IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PEOPLE FOR PEARCE and STEVE E. PEARCE, U.S. Representative for New Mexico's Second Congressional District,

Plaintiffs,

vs.

MAGGIE T. OLIVER, in her individual capacity and her official capacity as Secretary of State of the State of New Mexico; HECTOR H. BALDERAS, JR., in his individual capacity and his official capacity as Attorney General of the State of New Mexico; and DIANNA LUCE, in her official capacity as Fifth Judicial District Attorney of New Mexico,

Defendants.

Case No. 17-CV-____ ___/___

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF, AND ATTORNEYS' FEES

Plaintiffs People for Pearce ("PFP") and Steve Pearce ("Rep. Pearce") allege the following as their Complaint against Defendants Maggie Toulouse Oliver ("Secretary Oliver"), Hector Balderas ("AG Balderas"), and Dianna Luce ("DA Luce").

THE NATURE OF THE ACTION

1. The Plaintiffs bring this civil action for declaratory and injunctive relief to vindicate their constitutional right, recognized by this Court over two decades ago, to use lawfully raised contributions from constituents to make campaign expenditures – which the United States Supreme Court recognizes as protected political speech – in the race for governor of New Mexico.

2. After over a decade of service in Congress, Rep. Pearce has elected to run for New Mexico governor in 2018. His federal campaign committee, PFP, has amassed over $1,000,000

in contributions over the years, which Rep. Pearce now seeks to spend on his gubernatorial campaign by transferring those monies from PFP to his state campaign account.

3. Under both federal and state law, a candidate can rollover unspent contributions from a prior election and spend them on a subsequent one, regardless of whether the subsequent campaign is for the same elective office as the prior campaign. For example, a third-term congressman can use unspent funds raised during all of his first three elections to run for a fourth term or to run for Senate or President; and a New Mexico state treasurer is free to use any campaign funds that went unspent in his or her campaign for treasurer to run for governor, attorney general, or a state legislative seat. *See* Office of the Secretary of State, Candidate Information for Campaign Reporting, *available at* http://www.sos.state.nm.us/uploads/FileLinks/ca39fa62c82b4aa18c995f8740bcce9e/Candidate_Information_for_Campaign_Reporting_v2_1.pdf (last visited July 17, 2017) (containing a check box asking the secretary to "[p]lease transfer my current remaining campaign balance listed in CFIS to my new campaign indicated below").

4. Despite this well-established principle, Secretary Oliver has refused to allow Rep. Pearce to use all but a small portion of his PFP funds in a state race, on the grounds that even though the PFP funds were raised under federal election law and subject to federal campaign-contribution limits, New Mexico law limits a transfer from a federal campaign account to a state campaign account to $5,500 for the primary and $5,500 for the general election – which reflects the contribution limits imposed on individuals under state law. The Secretary has failed to articulate a valid government interest for her artificially constrained, and indeed unconstitutional, interpretation of New Mexico campaign finance laws. Secretary Oliver would nonetheless have all but $11,000 ($5,500 each for the primary and general elections) of PFP's more-than-one-million-dollar war chest go unused by the candidate who raised it.

5. Secretary Oliver's interpretation of New Mexico law violates both the First Amendment, which permits essentially no limitations on a candidate's expenditures, but only on contributions to the candidate, and the Equal Protection Clause, which prohibits the State from placing current federal officeholders in a massively worse position than state officeholders with regard to running for state office.

6. The Secretary's interpretation also ignores a decision of this Court on virtually this same issue, which is binding on the State of New Mexico and her office. In the 1990s, then-Congressman Bill Richardson brought federal suit against the secretary of the state and the attorney general for the right to use his federal campaign funds in his upcoming run for governor. *See New Mexicans for Bill Richardson v. Gonzales*, Case No. 93-CV-1135-JAP-RLP (D.N.M.) (Parker, J.). The secretary of state at the time refused to allow any such use in light of N.M.S.A. § 1-19-29.1(C), which provides that "[n]o contributions solicited for or received in a federal election campaign may be used in a state election campaign" – a provision that is basically a statutory codification of Secretary Oliver's position today.

7. The Honorable James A. Parker, in a binding final judgment on Richardson's claim for declaratory relief, "ruled that § 1-19-29.l(C) N.M.S.A. 1978 (1995 Repl.) violates the First Amendment of The Constitution of the United States of America," and "declared [it] void because [of that] violation." *Id.*, Summary Judgment (Doc. No. 74) (filed Aug. 2, 1996). Neither the secretary of state's office nor the attorney general's office – both of which were parties to Richardson's suit and thus bound by its judgment – ever appealed, collaterally challenged, or sought relief under Rule 60(b) from the Court's decision, and they appear to acknowledge its validity today. *See, e.g.*, N.M.A.G. Adv. Op., 2009 WL 2254371, at *2 n.3 (July 23, 2009) (opinion letter from Zachary Shandler to Paula Tackett).

8. This Court's decision in *New Mexicans for Bill Richardson v. Gonzales* was correct when it issued it, and, given that First Amendment protections in the campaign-finance arena have only grown stronger since then, it is, if anything, the even clearer conclusion today.

9. Because the Defendants have flouted this Court's prior grant of declaratory relief on this issue by effectively prohibiting the use of federal campaign funds in a state race, the Plaintiffs ask this Court for an injunction as well as declaratory relief.

THE PARTIES

10. Rep. Pearce is a Hobbs, New Mexico resident and a sitting U.S. Congressman representing New Mexico's second congressional district in the House of Representatives. He served in this capacity from 2003 to 2009, and then again from 2011 to present, and will continue to serve until the expiration of his term in January 2019. He has declared his candidacy for the 2018 New Mexico gubernatorial election.

11. PFP is Rep. Pearce's longstanding principal campaign committee, which he has used since 2009 to raise and spend funds in support of his campaigns for election and reelection to his House seat, which occur every two years. PFP is registered with and reports to the Federal Election Commission ("FEC") and maintains its principal place of business in Hobbs, New Mexico.

12. Secretary Oliver is the Secretary of State of the State of New Mexico and, in that capacity, oversees the state Bureau of Elections, *see* N.M.S.A. § 8-4-5, promulgates the state's campaign-finance rules and regulations, *see* N.M.S.A. § 1-19-26.2, issues, with the state's attorney general, advisory opinions on campaign-finance matters, *see* N.M.S.A. § 1-19-34.4(A), administers the state's campaign-finance regime, *see* N.M.S.A. ch. 1, art. 19, determines violations

of the same, *see* N.M.S.A. § 1-19-34.4(C), and initiates civil enforcement of the same by referring the matter to the state's attorney general or a district attorney, *see* N.M.S.A. § 1-19-34.6(A).

13. AG Balderas is the Attorney General of the State of New Mexico and, in that capacity, issues, with the secretary of state, advisory opinions on campaign-finance matters, *see* N.M.S.A. § 1-19-34.4(A); *see also* N.M.S.A. § 8-5-2(D), institutes, upon referral from the secretary of state, civil actions for alleged campaign-finance violations, *see* N.M.S.A. § 1-19-34.6, and brings criminal charges for the same, *see* N.M.S.A. § 1-19-36(B).

14. DA Luce is the district attorney for the Fifth Judicial District of New Mexico, which covers Chaves, Eddy, and Lea Counties, the last of which is both Plaintiffs' place of residence. In that capacity, she is empowered to initiate criminal and, upon the secretary of state's referral, civil actions for alleged violations of the state's campaign-finance laws. *See* N.M.S.A. §§ 1-19-34.6, -36.

JURISDICTION AND VENUE

15. This Court has original subject-matter jurisdiction over all claims in this Complaint under 28 U.S.C. § 1331, because the claims "aris[e] under the Constitution[and] laws . . . of the United States," and under 28 U.S.C. § 1343(a)(3)-(4), because the claims sound in equal protection and civil rights. Original subject-matter jurisdiction may also exist under 52 U.S.C. § 30110. This Court will have supplemental subject-matter jurisdiction under 28 U.S.C. § 1367(a) over any later-added claims that are not within the Court's original jurisdiction.

16. This Court has personal jurisdiction over all the Defendants, as each of them resides, works, holds office, and committed the acts alleged in this Complaint within the State of New Mexico, and because personal jurisdiction exists under the New Mexico long-arm statute, *see* N.M.S.A. § 38-1-16.

17. Venue in this District is proper under 28 U.S.C. § 1391(b)(1) and (2), because all Defendants reside here and because a substantial part of the events or omissions giving rise to the claims occurred or will likely occur here.

LEGAL, PROCEDURAL, AND FACTUAL BACKGROUND

I. Federal Campaign-Finance Law

18. Campaigns for federal elective office (*i.e.*, the presidency, vice presidency, and congressional seats) are governed by Federal Election Campaign Act of 1971, 52 U.S.C. §§ 30101-30146 ("FECA"). FECA applies uniformly nationwide, and states are preempted from placing additional restrictions on candidates for federal office. *See* 52 U.S.C. § 30143.

19. FECA is administered primarily by the FEC, which promulgates rules in the Code of Federal Regulations, issues advisory opinions interpreting FECA and its own regulations, and enforces those rules by way of its own administrative process, initiation of civil actions, and referral to the attorney general for criminal prosecution. *See* 52 U.S.C. §§ 30106-30111.

20. With a few exceptions not applicable in this case, *see, e.g.*, 52 U.S.C. § 30121(a), FECA does not apply to campaigns for state elective office, and the FEC does not regulate such campaigns.

21. FECA requires that all candidates for federal office form a "principal campaign committee," which serves as the financial hub for the campaign and must report periodically to the FEC all "receipts" received by the campaign and all "disbursements" made by it. 52 U.S.C. § 30102(e)(1), (f)(1). "Receipts" include both "contributions" – anything of value (money, loans, services, etc., but with a great many exceptions, such as volunteer work) given to the campaign for the purpose of helping the candidate win election – and things of value given to the campaign for a non-political purpose, such as fair-market payment for services and bank loans bearing

customary interest rates and genuine expectation of repayment. *See* 52 U.S.C. § 30101(8). "Disbursements" include both "expenditures" – money (or anything else of value) promised or spent with the purpose of helping the candidate win election – and other payments made by the campaign for non-political purposes. *See* 52 U.S.C. § 30101(9).

22. FECA places limits on the amount of money (including the value of in-kind contributions) that any one entity can contribute to any one candidate (including the candidate's campaign committees) per election, and these limits vary depending on the type of entity (natural person, corporation, political party, etc.) the donor is. The chart below contains the federal contribution limits (to candidates)[1] that were in place throughout PFP's existence:

Type of Donor	2009-2010	2011-2012	2013-2014	2015-2016	2017-2018
Individual	$2,400	$2,500	$2,600	$2,700	$2,700
Multicandidate PAC	$5,000	$5,000	$5,000	$5,000	$5,000
Other PAC	$2,400	$2,500	$2,600	$2,700	$2,700
National Party	$2,400	$5,000	$5,000	$5,000	$5,000
State, District, or Local Party[2]	N/A	$5,000	$5,000	$5,000	$5,000
Another Candidate's Campaign Committee	$2,400	$2,000	$2,000	$2,000	$2,000
Anonymous Cash Contributions[3]	$50	$50	$50	$50	$50
Corporations or Labor Unions[4]	$0	$0	$0	$0	$0

[1] FECA also places limits on contributions to (and regulates more generally) political parties, political action committees, and any other entity that makes direct contributions to a candidate. As this case concerns a candidate's (and his principal campaign committee's) right to expend his own funds, those regulations are not relevant to this case.

[2] The contribution limits in this row, unlike the other rows, refer to the amount of money the candidate can collect from all state, district, or local party committees *combined*.

[3] Anonymous contributions greater than $50 need not be disgorged, but the amount in excess of $50 must be promptly disposed of for a lawful purpose unrelated to any federal election, campaign, or candidate (*i.e.*, it must be disbursed, but not as an expenditure or a federal contribution). *See* 11 C.F.R. § 110.4(c)(3).

[4] While corporations and labor organizations are forbidden from making donations in federal campaigns, FECA does not forbid such entities from contributing to state campaigns (although state law may). The only entities prohibited by federal law from contributing to state campaigns are national banks, federally chartered corporations, and foreign nationals.

23. A candidate may form other campaign committees in addition to his principal campaign committee, but a donor's contribution to any of a candidate's committees counts toward the donor's contribution limit to that candidate.

24. Transfers of money or other assets between or among a candidate's own FECA campaign committees – including rolling over funds contributed in a past election cycle to a campaign committee devoted to a subsequent election (for the same or different federal elective office as the past campaign) – may be freely made,[5] and count as neither contributions nor expenditures. *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R. § 102.6(a)(1)(i).

II. PFP's Status

25. PFP has been Rep. Pearce's principal campaign committee since the 2009-2010 election cycle. *See* People for Pearce Committee Profile, FEC.gov, *available at* https://www.fec.gov/data/committee/C00463836 (last visited July 12, 2017). Detailed records of PFP's finances, including all receipts and disbursements throughout its entire period of existence, are not only available online, *see id.*, but were and still are given directly to the New Mexico Secretary of State's office at the same time they are reported to the FEC, *see* 52 U.S.C. § 30113(a)-(b).

26. When the Plaintiffs solicited and accepted funds for PFP, they did so without making any promises or representations to donors about whether the funds would be spent on a federal or state race. Given that donors typically want their money to be used for its highest and

[5] There are exceptions which are not applicable in this case. For example, if a candidate is actively simultaneously seeking more than one federal office (such a sitting congressman running for vice president while at the same time seeking reelection to his congressional seat as a backstop to a presidential loss), he must form two separate principal campaign committees and keep strict separation between the committees devoted to campaigning for each office (with no transfers between the two groups). This is because donors are allowed to contribute up to the amount of the contribution limit for each office sought.

best purpose, it is likely that "potential contributors would [have] be[en] less prone to donate if there were limitations on the use of their contributions." *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1498 (10th Cir. 1995).

27. All of the contributions accepted and received by PFP complied with the campaign-contribution limits set by FECA.

III. New Mexico Campaign-Finance Law

28. Campaigns for New Mexico elective office are governed by the Campaign Reporting Act, N.M.S.A. § 1-19-25 to -36 ("CRA"), which sets forth a scheme that is structurally similar to, albeit simpler than, FECA.

29. The CRA is administered primarily by the secretary of state, who has the power to promulgate regulations in the New Mexico Administrative Code (although no such regulations currently exist), "issue advisory opinions . . . on matters concerning" the CRA "in consultation with the attorney general," and enforce the CRA by way of voluntary compliance, binding arbitration, and referral to the attorney general or a district attorney to initiate a civil action or criminal prosecution. N.M.R.A. § 1-19-34.4; *see* N.M.S.A. § 1-19-26.2, -34.6, -36.

30. The CRA requires that all state candidates maintain "a separate bank account" for the campaign, and that "all receipts of money contributions and all expenditures of money are deposited in and disbursed from" that account. N.M.R.A. § 1-19-34(A)(3).

31. Candidates must "report [all] expenditures and contributions" periodically to the secretary of state – and the CRA defines those terms nearly identically to FECA – but they need not report non-contribution receipts or non-expenditure disbursements. N.M.S.A. § 1-19-27(A); *see* N.M.S.A. § 1-19-26(F), (J), (M) (definitions).

32. Like FECA, the CRA places limits on the amount of money (including the value of in-kind contributions) that any one entity can contribute to any one candidate (including the candidate's campaign committee) per election.[6] The chart below contains the CRA contribution limits (to candidates for statewide office)[7] that were in place throughout PFP's existence:

Type of Donor	2009-2010	2011-2012	2013-2014	2015-2016	2017-2018
Any "Person," Including a "Political Committee"	$4,800	$5,000	$5,200	$5,400	$5,500
Anonymous Cash Contributions	$100	$100	$100	$100	$100

See N.M.S.A. §§ 1-19-34.7(A), -34(B); N.M. Sec'y of State's Office, *Campaign Contribution Limits*, http://www.sos.state.nm.us/uploads/files/Contribution%20Limit%202016%20Increase.pdf (last visited July 17, 2017).

33. Given that the CRA defines "person" to "mean[] an[y] individual or entity," including a corporation or labor union, N.M.S.A. § 1-19-26(K), or a PAC or political party (which are also "political committees" under the CRA), N.M.S.A. § 1-19-26(L), the following chart displays the CRA contribution limits broken out into the same categories of donors that the FECA chart was above, with those limits that are higher than their FECA counterparts in green:

Type of Donor	2009-2010	2011-2012	2013-2014	2015-2016	2017-2018
Individual	$4,800	$5,000	$5,200	$5,400	$5,500
Multicandidate PAC	$4,800	$5,000	$5,200	$5,400	$5,500
Other PAC	$4,800	$5,000	$5,200	$5,400	$5,500
National Party	$4,800	$5,000	$5,200	$5,400	$5,500
State, District, or Local Party	$4,800	$5,000	$5,200	$5,400	$5,500
Another Candidate's Campaign Committee	$4,800	$5,000	$5,200	$5,400	$5,500

[6] The primary and general elections for an elective office count as two separate "elections" under both FECA and the CRA, and a donor can thus donate twice the contribution limit to a candidate in a single election cycle.

[7] The CRA sets lowers individual contribution limits for campaigns for non-statewide elective office than it does for campaigns for a statewide office like governor. Strangely, contributions by political committees are the subject to the same limits regardless of whether the recipient is seeking statewide or non-statewide office.

Anonymous Cash Contributions	$100	$100	$100	$100	$100
Corporations or Labor Unions	$4,800	$5,000	$5,200	$5,400	$5,500

Compare ¶ 32, *supra*, *with* ¶ 22, *supra*.

34. In short, every dollar ever contributed to the PFP account would have been lawful had the contribution been subject to the CRA limits in effect at the time the contribution was made.

35. The CRA also contains a codified answer to the question of how to handle federal-state transfers of campaign funds: "No contributions solicited for or received in a federal election campaign may be used in a state election campaign." N.M.S.A. § 1-19-29.1(C) ("subsection (C)").

IV. The First Amendment's Effect on Campaign-Finance Law

36. Since *Buckley v. Valeo*, 424 U.S. 1 (1976), the central distinction in First Amendment campaign-finance jurisprudence is between expenditures, which the government can virtually never limit (regardless of whether the expender is a private citizen or entity or the candidate himself), and contributions, which it usually can:

> Expenditures are core political speech directly advancing public debate, subject to strict scrutiny. Expenditures cannot be restricted unless narrowly tailored to advance a compelling state interest. . . . By contrast, contribution limitations[,] . . . while not subject to strict scrutiny, . . . still involve a "significant interference with associational rights" and "must be closely drawn to serve a sufficiently important interest."

Republican Party of N.M. v. King, 741 F.3d 1089, 1093 (10th Cir. 2013) (citations omitted).

37. The Supreme Court has gradually winnowed down the list of "compelling state interests" in the campaign-finance context to the remaining two: preventing *quid pro quo* corruption and preventing the appearance of *quid pro quo* corruption. Reducing the expensiveness of elections, 'equalizing' competing candidates' financial situations, reducing the influence of wealthy entities on elections, and compensating for the fact that a corporation's expenditures might

not reflect the views of its shareholders or the public are all *not* compelling interests. *See Buckley*, 424 U.S. at 53-54; *Citizens United v. FEC*, 558 U.S. 310, 349-50 (2010).

38. Given that third parties' expenditures/speech often have significant value to candidates, and can be just as likely to make the candidate feel grateful or even beholden to the third party as a direct monetary contribution would – *e.g.*, a respected newspaper endorsing the candidate or writing an op-ed damaging his opponent, or a well-known industrialist funding commercials promoting a policy that the candidate prominently supports – it can be sometimes be difficult to distinguish expenditures from in-kind contributions, but both FECA and the CRA use the same test: "When an individual or political committee pays for a communication [or other expenditure] that is *coordinated with* a candidate or campaign committee, the communication is considered an in-kind contribution to that candidate or campaign committee and is subject to the limits, prohibitions and reporting requirements of the [CRA]." New Mexico Secretary of State's Office, Draft, *Guide to Campaign Finance and Campaign Reporting* 26 (2014) (emphasis added), *available at* http://www.sos.state.nm.us/uploads/files/Guidelines%20of%20Candidates%20and%20Campaign%20Committees%2012-16-2013.pdf (last visited July 13, 2017); *see* 11 C.F.R. § 109.20-23 ("Any expenditure that is coordinated [with an entity outside the campaign] . . . is [] an in-kind contribution to . . . the candidate . . . with whom . . . it was coordinated . . . ."); N.M.R.A. § 1-19-34.7(C). Thus, "coordinated expenditures" can be constitutionally limited while "independent expenditures" cannot.

39. The courts have strengthened the First Amendment's protections in relation to campaign finance substantially since 2010. In *Citizens United v. FEC*, 558 U.S. 310 (2010), the Supreme Court struck down limits on independent expenditures, including by corporations. In *Republican Party of New Mexico v. King*, 741 F.3d 1089 (10th Cir. 2013), the Tenth Circuit (along

with every other Circuit to consider the issue) struck down limits on 'contributions' to entities that neither contribute to nor coordinate with candidates – reasoning that, since the money would never go to a candidate and there were thus no actual or apparent *quid pro quo* concerns, the donations were expenditures rather than contributions. And in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), the Supreme Court struck down caps on the aggregate contributions that a donor could give to all candidates or contribution-making entities combined, which the government had argued were necessary to prevent a donor from circumventing donor-to-candidate contribution limits by contributing up to the limit to a large number of PAC "conduits" or "intermediaries," which the donor knew would then turn around and contribute that money to the donor's favored candidate.

40. The *King* and *McCutcheon* cases, in particular, display a striking hostility to spending restrictions justified only by the rationale that the restrictions help prevent circumvention of other campaign-finance limitations, or help make the overall campaign-finance regime easier to enforce. In *McCutcheon*, the Supreme Court found aggregate contribution limits to be insufficiently narrowly tailored when compared to the simple solution of enforcing existing laws prohibiting donors from colluding with their donation recipients about where the recipients subsequently direct the donated money. *See McCutcheon*, 134 S. Ct. at 1446 ("With more targeted anticircumvention measures in place today, [] indiscriminate aggregate limits . . . appear particularly heavy-handed."). Although proving collusion would require election officials to investigate suspected violations rather than simply automatically applying an aggregate cap, the Court – doubtless aware that criminal prosecutors and other regulatory enforcers regularly have to investigate their violations and prove up difficult *mens rea* elements – was unsympathetic:

> [I]f an FEC official cannot establish knowledge of circumvention (or establish affiliation) when the same ten donors contribute $10,000 each to 200 newly created PACs, and each PAC writes a $10,000 check to the same ten candidates – the dissent's "Example Three" [in a series of hypotheticals proposed by the dissent in

> an attempt to show the consequences of the *McCutcheon* majority's holding] – then that official has not a heart but a head of stone.

Id. at 1456.

41. In short, "there can be no freestanding anti-circumvention interest. . . . [Rather,] there must be an underlying risk of corruption that justifies a contribution limit, and there must be a real possibility of evading those valid limits through unlimited contributions." *King*, 741 F.3d at 1102. And, importantly, the Supreme Court has admonished that

> [i]t is worth keeping in mind that the base [contribution] limits themselves are a prophylactic measure. As we have explained, restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The aggregate limits are then layered on top, ostensibly to prevent circumvention of the base limits. This "prophylaxis-upon-prophylaxis approach" requires that we be particularly diligent in scrutinizing the law's fit.

McCutcheon, 134 S. Ct. at 1458 (citations and internal quotation marks omitted).

42. The Court has also favorably mentioned another prophylactic measure – entirely separate from contribution limits – which it considers a "less restrictive alternative to flat bans on certain types or quantities of speech." *Id.* at 1460. Mandating "disclosure of contributions minimizes the potential for abuse of the campaign finance system . . . [and] deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 1459 (citations and internal quotation marks omitted). The Court warned, however, that "[d]isclosure requirements [still] burden speech," *id.*, and "[t]he Court has [thus] subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," *Citizens United*, 558 U.S. at 366-67 (citation omitted). Moreover, disclosure requirements are still a prophylaxis, and the addition of even more speech restrictions to avoid circumvention of that prophylaxis is likely to render those additional 'double-preventative' restrictions unconstitutional.

V. This Court's 1996 Judgment Striking Down Subsection (C)

43. In 1993, then-Congressman Bill Richardson was exploring the possibility of launching a bid for governor. His principal campaign committee under FECA, New Mexicans for Bill Richardson ("NMFBR"), had roughly a half-million dollars in campaign funds in it from Richardson's ten years (and, thus, five election cycles) in Congress.

44. Subsection (C)'s prohibition on using FECA funds in a state race, if enforceable, posed a serious problem for Richardson's gubernatorial aspirations. As such, Richardson and NMFBR filed suit against the secretary of state, the attorney general, and the district attorney for Richardson's district of residence. *See NMFBR v. Gonzales*, Case No. 93-CV-1135-JAP-RLP (D.N.M.) (Parker, J.) ("*NMFBR* D. Ct. Case"). The complaint alleged two claims – one "for violation of constitutional rights" and the other "for violation of federalism" – both of which sought declaratory and injunctive relief. *Id.*, Complaint for Declaratory and Injunctive Relief at 1, 4 (Doc. No. 1) (filed Sept. 27, 1993) (attached as Exhibit A).[8]

45. The Court initially dismissed the suit on ripeness grounds, ruling, as the defendants would argue on appeal, "that until such time as Congressman Richardson can represent to the Court that he intends to run for a state elective office, th[e] matter is not ripe for adjudication." *NMFBR v. Gonzalez*, 64 F.3d 1495, 1497 (10th Cir. 1995). The Tenth Circuit reversed that ruling, holding that the bar on using NMFBR funds "undoubtedly show[s that] the existence of the New Mexico statute has created a direct and immediate dilemma with respect to Congressman Richardson's exercise of his First Amendment liberties." *Id.* at 1500.

[8] As the filings from the *NMFBR* D. Ct. Case are not available on CM/ECF or PACER, the Plaintiffs have attached the relevant documents to this Complaint.

46. On remand to the District Court, the two sides filed cross-motions for summary judgment on the substantive question of subsection (C)'s constitutionality. *See NMFBR* D. Ct. Case (Doc. No. 33) (filed Feb. 2, 1994) (plaintiffs' motion for summary judgment) (attached as Exhibit B); *id.* (Doc. No. 42) (filed Mar. 16, 1994) (defendants' cross-motion for summary judgment and response to the plaintiffs' motion) (attached as Exhibit C); *id.* (Doc. No. 44) (filed Mar. 23, 1994) (plaintiffs' response to defendants' cross-motion and reply in support of their own motion) (attached as Exhibit D); *id.* (Doc. No. 47) (filed Mar. 30, 1994) (defendants' reply in support of their cross-motion) (attached as Exhibit E).

A. The Defendants' Arguments in Support of Subsection (C)

47. In their briefing on the motions,[9] the defendants acknowledged that the case's core "question [wa]s whether the State of New Mexico can legally prohibit [NMFBR] from *converting funds* contributed to it as a principal campaign committee for Congressman Richardson to use in a state election campaign of Bill Richardson for some state office." Ex. C at 13 (emphasis added). Thus, the question at issue in the case is not, as Secretary Oliver might now try to frame it, whether NMFBR would be allowed to contribute to Richardson's gubernatorial campaign within the statutory contribution limit. In fact, New Mexico had no contribution limits at that time, *see* 2009 N.M. Laws ch. 68, S.B. 521 (effective Nov. 3, 2010) (enacting contribution limits for the first time), as the defendants themselves recognized, *see* Ex. C at 14 ("Under New Mexico's statutory scheme, there would be very few, if any, limitations on what amounts could be contributed by individuals and other entities to a state campaign."), so the defendants' position in the case

[9] The current subsection (B) of § 1-19-29.1 was added during the *NMFBR* D. Ct. Case, and the current subsection (C) was previously subsection (B) – and is referred to that way in all of the summary judgment briefing (but not Judge Parker's orders).

implicitly required that a transfer from NMFBR to Richardson's state campaign committee not be treated as a contribution.

48. The defendants denied that subsection (C) was a limitation on campaign expenditures, despite the plain language that funds "may [not] be used in a state election campaign." *See, e.g.*, Ex. C at 13. Rather, they argued that the provision was a contribution limit, and that "[t]he purpose of the challenged statute is to prevent the circumvention of other, unquestionably legitimate state laws concerning campaign financing in state elections in New Mexico." Ex. E at 5; *see id.* at 6 ("[I]t can also be viewed as a limitation on contributions: *i.e.*, the transference of funds directly from one campaign committee to another."). And the specific "legitimate state laws" that subsection (C) was designed "to prevent the circumvention of" was, according to the defendants, itself a prophylactic measure:

> The purpose of [subsection (C)] . . . was to ensure that the disclosure laws of New Mexico could not be circumvented by means of a direct transference of funds from a federal election campaign, *i.e.*, principal campaign committee, to a state campaign committee for the same candidate. In other words, if a federal officeholder, such as Congressman Richardson, were permitted to convert funds directly from New Mexicans for Bill Richardson to his own state campaign committee, there would be no complete disclosure according to New Mexico law of those contributions made to the federal committee.
>
> Therefore, Section 1-19-29.l([C]) is first and foremost a law governing disclosure of campaign financing.

Ex. C at 13-14.

49. Anticipating that "[o]ne might make the argument that the federal laws are equally as stringent, and therefore, disclosures for federal office should be sufficient to address any concerns as to the source and amounts of funds contributed," the defendants pointed out two extremely insignificant situations in which the CRA requires disclosures where FECA would not. Ex. C at 17. The first is that the CRA requires disclosure of the names and addresses of all donors,

whereas FECA requires such disclosure only for those donors who contribute over $200. *See* Ex. C at 17 (comparing N.M.S.A. § 1-19-31 with what is now 52 U.S.C. § 30104(b)(3)(A), (F)-(G)). The second is that, under the CRA, "a political committee must . . . reveal its name . . . and give a statement of purpose for which it was organized." Ex. C. at 18. Conceding that FECA "arguably requires [federal] political committees to divulge the former," the defendants nonetheless argued that FECA "does not require a statement of purpose" from *its* PACs. *Id.*

50. Finally, the defendants argued that subsection (C) would not stop a candidate from undertaking a refund-and-resolicit process like the one mandated by FECA for state-to-federal campaign-fund transfers. *See* Ex. C at 14 ("New Mexicans for Bill Richardson would not be prohibited from refunding contributions and soliciting those same contributions for a state election campaign.").

B. <u>The District Court's Ruling</u>

51. The Court entered a Memorandum Opinion and Order on August 2, 1996 granting the plaintiffs' motion, denying the defendants', and ruling that subsection (C) "violates the First Amendment of The Constitution of the United States of America because its language is impermissibly broad." *NMFBR* D. Ct. Case, Memorandum Opinion and Order (Doc. No. 73) (filed Aug. 2, 1996) (attached as Exhibit F).

52. Contemporaneously with the Memorandum Opinion and Order, the Court entered a one-page final judgment on the case's merits, making clear that he was granting the plaintiffs' claim for declaratory relief: "§ 1-19-29. l(C) N.M.S.A. 1978 (1995 Repl.) is declared void because it is in violation of The Constitution of the United States of America." *NMFBR* D. Ct. Case, Summary Judgment (Doc. No. 74) (filed Aug. 2, 1996) (attached as Exhibit G).

53. In its opinion, the Court noted that subsection (C)'s meaning – exactly what it forbade and what it allowed – was far from clear, calling it a "terse, but far from perspicuous, section." Ex. F at 1. Rejecting the defendants' contention that subsection (C) was "nothing more than a 'disclosure' requirement and, therefore, the statute is not constitutionally infirm," Judge Parker wrote

> If, as defendants maintain, the purpose of § 1-19-29.l(C) was to shine the beneficial light of disclosure on sources of contributions, the statute could easily have been worded to say just that. A more carefully limited enactment could further New Mexico's stated interest by simply saying that someone can use funds acquired in federal election campaigns in state campaigns only if that person complies with state disclosure laws. This would circumvent the unnecessary and impermissible total ban on use in state elections of funds derived from federal campaigns while protecting the state's legitimate interest in demanding disclosure consistent with the state's laws that govern its own elections.

Ex. F at 2, 3.

VI. The Positions and Interpretations of New Mexico Secretaries of State and Attorneys General Prior to Secretary Oliver and AG Balderas

54. The question of what, if any, conditions the secretary of state can put on a candidate's use of FECA funds in a state election has apparently not been raised since the *NMFBR* case.

55. In 2007, then-attorney general Gary King wrote an advisory opinion stating that the CRA generally did not cover federal elections, mentioning that the term "election," as defined in § 1-19-26(H), includes only races for state office. N.M.A.G. Adv. Op. No. 07-01, at *2 (Feb. 7, 2007) (letter to the Hon. Lee Rawson). As that section of the CRA also defines a "contribution" as being "made or received for a political purpose," and "political purpose" as being for the purpose of "influencing or attempting to influence an *election*," this advisory opinion's logic would consider FECA funds to not be "contributions" at all for CRA purposes – and thus not subject to the CRA's limits. N.M.S.A. § 1-19-26(F), (M) (emphasis added).

56. In 2009, the attorney general's office issued another advisory opinion stating that "[t]he 10th Circuit has struck down a previous attempt to make a distinction in this section regarding federal and state campaigns." N.M.A.G. Adv. Op., 2009 WL 2254371, at *2 n.3 (July 23, 2009) (letter to Paula Tackett). Citing the appellate decision reversing the District Court's initial dismissal on ripeness grounds, the opinion nonetheless correctly summarizes the Court's ruling as having "invalidate[d] Section 1-19-29.1(C) regarding a ban on using federal funds for state campaigns." *Id.*

57. In the summer of 2016, counsel for Rep. Pearce wrote to Secretary Oliver's immediate predecessor posing the following questions and receiving the following answers from the secretary's attorney, Amy Bailey, at that time:

> May a Federal officeholder transfer funds from a FECA candidate campaign committee to a state candidate campaign committee?
>
> ANSWER: Yes. Although Section 1-19-29.1(C) contains a restriction on ***contributions for or received in a federal election campaign*** being used in a state election campaign, that provision has been found unconstitutional in a federal court *See*, New Mexicans for Bill Richardson v. Gonzales (D.N.M. 1996).
>
> May a Federal officeholder transfer funds from a FECA candidate campaign committee to a state candidate campaign committee without restriction or limitation?
>
> ANSWER: No. Although FECA permits the transfer of funds from a FECA candidate campaign committee to a local or state candidate's campaign committee, any transfer is first subject to the restrictions of FECA, and then subject to the limits within the applicable state or local laws, i.e. the CRA. *See*, 11 CFR 113.2(e). Section 1-19-34.7 NMSA 1978 created limits on contributions a candidate or political committee may receive. For example, during the 2016 election cycle, a statewide candidate may receive an aggregate maximum contribution of $5,400 ***from a single contributor*** for each election during the cycle.

Letter from Amy Bailey to Bill Canfield at 1 (June 15, 2016) (attached as Exhibit J) (emphases added). The secretary's attorney also stated that the secretary's position was that FECA monies were not the candidate's person funds. *See id.* at 1-2.

VII. Secretary Oliver's Actions in the Summer of 2017

58. In June 2017, Rep. Pearce's campaign reached out to Secretary Oliver to clarify her position on FECA-to-CRA transfers. Deputy Secretary of State and attorney for the Secretary John Blair wrote back, stating that the office intended to honor Ms. Bailey's interpretation – but that they viewed the letter as recognizing a $5,400 (change in 2017 to $5,500) cap on the entire transfer:

> The official position of this office is that Congressman Pearce could transfer $5,500 from his FECA account to a CRA account for a gubernatorial campaign both for the 2018 primary election and for the 2018 general election if he is selected as the Republican nominee.
>
> We believe that the June 15, 2016, letter from then-General Counsel Amy Bailey to Mr. Canfield that you included in your letter supports this same conclusion. Any transfer of funds from Congressman Pearce's federal campaign committee account to a state campaign committee account would be governed by both FECA and the CRA. To that end, Section 1-19-34.7 of the CRA provides that contributions from one campaign account to another are subject to this limit.

Email from John Blair to Andrea Goff (June 16, 2017) (attached as Exhibit K).

59. William Canfield, an attorney for Rep. Pearce, wrote to Secretary Oliver shortly afterward, expressing the Plaintiffs' surprise, as they had "understood [Ms. Bailey's] language to mean that any funds transferred to the CRA account would be required to comply with individual contribution limits." Letter from William Canfield to Maggie Toulouse Oliver at 2 (June 20, 2017) (attached as Exhibit L) (emphasis in original).

60. Mr. Canfield protested the illogic of Secretary Oliver's position as well as the office's change in position, noting, among other things, that:

a. a "transfer of funds between accounts controlled by the same individual or entity" does not fit the statutory definition of "contribution" as "'a

gift, subscription, loan, advance, or deposit, of money or other thing of value,'" Ex. L at 3 (emphasis in original) (quoting N.M.S.A. § 1-19-26(F));

b. Secretary Oliver's position would effectively "represent a restoration of the prohibition contained in" subsection (C), Ex. L at 3 (emphasis in original); and

c. that, "from a policy perspective, Mr. Blair's interpretation would effectively put federal officeholders at a distinct disadvantage compared to current state officeholders when contemplating a run for statewide office," because state officeholders could rollover their unused prior campaign funds while federal officeholders could not, Ex. L at 3.

61. Last, Mr. Canfield noted that Secretary Oliver's position may have been colored by it having been the position taken in an informal communication to Representative Michelle Lujan Grisham, another federal congressperson considering running for governor. *See* Ex. L at 4.

62. On July 10, Rep. Pearce officially announced his candidacy for governor.

63. Secretary Oliver, through her attorney, John Blair, responded to Mr. Canfield's letter, informing the Plaintiffs that Secretary Oliver's position remained that a FECA-to-CRA transfer would be treated as a "contribution" under the CRA, and that Rep. Pearce would thus be limited to transferring $5,500, for each of the primary and general elections, from PFP to his state campaign committee:

> Following a careful review of your letter, and continued discussion with the Secretary of State and our senior leadership, the official position of this office continues to be that Congressman Steve Pearce may transfer $5,500 from his FECA account to a CRA account for a gubernatorial campaign both for the 2018 primary election and for the 2018 general election.
>
> In 1996, when *New Mexicans for Bill Richardson v. Gonzales* was decided, the CRA prohibited any federal money in state elections. The United States District

> Court concluded in New Mexicans for Bill Richardson that Section 1-19-29.1(C) NMSA 1978 "violates the First Amendment of the Constitution of the United States of America because its language is impermissibly broad" and that it "flatly prohibits the use in state election campaigns of contributions obtained in a federal election campaign." While deemed unconstitutional, the New Mexico Legislature has not acted to repeal Section 1-19-29.1(C) from the CRA.
>
> At the time *New Mexicans for Bill Richardson* was decided, the CRA also did not include any limits on campaign contributions. However, in 2009, the New Mexico Legislature adopted limitations on the amount that can be contributed to a campaign during an election cycle. In the 2018 election cycle, a political committee may contribute a total of $5,500 to a candidate for Governor for the primary and the general election. *See* Section 1-19-34.7.

Letter from John Blair to Bill Canfield at 1 (July 19, 2017) (attached as Exhibit M). Mr. Blair reiterated Secretary Oliver's view that limiting FECA-to-CRA transfers to $5,500 in gross was consistent with the position taken by her predecessor in Ms. Bailey's letter. *See id.* at 3. He further wrote that Secretary Oliver "does believe there should be a defined difference in the CRA between a 'transfer' of funds and a 'contribution' but unfortunately that difference does not exist." *Id.* at 2.

COUNT I
DECLARATORY AND INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS, IN THEIR OFFICIAL CAPACITIES, FOR (AND TO PREVENT FURTHER) VIOLATIONS OF THE FIRST AMENDMENT

64. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Plaintiffs incorporate by reference all the foregoing allegations in this Complaint.

65. The contribution limits in N.M.S.A. § 1-19-34.7, as interpreted by Secretary Oliver in relation to a FECA-to-CRA transfer, are unconstitutional because they burden and chill First Amendment speech and association rights without adequate justification and are not narrowly tailored to advance a compelling state interest.

66. Because federal disclosure requirements and contribution limits are themselves prophylactic measures to serve anti-corruption and anti-appearance-of-corruption interests,

Secretary Oliver's interpretation of N.M.S.A. § 1-19-34.7 regarding FECA-to-CRA transfers requires the Court be "particularly diligent in scrutinizing the law's fit" in the narrow-tailoring analysis. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014).

67. Secretary Oliver's position has been codified and expressed with sufficient finality to constitute an "actual controversy" for both purposes of Article III ripeness and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Thus, the Plaintiffs request a declaratory judgment declaring that her position is unconstitutional and that the Plaintiffs have the right to use all of the PFP funds on Rep. Pearce's gubernatorial campaign.

68. On information and belief, Secretary Oliver's position was formed "in consultation with" AG Balderas, N.M.S.A. § 1-19-34.4(A), and can be enforced administratively and in arbitration by the former, *see* N.M.S.A. §§ 1-19-34.4(B)-(G), and civilly and criminally by the latter, *see* N.M.S.A. §§ 1-19-34.6, -36(B), or by DA Luce, who is the district attorney in the Plaintiffs' place of residence, *see id.* As such, an injunction against each of them is necessary and appropriate.

69. The Plaintiffs are likely to succeed on the merits of their claim, and will suffer irreparable harm – in the form of being put at a severe disadvantage in the 2018 gubernatorial election – if an injunction is not issued. The balance of harms weighs strongly in the Plaintiffs' favor, as does the public interest, as both the Defendants and the public have no interest in enforcing an unconstitutional interpretation of the CRA.

70. Thus, the Plaintiffs request that the Court preliminarily and permanently enjoin the Defendants from enforcing the CRA's campaign-contribution limits against any transfer of funds from PFP to Rep. Pearce's CRA campaign committee.

71. The Plaintiffs bring this claim under 42 U.S.C. § 1983, and seek to recoup their attorneys' fees and other costs under 42 U.S.C. § 1988.

COUNT II
CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS, IN THEIR OFFICIAL CAPACITIES, FOR (AND TO PREVENT FURTHER) VIOLATION OF THE EQUAL PROTECTION CLAUSE

72. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Plaintiffs incorporate by reference all the foregoing allegations in this Complaint.

73. Because state officeholders (and others with leftover CRA funds) are permitted under New Mexico law to transfer their funds to a subsequent state election campaign account, Secretary Oliver's interpretation of N.M.S.A. § 1-19-34.7 regarding FECA-to-CRA transfers intentionally discriminates against Rep. Pearce and other federal officeholders (and others with leftover FECA funds) seeking to run for state office by unduly and improperly restricting transfers from federal to state campaign accounts.

74. Because the limitations Secretary Oliver seeks to impose on Rep. Pearce and other federal officeholders impedes access to the ballot, they unconstitutionally infringe upon a fundamental right under "the fundamental rights strand of equal protection analysis," and thus the "State must prove that its limitation 'is necessary to serve a compelling interest.'" *See Goldman-Frankie v. Austin*, 727 F.2d 603, 605 (6th Cir. 1984) (citations omitted); *see also Clements v. Fashing*, 457 U.S. 957, 977 n.2 (1982) (ability to speak in favor of one's own campaign is a fundamental right).

75. Secretary Oliver has not identified any compelling state interest in distinguishing between federal officeholders and state officeholders with regard to interpretation of N.M.S.A. § 1-19-34.7.

76. As such, the Defendants have violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

77. Secretary Oliver's position has been expressed with sufficient finality to constitute an "actual controversy" for both purposes of Article III ripeness and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Thus, the Plaintiffs request a declaratory judgment declaring that her position is unlawful and that the Plaintiffs have the right to use all of the PFP funds on Rep. Pearce's gubernatorial campaign.

78. The Plaintiffs are likely to succeed on the merits of their claim, and will suffer irreparable harm – in the form of being put at a severe disadvantage in the 2018 gubernatorial election – if an injunction is not issued. The balance of harms weighs strongly in the Plaintiffs' favor, as does the public interest, as both the Defendants and the public have no interest in enforcing an unconstitutional interpretation of the CRA.

79. Thus, the Plaintiffs request that the Court preliminarily and permanently enjoin the Defendants from enforcing the CRA's campaign-contribution limits against any transfer of funds from PFP to Rep. Pearce's CRA campaign committee.

80. The Plaintiffs bring this claim under 42 U.S.C. § 1983, and seek to recoup their attorneys' fees and other costs under 42 U.S.C. § 1988.

PRAYER FOR RELIEF

The Plaintiffs hereby pray that this Court grant the following forms of relief to redress and prevent the past, ongoing, and imminent wrongs alleged in this Complaint:

A. declaratory relief as requested herein;

B. preliminary and permanent injunctive relief as requested herein;

C. attorneys' fees under 42 U.S.C. § 1988, or any other applicable provision of law;

D. costs of litigation, including multiples thereof if allowed by law; and

E. any other relief allowed by law or that the Court deems just and appropriate.

Respectfully submitted,

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