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Joey D. Moya

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

STATE OF NEW MEXICO *ex rel.*
WILLIAM E. SHARER, MARK MOORES,
JAMES R.J. STRICKLER, and DAVID M.
GALLEGOS,

Petitioners,

**No. S-1-SC-37435**

v.

MAGGIE TOULOUSE OLIVER, in her
official capacity as Secretary of State,

Respondent.

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# PETITIONERS' OPPOSITION TO RESPONDENT'S MOTION TO STAY THE PROCEEDINGS AND DISCLOSURE OF NEW CONTROLLING CASE LAW

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# I. INTRODUCTION

Pursuant to Rule 12-309(E) NMRA and as set forth more fully below, the Petitioners oppose Secretary of State Maggie Toulouse Oliver's (the "Respondent" or the "Secretary") Motion to Stay the Proceedings (the "Motion to Stay"). The Secretary argues that a stay is warranted because Senate Bill 3 ("SB3") will "change the 'legal landscape.'" *See* Resp't Mot. for Stay at 7 (Feb. 1, 2019). She is mistaken. The legal landscape changed in 2017 when the Secretary herself stood New Mexico's separation of powers on its head by enforcing the provisions of a vetoed bill against the citizens of New Mexico. SB3 cannot ratify, fix, or mitigate the Secretary's affront to Article III, Section 1 of the New Mexico Constitution.

The Petitioners have alleged that by enacting and enforcing the Campaign Finance Rule, 1.10.13 NMAC (10/10/2017) (the "Secretary's Rule"), the Secretary usurped legislative policymaking and lawmaking functions, nullified a governor's veto, and preempted legislative action to address that veto. Incredibly, the Secretary's solution to this problem is to ask the Court to stay the proceedings to allow time for the current Legislature and Governor to enact the election policy and law wrongfully established by the Secretary. It is constitutionally backwards for the Secretary to claim that New Mexico's separation of powers would be

restored if the Legislature were to bring New Mexico election law into conformity with the Secretary's Rule, rather than the other way around.[1]

## II. PROCEDURAL POSTURE & BACKGROUND

On December 20, 2018, the Petitioners filed a Verified Petition for Writ of Mandamus and Request for Stay (the "Petition"), No. S-1-SC-37435. The Petitioners have asked this Court, among other things, to vacate the entirety of the Secretary's Rule as unconstitutional.[2] Pet. for Writ of Mandamus at 26. On January 18, 2019 and at the request of the Respondent, the Supreme Court extended the deadline for the Secretary's Verified Response to the Petition from January 25 to February 8, 2019.

On February 1, 2019, the Secretary filed a Motion to Stay the Proceedings "as the legislature considers legislation with a direct bearing on the claims at issue

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[1] The Legislative Finance Committee reports that, "[a]ccording to [the Secretary], the *provisions of SB 3* relating to independent and coordinated expenditures … *align with [the Secretary's] administrative rules currently in effect*." Senate Bill 3 Fiscal Impact Rep., Legal Fin. Comm. (N.M. updated Feb. 11, 2019) (emphasis added). The Committee report is attached as Exhibit A.

[2] The Respondent's Motion to Stay indicates that the Petitioners have "specifically" challenged three provisions in the Secretary's Rule. *See* Resp't Mot. to Stay at 2. To be clear, the Petitioners have asked the Court to vacate the *entirety* of the Secretary's Rule because its enactment and enforcement unconstitutionally violates the separation of powers and, to the extent that any provision could possibly be constitutional, severing is impossible as it would leave an incomplete and unworkable regulation. *See State ex rel. Stewart v. Martinez*, 2011-NMSC-045, ¶¶ 22-23 (holding a line-item veto invalid because it left an incomplete and unworkable act). The Petition's specific examples of unconstitutional provisions in the Secretary's Rule were provided for illustrative purposes.

before this Court." *See* Mot. to Stay at 2. On February 8, 2019, the Secretary filed a timely Response to the Petition (the "Response").

## III. ARGUMENT

### A. The Unconstitutional Acts of a State Officer Cannot Be Ratified by the Subsequent Acts of Any Legislature or Governor

There is nothing that the 54th Legislature or Governor Lujan Grisham can do to ratify, cure, or legitimize the Secretary's arrogation of power constitutionally reserved to the 53rd Legislature and Governor Susana Martinez. Thus, it is impossible for SB3—even if it were passed in lockstep with the policies and precepts implemented by the Secretary's Rule—to moot the separation of powers infirmities that give rise to the Petitioners' request for a Writ of Mandamus.

Acts that offend the New Mexico Constitution, such as the Respondent's promulgation of the Secretary's Rule, are void *ab initio*. *See Fellow v. Shultz*, 1970-NMSC-071, ¶ 16 ("It is a well-established rule of constitutional law that an unconstitutional statute is wholly void from the time of its enactment[.]"). *See also State ex rel. W. v. Thomas*, 1956-NMSC-124, ¶ 5 (agreeing with the trial court and holding that which is unconstitutionally void is a nullity). Moreover, *provisional* statutes enacted in *anticipation* of legalizing constitutional amendments can "*never* become operative until the amendment is adopted."[3] *Fellow*, 1970-NMSC-071,

[3] Typically, even constitutional amendments cannot make once-unconstitutional laws, suddenly constitutional. *Fellow*, 1970-NMSC-071, ¶ 16. In

¶ 22 (emphasis added). What is true of a statute must, *a fortiori*, be true of a mere regulation. Besides, the Respondent cannot argue that the Secretary's Rule is anticipatory, because she has been enforcing it for more than one year.

Staying this case would have no impact whatsoever on this Court's ultimate decision on the merits, because there is nothing that bicameral presentment and a governor's signature can do to save the Secretary's Rule. If this Court determines that the Secretary had the statutory authority to promulgate the Rule from the preexisting CRA, then the regulation will survive. If this Court finds that the Secretary lacked statutory authority, then the regulation is a nullity (as if it never existed) and as such, SB3 cannot save it.

## B. The Unreported *Planned Parenthood* Opinion, upon Which the Respondent's Entire Motion to Stay Relies, Is Wholly Irrelevant

The Respondent's Motion to Stay relies upon one unreported case from another state, *Planned Parenthood v. N.H. Attorney General*, to stand for the proposition that a court may issue a stay pending legislation, where legislation could moot the litigation before it.[4] *See* Resp't Mot. for Stay at 6-7. *Planned*

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rare instances, however, a constitutional amendment may legalize a previously unconstitutional law, but only if the constitutional amendment expressly or impliedly ratifies the unconstitutional law. *Id.* ¶ 18.

[4] The Secretary also cites two authorities to support the general proposition that all courts have the authority to stay matters before them. *See* Resp't Mot. to Stay at 5 (citing *Belser v. O'Chleirachain* and *Wood v. Millers National Insurance*). Both cited cases address courts' inherent power to stay cases before them, pending *litigation*. *See Wood v. Millers Nat. Ins. Co.*, 1981-NMSC-086, ¶ 8.

*Parenthood* is not instructive for two principal reasons. First, the Secretary's premise is logically flawed—she conflates enacting a statute with repealing a statute, which have dissimilar remedy-related effects. Repealing a statute may very well moot a case challenging the statute's constitutionality because the very remedy sought by the *Planned Parenthood* plaintiffs—removal of an unconstitutional statute that was a product of an otherwise valid legislative process is achieved by repeal. That is not the case when *enacting* a statute, because the remedy sought by the Petitioners here—removal of a regulation that is the product of a state officer's violation of the separation of powers—cannot be remedied by the Legislature.

Second, the Respondent fails to mention several essential facts about the unreported case. House Bill 184 was a bill which proposed to repeal the statute challenged in the litigation before the court. *Planned Parenthood of N. N.E. v. N.H.*, No. 03-cv-491-JD, 2007 WL 329709, at *1 (D.N.H. Feb. 1, 2007).[5] The Secretary's Motion fails to mention, however, that *more than one year prior* to the stay, "[t]he *parties agreed* that *the permanent injunction* entered by this court on December 29, 2003, would remain in place for the remainder of the litigation[.]" *Planned Parenthood of N. N.E. v. Ayotte*, 571 F. Supp. 2d 265, 270 (D.N.H. 2008) (emphasis added). Hence, the stay pending the bill was something to which both

[5] The unpublished *Planned Parenthood* decision is attached as Exhibit B.

parties agreed. *Planned Parenthood*, 2007 WL 329709, at *1 ("Counsel agreed."). And thus, *Planned Parenthood* does not contain legal analysis applied to facts. Instead, it merely regurgitates the factual realities of the case. The Respondent misses this issue entirely and tries to attribute legal significance to the case which it does not contain.

The case before this Court, in contrast, has not yet enjoined enforcement of the unconstitutional Rule at issue. Thus, while there was no ongoing harm caused by the unconstitutional statute in *Planned Parenthood* because the parties agreed to a permanent injunction prior to mutually agreeing upon a stay, the Secretary's continued enforcement of her regulation here and the fact of her encroachment on the separation of powers causes ongoing harm to the government and citizens of New Mexico. A stay is not only unsupported by logic and the caselaw, it would be profoundly unjust.[6]

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[6] Moreover, the Secretary's request for a stay is ironic, if not outright hypocritical. In 2017, the Respondent did not have the patience to stay her promulgation of the Secretary's Rule to allow the 53rd Legislature to override Governor Martinez's veto of SB96, or to wait for a future legislature and governor to enact a similar bill into law. Nevertheless, the Secretary asks this Court to be patient and stay adjudication because "[t]his Court has made clear that the legislature is entitled to deference in the exercise of its policymaking power[,]" with respect to pending SB3. *See* Resp't Mot. for Stay at 6-7 (citing *Torres v. State*, 1995-NMSC-025, ¶ 10).

### C. As the Supreme Court of New Mexico Has Recognized, Matters of Great Public Importance Necessitate "Early Resolution"

As this Court held just last week, the Supreme Court will exercise its

> original jurisdiction in mandamus in instances where a petitioner [seeks] to restrain one branch of government from unduly encroaching or interfering with the authority of another branch in violation of Article III, Section 1 of [the New Mexico] state constitution.

*Unite New Mexico v. Oliver*, No. S-1-SC-37227, ¶ 2 (Feb. 7, 2019) (quoting *State ex rel. Sandel v. N.M. Pub. Utility Comm'n*, 1999-NMSC-019, ¶ 11 (internal quotations omitted). Indeed, exercising such jurisdiction is "a matter of controlling *necessity*" because "the conduct at issue affects, in a fundamental way, the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *See State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21 (internal quotations and citations omitted) (emphasis added).

This Court understands the imperative for "early resolution" of matters implicating the great public importance doctrine because "it is important that both the legislative and executive branches clearly understand their constitutional obligations and limitations." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17. By seeking such clarification regarding the constitutional obligations and limitations between governmental branches, the Petition poses essential questions whose answers will only become clear to the parties upon this Court's decision on the merits. For instance, and assuming *arguendo* that SB3 becomes law, what if

SB3's provisions, as legislatively amended, do not match the Secretary's Rule? May the Legislature retroactively ratify any illegal official act? Just illegal acts related to election law? May the Secretary take any failed election-related bill and enforce it against the citizens of New Mexico? What are the constitutional limitations, if any, upon the chief election officer? The Court needs to set clear precedent to guide future Secretaries of State—and especially the Respondent.

The Respondent's dismissive tone with respect to the harm that a delay works against the Petitioners betrays the Respondent's lack of appreciation for the seriousness of her unconstitutional actions, and her disregard for the supremacy of the Constitution.[7] It would be bad enough to perpetuate an unconstitutional regulatory regime by delaying a decision on the merits of this case, but the Secretary is currently inflicting very real, practical harm upon individuals. For example, if the Secretary's Rule is unconstitutional, she lacks the lawful authority to collect and retain the *names* and *home addresses* of New Mexico citizens under the regulation's independent expenditure reporting requirement. The continued compelled collection and storage of New Mexico citizens' personal information violates their constitutional right to privacy, ostensibly under color of regulation.

[7] The Respondent claims that "the Petitioners saw fit to bide their time and wait for more than a year prior to filing[.]" Resp't Mot. for Stay at 7. Even were this true, which it is not, the Respondent's concern is patently irrelevant, as constitutional violations are not subject to any statute of limitation.

## D. The 53rd Legislature's Attempt to Enact SB96, and the 54th Legislature's Current Efforts to Pass SB3, Demonstrate that the Respondent Never Had Statutory Authority to Promulgate the Secretary's Rule

The 53rd Legislature's attempt to enact an independent expenditure reporting law, and the 54th Legislature's ongoing consideration of an independent expenditure reporting bill nearly identical to the prior Legislature's bill, provide presumptive evidence that the Respondent never had the statutory authority to promulgate the Secretary's Rule.

The Secretary has claimed the statutory authority to promulgate the Secretary's Rule pursuant to the Campaign Reporting Act (the "CRA"). *See, e.g.*, Sec. of State, Not. of Adoption, Campaign Fin. R., at 1 (Sept. 12, 2017) (citing NMSA 1978, § 1-19-26.2 (1997)).[8] She is incorrect. This Court has held that it presumes "the Legislature is well informed as to existing statutory and common law … and that it does not intend to enact useless statutes." *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 12 (internal citations omitted). Moreover,

> [a]n adoption of a statutory amendment is presumptive evidence of an intention by the Legislature to change the provisions of the former law and to accord a meaning different from that which existed prior to the amendment.

[8] The Notice of Adoption of the Secretary's Rule is attached as Exhibit C.

*State v. Bryant*, 19820NMCA-178, ¶ 10.[9] The 53rd Legislature attempted to amend the CRA. It did not pass SB96 to have no force or effect because, contrary to the Respondent's assertions, that would render SB96 pointless. SB96 was

> AN ACT
> RELATING TO CAMPAIGN FINANCE; *REQUIRING REPORTING OF INDEPENDENT EXPENDITURES*; REDEFINING "POLITICAL COMMITTEE"; DEFINING "ADVERTISEMENT", "BALLOT MEASURE", "CAMPAIGN EXPENDITURE", "*COORDINATED EXPENDITURE*", "*INDEPENDENT EXPENDITURE*" AND OTHER TERMS; … AMENDING, REPEALING AND ENACTING SECTIONS OF THE NMSA 1978.

Campaign Finance Fixes, Senate Bill 96, 53rd Leg., 1st Sess., Preamble (N.M. 2017) (capitalization in original) (italics added). Thus, the CRA could not have delegated to the Secretary the statutory authority to implement the very policies and precepts proposed by SB96.

The Secretary now claims that SB3 is "legislation with a direct bearing on the claims at issue before this Court." Resp't Mot. to Stay at 2. On this narrow

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[9] The Respondent claims that "[i]n some instances, the legislature may amend a statute to 'clarify existing law[,]'" and she cites *Aguilera v. Board of Education* to support her assertion. Resp. at 26 (quoting *Aguilera v. Bd. of Educ.*, 2006-NMSC-015, ¶ 19) (internal quotations omitted). The *Aguilera* Court also explained that under normal circumstances, the presumption that the Legislature intended to change the existing law remains an important element of statutory construction. *See Aguilera*, 2006-NMSC-015, ¶ 19. *Aguilera* explained that statutory construction's "primary goal" is to "give effect to the intent of the Legislature." *Id.* Amendment for clarification of existing law is a rarity. *See id.*

point, the Petitioners agree with the Respondent.[10] Not only are the provisions of both SB96 and SB3 substantively identical, but SB3's preamble is identical to SB96's,[11] unequivocally stating that SB3's purpose is, in part, "REQUIRING REPORTING OF INDEPENDENT EXPENDITURES." *See* Senate Bill 3, 54th Leg., 1st Sess. (N.M. 2019) (capitalization in original). The bracketing of SB96 and SB3[12] around the promulgation of the Secretary's Rule provides presumptive evidence that the Respondent violated the separation of powers by usurping policymaking and lawmaking authority from the Legislature.

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[10] The disagreement between the parties lies in the significance of SB3's enactment *subsequent to* promulgation and enforcement of the Secretary's Rule. The Response claims that the Secretary's Rule "implement[ed] provisions of the Campaign Reporting Act." Verified Resp. at 4 (Feb. 8, 2019). She claims that "this case is ultimately about whether the regulations *are* authorized by statute." *Id.* at 3 (emphasis added). Her argument is in the present tense—she believes that the authority exists, so by the Secretary's own argument and logic, it is unclear how SB3 could possibly moot this case. If the Secretary has, and always has had, the statutory authority to enact the Secretary's Rule, then her Rule survives. If not, then her Rule was void *ab initio* and a subsequent statute cannot rescue it.

[11] Please note that as SB3 goes through the legislative process, its provisions are being amended, including the preamble. This refers to SB3 as introduced, not as amended.

[12] Efforts to require independent expenditure reporting did not begin with SB96. Since 2012, no fewer than *nine* bills have been introduced in the New Mexico House and Senate "requiring reporting of independent expenditures" and defining and redefining the same or similar terms. The nine bills may be accessed by hyperlink: SB11 (2012), SB15 (2013), SB18 (2014), SB384 (2015), HB278 (2015), SB11 (2016), SB96 (2017), and SB3 (2019).

### E. *Unite New Mexico* Is New Controlling Authority that (1) Confirms that this Court May Exercise Its Original Mandamus Jurisdiction in this Case, and (2) Rejects the Respondent's Claim that the Secretary's Rule Is Authorized by Delegation from the Legislature Through the Campaign Reporting Act

One week ago—one day prior to the Secretary's Verified Response filing—this Court issued a written opinion in *Unite New Mexico v. Oliver*, No. S-1-SC-37227. The Respondent may be unaware of the week-old *Unite New Mexico* decision because she did not disclose it as adverse authority, nor did she distinguish it from the issues in this case. *Unite New Mexico* is on point and dispositive with respect to at least two issues in contention in this case: (1) the Supreme Court's original mandamus jurisdiction and (2) the Secretary's CRA delegation defense.

#### 1. The Supreme Court Exercises Its Original Mandamus Jurisdiction When, as in this Case, Petitioners Seek to Restrain One Branch from Violating the Separation of Powers

*Unite New Mexico* confirms that this Court will exercise its original jurisdiction in mandamus where "Petitioners ask [the Supreme Court] to restrain the Secretary, an executive branch official, from encroaching upon the authority of the legislative branch to make the election laws." *Id.* at ¶ 2. In this matter, the Response's first argument asserts that the Petition failed to sufficiently set forth the circumstances that warrant the Supreme Court's extraordinary writ jurisdiction. Verified Resp. at 9-10. Yet, the Petition unequivocally states that the Secretary

violated Article III, Section 1's separation of powers by usurping the 53rd Legislature's exclusive Article IV authority to establish public policy and to make law, and by nullifying the exclusive Article IV, Section 22 prerogatives of Governor Martinez's veto and the Legislature's veto override. Verified Pet. at 2-3.

This case's similarity to *Unite New Mexico*'s justification for original mandamus jurisdiction is striking, and it is dispositive of the issue. The Supreme Court may exercise its original mandamus jurisdiction in this case because the Petitioners ask the Court to restrain the Secretary from encroaching upon the authority of the legislative and executive branches.

**2. Since Election Policy and Law Are Plenary and Nondelegable Prerogatives of the Legislature, an Executive Branch Officer Cannot Make Election Policy or Law, Contrary to the Secretary's Claim that the Authority Has Been Delegated to Her**

The *Unite New Mexico* Court also held: "The Legislature cannot delegate election policy determinations." *Unite New Mexico*, ¶ 1. The Court found that the Secretary of State's defense—that the Legislature delegated straight-party voting to her—was "highly problematic" because the New Mexico Constitution vests the "Legislature with plenary authority over elections, an authority limited only by the Constitution itself." *Id.* ¶¶ 5-6. The Court held that the Legislature cannot delegate "the right to determine what the law shall be[,]" because "[t]his is a function which the Legislature alone is authorized under the Constitution to

exercise." *Id.* ¶ 8 (quoting *State v. Spears*, 1953-NMSC-033, ¶ 10) (internal citations and quotations omitted). The Court held that the Secretary unconstitutionally opted "to decide what the election law shall be[,]" when she tried to implement straight-party voting. *Id.* ¶ 9.

In *Unite New Mexico*, the Supreme Court rejected the Secretary's defense that she had the discretionary authority to implement straight-party voting because the election law was silent on the topic. *See Unite New Mexico*, ¶¶ 5 & 9. In this case, the Respondent tries to recast her rejected *Unite New Mexico* defense, but the defenses are indistinguishable, or at best, two sides of the same coin. Instead of the *Unite New Mexico* argument that "legislative silence" afforded the Secretary "considered discretion" to implement straight-party voting, the Respondent in this case claims that legislative "unaddressed issues" due to "everyday realities" afforded her discretion to require independent expenditure reporting because independent expenditures "fall[] within the broad reporting requirements set forth in the CRA." *Compare Unite N.M.* Resp., at 10 & 11 (Sept. 7, 2018) *with* Resp., at 25 (citing *Albuquerque v. New Mexico Pub. Reg. Comm'n*, 2003-NMSC-028, ¶ 16) (internal quotations omitted)) & 20.

Whether the Secretary invokes legislative silence on straight-party voting (*Unite New Mexico*) or legislative vagueness and breadth on campaign finance reporting (*State ex rel. Sharer*), the defense is still one of implied delegation from

the Legislature. The Legislature, however, cannot delegate to the Secretary the election authority she claims in this case, because "to conclude otherwise would result in a violation of the separation of powers." *Unite New Mexico*, ¶ 9.

## IV. CONCLUSION & STATEMENT OF RELIEF

For the foregoing reasons, the Petitioners respectfully request that this Court deny the Secretary's Motion for Stay of the Proceedings and set a date for a hearing on the merits of the Verified Petition.

Respectfully submitted,

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## TABLE OF EXHIBITS

**Exhibit A**
Senate Bill 3 Fiscal Impact Rep., Legal Fin. Comm. (N.M. updated Feb. 11, 2019)

**Exhibit B**
*Planned Parenthood of N. N.E. v. N.H. Attorney General*, No. 03-cv-491-JD, 2007 WL 329709 (D.N.H. Feb. 1, 2007)

**Exhibit C**
Sec. of State, Not. of Adoption, Campaign Fin. R. (Sept. 12, 2017)

# EXHIBIT A

**Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.**

**Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.**

# F I S C A L  I M P A C T  R E P O R T

**SPONSOR** Wirth **ORIGINAL DATE** 1/25/19 **LAST UPDATED** 2/11/19 **HB**

**SHORT TITLE** Campaign Finance Reporting **SB** 3/aSJC

**ANALYST** Glenn

## ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY19 | FY20 | FY21 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | See Fiscal Implications | See Fiscal Implications | See Fiscal Implications | | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 310, HB 407, HB 428, HB 462, SB 4, SB 99

Conflicts with HB 407

**SOURCES OF INFORMATION**
LFC Files

Responses Received From
Secretary of State's Office (SOS)
New Mexico Attorney General (NMAG)

**SUMMARY**

Synopsis of SJC Amendments

The Senate Judiciary Committee amendments to Senate Bill 3:

- replace the term "ballot measure" with "ballot question" in the bill's title and throughout the bill;
- remove the cap of $50 per occurrence on the value of the incidental use of a candidate's personal property, home or business use for campaign purposes that is excluded from the definition of "contribution" for purposes of the Campaign Reporting Act;
- add a requirement that changes in a political committee's statement of organization be reported to the secretary of state within 10 days;
- change the reporting schedule for reports of expenditures and contributions made on the first Monday in October during an election year to allow an extra day when the first Monday is a state holiday; and
- require a candidate, political committee or campaign committee to notify SOS within 10 days after a successor treasurer is appointed.

Synopsis of Original Bill

Senate Bill 3 revises the Campaign Reporting Act, NMSA 1978, §§ 1-19-15 to -26 ("CRA"), to define independent expenditures and coordinated expenditures, and includes specific reporting requirements of individuals or entities that make independent expenditures as defined by the bill. Significant amendments made by SB 3 include the following:

**Section 1** adds a new section to the CRA relating to reporting requirements for "independent expenditures," which SB 3 defines as expenditures made by a person other than a candidate or campaign committee for political advertisements. The bill requires a person making an independent expenditure in an amount that exceeds $1,000 in non-statewide elections and $3,000 in statewide elections to file a report with the SOS within specified time periods. The report must include the name and address of the person who made the independent expenditure, the name and address of the person to whom the independent expenditure was made, the amount, date and purposes of the independent expenditure, and the source of the contributions used to make the independent contribution.

**Section 2** adds a new section to the CRA requiring that a person who spends more than $1,000 for an advertisement ensures that the advertisement includes a disclaimer containing the name of the candidate, committee, or other person who authorized and paid for the advertisement. The bill excepts from the disclaimer requirement certain small items upon which the disclaimer cannot be conveniently printed or where inclusion of the disclaimer would be impracticable.

**Section 3** revises the beginning and ending dates of an "election cycle," a "general election cycle," and a "primary election cycle," as those terms are defined in the Election Code.

**Section 4** amends Section 1-19-26 of the CRA to add new definitions for "advertisement,", "ballot measure", "campaign expenditure", "coordinated expenditure", "independent expenditure", and "political party." It also amends the current definitions for "bank account", "campaign committee", "candidate", "contribution", "election", "expenditure", "political committee", "political purpose", and "proper filing officer".

**Section 5** amends Section 1-19-26.1 to remove the $500 threshold on amounts a political committee received, contributed or expended before it was required to meet the registration and other requirements of the provision. As amended by SB 3, any political committee must meet the specified requirements before it may receive or make any contributions or make expenditures for a political purpose.

**Section 7** amends Section 1-19-29, which governs the time and place of filing campaign expenditure and contribution reports. The bill revises campaign finance reporting deadlines and reporting thresholds and reporting requirements for independent and coordinated expenditures, and adds additional reporting after a statewide election for expenditures and contributions not otherwise previously reported. The bill also allows a political committee to cancel its registration after a period of no activity by filing a request with the SOS.

**Section 9** amends Section 1-19-34 by increasing from $15 to $25 the cost of tickets sold (i.e., cash contributions) at special events that are exempt from the CRA's anonymous contribution limits. The bill adds a proviso precluding a candidate from accepting contributions of more than $25 in cash at a special event from any one contributor.

**Section 10** amends Section 1-19-34.3 to prohibit a person from making contributions or expenditures with the intent to conceal the names of persons who are the true source of funds used to make independent expenditures or are the true recipients of the expenditures.

**Section 11** amends Section 1-19-34.6, which relates to civil penalties, to increase the civil penalty for CRA violations to not more than $1,000 for each violation, not to exceed a total of $20,000.

**Section 12** simplifies language in Section 1-19-34.7 by setting a flat limit on contributions to all candidates and political committees of $5,000 per election cycle unless those contributions are from a candidate's own personal funds or are made to a political committee and used only to make independent expenditures. SB 3 further specifies that a primary election candidate who does not move on to the general election shall remain subject to the primary election cycle contribution limits and shall not receive funds beyond those limits to pay for primary election expenditures. The bill changes the date on which contribution limits are increased from the day after the general election to January 1.

**Section 15** directs SOS, in consultation with NMAG, to promulgate rules to implement the amendatory provisions of SB 3 by August 1, 2019.

SB 3 has an effective date of July 1, 2019.

## FISCAL IMPLICATIONS

SOS states that the current campaign finance reporting system administered by the SOS will require significant modifications to accommodate the provisions of SB 3. SOS is currently engaged in the procurement process to implement a new reporting system to replace the existing Campaign Finance Information System (CFIS). Additional funding for the project may become necessary.

NMAG states that SB 3 may have fiscal implications for the Office of the Attorney General, as SB 3 authorizes NMAG to institute civil actions in district court for violations or to prevent violations of the CRA and involves NMAG in the promulgation of rules to implement the bill's provisions.

## SIGNIFICANT ISSUES

According to SOS, the provisions of SB 3 relating to independent and coordinated expenditures provide important guidance to affected individuals as well as the SOS, and align with SOS administrative rules currently in effect.

NMAG points out that SB 3's reporting requirements do not infringe on constitutional free speech rights. NMAG explains that recent decisions of the U.S. Supreme Court and the Court of Appeals for the Tenth Circuit hold that while independent campaign participants have a right to speak all they want and spend all they want, when they tell the voters how to vote through express advocacy or ads mentioning candidates or ballot measures right before an election, the voters have a right to know who is paying for these ads and the state has the authority to enforce that right. See *Citizens United v. FEC,* 558 U.S. 310, 130 S.Ct. 876, 913-16 (2010), *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016), and *Free Speech v. FEC*, 720

F.3d 788 (10th Cir. 2013).

NMAG also states that the CRA will continue to include unconstitutional provisions if the revisions proposed in SB 3 are not enacted. In 2012, following the *Citizens United* ruling, NMAG, SOS, and district attorneys were enjoined from enforcing the CRA's contribution limits as applied to contributions to political action committees for independent expenditures. The amendments in Section 12 of the bill would address the constitutional concerns by removing the improper contribution limits. NMAG notes that the amendments in Section 12 also would remove contribution limits as applied to political parties for the parties' independent expenditures (the definition of "political committee" in the CRA encompasses both PACs and political parties), which is a current subject of litigation in *Republican Party of N.M. v. Balderas*.

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to:
HB 310 Prohibited Fundraising Period Changes
HB 407 Election Laws 50-Year Tune-Up
HB 428 Sec. of State Candidates in Voter Action Act
HB 462 Sec. of State & A.G. in Voter Action Act
SB 4 Campaign Public Financing Changes
SB 99 Appointment of PRC Members

Conflicts with: HB 407, which also amends Section 1-19-26 NMSA 1978

BG/gb/sb/al

# EXHIBIT B

2007 WL 329709
United States District Court, D. New Hampshire.

PLANNED PARENTHOOD OF
NORTHERN NEW ENGLAND, et al.
v.
NH ATTORNEY GENERAL.

Civil No. 03–cv–491–JD.
|
Feb. 1, 2007.

**Attorneys and Law Firms**

Corinne L. Schiff, Jennifer Dalven, Charu A. Chandrasekhar, American Civil Liberties Union Foundation, Dara Klassel, Planned Parenthood Federation of America, Inc., Public Policy Litigation and Law Dept., New York, NY, Martin P. Honigberg, Sulloway & Hollis, Concord, NH, Lawrence A. Vogelman, Nixon Raiche Manning Vogelman & Leach PA, Manchester, NH, for Plaintiffs.

Daniel J. Mullen, Ransmeier & Spellman, Laura E.B. Lombardi, Maureen D. Smith, NH Attorney General's Office, Concord, NH, for NH Attorney General.

*PROCEDURAL ORDER*

JOSEPH A. DiCLERICO, JR., United States District Judge.

***1** This court has taken judicial notice that House Bill 184, an Act repealing the Parental Notification Law, is pending in the New Hampshire House of Representatives. Legislative action on this Bill may have a direct affect on this case which is currently pending before this court on remand from the United States Court of Appeals for the First Circuit. If House Bill 184 is enacted into law, this case will be rendered moot; if it is not enacted into law, this case will proceed; if the Parental Notification Law is amended, then the legal landscape of this case may well change.

On this date, the court met with counsel for the parties and indicated that in its opinion this case should be temporarily stayed during the time that House Bill 184 is actively under consideration by the New Hampshire Legislature, in deference to the Legislature. A temporary stay would also conserve the public and private resources of the parties and the court. Counsel agreed.

Therefore, in the interest of comity and in deference to the New Hampshire Legislature which is currently considering House Bill 184, this action is temporarily stayed, pending further order of the court, during such time as the New Hampshire Legislature is actively considering House Bill 184.

The permanent injunction issued in this case shall remain in full force and effect. This stay is issued without prejudice to the positions of the parties in this case. All pending motions are terminated subject to being reinstated at an appropriate time, if necessary, upon the request of any party.

The New Hampshire Attorney General is requested to forward a copy of this order to the President of the New Hampshire Senate and the Speaker of the New Hampshire House of Representatives.

SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2007 WL 329709, 2007 DNH 014

**End of Document**

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# EXHIBIT C

# NM Secretary of State
# Notice of Adoption Campaign Finance Rule
# NMAC 1.10.13.1 to .31

The Office of the New Mexico Secretary of State ("NMSOS") announces the adoption of its proposed rules regarding the New Mexico Campaign Practices Act ("CPA") and the New Mexico Campaign Reporting Act ("CRA"). These adopted rules will be codified as 1.10.13.1 to .31 NMAC. These rules are adopted according to the NMSOS's rule making authority pursuant to NMSA 1978, Section 1-2-1 and Section 1-19-26.2. The adoption of these rules are further authorized by the Administrative Procedures Act, NMSA 1978, Sections 1-8-1 to -25, and the State Rules Act, NMSA 1978, 14-4-1 to -11. The effective date of these rules is October 10, 2017. The final rules may be found on the NMSOS's website at http://www.sos.state.nm.us/Legislation_And_Resources/NM_Administrative_Code_Rules.aspx.

The NMSOS held four public comment hearings on these rules before adoption. Public comment hearings were held on July 13, 2017 in Santa Fe; July 18, 2017 in Albuquerque, July 19, 2017 in Las Cruces, and on August 30, 2017 in Santa Fe, New Mexico.

Concise statement of its principal reasons for adoption:

The objective of these rules is to provide clear guidance to all persons, candidates, and committees regarding the application and implementation of the provisions of the CPA and the CRA, NMSA 1978, Sections 1-19-1 through 1-19-37, in order to comply with campaign finance disclosure and filing requirements in a manner that meets the requirements set forth in applicable case law, while also providing for consistent guidance to the NMSOS in administering and enforcing the law. The rules provide guidance to affected parties on how to disclose campaign finance information more completely and accurately in order to increase public transparency. Finally, the proposed rules define the scope and applicability of New Mexico law governing campaign participation by non-candidates and are based on recent court decisions that have restricted the enforceability of the CRA. These rules represent the duty of the NMSOS to identify and account for the particular elements of the CRA that are constitutionally unenforceable and the specific requirements that are constitutional and must be enforced. The NMSOS asserts that the CRA disclosures provide essential information to New Mexicans and are vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.

Explanation of positions rejected in adoption of the rules:

The NMSOS carefully considered all comments received at the public hearings and in writing during the comment period. The NMSOS received extensive public comment throughout the rule making process. All written comments have been available for public inspection at the NMSOS's website: http://www.sos.state.nm.us/Elections_Data/2017-campaign-finance-rulemaking.aspx. The NMSOS has consolidated the most common arguments received against the proposed rules.

**Comment 1:** The reporting requirements for independent spending go beyond the NMSOS's authority to implement.

**<u>Reasons for Not Incorporating in Final Rule</u>:** The Secretary of State is a constitutional officer of the State of New Mexico. *See* N.M. Const. art. V, § 1. She has pledged to "support the Constitution of the United States and the Constitution and laws of [New Mexico], and . . . faithfully and impartially discharge the duties of [her] office to the best of [her] ability." N.M. Const. art. XX, § 1. She has also been granted rule making authority pursuant to NMSA 1978, Sections 1-2-1 and 1-19-26.2. To that end, the NMSOS has a duty to adopt and promulgate rules and regulations to implement the provisions of the CRA, narrowing the application of the statute in such a manner as to render those actions constitutional.

The proposed rules define the scope and applicability of New Mexico law governing campaign participation by non-candidates in the wake of several recent court decisions that have drastically restricted the enforceability of the governing statutes. The rules identify which of the numerous statutory requirements for non-candidate campaign spenders that remain constitutional pursuant to these rulings and will still be enforced. As noted above, there is not a single reporting requirement for independent spenders imposed by these rules that is not already imposed by the CRA itself. Additionally, the proposed rules provide guidance to candidates and political committees regarding the manner in which existing laws are interpreted and enforced. The guidance is based upon the questions and comments the NMSOS regularly receives during its efforts to administer and oversee the CPA and CRA. Providing written guidance in rule is a statutory duty of the NMSOS and is superior to providing informal or unwritten guidance which poses a risk of being inconsistent, arbitrary, and capricious.

**<u>Comment 2</u>:** The dollar thresholds for reporting independent spending under the rules are too low, and have no justification and no foundation in the CRA.

**<u>Reasons for Not Incorporating in Final Rule</u>:** All of the proposed thresholds have constitutional justifications and represent the efforts of the NMSOS to bring the reporting requirements of the CRA within constitutional bounds. See e.g. *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016) (Upheld a threshold of $1,000 for triggering limited reporting about independent expenditures.); *Coalition for Secular Govt v. Williams*, 815 F.3d 1267 (10th Cir. 2016) (Struck down $3,500 as too low of a threshold for burdensome registration and reporting, in which all of the reporting entity's contributions and expenditures in any amount for any purpose must be periodically reported for as long as the entity continues to exist.) The court in this case suggested that a threshold of $5,000 might be permissible and criticized the Colorado Supreme Court for having refused to allow their secretary of state to adopt a rule establishing a $5,000 threshold in place of the unconstitutional $200 threshold set forth in their constitution for this kind of extensive reporting.

**<u>Comment 3</u>:** Many of the proposed rules for reporting independent campaign spending infringe upon the right of free speech guaranteed by the First Amendment of the U.S. Constitution.

**<u>Reasons for Not Incorporating in Final Rule</u>:** The recent court decisions of *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876 (2010), *Independence Institute v. Williams*, 812 F.3d 787 (10th Cir. 2016), and *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) provide ample constitutional justification for the proposed rules. As noted above, the very purpose of the proposed rules is to

bring the requirements of the CRA within the constitutional limitations delineated by the courts so as to not infringe upon free speech. In general, these cases held that independent campaign participants have a right to speak as much as they wish, and spend as much as they wish, when they attempt to influence the decisions of voters through express advocacy or ads mentioning candidates or ballot measures right before an election, but the voters have a right to know who is paying for these ads and the state has the authority to enforce that right. *E.g., Citizens United v. FEC, supra*, 130 S.Ct. at 913-16.

**Comment 4:** The reporting requirements for independent spending in the rules are too burdensome on small organizations.

**Reasons for Not Incorporating in Final Rule:** The current definition and subsequent reporting requirements for political committees in the CRA are much broader and much more burdensome than what is defined in the rules. In fact, current law requires anyone who spends $500 for an ad or political purposes to register and report every single contribution and expenditure made or received thereafter. The rules actually narrow the definition and applicability of New Mexico law governing campaign participation by non-candidates in the wake of several recent court decisions that have drastically restricted the enforceability of the governing statutes.

**Comment 5:** The rules should adopt the three-part test adopted by the Federal Election Commission (FEC) to define "coordination."

**Reasons for Not Incorporating in Final Rule:** The FEC rules fail to address the full federal statutory definition of the kinds of "coordinated expenditures" that should be treated as contributions to candidates. The statutory definition covers any kind of "expenditures made by any person in cooperation, consultation or concert with, or at the request or suggestion of a candidate," and is not confined to expenditures for advertising, but also encompasses other campaign expenses such as polling, research, salaries etc. 52 U.S.Code §30116(a)(7)(B)(i). Although this definition was sustained and expressly approved on two occasions by the Supreme Court (*McConnell v. FEC*, 540 U.S. 93, 219-20 (2003); *Buckley v. Valeo*, 424 U.S. 1, 46 (1976)), the FEC decided to use a more narrow definition in its rules that covers only expenditures for advertising. This is inconsistent with both federal statute, and, more importantly, with the basic purpose of regulating coordinated expenditures, which is to prevent evasion of contribution limits.

**Comment 6:** The definition of "advertisement" is too broad.

**Reasons for Not Incorporating in Final Rule:** The current reporting requirements for advertisements in the CRA are much broader than what is proposed within the rules. Disclosure of independent expenditures for advertisements is triggered by dollar thresholds supported by applicable case law, which narrows current governing laws deemed to be unconstitutional.

**Comment 7:** The office should be careful when regulating "coordinated expenditures" to avoid impermissibly chilling speech.

**Reasons for Not Incorporating in Final Rule:** The current reporting requirements in governing law provide that candidates are both subject to contribution limits and must report all contributions

received by the candidate's campaign regardless of the amount. These provisions of the CRA are enforceable and have not been challenged. The rules simply clarify to candidates how coordinated expenditures shall be determined and how coordinated expenditures shall be reported under the current context of the governing laws.

**Comment 8:** The rules negatively impact charitable organizations and donor privacy.

**Reasons for Not Incorporating in Final Rule:** The rules require disclosure of independent expenditures in political spending; specifically when expressly advocating, appealing for a vote, or otherwise identifying a specific candidate or ballot measure in an advertisement once spending reaches a certain dollar threshold in an election cycle. Organizations and individuals not engaged in this type of political spending are not impacted by the rules and are not required to report spending to the NMSOS. Furthermore, the rules provide that donors to charitable organizations wishing to remain anonymous have the ability to expressly state that their donations may not be used for a political purpose in order to continue to remain anonymous.

## CERTIFICATE OF SERVICE

I certify that a copy of this Opposition to Respondent's Motion for Stay of the Proceedings, was served on this 15th day of February 2019 electronically through the Odyssey Electronic Filing System, which caused all parties of record to be served.

*/s/ Michael P. DeGrandis*
Michael P. DeGrandis