

February 23, 2024

Via Email

Arizona Citizens Clean Elections Commission
c/o Thomas Collins, Executive Director
1110 West Washington Street
Phoenix, Arizona 85007

RE: Request for Advisory Opinion

Dear Commissioners:

Pursuant to A.A.C. R2-20-808, Opportunity Arizona through undersigned counsel seeks an advisory opinion from the Arizona Citizens Clean Elections Commission regarding its proposed activities. Opportunity Arizona has developed plans to spend money that traditionally constituted non-reportable grassroots lobbying and issue advocacy unrelated to candidate elections. It now seeks clarification as to whether these planned expenditures would qualify as Campaign Media Spending under the Voters' Right to Know Act (the "Act").

I. Background

A. Opportunity Arizona

Opportunity Arizona is an Arizona nonprofit corporation organized under Internal Revenue Code § 501(c)(4), and its mission is "to build issue majorities and political power for policies that improve the lives of hardworking Arizonans." To those ends, Opportunity Arizona engages in some political campaign intervention during elections, but it also engages in significant lobbying and issue advocacy work unrelated to particular candidates.

For example, Opportunity Arizona spends resources asking the public to call legislators about supporting or opposing certain bills when the Legislature is in session. It also places advertisements thanking specific legislators by name for their positions on bills or alerting the public that a legislator opposes an issue. Last, it at times calls for support for "legislative Democrats" or "Democrats in the Legislature" and their agenda.

To be clear, however, Opportunity Arizona’s advertisements credit and target both Democratic and Republican legislators alike. Opportunity Arizona’s advertisements are focused on promoting the organization’s mission of improving the lives of Arizonans, regardless of party affiliation. As such, it has alerted the public to positions Democratic members have taken on bills it opposes, and thanked Republicans for voting for bills it supports. During the current legislative session, Opportunity Arizona’s work will continue to call attention to timely legislative issues, encourage Arizonans to get involved in the process, and call out the work of legislators on both sides of the aisle.

B. Examples of Opportunity Arizona’s Potential Advertisements

To illustrate the activity Opportunity Arizona has engaged in previously and intends to prospectively, some examples of communications are listed below.¹ While these are examples from prior legislative sessions, they are illustrative of the work that Opportunity Arizona hopes to engage in during the coming months.

In light of the following examples, we request that the Commission provide responses to Opportunity Arizona’s Questions #1-3 below, and where appropriate, indicate whether each of the below advertisements would constitute “Campaign Media Spending” under the Act. *See* A.R.S. § 16-971(2).

1) “Thank you” Advertising

Some of Opportunity Arizona’s advertisements include messages thanking legislators for their official positions or votes on bills and, at times, ask voters to contact an official’s office to communicate that support. For example:



¹ For the purposes of this request, Opportunity Arizona assumes that all its proposed ads will be “public communications” per A.R.S. § 16-971(17).

The above ad refers to a legislator only in her capacity as a Senator and does not mention any election, let alone ask viewers to vote for her.

2) Accountability Advertising

The following are examples of Opportunity Arizona's prior "accountability" advertising, which aim to notify voters of a position that a legislator (or group of legislators) has taken that is contrary to Opportunity Arizona's values.



The first ad, which ran during a prior legislative session, refers to a sitting legislator and prompts her constituents to email her in opposition to several voting bills that she sponsored and/or voted for during the legislative session. While the identified lawmaker was, at the time, running for reelection, the ad does not mention the legislator in the context of an election.²

The second ad refers to the “Republican-led Legislature” without referring to any individual legislator by name. It also does not mention the “Republican-led Legislature” in the context of an election, but instead references three specific legislative actions the group collectively took during that session.

3) Patch Calls

Opportunity Arizona also directly calls individuals with scripts that ask the individual to contact their legislator’s office and give their opinion on a legislative issue. The following is an example script from a prior call campaign, similar to what Opportunity Arizona plans to do this session:

[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**³ 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**

² At other times, an ad may identify a lawmaker and a timely issue, but not include a direct method to contact the legislator, instead (like in the second ad in Example 2 above) including a link to Opportunity Arizona’s website and an invitation to “learn what your representatives are doing at the state capitol.” Opportunity Arizona’s website includes resources for Arizonans who want to learn more or get involved in the legislative process. See *Opportunity Arizona*, <https://www.opportunityarizona.org/advocacy> (providing a calendar of legislative committee hearings and an opportunity for Arizonans to sign up to speak during the hearings).

³ The “(Name)” is to be filled in with the name of the legislator(s) in the relevant district. Constituents receive calls only about their own legislators.

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]

(Emphasis added.)

These calls may mention sitting legislators, some of whom will likely run for reelection at the time the call is made. They also mention factions of legislators, in this case "MAGA extremists," but may at other times mention "Legislative Democrats" or "Legislative Republicans." However, the calls refer to these groups only in their capacity as lawmakers, and do not mention any election.

4) Issue Advocacy

Last, Opportunity Arizona engages in other issue advocacy ad campaigns, such as the ad below:



The ad calls for support for specific issues or bills and identifies the recipient constituent's lawmaker so that they may contact her directly. But the ad does not identify legislators in the context of their election or defeat.

II. Questions Presented

- 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 above, 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 any of the examples above, 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 Examples 2 and 3 above 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).

III. Legal Analysis & Proposed Answers

A. None of the Example Public Communications are Campaign Media Spending under the Act.

None of the above examples of public communications qualify as Campaign Media Spending (and thus the answer to questions 1-3 above is “No”) because they only refer to public officials in their official capacity and not in any context related to elections. The Act details seven discrete types of Campaign Media Spending that trigger the Act’s disclosure obligations:

- (i) A public communication that expressly advocates for or against the nomination, or election of **a candidate**.
- (ii) A public communication that promotes, supports, attacks or opposes **a candidate** within six months preceding an election involving that candidate.
- (iii) 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.
- (iv) A public communication that promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum.
- (v) A public communication that promotes, supports, attacks or opposes the recall of **a public officer**.

(vi) 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.

(vii) Research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision.

A.R.S. § 16-971(2)(a) (emphasis added).

To be clear, Opportunity Arizona understands that these categories expand disclosure obligations of election-related speech beyond the traditionally regulated “express advocacy.” But the Act should not be interpreted to disrupt the status quo so much as to also regulate issue advocacy—a distinct form of speech that Arizona law has always recognized as separate from candidate advocacy. *See Comm. for Just. & Fairness v. Ariz. Sec’y of State*, 235 Ariz. 347, 353–55 ¶¶ 22–30 (App. 2014) (analyzing the difference between issue advocacy and express advocacy).

At the outset, none of the issue-based advocacy that Opportunity Arizona intends to engage in refers to a specific election or a person in their capacity as a candidate. But unfortunately, given the definition of “candidate” under the Act, most legislators who plan to run for reelection are perpetual “candidates.”⁴ *See* A.R.S. § 16-971(3); § 16-901(7). Thus, an overly broad reading of the categories of Campaign Media Spending could result in organizations being forced to disclose lobbying and issue advocacy communications simply because they name a sitting legislator who will be up for reelection in under two years. This is not in keeping with the intent of the Act, which was presented to Arizona voters as aimed at *electoral* advertisements—in particular, “stop[ping] ‘dark money,’ [and] the practice of laundering political contributions.” Ariz. Sec’y of State, 2022 General Election Publicity Pamphlet, Proposition 211 § 2,

⁴ Given the brevity of a two-year term, most candidates who have successfully won state legislative office leave their candidate committee open to fundraise for their next election, which is always just around the corner. Thus, per the definition in the Act, they are nearly always “candidates” because they may “receive[] contributions or make[] expenditures” from that committee while simultaneously sitting as a legislator. A.R.S. § 16-901(7).

https://apps.azsos.gov/election/BallotMeasures/2022/azsos_2022_publicity_pamphlet_standard_english_web_version.pdf.⁵

The Act should recognize the difference between electoral and issue advocacy, regardless of whether the issue advocacy occurs within one of the designated Campaign Media Spending time periods of six months or 90 days before a primary election. Even if an elected official is running for reelection, 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. A.R.S. § 16-971(2)(a)(iii). And it certainly should not mean that issue-based messaging “promotes, supports, attacks or opposes a candidate.” *Id.* § 16-971(2)(a)(ii). To interpret the Act to the contrary would create an untenable proposition for organizations that wish to use donor funds not for electoral advocacy, but to hold current elected officials accountable for their official acts that affect the lives of everyday Arizonans.

Lobbying and legislative accountability efforts are regulated separately from electoral advocacy efforts because a legal difference exists between the two. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 480 (2007) (“There is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other.” (quoting *Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring))). Namely, “the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy.” 551 U.S. at 457. For this reason, speakers’ First Amendment rights to hold public officials to account and to advocate for better public policy via grassroots lobbying communications and accountability ads should remain unfringed. These communications that invoke the name of an individual in their public-official role touch on different speech interests than those that invoke their name as a candidate. And “discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election.” *Id.* at 474.⁶

⁵ Notably, the Act was also intended to “promote rights guaranteed by the First Amendment . . . to promote self-government and ensure responsive officeholders.” Ariz. Sec’y of State, 2022 General Election Publicity Pamphlet, Proposition 211 § 2, https://apps.azsos.gov/election/BallotMeasures/2022/azsos_2022_publicity_pamphlet_standard_english_web_version.pdf. The best way to exercise traditionally protected First Amendment rights and keep officeholders responsive to voters’ priorities is to engage in lobbying and issue advocacy.

⁶ Opportunity Arizona recognizes that its speech under the Act is not “suppressed” to the point of total censorship, as was the case in *Wisconsin Right to Life*. But the Act’s reporting scheme requires a heavy lift from groups engaging in speech regulated by the Act (*e.g.*, sending opt-out notices and awaiting responses, obtaining transfer

Indeed, the Act’s Campaign Media Spending definition *itself* recognizes a difference between someone’s public-official capacity and their candidate capacity. “[W]hen the legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language.” *Workers for Responsible Dev. v. Tempe*, 254 Ariz. 505, 511 ¶ 21 (2023) (citation omitted). Standard principles of statutory interpretation such as this apply equally to voter-approved initiatives. See *Ariz. Citizens Clean Elections Comm’n v. Brain*, 234 Ariz. 322, 324 ¶ 11 (2014); *Sedona Grand, LLC v. City of Sedona*, 229 Ariz. 37, 40 ¶ 11 (App. 2012) (“We apply the same principles to the interpretation of a voter-approved initiative.”).

The Act purposefully differentiates between public communications referring to people in their candidate capacity (§ 16-971(2)(a)(i–iii, vi)), and ads that refer to people as “public officer[s]” (§ 16-971(2)(a)(v)). The latter is triggered only when a public communication “promotes, supports, attacks or opposes the recall of” someone in their public-officer capacity. Equating a public communication that refers to a legislator only in their legislative capacity with a public communication that refers to that same person in the express context of an election would nullify this textual difference. “A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.” *Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix*, 247 Ariz. 45, 47 ¶ 9 (2019) (citation omitted).

This reasoning also extends to A.R.S. § 16-971(2)(a)(vi) including 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.” Public communications supporting or opposing the policy positions of “Democratic” or “Republican” legislators collectively, such as Example 2 above (referring to the “Republican-led Legislature”) and Example 3 (referring to “MAGA extremists”) are not the same as supporting or opposing the Democratic or Republican Party in an election. Merely because a group of legislators of the same party support or oppose an issue that is the focus of Opportunity Arizona’s public communication does not mean the public communication “supports the election or defeat of . . . the electoral prospects of an identified political party.” *Id.* Rather, the communication would—at the very least—need to mention an election involving that party or spend funds on direct electoral activity like that named in § 16-971(2)(a)(vi) (“partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity”).

record requests, performing detailed accounting, and reporting). These obligations should not be imposed on issue-based advocacy. And without clarity on the status of its potential future public communications, Opportunity Arizona may be forestalled from engaging in this important work during the current legislative session, thus chilling its speech.

Finally, this Commission’s prior Advisory Opinion supports differentiating between electoral-related Campaign Media Spending that falls within the Act’s purview and issue advocacy that does not. Given the speech-interest differences between public communications that focus solely on issue advocacy and official action and those that are election-related, “voters who approved [the Act] would likely not expect such activity, without more, to be included” in its disclosure requirements. *Ariz. Citizens Clean Election Comm’n*, AO 2023-01 at *5. As this Commission observed in the context of signature gathering for initiatives, more express language would be required to make clear that voters intended to regulate a completely separate type of First Amendment protected activity than appears on the face of the Act.

IV. Conclusion

None of the types of public communications described above qualify as Campaign Media Spending because they do not refer to candidates or political parties in an electoral capacity—the ads only refer to public officials, or groups of affiliated public officials, in their *official* capacity. The law generally, and the Act specifically, differentiates between issue advocacy that seeks to influence official action and Campaign Media Spending that seeks to influence elections. The requirements of the Act should be applied accordingly.

Sincerely,



Roy Herrera
Jillian Andrews
Austin Marshall