Written by **Joe Wolverton, II, J.D.** on December 16, 2010

Supreme Court Set to Hear Challenge to Arizona Campaign Finance Law

As the October session came to an end after Thanksgiving, the Supreme Court agreed to hear a First Amendment challenge to Arizona's controversial campaign finance legislation.

The law, known as the Citizens Clean Elections Act, provides state funds to candidates supposedly hamstrung by opponents whose spending exceeds the limits imposed by the government.

According to an article published in the *Christian Science Monitor* the Arizona statute "is designed to level the playing field among political candidates by creating a strong incentive for candidates to limit the amount they spend in statewide campaigns." That is to say, the reasoning undergirding the law is that wealthier candidates for state office will be less inclined to spend lots of their own money on a campaign if they know that the coffers of their less-affluent opponents will be filled with the public's cash.

The law, enacted by the state legislature in 1998, ostensibly aims to discourage extravagant campaign spending by using state funds to match money paid by individual candidates on their own campaigns in defiance of the arbitrary limits set by the state government.

Predictably, the Arizona statute permits candidates to opt out of the program. The *Christian Science Monitor* summed up the law thus:

> Under the Arizona system, if a nonparticipating candidate spends more than the state's pre-set limit for a particular seat, the participating candidates are no longer required to abide by the spending limits. Instead, under the program, the state provides all participating candidates with matching funds equal to the amount being spent by the nonparticipating candidate.

According to supporters of the legislation, an intended side effect of the scheme is the improvement in the level of serious issues-based discourse that will somehow occur if money is removed as a constant consideration. Apparently, when money is no object, thoughtful and elevated debate pours in to the void.

As quoted in the above-cited CSM article: "'The Arizona Clean Elections system, in effect over a decade, helped move the state beyond egregious corruption and recurrent scandal,' said Michael Waldman, executive director of the Brennan Center for Justice at New York University School of Law."

And again, speaking in a statement quoted in the *New York Times*, Waldman, said, "We believe this provision is constitutionally sound and advances First Amendment values rather than burdening them."

Waldman correctly identifies the First Amendment and the burden placed on it by such campaign finance "reforms" that is the central argument in the complaints filed against it in federal court. The legal question posed by the plaintiffs is whether a state may limit political speech by establishing ceilings on expenditures made to communicate that type of speech.

In relevant part, the First Amendment to the Constitution reads: "Congress shall make no law … abridging the freedom of speech."

The recent spate of Supreme Court decisions defining the terms of that simple statement doesn't bode well for the future of the Arizona law. In *Citizens United v. Federal Elections Commission*, the Court ruled 5-4 that the right of corporations to finance political advertising cannot be restricted under the First Amendment.

Writing for the majority, Justice Kennedy wrote, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." In a separately authored concurrence, Justice Antonin Scalia explained that, "Its [the First Amendment's] text offers no foothold for excluding any category of speaker." Even, it seems, rich or corporate ones.

In a similar ruling handed down in the case of *Davis v. Federal Election Commission* (known derisively by opponents as the "millionaire's amendment"), once again a divided bench held unconstitutional any law that set "an unprecedented penalty on any candidate who robustly exercises" his protected right to speak without government restrictions as guaranteed by the First Amendment.

The groups who have mounted (and financed) the legal opposition to the Arizona law rely on the prospect of Alito's perspective holding sway over a majority of his colleagues. A lawyer for one of the plaintiffs said, "The government shouldn't be deciding who is speaking too much and who is speaking too little."

The actual case that will be heard by Alito and his fellow justices is a consolidation of two cases filed separately: *Arizona Free Enterprise Club v. Bennett*, and *McComish v. Bennett*. Given the ideological composition of the court, observers expect the Arizona law to be overturned.

The decisions issued in the *Citizens United* and *Davis* cases represent constitutional checks by the court on Congress' attempt to violate the limits on its power placed by the First Amendment. In the matter of the Arizona law (and other such attempts to limit campaign financing in nine other states), however, there seems to be a Tenth Amendment issue. While the First Amendment expressly prohibits "Congress" from passing laws abridging the freedom of speech, no such proscription is imposed on the sovereignty of the states. Therefore, per the plain language of the Tenth Amendment, the states retain that authority.

While it is true that the right of free speech has been deemed "fundamental to the American scheme of justice" and thus incorporated by the 14th Amendment as applicable to the governments of the states, such jurisprudential gymnastics are of questionable constitutionality and seem contrary to the intent of the Ninth and Tenth Amendments to wall off the sovereignty of the states and the people from invasion by the national authority.