

November 27, 2023

BY ELECTRONIC MAIL DELIVERY

Arizona Citizens Clean Elections Commission
1110 W. Washington St., Suite 250
Phoenix, AZ 85007

Re: Advisory Opinion Request

Dear Commissioners:

Pursuant to Rule R2-20-808 adopted by the Arizona Citizens Clean Elections Commission (“*Commission*”), we seek an advisory opinion on behalf of Democratic Legislative Campaign Committee (“*DLCC*”). DLCC seeks confirmation whether its intended activities constitute campaign media spending under the Voters Right to Know Act (the “*Act*”).

I. Background

DLCC is organized under section 527 of the Internal Revenue Code. DLCC is a national organization with a purpose of electing Democrats to state legislative offices around the country. It is registered in multiple states in accordance with state campaign finance rules. DLCC is not “organized for the primary purpose of influencing the result of an election” in Arizona.¹ Therefore, it is not a “political action committee” and is not registered as such with the Secretary of State.²

To effectuate its purpose of electing Democrats to state legislative offices, DLCC intends to engage in the following projects during the 2023-2024 election cycle in Arizona:

- *Project #1*: Make a monetary contributions to the Arizona Democratic Party, which will not be earmarked for any particular campaign or purpose;
- *Project #2*: Expend funds to hire consultant(s) to provide research, polling, and data analytics services related to legislative elections to be used for DLCC’s internal planning

¹ See A.R.S. § 16-905(C)(1). See also *id.* § 16-901(17) (defining “election” to mean “any election for any ballot measure in this state or any candidate election during a primary, general, recall, special or runoff election for any office in this state other than a federal office and a political party office. . .”).

² See *id.* §§ 16-971(15), 16-901(41).

purposes; and

- *Project #3*: Make in-kind contributions for research, polling, and data analytics work product to other persons engaged in campaign media spending.

The value of the contributions and expenditures for Projects 1-3 will exceed \$25,000 per legislative election that DLCC seeks to influence during the 2023-2024 cycle.

DLCC will not spend monies or accept in-kind contributions to pay for any of the following in Arizona during the 2023-2024 election cycle:

- A public communication that expressly advocates for or against the nomination, or election of a candidate;
- 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;
- A public communication that promotes, supports, attacks, or opposes the qualification or approval of any state or local initiative or referendum;
- A public communication that promotes, supports, attacks, or opposes the recall of a public officer;
- A 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; or
- Research, design, production, polling, data analytics, mailing or social media list acquisition conducted in preparation for or in conjunction with any of the activities described above.

Accordingly, DLCC will not be engaged in “campaign media spending” as defined by A.R.S. § 16-971(2)(a)(i)-(v). DLCC now seeks confirmation that its planned activities do not constitute “campaign media spending” as set forth by A.R.S. § 16-971(2)(a)(vi)-(vii).

II. Questions Presented

1. Does making a monetary contribution to a political party or spending money for projects for internal use (such as research, polling, and data analytics) constitute campaign media spending by a person if that person is not engaged in any of the activities set forth in A.R.S. § 16-971(2)(a)(i)-(v)? If so, please specify which of the two projects – the monetary contribution and/or the internal projects –

constitutes campaign media spending.

2. Does making an in-kind contribution of research, polling, or data analysis to another person constitute campaign media spending if the recipient of the in-kind contribution engages in campaign media spending?

III. Legal Analysis

1. *Does making a monetary contribution to a political party or spending monies for projects solely for internal use (such as research, polling, and data analytics) constitute campaign media spending by a person if that person is not engaged in any of the activities set forth in A.R.S. § 16-971(2)(a)(i)-(v)? If so, please specify which of the two projects – the monetary contribution and/or the internal projects – constitutes campaign media spending.*

No. The Act defines campaign media spending to mean “spending monies or accepting in-kind contributions to pay for” five types of “public communications” enumerated at A.R.S. § 16-971(2)(a)(i)-(v) or either of the following:

(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.”***³

(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.”⁴

The Commission’s implementing Rules clarify that the internal activities set forth at so-called “Prong 7,” A.R.S. § 16-971(2)(a)(vii), “shall *not* be considered campaign media spending unless these activities are *specifically* conducted in preparation for or in conjunction with those other activities” set forth in so-called “Prongs 1-6,” A.R.S. § 16-971(2)(a)(i)-(vi).⁵ As noted above, DLCC will not sponsor any of the public communications described in Prongs 1-5. Therefore, Prong 7 would only be satisfied if any of the DLCC’s projects also satisfied Prong 6.

At bottom, then, the question presented here is whether making a monetary contribution to a political party or spending monies for projects solely for internal use (such as research, polling, and data analytics) is an “[a]n activity ... 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” under A.R.S. § 16-971(2)(a)(vi). We contend that it is not.

The term “activity” is not defined anywhere in Title 16 and is used only once in the definition of

³ *Id.* § 16-971(2)(a)(vi) (emphasis added).

⁴ *Id.* § 16-971(2)(a)(vii).

⁵ Ariz. Admin. Code R2-20-801(B) (emphasis added).

campaign media spending. When interpreting statutory terms established by voter-approved ballot measures, the primary objective “is to place a reasonable interpretation on the intent of the electorate that adopted it.”⁶ The first step in doing so is to give words “their natural, obvious and ordinary meaning unless the context suggests otherwise” and to “apply the provision as written if it is subject to only one reasonable meaning.”⁷ The word “activity” is defined to mean “the quality or state of being active; behavior or actions of a particular kind.”⁸ The ordinary definition of the word is so broad, therefore, that it is subject to more than one reasonable meaning. When a term is subject to more than one reasonable meaning, or when context suggests that a term should not given its ordinary meaning, then the general rule of interpretation is that “each word, phrase, clause and sentence must be given meaning so that no part will be void, inert, redundant or trivial.”⁹

To do so, the Commission should confirm that the term “activity” in Prong 6 includes only programs aimed externally at voters to support or oppose a political party and does *not* include monetary contributions *or* internal projects. While rules of statutory construction dictate that the term “activity” mean something distinct from “public communication,” the statutory examples of such “activity” – partisan voter registration and partisan get-out-the-vote-activity – describe external programs aimed at voters that contain *non-communicative* program elements, such as collecting and submitting voter registration cards or transporting voters to the polls. Accordingly, the inclusion of the term “activity” simply encompasses non-communicative elements that often accompany programs aimed externally at voters. Likewise, the interpretive canon of *ejusdem generis* – providing that where a general word follows a list of specific terms, the general word will be interpreted to include only items of a similar nature to the terms specified – dictates that the term “other partisan campaign activity” is limited to activities of the same type as partisan voter registration and partisan get-out-the-vote activity – *e.g.*, external programs aimed at voters.¹⁰

This construction also ensures that no part of the Act will be void, inert, redundant, or trivial. The Act, for example, already requires organizations that make monetary contributions to covered persons engaged in campaign media spending to disclose their underlying contributors. Treating such contributions as campaign media spending that transform the organizational donors into covered persons would impose duplicative reporting obligations that do not further the purpose or intent of the Act.¹¹ Such a requirement would not increase the transparency of the original sources of contributions to influence election results, would not give voters more information so they can make informed decisions and hold officeholders accountable, and would not reduce the potential for corruption or the laundering of political monies.¹² Such a construction would also violate a

⁶ *State v. Estrada*, 201 Ariz. 247, 250 (2001) (internal quotation and citation omitted).

⁷ *Arizona Chamber of Com. & Indus. v. Kiley*, 242 Ariz. 533, 537 (2017) (internal quotation and citation omitted).

⁸ Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/activity>.

⁹ *Vangilder v. Arizona Dep't of Revenue*, 248 Ariz. 254, 260 (Ct. App. 2020), *as amended* (Mar. 3, 2020), *aff'd in part, vacated in part*, 252 Ariz. 481 (2022) (internal quotation and citation omitted).

¹⁰ See *Wilderness World, Inc. v. Dep't of Revenue State of Arizona*, 182 Ariz. 196, 199 (1995) (describing the *ejusdem generis* interpretive canon as “where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class of those enumerated.”), quoting *White v. Moore*, 46 Ariz. 48, 53–54 (1935) and 59 C.J. Statutes § 581 (1932).

¹¹ A.R.S. § 16-926.

¹² See Ariz. Sec’y. of State, *Certificate and Title: An Initiative Measure Amendment Title 6, Arizona Revised Statutes by Adding Chapter 6.1; Relating to the Disclosure of the Original Source of Monies Used for Campaign Media*

core principle of the Act: that donors may restrict their funds from being used for campaign media spending (even if the recipient is a covered person) and therefore avoid the burdensome requirements that the Act imposes. If such contributions were treated as campaign media spending under Prong 6, that option would be eliminated.

The same is true for the internal projects that DLCC proposes to undertake. If the term “activity” in Prong 6 encompassed internal projects, it would render Prong 7 “void, inert, redundant, and trivial.” Moreover, while Prongs 1 through 6 stand on their own, Prong 7 stipulates that the enumerated internal activities qualify as “campaign media spending” only if they are “conducted in preparation for or in conjunction with any of the [other six] activities.”¹³ If Prong 6 were also aimed at internal activities, it would likely contain the same requirement that it be conducted in preparation for or in conjunction with other types of campaign media spending. But it does not, further bolstering the interpretation that the sixth type covers only activity aimed externally at voters.

For these reasons the Commission should confirm that the term “activity” only includes programs aimed externally at voters to support or oppose a political party, as opposed to monetary or in-kind contributions of goods or services made to a covered person or internal work performed by an organization.

2. *Does making an in-kind contribution of research, polling, or data analysis to another person constitute campaign media spending if the recipient of the in-kind contribution engages in campaign media spending?*

No. The term “campaign media spending” is defined to mean “spending monies *or accepting in-kind contributions* to pay for ... [r]esearch, 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.”¹⁴ It is notable that the term does *not* include *making* in-kind contributions for these goods or services. This reflects the clear distinction that the statute draws between donors and covered persons: the *recipient* of in-kind contributions is the covered person while the *maker* of in-kind contributions is subject to the requirements imposed on donors. Therefore, the Commission should confirm that an organization does not engage in “campaign media spending” merely because it makes an in-kind contribution of research, design, production, polling, data analytics, mailing or social media list acquisition to a covered person.

Very truly yours,

Jonathan S. Berkon
G. Meredith Parnell
Counsel to Democratic Legislative Campaign Committee

Spending at Section 2: Purpose and Intent,

<https://apps.arizona.vote/electioninfo/assets/33/0/BallotMeasures/Certificate%20and%20Title.pdf>.

¹³ See A.R.S. § 16-971(2)(a)(vi).

¹⁴ See *id.* § 16-971(2)(a)(vii).