



Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

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ARIZONA ATTORNEY GENERAL

August 28, 1984

The Honorable Glenn Davis
Arizona State Representative
State Capitol, House Wing
1700 W. Washington
Phoenix, AZ 85007

Re: I84-118 (R84-114)

Dear Representative Davis:

You have asked whether A.R.S. § 16-922.3¹/ prohibits political candidates from giving away items of nominal value, such as matches, pens and caps, which advertise their candidacy. A.R.S. § 16-922.3 provides:

A person who commits any of the following acts with intent to promote the election of himself or any other person is guilty of a class 2 misdemeanor unless another classification is specifically prescribed in this title:

3. Furnishes or engages to pay or deliver money or property for any purpose intended to promote the election of a candidate, except for the expense of holding and conducting public meetings for discussion of public questions or for printing and circulating handbills and other literature prior to the election.

1. Formerly A.R.S. § 16-472.3.

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For the reasons set forth below, it is our opinion that political candidates may give away items of nominal value so long as those items carry a message advertising a candidate's candidacy.

Because the particular items at issue convey a message advertising an individual's candidacy, we must analyze the restrictions imposed by A.R.S. § 16-922.3 in light of the free speech guarantees of the First Amendment of the United States Constitution and Article 7, § 16 of the Arizona Constitution. We note initially that statutes are presumed to be constitutionally sound. New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367, 519 P.2d 169, 172 (1974); State v. Lycett, 133 Ariz. 185, 650 P.2d 487, 492 (App. 1982). In this matter, we must balance the necessity to protect First Amendment guarantees with the importance of the governmental interest at stake. Brown v. Hartlage, 456 U.S. 45 (1982); New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367, 519 P.2d 169 (1974).

Arizona, in enacting A.R.S. § 16-901 et seq., clearly had a legitimate interest in preventing corruption and the appearance of corruption in the election process. Buckley v. Valeo, 424 U.S. 1, 45 (1976). However, First Amendment rights may only be abridged upon a showing of a compelling state interest. New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367, 519 P.2d 169, 173 (1974). While the state's interest in preventing bribery or the influencing of elector votes is compelling we do not believe that advertising on items of nominal value will contravene that interest. Moreover, the Arizona Supreme Court has said neither an inherent tendency nor a reasonable tendency to cause a substantive evil is sufficient to justify a restriction of free expression. New Times, Inc. v. Arizona Board of Regents, 110 Ariz. 367, 519 P.2d 169, 173 (1974). Thus, the compelling state interest behind the regulation of election practices is not furthered when the items carrying a message advertising a candidate's candidacy are of such nominal value that they would not influence elector votes.

We note that A.R.S. § 16-922.3 specifically exempts expenses incurred for printing and circulating handbills and other literature prior to the election from the proscribed activity. While the statute itself does not define the term "other literature," that term is defined by Webster's New World Dictionary as "leaflets, handbills, circulars or other printed matter of any kind." [Emphasis added] Webster's Third New

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International Dictionary 1321 (1976). This broad definition conceivably encompasses the advertising in question, therefore, bringing it within the scope of the exclusion set forth in A.R.S. § 16-922.3.

A review of the pertinent statutes indicates that the Legislature anticipated that a candidate would distribute some things of value during the course of campaigning for election and, in fact, enacted certain safeguards to prevent bribery of electors. A.R.S. §§ 16-901 et seq. prescribes stringent disclosure requirements for all campaign expenditures including "money and things of value expended." See A.R.S. §§ 16-907.B, 16-909.A, 16-913.B and 16-914.A. By requiring extensive disclosure of all expenditures by a candidate, the Legislature has provided a less restrictive mechanism for the detection of corruption in the election process. In addition, A.R.S. §§ 16-1001 et seq. sets forth the penal provisions which govern crimes involving the election process and specifically proscribe bribing or influencing the vote of an elector. See A.R.S. §§ 16-1006, 16-1008 and 16-1014. A violation of A.R.S. §§ 16-1001 et seq. may occur if the item used for advertising is of such value that it may influence an elector's vote or if it is given to an elector with the intent of influencing his or her vote. The items used for advertising, therefore, must be of such de minimus value that they will not influence an elector's vote, nor may these items be distributed with the intent to bribe or induce an elector's vote. Rather, to comply with A.R.S. § 16-1001 et seq. a candidate may distribute only those items of nominal value which are designed to inform the electorate of a person's candidacy for office.

In conclusion, A.R.S. § 16-922.3 does not prohibit the distribution of items of nominal value which advertise a person's political candidacy. To reach any other conclusion would render the statute unconstitutional as violative of the right to freedom of speech under Article 7, § 16 of the Arizona Constitution and the First Amendment of the United States Constitution.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:JBS:cmh