April 5, 2024

Submitted electronically to ccec@azcleanelections.gov.

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

Re: Supplemental Comments Regarding AOR 24-01 and Draft AO 24-03

Dear Commissioners,

Campaign Legal Center ("CLC") respectfully submits these supplemental written comments in response to AOR 24-01,[1] the request for an Advisory Opinion submitted by Opportunity Arizona regarding the Voters' Right to Know Act ("the Act"), and Draft Advisory Opinion 24-03 ("Draft AO").[2]

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American's right to an accountable and transparent democratic system.[3]

[1] AOR 24-01, Request for Advisory Opinion from Opportunity Arizona (Feb. 23, 2024), https://storageccec.blob.core.usgovcloudapi.net/public/docs/976-2024-02-23-Ltr-re-AO-Request--Opportunity-Arizona.pdf.

[2] Ariz. Citizens Clean Elections Comm., Notice of Public Meeting and Possible Executive Session of the State of Arizona Citizens Clean Elections Commission – Draft Advisory Opinion 2024-03 (Mar. 28, 2024), 75-85, https://storageccec.blob.core.usgovcloudapi.net/public/docs/1022-Meeting-Packet-3-28-24.pdf (hereinafter "Draft AO").

[3] CLC's affiliated 501(c)(4) organization, CLC Action, represents Voters' Right to Know, the political committee established to support Proposition 211, in ongoing litigation relating to the Act.

CLC previously submitted comments to the Commission regarding the second question presented in AOR 24-01—the interpretation of A.R.S. § 16-971(2)(a)(iii).[4] CLC is providing these supplemental comments in response to the Commission's request for additional comments focusing on the first issue presented in AOR 24-01—the interpretation of A.R.S. § 16-971(2)(a)(ii). This provision defines "campaign media spending" to include a public communication that "promotes, supports, attacks, or opposes a candidate within six months preceding an election involving that candidate."[5]

Our comments will first explain that we agree with the Commission's interpretation of § 16-971(2)(a)(iii). We will then discuss why the terms of § 16-971(2)(a)(ii), the context of the federal law from which § 16-971(2)(a)(ii) is drawn, and the interpretation of similar state laws support interpreting § 16-971(2)(a)(ii) more narrowly than in the current Draft AO.

I. Draft AO 24-03's interpretation of A.R.S. § 16-971(2)(a)(iii)

CLC strongly supports the Commission's proposed interpretation of § 16-971(2)(a)(iii) in the Draft AO. As we explained in our prior comments, disclosure under § 16-971(2)(a)(iii) is not limited to communications that expressly reference an election or identify a candidate "as a candidate." In fact, this is an essential element of disclosure requirements for ads that fall under § 16-971(2)(a)(iii)—often called "electioneering communications—to prevent evasion of disclosure simply by omitting certain words.[6]

The Commission's interpretation is also supported by a recent federal court decision upholding the Voters' Right to Know Act. In *Americans for Prosperity, et al. v. Damien R. Meyer, et. al.*, the District of Arizona held that § 16-971(2)(a)(iii) was analogous to federal disclosure laws for electioneering communications, and that the similar federal language requiring disclosure for communications that "refer[] to a clearly identified candidate" "was permissibly applied to even a remarkably cursory reference to a candidate."[7] The court specifically pointed to *Citizens United*, noting that the brief ads promoting *Hillary: The*

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[4] *CLC Comments regarding AOR 24-01*, Campaign Legal Ctr. (Mar. 8, 2024), https://campaignlegal.org/sites/default/files/2024-04/CLC%20Comment%20on%20AZ%20CCEC%20AOR%2024-01%20%283.8.24%29.pdf.

[5] A.R.S. § 16-971(2)(a)(ii).

[6] Campaign Legal Ctr., *supra* note 4, at 4-6.

[7] *Americans for Prosperity, et al., Plaintiffs, v. Damien R Meyer, et al., Defendants. Additional Party Names: Americans for Prosperity Found.,* No. CV-23-00470-PHX-ROS, 2024 WL 1195467, at *10 (D. Ariz. Mar. 20, 2024) (discussing *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 368 (2010)).

Movie, a video-on-demand documentary, qualified as electioneering communications.[8] Given the Court's prior rejection of arguments that "refer[ring]" to a candidate should be interpreted narrowly in *Citizens United*, the District of Arizona rebuffed plaintiffs' argument that the analogous provision in the Voters' Right to Know Act was not sufficiently narrowly tailored.[9]

II. Draft AO 24-03's interpretation of A.R.S. § 16-971(2)(a)(ii)

The Draft AO appears to interpret § 16-971(2)(a)(ii) to cover a public communication that in any way "promotes, supports, attacks or opposes" a person who is a candidate for office. CLC recommends that the Commission take a narrower approach than the current Draft AO and, instead, interpret § 16-971(2)(a)(ii) to apply to communications that promote, support, attack, or oppose ("PASO") a person's candidacy or otherwise reference their candidacy for office in promoting, supporting, attacking, or opposing them.

As explained below, the terms used by § 16-971(2)(a)(ii)—"promotes, supports, attacks or opposes"—are qualitatively different from § 16-971(2)(a)(iii)'s use of "refer." Additionally, § 16-971(2)(a)(ii) is drawn from similar standards that have been adopted and implemented at both the federal level and in other states, which generally apply to communications that in some way refer to a person's candidacy or the election they are running in. Taken altogether, these factors support a narrower interpretation of § 16-971(2)(a)(ii).

A. The terms of A.R.S. § 16-971(2)(a)(ii)

As the Draft AO explains, the Voters' Right to Know Act does not provide definitions of the terms "promotes," "supports," "attacks," or "opposes." Thus, the Draft AO identifies common definitions of those terms in interpreting § 16-971(2)(a)(ii). Although the definitions identified by the Draft AO are not controversial, we believe the Draft AO's application of those definitions overlooks important context in how those terms are generally used.

Specifically, at least the terms "supports" and "opposes" suggest that, when used in reference to a person, a particular *aspect* or *trait* of that person is at issue. For example, when saying that you are "supporting" or "opposing" another person, that generally refers to supporting or opposing them in a specific context—such as for an elected office or for a new job—or for a particular task they are undertaking—such as to raise funds for a cause. As a type of activity covered within "campaign media spending," those terms would seemingly refer to supporting or opposing a person *as a candidate*. And while the terms

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[8] *Id.* One of the communications at issue was a brief ten second ad stating, "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).

[9] *Americans for Prosperity*, 2024 WL 1195467, at *10.

"promotes" or "attacks" generally may not have a more limited connotation, their use with "supports" and "opposes" in this provision—again, regulating "campaign media spending"—indicates they should also be interpreted to focus on the person's status as a candidate.

These terms stand in contrast to the term "refers" as used in § 16-971(2)(a)(iii), which, in this context, means "to direct attention usually by clear and specific mention."[10] A communication can easily "refer" to a person—or other object—without referring to a particular aspect of that person—as supported by the consistent interpretation of similar provisions by courts to *not* require reference to a person's status as a candidate.[11]

To the extent that there remains ambiguity as to how broadly or narrowly the terms of § 16-971(2)(a)(ii) should be interpreted, though, the context and interpretation of similar laws (as discussed below) provides further support for a narrower interpretation.

B. Federal law

The standard utilized in § 16-971(2)(a)(ii) originated in federal law as part of the Bipartisan Campaign Reform Act of 2002 (BCRA). Among the substantial federal reforms adopted in BCRA were several policies to eliminate "soft money" in federal elections—that is, money previously raised by political parties for supposedly "nonfederal" purposes and not subject to federal law restrictions on sources and amounts of contributions.[12] Although the "cornerstone" of BCRA's elimination of soft money was barring national political parties from accepting *any* money that was not subject to federal law's source and amount restrictions, BCRA also placed restrictions on federal candidates, state and local political parties, and state and local candidates to prevent them from circumventing the ban on soft money to national political parties.[13]

Specifically, BCRA barred state and local political parties and candidates from accepting soft money to engage in "federal election activity."[14] BCRA then defined "federal election activity" to focus on spending "used to benefit federal candidates directly."[15] Amongst the covered activity was:

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[10] *Refer*, Merriam-Webster, https://www.merriam-webster.com/dictionary/refer (last visited Apr. 5, 2024).

[11] Campaign Legal Ctr., *supra* note 4, at 4-6.

[12] *McConnell v. FEC*, 540 U.S. 93, 122-26, 133-34 (2003).

[13] *Id.* at 133-34.

[14] 52 U.S.C. § 30125(b).

[15] *McConnell*, 540 U.S. at 167.

> [A] public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate).[16]

In 2003, the Supreme Court upheld BCRA's soft-money restrictions—both generally the bar on state and local parties spending soft money on federal election activity and specifically the bar on state and local parties spending on PASO public communications. In doing so, the Court noted that "any public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating."[17] Viewed in this context, the thrust of federal law's coverage of PASO communications was to focus on ads that fell short of express advocacy but nonetheless positively or negatively address a person's candidacy for office. While the terms of 52 U.S.C. § 30101(2)(A)(iii) and A.R.S. § 16-971(2)(a)(ii) are not identical, A.R.S. § 16-971(2)(a)(ii) is clearly modeled after 52 U.S.C. § 30101(2)(A)(iii) and would reasonably be interpreted similarly.

C. Other states' laws.

Although the Voters' Right to Know Act is groundbreaking in many respects, Arizona does not stand alone in applying disclosure requirements to PASO communications. Other states utilizing similar standards for regulating electoral communications, and these laws have been upheld by courts across the country.[18] As many of those decisions illustrate, these similar laws have generally been interpreted to reflect that PASO communications must refer to a person's status as a candidate in some way to be covered.[19] Again, while none of these examples is identical to A.R.S. § 16-971(2)(a)(ii), the interpretation of similar laws in

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[16] 52 U.S.C. § 30101(2)(A)(iii). BCRA also barred state and local candidates from spending soft money on these PASO public communications as well. *See id.* § 30125(f).

[17] *McConnell*, 540 U.S. at 170.

[18] *See Yamada v. Snipes*, 786 F.3d 1182, 1192-94 (9th Cir. 2015); *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128-29 (2d Cir. 2014); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 285-87 (4th Cir. 2013); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62-64 (1st Cir. 2011)).

[19] *See, e.g.*, *Yamada*, 786 F.3d at 1193 (9th Cir. 2015) ("Hawaii's statutes are tied to an election-related object—the terms 'advocates,' 'supports' and 'opposition' refer only to 'the nomination ... or election of the candidate'"); *Vermont Right to Life*, 758 F.3d at 130, 133 (citing *State of Vermont v. Green Mountain Future*, 86 A.3d 981, 997 (2013)) (In analyzing the phrase under a vagueness challenge, the Court determined "['supporting or opposing'] both refer to advocacy to vote in a particular way in an election." In its First Amendment analysis, the Court further explained that "[the statutory definition] by its terms only reaches communications that take a position on an actual candidacy"); *McKee*, 649 F.3d at 63-4 ("the terms 'promote'/'promoting,' 'support,' and 'oppose'/'opposition' have an election-related object" in both the federal statute and in Maine).

the disclosure context provides additional reason to consider a narrower interpretation of § 16-971(2)(a)(ii) than proposed in the Draft AO.

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Section 16-971(2)(a)(ii)'s coverage of PASO communications essentially occupies a middle ground between the Act's coverage of express advocacy in § 16-971(2)(a)(i) and its coverage of ads that merely reference a candidate close to an election in § 16-971(2)(a)(iii). Interpreting the reach of § 16-971(2)(a)(ii) thus requires the Commission to determine whether that provision is focused on communications referencing a person's candidacy (as with express advocacy) or covers all types of references to that person (as with electioneering communications). In our view, the better interpretation is the narrower one, and we therefore recommend the Commission interpret § 16-971(2)(a)(ii) to apply only to ads that promote, support, attack, or oppose a person's candidacy or otherwise reference their candidacy for office in promoting, supporting, attacking, or opposing them.

CONCLUSION

We thank the Commission for this additional opportunity to share comments regarding AOR 24-01 and the Draft AO. We would be happy to answer questions or provide additional information to assist the Commission's development of its Advisory Opinion.

Respectfully submitted,

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