

## **Guide to New Mexico Laws Governing Campaign Finance Disclosure by Campaign Participants Other Than Candidates**

Common Cause New Mexico is often asked what “rules” exist in New Mexico for regulating campaign spending by “PACs” and other groups who operate independently of the candidates. No short and simple answer to this question can be given, because New Mexico’s law on this subject is currently in a fluid and uncertain state, owing to recent court decisions invalidating most of the current statutes and to recent legislative efforts to rewrite the law to bring it into line with these decisions and with modern campaign practices. To answer the question properly, therefore, we must break it down into several separate questions, namely:

1. What do the New Mexico statutes currently say on this subject?
2. How have recent court decisions limited the enforceability of these statutes?
3. What parts of the current law can still be applied in the wake of these decisions?
4. What legislative efforts to rewrite the statutes are currently under way?

### **The Current Statutes Governing Campaign Participation by Non-candidates**

The New Mexico law regulating campaign spending by non-candidates is dependent on a legal construct known as a “political committee.” The statutory definition of a “political committee” in §1-19-26 NMSA is long and complex but its practical effect is to include within that definition any person or entity who spends more than \$500 in a given year on any form of “advertisement” that could be characterized as “influencing or attempting to influence an election.” Any person or entity found to satisfy this broad definition of a “political committee” is required to comply with Sections 1-19-26.1, 1-19-27, 1-19-29, 1-19-31 and 1-19-34 NMSA, which impose extensive registration and disclosure requirements, including payment of a \$50 registration fee, establishment of a single bank account through which all receipts and disbursements must pass, and periodic reports of all contributions and expenditures as well as ongoing bank balances and any unpaid debts of the person or organization.

Besides these reporting and disclosure requirements, New Mexico statutes impose two other limitations on non-candidate campaign activities. First, Sections §§1-19-16 and 1-19-17 NMSA require that information about the sponsor must be included on the face of any “campaign advertising or communication” which is disseminated to voters. Second, Section 1-

19-34.7 NMSA imposes a \$5,000 limit on the amount of any contribution that can be made to any “political committee.”

### **Court Decisions Invalidating or Limiting the Application of These Statutes**

Not surprisingly, the courts have held these statutes unconstitutional in most of their applications. The most important of these court rulings was *New Mexico Youth Organized v. Herrera*, No. CIV 08-1156 (D.N.M., August 3, 2009), where the federal district court struck down a major part of the statutory reporting and disclosure requirements for non-candidates. In that case, the state had attempted to impose these requirements on two civic organizations who had spent a small portion of their overall budgets to publish political ads criticizing the voting records of certain state legislators. The ads were published more than two months before the next election in which the legislators would be running, and did not mention the election or expressly urge the recipients to vote against the legislators. The federal district court held that the statutory requirements could not constitutionally be applied to these organizations in these circumstances.

The court gave two reasons for its decision. First, it ruled that the state could not regulate in any manner or require any disclosure concerning ads that were not sponsored by or coordinated with a candidate and did not amount to either (1) “express advocacy” of a candidate’s election or defeat, or (2) “electioneering communication,” meaning communications that refer to a specific candidate and are disseminated to the relevant electorate within a short period before the election.<sup>1</sup> Since the ads at issue in that case did not satisfy either of these tests, they could not be regulated in any way and no disclosure regarding the ads could be compelled by the state.

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<sup>1</sup> While the court did not specify the exact length of time before an election within which an ad could constitutionally be regulated, it did refer to the federal law allowing regulation only for ads appearing within 30 days before a primary or 60 days before a general election, and it held that two months before a primary was “well outside” the constitutionally permissible period. The court additionally held that, in order to be subject to regulation, an ad that otherwise satisfied the definition of an “electioneering communication” would also have to be “susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.*, quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007). This constitutional requirement, however, was later implicitly eliminated by the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876 (2010), where the Court held that disclosure could constitutionally be required concerning ads that fit the federal definition of an “electioneering communication,” regardless of whether or not it could only be interpreted as advocating a candidate’s election or defeat. *Id.*, 130 S.Ct. at 915

Secondly, the court held that, even if the ads had amounted to “express advocacy” or “electioneering communication,” the state could only have required disclosure of information about the ads themselves and the manner in which they were paid for, and could not have gone on to compel production of all of the sorts of organization-wide financial and administrative information that the statute literally required. The court ruled that, unless “the major purpose” of a sponsoring organization is the publication of these kinds of election ads, the state cannot require disclosure of “every organizational contribution and expenditure” made or received by the organization. Since, in this case, the publication of political ads was only a small part of these groups’ activities, the state could not have compelled this kind of full “organizational disclosure,” said the court, even if the content or timing of these particular ads might have justified requiring some limited disclosure about how these specific ads had been financed. These rulings by the court were later upheld in all respects by the Tenth Circuit Court of Appeals. *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010)

Meanwhile, in addition to the reporting and disclosure laws, all of the other New Mexico statutes regulating campaign participation by non-candidates have likewise been invalidated at least in part. The statutes requiring “disclaimers” on all campaign advertising, §§1-19-16 and 1-19-17, were effectively ruled unconstitutional in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where the Supreme Court held that an individual who had spent a small amount of money to print and circulate leaflets opposing a school tax could not be compelled by state law to include information in the leaflets identifying their sponsor. Although the Court did not clarify exactly what level of spending might justify a law of this kind, it is at least clear that New Mexico’s laws requiring such “disclaimers” on all campaign ads cannot be applied to advertising whose cost falls below a certain minimum threshold.<sup>2</sup> Finally and most recently, New Mexico’s statutory limits on contributions to “political committees” were partially invalidated by the federal district court and the Tenth Circuit in *Republican Party of New Mexico v. King*, 741 F.3d 1089 (10th Cir. 2013), affg. 850 F.Supp.2d 1206 (D.N.M. 2012), where the courts held that no limits can be imposed on contributions which will be used exclusively to make campaign expenditures that are independent of any candidate and not coordinated with any candidate.

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<sup>2</sup> The Tenth Circuit, in its subsequent decision in *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), effectively extended this constitutional exemption for small-scale campaign spenders to cover reporting and disclosure rules as well as disclaimers, holding in that case that a citizens’ group that had spent only \$772.02 on advertising in a ballot-measure election could not be required to comply with Colorado’s extensive registration and reporting rules for “issue committees.”

## **Determining How Much of the Law Can Still Be Enforced Under the Principles Enunciated in These Court Decisions**

When a court has held a statute unconstitutional “as applied” to a particular case, it is never possible to determine with complete certainty how the decision will affect the statute’s application in other cases involving somewhat different facts. However, where the court has stated with sufficient clarity the reasons that justified its decision, as the courts have done in all the recent decisions we are discussing here, we can usually make some reliable conjectures about the extent to which the law may still be enforced in most of the other types of cases that may arise. That is what we have tried to do in the following analysis of the likely impact of these recent decisions on the application of New Mexico’s laws to the most common categories of campaign spending by non-candidates.<sup>3</sup>

First, it is clear from the court’s reasoning in the *New Mexico Youth Organized* case, as well as from the earlier decisions on which the court relied, that no reporting can be required and none of the statutory registration and reporting requirements that are imposed by New Mexico law can be enforced for political advertising by a non-candidate that is not coordinated with a candidate and does not constitute either (a) “express advocacy” for the election or defeat of a candidate or (b) “electioneering communication” referring to a clearly identified candidate within a short period (30 to 60 days) before an election in which he or she is running. Advertising which does not fall within these categories - regardless of whether or not it could be characterized as “influencing or attempting to influence an election” within the meaning of the New Mexico statute - amounts to mere “issue advertising” which is constitutionally exempt from disclosure requirements or any form of state regulation.

Second, even where political advertising does fall within one of these categories - that is, even where it constitutes “express advocacy” or “electioneering communication” - we know from the Supreme Court’s decision in the *McIntyre* case and the Tenth Circuit’s decision in the *Sampson* case that there is some minimum spending threshold below which no disclosure can be

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<sup>3</sup> This analysis is based on the best legal advice available to our organization, but we cannot give any assurance that other attorneys may not interpret these court decisions differently or reach different conclusions about how the decisions should influence the application of the statutes. In particular, we cannot guarantee that the authorities charged with enforcing New Mexico law - the Secretary of State and the Attorney General - will not attempt to enforce it in situations where we have concluded that it cannot be enforced or fail to enforce it in situations where we have concluded that it is probably still enforceable

required and no regulation can be imposed. Although the court did not specify in either case exactly what that threshold is, the leaflets that were exempted from disclaimer requirements in *McIntyre* apparently cost less than a hundred dollars, and the ads that were held immune from registration and reporting requirements in *Sampson* cost a little under \$800. It seems reasonably clear, therefore, that the statutory thresholds for application of New Mexico's law - which are zero dollars for disclaimers and \$500 for reporting requirements - are too low, and that any attempt to enforce these laws against persons who have spent less than about \$800 on political ads would be blocked by the courts.

Third, the decisions in *New Mexico Youth Organized*, as well as earlier Tenth Circuit decisions on which the courts in that case relied, have established that even an organization that spends a substantial amount on ads constituting "express advocacy" or "electioneering communication" cannot be compelled to comply with the full range of registration and reporting requirements imposed by New Mexico law unless "the major purpose" of the organization is the dissemination of this kind of political advertising. If, instead, such spending comprises only a subsidiary part of the organization's activities (less than half its budget, according to one of the earlier Tenth Circuit decisions), it can only be required to disclose information about the ads themselves and the way they were financed. It cannot be compelled to go further and make the kind of complete organization-wide disclosure that is literally mandated by New Mexico law.<sup>4</sup>

Fourth, certain of the provisions of New Mexico law cannot be enforced against a national organization like the Republican State Leadership Committee or the Democratic Governors' Association even when "the major purpose" of the organization is the dissemination of advertising amounting to "express advocacy" or "electioneering communication." The requirement that every political committee must report every expenditure made by the organization in any place for any purpose, for example, would literally encompass campaign expenditures made by such national groups in state and local elections in other states. New Mexico has no legitimate interest in knowing about these out-of-state expenditures and therefore no constitutional justification for imposing such a burden on these organizations. Certain administrative provisions of New Mexico's law are likewise unenforceable against these groups,

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<sup>4</sup> The law's additional requirements, which cannot be enforced against such a "non-major-purpose" organization, include identification of all of the organization's officers and "any connected or associated organization or entity," and periodic reporting of all of its bank balances, debt balances and every expenditure made or payment received by the organization for any purpose (§§1-19-26.1(B), 1-19-31 NMSA).

including the requirements that every political committee must conduct all its financial transactions through a single bank account “in a financial institution located in New Mexico,” and must dissolve itself and close its only bank account as a precondition to being relieved of a perpetual duty to file periodic reports with the NM Secretary of State (§§1-19-26(C), 1-19-29(F), 1-19-34(A)(3) NMSA). These requirements would effectively make it impractical for national organizations like the RSLC and the DGA to participate in the state and county elections covered by the Act, and, as such, would violate the basic First Amendment principle that any such restriction of political speech must be justified by “a compelling [state] interest and ... narrowly tailored to achieve that interest” (*Citizens United v. FEC*, 130 SCt. 876, 898 (2010)), a demanding standard that is plainly not satisfied by these mere housekeeping provisions of New Mexico’s campaign reporting law.<sup>5</sup>

Fifth, under the recent decision in *Republican Party v. King*, the limits that are imposed by New Mexico law on contributions to political committees cannot be enforced with respect to contributions to a non-candidate that will only be used to pay for independent advertising that is not coordinated with any candidate. An organization that does not make any contributions to candidates or any expenditures coordinated with candidates can therefore accept unlimited contributions; and even an organization that does make candidate contributions or coordinated expenditures is entitled to accept some unlimited contributions if it is willing to deposit these in a separate account that can only be used for independent expenditures.

Sixth, the recent decisions striking down various provisions of New Mexico law governing campaign expenditures by non-candidates apply only to expenditures that are truly independent of the candidates and not to expenditures that - although formally made by a non-candidate - are actually directed by or coordinated with a candidate. The courts have made clear in earlier decisions that, for constitutional purposes, such “coordinated expenditures” are actually

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<sup>5</sup> There is a section of New Mexico’s law that was apparently intended to exempt some national organizations from many of the law’s requirements, but it is poorly drafted and ends up conferring no such exemption. Section 1-19-26.1(C) NMSA states that a “political committee that is located in another state” need not register and file the reports required by the law if it (a) “is registered with the federal election commission,” and (b) “reports on federal reporting forms” all of the information regarding contributions and expenditures in New Mexico state and county elections that would normally have to be reported to the Secretary of State. But since the FEC only has jurisdiction over elections for federal office (President, Senate and House), national organizations like the RSLC and DGA that participate exclusively in state elections are not required and would not be allowed to “register” with that agency. Moreover, for the same reason, even an organization that happened to participate in both federal and state elections and therefore could conceivably be registered with the FEC would not be required or allowed to file any report with the commission of its expenditures or contributions in New Mexico state and county elections. It thus appears that there is in fact no organization and no political activity that could ever qualify for this purported exemption.

the equivalent of contributions to candidates and can be treated as such in the laws regulating campaign finance. *E.g., McConnell v. FEC*, 540 U.S. 93, 219-23 (2003). This means that they can be subjected to the same limits and the same reporting and disclosure requirements that apply to candidate contributions. *Id.* The problem in New Mexico, however, is that its law does not currently take advantage of this constitutional authority to regulate these kinds of expenditures in this way. There is no explicit reference in the law to “coordinated expenditures” and no express prescription for how they should be dealt with. The most that the enforcing authorities could do under the present statutes is to try to make the case that such coordinated advertising amounts to an “in-kind contribution” within the meaning of §1-19-26(F) NMSA and should therefore be subject to the same limits and reporting requirements as other in-kind contributions such as office space or the use of a vehicle. But there is no guarantee that this argument would succeed. A better solution would be to amend the law to make it explicit that campaign expenditures coordinated with a candidate are the legal equivalent of - and are subject to all the same regulations as - ordinary cash contributions to the candidate.

Finally, although most of the recent court decisions invalidating New Mexico’s laws on non-candidate expenditures did not involve ballot-measure elections, it is clear from earlier decisions that any ruling invalidating a regulation of non-candidate spending in the context of a candidate election would be equally applicable in a ballot-measure election. Although the constitutional law on the permissible regulation of ballot-measure campaigns is less well developed than it is for candidate elections, there are strong suggestions in the case law that the states have, if anything, even less leeway for imposing such regulations in the context of a ballot-measure campaign. See *Sampson v. Buescher*, *supra*, 625 F.3d at 1255. It can therefore be safely assumed that all of the foregoing discussion of the constitutional restrictions that the courts have recently imposed upon the application of New Mexico law to campaign expenditures by non-candidates in candidate elections will apply with equal force in ballot-measure elections.

At the risk of some repetition, it is useful to conclude with the following thumbnail sketch of the impact of recent court decisions on the enforceability of New Mexico’s laws regulating campaign spending by non-candidates:

1. None of the law’s requirements can be enforced against a person or organization that has not engaged in “express advocacy” for or against a candidate or ballot measure or

“electioneering communication” referring to a candidate or ballot measure within a short time (30-60 days) before the election.

2. None of the law’s requirements can be enforced against a person who has not spent a certain minimum amount - probably at least \$800 - on “express advocacy” or “electioneering communication.”

3. A person or organization that has spent the requisite minimum amount on “express advocacy” or “electioneering communication” but for whom these activities are not its “major purpose” can only be required to disclose information about the activities themselves and the way they were financed. It cannot be compelled to comply with the remaining provisions of New Mexico law requiring registration as a “political committee” and disclosure of all the person’s or organization’s financial and administrative affairs.

4. It is uncertain how much of the law can be enforced with respect to national organizations even when their “major purpose” is “express advocacy” or “electioneering communication.” If such organizations engage in this kind of activity in New Mexico, they can probably be required to register and to disclose certain organizational information such as the names of their officers and principal contributors, in addition to information about their New Mexico activities. But they cannot be required to report their out-of-state expenditures; and certain additional requirements of New Mexico law, such as use of a single bank account “located in New Mexico” and dissolution of the organization as a condition to being relieved of periodic reporting requirements, are plainly unreasonable and unenforceable in the case of these national organizations.

5. The limits imposed by New Mexico law on contributions to “political committees” are unenforceable for contributions that will only be used to finance campaign spending that is independent of, and not coordinated with, any candidate.

6. Campaign expenditures by a non-candidate that are coordinated with a candidate might possibly be treated as “in-kind contributions” to the candidate subject to the same limits and reporting requirements as cash contributions, but there is no certainty that such an application of the current law would be sanctioned by the courts.

7. All of the limitations imposed by the courts on enforcement of New Mexico’s laws regulating non-candidate spending in candidate elections are equally applicable to the laws regulating ballot-measure campaigns.

## **Pending Legislation**

In every legislative session since 2011, Senator Peter Wirth has introduced a bill that would resolve the issues raised by these court decisions and modernize New Mexico's law regulating campaign spending by non-candidates. In each of these sessions, the bill has passed the Senate (unanimously the last two times) and received a "do pass" recommendation from all of its assigned committees in the House, but has not been brought up for a vote on the House floor. Public pressure for passage of the bill has been building, however, and we are hopeful that the House will finally be given a chance to vote on it at next year's session.

The bill would accomplish a major overhaul of the law to bring it into line with both recent constitutional jurisprudence and modern campaign practices. It would compel public disclosure of as much information about the campaign spending of PACs and other non-candidate campaign participants as can be compelled without crossing the constitutional boundaries established by the courts. These are the principal features of the latest version of the bill that Sen. Wirth intends to pre-file for the 2015 legislative session:

1. The bill would drastically narrow the law's definition of a "political committee" to include only registered state political parties and organizations whose "major purpose" is to engage in "express advocacy" and "electioneering communications" in New Mexico state or county elections. These are the only entities that would be required to comply with the full range of registration and disclosure requirements that are imposed by the current law.

2. The bill would establish a separate category of "out-of-state political committees," which would be defined as entities whose "major purpose" is "express advocacy" and "electioneering communication" but whose activities are not focused primarily in New Mexico. These groups would be required to register with the Secretary of State and to report certain information about their organization, including their officers and principal sponsors and contributors, as well as all the details of their campaign spending and fundraising in New Mexico. They would not have to report their out-of-state expenditures, however, and would not have to comply with those provisions of the current law, such as use of a single bank account located in New Mexico and perpetual reporting for as long as the organization exists, that have no reasonable application to such national groups.

3. All other non-candidate entities that spend more than \$800 in a single year for “express advocacy” or “electioneering communication” in New Mexico state and county elections would be subject to a catch-all provision that would require the entity to report to the Secretary of State, for each instance of such activity, the name of the person who made the expenditure, the amount, purpose and recipient of the expenditure, and the name of the contributor and the amount of each contribution for each person who donated over \$200 for the purpose of financing the expenditure. In addition, if the amount of such expenditures by the same entity in the same year exceeded \$3,000, then the entity would be required to either (1) disclose the name of the contributor and the amount of each contribution for each person who donated over \$5,000 to the organization in the preceding year, or (2) establish a separate bank account to be used exclusively to finance such expenditures and disclose the name of each contributor of over \$200 to the account.

4. The bill would exempt from the contribution limits imposed by the current law any contribution that could only be used to finance campaign expenditures that are independent of any candidate and not coordinated with any candidate.

5. Under the bill, expenditures by a non-candidate that are directed by or coordinated with a candidate would be treated as contributions to the candidate subject to the same limits and reporting requirements as cash contributions.

6. The bill would replace the law’s current provisions on disclaimers with a new section that would require each advertisement constituting “express advocacy” or “electioneering communication” made by a person who has spent over \$3,000 on such ads in the preceding year to contain a statement identifying the sponsor of the ad.