

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**New Mexico Turn Around,**

*Plaintiff,*

v.

**Amy B. Baily**, in her official capacity as City  
Clerk for Albuquerque, New Mexico,

*Defendant.*

Civil Action No. \_\_\_\_\_

**VERIFIED COMPLAINT FOR  
INJUNCTIVE AND DECLARATORY  
RELIEF**

Plaintiff New Mexico Turn Around, for its Complaint against Defendant

Amy B. Baily in her official capacity as City Clerk for Albuquerque, New Mexico, states the following:

**Introduction**

1. This is a civil action for declaratory and injunctive relief arising under the Constitution of the United States. Article XVI of the Albuquerque City Charter, titled the Open and Ethical Elections Code, establishes a public funding system for the Albuquerque City Council. Provisions of Article XVI are implemented by the 2009 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code (“City Clerk Regulations”). Plaintiff challenges the constitutionality of Section 16 of Article XVI and Part H(9) of the City Clerk Regulations, which provide for the distribution of “matching funds” to candidates based on independent expenditures made in opposition to that candidate and based on expenditures made in opposition to that candidate by a candidate opponent.

These provisions violate the First and Fourteenth Amendments to the United States Constitution by unduly impinging upon protected political speech and association as set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), *Davis v. FEC*, 128 S. Ct. 2759 (2008), and their progeny and by burdening free expression and association without any compelling justification for doing so, without being narrowly tailored in doing so, and for being overbroad by sweeping within their strictures constitutionally protected advocacy. *See Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *Randell v. Sorrell*, 548 U.S. 230, 262 (2006).

2. Plaintiff seeks to have Section 16 of Article XVI and Part H(9) of the City Clerk Regulations declared unconstitutional in violation of the First and Fourteenth Amendments. Plaintiff also seeks to have enforcement of Section 16 of Article XVI and Part H(9) of the City Clerk Regulations permanently enjoined. This issue should be resolved promptly so that Plaintiff and those similarly situated will not be chilled in their free expression and association or risk being unlawfully enjoined or found in violation of Albuquerque election laws as a result of having engaged in constitutionally-protected political expression in the upcoming October 4, 2011 election.

#### **Jurisdiction and Venue**

3. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the First and Fourteenth Amendments to the Constitution of the United States.

4. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The jurisdiction over the claims arising under the First and Fourteenth Amendments is founded upon 28 U.S.C. §§ 1331 and 1343(a).

5. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b).

## **Parties**

6. Plaintiff New Mexico Turn Around is a non-profit political action committee organized in the State of New Mexico. Garth Simms is the President of New Mexico Turn Around.

7. Defendant Amy B. Baily is the City Clerk for Albuquerque, New Mexico. The City Clerk is responsible for distributing matching funds under Article XVI and for ensuring that the reporting requirements contained in Article XVI and the City Clerk Regulations are met.

## **Facts**

8. Article XVI of the Albuquerque City Charter, entitled the Open and Ethical Election Code, governs campaign finance law for Albuquerque elections, and creates a public funding scheme for Albuquerque mayoral and city council candidates. Procedures implementing Article XVI are contained in the 2009 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code.

9. To participate in the public funding scheme, city council candidates must file a Declaration of Intent to participate in the scheme with the Albuquerque City Clerk by May 31st of the year in which the election is to be held. Article XVI Sec. 3(Q)(2), and Sec 4(A); City Clerk Regulations Part C(1). To qualify for public funding, the candidate must also “obtain Qualifying Contributions from a minimum of 1% of the City voters registered in the district that the Applicant Candidate desires to represent.” Article XVI Sec. 5(B); City Clerk Regulations Part C(7).

10. After June 1st, candidates for city council who are certified as participating in the public funding scheme receive a government funding distribution issued by the City Clerk in the amount of “\$1.00 per registered City voter residing in the district in which the Participating Candidate desires to

represent,” minus any contributions already received by the candidate. Article XVI, Sec. 12(A)(2) & 12(B)-(C).

**11.** In addition, participating candidates may also receive “matching funds” from the government based on speech made in opposition to their candidacy. Specifically, Article XVI provides that

when a Participating Candidate’s Opposing Funds in aggregate amount are greater than the funds distributed plus any Seed Money spent to a Participating Candidate in the same race, then the Participating Candidate is entitled to receive matching funds in the amount that the Opposing Funds exceed the distribution from the fund plus any Seed Money spent. Total Opposing Funds to a Participating Candidate in an election are limited to twice the amount originally distributed to that Candidate pursuant to Section 12 of the Open and Ethical Elections Code.

Article XV, Sec. 16; City Clerk Regulations Section 9(a). The OEEC further provides that “the amount of Opposing Funds is calculated by totaling the Expenditures made by [the opponent of the Participating Candidate who has the highest total of Expenditures], the amount spent on Independent Expenditures in support of that opponent and the amount spent on Independent Expenditures in opposition to the Participating Candidate.” Article XVI, Sec. 3(M).

**12.** Plaintiff New Mexico Turn Around is a non-profit political action committee organized in the State of New Mexico. New Mexico Turn Around intends to raise and spend funds on independent expenditures in opposition to Rey Garduno, a candidate for Albuquerque City Council, District 6 in 2011, as well as potentially other city council candidates in its discretion, because it believes it is the clearest way to communicate with the voters.

**13.** Because such expenditure are likely to trigger funds to Rey Garduno, New Mexico Turn Around will not make these independent expenditures. Therefore, the matching funds provision

irreparably harms New Mexico Turn Around by chilling the exercise of its First Amendment right to make independent expenditures in connection with the Albuquerque City Council election.

14. Plaintiff has no adequate remedy at law.

## COUNT I

### **THE MATCHING FUNDS PROVISION UNCONSTITUTIONALLY BURDENS AND PENALIZES SPEECH AND FAILS STRICT SCRUTINY.**

15. Plaintiff realleges the preceding paragraphs.

16. Section 16 of Article XVI of the Albuquerque City Charter provides that

when a Participating Candidate's Opposing Funds in aggregate amount are greater than the funds distributed plus any Seed Money spent to a Participating Candidate in the same race, then the Participating Candidate is entitled to receive matching funds in the amount that the Opposing Funds exceed the distribution from the fund plus any Seed Money spent. Total Opposing Funds to a Participating Candidate in an election are limited to twice the amount originally distributed to that Candidate pursuant to Section 12 of the Open and Ethical Elections Code.

Article XV, Sec. 16; City Clerk Regulations Section 9(a). The OEEC further provides that "the amount of Opposing Funds is calculated by totaling the Expenditures made by [the opponent of the Participating Candidate who has the highest total of Expenditures], the amount spent on Independent Expenditures in support of that opponent and the amount spent on Independent Expenditures in opposition to the Participating Candidate." Article XVI, Sec. 3(M).

17. The matching funds provision provides a direct, dollar-for-dollar public subsidy to publicly funded candidates whenever an expenditure is made by another candidate or independent group that either opposes the publicly funded candidate, or supports a traditionally funded candidate with a publicly funded opponent. Therefore, this statute amounts to an unconstitutional content-based regulation of political free speech, in that it treats speech differently depending on whether it opposes

or favors a publicly funded candidate. *Davis v. FEC*, 128 S. Ct. at 2771; *Scott v. Roberts*, 2010 WL 2977614 (11th Cir. July 30, 2010); *Green Party of Conn. v. Garfield*, 2010 WL 2737134 (2d. Cir. July 13, 2010); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994).

**18.** Under the First Amendment to the U.S. Constitution and *Buckley v. Valeo*, 424 U.S. 1 (1976), *Davis v. FEC*, 128 S. Ct. 2759 (2008), and their progeny, a public campaign financing scheme violates the right to free political speech where it goes beyond mere promotion of the voluntary use of public funding, and improperly injects the government into the political process by attempting to equalize the relative financial resources of candidates.

**19.** New Mexico Turn Around will suffer imminent injury to their First Amendment rights to free political speech and free association as a direct result of this statutory scheme. The City's payment of matching funds—which, unlike an independent expenditure, are directly controlled by the publicly funded candidate—neutralizes the effect of any such expenditure. The knowledge that making an expenditure that opposes a publicly funded candidate or supports a traditionally funded one will directly result in that publicly funded candidate receiving a dollar-for-dollar matching public subsidy (with no effect on that candidate's spending limit) creates a chilling effect on New Mexico Turn Around's free exercise of protected speech, and imposes a climate of self-censorship that is inimical to our American heritage of unfettered political discourse. In so doing, the statute also encroaches upon the ability of like-minded persons to pool their resources in furtherance of common political goals in violation of New Mexico Turn Around's right to freedom of association. *See Green Party of Conn. v. Garfield*, 2010 WL 2737134 (2d. Cir. July 13, 2010); *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994).

20. Additionally, the matching funds provision creates a content-based regulation of speech opposing a funded candidate that is not narrowly drawn to serve a compelling interest. *See Scott v. Roberts*, 2010 WL 2977614 (11th Cir. July 30, 2010); *Green Party of Conn. v. Garfield*, 2010 WL 2737134 (2d. Cir. July 13, 2010); *Day*, 34 F.3d at 1360-61. Therefore, the matching funds provision is an unconstitutional violation of the First and Fourteenth Amendments.

## **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully prays the Court to:

- (1) Declare Section 16 of Article XVI to the Albuquerque City Charter unconstitutional, facially, and as applied to Plaintiff;
- (2) Declare Part H(9) of the 2009 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code unconstitutional, facially, and as applied to Plaintiff;
- (3) Enjoin Defendants, their agents, and successors, from acting pursuant to Section 16 of Article XVI to the Albuquerque City Charter and Part H(9) of the 2009 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code;
- (5) Grant Plaintiff its costs of this action, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable authority; and
- (6) Grant Plaintiff such other relief as may be just and equitable.



Dated: June 17, 2011

Respectfully submitted,

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