of the statewide report that would be posted on the secretary of state's website regarding such individuals who did deliver more than ten early ballots. The Attorney General withdrew the submission regarding Subsection D on August 4, 2011. In 2012, the Legislature amended A.R.S. § 1005 by repealing that subsection. 2012 Ariz. Session Laws Ch. 361, § 22. Therefore, *Shelby County* has no effect on the validity of this provision.

e) Laws 2011 Ch. 166 (S.B. 1471)

In 2011, S.B. 1471 made changes to a number of election-related statutes. Section 1 amended A.R.S. § 16-248 to increase the minimum number of active registered voters needed to allow precincts to conduct the presidential preference primary by mail from two hundred to three hundred. Section 2 amended A.R.S. § 16-531 regarding the number of clerks of election a board of supervisors may appoint. Section 3 repealed the language set forth in A.R.S. § 16-547(A) for the affidavit contained on an early ballot envelope and added new language. The new language provided that the declaration is provided under penalty of perjury, that the voter is a registered voter in the county, and that the voter has not voted in any other county or state. The new language also indicates whether the voter was assisted and provides blanks for the signature and address of the assistant. Section 4 amended A.R.S. § 16-580(G), prohibiting candidates and persons who have been employed by or volunteered for a candidate, campaign, political organization or political party from assisting voters in voting. Section 5 of the bill added a requirement that a new political party seeking recognition must obtain signatures from voters in at least five different counties, and at least ten percent of the required total shall be registered in

counties with populations under 5,000. Section 6 amended the signature requirements of A.R.S. § 16-803 regarding recognition of a new political party.

The Attorney General submitted the bill to the DOJ for preclearance on June 15, 2011. The DOJ sent a letter on August 15, 2011 that precleared all but Section 4 (A.R.S. § 16-580(G)) of the bill. As to that section, the DOJ requested additional information, including the following:

A detailed description of the manner in which the prohibition will be implemented including,

a. the minimum amount of time, if any, that an individual may be employed by or volunteer for one of the prohibited entities that will preclude them from providing any assistance to a voter;

b. whether for those individuals whose ineligibility is based on volunteering for an entity that exists for more than a single election cycle, such as a political party, that the resulting ineligibility for the individual similarly extends beyond the date of the election;

c. whether the proposed prohibition on providing assistance will be applicable to those individuals who also serve as employees in county offices or as poll workers on election day; and

d. any guidance that the state has issued concerning the manner in which it will implement this prohibition, including enforcement at the polling places or in county offices.

On October 4, 2011, the Attorney General withdrew the preclearance submission regarding Section 4 of S.B. 1471 regarding amendments to A.R.S. § 16-580(G). The Legislature amended A.R.S. § 16-580 in 2012 to remove the language at issue. 2012 Ariz. Session Laws Ch. 361, § 13. That version was precleared on July 19, 2012.

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Conclusion

The *Shelby County* decision removed the preclearance obligation by holding the coverage formula unconstitutional. Therefore, any duly enacted state statutes that had not been precleared or repealed are deemed valid and enforceable. The effective date of such statutes is the date of the *Shelby County* decision, June 25, 2013. This Opinion does not address the effect of *Shelby County* on the enforceability of any laws, policies, or procedures enacted by the counties, cities, towns, or other jurisdictions subject to the preclearance obligation.

Of the preclearance submissions withdrawn by the Attorney General, only the amendments to A.R.S. §§ 15-1441 and 16-322 are affected by the *Shelby County* decision. Those sections provide for two new at-large members of community college districts in counties with a population of at least three million people. Those two new at-large board members must be elected during the 2014 election.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| <i>AMENDED</i> ATTORNEY GENERAL OPINION by ERIC J. BISTROW* CHIEF DEPUTY ATTORNEY GENERAL October 2, 2013 | No. I13-007 (R13-015) Re: Campaign Finance |
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To: Ken Bennett
Arizona Secretary of State

Questions Presented

You have asked for an opinion on the following questions regarding 2013 Laws Ch. 98 (H.B. 2593), which amended various campaign finance statutes:

1. May a candidate's committee accept up to the maximum contributions for both the primary and general elections prior to the primary election?
2. Must there be two different accounting systems for primary contributions and general contributions?
3. If a candidate's committee may accept general election contributions in the primary election period, may a candidate's committee spend general election contributions for the purpose of influencing the outcome of the primary election?
4. Under the current law, a candidate's committee may accept contributions for a committee organized for a past election. Is this still the case for the new bifurcated contribution

limits? For example, if a candidate's committee did not accept the maximum primary contribution limit from an individual for the primary election may the candidate's committee retroactively accept up to the maximum primary election contribution limits from the individual after the primary election?

5. May candidates' committees assign contributions they receive that are above the maximum allowed for the primary election to their general election allocation for that contributor?

6. Who determines whether the contribution is for the primary or general election (the contributor or the candidate's committee)? If it is the candidate's committee, is the treasurer required to ask the contributor? Under current law, a contributor must indicate certain information along with the contribution; it would seem this would continue under the new law, requiring the allocation to come from the contributor.

7. May 16-341 candidates, who qualify for direct placement on the general election ballot, accept primary election contributions?

8. Does the language "from a single source a contribution of at least one thousand dollars" apply to one individual contribution or an aggregate amount from an individual during the twenty-day pre-election time period (emphasis added)?

9. What is the election period for an office that may span more than one primary and general election? For example, for a municipal office with a four-year staggered term, could a candidate's committee receive the maximum contributions for the primary and general in year two of his/her term, even though not on the ballot, and then receive additional maximum contributions in year three (his/her election year)? Said another way, does the primary and

general cycle follow the particular seat, like the federal model, or does it apply any time there is a primary and general election?

10. What are the restrictions, if any, for funds in existing candidate's committee accounts on the effective date of this legislation?

11. Finally, this law becomes effective on September 13, 2013, at which time municipal candidates can receive up to \$2,500 from contributors per election. However, September 13th is after the municipal primary in Phoenix, but before the end of the primary election reporting period. Therefore, could a candidate's committee in this municipal election receive \$2,500 for the primary on September 14th and another \$2,500 for the general at the same time?

Summary Answers

1. Yes, a candidate committee may accept up to the maximum contributions for both the primary and general elections prior to the primary election.

2. Yes, a candidate committee must establish two separate accounting systems for primary and general election contributions and expenditures.

3. Yes, a candidate committee may spend general election contributions for the purpose of influencing the outcome of the primary election, subject to the contribution limits.

4. Yes, a candidate committee may accept contributions for the primary election up to the contribution limits after the primary election has occurred for the purpose of retiring outstanding debts incurred by the primary election committee.

5. Yes, a candidate committee that receives a contribution in excess of the primary contribution limit may transfer the excess to the general election committee, to the extent that

both limits have not yet been reached, and to the extent that the committee-to-committee limit has not yet been reached.

6. The candidate committee should make best efforts to ascertain the contributor's intentions, but otherwise may assume that any contribution is intended for the next upcoming election, to the extent that the contribution limit for that election has not already been reached.

7. Yes, write-in candidates under A.R.S. § 16-341 may accept contributions for both the primary and general elections up to the statutory maximums.

8. The language in A.R.S. § 16-913.01 requiring special reporting of contributions of at least one thousand dollars applies to an individual contribution rather than an aggregate amount from an individual.

9. A candidate committee may only accept contributions for a single primary election and general election. Candidates who are not running in a particular election cycle due to their terms of office may accept contributions for a primary and a general election, but contributions accepted early (during their non-election cycle) must be counted against the contribution limits for the election cycle that they will be participating in.

10. Existing funds in a candidate's committee on the effective date of H.B. 2593 are subject to the laws in existence when the contributions were accepted.

11. Municipal candidates may accept contributions up to the maximum limit for the general election on or after September 13, 2013 and may accept contributions up to the maximum limit for the primary election to the extent necessary to retire debt.

Background

The Arizona Legislature enacted H.B. 2593, amending portions of A.R.S. §§ 16-901 and -905 and creating a new section A.R.S. § 16-913.01. The relevant changes are set forth below:

16-901(7). “Election” means any election for any initiative, referendum or other measure or proposition or a primary, general, recall, special or runoff election for any office in this state other than the office of precinct committeemen and other than a federal office. For THE purposes of sections 16-903 and 16-905, the general election ~~includes~~ DOES NOT INCLUDE the primary election.

16-905. Contribution limitations; civil penalty; complaint

A. For an election other than for a statewide office, a contributor shall not give and an exploratory committee, a candidate or a candidate's campaign committee shall not accept contributions of more than:

1. For an election for a legislative office, ~~four hundred eighty-eight~~ TWO THOUSAND FIVE HUNDRED dollars¹ from an individual.

2. For an election other than for a legislative office, ~~three hundred ninety~~ TWO THOUSAND FIVE HUNDRED dollars from an individual.

3. For an election for a legislative office, ~~four hundred eighty-eight~~ TWO THOUSAND FIVE HUNDRED dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by paragraph 5 of this subsection and subsection B, paragraph 3 of this section.

4. For an election other than for a legislative office, ~~three hundred ninety~~ TWO THOUSAND FIVE HUNDRED dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by subsection B, paragraph 3 of this section.

¹ The contribution limits set forth in § 16-905 are reduced by twenty percent by the Citizens Clean Election Act, as set forth in A.R.S. § 16-941(B). The relevant contribution limits for all offices set forth in A.R.S. § 16-905 are \$2,000 per election for subsections (A)(1) through (4) and \$4,000 for subsection (A)(5). The examples used in this Opinion reflect the reduced contribution limits.

5. ~~Two~~ FIVE thousand dollars from a single political committee, excluding a political party, certified pursuant to subsection G of this section.

B. For an election for a statewide office, a contributor shall not give and an exploratory committee, a candidate or a candidate's committee shall not accept contributions of more than:

1. ~~One~~ TWO thousand ten FIVE HUNDRED dollars from an individual.

2. ~~One~~ TWO thousand ten FIVE HUNDRED dollars from a single political committee, excluding a political party, not certified under subsection G of this section to make contributions at the higher limits prescribed by subsection A, paragraph 5 of this section and paragraph 3 of this subsection.

3. Five thousand ten dollars from a single political committee excluding political parties certified pursuant to subsection G of this section.

C. A candidate shall ~~not~~ MAY accept contributions from all political committees, excluding political parties, ~~combined totaling more than:~~

~~1. For an election for a legislative office, sixteen thousand one hundred fifty dollars.~~

~~2. For an office other than a legislative office or a statewide office, ten thousand twenty dollars.~~

~~3. For a statewide office, one hundred thousand one hundred ten dollars~~ AS OTHERWISE PRESCRIBED IN THIS SECTION AND A CANDIDATE IS NOT RESTRICTED AS TO THE AGGREGATE TOTAL THAT A CANDIDATE MAY LAWFULLY RECEIVE FROM ALL POLITICAL COMMITTEES, EXCLUDING POLITICAL PARTIES.

D. A nominee of a political party shall not accept contributions from all political parties or political organizations combined totaling more than ten thousand twenty dollars for an election for an office other than a statewide office, and one hundred thousand one hundred ten dollars for an election for a statewide office.

E. An individual shall ~~not~~ MAY make contributions totaling ~~more than five thousand six hundred ten dollars in a calendar year to state and local candidates and political committees contributing to state or local candidates. Contributions to political parties and contributions to independent expenditure committees are exempt from the limitations of this subsection~~ AS OTHERWISE PRESCRIBED BY THIS SECTION, AND AN INDIVIDUAL IS NOT RESTRICTED AS TO THE AGGREGATE TOTAL THAT AN INDIVIDUAL MAY GIVE.

16-913.01. Additional reporting by candidate campaign committees; single contribution; civil penalty

A. IN ADDITION TO ANY OTHER FILINGS REQUIRED BY LAW, A CANDIDATE OR A CANDIDATE'S CAMPAIGN COMMITTEE SHALL GIVE NOTICE TO THE FILING OFFICER IF THE CANDIDATE OR COMMITTEE RECEIVES FROM A SINGLE SOURCE A CONTRIBUTION OF AT LEAST ONE THOUSAND DOLLARS LESS THAN TWENTY DAYS BEFORE THE DAY OF THE ELECTION.

B. THE NOTICE PRESCRIBED BY THIS SECTION SHALL BE FILED WITHIN SEVENTY-TWO HOURS AFTER RECEIPT OF THE CONTRIBUTION AND SHALL INCLUDE THE DATE OF RECEIPT, THE NAME OF THE CONTRIBUTOR AND THE AMOUNT OF THE CONTRIBUTION. CONTRIBUTIONS THAT ARE SUBJECT TO THE NOTICE PRESCRIBED BY THIS SECTION SHALL BE INCLUDED IN THE NEXT REGULAR REPORT FILED PURSUANT TO SECTION 16-913. FOR THE PURPOSES OF THIS SECTION, THE DATE OF RECEIPT OF A CONTRIBUTION IS THE DATE THE CANDIDATE'S CAMPAIGN COMMITTEE OBTAINS POSSESSION OF THE CONTRIBUTION.

C. A CANDIDATE'S CAMPAIGN COMMITTEE THAT KNOWINGLY VIOLATES THIS SECTION AND A PERSON WHO KNOWINGLY VIOLATES THIS SECTION ARE LIABLE IN A CIVIL ACTION FOR A CIVIL PENALTY OF UP TO THREE TIMES THE AMOUNT IMPROPERLY REPORTED.

Analysis

1. May a candidate's committee accept up to the maximum contributions for both the primary and general elections prior to the primary election?

Yes. The new legislation specifies in subsection 1, amending A.R.S. § 16-901(7), that the general election does not include the primary election when the term “election” is used in sections 16-903 and 16-905. This amendment reverses the previous version of A.R.S. § 16-901(7), which stated that the general election includes the primary election. Because there are now two elections within each election cycle—the primary and the general—candidates may accept contributions up to the contribution limit for each such election, enabling candidates to accept two times the maximum contribution limit for each election cycle.

Neither H.B. 2593 nor other election statutes impose limitations on the timing of receipt of contributions for an election other than *after* filing a statement of organization for the political committee (A.R.S. § 16-902.01(A)), designating an account to deposit contributions (A.R.S. § 16-902(C)), and designating a political committee for each election to serve as the candidate’s campaign committee (A.R.S. § 16-903(A)). This facet of the newly revised Arizona statutory regime is similar to the federal campaign finance system, which requires that a campaign committee may only accept contributions when a treasurer has been designated and is holding office. 11 C.F.R. § 102.7(a), (b). The treasurer must be designated in the statement of organization for the campaign committee. 11 C.F.R. § 102.2(a)(iv).

2. Must there be two different accounting systems for primary contributions and general contributions?

Yes. The primary election and the general election are *separate* elections. A.R.S. § 16-901(7). The campaign contribution limits apply separately for each election. A.R.S. § 16-905(I)(1). A candidate must designate a political committee for each election to serve as the candidate’s campaign committee under A.R.S. § 16-903(A), and may have only one campaign

committee designated for each election under A.R.S. § 16-903(C).² The candidate may have more than one campaign committee simultaneously in existence. *Id.* Harmonizing sections 16-901(7), -903, and -905 together, a candidate must designate a separate committee for each election. The candidate need not designate separate treasurers.

Note that under the federal system, the campaign committee also must use a system to separate contributions received for the general election before the primary election has occurred, including the use of separate accounts for each election or the use of separate books and records for each election. 11 C.F.R. § 102.9(e).

3. If a candidate's committee may accept general election contributions in the primary election period, may a candidate's committee spend general election contributions for the purpose of influencing the outcome of the primary election?

Yes. As stated above, the campaign limits and campaign committee requirements apply separately to each election. Under the statute, a candidate's campaign committee can transfer or contribute monies to another campaign committee designated by the same candidate, *subject to the contribution limits*, if both committees have been designated for an election in the same year. A.R.S. § 16-905(F)(2).³ Because the campaign committees for the primary election and the general election would be designated in the same year, the candidate can transfer monies between the two committees subject to the contribution limits. A.R.S. § 16-905(A)(5) also states that the contribution limit is two thousand dollars from any single political committee, other than a political party, and did not specifically exclude candidate committees from that limitation.

² This Opinion does not address whether or not candidates who participate in public financing pursuant to A.R.S. §§ 16-940 to -961 are required to have two committees or separate general and primary accounts. Section 16-948(A) provides that "[a] participating candidate shall conduct all financial activity through a single campaign account of the candidate's campaign committee." Participating candidates are urged to seek advice from the Citizens Clean Elections Commission regarding compliance with the relevant campaign finance statutes.

³ H.B. 2593 did not amend this subsection.

An example may be illustrative here. If a candidate has \$9,000 remaining in his primary candidate committee account after the primary election has occurred, he can make one transfer of up to \$2,000 to his general candidate committee, leaving a balance of \$7,000 in the primary account. This is because A.R.S. § 16-905(F)(2) states that a candidate's campaign committee may transfer to another campaign committee up to the contribution limits of this section if both candidate committees are designated for an election *in the same year*. The committee in this example could then transfer the remaining \$7,000 to an exploratory or candidate committee for a future election in a different year or otherwise dispose of the surplus monies in accordance with A.R.S. § 16-915.01.

Note that under the federal system, all contributions received by affiliated committees—including authorized committees of the same candidate for the same election to federal office—are considered to be made or received by a single political committee. 11 C.F.R. § 110.3(a)(1)(i). Funds and assets may be freely “transferred without limit between a candidate’s principal campaign committee and the candidate’s other authorized committees for the same office during the same election.” FEC Campaign Guide at 59.

4. Under the current law, a candidate’s committee may accept contributions for a committee organized for a past election. Is this still the case for the new bifurcated contribution limits?

Yes. Under A.R.S. § 16-913(E), the Legislature expressly recognized that a candidate’s campaign committee may remain active after the election due to outstanding debts, and that the committee may receive a contribution or make an expenditure to pay down the debt. *See also* A.R.S. § 16-901(5)(a)(i) (defining a contribution to include anything of value given the purpose of retiring debt). The committee may not terminate under the statute unless it files a termination

statement certifying that it will no longer receive contributions or make disbursements, and that the committee has no outstanding debts or obligations. A.R.S. § 16-914. The Legislature made no express or implied changes to these statutes in enacting H.B. 2593.

Note that under the federal system, the candidate may accept contributions after the election only to the extent that the contributions do not exceed net debts from such election, the contributions are designated for that election, and the contributions do not exceed the contribution limits in effect on the date of the election. 11 C.F.R. § 110.1(b)(3)(i) and (iii).

5. May candidates assign contributions they receive that are above the maximum allowed for the primary election to their general election allocation for that contributor?

Yes. As stated above, the campaign limits and campaign committee requirements apply separately to each election. Under the statute, a candidate's campaign committee can transfer or contribute monies to another campaign committee designated by the same candidate, *subject to the contribution limits*, if both committees have been designated for an election in the same year. A.R.S. § 16-905(F)(2). Because the campaign committees for the primary election and the general election would be designated in the same year, the candidate can transfer monies between the two, subject to the contribution limits. But when the limits have been reached by the same contributor for both elections, the excess contribution must be returned.

For example, a candidate committee may split a single contribution of \$4,000 evenly between her primary election campaign fund and her general election campaign fund. Likewise, a candidate who receives a contribution of \$3,000 could designate \$1,000 to the primary election fund and the remaining \$2,000 to the general election fund, or vice versa, or any other combination such that neither account accepts more than the contribution limit for a single election. The candidate committee, through its treasurer, should attempt to determine the

contributor's preference as to which account should reach the maximum limitation first. *See* Response to Question # 6 below. Further, the better practice would be to ask the donor to write two separate checks, one to the primary election committee and one to the general election committee, to avoid potential problems with transfers under A.R.S. § 16-905(F)(2).

Note that under 11 C.F.R. § 110.1(b)(5)(ii)(B), candidates may redesignate contributions that exceed the limits for the primary election to the general election subject to the following:

- (a) The contribution was made before the primary election;
- (b) The contribution was not designated for a particular election;
- (c) The contribution would exceed the applicable limit on contributions for the primary election if accepted for such election;
- (d) The contribution would not exceed the applicable limit on contributions for the general election if redesignated;
- (e) The committee must notify the contributor of the excess contribution that was redesignated and must notify the person of the right to request a refund.

If the contributor designated the contribution, the campaign committee must request a written redesignation of the contribution. 11 C.F.R. § 110.1(b)(5)(ii)(A).

6. Who determines whether the contribution is for the primary election or general election (the contributor or the candidate's committee)?

Arizona law does not address this specific issue. Because a candidate must establish two separate committees for the primary and general elections, the contributor should, in most circumstances, provide sufficient information to determine whether, or in what amounts, the contribution is intended for the primary or general election. For example, a check made out to "Candidate X – Primary 2014" would probably not be intended for Candidate X's general election candidate committee.

Under A.R.S. § 16-904(D), a political committee, through its treasurer, must exercise its best efforts to obtain the required information in order to prepare the itemization required on a campaign finance report. This information includes the mailing address, occupation, and employer, of each individual contributor and the mailing address and identification number of each political committee contributor. Arizona law neither requires a committee to ask nor prohibits a political committee from asking a contributor whether a given contribution is intended for the primary election or the general election.

In lieu of specific information from the contributor, the best practice appears to be a presumption that the contribution was intended for the next election to occur. If the contribution occurred prior to the primary and that contributor had not already given the maximum amount for that election, then the committee should designate the contribution as one for the primary election. If the contribution occurred after the primary election and before the general election, the committee should presumably designate the contribution as one for the general election.

A contribution is generally defined as anything of value made for the purpose of influencing an election. A.R.S. § 16-901(5). Although a contribution made after an election cannot influence that election, an exception exists for “a contribution made to retire campaign debt.” A.R.S. § 16-901(5)(a)(i). Accordingly, if a contribution is made after the primary election and before the general election, it can be applied to the primary election committee where the primary election candidate committee incurred debt. In such circumstances, it falls to the committee’s treasurer to use best efforts to glean the contributor’s intentions.

For example, if a candidate committee receives a contribution prior to the August primary election date and cannot determine the contributor’s intentions, the contribution presumably goes to the committee account for the upcoming primary election. If the candidate committee

receives a contribution in September, it presumably is intended for use in the general election unless the candidate lost the primary election. If, however, the candidate lost the primary election and had no debt, the committee must dispose of surplus monies as required by A.R.S. § 16-915.01.

Note that under the federal system, the contributor's designation controls. If the contributor makes no designation, the contribution is allocated to the candidate's next election. 11 C.F.R. § 110.1(b)(2)(ii). Therefore, "an undesignated contribution made after the candidate has won the primary, but before the general election, applies toward the contribution limit for the general election." FEC Campaign Guide at 22.

7. May 16-341 candidates who qualify for direct placement on the general election ballot accept primary election contributions?

Yes. A candidate who is not a member of a political party that selects its candidates through a primary election can get on the ballot under A.R.S. § 16-341. A candidate is defined under A.R.S. § 16-901(2) as an "individual who receives or gives consent for receipt of a contribution for his nomination for or election to any office in this state other than a federal office." Candidates who file under A.R.S. § 16-341 are candidates as defined in § 16-901 and they are subject to and entitled to the same contribution limits as other candidates, including the limitation on transfers between committees pursuant to A.R.S. § 16-905(F)(2).

Note that under the federal system, independent and non-major party candidates who are not involved in a primary election are entitled to a primary limit. Such candidates must choose one of the following dates as their "primary" date and, until that date, may collect contributions that count toward the contributor's primary limits: (1) the last day on which, under state law, a

candidate may qualify for a position on the general election ballot; or (2) the date of the last major primary election, caucus, or convention in that state. FEC Campaign Guide at 22.

8. Does the language “from a single source a contribution of at least one thousand dollars” apply to one individual contribution or an aggregate amount from an individual during the twenty-day pre-election time?

The new statute, A.R.S. § 16-913.01, requires a candidate’s campaign committee to report each contribution received from a single source of at least one thousand dollars less than twenty days before the day of the election. The statutory language – “receives from a single source a contribution of at least one thousand dollars” – is unambiguous. It does not apply to aggregate contributions. If the Legislature had intended to apply this disclosure requirement to aggregate contributions in lesser amounts, it could have done so. For example, in the same bill, the Legislature removed the previous language in A.R.S. § 16-905 that established aggregate limits for individual contributors in a given calendar year as well as aggregate limits that a candidate committee could accept from all contributors. In enacting H.B. 2593, the Legislature removed those aggregate limits when it could have retained them or could have adopted the existing concept of aggregate contributions in A.R.S. § 16-913.01.

9. What is the election period for an office that may span more than one primary and general election?

Certain offices are subject to elections every two years while other offices have terms of four or six years. Accordingly, you have asked whether candidates for the latter category of offices are entitled to contribution limits for primary and general elections held during years in which they are not actually running.

Analysis begins with the definition of candidate, which is an “individual who receives or gives consent for receipt of a contribution for his nomination for or election to any office in this state other than a federal office.” A.R.S. § 16-901(2). A candidate is necessarily someone running for a particular office in a particular election, e.g., for the office of secretary of state in 2014. There is only one primary election and one general election for that office. Those elections will be held in August and November of 2014. Unless a vacancy occurs, that office will not be on the ballot again until August and November of 2018. However, there will be an intervening primary election and general election for different offices in August and November of 2016.

No statute precludes a person from filing an exploratory committee or even a candidate committee well in advance of the election for that particular office; however, a person may have only one exploratory committee at a given time. A.R.S. § 16-903(C). In the example above, a person seeking to run for the office of secretary of state in 2018 could file as an exploratory committee or a candidate committee and could begin accepting contributions. A.R.S. § 16-903(G). The committee could accept contributions up to the maximum amount per contributor for the primary election and for the general election for that office. Although those contributions could be accepted any time before the 2018 election, there is only one primary election and one general election for which the office will be on the ballot. Therefore, a candidate committee may only accept contributions attributable to a single primary election and a single general election for that office, regardless of the timing.

10. What are the restrictions, if any, for funds in existing candidates' committee accounts on the effective date of this legislation?

Funds existing in a candidate's committee on the effective date of this legislation were subject to the limitations set forth in the previous versions of A.R.S. § 16-905 and remain subject to all other campaign finance statutes. Prior to September 13, 2013, a candidate running for legislative office, for example, could not accept a contribution from an individual contributor exceeding \$440.00.⁴ On and after September 13, 2013, that same candidate can potentially accept up to \$2,000.00 for the primary and another \$2,000.00 for the general election. Assuming that the existing funds in this hypothetical candidate's committee accounts include a maximum pre-H.B. 2593 contribution of \$440.00, any additional contribution would have to be identified as one for the primary or for the general election (or attributed as set forth above in response to question #6), but in any event must not exceed the maximum for that election. In other words, if the next election is the primary, and the same individual wants to contribute to this legislative candidate, the maximum available contribution would be \$1,560, the difference between the limit of \$2,000 and the existing contribution of \$440. A candidate committee with existing funds for the upcoming elections during this transitional phase from the old version of A.R.S. § 16-905 and the new version will have to decide whether existing funds are for the primary election or for the general election and then account for additional contributions accordingly.

To the extent that existing funds in a candidate's committee coffers are transfers from other candidate committees in previous years or personal funds, they do not count against any contribution limitations set forth in A.R.S. § 16-905. See A.R.S. § 16-915.01 regarding transfers of surplus monies from a previous election to a subsequent committee.

⁴ The previous statutory contribution limit for a nonparticipating legislative candidate after adjusting for the Citizens Clean Election Act pursuant to A.R.S. § 16-941(B) and after adjusting by the secretary of state biennially based on the consumer price index pursuant to A.R.S. § 16-905(H) was \$440.00.

11. Effective date (9/13/13) and the Municipal Elections in Phoenix.

The City of Phoenix election for City Council is on August 27, 2013 and the runoff election, if necessary, will be held on November 5, 2013. These dates are the same for the City of Tucson's municipal election. Consequently, the primary or first election will be held before H.B. 2593 takes effect. As set forth above in response to Question #6, contributions are defined as anything of value given for the purpose of influencing an election, but may also include anything of value given to retire campaign debt. A.R.S. § 16-901(5). Candidates in the municipal elections during the 2013 election cycle may accept contributions up to the maximum for the general election (or runoff election) and may accept additional contributions up to the maximum for the primary election only to retire debt incurred by the candidate's primary committee.

Conclusion

The Legislature changed the campaign finance system for candidates in Arizona state elections when it enacted H.B. 2593. A candidate now has the ability to accept funds for the primary election and for the general election, up to statutory maximums. The candidate must establish an accounting system to accurately register contributions made in each election. The candidate may transfer funds and debts between the two accounts in accordance with campaign finance statutes. Candidates can accept contributions up to those two maximums at any time before the elections occur, and can continue to accept contributions up to those maximums after the elections occur to the extent needed to retire debt. The dual contribution limits apply equally to major party candidates who participate in primary elections and non-major party candidates who qualify at the outset of their campaigns for the general ballot. A candidate may only accept contributions for a single primary election and a single general election for the office sought

regardless of whether the particular jurisdiction holds another primary election and general election between the time that the individual files his exploratory or candidate committee and the time that the elections for that office will actually be held. Finally, candidates and their committees are urged to review, and required to comply with, all campaign finance statutes, including those not amended by H.B. 2593.

Eric J. Bistrow
Chief Deputy Attorney General

*Under the Attorney General's policy of avoiding conflicts of interest and the appearance of impropriety, Attorney General Thomas C. Horne has recused himself from any participation in formulating this Opinion. Eric J. Bistrow, Chief Deputy Attorney General, has been designated to serve as the acting Attorney General for purposes of this Opinion.



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>ERIC J. BISTROW*</p> <p>CHIEF DEPUTY ATTORNEY GENERAL</p> <p>August 21, 2013</p> | <p>No. I13-006 (R13-011)</p> <p>Re: Campaign Finance</p> |
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To: Hon. Phil Lovas
Arizona House of Representatives

Questions Presented

You have asked the following questions regarding freedom of political association under Arizona's campaign finance laws:

1. May an incumbent Arizona Legislative candidate associate himself with an Arizona political committee (standing or super PAC) in support of or opposition to one or more candidates if the committee does not accept contributions for the candidate's own race and does not make expenditures in connection with the candidate's own race?

2. May an incumbent Arizona Legislative candidate associate himself with an Advocacy Organization (I.R.C. § 501(c)(4), (c)(5), or (c)(6)) if the Advocacy Organization does not make any expenditures to influence the candidate's own race and does not receive or make contributions or expenditures that would trigger registration as an Arizona political committee of any kind?

Summary Answers

1. Yes, with qualification. Arizona law permits a state legislative candidate to associate with a state political committee that supports or opposes one or more other candidates and that neither contributes nor expends funds toward the candidate's own race, provided that (a) the political committee is not the candidate's own campaign committee, (b) the candidate is not acting as an agent of his own campaign committee, and (c) the candidate follows all other state campaign finance rules.

2. This question requires a fact-driven analysis of which factors require registration as a political committee under A.R.S. § 16-901(19) and what types of conduct constitute an independent expenditure under A.R.S. § 16-901(14). Because the answer to this question may vary based on an infinite number of factual permutations, we decline to provide a formal opinion in response to this question. We recommend that you refer to the Handbook for Candidates & Political Committees and the Guide for Campaign Finance published by the Arizona Secretary of State when considering these issues.

Background

Courts have long recognized the social and personal importance of allowing individuals to associate with political organizations of their choice. In *Buckley v. Valeo*, the United States Supreme Court affirmed that the "freedom of political association . . . is 'a basic constitutional freedom'" that the First Amendment protects. 424 U.S. 1, 24-25 (1976) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

At the same time, courts have also identified compelling interests that justify some restrictions on this freedom. In particular, *Buckley* upheld parts of a restriction designed "to limit the actuality and appearance of corruption" in campaign finance. *Id.* at 26. The *Buckley* Court

recognized that some forms of political association could covertly “secure a political quid pro quo from current and potential office holders” whereby “the integrity of our system of representative democracy is undermined.” *Id.* at 26-27. Even if these corrupt quid pro quo arrangements do not actually arise, “the appearance of corruption” and the “public awareness of the opportunities” for such arrangements are of “almost equal concern.” *Id.* at 27.

This deep tension—between the need to protect freedom of political association and the need to deter real and apparent corruption—has prompted federal and state governments to develop increasingly complex campaign finance regulatory schemes. Your question implicates this long-recognized tension.

Analysis

In general, an Arizona Legislative candidate may associate with a state political committee that supports or opposes one or more other candidates and that does not influence the candidate’s own race.

Your first question is whether an Arizona Legislative candidate (“the Candidate”) may associate with a certain kind of political committee (“the Committee”). According to your explanation, the Candidate’s association with the Committee might “include fundraising for the . . . Committee, serving on the Board of Directors, and/or serving as Chairman.” Request at 1. The Committee would neither “receive contributions for the candidate’s own race” nor “make any expenditure in connection with the candidate’s own race.” Request at 1. The Committee might “make contributions to [other] Arizona Legislative candidates” and would “restrict its expenditures to those that influence only races other than the candidate’s.”¹ Request at 1-2.

Arizona law acknowledges that legislative candidates have a basic right to lend their personal support to other candidates of their choice. This acknowledgment has, for instance,

¹ Our analysis assumes—and therefore applies only to the extent—that the Committee would actually operate in the way that you have described (i.e., that it would neither receive contributions for the Candidate nor make expenditures in connection with the Candidate).

compelled this Office to deem an Arizona statute “patently unconstitutional to the extent that it prohibits a candidate from making a contribution to other campaigns with the candidate’s personal funds.” Ariz. Att’y Gen. Op. I87-039. In *Buckley*, the Supreme Court similarly declared that “[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election *and the election of other candidates.*” 424 U.S. at 52 (emphasis added). Since the Candidate’s association with the Committee would constitute an expression of the Candidate’s support for other candidates, Arizona law generally permits this kind of association.

Arizona law does not, however, permit this kind of association in all circumstances. In an effort to stem real and apparent corruption, the Arizona Revised Statutes have placed restrictions on the particular ways in which candidates may support one another via political association. We discuss these restrictions below.

1. The Committee must not be the Candidate’s own campaign committee.

Under A.R.S. § 16-905(F), a “candidate’s campaign committee . . . shall not transfer or contribute money to any other campaign . . . committee” Moreover, under A.R.S. § 16-903(D), a “political committee that supports . . . another candidate . . . may not be designated as a candidate’s campaign committee.” Hence, if the Committee were the Candidate’s campaign committee, the Committee’s contributions to other candidates would violate § 16-905(F) and § 16-903(D).

The Candidate could take steps to ensure that the Committee does not become his campaign committee. “Candidate’s campaign committee” means “a political committee designated and authorized by a candidate,” A.R.S. § 16-901(3), although a political committee might become a candidate’s de facto campaign committee even without the candidate’s formal

designation if it accepted earmarked contributions for that candidate, *see* A.R.S. § 16-907(B); *cf.* *Van Riper v. Threadgill*, 183 Ariz. 580, 583, 905 P.2d 589, 592 (Ct. App. 1995) (deeming an “informal ad hoc group[]” to be a political committee). Therefore, as long as the Candidate neither designates the Committee as his campaign committee nor accepts contributions from it, the Committee will not become his campaign committee.

Note that if the Committee becomes the campaign committee of any candidate, it cannot also be a standing political committee. A.R.S. § 16-907(D). To avoid this result, a concerned candidate should follow the steps outlined above.

2. The Candidate must not be acting as an agent of his own campaign committee.

Even if the Committee is not the Candidate’s campaign committee, the Candidate’s association with the Committee might still violate sections 16-905(F) and § 16-903(D) in at least one scenario. If in associating with the Committee, the Candidate acts as an agent of his own campaign committee, then this association might constitute a contribution from the Candidate’s campaign committee to another candidate, which sections 16-905(F) and 16-903(D) prohibit. An important question, then, is whether the Candidate is an agent of his own campaign committee by virtue of his association with the Committee.

Arizona Revised Statute § 16-903(E) provides as follows:

Any candidate who receives a contribution or any loan for use in connection with the campaign of that candidate for election or who makes a disbursement in connection with that campaign shall be deemed as having received the contribution or as having made the disbursement as an agent of the candidate’s campaign committee for purposes of this article.

This statute does not directly address the situation at hand; rather, it deals with a “candidate who receives a contribution” for “the campaign of *that* candidate” or “who makes a disbursement” for “*that* campaign” (emphasis added), i.e., a candidate who receives or spends money for his or her

own campaign. Because the Committee would limit its spending to races other than the Candidate's, section 16-903(E) does not render the Candidate an agent of his own campaign committee merely by virtue of associating with the Committee.

No Arizona statute deems a candidate who contributes to another campaign to be thereby acting as an agent of his own campaign committee absent additional facts. Any such judgment would make all such contributions illegal per § 16-905(F), whereas in reality these contributions are not only permitted but also protected. *See, e.g.,* Ariz. Att'y Gen. Op. I87-039; *Buckley*, 424 U.S. at 52. Thus, the Candidate would not be acting as an agent of his own campaign committee simply by virtue of his association with the Committee.

3. The Candidate must follow all other state campaign finance rules.

The Candidate who associates with the Committee but does not act as an agent of his campaign committee is acting personally. Various state campaign finance rules, such as personal contribution limits, therefore apply. *See* A.R.S. § 16-905(B). The applicability of these rules is beyond the scope of the questions presented.

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Conclusion

An Arizona Legislative candidate may associate with an Arizona political committee that supports or opposes one or more other candidates and that neither contributes nor expends toward the candidate's own race, provided that (a) the political committee is not the candidate's own campaign committee, (b) the candidate is not acting as an agent of his own campaign committee, and (c) the candidate follows all other state campaign finance rules.

Eric J. Bistrow
Chief Deputy Attorney General

*Under the Attorney General's policy of avoiding conflicts of interest and the appearance of impropriety, Attorney General Thomas C. Horne has recused himself from any participation in formulating this Opinion. Eric J. Bistrow, Chief Deputy Attorney General, has been designated to serve as the acting Attorney General for purposes of this Opinion.



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 23, 2013</p> | <p>No. I13-005 (R13-009)</p> <p>Re: Participation of Non-Traditional Teachers in a School's Classroom Site Fund Performance Pay Plan</p> |
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To: Candyce B. Pardee, Esq.
Udall Shumway

You have submitted to the Attorney General's Office for review an opinion that you prepared for the Tolleson Union High School District ("District") regarding the eligibility of Marine Junior Reserve Officer Training Instructors and Guidance Advisors to participate in the District's classroom site fund ("CSF") performance pay under Arizona Revised Statutes ("A.R.S.") § 15-977 following the decision in *Reeves v. Barlow*, 227 Ariz. 38, 251 P.3d 417 (App. 2011). The *Reeves* decision modified an earlier Attorney General Opinion (Ariz. Att'y Gen. Op. I01-014) by establishing that, as a threshold matter, a school employee must have a teaching certificate to participate in the CSF performance pay plan.

Pursuant to A.R.S. § 15-253(B), this Opinion revises your opinion as follows. We accept your conclusions and analysis regarding questions A and B presented in your opinion to the District. We further agree with your conclusions regarding whether the Marine Junior Reserve Officer Training Corps teaching certificate and the Arizona Guidance Counselor certificate

would meet the threshold established by *Reeves* for participation in a CSF performance pay plan. However, we revise your Opinion to clarify only that although an employee may possess a qualifying certificate, that employee must be engaged in instructional activities relating to the school's educational mission to participate in the CSF plan.

Question Presented

Is possession of a qualifying teaching certificate sufficient pursuant to *Reeves* to participate in a district's CSF performance pay plan?

Summary Answer

No. Although it is necessary for an individual to possess a qualifying teaching certificate to meet the threshold eligibility for the CSF performance pay plan, such individual should not be included in the plan unless they are also employed to provide instruction to students relating to the school's educational mission.

Background

During the 5th Special Legislative Session of 2000, the Legislature passed S.B. 1007, which created the CSF to provide funding to districts and charter schools. A.R.S. § 15-977. A school district or charter school must spend monies distributed from the CSF "for use at the school site," including spending at least 40% of the funds for "teacher compensation increases based on performance." A.R.S. § 15-77(A). Although the statute allocates CSF monies for teacher compensation increases, it does not define the category of employees who qualify as "teachers."

Your opinion analyzes whether Marine Junior Reserve Officer Training Corps instructors and Guidance Advisors may qualify to participate in the CSF plan as "teachers." The District's

request states that following the *Reeves* decision, the District stopped paying CSF funds to these individuals who were classified as teachers under Ariz. Att’y Gen. Op. I01-014.

Analysis

In 2001, our office issued an opinion concluding that the definition of “teachers” for purposes of the CSF plan is not limited to traditional classroom teachers. Ariz. Att’y Gen. Op. I01-014. Rather, the opinion stated “others employed at public schools to provide instruction to students relating to the school’s educational mission are also ‘teachers’ for the purposes of A.R.S. § 15-977.” *Id.* Further, the opinion concluded that school districts and charter schools should apply these principles to determine in their specific circumstances which employees would qualify for the CSF plan. *Id.*

In *Reeves*, a group of school district employees from the Window Rock school district brought an action against the district seeking a writ of mandamus compelling the district to include them as teachers eligible to participate in the district’s CSF plan. *Reeves*, 227 Ariz. at 39 ¶ 1, 251 P.3d at 418.¹ The district argued that, pursuant to Ariz. Att’y Gen. Op. I01-014, it had exercised its discretion in determining that the employees did not qualify as teachers. The court reviewed the relevant statutes and determined that although “teacher” is not defined, the requirements of A.R.S. § 15-502(B) regarding the employment of certificated teachers made it “clear that a school district may not employ as a teacher anyone who has not received a teaching certificate.” *Id.* at 41 ¶ 13, 251 P.3d at 420. Therefore, the court determined that reading these statutes together, “the class of persons eligible to participate in the compensation system as ‘teachers’ is limited to persons who have the requisite teaching certificate.” *Id.* at 42 ¶ 13, 251

¹ The five employees held positions at the school as a physical therapist, psychologist, speech therapist/pathologist, speech language pathologist, and registered nurse. None of these positions required a teaching certificate, and only one of the employees actually possessed a teaching certificate. *Reeves*, 227 Ariz. at 40 ¶ 4, 251 P.3d at 419.

P.3d at 421. The court thus concluded that “[t]o the extent the Attorney General’s opinion on this issue is contrary . . . we disagree with it.” *Id.* at n.3.

Your opinion correctly observes that a Junior Reserve Officer Training Corps Teaching Certificate is listed as an “Other Teaching Certificate” pursuant to Arizona State Board of Education Rules. Ariz. Admin. Code (“A.A.C.”) R7-2-614(G). We agree with your conclusion that this certificate would meet the *Reeves* qualification as a “teaching certificate” for participation in a CSF plan. Additionally, your opinion is correct in its determination that the Guidance Counselor Certificate issued pursuant to A.A.C. R7-2-617(B) is listed as an “Other Professional Certificate” and would not qualify the employee to participate in the CSF plan.

However, your opinion then concludes that any employee that has a Junior Reserve Officer Training Corps teaching certificate and Guidance Advisors in the District that possess an Arizona teaching certificate in addition to their guidance counselor certificate may be included in the District’s CSF performance plan. We disagree. *Reeves* does not eliminate the requirement from the earlier Attorney General Opinion that an employee must be employed to provide instruction to students to participate in the CSF plan. *See* Ariz. Att’y Gen. Op. I01-014 (concluding that schools may use CSF funds for employees that are “employed to provide instruction to students related to the school’s educational mission”). In fact, the *Reeves* opinion specifically notes that “a school district that permitted a non-teacher to participate in the compensation system would exceed its authority under A.R.S. § 15-977.” *Reeves*, 227 Ariz. at 41 ¶ 11, 251 P.3d at 420. The holding of an appropriate teaching certificate is a necessary condition, but it is not alone sufficient for participation in the District’s CSF plan. As the court discussed in *Reeves*, “a school district retains discretion to determine whether employees who possess a teaching certificate, but are not employed in positions requiring such, are eligible to

participate in the compensation system.” *Id.* at 42 ¶ 14, 251 P.3d at 421. We believe that the earlier Attorney General Opinion provides the framework for schools to make this determination.

Conclusion

We conclude that under A.R.S. § 15-977, a school may include in its CSF plan those individuals who: (1) possess the requisite teaching certificate issued by the Arizona State Board of Education; and (2) are employed to provide instruction to students relating to the school’s educational mission. We therefore revise your opinion to the extent that it is contrary on this limited issue.

Thomas C. Horne
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 23, 2013</p> | <p>No. I13-004 (R13-008)</p> <p>Re: House Bill 2178 and gift clauses of the Arizona Constitution</p> |
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To: The Honorable Kelli Ward
Arizona State Senator

Question Presented and Summary Answers

Does House Bill 2178 (“H.B. 2178”) violate the special law and/or gift clauses of the Arizona Constitution?

H.B. 2178 is an unconstitutional special law and thus invalid because it improperly confers tax benefits on a handful of landowners while depriving similar benefits to past, present and future landowners thrust into identical circumstances.

We decline to address whether H.B. 2178 violates the gift clause because the question rests, in part, on issues of fact.

Background

Your question concerns H.B. 2178, 2012 Ariz. Sess. Laws, ch. 200, § 1, which “[f]orgives outstanding property taxes and penalties for qualified property owners in tax years 1987 through 2009, and directs the county treasurer to grant a refund for taxes paid in that time.”

See Ariz. State Senate Staff, 50th Leg., 2d Reg. Sess., Fact Sheet for H.B. 2178 (Mar. 16, 2012).

H.B. 2178 was signed into law on April 5, 2012.

A. The Disputed Triangle.

H.B. 2178 impacts a discrete group of private landowners who own real property in a triangular-shaped area of land (the “Disputed Triangle”) located east of the Colorado River in Mohave County (the “County”), on or near the Fort Mojave Indian Reservation. The landowners acquired their property interests as successors to a 1905 conveyance (or land patent) from the federal government to the State of California. It is unclear whether the landowners reside in Arizona.

In or around 1987, the United States and the Fort Mojave Indian Tribe (the “Tribe”) asserted an ownership interest in the Disputed Triangle and 47 additional parcels (the “disputed parcels”) along the Colorado River. The United States argued that the Disputed Triangle attached to sections of land held by the United States in trust for the Tribe through the process of accretion, which is “the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain.” *State v. Jacobs*, 93 Ariz. 336, 339, 380 P.2d 998, 1000 (1963).

On August 9, 1994, the United States sued the private landowners for quiet title, ejectment, and trespass damages under the accretion theory. The landowners ultimately prevailed in 2009.

B. Property Tax Assessments.

Mohave County assessed property taxes on the disputed parcels during the litigation period from 1994 to 2009, and an unknown number of private landowners continued to voluntarily pay them. Given the ownership issues, however, the County apparently deferred

collection of the taxes until the litigation concluded. Thus, an unknown number of landowners paid no taxes.

When the landowners ultimately prevailed in the lawsuit in 2009, Mohave County requested back taxes from 1994 through 2009. Some landowners expressed surprise to Mohave County officials because the County never indicated the landowners would be responsible for back taxes if they prevailed. The private landowners also raised fairness objections based on their inability to use, improve, or sell the land while embroiled in litigation.

C. H.B. 2178.

Unable to persuade Mohave County officials, the private landowners approached the Arizona Legislature for tax relief, which resulted in H.B. 2178. Signed into law on April 5, 2012, H.B. 2178 provides that:

Property taxes and any accrued penalties due from but not paid by any qualified property owner for tax years 1987 through 2009 are forgiven and no longer due and payable. The county board of supervisors shall direct the county treasurer to strike off any forgiven taxes from the tax roll.

The county board of supervisors shall direct the county treasurer to grant a refund to a qualified property owner if [t]he qualified property owner paid property taxes on qualified property during any tax year 1987 through 2009 [and t]he property taxes paid have not already been refunded.

2012 Ariz. Sess. Laws, ch. 200, § 1(A), (D). The defined terms are:

“Qualified property” means the property that is owned by a qualified property owner and that was subject to a federal lawsuit brought by the United States of

America for the benefit of the Fort Mojave Indian Tribe against the qualified property owner.

“Qualified property owner” means a property owner who was a defendant in a federal lawsuit brought by the United States of America for the benefit of the Fort Mojave Indian Tribe in which the property owner owns land that is included in approximately one hundred thirty acres of land within a triangular shaped area that is east of the Colorado River and that is near the Fort Mojave Indian Tribe reservation.

Id. at § 1(E).

The legislation set a December 31, 2012 deadline for qualified owners to submit refund claims and directed “the county treasurer [to] pay the claim after it is submitted.” *Id.* at § 1(B). In turn, the Mohave County treasurer is entitled to a credit with the State of Arizona “for the refunds given to qualified property owners.” *Id.* at § 1(C).

According to the Senate Fact Sheet, “[t]he fiscal impact of [H.B. 2178] is not known at this time.” *See* Ariz. State Senate Staff, 50th Leg., 2d Reg. Sess., Fact Sheet for H.B. 2178 (Mar. 16, 2012).

D. H.B. 2177.

Of particular import here, H.B. 2178 was first introduced in tandem with a second far broader bill—H.B. 2177—that would have authorized all taxpayers to petition state and local agencies to waive any property taxes that become due on land which “is the subject of an action *in rem* filed by any jurisdiction of federal, state, local or tribal government, if the action continues for at least twelve months and if the action includes a determination of the ownership status of the property.” H.B. 2177, 50th Leg., 2d Reg. Sess. (Ariz. 2012).

Representative Jeff Dial introduced and sponsored both H.B. 2177 and H.B. 2178. He explained the difference between the bills as follows: “I always felt that if someone doesn’t have use of the property because [a] government entity comes along and ties you up in court for 24 years or a significant period of time, then I really think then we shouldn’t really be asking people to pay property taxes on a property they’re not getting the use of so that’s what these bills go towards. So one bill goes specifically towards resolving [the Disputed Triangle] case and another one as I was asked in this body for other people this happens to versus us going out and dealing with each case-by-case basis. This is trying to create an umbrella to deal with this issue.” See Minutes of Comm. On House Ways and Means (Feb. 6, 2012) (statement of Rep. Jeff Dial). H.B. 2177 was ultimately abandoned and never submitted to a vote.

Analysis

All legislative enactments are presumed constitutional, *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 204, ¶ 9, 972 P.2d 179, 188 (1999) (“We assume, as always, that legislative enactments are constitutional. We do not lightly conclude to the contrary.”), and construed, when possible, to have a reasonable and constitutional meaning, *State v. Arnett*, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978). Moreover, because the Attorney General is duty-bound to uphold and defend state laws, he “will not opine that a statute is unconstitutional unless it is patently so.” Ariz. Att’y Gen. Op. I83-069; cf. *State v. Ramos*, 133 Ariz. 4, 6, 648 P.2d 119, 121 (1982) (“An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional.”).

1. Special Law Prohibition

The Arizona Constitution directs that “[n]o local or special law shall be enacted in any of

the following situations: (9) assessment and collection of taxes, (13) granting to any corporation, association, or individual, any special or exclusive privileges, immunities or franchises, and (18) relinquishing any indebtedness, liability, or obligation to this state.” ARIZ. CONST. art. IV, § 19. This prohibition is designed “to prevent the legislature from providing benefits or favors to certain groups or localities.” *State Compensation Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993). It applies to tax exemption laws. *State v. Levy’s*, 119 Ariz. 191, 192, 580 P.2d 329, 330 (1978).

A statute is an unconstitutional special law if it fails to meet any of three independent requirements: (1) the classification of beneficiaries in the statute must have a rational relationship to a legitimate legislative objective; (2) the classification must encompass all members of the relevant class; and (3) the class must be elastic, allowing members to come and go as circumstances warrant. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 149, 800 P.2d 1251, 1257 (1990) (deannexation statute was invalid as special law for lack of generality and elasticity where the legislature restricted statute to a closed class of twelve cities).

a. Rational Relationship to Legitimate Goal

We first examine whether the classification scheme in H.B. 2178 bears a rational relationship to a legitimate governmental objective. *Arizona Downs v. Arizona Horsemen’s Found.*, 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981) (statute that gave preference for horse racing permit to past holders was rationally related to encouraging investment into horse racing business by assuring continuity and predictability of events). The legislature has broad discretion to create property tax classifications and Arizona courts defer to legislative judgment on the reasonableness of such classifications unless palpably arbitrary. *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 13, 912 P.2d 9, 17 (App. 1995) (“The judgment of the legislature

that a statutory classification is reasonable controls the courts unless palpably arbitrary.”); *see also generally America West Airlines v. Department of Revenue*, 179 Ariz. 528, 535, 880 P.2d 1074, 1081 (1994) (affirming legislature’s broad discretion in property tax classifications).

H.B. 2178 conceivably advances three legitimate governmental objectives. First, its sponsors intended to correct inequities that arise when private landowners are required to pay taxes on land they cannot use or enjoy due to pending government litigation to secure title in the same land. *See Minutes of Comm. On House Ways and Means* (Feb. 6, 2012) (statement of Rep. Jeff Dial). It thus seeks to promote fairness in the realm of property tax burdens and obligations. *Apache County v. Atchison, Topeka & Santa Fe Ry. Co.*, 106 Ariz. 356, 363, 476 P.2d 657, 664 (1970) (“One purpose of a property tax classification scheme is to raise those revenues necessarily borne by property taxes. It has been recognized that those groups specially benefiting from or specially burdening society may be required to pay additional taxes.”). Secondly, while less clear, the legislature might have passed H.B. 2178 to incent and foster economic development in the affected areas. *Cutter Aviation, Inc. v. Arizona Dept. of Revenue*, 191 Ariz. 485, 958 P.2d 1 (App. 1997) (recognizing rational basis for tax relief legislation intended to foster economic development). And last, the legislature may have sought to ensure future tax revenues from landowners about to lose their land for nonpayment of taxes. *Cf. Maricopa County v. State (Sherwood)*, 187 Ariz. 275, 280, 928 P.2d 699, 704 (App. 1996) (raising prospective tax revenues as public purpose in gift clause context).

Even so, we discern no rational relationship between such legitimate objectives and the defined class of beneficiaries in H.B. 2178 who actually obtain tax relief. The law forgives unpaid taxes and promises tax refunds only to “qualified property owners,” which the legislature defined narrowly to include a handful of taxpayers who both own land in the Disputed Triangle

and were named as defendants in *United States v. Aria, et. al.*, No. 94-cv-01624 (D. Ariz.). But if the Legislature intended H.B. 2178 as relief for landowners who are expected to pay taxes on land rendered worthless by overreaching government litigation, then the tax relief in H.B. 2178 should be available to all private landowners thrust into an identical predicament. *Republic*, 166 Ariz. at 149, 800 P.2d at 1257 (“The legislature may classify, but it cannot make a classification based on a decision that a law should apply to a particular individual or group. Rather, the legislature must enact laws that apply to all individuals who may benefit from its attempt to remedy a particular evil.”). It is “palpably arbitrary” to bestow special tax treatment on a discrete group of landowners in the Disputed Triangle while continuing to impose standard taxes on similarly situated landowners. *Tucson Elec. Power*, 185 Ariz. at 15, 912 P.2d at 19 (finding special treatment of particular taxpayers palpably arbitrary).

b. All-Encompassing Class and Elasticity

For analogous reasons, H.B. 2178 fails to meet the second and third constitutional requirements; it neither encompasses all members of the relevant class, nor is pliable enough to accommodate additional members. *Levy’s*, 119 Ariz. at 192-93, 580 P.2d at 330-31 (tax exemption that sought to mitigate adverse economic impact upon retailer who faced border competition was invalid as a special law because it failed to treat all similarly situated retailers in the same fashion and instead defined a class upon arbitrary geographic lines).

H.B. 2178 improperly affords special tax treatment to a handful of landowners while ignoring all other landowners thrust into identical circumstances. *Republic*, 166 Ariz. at 151, 800 P.2d at 1259 (“The statute was enacted in response to the abuse of the municipalities’ power to strip annex. On that basis, the class affected by the statute should include all cities where annexation abuses may have occurred. Because the statute applies to only 12 cities within

Maricopa County, it does not apply uniformly to all members of the class. Instead, the statute confers a benefit only on part of the class while immunizing larger cities in Maricopa County and all other similarly situated cities in other counties.”). Indeed, apparently recognizing this deficiency, Representative Dial first introduced H.B. 2178 in tandem with H.B. 2177. In remarks to a House Committee, he described H.B. 2177 as the “umbrella” to protect all landowners from identical misfortune while explaining that H.B. 2178 “goes specifically towards resolving this [Disputed Triangle] case.” *See* Minutes of Comm. On House Ways and Means (Feb. 6, 2012) (statement of Rep. Jeff Dial).

Next, H.B. 2178 is not sufficiently elastic to pass constitutional muster. *Id.* at 150, 800 P.2d at 1258 (“A statute is special or local if it is worded such that its scope is limited to a particular case and it ‘looks to no broader application in the future.’”) (quoting *Arizona Downs*, 130 Ariz. at 558, 637 P.2d at 1061). H.B. 2178 is not worded to reach landowners who confront identical circumstances in the future; rather, it provides relief to a finite group of landowners over a discrete period of twenty-two years. *Id.* at 151, 800 P.2d at 1259 (“Moreover, the statute’s focus, limited to a particular census for only 13 months, prevents any municipality from either coming within or exiting from its operation in the future. Because a general law would have provided a remedy to individuals in all areas annexed by large or small cities within the state, as indicated by the original bill, the statute’s limited application violates the special law prohibition.”).

H.B. 2178 is an unconstitutional special law and thus invalid because it arbitrarily confers tax benefits on a clique of landowners while excluding past, present and future landowners thrust into the same predicament.

2. Gift Clause

The Arizona Constitution prohibits the expenditure or use of public monies for private purposes under the gift clause, ARIZ. CONST. art. IX, § 7, which is designed to eliminate government favoritism and prevent governments from depleting public resources in favor of special interests. See *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) (“The constitutional prohibition was intended to prevent government entities from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises.”); John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L. J. 1, 96 (1988). The clause provides, in relevant part, that “[n]either the state, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.” ARIZ. CONST. art. IX, § 7. It has been applied to tax forgiveness and tax rebate legislation. *Sherwood*, 187 Ariz. at 280, 928 P.2d at 704.

A government expenditure violates the gift clause unless it meets two independent requirements: (1) it must have a public purpose, and (2) the government must, in return for the expenditure, receive consideration that “is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.” *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357 (internal quotations and citations omitted).

In conducting the analysis, Arizona courts examine all relevant facts to determine the “reality of the transaction both in terms of purpose and consideration.” *Id.* at 348-349, 687 P.2d at 356-357. And, similar to the special law inquiry, the Court has directed that substantial deference be given to the judgment of elected officials. *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2010) (“In taking a broad view of permissible public purposes under the Gift Clause, we have repeatedly emphasized that the primary determination of whether a specific

purpose constitutes a ‘public purpose’ is assigned to the political branches of government, which are directly accountable to the public. We find a public purpose absent only in those rare cases in which the governmental body’s discretion has been ‘unquestionably abused.’”) (internal citations omitted). Notwithstanding such deference, Arizona courts “must be independently satisfied that the two elements of a valid dispensation have been shown,” *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 367, 837 P.2d 158, 169 (App. 1991), rather than “merely rubber-stamp[ing] the legislature’s decision.” *Id.* at 369, 837 P.2d at 171.

The public expenditure must serve a public purpose. *Sherwood*, 187 Ariz. at 280, 928 P.2d at 704. The Court has recognized that “public purpose” is incapable of exact definition and changes in meaning to meet new developments and conditions. *Id.* A public purpose has been found where benefits are conferred on particular persons or organizations. *See, e.g., Humphrey v. City of Phoenix*, 55 Ariz. 374, 387, 102 P.2d 82, 87 (1940) (slum clearance program found to serve interest of general public even though effect is felt by a given class more than the community at large).

Turning to the instant expenditure, H.B. 2178 affords tax relief to a discrete group over a finite period. The group is comprised of landowners sued by the federal government in 1994 for quiet title and related claims. The finite period spans from the point at which the federal government first contested their ownership in 1987 until the landowners prevailed in 2009. Among the public purposes that either have been or might be offered for the expenditure are: (1) moral justification, (2) estoppel, and (3) economic justification.

The landowners have largely cited fairness considerations as the public purpose for H.B. 2178; that is, tax relief was appropriate because the landowners had no use or enjoyment of the land while embroiled in the title dispute. We are unable to find support for the argument. While

the Arizona Supreme Court recognized a moral consideration theory in *Udall v. State Loan Board*, 35 Ariz. 1, 11, 273 P. 721, 724 (1929), that decision is inapplicable here. There, the Court examined and upheld legislation under the gift clause that forgave certain debts to the state because those debts had been unreasonably expanded through the incompetence of state engineers. *Id.* Here, the landowners blame the federal government for impairing their property rights through litigation rather than state government. Moral consideration might support federal legislation under this theory, but not state legislation.

Although undefined and unclear, the landowners have also mentioned an estoppel theory based on alleged promises from Mohave County that the landowners would not be required to pay property taxes while the ownership dispute remained unresolved. With the limited information provided, this argument is not persuasive. Even accepting the alleged statements as fact, Mohave County never promised that back taxes would not be collected after the ownership dispute had been resolved.

An economic public purpose is also conceivable; that H.B. 2178 prevented an unknown number of landowners from losing their land, which, in turn, protected the employment and commodities derived from the land while ensuring a future tax revenue stream. *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198, 1201, 188 Ariz. 550, 553 (App. 1997) (“These attempts reflect a desire to prevent the possessory interest tax from deterring non-Indian commercial development on Indian lands and a desire to further the public benefit of an expanded employment base available to all Arizonans.”). Without particularized information about such public benefits, however, we cannot assess their existence or adequacy. *Hassell*, 172 Ariz. at 369-70, 837 P.2d at 171-72 (rejecting assorted theories of public benefit because the court “cannot judge their adequacy for a reason that brings us to a central defect of H.B. 2017. [T]he

legislature acted without particularized information, and established no mechanism to provide particularized information, to support even an estimate of the value of those claims.”).

Even assuming a public benefit, H.B. 2178 must still meet the consideration requirement, which is a question of fact, *Sherwood*, 187 Ariz. at 281, 928 P.2d at 705 (“The second prong, whether the exchange of tax money for the public benefit is disproportionate, is as a question of fact.”), and thus outside the Attorney General’s statutory authorization to offer opinions. ARIZ. REV. STAT. § 41-193(A)(7); Ariz. Op. Atty. Gen. No. I80-231; *see also* 1988 Ariz. Op. Atty. Gen. 97 (“Since the existence of the requisite intent to establish district residency is primarily a factual determination, we express no opinion with respect to this matter.”).

Conclusion

H.B. 2178 is an unconstitutional special law and thus invalid because it arbitrarily confers tax benefits on a handful of landowners while depriving similar benefits to past, present and future landowners thrust into identical circumstances. Although H.B. 2178 raises additional concerns under the gift clause, we cannot provide an opinion on that issue because it rests, in part, on questions of fact.

Thomas C. Horne
Attorney General



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 12, 2013</p> | <p>No. I13-003 (R13-005)</p> <p>Re: Vacancy in the Legislature</p> |
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To: Honorable Kelly Townsend
Arizona House of Representatives

Questions Presented

You have asked for an opinion on the following questions:

1. Does Arizona Revised Statutes (A.R.S.) § 41-1202(A)(2) and (3) require the nomination of a qualified elector from the same county of residence as that of the person vacating a legislative office in a legislative district that encompasses portions of more than one county within its boundaries?
2. Is an otherwise qualified elector eligible for nomination under A.R.S. § 41-1202(A) if he or she purports to meet the residency requirement by relying on a room above his or her commercial property?

Summary Answers

1. Yes, A.R.S. § 41-1202(A) requires a vacancy to be filled by a qualified elector of the same political party residing in the same county as the person who is vacating the office.

2. As the answer to the first question implies, the answer to the second question depends on actual residency as a matter of fact and law. We cannot answer this question without additional factual information to indicate whether the person actually resides in the room above commercial property.

Background

The Statutory Procedure

In 1999, the Legislature enacted a procedure for filling a legislative vacancy in A.R.S. § 41-1202.¹ The Legislature amended A.R.S. § 41-1202 in 2002 and again in 2012. Under the currently effective version, subsection 1202(A) applies if the officeholder who is leaving the office is a member of a political party organized pursuant to title 16, chapter 5, article 2, if that party has at least thirty elected committeemen who are from precincts that are “in the legislative district and that are in the county in which the vacancy occurred.” A.R.S. § 41-1202(A). Subsection 1202(B) applies if there are fewer than thirty elected committeemen of the appropriate political party. A.R.S. § 41-1202(B).

Under subsection 1202(A), the secretary of state must notify the state party chairperson of the vacating legislator’s political party, who must then provide written notice of a meeting to fill the vacancy to “all elected precinct committeemen of the appropriate political party from precincts that are in the legislative district and that are in the county in which the vacancy occurred.” A.R.S. § 41-1202(A)(1). Those precinct committeemen must then nominate three

¹ A vacancy in the office of United States senator or representative is filled either by the next general election, if held within six months from the date of the vacancy, or by a special election, if the next general election is more than six months in the future. A.R.S. § 16-222.

qualified electors who meet the requirements for service in the legislature and “who belong to the same political party and reside at the time of nomination in the same district and county as the person elected or appointed to the office immediately before the vacancy occurred.” A.R.S. § 41-1202(A)(2). The state party chairman must then forward the three nominees’ names to the “board of supervisors of the county of residence of the person elected or appointed to the office immediately before the vacancy occurred,” and the board of supervisors shall then appoint a successor from those three nominees. A.R.S. § 41-1202(A)(4).

The Maricopa County Attorney’s Advice Letter

In 2012, a vacancy in the Legislature prompted a Maricopa County supervisor to request an opinion from the Maricopa County Attorney regarding whether Ariz. Const. art. 4, pt. 2, § 2 required the Board of Supervisors to fill the vacancy by appointing a qualified elector who had been a resident of Maricopa County for at least one year. Senator Scott Bundgaard, a Maricopa County resident representing Legislative District 4—which includes portions of both Maricopa and Yavapai Counties—resigned. The request focused on the one-year residency requirement, not on which county’s precinct committee persons (and board of supervisors) would nominate and appoint someone to fill the seat. Nonetheless, the responding letter² addressed the latter issue.

Article 4, pt. 2, § 2 of the Arizona Constitution provides:

No person shall be a member of the Legislature unless he shall be a citizen of the United States at the time of his election, nor unless he shall be at least twenty-five years of age, and shall have been a resident of Arizona at least three years and of the county from which he is elected at least one year before his election.

² A deputy county attorney responded to the supervisor’s request for a legal opinion. The letter was not signed by the Maricopa County Attorney himself.

For purposes of Title 16, a “resident” is an “individual who has actual physical presence in this state, or for purposes of a political subdivision actual physical presence in the political subdivision, combined with an intent to remain.” A.R.S. § 16-101(B).

The letter from the Maricopa County Attorney’s Office concluded that the one-year residency requirement set forth in the Arizona Constitution is unenforceable because legislators are no longer elected from counties. The letter recounted the history of apportionment of legislators in Arizona and noted that before 1965 the Legislature consisted of two senators from each county and eighty state representatives apportioned to each county based on the ballots cast in the preceding gubernatorial election. In 1964, the United States Supreme Court ruled that the Equal Protection Clause requires that legislative districts be “as nearly of equal population as is practicable.” *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Beginning with the 28th Legislature in 1967, the Senate had thirty members and the House of Representatives had sixty members, who are apportioned among thirty legislative districts based on the population rather than county lines. Ariz. Const. art. 4, pt. 2, § 1.

Article 4, pt. 2, § 2 has not been amended to keep pace with the changes in legislative apportionment set forth in the preceding section. The letter from the Maricopa County Attorney’s Office indicated that the one-year residency requirement is unenforceable because it is a vestige of the previous apportionment process. Thus, the letter concluded that individuals considered for appointment to fill the vacancy in Legislative District 4 need not have resided in Maricopa County for at least one year prior to their nomination or appointment.

Analysis

The Legislative History of A.R.S. § 41-1202 Reflects the Legislature's Intent to Impose the County of Residence Requirement.

The original version of A.R.S. § 41-1202 vested responsibility for filling legislative vacancies solely in the county boards of supervisors. When House Bill 2586 was introduced in 1999 to enact a new section 41-1202, it did not mention the residency of the vacating legislator, but instead provided the following:

A. If a vacancy occurs in the legislature and the vacant seat was represented by a political party that has precinct committeemen organized pursuant to title 16, chapter 5, article 3, the secretary of state shall notify the state party chairman of the appropriate political party of the vacancy. Within three business days after notification of the vacancy by the secretary of state, the state party chairman of the appropriate political party or the chairman's designee shall give written notice of the meeting to fill the vacancy to all elected precinct committeemen of the appropriate political party *from precincts that comprise the legislative district in which the vacancy occurred*. The elected precinct committeemen of the appropriate political party who are *from the precincts that comprise the legislative district in which the vacancy occurred* shall appoint, within twenty-one days after notification of the vacancy by the secretary of state and by a majority vote, a qualified elector to fill the vacancy who meets the requirements for service in the legislature and who belongs to the same political party and resides at the time of appointment *in the same district* as the person elected to or appointed to the office immediately before the vacancy.

(Emphases supplied). The House Federal Mandates & States' Rights Committee voted to pass the bill without amendment. Public testimony praised the bill for putting the responsibility in the hands of the precinct committeemen, who were more familiar with the needs of the community. There were no opposing comments. The House passed it as introduced and transmitted it to the Senate.

The Senate Committee on the Judiciary discussed at length the fact that some legislative districts are comprised of portions of more than one county. This led to a conference committee that amended the bill. The version of HB 2586 ultimately enacted by the Legislature and signed by the Governor provided the following:

A. If a vacancy occurs in the legislature and the vacant seat was represented by a political party that is organized pursuant to title 16, chapter 5, article 2 and that has at least thirty elected committeemen who are from precincts that are in the legislative district *and that are in the county in which the vacancy occurred*, the secretary of state shall notify the state party chairman of the appropriate political party. Within three business days after notification of the vacancy by the secretary of state, the state party chairman or the chairman's designee shall give written notice of the meeting to fill the vacancy to all elected precinct committeemen of the appropriate political party from precincts that are in the legislative district *and that are in the county in which the vacancy occurred*. Those elected precinct committeemen shall nominate, within twenty-one days after notification of the vacancy by the secretary of state if the legislature is not in regular session or within five days if the legislature is in regular session and by a majority vote, three qualified electors to fill the vacancy who meet the requirements for service in the legislature and who belong to the same political party and reside at the time of nomination *in the same district and county* as the person elected to or appointed to the office immediately before the vacancy.

(Emphases supplied). In light of the conference committee's amendments, the county of residence requirement cannot be disregarded as an overlooked, anomalous vestige of the old apportionment regime. The 44th Legislature affirmatively added the reference to county of residence for the vacating legislator well after the change to the new population-driven apportionment regime. The legislators deliberated and decided to include residency in the vacating legislator's county as a qualification for the nominees to fill the vacancy.

The 2002 amendments, embodied in House Bill 2124, confirm the continuing vitality of the county of residence requirement. The introduced version removed the county-of-residence

requirement. Representative Gary Pierce, one of the bill's sponsors, explained that it was more desirable to allow all precinct committeemen in a district select the three nominees. Under the bill, the board of supervisors from the county in which the vacating legislator resides would still decide which of the three nominees to appoint for the vacancy. Senator Jack Brown proposed a floor amendment to undo the deletion of the county-of-residence references. Adopting the floor amendment, the Legislature passed a final version that kept the county-of-residence language.

The Legislature again amended § 41-1202 in 2012 through House Bill 2033, and again kept the county-of-residency requirement.

The Legislature affirmatively added the county-of-residency requirement as a qualification for potential nominees to fill a vacancy well after the change to population-based redistricting. The statutory language is unambiguous and requires nominees to fill a vacancy to reside in the same county as the vacating legislator.

Eligible Nominees Must Meet the Residency Requirement as a Qualification for Office.

The answer to the second question presented—whether a person can indicate a room over a commercial property as his or her residence for purposes of establishing residency for appointment to fill a vacancy—depends upon whether the person actually resides in the room, rather than whether the room is above commercial property. We cannot answer the second question without addressing facts and circumstances that are not set out in the question.

Conclusion

Under A.R.S. § 41-1202, nominees to fill a legislative vacancy in districts encompassing portions of more than one county must be residents of the same county in which the vacating legislator resides. How and whether a prospective nominee may establish residency for purposes of this statute encompasses factual questions beyond the scope of this opinion.

Thomas C. Horne
Attorney General



STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 11, 2013</p> | <p>No. I13-002 (R13-007)</p> <p>Re: Financial Treatment of Charter School Pupils at a District-sponsored Charter School</p> |
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To: Linda L. Good, Esq.
Staff Attorney
Higley Unified School District No. 60

You have submitted to the Attorney General's Office for review an opinion that you prepared for the Higley Unified School District ("District") regarding the impact of opening district-sponsored charter schools on the calculations of the District's adjustment for growth in student count pursuant to Arizona Revised Statutes ("A.R.S.") § 15-948. That statute provides for certain adjustments in budgeting capacity based on an increase in student population; it is known as the "Rapid Growth" provision. Your opinion recognizes that the District would not be eligible for Rapid Growth monies for new students attending the District's non-charter schools, based on how the Arizona Department of Education ("Department") would determine the District's eligibility for Rapid Growth monies. But you concluded that there was an alternative way to interpret the Rapid Growth statute so that the District retained eligibility for Rapid Growth monies for the students new to the District schools. You also concluded that A.R.S. §

15-185(E) had no impact on the District-sponsored charter schools because they are subject to A.R.S. § 15-185(D).

Pursuant to A.R.S. § 15-253(B), this Opinion revises your opinion as follows. First, we clarify that the Department's process of calculating the District's eligibility for Rapid Growth monies complies with the statute. This conclusion moots your alternative analysis of the Department's Rapid Growth process, so we decline to address that alternative analysis. Finally, we clarify that the District's charter schools are subject to the reduction described in A.R.S. § 15-185(D) for the first year of operation because of the application of A.R.S. § 15-185(E).

Questions Presented

1. Does A.R.S. § 15-183(A)(4) require that a school district's charter-school pupils be excluded from the calculation of the district's growth in student count?
2. How is double funding avoided if a school district's charter-school pupils are included in the district's student count?
3. What is the impact of A.R.S. § 15-185(E) on a new school that a school district opens as a charter school?

Summary Answer

1. If a district sponsors a charter school that it elects to fund as a charter school—thus availing itself of the additional assistance and current funding available pursuant to A.R.S. § 15-185(A)(3)—then the students who attend the charter school must be excluded from the Rapid Growth calculation under A.R.S. § 15-185(A)(4).
2. Under the interpretation of the statute outlined here, it is not necessary to reach this question.

3. If a District opens a new charter school that serves a student population that had previously been served at a district school, then A.R.S. § 15-185(E) requires a reduction of the District's base support level equal to the sum of the base support level and additional assistance received in the current year for those pupils that were at the District in the prior year and are now enrolled at the District's charter school.

Background

Analysis of the question you present requires an understanding of the following Arizona school finance concepts, their interrelationship, and the effect of a district's decision to sponsor a charter school:

1. How the district's base support level funding is determined;
2. The purpose and calculation of the district's base revenue control limit,
3. How the Rapid Growth provisions function to allow school districts with a sudden influx of students to be fully funded; and
4. Calculation of funding for district-sponsored charter schools.

A district's base support level funding is determined by multiplying its student count by a legislatively determined dollar amount. A.R.S. § 15-943.¹ "Student Count" is defined as the average daily membership "for the fiscal year before the current year, except that for the purpose of budget preparation student count means average daily membership . . . for the current year." A.R.S. § 15-901(A)(13). Average daily membership ("ADM") is the number of enrolled full-time and fractional students in the district. A.R.S. § 15-901(A)(1). Thus the Student Count and ADM are essential components in determining the amount of funding that a district will receive. A district's base support level funding is in turn one component of its revenue control limit. That

¹ Although the calculation of a district's base support level is more complicated than is described here, further details are not relevant to the questions presented.

limit is a spending limit: it is the maximum amount that the district may spend for most of its day-to-day operations. A.R.S. §§ 15-947(C), 15-905(E).²

A district is eligible for Rapid Growth monies if it is educating more pupils in the current school year than it educated the prior school year. A.R.S. § 15-948. Rapid Growth allows a district to increase its revenue control limit and district support level³ for the current year to account for the growth in its student body, thus allowing the district to receive and expend additional monies. Rapid Growth is necessary because traditional district schools are funded based on the prior year's Student Count. Without such an adjustment, a district that experiences a significant influx of new students might not be funded adequately.

When a district sponsors a charter school, that district must be able to increase its revenue control limit and district support level to be able to accept and budget the additional charter school monies. A.R.S. § 15-185(A)(1) allows the district to properly budget and receive funding for the sponsored charter school. It states that the charter school "shall be included in the district's budget and financial assistance calculations pursuant to paragraph 3 of this subsection and chapter 9 of this title, except for chapter 9, article 4 of this title."⁴ However, the charter school law limits a district's access to Rapid Growth funding by providing: "If a school district uses the provisions of paragraph 3 of this section, the school district is not eligible to include those pupils in its student count for the purposes of computing an increase in its revenue control limit and district support level as provided in section 15-948." A.R.S. § 15-185(A)(4).

² A district's revenue control limit is calculated by adding its base revenue control limit and its transportation revenue control limit. A.R.S. § 15-901(12). The district's base revenue control limit is equal to the district's base support level as calculated in A.R.S. § 15-943. A.R.S. § 15-944(E).

³ The Rapid Growth provisions in A.R.S. §§ 15-948 and 15-185(A)(4) use the phrase "district support level" which is defined in A.R.S. § 15-901(A)(7) as the base support level plus the transportation support level. Transportation funding is irrelevant to the questions presented in this Opinion, so it is not discussed here.

⁴ Chapter 9, article 4 of title 15 concerns issues of capital funding that are not relevant to this Opinion.

You explain in your request that the District is constructing two new school facilities that will be its first middle schools to serve its seventh- and eighth-grade populations.⁵ The District is considering the fiscal implications of operating the two new schools as district-sponsored charter schools, rather than as traditional district schools. The District is concerned that operating the schools as charters would cause the District to lose its Rapid Growth funding pursuant to A.R.S. § 15-948.

Analysis

The issues presented by this Opinion involve the interplay between two school finance statutes that are administered by the Department—the Rapid Growth statute (A.R.S. § 15-948) and the Charter School funding statute for district-sponsored charters (A.R.S. § 15-185(A)). In particular, A.R.S. § 15-185(A)(4) provides that a school district “is not eligible to include those pupils in its student count . . . as provided in section 15-948.”

To provide clarity throughout the Opinion about how the various subsections of A.R.S. § 15-185 interact, we will use the example set forth in your opinion to guide the discussion.

| Fiscal Year 2013 | | Fiscal Year 2014 | |
|---|--------|---|--------|
| Students Attending All District Schools | 10,000 | Students Attending All District Schools | 10,500 |
| Non-Charter Schools | 10,000 | Non-charter Schools | 9,800 |
| | | At District in 2013 | 9,500 |
| | | New to District in 2014 | 300 |
| Charter Schools | 0 | Charter Schools | 700 |
| | | At District in 2013 | 500 |
| | | New to District in 2014 | 200 |

⁵ Although not stated in your opinion, we understand that the District is reconfiguring its elementary schools from kindergarten-through-eighth-grade to kindergarten-through-sixth-grade schools, with the two new middle schools taking seventh- and eighth-grade students.

I. A.R.S. § 15-185(A)(4) Requires the Exclusion of All Charter-School Pupils from the Rapid Growth Calculation.

As discussed above, Rapid Growth allows a school district to receive additional funding during the current school year if it is educating more students in the current year than it did in the previous year. The adjustment set out in the Rapid Growth statute is important because district schools are funded on the previous year's Student Count.⁶ For most school districts, the Rapid Growth calculation is fairly straightforward pursuant to A.R.S. § 15-948:

1. determine the number of students that were attending district schools in the previous year;
2. determine the number of students attending district schools in the current year;
3. if the number of students in (2) is greater than (1), the district is eligible to calculate an increase in its revenue control limit and district support level.

A.R.S. § 15-948(A).⁷ Therefore, a district that does not sponsor any charter schools simply asks whether more students are attending this year than attended in the previous year. If so, then the

⁶ There is no need for Rapid Growth funding for charter schools because they are funded based on their current year student population, allowing them to receive current year growth funding through their Student Count.

⁷ The full text of the relevant portion of A.R.S. § 15-948 is:

A. Any school district . . . may determine if it is eligible to increase its revenue control limit and district support level for the current year due to growth in the student population as follows:

1. Determine the student count used for calculating the base support level for the current year [prior year's student population].
2. Determine the average daily membership or adjusted average daily membership, which is applicable, through the first one hundred days or two hundred days in session, as applicable, of the current year [current year's student population].
3. Subtract the amount determined in paragraph 1 of this subsection from the amount determined in paragraph 2 of this subsection.
4. If the amount determined in paragraph 2 of this subsection is greater than the amount determined in paragraph 1 of this subsection, the governing board of the

district may receive Rapid Growth and increase its revenue control limit and district support level.

When a district sponsors a charter school, however, its simple Rapid Growth calculation is complicated by A.R.S. § 15-185, which addresses Rapid Growth funding for districts with district-sponsored charter schools. In particular, A.R.S. § 15-185(A)(4) provides: “If a school district uses the provisions of paragraph 3 of this section, the school district is not eligible to include *those pupils* in its student count for the purposes of computing an increase in its revenue control limit and district support level as provided in section 15-948.” (Emphasis added.) Paragraph 3 of § 15-185(A) provides the option for district-sponsored charter schools to be funded as either traditional district schools or as charter schools.⁸ A district that “uses the provisions of paragraph 3” has opted to fund the school as a charter school, a decision that has several consequences. First, the paragraph allows the district to receive funding for the current year for the charter-school students who are new to the district. A.R.S. § 15-185(A)(3).⁹ In our example, the District would be able to increase its fiscal year 2013 Student Count by the 200 new students attending the charter school in fiscal year 2014 if it elects to fund the school as a charter

school district may compute an increase to its revenue control limit and district support level for the current year.

⁸ In addition to being funded in the current year, charter schools receive charter school additional assistance which the Legislature added to account for certain transportation and soft capital funds that are received by district schools, but for which charter schools are ineligible. A.R.S. § 15-185(B)(4). In recent years, charter school additional assistance has increased at a greater rate than the equivalent district-school funds, thus motivating school districts to explore this avenue to increase per-pupil funding. See Staff Memorandum from the Joint Legislative Budget Committee re: Charter Conversions (June 3, 2013), available at <http://www.azleg.gov/jlbc/m-charterconversions.pdf>.

⁹ The district can determine the Student Count for the charter-school students who were not previously enrolled in the district by using an estimated Student Count based on actual registration of students before the beginning of the school year. A.R.S. § 15-185(B)(2).

school.¹⁰ Further, the second sentence of A.R.S. § 15-185(A)(3)(a) provides that these 200 students would receive charter school additional assistance pursuant to A.R.S. § 15-185(B)(4). For fiscal years 2015 and beyond, all District charter-school students would be eligible for current year funding and charter school additional assistance.

Because A.R.S. § 15-185(A)(3) establishes the funding when a district elects to fund a school as a charter school, the Department has determined that “those pupils” described in A.R.S. § 15-185(A)(4) means all pupils who attend the charter school. Therefore, when a district makes a Rapid Growth calculation pursuant to A.R.S. § 15-948, the Department will exclude all charter-school pupils from the computation. Using your example, the Rapid Growth calculation would be as follows:

1. Student Count in fiscal year 2013 for District schools: 10,000
2. Average Daily Membership for fiscal year 2014 for District schools: 9,800
3. Because the fiscal year 2014 number is less than fiscal year 2013, the District is ineligible for Rapid Growth.

As the District is receiving current year funding for all the charter-school pupils who are new to the District and received funding this year also for the pupils who were in the District last year, the District has been funded for all of the pupils in the district-sponsored charter schools. Therefore, when the District determines its eligibility for Rapid Growth consistently with the Department’s interpretation of the statutes, the current year Student Count (referred to as “average daily membership” in the statute) includes only those 9,800 pupils currently attending the district schools, including the 300 new pupils attending the District schools. As the Student

¹⁰ The sponsoring district’s Student Count from the prior fiscal year, which formed the basis for the current year funding, already includes funding for any charter-school student who attended the sponsoring district the prior year. Therefore, the sponsoring district has received funding for all of the charter-school students for that first year of operation.

Count for the previous year included the 500 district students who are now attending the district-sponsored charter schools, in order for the District to be eligible for Rapid Growth, the Student Count for the current year in the District schools would have to increase by more than the number of pupils who transferred from a district school to the district-sponsored charter school.

We concur with the Department's interpretation of the Rapid Growth statute for district-sponsored charter schools to exclude charter-school pupils from the Rapid Growth calculation. Additionally, although the statute at issue may be susceptible of more than one interpretation, an agency's interpretation of the statute that administers it is entitled to deference. *See, e.g., Better Homes Constr., Inc. v. Goldwater*, 203 Ariz. 295, 299, 53 P.3d 1139, 1143 (App. 2002) (stating that the court accords great weight to an agency's interpretation of a statute); *Berry v. State Dep't of Corr.*, 145 Ariz. 12, 13, 699 P.2d 387, 388 (App. 1985) (stating that the "historical statutory construction placed upon a statute by an executive body administering the law will not be disturbed unless clearly erroneous"). Therefore, the District will not be able to include students who attend District-sponsored charter schools in its calculations for the purpose of determining its eligibility for Rapid Growth monies.

II. The Department's Interpretation of A.R.S. § 15-185(A)(4) Moots Any Alternative Analysis.

Because we concur with the Department's interpretation, it is not necessary to discuss the second question posed in your opinion regarding double funding in Rapid Growth.

III. The Reduction in A.R.S. § 15-185(E) Addresses a Particular Instance of Potential Double Funding that is Distinct From A.R.S. § 15-185(D).

Your opinion states that whether a school falls within the description in A.R.S. § 15-185(E) makes no difference because A.R.S. § 15-185(D) applies in all situations. While we agree that A.R.S. § 15-185(D) applies in all situations, we do not agree that A.R.S. § 15-185(E) is superfluous. Both statutes require a reduction in charter school funding where a charter school

has received funding from more than one source: as A.R.S. § 15-185(D) states, “it is not the intent of the charter school law to require taxpayers to pay twice to educate the same pupils.” But the reductions in the two sections apply to two different sources of funds. A.R.S § 15-185(D) applies to grants and gifts received from a federal or state agency if the monies are intended for the basic maintenance and operation of the charter school, A.R.S. § 15-185(E) applies to base support level and additional assistance received in the current year for pupils who were attending the district school in the prior year. Neither basic state aid nor additional assistance is a “gift or grant” as specified in A.R.S. § 15-185(D). Further, the reduction in A.R.S. § 15-185(E) applies solely in the first year following the conversion of a district school to a charter school.¹¹

We agree with your conclusion that a *new* school that a district opens as a charter school does not fall within the description of schools subject to A.R.S. § 15-185(E). That section states: “If a charter school was a district public school in the prior year and is now being operated for or by the same school district and sponsored by . . . a school district governing board, the reduction in subsection D of this section applies.”

The primary goal of statutory construction is to find and give effect to the Legislature’s intent. *See Mail Boxes, Etc., U.S.A. v. Indus. Comm’n*, 181 Ariz. 119, 121, 888 P.2d 777, 779 (1995). The best and most reliable indicator of that intent is the statute’s own language. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). “When the statute’s language is not clear, [courts] determine legislative intent by reading the statute as a whole, giving meaningful operation to all of its provisions, and by considering factors such as the statute’s context, subject matter, historical background, effects and consequences, and spirit and purpose.”

¹¹ The reference in subsection E to the reduction in subsection D appears to have been included to ensure that the treatment of a negative balance in A.R.S. § 15-185(D)(1)-(3) is applied without having to be repeated verbatim in subsection E.

Id. A statute's individual provisions must be considered in the context of the statute as a whole to achieve a consistent interpretation. *State v. Gaynor-Fonte*, 211 Ariz. 516, 518, 123 P.3d 1153, 1155 (App. 2005).

Subsection E of A.R.S. § 15-185 was added in 1999 to prevent double funding for students at a district-sponsored charter school if that school was a district school in the previous year. 1999 Ariz. Sess. Laws 1st Spec. Sess. ch. 4, § 2. Double funding would arise because in the current year the district would receive funding generated by the same students in both the prior year as district-school students and the current year as charter-school students. Such double funding would occur because, as noted above, district schools receive funding based on their prior year's student count, while charter schools are funded based on the current year's student count. A.R.S. §§ 15-185(B)(2), 15-901, 15-943. Paragraph 15 of the Senate Fact Sheet for SB1006 indicates that the intent of the provision was to prevent this "double funding of a charter school or its sponsoring district." Revised Fact Sheet for S.B. 1006 (April 1, 1999), *available at* <http://www.azleg.gov/legtext/44leg/1s/summary/s.1006ss1r.app.htm>.

As discussed earlier, the District is considering opening two new schools as charters to serve its seventh- and eighth-grade populations. If it does so, current District students in the sixth and seventh grades would have been attending the same district schools in fiscal year 2014, had the District not reconfigured its elementary schools from kindergarten-through-eighth-grade to kindergarten-through-sixth-grade. Although the middle schools are technically new schools and not a conversion of a school that was previously a district school, the schools here must be treated as converted schools to fulfill the intent of the statute and avoid double funding for District pupils for whom the District is already receiving funding based on their prior year enrollment at District schools.

We conclude that students who previously attended the District schools for sixth and seventh grades in fiscal year 2013 and will attend the charter school in fiscal year 2014 are subject to the A.R.S. § 15-185(E) reduction. For purposes of our example, the District would not be able to claim current year funding for the 500 students that were District-school students in fiscal year 2013, but are now attending the District charter school in fiscal year 2014.

Conclusion

For the foregoing reasons, we concur with the Department's interpretation of A.R.S. § 15-185(A)(4) to exclude all charter school pupils from a school district's Rapid Growth calculation. Because we conclude that the Department's approach should be upheld, we do not address your alternative proposal for interpreting the Rapid Growth formula for districts with district-sponsored charter schools. Further, we conclude that your opinion regarding A.R.S. § 15-185(E) is erroneous and that the provision requires the reduction of the district's state aid in the first year of operation of the district-sponsored charter school for all charter school students that were students in the district schools in the previous year.

Thomas C. Horne
Attorney General



**STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL**

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| <p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>THOMAS C. HORNE ATTORNEY GENERAL</p> <p>July 11, 2013</p> | <p>No. I13-001 (R13-006)</p> <p>Re: Board of Technical Registration with Regulating the Alarm Industry</p> |
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To: Melissa Cornelius,¹ Executive Director
Arizona Board of Technical Registration

Pursuant to Arizona Revised States (“A.R.S.”) § 41-193(A)(7), this Opinion addresses questions from the Executive Director of the Arizona Board of Technical Registration (the “Board”) regarding implementation of H.B. 2748, as amended by H.B. 2176, (collectively the “alarm legislation”) which authorizes the Board to certify and regulate alarm businesses and agents.

Questions Presented

- (1) Are businesses that install alarms and are already licensed by the Registrar of Contractors (the “Registrar”) required to also register with the Board?
- (2) Can the Board require that a firm registered only with the Registrar sign off on alarm agent applications? Can the Board request that a firm licensed only by the Registrar designate a “controlling person”?

¹ Ronald Dalrymple submitted the Opinion request as Executive Director for the Board. Effective June 14, however, Melissa Cornelius is the Board’s new Executive Director.

(3) Can the Board deny an alarm business's application if the controlling person has been convicted of any felony? What is the Board's time frame for issuing or denying an alarm business certification?

(4) In the event that an alarm business decides to add or replace a controlling person after initial certification, must the new person submit fingerprints?

(5) How should the Board construe the requirement in A.R.S. § 32-122.06(A) that the Board act on an alarm agent application within 10 days so that it is consistent with the requirement in A.R.S. § 32-122.06(B) that the Board obtain a criminal background check on applicants?

Summary Answer

The Board's authority to certify and regulate alarm businesses and agents is determined by reading the alarm legislation in the context of the Board's existing statutes at A.R.S. §§ 32-101 through -152. An alarm business may be licensed by either the Registrar or the Board. Alarm agents and alarm businesses certified by the Board are subject to the requirements of the alarm legislation and the Board's other statutes.

Background

Effective August 2, 2012, the Legislature passed H.B. 2748, which amended portions of A.R.S. §§ 32-101 through -152 to empower the Board to regulate alarm businesses and agents in addition to the professions that the Board already regulates.² Effective September 13, 2013, H.B. 2176 amends certain portions of H.B. 2748 involving alarm agents.³ Beginning October 1, 2013,

² The Board also regulates architects, assayers, drug laboratory site remediation firms, engineers, geologists, home inspectors, land surveyors, and landscape architects.

³ This opinion treats H.B. 2176 as already in effect.

a business is required to be certified by the Board to operate an alarm business. A.R.S. § 32-122.05(A).

Analysis

1. Alarm Businesses Registered with the Registrar Do Not Also Have to Register with the Board to Install Alarms.

An alarm business may install alarms if the alarm business has been certified⁴ by the Board or if it has been licensed as a contractor by the Registrar. A.R.S. §§ 32-121 and -122.05(A). There is no authority for the Board to require that businesses that only install alarms and are already licensed with the Registrar also become licensed with the Board.⁵ Nothing in A.R.S. §§ 32-121 or -122.05(A), however, prevents a business from being licensed both with the Registrar and with the Board. Where an alarm business provides products or services beyond installation, that alarm business is required to be licensed with the Board. A.R.S. §§ 32-121 and -122.05(A).

2. If the Alarm Business Installing Alarms Is Registered Only with the Registrar, No Designated Person from the Alarm Business Is Required to Sign the Forms Required of an Individual Alarm Agent Applicant.

Under H.B. 2748, each alarm agent is required to apply for certification with the Board. A.R.S. § 32-122.06(A). An “alarm agent” means a “person, whether an employee, an independent contractor or otherwise, who acts on behalf of an alarm business.” A.R.S. § 32-101(B)(3)(a).

⁴ Arizona Revised Statutes Section 32-121 states that an alarm business may install alarms if it has *submitted an application* to the Board. However, this provision is clarified by A.R.S. § 32-122.05(A), which states that a “person shall not operate an alarm business unless the person obtains an alarm business certificate from the Board.”

⁵ Alarm agents are specifically exempted in H.B. 2176 as persons required to be licensed by the Registrar. *See* A.R.S. § 32-1121(A)(17) (effective September 13, 2013).

Licensed contractors are not required to be licensed with the Board in order to install alarms. A.R.S. § 32-121. However, if an alarm business applies for certification from the Board and is a corporation, partnership, limited liability company or other legal entity, it is required to designate one of its “controlling persons”⁶ to have full authority and act as principal. A.R.S. § 32-122.05(B)(2). That designated controlling person is then required to sign all application forms required of an individual alarm agent. *Id.* However, A.R.S. § 32-122.05 contains no provision requiring a principal of a firm licensed only with the Registrar to sign the application form of an individual alarm agent.

Statutory provisions are read and construed in context with related provisions and in light of their place in the statutory scheme. *State v. Seyrafi*, 201 Ariz. 147, 150, 32 P.3d 430, 434 (App. 2001). The Legislature’s intent is determined by reading the statute as a whole and by considering its context, subject matter, historical background, consequences, and effects. *Bunker Glass Co. v. Pilkington, PLC*, 202 Ariz. 481, 485, 47 P.3d 1119, 1123 (App. 2002).

Because licensed contractors are not required to be licensed with the Board to install alarms, the Board has no jurisdiction over them. As a result, the Board has no authority to require a licensed contractor to designate a controlling person or persons and also has no authority to require that a licensed contractor designate one of its controlling persons as a principal to sign alarm agent applications.

Moreover, the requirement that a designated controlling person sign off on an alarm agent’s application is located in the section of the alarm legislation that concerns the Board’s certification of alarm businesses. Consequently, the context of this requirement also makes it

⁶ A “controlling person” means a person who is designated by an alarm business. A.R.S. § 32-101(B)(14).

apparent that it applies only to those alarm businesses that are certified by the Board and not to entities that are only licensed by the Registrar.

3. The Board May Deny an Alarm Business's Application for Certification Based upon Conviction of the Crimes Listed in A.R.S. § 32-122.07, and the Board's Typical Time Frames Apply to Processing Alarm Business Applications.

Arizona Revised Statutes Section 32-122.07(A) provides a list of convictions for which the Board "shall deny" an application for certification as an alarm business or alarm agent. This is the only place in the Board's statutes that addresses the qualifications for certification as an alarm agent or an alarm business.⁷ As a result, the Board must necessarily deny an application for certification if an alarm agent or person designated as a controlling person for an alarm business has been convicted of one of the listed crimes.

There is no requirement for expedited processing of an alarm business's application for certification. See A.R.S. § 32-122.05. As a result, the typical time frames for processing applications established in Board rule apply to the processing of applications for alarm business certification. See A.A.C. R4-30-209.

4. Any Additional or Replacement Controlling Persons Are Required to Submit Fingerprints.

The statute requires that to obtain an alarm business certificate, each controlling person of the alarm business must submit a completed fingerprint card and a fingerprint background check fee to the Board. A.R.S. § 32-122.05(A). "On receipt of the application and each year thereafter on the anniversary of the initial certification" the Board is required to submit the fingerprints of

⁷ The qualifications for professional registration as an architect, engineer, geologist, and landscape architect are set out separately at A.R.S. § 32-122.01, and the qualifications for certification of home inspectors are set out at A.R.S. § 32-122.02.

each controlling person to the Department of Public Safety for the purpose of obtaining a criminal records check. *Id.*

Because each controlling person is required to submit a fingerprint card and a fee to the Board, any additional or replacement controlling person would also have to submit a fingerprint card and a fee when that person becomes a controlling person for the alarm business. This is the only tenable interpretation of Section 122.05(A). If replacement or additional controlling persons were not required to submit a background check, an unqualified person could become a controlling person immediately after certification and then resign as controlling person a year later when fingerprints were again required. Under such an interpretation, an unqualified person could serve as controlling person notwithstanding a disqualifying conviction under A.R.S. § 32-122.07(A).

If statutory language is susceptible of two constructions, an interpretation that will carry out the manifest objective of the legislation should be adopted. *State v. Jacobson*, 15 Ariz. App. 604, 606, 490 P.2d 433, 435 (1971). A common sense approach should be applied, and a statute should be read in terms of its stated purpose and the system of related statutes of which it is a part. *In re Marabella P.*, 223 Ariz. 159, 161, 221 P.3d 38, 40 (App. 2009). A statute should not be construed in an absurd manner, but rather must be construed so that it is reasonable and workable. *Rasmussen v. Indus. Comm'n*, 162 Ariz. 384, 386, 783 P.2d 830, 832 (App. 1989). As a result, A.R.S. § 32-122.05(A) should be interpreted to require submission of a fingerprint card and fee by any additional or replacement controlling person upon that person's becoming a controlling person for the alarm business.

You have further inquired whether an additional or replacement controlling person would be required to submit a second set of fingerprints when the alarm business certification is subject

to renewal, even if that occurs just a few months after they submitted their first set of fingerprints. For alarm businesses, the statute requires that the Board conduct a criminal records check each year on the anniversary of certification. A.R.S. § 32-122.05(A). As a result, criminal records checks must be performed for all controlling persons on the anniversary of certification even if the Board has only recently performed a background check on a particular controlling person.

5. The Board Should Obtain the Results of the Criminal Background Check Before Taking Action on an Alarm Agent Application, and Once a Certification Has Been Issued the Board Must Provide Due Process Before Taking Disciplinary Action on the Certification.

The Board is required to issue or deny an alarm agent certification card or a renewal certification card within ten business days after receiving the application. A.R.S. § 32-122.06(A). However, the Board is also required to submit an applicant's fingerprints to the Department of Public Safety for the purposes of obtaining a criminal records check. A.R.S. § 32-122.06(B). To construe these two provisions consistently and to prevent certification of statutorily disqualified applicants, the application is not complete until the Board receives the results of the criminal background check, and the Board then has ten business days to take action on the application. *See State v. Seyrafi*, 201 Ariz. 147, 150, 32 P.3d 430, 434 (App. 2001) (stating statutory provisions are read and construed in context with related provisions and in light of their place in the statutory scheme).

Once the Board issues an alarm agent certification, the person may work as an alarm agent without being directly supervised by another certified alarm agent. A.R.S. § 32-122.06(C). Due process is required before an agency can take away a person's property interest, such as an existing license to practice a profession. *Comeau v. Ariz. Bd. of Dental Exam'rs*, 196 Ariz. 102,

106, 993 P.2d 1066, 1070 (App. 1999); *see also Schillerstrom v. State*, 180 Ariz. 468, 471, 885 P.2d 156, 159 (App. 1994). When a professional license is at stake, the State's interest must justify the degree of infringement that ensues from the sanction, and appropriate procedures must be used to guard against arbitrary action. *Comeau*, 196 Ariz. at 106, 993 P.2d at 1070. As a result, once the Board has issued the alarm agent certification, it would need to hold a formal hearing to revoke or take other disciplinary action with regard to the certification.

Under A.R.S. § 32-128(C), the Board may take disciplinary action against the holder of a certificate or registration for gross negligence, incompetence, bribery, or other misconduct in the practice of the profession. A.R.S. § 32-128(C)(2). "Other misconduct" is defined in the Board's rules and includes "being convicted of a felony or misdemeanor, if the offense has a reasonable relationship to the functions of the registration." A.A.C. R4-30-101(16)(b). For alarm agents and controlling persons of an alarm business, the thirteen convictions listed in A.R.S. § 32-122.07(A) necessarily subject a certificate holder to revocation because they disqualify the person from certification. *See* A.R.S. § 32-122.07(A). In the event an alarm agent or controlling person for an alarm business is convicted of some other offense, the Board may take action as appropriate under its statutes. *See* A.R.S. § 32-128(C).

Conclusion

Alarm businesses must be licensed by either the Registrar or the Board. Where alarm businesses are certified by the Board, they are subject to the requirements of the alarm legislation and the Board's other statutes. If an alarm business is licensed only through the Registrar, the Board has no authority to require that alarm business to take any action. Alarm agents are certified by the Board and are also subject to the requirements of the alarm legislation and the Board's other statutes.

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