**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

| ATTORNEY GENERAL OPINION<br><br>By<br><br>MARK BRNOVICH<br>ATTORNEY GENERAL<br><br>July 30, 2015 | No. I15-002 AMENDED<br>(R15-002)<br><br>Re: Use of Public Funds to Influence the Outcomes of Elections |
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To: Sheila Polk
Yavapai County Attorney

Bill Montgomery
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## Questions Presented

You have asked for guidance on the limitations imposed by Arizona Revised Statutes Section 11-410 on the use of county resources to influence an election. Your inquiry focuses on the relationship between section 11-410 and ballot measures, and raises two discrete questions:

1. When do the restrictions on the use of public resources "for the purpose of influencing the outcomes of elections" arise with regard to a ballot measure?
2. What conduct or communications does the prohibition in A.R.S. § 11-410 preclude?

## Summary Answer

1. The prohibitions in Section 11-410 on the use of public resources "for the purpose of influencing the outcomes of elections" in the context of a ballot measure

proposition arise upon the filing of an application for a serial number for a ballot initiative or referendum.

2. Determining whether particular conduct or communications may be prohibited requires analysis under an objective two-part test:

   a. Was there a use of public resources?

   b. If so, were the public resources used "for the purpose of influencing the outcomes of elections?"

**Background**

In 1996, the Arizona Legislature enacted a series of statutes to prohibit the use of public resources "for the purpose of influencing the outcomes of elections." 1996 Ariz. Legis. Serv. Ch. 286 (S.B. 1247). The original statutory language did not define the phrase "influencing the outcome of elections," but rather, generally prohibited expending public resources for that purpose. *Id.* The prohibitions, codified in the Arizona Revised Statutes, applied to cities (§ 9-500.14); counties (§ 11-410); state and public agencies (§ 16-192); school districts and charter schools (§ 15-511); community colleges (§ 15-1408); and universities (§ 15-1633). The Legislature clarified that it did not intend through these prohibitions to deny any civil or political liberties of public employees that are guaranteed by the federal and state constitutions. *See, e.g.,* A.R.S. § 11-410(G) (2015).

In 2000, this office looked to the campaign finance laws for guidance to determine what "influencing the outcome of elections" encompassed. Ariz. Atty. Gen. Op. I00-020. That guidance resulted in two general principles. First, determining whether something has the purpose of influencing an election should be generally an objective test. *Id.* at 2 (*citing Federal Election Comm'n v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1116 (9th Cir. 1988)

(Under federal campaign finance law, whether something is intended to influence an election is an objective test, rather than a test "based on the subjective state of mind of the actor.")). Second, "campaign expenditures 'for the purpose of influencing elections' do not include 'non-partisan activity designed to encourage individuals to vote or to register to vote.'" *Id.* (*quoting* A.R.S. § 16-901(9)(b)). This office set forth specific guidance for public officials stating that the operative statutes "do *not* prohibit

- elected officials from speaking out individually regarding measures on the ballot;
- the use of public resources to respond to questions about ballot measures, although responses should provide factual information that suggest neither support nor opposition to the measure;
- the use of public resources to investigate the impact of ballot measures on a jurisdiction;
- the use of public resources to prepare and distribute the election information required by statute; and
- the preparation and dissemination of materials 'reporting on official actions of the governing body.'"

*Id.* at 3-4 (emphasis in original).

Two years later, Division Two of the Arizona Court of Appeals interpreted Section 9-500.14. *See Kromko v. City of Tucson*, 202 Ariz. 499 (App. 2002). The court noted, "[a]t the heart of the appeal and cross-appeal is the following question: precisely what constitutes 'influencing the outcomes of elections' for purposes of the statute?" *Id.* at 501 ¶ 6. The court ultimately settled on the "unambiguously urges" test, finding that an actor would not be found to violate the prohibition unless the communication at issue "unambiguously urges a person to vote

in a particular manner." *Id.* at 503 ¶ 10 (internal quotation marks and alterations omitted). In applying this test, the court looked at whether "reasonable minds could differ" as to whether the particular communication encouraged a vote one way or the other on the propositions at issue. *Id.* (internal quotation marks omitted). In other words, the court imposed a very narrow reading of the prohibition at issue. The *Kromko* court explicitly rejected a requirement of impartiality similar to that in A.R.S. § 19-124(B) because Section 9-500.14 did not expressly require impartiality. *Id.* at 502.

In 2007, this office subsequently relied on the 2000 AG opinion, with reference to *Kromko*, in considering whether elected county officials may use their official titles in various materials that advocate the success or defeat of ballot measures. *See* Ariz. Atty. Gen. Op. I07-008 ("[E]lected officials may communicate their views on pending ballot measures and may use their official titles when doing so." "Although county officials may sign their names and use their official titles in such communications, they may not use public resources or funds for the purpose of expressing these views.").

In 2013, the Arizona Legislature substantially amended the prohibitions against the use of public resources to affect elections. *See* 2013 Ariz. Legis. Serv. Ch. 88 (H.B. 2156). Among the broad changes made, the Legislature provided a statutory definition of "influencing the outcomes of elections" lacking at the time of the *Kromko* decision:

> "Influencing the outcomes of elections" means supporting or opposing a candidate for nomination or election to public office or the recall of a public officer or supporting or opposing a ballot measure, question or proposition, including any bond, budget or override election and supporting or opposing the circulation of a petition for the recall of a public officer or a petition for a ballot measure, question or proposition in any manner that is not impartial or neutral.

A.R.S. § 9-500.14(G)(2); § 11-410(G)(2); § 15-511(L)(2); § 15-1408(J)(2); § 15-1633(K)(2); § 16-192(G)(2).[1]

## Analysis

There are two questions pending: (1) when do the statutory prohibitions on the use of public resources "for the purpose of influencing the outcomes of elections" arise with regard to a ballot measure, and (2) what conduct or communications do the prohibitions preclude?

### 1. Question One: When (temporally) do these prohibitions arise?

The Legislature has not explicitly answered this question. This office's 2000 opinion stated that the statutory prohibitions with regard to ballot measures "apply before a measure qualifies for the ballot." Ariz. Atty. Gen. Op. I00-020 at 4. We now clarify that the language of Section 11-410[2] indicates that the prohibitions arise upon the filing of an application for a serial number for a ballot initiative or referendum. *See* A.R.S. § 19-111.

The 2013 amendments to Section 11-410 adding the operative definition make it clear that, for purposes of ballot measures, the prohibition against influencing an election includes "supporting or opposing a ballot measure, question or proposition" and "supporting or opposing *the circulation of a petition* for a ballot measure, question or proposition." A.R.S. § 11-410(H)(2) (emphasis added). The statute makes plain that the prohibition applies not just to measures on the ballot, but also to supporting or opposing the circulation of a petition. *See id.* In other words, the Legislature defined this prohibition to apply beyond merely the time at which

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[1] As previously noted, the Legislature further amended the relevant statutes in 2015. *See* 2015 Ariz. Legis. Serv. Ch. 296 (H.B. 2613) (amendments to all relevant statutes except A.R.S. § 15-1633).

[2] For convenience, and because it is the direct subject of the inquiry, the analysis in this Opinion will reference Section 11-410. Because the operative language in that section is repeated elsewhere, the analysis in this Opinion applies equally to the same language as found in A.R.S. § 9-500.14(G)(2); § 15-511(L)(2); § 15-1408(J)(2); § 15-1633(K)(2); and § 16-192(G)(2).

the election participants (candidates and ballot measures) are fixed. A petition may be circulated once the Secretary of State issues an official serial number to the petition. *See* A.R.S. §§ 19-111(B), 19-121(A). Thus, for ballot measures, the prohibitions arise when an official serial number is assigned to the petition.

Aligning the statutory prohibitions with this objectively identifiable date is consistent with Arizona's election laws generally, which typically tie election-related prohibitions and duties to objectively identifiable dates and times. *See, e.g.,* Ariz. Const. Art. IV, Pt. 1 § 1(4) (setting the time for filing of initiative and referendum petitions); A.R.S. § 16-311 (time for filing a candidacy nominations paper); § 16-914.01 (duties for campaign finance reporting, including deadlines, for committee supporting or opposing a ballot measure); § 16-945 (prescribing contribution schedules for candidates participating in public financing scheme). A contrary rule would cause unnecessary ambiguity and potentially chill the otherwise permissible conduct or speech of elected officials and public employees. Accordingly, the prohibitions in Section 11-410 arise with regard to ballot measures when an application for a serial number for a ballot initiative or referendum is filed.

**2. Question Two: What conduct or communications do these prohibitions preclude?**

The Legislature's 2013 amendments to Section 11-410 effectively rejected the *Kromko* "unambiguously urge" test as the only measure of influencing the outcome of elections, but the Legislature did not clearly articulate its preferred alternative to that test. However, the definition of "influencing the outcomes of elections" provides sufficient guidance to construct an analytical framework to assist public officials in avoiding prohibited conduct under the statute.

Statutory interpretation principles require that each portion of the provision at issue be given effect; in other words, we do not read a statute in a way that would render a portion

superfluous or ineffective. *Grand v. Nacchio,* 225 Ariz. 171, 175-76 ¶ 21 (2010) ("We ordinarily do not construe statutes so as to render portions of them superfluous."). Accordingly, whatever test the Legislature intended to adopt in its 2013 amendments, it must incorporate all elements of the definition.

To give full meaning to the statute, the analytical framework requires an objective two-part test: (1) was there a use of public resources; (2) if so, were the public resources used "for the purpose of influencing the outcomes of elections?"

*A. Was There A Use of Public Resources?*

As a threshold matter, the statutory prohibition does not become operative unless there is a use of public resources. In other words, there is no need to analyze the conduct or communication if there is no use of public resources because Section 11-410 does not apply.

Arizona's statutory prohibitions are quite broad, including "the use or expenditure of monies, accounts, credit, facilities, vehicles, postage, telecommunications, computer hardware and software, web pages, personnel, equipment, materials, buildings or any other thing of value." A.R.S. § 11-410(A). Although broad, this list is consistent in applying only to a "thing of value." *See id.* A violation of the statutory prohibitions must therefore involve the use or expenditure of a public resource that has value.

In addition to the specific examples given in the statute, this prohibition also generally applies to the use of a public employee's time during normal working hours, as that time is a public resource that has value. Employees' time spent outside of normal working hours is not a public resource.

Elected officials' time, however, should be considered differently. Elected officials' titles and duties are not readily separated from their persons. *Colorado Taxpayers Union, Inc. v.*

*Romer*, 750 F. Supp. 1041, 1045 (D. Colo. 1990) ("the political personage which are not separable from the man in office. The official position is a part of the person of the incumbent at all times. Governors have no duty shifts or time off.").[3] This should not lead to a conclusion that elected officials have less ability to participate in the political process than their employees. Rather, it suggests that whether particular conduct in question under this statute occurred during the traditional work day is not a relevant consideration to evaluating if public resources have been expended when the actor at issue is a politically elected official.[4] Instead, the inquiry for elected officials must consider whether the official used public resources other than his time.

The Legislature is not presumed to have adopted a statute intended to infringe state elected officials' and employees' ability to engage in the political process as citizens. And the Legislature expressly stated that it did not intend the prohibitions as prohibiting constitutionally protected speech. A.R.S. § 11-410(G) ("Nothing contained in this section shall be construed as denying the civil and political liberties of any employee as guaranteed by the United States and Arizona Constitutions"). Thus, elected officials and public employees do not use public resources when they take a position on a ballot proposition, where for the employee it is outside of their normal working hours or while on approved official leave, and for either an elected

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[3] In Arizona, state and county elected officials do not accrue sick or annual leave and are not required to use leave for time away from the office. *See* A.R.S. § 41-742(D)(1) (exempting state elected officials from the state personnel system), A.R.S. § 11-352(A) (exempting county elected officials from the county merit system). In other words, Arizona's laws explicitly recognize that elected officials always carry their title and official persona, regardless of the time of day.

[4] This is consistent with the general jurisprudence regarding the federal Hatch Act, and related state "Little Hatch" Acts, which proscribe certain political activities by government employees, but generally exempt certain high level, primarily elected, officials. In *United States Civil Service Commission v. National Ass'n of Letter Carriers*, the Supreme Court held that the Hatch Act struck a constitutionally sustainable balance between First Amendment rights of public employees and "obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act." 413 U.S. 548, 564 (1973). *See also Patterson v. Maricopa County Sheriff's Office*, 177 Ariz. 153 (App. 1993). The statutory framework in A.R.S. § 11-410 strikes that same balance.

official or a public employee, the individual does not otherwise expend public resources in taking that position. Examples of this type of permissible speech include drafting an editorial or participating in an interview or a debate.

The use of either an elected official's title or other incidental uses of the attributes of office also is not a use of public resources for purposes of the statutory prohibition. The statutory prohibitions should be interpreted and applied to implement the Legislature's legitimate purpose of deterring the misuse of public funds, but they should not be employed to improperly silence public officials from expressing views on important matters of public policy. Although an elected official's title has some inherent value, it does not constitute a use of public resources under the statute when the elected official exercises his First Amendment rights to speak about elections. Thus, the use of a public official's name and title on a mailing that is not paid for with public resources would not constitute a use of public resources because the Legislature's legitimate regard for the First Amendment outweighs whatever minimal value that the use of an official's title may have. *See* Atty. Gen. Op. I07-008. Similarly, the presence of a regular security detail paid for by an elected official's office by itself does not constitute the use of public resources for purposes of the statutory prohibition because the security detail must accompany the elected official regardless of whether the elected official is communicating about a ballot measure. *See, e.g., Romer*, 750 F. Supp. at 1045 (The detail is generally considered an extension of the public official's political person and is not separable from the person in office; "There is a difference between the conduct of public officials in speaking out on controversial political issues and their use of governmental power to affect the election.").[5]

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[5] *Romer* was "not a public expenditure case." *Id.* at 1044. The federal court instead considered whether the Colorado Governor's conduct and speech in opposition to a ballot measure violated state citizens' First Amendment rights as a result of the use of state resources as well as the

If an activity falls into one of the exceptions above, there is no need to move on to the second step of the analysis. But where an elected official or public employee does in fact use a public resource, additional analysis is required.

### *B. Was the Public Resource Used "For the Purpose of Influencing the Outcomes of Elections?"*

#### *1. The standard is objective.*

Where there is a use of public resources, the analysis turns to purpose—whether the public resources were used "for the purpose of influencing the outcomes of elections." Although examination of that purpose seems to implicate subjective intent, our office has previously adopted an objective test in determining whether something has the purpose of influencing an election. Ariz. Atty. Gen. Op. I00-020 at 2 (*citing Fed. Election Comm'n v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1116 (9th Cir. 1988)); *see also FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 466-69 (2007) (rejecting intent-based test in the context of an as-applied constitutional challenge); *Orloski v. Fed. Election Comm'n*, 795 F.2d 156, 162, 165 (D.C. Cir. 1986) (approving of an objective test to determine whether a contribution is made for the purposes of influencing any election). While the Legislature substantially amended the statutes at issue since this office's 2000 opinion, it did not suggest that the standard should not be objective. Indeed, the primary concern—conduct or communications that have the purpose of influencing the outcomes of elections—has remained the same and thus the analysis regarding an

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"power and prestige" of the public office. *Id.* at 1042. The court's analysis as to what constituted public resources in that context is relevant and instructive to the questions addressed in this opinion. A public official presented with an opportunity to exercise constitutionally protected rights to free speech, where such opportunity poses a potential security threat, must not be required to choose between his safety and the exercise of free speech. As previously noted, section 11-410 explicitly exempts conduct protected by state and federal constitutions so it is clear that our Legislature did not intend for public officials in this state to be faced with such a Hobson's choice.

objective test endures. The objective test will necessarily involve a fact-specific, case-by-case evaluation. Ariz. Atty. Gen. Op. I00-020.

*2. The standard prohibits supporting, opposing, or disseminating information in a manner that is not impartial or neutral.*

The statutory prohibition on the use of public resources for the purpose of "influencing the outcomes of elections" precludes the use of public funds for "supporting or opposing" a candidate or ballot measure "in any manner that is not impartial or neutral." A.R.S. § 11-410(H)(2). "Support" is defined as "to promote the interests or cause of." Merriam-Webster.com. "Oppose" means "to place opposite or against something." *Id.* By contrast, "impartial" is defined as "treating or affecting all equally" *id.,* while "neutral" means "a position of disengagement," *id.* Thus, the terms "supporting or opposing" are antonymic to "impartial or neutral." In other words, it is not possible to "support or oppose" a candidate or ballot measure in an "impartial or neutral" manner.[6]

Despite this apparent tension in the text of the statutory prohibition, it is possible to discern the Legislature's purpose and intent from the language of the statute. Courts determine legislative intent from the statutory language, "the general purpose of the act in which it appears,

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[6] It is well-established that statutes "must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012). "The requirement of clarity is enhanced . . . when the statute 'abut[s] upon sensitive areas of basic First Amendment freedoms." *Info. Providers' Coal. for Def. of the First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991) (internal quotation marks and citations omitted). Where a statute is vague, it will "inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1972)). The definition of "influencing the outcome of elections" presents some constitutional concerns because the uncertainty resulting from the inherent contradiction between "supporting or opposing" and "in any manner that is not impartial or neutral" may well deter public officials and employees from engaging in protected speech. The Arizona Legislature may consider looking to language that the State of Washington used in a similar statutory prohibition that does not present the same vagueness concerns. *See* Wash. Rev. Code Ann. § 42.52.180 (2012).

and the language of the act as a whole." *No Ins. Section v. Indus. Comm'n,* 187 Ariz. 131, 132 (App. 1996) (internal citation omitted). Section 11-410 generally sets forth a prohibition against the use of public resources for the purpose of influencing the outcomes of elections, and attempts to give some parameters for that prohibition through carve outs (that is, distributing informational pamphlets or reporting on official actions (Subsection A); certain government-sponsored forums or debates (Subsection C); and any conduct protected by our federal or state constitution (Subsection G)). Moreover, the definition in subsection (H)(2) is self-evidently a response to the narrow test set forth in *Kromko*. The Court of Appeals in *Kromko* rejected an impartiality test because, "Had the legislature wanted to make presentation of an impartial analysis a prerequisite to [the use of public] funds and resources to educate the public on a ballot issue, it easily could have done so." 202 Ariz. at 502 ¶ 7. With subsection (H)(2), the Legislature made clear that it did require impartiality as an element in the test. We can thus infer that the Legislature intended the prohibition on the use of public resources to apply not just to uses of public resources that unambiguously urge the electorate to vote in a particular matter, but also to uses of public resources that "support or oppose" a ballot measure ambiguously by presenting the information in "any manner that is not impartial or neutral." *See* A.R.S. § 11-410(H)(2); *see also* Ariz. Atty. Gen. Op. I00-020 at 2 (allowing responses to inquiries on election issues "in a neutral manner that does not urge support or opposition to a measure").

In the context of a ballot measure, we thus assess whether the use of public resources is for the purpose of influencing an election using an objective test to determine both its purpose and its manner. The test looks to: (1) whether the use of public resources has the purpose of supporting or opposing the ballot measure, and (2) whether the use of public resources involves

dissemination of information in a manner that is not impartial or neutral. As noted above, this test is objective.

In many cases, the application of the test will be straightforward. If the use of public resources unambiguously urges voters to vote for or against a ballot measure, it will violate the statutory prohibitions because (1) it supports or opposes the ballot measure, and (2) there is no question that the use is not impartial or neutral given its unambiguous message for or against the measure. Similarly, if a reasonable person could not find that the use of public resources supports or opposes a ballot measure, it will not violate the statutory prohibitions because (1) it does not support or oppose a ballot measure, and (2) it must therefore be impartial or neutral with regard to the ballot measure.

In other cases, the application of the test will require additional analysis. If a reasonable person could conclude that the use of public resources supports or opposes a ballot measure but reasonable minds could differ, *see Kromko*, 202 Ariz. at 503 ¶ 10, then the test will require closer examination of whether the use of public resources disseminates information in a manner that is not impartial or neutral. For this examination, we can analogize to the requirement that the legislative council provide "an impartial analysis" of each ballot measure or proposed amendment. A.R.S. § 19-124(B). Our Supreme Court has held that impartial analysis must "avoid[] argument or advocacy" and "be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and it must not be tinged with partisan coloring." *Tobin v. Rea*, 231 Ariz. 189, 194 ¶¶ 12-13 (2013) (internal quotation marks and citations omitted). The use of "rhetorical strategy" in an attempt to persuade the reader is another signal that the dissemination of information violates this prohibition. *See Citizens for Growth Management v. Groscost*, 199 Ariz. 71, 72-73 ¶ 6 (2000). If an analysis of the manner of the use of public

resources reveals that it engages in advocacy, misleads, or uses rhetorical strategy, the use of public resources will violate the statutory prohibition because (1) a reasonable person could find that the use supports or opposes a ballot measure, and (2) it is not impartial or neutral.[7]

In other words, when assessing whether conduct implicates section 11-410's restrictions based on its purpose, we must account for the delicate balance between the prohibition on the improper use of public resources to influence elections and the need for public officials and employees to carry out their public functions. If a reasonable person could find that the use of public resources supports or opposes a ballot measure, we assess whether it is done in a neutral or impartial manner by examining whether it is: (1) free of advocacy; (2) free of misleading tendencies, including amplification, omission, or fallacy; and (3) free of partisan coloring.

*3. The standard may be applied practically.*

To clarify the application of the standard set forth above, we provide the following practical application examples, each of which is subject to the purpose and manner analysis as set forth above.

Routine uses of public resources made in the normal course of government functions would be presumed not to run afoul of the statutory prohibitions unless additional evidence demonstrates the use of resources was for the purpose of influencing an election. If the use of public resources is a routine use in the normal course of government functions, an objective observer would likely conclude that the purpose of the use of public resources was not to promote the interests of the ballot measure or to be used against the ballot measure. As such,

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[7] This is consistent with our previous opinion assessing the circumstances under which informational materials that do not advocate for or against a measure, but are not specifically authorized or required by statute, may be disseminated using public resources. Ariz. Atty. Gen. Op. I00-020 (approving of "such factors as the style, tenor and timing of the publication" to determine whether a public resource was used for the purpose of influencing an election) (internal quotation marks and citation omitted).

routine communications are presumed to be permissible; but that presumption may be rebutted by evidence that the communication meaningfully deviated from the routine in a manner that objectively indicated it had the purpose of influencing an election in violation of the statutory prohibitions. For example, where a tough-on-crime ballot measure is being circulated, the release of statistics that report an increase or decrease in crime but did not expressly address the ballot measure would be presumed not to violate the statutory prohibitions if it is a routine communication. In order to rebut that presumption, there would need to be evidence that, considering the totality of the circumstances, the report disseminated information in a manner that was not impartial or neutral. Relevant circumstances may include evidence that the report was inaccurate, misleading, and/or used rhetorical strategies that attempt to persuade the voter.

Similarly, in the discharge of their duties, elected officials are often presented with inquiries from the press or constituents concerning their positions on a variety of public policy issues, including ballot measures. For example, a county attorney may be asked at an open press conference to express a position on a pending ballot measure. Given the First Amendment implications discussed above, the official may respond to the inquiry without violating the prohibition on the use of public funds where the statement does not otherwise result in a non-routine use of public resources. Ariz. Atty. Gen. Op. I00-020 at 3 (citing *Smith v. Dorsey*, 599 So. 2d 529, 541 (Miss. 1992) ("the effective discharge of an elected official's duty would necessarily include the communication of one's considered judgment of the proposal to the community which he or she serves.")). Although the use of the official's time during the press conference has some value, the First Amendment implications of the official's speech and the explicit carve-out in subsection (F) for speech protected by the First Amendment both indicate that this should not be considered a use of public resources within the statutory prohibition.

Further, the statute and this office's previous guidance recognizes that public officials may expend public resources concerning elections for a variety of neutral or impartial reasons, including "the use of public resources to respond to questions about ballot measures, although responses should provide factual information that suggest neither support nor opposition to the measure;" "the use of public resources to investigate the impact of ballot measures on a jurisdiction;" "the use of public resources to prepare and distribute the election information required by statute;" and "the preparation and dissemination of materials 'reporting on official actions of the governing body.'"[8] Ariz. Atty. Gen. Op. I00-020 at 3-4. Again, any expenditure or use of resources related to the subject matter of a ballot measure and within the operative time frame will be subject to the purpose and manner analysis to determine whether it violates the prohibition. For example, the use of public resources to investigate the potential impact of a ballot measure on a jurisdiction could give rise to a challenge where the dissemination of information related to that investigation is made in a manner that fails to be neutral or impartial.

As expressly permitted by the statute, public officials also may sponsor forums or debates at public expense if they remain impartial, the events are purely informational and provide an equal opportunity to all viewpoints. A.R.S. § 11-410(B).

In contrast, the statute prohibits a non-elected public employee's attendance at a non-neutral event designed for the purpose of supporting or opposing a ballot measure if the employee attends the event during normal working hours unless the employee uses annual leave

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[8] Ariz. Atty. Gen. Op. I00-020 interpreted the prior version of the statutory prohibitions that did not have the definition of "influencing the outcome of elections" at issue here. But that opinion embraced a similar standard, as it indicated that the use of resources must be assessed in an objective manner on a case-by-case basis to determine whether, for example, information is provided "in a neutral manner that does not urge support or opposition to a measure."

personal time; such attendance would violate the statute's prohibition on use of personnel for the purpose of influencing the outcome of an election.

The importance of context in this objective analysis cannot be overstated. The use of public resources to disseminate information may be impartial or neutral in content, but violate the statutory prohibition in the manner in which it is disseminated. For example, if neutral or impartial information is disseminated through direct mail only to likely voters (as opposed to the full relevant constituency), that context may indicate that the public resources are being used for the purpose of influencing the outcome of elections.

## Conclusion

Section 11-410 prohibits counties from using public resources for the purpose of influencing the outcomes of elections. The statute seeks to balance a public official's First Amendment rights to participate in the political process, and the public's right against compelled subsidy of speech embodied in the improper use of public resources to influence elections. This opinion provides an analytical framework to assist public officials in their efforts to balance their First Amendment rights with the public's right against compelled subsidy of speech.

To that end, the operative time frame for the relevant prohibitions is triggered by the filing of an application for a serial number for a ballot initiative or referendum.

The determination of whether particular conduct is permissible requires analysis under an objective two-part test:

1. Was there a use of public resources?
2. If so, were the public resources used "for the purpose of influencing the outcomes of elections?"

Under this test, any use of public resources that occurs after the restrictions arise under the statute is subject to the objective test set forth above, which must necessarily constitute a fact-specific, case-by-case evaluation to determine whether such use was for the impermissible purpose of influencing the outcome of an election.

Mark Brnovich
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