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M E M O R A N D U M

TO: Charles Sieck, President

FROM: James A. Jutry
Tyler Stanton

DATE: January 27, 2020

RE: Non-profit Corporations and the First Amendment

ISSUE PRESENTED

May Green Valley Recreation, Inc. (“GVR”) implement policies and rules limiting the distribution of materials and solicitation of support by candidates for office in both public and GVR elections?

SHORT ANSWER

Yes. Provided such rules are consistent with its own corporate governing documents, GVR may implement policies and rules limiting the distribution of materials and solicitation of support by candidates for both public and GVR offices.

DISCUSSION

I. First Amendment as Applied to GVR

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech.” U.S. Const. amend. I. It is a fundamental Constitutional concept that the Free Speech Clause “does not prohibit *private* abridgement of speech.” *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (emphasis original). The Supreme Court’s “state-action” doctrine distinguishes the government from individuals and private entities. *Id.* In very limited cases, a private entity may qualify as a “state actor” subject to First Amendment constraints. *Id.* A private entity may qualify as a “state actor” when (i) the private entity performs a traditional, exclusive public function; (ii) the government compels the private entity to take a particular action; or (iii) the government acts jointly with the private entity. *Id.*

The issue here is whether GVR’s policies restricting the distribution of campaign literature violate the First Amendment. GVR is clearly a private, non-profit entity and not a governmental agency. As a result, the presumption is that the First Amendment does not prohibit GVR’s private abridgement of speech. Thus, GVR’s actions must be analyzed under the above referenced “state-actor” test. There is no government compulsion nor is GVR acting in

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conjunction with any governmental entity. So, the only possible way GVR could qualify as a state actor in this instance is if GVR is performing a traditional, exclusive public function. To qualify as a state actor under the “traditional public function” test, “it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of [the state-actor test], the government must have traditionally *and* exclusively performed the action.” *Id.* at 1928-29. While, “running elections” will typically qualify a private entity as a state actor, this does not include merely hosting candidate forums or other election-adjacent activities. *Id.* at 1929.

The U.S. Supreme Court clearly and unambiguously stated the above principles in *Halleck*, a case involving a non-profit corporation providing public-access television. “Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor.” *Id.* at 1930. “In short, merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.” *Id.*

As a result, merely hosting candidates for any form of office does not transform GVR into a state actor. Because GVR is a private entity, it is not legally constrained by the First Amendment and GVR may restrict as it sees fit speech occurring on its own property and in the general-use rooms it rents to outside groups and individuals.

II. Arizona Law

As with the federal constitution, the Arizona state constitution does not prohibit private entities from restricting speech. *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 748 (9th Cir. 2004) (holding that private employers are “not subject to the constitutional strictures applied to state actors by both the federal and Arizona state constitutions.”). Arizona law does, however, prohibit planned communities from restricting certain categories and types of speech, but as the Officers and Board of Directors of GVR are undoubtedly aware, as a result of recently enacted legislation it is now clear that GVR is not a planned community and, thus, GVR is not subject to the provisions of the Arizona Revised Statutes where those restrictions on planned communities are found. The limitations on the ability of a planned community to limit political speech are thus not applicable to GVR. Accordingly, GVR is also free under Arizona law to restrict as GVR sees fit speech occurring on its own property and in the rooms it rents to outside groups and individuals.

III. GVR’s Campaign Policies

Although neither Arizona nor federal law would keep GVR from restricting speech, GVR could by its own by-laws and/or other governance documents establish limitations and policies regarding speech on GVR property. For example, the GVR Corporate Policy Manual (“CPM”) allows “[a]dvertising or promotional signage for non-GVR elected positions (e.g., public sector

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election campaigns), *including* solicitation of support/opposition regarding candidates or ballot issues” as long as such solicitation or advertising is “(1) within rented meeting space during the rental period; or (2) in public areas and parking lots of a GVR facility being used as a polling place on election day or as an early voting site during the period of early voting.” GVR Corp. Policy Man. Sec. IV, Subsec. 1, ¶ W. In other words, GVR’s CPM does, in fact, regulate the distribution of advertising material or solicitation of support for public elections within a room rented by an outside group and on certain other GVR property.

For GVR related elections, the CPM provides that advertising or solicitation may occur only in GVR facility lobby areas, common areas, or curbsides and parking lots. *Id.* at Sec. IV, Subsec. 3, ¶ A. There is no mention of distribution of materials or solicitation of support for GVR candidates within rented meeting spaces although candidates for public office are allowed to undertake such activities. These provisions read together seem clear: candidates for non-GVR elections may distribute materials and solicit support in rented meeting rooms during the rental period while candidates for GVR elections may distribute materials or solicit support only in GVR common areas or, in certain situations, outside of GVR buildings. Based on the authorities cited above, these policies included in the CPM do not violate the First Amendment and are therefore legal. GVR may limit (and by the provisions of the CPM, has limited) when and where different types of candidates may distribute campaign materials and solicit support for their campaigns.