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Advisory Opinion 2024-03

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We are responding to your advisory opinion request on behalf of Opportunity Arizona concerning whether advertisements relating to policies and actions contemplated by elected officials who are also candidates for office or by their respective governmental bodies constitute campaign media spending under the Voter's Right Know Act (the "Act" or the "VRKA"), A.R.S. §§ 16-971 to 16-979.

Questions Presented¹

1) If disseminated within six months "preceding an election involving" a sitting lawmaker who is running for reelection, do public communications like any of the examples provided in the Advisory Opinion Request (AOR), that mention elected officials by name, but only in relation to their official positions or votes without referring to any election, qualify as campaign media spending by constituting "[a] public communication that promotes, supports, attacks or opposes" a candidate? *See* A.R.S. § 16-971(2)(ii).

2) If disseminated within 90 days "before a primary election" in which a sitting lawmaker is running for office, do public communications like the examples

¹ The questions presented have been slightly reworded from the request to clarify references to particular communications.

provided in the AOR, that mention elected officials by name, but only in relation to their official positions or votes without referring to any election, qualify as campaign media spending by constituting “[a] public communication that refers to a clearly identified candidate?” See A.R.S. § 16-971(2)(a)(iii).

3) Does a public communication like two examples provided (AOR at 3-5) that refer generally to the legislative actions of a political party qualify as campaign media spending by “support[ing] the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party?” See A.R.S. § 16-971(2)(a)(vi).

Commission Response

Question 1

None of the examples provided in the AOR is “[a] public communication that promotes, supports, attacks or opposes a candidate [if made] within six months preceding an election involving that candidate.” These public communications are directed at encouraging communication with an elected official, who is also a candidate, and do not promote, support, attack or oppose the candidate.

Question 2

The VRKA does not require a candidate to be identified expressly as a candidate for a particular office in order to be clearly identified. Consequently, a public communication beginning 90 days before primary may be campaign media spending regardless of an express reference to a particular candidacy.

Question 3

No. Although each public communication warrants its own analysis, the three communications identified do not involve the electoral prospects of candidates of a particular party or the party itself. Each advertisement only mentions party as a means to another end, whether providing context for a call to action to contact a legislator, seeking to bring more people into association with the organization, or facilitating direct communication with a particular elected official.

Background

The facts presented in this advisory opinion are based on your AOR received February 23, 2024 and publicly available information.

Opportunity Arizona describes itself as an Arizona nonprofit corporation. AOR at 1. It states that it has obtained tax exempt status pursuant to Internal Revenue Code § 501(c)(4). *Id.* The organization states that it exists to “to build issue majorities and political power for policies that improve the lives of hardworking Arizonans.” *Id.*

The organization spends money on what it calls “political campaign intervention” as well as lobbying and “issue advocacy.” *Id.* For example, Opportunity Arizona states that it spends money urging the public to contact members of the state legislature on certain bills, thanks and criticizes legislators for their positions on bills and issues. The AOR contains specific examples of the kinds of communications Opportunity Arizona has used and it states that it intends to continue to use these kinds of communications. *Id.* at 2.

The AOR identifies five public communications for the Commission’s analysis. The Commission accepts for purposes of this response Opportunity Arizona’s assumption that all of the communications it discusses are public communications. The Commission also accepts the assumption that each legislator identified in the communications is a “candidate” as defined in the Act.

Example 1. First, the AOR identifies an advertisement that features a photo illustration of the state capitol building along with the text “Click to send a thanks to Senator [] for investing in house affordability!” followed by a link to “Visit www.opportunityarizona.org to learn more.” AOR at 2.

Example 2. The second public communication calls on people to email a particular lawmaker to urge her to change her position on what Opportunity Arizona claims are “barriers to voting.” It includes a photo of the legislator as well as a headline from the website Salon.com. The headline states “‘Hyper-partisan attack’: Arizona GOP advances voting bills inspired by conspiracy theories.” This public communication was published during the legislative session. AOR at 4.

Example 3. The third communication identifies policy values it identifies with a particular party. Specifically, the advertisement claims a party is in favor of “tax breaks for private jet owners,” giveaways for big business,” and “rigging the system for the elite” with the tag line “What is the Republican-led legislature

thinking.” The communication further states that “Arizona families are struggling. It’s time the Republican-led legislature stopped serving special interests and started serving us” Finally, the advertisement states: Join us to learn what your representatives are doing at the state capitol.”² This public communication, the AOR states, refers to an apparently prior legislative session, but does not specify when it was published. AOR at 4.

Example 4. The fourth public communication is a so-called patch call where a person calls someone with an offer to directly connect that person to an elected official’s office by phone.

[Q1] **MAGA extremists at the Arizona Capitol** are considering laws that make more barriers to early voting by mail - making it harder for everyone to vote, especially enlisted military and their families. But you can stop it RIGHT NOW. **Can I transfer you to Senator/Representative (NAME)’s office** right now so you can demand they pledge to protect early voting by mail?

1= Yes [GO TO PATCH STATEMENT]

2= No [GO TO CLOSING]

3= Unsure [READ] Laws are moving through the process that make more barriers to voting. Now is the time to call your State Senator/Representative to stop them. **I urge you to contact State Senator/Representative (NAME) and ask them to pledge to keep voting accessible for the active-duty military and their families.** [GO TO CLOSING]

4= Supports issue but does not want to patch [GO TO CLOSING]

5= Anti issue [GO TO CLOSING]

6= Refused to say [GO TO CLOSING]

7= Does not answer political surveys [GO TO CLOSING]

[PATCH STATEMENT] Great! Here’s what will happen next. In just a moment, **I’ll transfer you to Senator/Representative (NAME)’s office.** Whether you reach a live person or an answering machine, tell their office your name, where you live, and that they need to protect early voting by mail and drop offs. I’ll transfer you now. The next voice you hear will be someone in the office or instructions to leave a voicemail. [TRANSFER CALL]

[END CALL]

AOR at 4-5 (footnote omitted).

² Opportunity Arizona also includes other potential variations on these communications. AOR at 4 fn. 2. This Response does not address those variations in view of the fact-specific analysis required.

Example 5. The fifth public communication features a photo illustration of a person placing a ballot envelope in a mailbox and the statement “For 30 years Arizona has voted by mail.” The next frame or slide of the public communication includes a photo of an Arizona legislator along with text stating “Opportunity Arizona” and “call 602-926- [] to tell Senator [] to protect our freedom to vote.” The AOR provides no information on when the advertisement ran.

Legal analysis

Voters passed the VRKA as Proposition 211 at the 2022 General Election and it was certified by Governor Doug Ducey in December 2022. The Act provides for reports by covered persons, that is, “any person whose total campaign media spending or acceptance of in-kind contributions to enable campaign media spending, or a combination of both, in an election cycle is more than \$50,000 in statewide campaigns or more than \$25,000 in any other type of campaigns.” A.R.S. § 16-971(7)(a). “For the purposes of [the VRKA], the amount of a person’s campaign media spending includes campaign media spending made by entities established, financed, maintained or controlled by that person.” *Id.*

Campaign media spending is a defined term under the Act. This AOR addresses three definitions of campaign media spending:

A public communication that promotes, supports, attacks or opposes a candidate within six months preceding an election involving that candidate.

A public communication that refers to a clearly identified candidate within ninety days before a primary election until the time of the general election and that is disseminated in the jurisdiction where the candidate’s election is taking place.

An activity or public communication that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity.

A.R.S. § 16-971(2)(a)(ii), (iii), (vi).

Question 1: If disseminated within six months “preceding an election involving” a sitting lawmaker who is running for reelection, do public communications like any of the examples provided in the AOR, that mention elected officials by name, but only in relation to their official positions or votes without referring to any election, qualify as campaign media spending by constituting “[a] public communication that promotes, supports, attacks or opposes” a candidate? *See* A.R.S. § 16-971(2)(a)(ii).

Campaign media spending includes “a public communication that promotes, supports, attacks or opposes a candidate within six months preceding an election involving that candidate.” A.R.S. § 16-971(2)(a)(ii).

The terms promote, support, oppose, or attack are not defined in the Act.³ The examples described in this opinion do not turn on the application of those terms, but on how they bear on the word “candidate.” Unlike the definition in A.R.S. § 16-971(2)(a)(iii), which requires only that public communication “refer” to a “clearly identified candidate” this definition uses verbs that speak to an action that involves not just the person who is a candidate, but the candidacy itself.

For example, promote, as used in this context, means “to contribute to the growth or prosperity of: further,” “to help bring (something, such as an enterprise into being: launch,” or “to present (merchandise) for buyer acceptance through advertising, publicity, or discounting.” Promote, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/promote> (last checked March 24, 2024). Thus, a public communication that is focused on a particular policy view of an elected official but does not mention their candidacy is not contributing to the growth of or advertising the candidate, even if it might refer to the candidate. The same reasoning would arise from applying the ordinary meaning of support, oppose or attack.⁴

³ The phrase “promote, support, oppose, or attack” is used in federal campaign finance law, but we have not found useful guidance that informs how it should be applied to respond to the questions raised in this AOR.

⁴ Support, as used in this context, means “to promote the interests or cause of,” “to uphold or defend as valid or right: advocate [as in] supports fair play,” or “to argue or vote for [as in] supported the motion to lower taxes.” Support, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/support> (last checked March 24, 2024).

Oppose, as used here, means “to place opposite or against something [as in] oppose the enemy [or] oppose a congressional bill.” Oppose, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/oppose> (last checked March 24, 2024).

Example 1, which asks a person to click to send a thank you message to an elected official does not meet any of these terms. As a practical matter, it could only meet the definitions of promote or support. But in this case, it does neither. This “thank you” message is directed at a particular policy rather than the candidacy of the elected official.

Example 2 does not promote or support the subject of the communication, nor does it attack or oppose a candidate. Rather it asserts the elected official is working in favor of a policy OA would like to stop. This opposition to a specific kind of policy proposal would not come under A.R.S. § 16-971(2)(a)(ii).

Similarly, Examples 3, 4, and 5 do not qualify as “campaign media spending” under A.R.S. § 16-971(2)(a)(ii) because they do not “promote, support, attack or oppose” a candidate.

Example 3, which discusses “tax breaks for private jet owners,” does not refer to any individual, so it could not “promote, support, attack or oppose” a candidate.

Example 4, the so-called patch call, likewise does not fall under the ambit of § 16-971(2)(a)(ii) because it does not promote, support, attack or oppose a candidate. Rather, it involves a direct solicitation to immediately contact an elected official and demand a particular policy position. Though Example 4 may promote a particular policy, it does not promote or attack a candidate.

In the same way, Example 5 does not promote, support, attack or oppose a candidate. Instead, the communication calls on readers to urge the elected official/candidate to take a particular position.

Other provisions of the Act may apply to these communications under particular circumstances, but A.R.S. § 16-971(2)(a)(ii) does not.

Question 2: If disseminated within 90 days “before a primary election” in which a sitting lawmaker is running for office, do public communications like the examples provided in the AOR, that mention elected officials by name, but only in relation to their official positions or votes without referring to any election, qualify

Attack, as used here, means “to assail with unfriendly or bitter words [as in] a politician verbally attacked by critics.” *Attack*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/attack> (last checked March 24, 2024).

as campaign media spending by constituting “[a] public communication that refers to a clearly identified candidate?” *See* A.R.S. § 16-971(2)(a)(iii).

Yes. The statute applies to communications that “refer[] to a clearly identified candidate.” Even though that phrase is undefined in the VRKA, there is no reason to deviate from the application of the same terminology in federal law or Arizona law. Consequently, a public communication beginning 90 days before primary may be campaign media spending regardless of an express reference to a particular candidacy.

Several of the examples provided by Opportunity Arizona refer to a sitting legislator who is presumably running for office, either reelection or another Arizona office covered by the Act. The organization asserts that “merely referring to the individual should not automatically convert the public communication to one that ‘refers to a clearly identified candidate’ for Campaign Media Spending purposes.” AOR at 9 (quoting A.R.S. § 16-971(2)(a)(iii)).

Opportunity Arizona suggests that “[t]o interpret the Act to [in this manner] would create an untenable proposition for organizations that wish to use donor funds not for electoral advocacy, but to hold current election officials accountable for their official acts that affect the lives of everyday Arizonans.”

Further, Opportunity Arizona argues that because the recall provisions of the Act refer to a “public officer” rather than a “candidate,” the Commission should infer that the Act is only triggered by a public communication that refers to a “clearly identified candidate” as “a candidate.” Put another way, Opportunity Arizona asserts that a communication suggesting that voters call Representative X about a bill 90 days before the primary simply does not implicate the Act. The phrase at issue, “refers to a clearly identified candidate,” however, does not support such a restrictive application.

Although the terms “clearly identified candidate” are not defined in the VRKA, they are defined in other federal and state laws. For example, federal law defines the terms “clearly identified” in a similar context to mean: “(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference.” 52 U.S. Code § 30101(18).

In its recent order granting the Commission’s motion to dismiss, the Arizona District Court explained how the language in the VRKA parallels the federal standards:

Federal law imposes disclosure obligations for all “electioneering communications.” *See* 52 U.S.C. § 30104(f)(1). That term is defined as any communication that “refers to a clearly identified candidate for Federal office.” 52 U.S.C. § 30104(f)(3)(A)(i)(I). In 2010, the Supreme Court addressed and upheld the federal definition. According to the Supreme Court, the federal definition was permissibly applied to even a remarkably cursory reference to a candidate. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 368 (2010). One of the communications at issue was a ten second ad that stated, in full, “If you thought you knew everything about Hillary Clinton . . . wait ‘til you see the movie.” *Citizens United v. Fed. Election Comm’n*, 530 F. Supp. 2d 274, 276 (D.D.C. 2008). In determining this ad met the statutory definition of “refer[ring]” to a candidate, the Supreme Court rejected an argument that the definition needed to be narrowed. *Citizens United*, 558 U.S. at 368-69.

Americans for Prosperity v. Meyer, No. CV-23-00470-PHX-ROS, 2024 WL 1195467, at *10 (D. Ariz. March 20, 2024).

Similarly, Arizona’s campaign finance code defines “clearly identified candidate” as “the name or a description, image, photograph or drawing of the candidate appears or the identity of the candidate is otherwise apparent by unambiguous reference.” A.R.S. § 16-901(9). The Arizona Court of Appeals has held that the candidacy of the clearly identified candidate is not necessary to meet this definition:

[T]he advertisement did not specifically identify [a person] as a candidate for Attorney General, no question exists that [the person] was in fact a “clearly identified candidate” as defined under Arizona’s statutory scheme. “‘Clearly identified candidate’ means that the name, a photograph or a drawing of the candidate appears or the identity of the candidate is otherwise apparent by unambiguous reference.” A.R.S. § 16-901(4). . . . In the advertisement promulgated by [the organization], [the person] was identified through his name, photographs, and his prior and then-current public offices. Moreover, by the time the advertisement was run, [the person] had been clearly identified to the general populace as the Republican candidate for Attorney General. It was unnecessary for the advertisement to further identify the position he sought.

Comm. for Just. & Fairness v. Ariz. Sec’y of State, 235 Ariz. 347, 354, ¶ 28 (App. 2014).⁵

The statutory definition of campaign media spending is consistent with the ordinary meaning of the phrase “clearly identified candidate” as used in campaign finance law in Arizona. Moreover, the relevant portion of the campaign media spending definition is expressly limited to the 90-day period before the primary election through the general election and the communication must be “disseminated in the jurisdiction where the candidate’s election is taking place.” A.R.S. § 16-971(2)(a)(iii).

Finally, the statute requires a reference to a clearly identified candidate, rather than active promotion, support, attack or opposition, as is required for campaign media spending further away from an election.⁶

Question 3: Does a public communication like Examples 2, 3, and 4 that refer generally to the legislative actions of a political party qualify as campaign media spending by “support[ing] the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party?” See A.R.S. § 16-971(2)(a)(vi).

No. Although each public communication warrants its own analysis, the three communications identified do not involve the electoral prospects of candidates of a particular party or the party itself. Each advertisement only mentions party as a means to another end, whether providing context for a call to action to contact a legislature, seeking to bring more people into association with the organization, or facilitating direct communication with a particular elected official.

The organization cites three public communications that are included in two sets of examples. AOR at 3-5. Two are advertisements and one is a so-called “patch call” script. For ease of reference the descriptions of these public communications employed above in response to Question 1 are repeated here.

Example 2 calls on people to email a particular lawmaker to urge her to change her position on what Opportunity Arizona claims are “barriers to voting.” It

⁵ Substantially the same language appears today in A.R.S. §16-901(9).

⁶ Laws 2012, ch. 257 removed a similar provision from A.R.S. § 16-901.01. That provision required a “general public communication” that identified a “clearly identified candidate” to be reported at certain thresholds “[i]n the sixteen-week period immediately preceding a general election.”

includes a photo of the legislator as well as a headline from the website Salon.com. The headline states “‘Hyper-partisan attack’: Arizona GOP advances voting bills inspired by conspiracy theories.”

Example 3 identifies policy values it identifies with a particular party. Specifically, the advertisement claims a part is in favor of “tax breaks for private jet owners,” “giveaways for big business,” and “rigging the system for the elite” with the tag line “What is the Republican-led legislature thinking.” The communication further states that “Arizona families are struggling. It’s time the Republican-led legislature stopped serving special interests and started serving us.” Finally, the advertisement states: “Join us to learn what your representatives are doing at the state capitol.”

Example 4, the patch call script, was reproduced in the AOR at 4-5 and is set forth above.

The Act provides that campaign media spending includes “[a]n activity or public communication that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity.” None of these three examples meet that definition.

Example 2 only mentions a party in the form of an apparently authentic headline from a news story, albeit from a news site associated with a left-of-center point of view. The headline thus provides context for the main call to action in the communication. Because it does not “support . . . the defeat” of candidates of a particular political party, it does not fall under the definition in § 16-971(2)(a)(vi).

Example 3 purports to identify policies associated with a political party. But rather than its “electoral prospects,” the advertisement’s call to action is to join Opportunity Arizona to receive more information about that party’s supposed positions. A call to action that is specifically designed to bring more people into association with Opportunity Arizona is not itself a public communication having to do with a party’s electoral prospects.

Finally, Example 4, while using a term of derision for a party, uses that term in a particular context—facilitating a direct communication with an elected official. This publication is narrow and, in the context of the call, the derisive term enhances the efficiency of the solicitor’s call as by sorting those who might be responsive to such a term from those who would not be.

Conclusion

A Commission advisory opinion “may be relied upon by any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.” Ariz. Admin. Code § R2-20-808(C)(3). A “person who relies upon an advisory opinion and who acts in good faith in accordance with that advisory opinion shall not, as a result of any such act, be subject to any sanction provided in Chapter 6.1 of Title 16.” *Id.* at (C)(4). Advisory opinions may be affected by later events, including changes in law.

Sincerely,

Mark S. Kimble
Chair