CASE NOTE:

MAY V. MCNALLY: CITIZENS CLEAN ELECTIONS ACT LEAPS A FIRST AMENDMENT HURDLE

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I. INTRODUCTION

In November 1998, Arizona voters approved Proposition 200—the Citizens Clean Elections Act ("Act").[1] The Act created the Citizens Clean Election Commission to oversee disbursement of public funds for the campaigns of qualifying candidates for certain elected offices.[2] According to the Act, the Commission was to obtain financing from four sources: (1) voluntary contributions, (2) funds through a voluntary "check off" on state tax returns, (3) an assessment on certain lobbyists, and (4) a ten percent surcharge on criminal and civil fines.[3] In 2001, an Arizona legislator was assessed a clean-elections surcharge on a parking ticket and challenged the Act as a violation of his freedom of speech

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1. May v. McNally, 55 P.3d 768, 769 (Ariz. 2002); *see also* ARIZ. REV. STAT. § 16-954 (2003), historical and statutory notes. In 1995, the League of Women Voters-Arizona, United We Stand-Arizona, Arizona Citizen Action, and several individuals formed Arizonans for Clean Elections ("ACE") to draft a citizens' initiative called the Citizens Clean Elections Act. Clean Elections Institute, Inc., *The Clean Elections History*, *at* http://www.azclean.org/documents/WeblinkHistoryCEI.doc (last visited Jan. 16, 2004). The purposes of the initiative were to encourage citizen participation in the electoral process, to encourage free speech and to improve the integrity of the state government by diminishing the influence of special interest money in elections. *May*, 55 P.3d at 769. In early February 1998, ACE filed the initiative with the state and subsequently gathered the requisite amount of signatures to place the initiative on the November 1998 ballot as Proposition 200. *Id.* Proposition 200 was passed by Arizona voters, and thereafter the Citizens Clean Elections Act added Article 2, Sections 16-940 through 16-961 and Article 1, Section 16-901.01 to Title 16, Chapter 6 to the Arizona Revised Statutes. *May*, 55 P.3d at 769.

2. *May*, 55 P.3d at 769–70.

3. ARIZ. REV. STAT. §§ 16-944, 16-954(A)–(C) (2003); *see May*, 55 P.3d at 770.

rights under the First Amendment of the United States Constitution.[4] The Arizona Supreme Court ultimately accepted the case to decide whether the Clean Elections Act "impermissibly compels political speech of the surcharge payers, in violation of the First Amendment's guarantee of freedom of speech."[5] Because the court found the surcharge to be viewpoint-neutral, the court held that the surcharge provision of the Act was constitutional.[6]

II. BACKGROUND AND PROCEDURAL HISTORY OF *MAY V. MCNALLY*

The petitioner, Steve May,[7] received a $27 parking ticket, to which a $2.70 surcharge was assessed, as authorized by the Act.[8] May refused to pay the surcharge and filed suit in federal district court.[9] After the federal court dismissed the claim for lack of subject matter jurisdiction,[10] May brought suit in the Maricopa County Superior Court, urging the court to find the Act unconstitutional as an abridgement of his First Amendment freedom of speech rights under the U.S. Constitution.[11] The trial court declared the fee on lobbyists unconstitutional but upheld the surcharge on fines as constitutional.[12] The trial court's ruling on the lobbyist's fees was not appealed; May appealed the surcharge ruling.[13] On appeal, the Arizona Court of Appeals, Division One, reversed the trial court's decision and declared the surcharge unconstitutional.[14]

III. ARIZONA SUPREME COURT OPINION

The Arizona Supreme Court granted review to decide whether the ten percent surcharge on fines required by the Act "violates the First Amendment by impermissibly compelling those who pay the fines to support the speech of political candidates whom they might not otherwise support."[15] The court analyzed the Act under a general First Amendment analysis and then entertained a tax/fee argument.

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4. *May*, 55 P.3d at 770.
5. *Id.*
6. *Id.* at 773.
7. May was an Arizona state legislator at the time he was fined. *Id.* at 770.
8. *Id.*
9. *Id.*
10. The court stated that, pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 (2001), it did not have jurisdiction. Lavis v. Bayless, 233 F. Supp. 2d 1217, 1219–24 (D. Ariz. 2001).
11. *May*, 55 P.3d at 770. The Citizens Clean Elections Commission and the initiative's sponsors, Arizonans for Clean Elections, intervened supporting the Act's constitutionality. *Id.*
12. *Id.*
13. *Id.*
14. May v. McNally, 49 P.3d 285 (Ariz. Ct. App. 2002).
15. *May*, 55 P.3d at 770.

A. First Amendment Analysis

Both parties relied on United States Supreme Court precedent concerning "compelled" speech. May argued the Act's invalidity under a trilogy of opinions—*Abood v. Detroit Board of Education*,[16] *Keller v. State Bar of California*,[17] and *United States v. United Foods, Inc*.[18] The defendant, however, relied on a different Supreme Court case—*Board of Regents v. Southworth*[19]—to assert the Act's validity.

1. United States Supreme Court Caselaw

a. *Buckley v. Valeo*

In *Buckley*, the U.S. Supreme Court declared the Presidential Election Campaign Fund ("Fund") constitutional.[20] The Fund was a voluntary system of public campaign financing, with the amount of the Fund determined by a voluntary taxpayer check-off on federal income tax returns.[21] Opponents of the Fund argued that they should be permitted to designate whom their contribution funded.[22] The U.S. Supreme Court was not persuaded by the opponents' objection to the use of the Fund for candidates whom the contributor opposed. [23] The Court rejected the argument, stating "every appropriation made by Congress uses public money in a manner to which some taxpayers object."[24]

b. *Abood*, *Keller*, and *United Foods*

In *Abood*, a teacher's union required every teacher, member or not, to pay fees to the union.[25] Such fees were used for several purposes, including funding some political activities with which some non-union teachers disagreed.[26] The U.S. Supreme Court held that the union's dues could be used to support political causes.[27] The union, however, could not use the non-members' dues to fund causes with which the non-members disagreed.[28]

Keller involved California attorneys who were required to join the state bar association and pay membership fees to practice law in the state.[29] The Court applied a "germaneness test" and held that the bar association could only use funds

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16. 431 U.S. 209 (1977).
17. 496 U.S. 1 (1990).
18. 533 U.S. 405 (2001).
19. 529 U.S. 217 (2000).
20. Buckley v. Valeo, 424 U.S. 1, 91–92 (1976).
21. *Id.* at 86–90.
22. *Id.* at 91.
23. *Id.* at 91–92. This argument was similar to that propounded by May. *See* May v. McNally, 55 P.3d 768, 770 (Ariz. 2002); *see also infra* Part A-2.
24. *Buckley*, 424 U.S. at 91.
25. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977).
26. *Id.* at 213.
27. *Id.* at 235–36.
28. *Id.*
29. Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990).

from mandatory membership fees for activities that were germane to the organization.[30] The bar association could not use the funds in any manner that was not germane to the group's goals.[31]

United Foods refined the germaneness test. The Court held that fees charged to mushroom handlers to fund mushroom advertisements were unconstitutional because the advertisements were not germane to the regulatory goals of the organization.[32] Affirming the reasoning in *Keller*, the Court stated that the "objecting members were not required to give speech subsidies for matters not germane to the larger . . . purpose which justified the required association."[33]

c. *Board of Regents v. Southworth*

Southworth involved a challenge to a university's mandatory student fees, which were distributed to various student groups on a viewpoint-neutral basis.[34] The students challenging the fees argued that the fees forced them to fund groups with whose views they did not agree.[35] While the Supreme Court acknowledged that the university could not condition an education upon an agreement to support speech with which the students disagreed, the Court rejected the germaneness test.[36] The Court called the germaneness test "unworkable" in the university context.[37] Because the university's purpose in charging the fees was to encourage the "free and open exchange of ideas by, and among, students," asking what speech was germane would undermine the university's goal in charging the fees.[38] Rather, the Court applied a viewpoint-neutrality test, determining that the viewpoint-neutrality standard best protected the students' First Amendment rights.[39]

2. Arizona Supreme Court First Amendment Analysis

May argued that the ten percent surcharge violated his First Amendment rights by forcing him to fund the speech of election candidates with which he did not agree.[40] The Arizona Supreme Court, however, by framing its analysis according to *Buckley v. Valeo*,[41] held the Act constitutional. The court interpreted *Buckley* to hold that "the public financing of political candidates, in and of itself, does not violate the First Amendment, even though the funding may be used to further speech to which the contributor objects."[42]

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30. *Id.* at 13–14.
31. *Id.* at 14.
32. United States v. United Foods, Inc., 533 U.S. 405, 408 (2001).
33. *Id.* at 414.
34. Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).
35. *Id.*
36. *Id.* at 231.
37. *Id.*
38. *Id.* at 229–32.
39. *Id.* at 230.
40. May v. McNally, 55 P.3d 768, 770 (2002).
41. 424 U.S. 1 (1976).
42. *May*, 55 P.3d at 771.

Nevertheless, May asserted that *Abood*, *Keller*, and *United Foods*—which were decided after *Buckley*—compelled the Arizona Supreme Court to hold the Citizens Clean Elections Act unconstitutional.[43] May argued that the court needed to apply the germaneness test, under which the Act would be found invalid.[44]

The Arizona Supreme Court rejected May's arguments and found the *Abood* line of cases inapplicable. The court distinguished those cases from the present case for three reasons. First, the payment of the surcharge was not a precondition to employment or any other benefit.[45] Second, the germaneness test was inapplicable in this case because those subject to the surcharge were not part of an association.[46] According to the Arizona Supreme Court, the application of the germaneness test in the *Abood* line of cases was predicated on the existence of an association.[47] The court found that the group of fine-payers under the Citizens Clean Elections Act was not an association because the fine-payers did not join together for a common purpose.[48] Finally, the court found it critically important that the Act did not fund speech based on viewpoint; the funds were distributed to all qualifying candidates, regardless of their political views. In contrast, in the *Abood* line of cases, the fees at issue were only used to fund particular viewpoints.[49] Hence, the court found the *Abood* line of cases unpersuasive and their reasoning inapplicable.[50]

Additionally, the court found *Southworth* informative.[51] The court refused to limit the holding in Southworth to the university setting.[52] As in the university setting, the court found that political election campaigns require the free and open exchange of ideas.[53] The court concluded that when the government chooses to "facilitate or expand the universe of speech" via viewpoint-neutral means, the germaneness test is inappropriate.[54] Therefore, the court applied the viewpoint neutrality standard to the Citizens Clean Elections Act. By combining the principles in *Buckley*—that government may fund political speech with public funds—and *Southworth*—that the viewpoint neutrality standard protects First Amendment rights—the court held that funding political campaigns with money collected from a surcharge on civil and criminal fines is constitutional.[55]

The court further concluded that the Act was viewpoint-neutral.[56] The court rejected May's argument that the Act was unconstitutional because it forced

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 772.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 773.
56. *Id.*

fine-payers to support government funding that they opposed.[57] Echoing *Buckley*,[58] the court instead stated that since all uses of government money are opposed by some taxpayers, such opposition alone did not make the funding unconstitutional.[59] Additionally, the fact that not all candidates requested funds did not diminish the Act's neutrality with regard to political ideology.[60]

B. Tax/Fee Analysis

An amicus brief in support of May[61] argued that the civil and criminal fines were a fee and not a tax, and therefore should be analyzed under a different rubric.[62] Whether an assessment is categorized as a tax, according to the Arizona Supreme Court, depends on: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed;" and (3) whether the assessment serves a general public purpose or benefits the fee payers.[63] The court concluded that the surcharge was a tax because it was imposed by "citizen initiative on a broad range of payers for a public purpose."[64] The court found that in any event, whether the surcharge was a tax or a fee, the analysis would be the same.[65]

If the court found that the fine was a tax, May argued, the tax was an unconstitutional "special tax"[66] because it did not tax all Arizonans.[67] The court summarily rejected this argument, concluding that the fine did apply to all Arizonans, just as a tax on new cars applies to all Arizonans.[68] Additionally, the court stated that those who commit crimes were not exercising a First Amendment right, and therefore a "special tax" could not burden any such rights.[69]

IV. CONCLUSION

The Arizona Supreme Court held that the ten percent surcharge on criminal and civil fines required by the Citizens Clean Elections Act, A.R.S. § 16-954(C), whether a tax or a fee, was constitutional because the Act was a viewpoint-neutral system of publicly financing all qualifying political candidates.[70]

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57. *Id.*

58. Buckley v. Valeo, 424 U.S. 1, 91 (1976) ("[E]very appropriation made by Congress uses public money in a manner to which some taxpayers object.").

59. *May*, 55 P.3d at 773.

60. *Id.*

61. The amicus was filed by the Pacific Legal Foundation. *Id.*

62. *Id.*

63. *Id.* at 773–74 (quoting Bidart Bros. v. Cal. Apple Comm'n, 73 F.3d 925, 931 (9th Cir. 1996)).

64. *Id.* at 774.

65. *Id.* at 773.

66. May relied on *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), to support his "special tax" argument. *May*, 55 P.3d at 774.

67. *May*, 55 P.3d at 774.

68. *Id.*

69. *Id.*

70. The U.S. Supreme Court subsequently denied May's petition for writ of certiorari. May v. Brewer, 123 S. Ct. 1583 (2003).

Further, the court limited the application of the *Abood* line of cases to associations in which employment or a benefit is conditioned upon payment of a fee and the fee is used to fund speech in a viewpoint-specific manner. The court also extended the holding in *Southworth* beyond the university setting. Thus, the government may fund political speech with public funds when it does so in a viewpoint-neutral manner with the goal to enhance the free and open exchange of ideas.