STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

August 14, 2018

Opinion No. 18-37

Applicability of Electioneering Disclaimer Requirements to Social Media Platforms

Question 1

Do the disclaimer requirements of Tenn. Code Ann. § 2-19-120 apply when a person finances an election-related communication on a social media platform?

Opinion 1

Yes.

Question 2

Do any other financial disclosure or disclaimer requirements under state law apply to election-related communications on social media platforms?

Opinion 2

Yes, Tenn. Code Ann. § 2-10-105 is also applicable to political communications on social media platforms.

ANALYSIS

1. Section 2-19-120(a) of the Tennessee Code imposes a disclaimer requirement on election-related communications. In pertinent part, it provides:

> Whenever any person makes an expenditure for the purpose of financing a communication that expressly advocates the election or defeat of a clearly identified candidate, as defined by § 2-10-102 . . . , through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or any other form of general public political advertising, a disclaimer meeting the requirements of subdivision (a)(1), (2), (3), or (4) shall appear and be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication.

Neither "communication" nor "general public political advertising" is defined in § 2-19-120 or in the definition section it incorporates, Tenn. Code Ann. § 2-10-102. Undefined words in the Tennessee Code must "be given their natural and ordinary meaning, without forced or subtle

construction that would limit or extend the meaning of the language, except when a contrary intention is clearly manifest." Tenn. Code Ann. § 1-3-105(b).

The ordinary meaning of the word "communication" includes a message or advertisement posted on a social media platform. The word "communication" means "the imparting or exchanging of information or news." *New Oxford American Dictionary* (3d ed. 2010); *see also Black's Law Dictionary* (10th ed. 2014) (defining "communication" as "the interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception"). A message or advertisement that expressly advocates the election or defeat of a clearly identified candidate constitutes the imparting of information or news and the interchange of a message or idea and fits easily within the ordinary meaning of "communication."

The catch-all phrase "or any other form of general public political advertising" is also broad enough to include social media platforms. "[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001)). The meaning of "general public political advertising" is thus to be determined from the words that precede it. A "broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, and direct mailing" are all traditional media through which to advertise and convey messages. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 373 (Roberts, C.J. concurring) (noting television and radio broadcasts, pamphlets, posters, and newspapers as methods for expressing opinions on matters of public concern). Section 2-19-120 enumerates all of these methods of communications and then includes "*any other form* of general public" advertising.

As an important medium of speech and political advertising, social media platforms are similar in nature to the other forms of advertising listed in § 2-19-120 and thus fall within its catch-all provision for "any other form of general public political advertising." Indeed, social media platforms have overtaken the traditional methods of political advertising enumerated in § 2-19-120—newspapers, posters, direct mailings, etc.—as the most effective means of communicating with a target audience. Social media platforms are simply a new "form" of "general public" advertising similar in purpose to the more traditional forms listed in the statute. Social media platforms have, in fact, become the paramount form of political advertising, replacing many of the traditional forms. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) ("While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular." (internal quotation marks omitted)); *see also Citizens United*, 558 U.S. at 364 ("Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues."). Section 2-19-120 accounts for such developments by including a catch-all provision requiring disclaimers on "any other form" of public political advertising.

Section 2-19-120(b) does except from its disclaimer requirements "bumper stickers, pins, buttons, pens, novelties, and similar small items upon which the disclaimer cannot be conveniently

printed." This express exception for bumper stickers, pins, and other small items reinforces that additional exceptions to the disclaimer requirement—e.g., for social media posts—should not be implied. *See TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." (internal quotation marks omitted)); *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83-84 (Tenn. 2001).

Social media platforms do not fit within the exception in subsection (b) for "similar small things upon which the disclaimer cannot be conveniently printed." The meaning of that concluding phrase must also be determined from the words which proceed it. *See Guardianship Estate of Keffeler*, 537 U.S. at 384. Bumper stickers, pins, buttons, pens, and novelties are all tangible items with a limited space on which a message may be printed. Political messages posted on social media platforms are not similar to these tangible forms of political advertisements and do not share their physical limitations; on social media platforms, the required disclaimer requirements can conveniently be included with the political message.[1]

In sum, a message or advertisement that expressly advocates the election or defeat of a clearly identified candidate is a "communication" within the scope of Tenn. Code Ann. § 2-19-120, and social media platforms are a form of "general public political advertising" within the scope of the statute as well. Accordingly, a person who spends money to finance a "communication that expressly advocates the election or defeat of a clearly identified candidate" on a social media platform must comply with the applicable disclaimer requirements.[2]

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[1] While some social media platforms—such as Twitter—may impose a maximum character limit, there exist many ways in which a user can "conveniently" include a disclaimer, e.g. by using an image, a reply tweet, or profile information to disclose the identity of the person who paid for, or authorized, the communication in a sufficiently clear and conspicuous manner necessary to satisfy the requirements of § 2-19-120.

[2] This Office previously concluded that § 2-19-120 violated the First Amendment in light of the Supreme Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). *See* Tenn. Att'y Gen. Op. 95-090 (Aug. 29, 1995). Subsequent statutory amendments and case law have, however, rendered the conclusion of the 1995 opinion obsolete. In *McIntyre*, the Supreme Court held unconstitutional an Ohio law that prohibited the distribution of anonymous campaign material for both referenda and candidate elections. *See Majors v. Abell*, 361 F.3d 349, 351 (7th Cir. 2004) (Posner, J.). When the 1995 opinion was issued, § 2-19-120 similarly applied to communications supporting both candidates and ballot "measure[s]." But the statute was subsequently amended in 2004 to apply only to communications supporting candidates. *See* 2004 Tenn. Pub. Acts, ch. 480, §§ 11, 12. *McIntyre* also expressly limited its holding to "only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed." 514 U.S. at 338 n.3. Although the previous opinion found it "certain that the Court would apply the same First Amendment analysis to broadcast restrictions," Tenn. Att'y Gen. Op. 95-90 (Aug. 29, 1995), some courts have in fact interpreted *McIntyre* as limited to written communications, *see, e.g.*, *Worley v. Fla. Sec. of State*, 717 F.3d 1238, 1254 (11th Cir. 2013). In addition, since *McIntyre*, the Supreme Court and lower courts have upheld limited disclaimer requirements, some of which are similar to § 2-19-120. *See, e.g.*, *Citizens United* 558 U.S. at 366–71 (upholding disclaimer requirements that applied to electioneering communications funded by anyone other than a candidate); *Worley*, 717 F.3d at 1253-55; *Majors*, 361 F.3d at 351-55; *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 647-48 (6th Cir. 1997). Moreover, the implications of *McIntyre*, *Citizens United*, and other cases for political advertising done through the unique medium of social media platforms have not yet been addressed. The anonymity protection provided by the First Amendment in the social media context remains an open question. *See, e.g.*, *Packingham*, 137 S. Ct. at 1743 (Alito, J. concurring in the judgment) (cautioning against the "unprecedented degree of anonymity" provided by the internet); *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 4 (D.D.C. 2012) ("Mr. X has a right under the First Amendment to post on the Internet, and to do so anonymously.").

2. Tennessee law also requires that "all expenditures made by or on behalf of" candidates for state public office and political campaign committees involved in state elections be filed in a statement with the registry of election finance. Tenn. Code Ann. § 2-10-105(a). Similarly, candidates for local public office and political campaign committees involved in local elections must file an identical statement with the applicable county election commission. *Id.* § 2-10-105(b). These statutes require disclosure of "all expenditures," which would include expenses incurred in promulgating political advertisements or communications on social media platforms. Any expenses incurred for communicating via social media are thus required to be disclosed pursuant to § 2-10-105.

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