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The Honorable Carolyn Walker  
State Senator  
Capitol Complex, Senate Wing  
Phoenix, Arizona 85007

Re: I90-054 (R90-035)

Dear Senator Walker:

You have asked a number of questions regarding State employee participation in initiative campaigns.<sup>1/</sup> Your specific questions are addressed in turn.

1. Is an initiative campaign considered to be a political campaign for the purpose of A.R.S. § 41-772? If yes, to what degree are state employees allowed to participate in initiative campaigns?

A.R.S. § 41-772(B) prohibits certain political activities of state service employees as follows:

B. No employee or member of the personnel board may be a member of any national, state or local committee of a political party, or an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his opinion,

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<sup>1/</sup>Although your questions specifically concern initiative campaigns, our answers apply to referendums and other ballot measures as well.

attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues, and cast his vote.

(Emphasis added). Initiative and other non-candidate, ballot measure campaigns are not specifically mentioned in this prohibition. Therefore, we must determine whether the prohibition against participation in "any political campaign" is broad enough to cover initiative activity. Although we recognized in Ariz. Att'y Gen. Op. 183-134 that A.R.S. § 41-772 prohibits state employee participation in any nonpartisan political campaign, we conclude that it can not constitutionally reach to all initiative campaigns.

There is no doubt that public employees may constitutionally be prohibited from engaging in partisan political conduct in this manner. Broadrick v. Oklahoma, 413 U.S. 601 (1973); United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). The government has an interest in regulating the conduct and speech of its employees that is much greater than those it possesses in connection with the general population. Letter Carriers, 413 U.S. at 564. The balance struck is sustainable by the substantial government interests served by prohibitions on the partisan political activities of its employees. We acknowledged these interests in Ariz. Att'y Gen. Op. 183-134 as follows:

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In Letter Carriers, the Court discussed four "obviously important interests" served by the Hatch Act limitations. 413 U.S. at 565. These are the same interests served by A.R.S. § 41-772. First, government employees "should be expected to enforce the law and execute the programs of the government without bias or favoritism for or against any political party or group or the members thereof." Id. at 564-65. Second, the employees should avoid even the appearance of "political justice" so as to instill public confidence. Id. at 565. Third, "the rapidly expanding Government work force should not be employed to build a powerful, invincible and perhaps corrupt political machine." Id. Fourth, "employment and advancement in Government service [should] not depend on political performance, and at the same time . . . Government employees

[should] be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their supervisors rather than to act out their own beliefs." Id. at 566.

These interests identified in Letter Carriers also justify the government restriction of "its employees' participation in nominally nonpartisan elections if political parties play a large role in the campaigns." Magill v. Lynch, 560 F.2d 22, 29 (1st Cir. 1977). But "[f]or purposes of judging the validity of restrictions on election-related activity in the light of first amendment considerations, . . . it [is] more meaningful to distinguish between elections on the basis of whether they are candidate elections or noncandidate elections, such as referenda and constitutional amendment elections" rather than on the basis of whether the elections are partisan or nonpartisan.<sup>2/</sup> Wachsman v. City of Dallas, 704 F.2d 160, 169 (5th Cir. 1983). We have previously concluded that Arizona state service employees may not participate in any candidate campaign whether partisan or nonpartisan. Ariz. Att'y Gen. Op. 183-134. Our conclusion was based in large part on the purposes to be served by such restrictions.

There exists no meaningful justification for restricting a public employees' involvement in all initiative or referendum campaigns. One of the original purposes of civil service restrictions was to prevent employees from being obligated to political parties for their positions or from having the power to ingratiate themselves with political parties or elected officials by their political activity. Heidtman v. City of Shaker Heights, 163 Ohio St. 109, 126 N.E.2d 138 (1955). The court in Heidtman cited a lack of connection to

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<sup>2/</sup>The issue in Wachsman was to what extent a city may regulate the political activities of its employees when the city elections are nonpartisan elections in which there is no substantial party involvement. In upholding restrictions on nonpartisan candidate activity, the Fifth Circuit specifically "decline[d] to adopt as the touchstone for decision in this area an across-the-board distinction based purely on whether the elections are partisan or nonpartisan" after noting that the basic purpose of these restrictions is to keep employees from being involved in the politics that elect candidates. Wachsman, 704 F.2d at 165-169.

this objective as one reason for its decision that the circulation of initiative petitions by city firemen did not violate an Ohio prohibition against "taking part in politics" and that a narrower view of "politics" was more consistent with the objectives of the law. Hudson v. Gray, 234 So.2d 564, 566 (Ala. 1970) (citing Heidtman in holding that circulating and filing initiative petitions is not to be construed as prohibited "political activity" or "taking part in a political campaign"). Consequently, the government should not classify the permissibility of its employees' political activity based on whether they fall into the category of "partisan" or "non-partisan" alone.

. . . The proper inquiry is a balancing of government needs and private rights.

Using a balancing approach, it is clear that the partisan- non-partisan analysis makes much more sense at a state or national level than at a municipal level. Prohibiting involvement by state and Federal employees in party politics avoids wholesale changes in the civil service with each electoral change. It also prevents groups of public employees beholden to one political party.

At the municipal level, the partisan- non-partisan analysis breaks down. Most elections are non-partisan in the sense that candidates are not Democrats or Republicans. The danger of civil servants beholden to a candidate remains. The danger of public employees getting together to elect public officials who will favor them at contract time is greater than at a state or national level. A more useful analysis may be one which examines the office involved and the employees whose jobs are related to that office. Additionally, support for issues should be distinguished from support for candidates. The evils of employee political involvement feared by defendant are rarely present in referenda, bond issues, and other ballot issues, while the direct interest of the public employee as a citizen is more obvious.

(1975) (where the Municipal ordinance in question on its face would have prevented employees from contributing their services to any ballot measure)(Emphasis added).

In fact, specific bans on activity by government employees in initiative or referendum campaigns have been found to impermissibly violate the employees' First Amendment freedoms of association and speech on the grounds that restrictions including such bans were not narrowly drawn to serve a compelling state interest. Arden v. Village of Oak Lawn, 537 F.Supp. 181 (D.C.N.D. Ill. 1982) (where the ban on specific activities was in connection with elections for offices or propositions); Fort v. Civil Service Commission of County of Alameda, 38 Cal. Rptr. 625, 392 P.2d 385 (1964). In Fort, the prohibition was, in part, strikingly similar to A.R.S. § 41-772(B):

. . . No person holding a position in the classified civil service shall take any part in political management or affairs in any political campaign or election, or in any campaign to adopt or reject any initiative or referendum measure other than to cast his vote or to privately express his opinion. Any employee violating the provisions of this section may be removed from office.

Fort, 392 P.2d at 386 (Emphasis added). Such a restriction was deemed "of sufficient breadth to apply to political activity concerning all propositions on the ballot . . ." Fort, 392 P.2d at 388. While the need clearly exists to limit certain political activities of public employees, ". . . the more remote the connection between a particular activity and the performance of official duty the more difficult it is to justify restriction on the ground that there is a compelling public need to protect the efficiency and integrity of the public service." Fort, 392 P.2d at 389. This court found no sound basis for a restriction of this breadth. Id.

The Arizona Supreme Court cited from Fort approvingly when it stated:

It must appear that restrictions imposed by a government entity are not broader than are required to preserve the efficiency and integrity of its public service.

Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968).

A.R.S. § 41-772(B) is not narrowly drawn. Should there be types of initiative and referendum campaign activities that must be banned to serve the type of interests set forth in Letter Carriers, then the Arizona statute would have to be more narrowly drawn to clearly proscribe that conduct alone rather than barring participation in all initiative and referendum campaigns.

We conclude that the phrase "political campaign" as used in A.R.S. § 41-772(B) does not include initiative campaigns.<sup>3/</sup> Therefore, a state service employee's participation in an initiative campaign is unrestricted by A.R.S. § 41-772. To conclude otherwise would impermissibly restrict the First Amendment rights of state employees without serving any substantial purpose.

2. May a state employee circulate and/or sign an initiative petition? If so, when may he do so: while at work, on break or at lunch or only while off duty?

In our answer to your first question, we stated that state service employees may participate in initiative campaigns. This

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<sup>3/</sup>We have previously opined that A.R.S. § 41-772 prohibits state employee participation in nonpartisan or partisan candidate campaigns and in recall campaigns. Ariz. Att'y Gen. Ops. 187-028, 183-134 and 178-26. In concluding that state employees could not circulate recall petitions we reasoned as follows:

We do not read the proscription of A.R.S. § 41-772(B) as being limited to a "political campaign" of an individual running for election for a specific office. The words themselves suggest a much broader scope, including any organized effort to promote a cause or secure some result through the political process. See State ex rel. Green v. City of Cleveland, 33 N.E.2d 35 (Ohio App. 1940).

Ariz. Att'y Gen. Op. 178-26. (Emphasis added). While we affirm our conclusion with respect to the application of A.R.S. § 41-772 to recall activities, we reject this reasoning to the extent that it could be read to include initiative and other ballot measure campaigns within the scope of prohibited "political activity."

includes the circulation and signing of initiative petitions.<sup>4/</sup>

The fact that state employees may circulate and sign initiative petitions does not mean that they may engage in this activity while on duty. As recognized in Ariz. Att'y Gen. Op. 187-028, the language of A.R.S. § 41-772 is substantially similar to the federal Hatch Act.<sup>5/</sup> The federal Civil Service Commission regulations specify that conduct which is prohibited or permitted by the federal Hatch Act. 5 C.F.R. § 733.111 sets forth specific permissible activities in paragraph (a) but cautions in paragraph (b) that the enumeration of permissible activities ". . . does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee."<sup>6/</sup> While no rules exist specifically interpreting A.R.S. § 41-772, Arizona State Personnel rules prohibit state service employees from:

Engag[ing] in outside employment or other activity which is not compatible with the full and proper discharge of the duties and responsibilities of state employment, or which tends to impair the employee's capacity to perform the duties and responsibilities in an acceptable manner.

R2-5-501(C)(6).

It is our opinion that state service employees may engage in the circulation or signing of initiative petitions only on their own time so that they may devote their working hours to the discharge of their duties and responsibilities as state employees.

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<sup>4/</sup>Even in the context of candidate or recall campaigns in which state employees may not actively participate, the signing of nomination or recall petitions is not prohibited. A.R.S. § 41-772(B) expressly reserves the right-to-vote-to state employees, and we stated in Ariz. Att'y Gen. Op. 178-026 and reaffirmed in Ariz. Att'y Gen. Op. 187-028 that the signing of a petition is highly analogous to voting.

<sup>5/5</sup> U.S.C. § 7324

<sup>6/</sup>In Ariz. Att'y Gen. Op. 187-028, we noted that these regulations were adopted in 1970, prior to Arizona's enactment of A.R.S. § 41-772 in 1972, and that their constitutionality was upheld in United States Civil Service Commission v. National Association of Letter Carriers, Supra.

3. May a state employee publicly voice his opinion about an initiative?
4. May a state employee write a letter to the editor of a newspaper to express his opinion about an initiative?
5. May a state employee write a letter of endorsement for an initiative?

In setting forth that political activity which is prohibited, A.R.S. § 41-772(B) expressly states that covered employees retain the right to express their opinions. In addition, A.R.S. § 41-772(E) provides that:

E. Nothing contained in this section shall be construed as denying any employee or board member his civil or political liberties as guaranteed by the United States and Arizona Constitutions.

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." The Arizona Constitution further protects expression by directing that "[e]very person may freely speak, write, and publish on all subjects . . . ." Ariz. Const. art. II, § 6. This "[f]reedom of expression guarantees to the individual the opportunity to write a letter to the local newspaper [or to] speak out in a public park . . ." Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). In addressing the question of the display of badges, buttons and bumper stickers advocating the recall of a public officer, we discussed the public employees' right to engage in pure speech as follows:

The State may not prohibit or control conduct of a persons [sic] by infringing on constitutionally guaranteed freedoms and public employment may not be conditioned on a basis that infringes an employee's constitutionally protected right to freedom of expression. Connick v. Myers, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708, 716-717 (1983); Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629, 642 (1967).

Ariz. Att'y Gen. Op. 187-028.

Further, A.R.S. § 41-772 contains no specific language purporting to prohibit state employees from individually voicing their opinions, writing letters to the editor or letters of endorsement even in connection with those campaigns in which their political activity is forbidden.<sup>7/</sup>

Therefore, Arizona law does not and could not restrict the right of state employees to publicly voice their personal opinions including the expression of opinion through a letter to the editor or a letter of endorsement.

6. Are officers and employees of the Department of Public Safety covered by A.R.S. § 41-772?

The employees of the Department of Public Safety are covered by the Rules of the Law Enforcement Merit System Council pursuant to A.R.S. § 41-1714 rather than subject to the state personnel commission's jurisdiction.<sup>8/</sup> Accordingly, they are not subject to A.R.S. § 41-772. However, their political activities remain restricted by the terms of the Council's rules.

An employee of the Department of Public Safety may face discipline or discharge for engaging in "[i]mproper political activity." R13-5-47(C)(2). "Improper political activity" is defined in R13-5-01(28) to include "[p]articipation in the management or affairs of any political party or in any political campaign." Given that this language is identical to that used in A.R.S. § 41-772(B), our answer herein with respect to the exclusion of initiative and other ballot measure campaigns from such a prohibition applies with equal force to Department of Public Safety employees.

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<sup>7/</sup>We must caution that while state service employees may express their personal opinions regarding candidates in this manner, they must not become involved in the management or affairs of candidate campaigns.

<sup>8/</sup>A.R.S. § 41-771(A) lists those positions exempt from the definition of "state service" and the personnel administration and in paragraph (12) includes "[a]ny other position exempted by law."

7. Are employees of the Attorney General's Office covered by A.R.S. § 41-772?

Employees of the Attorney General's Office include individuals covered by the state personnel administration and, thus, A.R.S. § 41-772. Assistant Attorney Generals are governed not by A.R.S. § 41-772 but by the Department of Law Attorney General's Office rule prohibiting political activity as follows:

A. No Assistant Attorney General or attorney who has been assigned permanent responsibility for supervising other attorneys employed by the Department of Law may:

1. Use any political endorsement in connection with any appointment to a position in public employment.

2. Use or promise to use any official authority or influence for the purpose of influencing the vote or political action of any person or for any consideration.

B. No Assistant Attorney General or attorney who has been assigned permanent responsibility for supervising other attorneys may be a member of any national, state or local committee of a political party, or an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his or her opinion, attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues, and cast his or her vote.

C. The provisions of this Section do not apply to school board elections or community college district governing board elections, and an Assistant Attorney General or attorney who has been assigned permanent responsibility for supervising other attorneys may serve as a member of the board of trustees of a common or high school district or as a member of the community college district governing board.

D. Nothing contained in this Section shall be construed as denying any Assistant Attorney General or attorney who has been assigned permanent responsibility for supervising other attorneys his or her civil or political liberties as guaranteed by the United States and Arizona constitutions.

E. The provisions of this Rule shall not apply to any employee of the Administrative Division of the Attorney General's office, if the Attorney General, in writing, specifically waives the application of this Rule.

R10-1-201. However, certain employees otherwise covered by the Department of Law Attorney General's rules may become exempt from any restriction on political activity by way of R10-1-201(E). There are also categories of non-attorney employees of the Attorney General's Office not covered by the Department of Law Attorney General's rules who are also exempt from restrictions on political activity by the terms of A.R.S. § 41-771.<sup>2/</sup>

The restrictions on political activity of all non-exempt Attorney General employees are for all practical purposes the same as those on employees covered by A.R.S. § 41-772. The content of the prohibitions against political activity found in R10-1-201 is in all substantive respects identical to that found in A.R.S. § 41-772. Consequently, our interpretations with respect to the meaning of a "political campaign" in the context of A.R.S. § 41-772 are applicable to questions arising pursuant to R10-1-201.

8. Are public school teachers for grades K-12 covered by A.R.S. § 41-772?

A.R.S. § 41-772 applies only to persons holding a position of employment in State government. Public school

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<sup>2/</sup>Relevant examples of exemptions from A.R.S. § 41-772 granted by A.R.S. § 41-771 are those for two assistants of an elected state official; certain persons required to maintain a direct confidential working relationship with an exempt official; persons who provide legal counsel; part-time positions; or temporary positions established for conducting a special project, study or investigation. See A.R.S. § 41-771(A), (B).

teachers for kindergarten through twelfth grade are not employed by the State and, therefore, the restrictions on political activity found in that section do not apply to these teachers.

9. If a state employee legally expresses his opinion about an initiative, what protection does the employee have from harassment or disciplinary action by his superiors for doing so?

We assume your question to be directed to avenues of protection available by Arizona statute to protect an employee who expresses his opinion from harassment or discipline by his supervisors. If the employee's superiors are also state service employees, they are themselves subject to suspension or dismissal for using or promising to use their official, supervisory authority or influence over their subordinates for the purpose of influencing their political action. A.R.S. § 41-772(A)(2). This would arguably include influence exerted in order to silence these employees. Should an employee be disciplined for merely expressing his opinion, the personnel board's grievance or appeals procedures are available, as applicable. R2-5-701; A.R.S. § 41-785.

10. May initiative petitions be circulated in or on tax-supported public facilities and subject to what restrictions?

A similar question was posed in Ariz. Att'y Gen. Op. 182-083 concerning the distribution of partisan political advertisements." In that opinion we stated the following:

No specific State law exists which prohibits the distribution of partisan political advertisements on the premises of a tax-supported public facility or building. The Department of Administration (DOA), however is vested by statute with broad powers over the allocation of space, operation, alteration, renovation and security of State buildings. See A.R.S. § 41-791.B.

Ariz. Att'y Gen. Op. 182-083.

Similarly, there is no Arizona statutory provision concerning the circulation of initiative petitions in tax-supported public buildings or on their grounds. The direct or indirect solicitation for any purpose, presumably including solicitation for petition signatures, within the State capitol buildings or upon the capitol grounds is permissible with a

permit issued by the Department of Administration.<sup>10/</sup>  
R2-6-201. No similar permit requirement exists for other state  
public buildings.

We conclude that initiative petitions may be circulated  
in state buildings or on their grounds, except that such  
solicitation in state capitol buildings or on the capitol  
grounds requires a permit.<sup>11/</sup>

Sincerely,



BOB CORBIN  
Attorney General

RKC:LTH:chp

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<sup>10/</sup>In the context of public buildings maintenance, "state  
capitol building" is defined in A.R.S. § 41-790(6) to mean:

- (a) The original 1898 statehouse known as the state capitol  
museum.
- (b) The 1919 state capitol wing and the 1938 state capitol  
justice addition known jointly as the legislative services  
wing.
- (c) The house of representatives wing.
- (d) The senate wing.
- (e) The west wing known as the state capitol executive tower.

<sup>11/</sup>We express no opinion concerning the circulation of  
initiative petitions on the property of any county, city, town  
or other political subdivision of the state.