United States District Court
District of New Mexico

Republican Party of New Mexico, **Republican Party of Doña Ana County**, **Republican Party of Bernalillo County**, **New Mexico Turn Around**, **New Mexicans for Economic Recovery PAC, Harvey Yates**, **Rod Adair**, **Conrad James**, **Howard James Bohlander,** and **Mark Veteto** *Plaintiffs*, ***v.*** **Gary King**, in his official capacity, New Mexico Attorney General, **Dianna Duran**, in her official capacity, New Mexico Secretary of State, and District Attorneys **Kari Brandenburg**, **Janetta Hicks**, **Amy Orlando**, and **Angela R. "Spence" Pacheco**, in their official capacities, *Defendants*.	**Civ. No. 1:11-cv-00900-WJ-KBM** **ORAL ARGUMENT REQUESTED**

Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction

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Introduction

This is a free speech and association case arising under the First and Fourteenth Amendments to the United States Constitution, as well as the Supremacy Clause of the Constitution of the United States. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment protects not only speech, but also association. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). And the Fourteenth Amendment incorporates the First Amendment, making it applicable to State and local governments. *See, e.g.*, *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925).

The Plaintiffs in this case want to engage in their proposed political speech and association activities *right now*, in the months leading up to the upcoming 2012 election, but are prohibited by New Mexico's Campaign Reporting Act as codified in Sections 1-19-25 to 1-19-36 of the New Mexico Statutes. These laws unconstitutionally restrict the Plaintiffs' First Amendment free speech and association rights by preventing them from engaging in their desired speech and association. They have therefore filed their lawsuit challenging the constitutionality of these laws and seek a preliminary injunction against their enforcement.

As the Supreme Court recognizes, "[t]here are short timeframes in which [election-related] speech can have influence." *Citizens United v. FEC*, 130 S.Ct. 876, 895 (2010). If the Plaintiffs must wait to speak and associate until the Court declares New Mexico's laws unconstitutional, the 2012 election may have passed and the Plaintiffs' First Amendment activity will have been "stifled." *Id.* A preliminary injunction is therefore required so the Plaintiffs may engage in their constitutionally-protected political speech and association in a timely fashion, while it may make a difference for the 2012 election.

Facts

As set forth more fully in the *Verified Complaint for Declaratory and Injunctive Relief* ("Compl."), the facts of this case are as follows:

The New Mexico Campaign Reporting Act (the "Act"), codified at New Mexico Statute Sections 1-19-25 to 1-19-36, imposes contribution limits on individuals and entities. (Compl. ¶¶ 21-23.) Specifically, the Act bars individuals or entities from making contributions greater than $5,000 to political committees, including political parties. N.M. Stat. § 1-19-34.7(A)(1). (Compl. ¶ 22.) It also prohibits political committees from making contributions greater than $5,000 to other political committees or candidates. N.M. Stat. § 1-19-34.7(A)(2). (Compl. ¶ 22.) And it bars persons, including political committees, from soliciting or accepting contributions greater than $5,000. N.M. Stat. § 1-19-34.7(C). (Compl. ¶ 22.) A knowing acceptance or solicitation, either directly or indirectly, of contributions greater than $5,000 constitutes a violation of the Act for which civil and criminal penalties may be imposed. N.M. Stat. §§ 1-19-34(C); 1-19-34.6; 1-19-36. (Compl. ¶ 24.)

The secretary of state, attorney general, and district attorneys may institute investigations and enforce these penalties. N.M. Stat. §§ 1-19-34.6; 1-19-36. (Compl. ¶¶ 15-17, 24.) Defandant Gary King is the New Mexico Attorney General. (*Id.* ¶ 15.) He has enforcement power to "institute a civil action in district court," assess fines, and institute criminal prosecutions for violations of the Act. N.M. Stat. §§ 1-19-34.6(A)–(C). (Compl. ¶ 15.) Defendant Dianna Duran is the New Mexico Secretary of State. (*Id.* ¶ 16.) She has enforcement power to "adopt and promulgate rules and regulations" in order "to implement the provisions of the [Act];" "initiate investigations to determine whether any provision . . . has been violated," and "conduct[ ] a thorough examination . . . of reports filed" in order "to determine compliance with the provisions of the [Act.]" N.M. Stat. §§ 1-19-26.2,

1-19-32.1, 1-19-34.4. (Compl. ¶ 16.) Defendants Kari Brandenburg, Janetta Hicks, Amy Orlando, and Angela R. "Spence" Pacheco are District Attorneys. (*Id.* ¶ 17.) They have enforcement power to "institute a civil action in district court" and assess fines for violations of the Act, as well as institute criminal prosecutions for violations of the Act. N.M. Stat. §§ 1-19-34.6(B)–(C); 1-19-36(A). (Compl. ¶ 17.) The Defendants are sued in their official capacities. (*Id.* ¶ 18.)

The Republican Party of New Mexico (the "NM-GOP"), the Republican Party of Doña Ana County, and the Republican Party of Bernalillo County are each political parties. (*Id.* ¶ 27.) The NM-GOP nominates, endorses, supports, and makes contributions to candidates seeking elected office in the state of New Mexico particularly in competitive races. (*Id.* ¶ 28.) Likewise, the Republican Party of Doña Ana County and the Republican Party of Bernalillo County endorse, support, and make contributions to candidates seeking elected office in the State of New Mexico. (*Id.*) They, however, tend to focus on candidates for local races in their respective counties, as well as candidates for state office who will represent their respective counties. (*Id.*)

In order to support and advance candidates who hold principles in common with the NM-GOP, the NM-GOP raises money by soliciting and accepting contributions from individuals, entities, and political committees so that it may make contributions to support and elect its candidates. (*Id.* ¶ 32.) In the past, prior to the enactment of the Act, the NM-GOP has solicited and accepted contributions in amounts greater than $5,000 per election. (*Id.*) The NM-GOP does not allow contributors to earmark contributions for particular candidates. (*Id.*) Rather, the NM-GOP determines how contributions made to it will be used, and which candidates it will support. (*Id.*) The NM-GOP wants to again solicit and accept contributions greater than $5,000 from individuals, entities, and political committees to support its efforts for the 2012 primary and general elections. (*Id.*) This includes

soliciting and accepting contributions greater than $5,000 from the Republican National Committee ("RNC"). (*Id.* ¶ 34.) Contributions from the RNC would be used to support candidates for election to Federal office. (*Id.*) The NM-GOP would solicit and accept contributions greater than $5,000 from individuals, entities, and political committees (including the RNC) right now but for New Mexico's contribution limit and the penalties imposed for violating it.[1] (*Id.* ¶¶ 32, 34.)

Mr. Harvey Yates, Jr., an individual who resides in Albuquerque, New Mexico, (*id.* ¶ 10), wants to make a contribution greater than $5,000 right now to the NM-GOP, (*id.* ¶ 33.) He is ready, willing, and able to do so. (*Id.*) And the NM-GOP wants to solicit and accept Mr. Yates' contribution, right now, in an amount greater than $5,000. (*Id.*) But under New Mexico law, Mr. Yates cannot make his contribution and the NM-GOP cannot accept it. N.M. Stat. § 1-19-34.7(A)(1). (Compl. ¶ 33.)

The NM-GOP wants to make contributions greater than $5,000 right now to the Republican Party of Doña Ana County and the Republican Party of Bernalillo County (together, "Local Parties") to aid the Local Parties in their efforts to elect Republican candidates representing their districts. (Compl. ¶ 39.) The Local Parties want to receive the NM-GOP's planned contributions that are greater than $5,000 right now. (*Id.*) Although the NM-GOP and the Local Parties are each Republican parties, and so identify with the national Republican platform, they are independent parties that are autonomous from one another. (*Id.* ¶ 27.) The NM-GOP would make its desired contributions, and the Local Parties would receive them, but New Mexico law limits contributions

[1]Opinion Number 10-03 explicitly states "[T]he [Act] prohibits the Republican National Committee from contributing to the NM-GOP in an amount greater than five thousand dollars during a primary election or during general election." (Compl. ¶ 35, Ex. 1, at 3.)

from the NM-GOP to the other political parties, including the Local Parties, to no more than $5,000 each per election. (*Id.* ¶ 39.) *See* N.M. Stat. § 1-19-34.7(A)(2)(b).

The New Mexicans for Economic Recovery PAC ("NMER PAC")[2] is a political committee established solely for the purpose of making independent expenditures ("IE"s).[3] (Compl. ¶ 42.) NMER PAC wants to solicit and accept contributions greater than $5,000 for its IEs. (*Id.* ¶ 43.) It would solicit and accept such contributions right now, but for New Mexico's prohibition. N.M. Stat. § 1-19-34.7(A). (Compl. ¶ 43.) Mr. Mark Veteto, an individual who resides in Hobbs, New Mexico, (*Id.* ¶ 14), wants to make a contribution greater than $5,000, right now, to NMER PAC. (*Id.* ¶ 44.) He is ready, willing, and able to do so. (*Id.*) NMER PAC wants to solicit and accept Mr. Veteto's contribution, right now, in an amount greater than $5,000. (*Id.*) But New Mexico law prohibits soliciting, accepting or making such a contribution. N.M. Stat. § 1-19-34.7(A)(1). (Compl. ¶¶ 43-44.)

New Mexico Turn Around ("NMTA") is also a political committee.[4] (*Id.* ¶ 45.) NMTA wants to make IEs supporting or opposing candidates for election in the 2012 general election. (*Id.* ¶ 49.)

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[2]NMER PAC is an IE committee organized by the NM-GOP to shape the future of economic development in the State of New Mexico. (Compl. ¶ 42; Ex. 2, *New Mexicans for Economic Recovery PAC Registration Form*). It operates completely independently of the NM-GOP, candidates, officeholders, NM-GOP officers and staff, NM-GOP's Executive Committee, and the NM-GOP chairman. (Compl. ¶ 42.) Board members of NMER PAC are solely responsible for making the IEs independently of NM-GOP or any candidate direction or control. (*Id.*) It will make only independent expenditures, and will not make any other expenditures or contributions. (*Id.*)

[3]New Mexico law recognizes an independent expenditures as "an expenditure made by a person separately and independently of a candidate[.]" (Compl. ¶ 41, Ex. 1, at 5.)

[4]New Mexico Turn Around ("NMTA") is a New Mexico Political Committee, which was founded in 2001, as an exempt organization under Section 527 of the U.S. Internal Revenue Code of 1986. (Compl. ¶ 45.) NMTA is regulated as a "political committee" under New Mexico law and as such reports to the New Mexico Secretary of State. (*Id.*) NMTA supports and opposes only candidates for state offices. (*Id.*)

NMTA has established a segregated account into which contributions for the designated purpose of making IEs will be deposited. (*Id.* ¶ 48.) This account is maintained solely for the purpose of making IEs. (*Id.*) And it will remain segregated from monies able to be used for candidate contributions. (*Id.*) In order to fund its IEs, NMTA wants to solicit and accept contributions now, in amounts greater than $5,000 from individuals, entities and other political committees, for the designated purpose of making IEs. (*Id.* ¶ 49.) It would do so, but for the Act's contribution limit and the penalties it imposes. (*Id.* ¶ 49.) *See* N.M. Stat. §§ 1-19-34.7(A)(1)–(2). Mr. Howard Bohlander, an individual who resides in Santa Fe, New Mexico, (Compl. ¶ 13), wants to make a contribution greater than $5,000, earmarked for the purpose of making IEs, right now to NMTA. (*Id.* ¶ 50.) He is ready, willing, and able to do so. (*Id.*) And NMTA wants to solicit and accept Mr. Bohlander's contribution, greater than $5,000 and designated for the purpose of making IEs, right now. (*Id.*) But New Mexico law prohibits soliciting, accepting or making such a contribution. N.M. Stat. § 1-19-34.7(A)(1).

In addition to the planned activity recited herein, the Plaintiffs intend to do materially similar future activity and have no adequate remedy at law. (Compl. ¶¶ 51-52.)

Argument

In the Tenth Circuit, a plaintiff seeking a preliminary injunction must establish: (1) he is likely to succeed on the merits; (2) likely to suffer irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (*citing Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365, 374 (2008)). Because the Plaintiffs meet this standard, a preliminary injunction should issue.

I. The Plaintiffs Enjoy Likely Merits Success.

A. New Mexico's Contribution Limit Is Unconstitutional as Applied to Contributions Made to NM-GOP.

The Supreme Court has recognized that "[t]he First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). Without such a right, "representative democracy in any populous unit of governance is unimaginable." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *see also* Clinton Rossiter, Parties and Politics in America 1 (1960) (declaring that there is "[n]o America without democracy, no democracy without politics, and no politics without parties").

Political parties unquestionably play a "unique role in serving" the principles of the First Amendment. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) ("*Colorado-I*") (Kennedy, J., concurring) They allow individuals to do collectively what they cannot do independently; that is, "combine[] its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 453 (2001) ("*Colorado-II*"). The unique electoral role of political parties is also embodied in a host of federal laws. Importantly, with respect to the financing of federal election campaigns, political parties operate under contribution limits of greater magnitude than those provided to any other entity. For example, national parties enjoy a $30,800 annual limit[5] on contributions from an individual, which is over six times greater than the $5,000

[5] 2 U.S.C. § 441a(a)(1)(B) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See* "Contribution Limits for 2011-2012," *available at* http://www.fec.gov/info/contriblimits1112.pdf (*last visited* October 11, 2011).

annual contribution limit[6] applicable "to any other political committee." Further, national parties enjoy a $15,000 annual limit[7] on contributions from multi-candidate political committees, compared to the $5,000 annual limit[8] on such contributions when provided "to any other political committee."

The unique and central role political parties play in the American electoral system justifies these special, robust contribution limits. Indeed, campaign finance laws should strengthen the role of parties in elections and further "Congress' general desire to *enhance* . . . [the] important and legitimate role for political parties in American elections." *Colorado-I*, 518 U.S. at 618 (citation omitted) (emphasis added). New Mexico, however, has enacted limits restricting contributions to political parties to $5,000, which is the same amount an individual, entity, or political committee can contribute to any other political committee. Instead of "enhanc[ing] . . . [the] important and legitimate role for political parties," New Mexico has reduced political parties to the level of any other political committee. For the reasons explained *infra*, this is unconstitutional.

1. The Contribution Limit Is Subject To Strict Scrutiny, Which It Fails.

a. Strict Scrutiny Applies.

Contributions are both political speech and association. *Randall v. Sorrell*, 548 U.S. 230, 246 (2006); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The Supreme Court has called contributions "symbolic" speech and "general expression[s] of support," *Buckley*, 424 U.S. at 21, and explained that contributions "lie closer to the edges than to the core of political expression[,]" *FEC v.*

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[6]2 U.S.C. § 441a(a)(1)(C). An individual may give a total of $10,000 to state, district and local political parties, which is twice the limit applicable to "any other political committee." 2 U.S.C. § 441a(a)(1)(D).

[7]2 U.S.C. § 441a(a)(2)(B).

[8]2 U.S.C. § 441a(a)(2)(C).

Beaumont, 539 U.S. 146, 149 (2003). But the Court has always recognized that contributions are political speech. Consequently, limits on contributions are burdens on political speech as well as political association. *Randall*, 548 U.S. at 246; *Buckley*, 424 U.S. at 14-15.

Traditionally, contribution limits were evaluated under intermediate scrutiny, requiring Government to prove its limits are "closely drawn" to a "sufficiently important interest." *Randall*, 548 U.S. at 247. However, the Supreme Court recently ruled that laws that burden political speech are subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898.[9] This level of scrutiny requires that Government prove its law is "narrowly tailored" to a "compelling interest," *id*., and employs "the least restrictive means" to further the interest, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

At least two district courts have ruled that strict scrutiny applies to post-*Citizens United* contribution limit challenges. One famously called *Citizens United* "a game changer" as it applied strict scrutiny to contribution limits, finding them unconstitutional. *Family PAC v. Reed*, No. C09-5662RBL, at 39, 43-45, 48 (D. Wash. September 1, 2010), *appeal docketed*, Nos. 10-35832, 10-35893 (9th Cir. Sept. 17, 2010) (*attached as* Ex. 3). Another recently applied strict scrutiny to a challenged contribution limit, citing *Citizens United*, and granted a preliminary injunction. *Carey v. FEC*, __F.Supp.2d__, 2011 WL 2322964 at *4 and *7 (D.D.C. 2011). This Court should likewise follow *Citizens United*'s rule and apply strict scrutiny to New Mexico's contribution limits.

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[9]The *Citizens United* Court emphatically declared that "Laws that burden political speech are subject to strict scrutiny[.]" *Citizen United*, 130 S. Ct. at 898 (internal quotation omitted). While it is true that the Court was considering an expenditure limit, not a contribution limit, the Court deliberately used extremely broad language. It did not say, 'Laws that burden expenditure limits are subject to strict scrutiny.' Rather, the Court held that "Laws that burden *political speech* are subject to strict scrutiny."

b. The Limit As Applied to Contributions to The NM-GOP Fails Strict Scrutiny.

To survive strict scrutiny, contribution limits must be "narrowly tailored" to a "compelling interest" and employ the "least restrictive means." *Citizens United*, 130 S.Ct. at 898; *Gonzales*, 546 U.S. at 429. The *only* interest that will support restrictions on political speech and association is the interest in preventing quid-pro-quo financial corruption or its appearance associated with "large contributions" given to "candidates" for a political "quid pro quo." *Citizens United*, 130 S.Ct. at 901-02, 909 (*citing Buckley*, 424 U.S. at 25).

When the Supreme Court has upheld limits on contributions, it has *always* done so because of concern that contributions might be given to secure a quid pro quo from candidates, or might appear to have been given for that purpose. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297-98 (1981) ("*CARC*") (explaining that "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment[,]" and that narrow exception "relates to the perception of undue influence of large contributors to a candidate"). Thus, the Court upheld limits on contributions given directly to candidates. *Buckley*, 424 U.S. 1; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Beaumont*, 539 U.S. 146; *McConnell v. FEC*, 540 U.S. 93 (2003). The Court also upheld a limit on contributions to political action committees, or PACs, because it recognized in the facts of that case a danger that contributions to PACs might be used to circumvent valid limits on individual contributions to candidates. *Cal. Medical Assoc. v. FEC*, 453 U.S. 182, 197-98 (1981) ("*Cal Med*"). Similarly, the Court upheld a limit on contributions to political parties because, on the facts of that particular case, there was a danger that the parties might become conduits for individuals to circumvent valid limits on individual contributions to

candidates. *Colorado-II*, 533 U.S. at 462. But the Court has consistently struck limits on contributions that were not given to candidates and could not circumvent valid limits on contributions to candidates. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) ("*Bellotti*") (striking ban on corporate contributions to ballot measure committee); *CARC*, 454 U.S. 290 (striking limit on individual contributions to ballot measure committee). In fact, the Court recognized that there is no risk of quid pro quo corruption when contributions are not given to candidates or capable of being earmarked for particular candidates. *Bellotti*, 435 U.S. at 790; *CARC*, 454 U.S. at 299.

It is unclear whether the anticircumvention interest, accepted in *Cal Med* and *Colorado-II*, remains valid following *Citizens United*, which noted that political speech regulations are always underinclusive to the anticircumvention interest. 130 S.Ct. at 912. The Court has elsewhere held that regulations that are underinclusive fail scrutiny. *Republican Party of Minnesota v. White*, 536 U.S. 765, 780 and 788 (2002). Even if the anti-circumvention interest remains valid, New Mexico's limit is unconstitutional because it is not narrowly tailored. The State has less intrusive means available to prevent circumvention of valid individual contribution limits. For instance, New Mexico law provides that any contribution made to a political party and earmarked for a particular candidate is treated as a contribution made directly to that candidate. *See* N.M. Stat. § 1-19-34.7(B). Regardless, the anticircumvention interest is not present with regard to contributions made to the NM-GOP because the NM-GOP does not allow donors to earmark contributions for particular candidates. (Compl. ¶ 32.) So the NM-GOP cannot become a conduit for donors to circumvent valid individual

contribution limits, as the political parties in *Colorado-II* or the PACs in *Cal Med* could. The anticircumvention interest thus has no application to contributions made to the NM-GOP.

New Mexico can only justify its limit as applied to contributions to the NM-GOP if the limit furthers the interest in preventing the type of corruption or appearance of corruption associated with large contributions to *candidates*. But contributions to political parties cannot be equated with contributions to candidates because "[a] political party has its own traditions and principles that transcend the interests of individual candidates and campaigns." *Colorado-I*, 518 U.S. at 630 (Kennedy, J., concurring in judgment and dissenting in part). And the anticorruption interest cannot justify limits on contributions that are not given to particular candidates, nor earmarked for them. *Bellotti*, 435 U.S. at 790; *CARC*, 454 U.S. at 299. The State therefore cannot meet its burden to demonstrate an interest in the contribution limit as it applies to contributions made to the NM-GOP.

New Mexico's contribution limit does not target only contributions made to candidates. Rather, it is overbroad, limiting also contributions made by persons, entities, and political committees to political parties, including the NM-GOP. But there is no interest in limiting contributions to the NM-GOP, when—as here—those contributions cannot be earmarked for particular candidates. The State thus lacks a constitutionally permissible interest to justify this burden on political speech and association. The limits therefore fail strict scrutiny analysis and are unconstitutional.

2. Even If Intermediate Scrutiny Applies, the Limit Fails.

Even if intermediate scrutiny analysis is proper, New Mexico's limit is still unconstitutional as applied to contributions made to the NM-GOP. Intermediate scrutiny requires that Government "demonstrate[]" its limit is "closely drawn" to a "sufficiently important interest." *Randall*, 548 U.S.

at 247. Yet, as explained *supra*, there is no interest in limiting contributions not made to candidates nor allowed to be earmarked for particular candidates. New Mexico's contribution limit is unconstitutional as applied to contributions made to the NM-GOP even under intermediate scrutiny.

B. New Mexico's Contribution Limit Is Unconstitutional as Applied to Transfers of Money or Contributions Made By One Political Party to Another Political Party.

1. The Contribution Limit Is Subject To Strict Scrutiny, Which It Fails.

Contributions are both political speech and association. *Randall*, 548 U.S. at 246; *see supra*, Part I.A.1.a. So restrictions on contributions should be evaluated under strict scrutiny, *see supra*, *id*., because "laws that burden political speech are subject to strict scrutiny," *Citizens United*, 130 S. Ct. at 898. The *only* constitutionally cognizable interest in restricting political speech and association is the anticorruption interest, which is defined as financial, quid pro quo corruption. *Id*. at 901, 909; *see also supra*, Part I.A.1.b. Potential for financial, quid pro quo corruption arises only with respect to contributions to candidates. *E.g., Buckley* , 424 U.S. at 25-27; *see also supra*, Part I.A.1.b. Therefore limits may be constitutionally applied only to contributions that are made to candidates or that are earmarked for candidates. *See supra*, Part I.A.1.b. Political parties like the NM-GOP and the Local Parties are not candidates. *See Colorado-I*, 518 U.S. at 630 (Kennedy, J., concurring in judgment and dissenting in part). Consequently, New Mexico cannot meet its burden to show that its limit furthers a compelling state interest, because there simply is no possibility of corruption when one political party makes contributions to another political party.

Even if New Mexico can prove limits on contributions from one political party to another implicate an anti-corruption interest, applying the limit to such contributions still fails scrutiny because it is not narrowly tailored. The Supreme Court has upheld contribution limits to entities

other than candidates as a means to prevent circumvention of valid individual contribution limits. *Colorado II*, 533 U.S. at 456; *see supra*, Part I.A.1.b. But New Mexico's limit cannot be sustained by an interest in preventing circumvention because the anticircumvention interest is constitutionally infirm, if not invalid, following *Citizens United* . *See supra*, Part I.A.1.b. Even if the anticircumvention interest remains valid, New Mexico's limit is unconstitutional because it is not narrowly tailored. *See supra*, Part I.A.1.b. Besides, where the contribution in question is made from one party to another party, as here, circumvention is even less of a concern. Circumvention of a valid individual contribution limit via a party-to-party transfer would require the individual to funnel money through multiple political parties—an unlikely prospect. There simply is no constitutionally cognizable interest to justify the limit on party to party transfers. It therefore fails strict scrutiny analysis and is unconstitutional.

2. Even If Intermediate Scrutiny Applies, the Limit Fails.

Intermediate scrutiny requires that Government "demonstrate[]" its limit is "closely drawn" to a "sufficiently important interest." *Randall*, 548 U.S. at 247. Yet, as explained *supra*, there is no interest in limiting contributions that are not made to candidates nor earmarked for particular candidates. New Mexico's contribution limit is therefore unconstitutional as applied to transfers or contributions from one political party to another even under intermediate scrutiny.

3. The Contribution Limit As Applied To Transfers of Money From a National Party To a State Party for Federal Campaigns Is Preempted By FECA.

Opinion Number 10-03 states "[T]he [Act] prohibits the Republican National Committee from contributing to the [NM-GOP] in an amount greater than five thousand dollars during a primary election or during general election." (Compl. ¶ 35, Ex. 1, at 3.) However, the Federal Elections

Campaign Act ("FECA") "supersedes and preempts" application of the Act Section 1-19-34.7 to monetary transfers from a national party to the state party entity where the money is to be used to support candidates for election to Federal office, as it will be here. 2 U.S.C. § 453; (Compl. ¶ 34.)

To implement FECA's preemption provision, the Federal Elections Commission promulgated rules providing that "(b) Federal law supersedes State law concerning the– . . . (3) Limitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 108.7. *See also Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (holding FECA preempts Minnesota Campaign Reform Act, which allowed federal candidates to receive public funding in exchange for agreeing to limit campaign expenditures). FECA permits unlimited transfers of money from national political parties to state political parties. 2 U.S.C. Section 441a(a)(4); *See also* 11 C.F.R. § 102.6 (stating "transfers of funds may be made without limit on amount between or among a national party committee, a State party committee and/or any subordinate party committee"). New Mexico's $5,000 limit therefore cannot be applied to the transfer of money the NM-GOP wishes to solicit and accept from the RNC where that money will be used to support candidates for election to Federal office. Section 1-19-34.7(A)(2)(b) is preempted by FECA as it applies to contributions or transfers from the RNC to the NM-GOP to be used to support candidates for federal office.

C. New Mexico's Contribution Limit Is Unconstitutional as Applied To Contributions Made By The NM-GOP To Its Candidates.

1. Strict Scrutiny Review Applies.

Political parties exist "for the advancement of common political goals and ideas." *Timmons*, 520 U.S. at 357. If parties were unable to promote candidates who espouse the political views of their members, representative democracy would be "unimaginable." *California Democratic Party*, 530

U.S. at 574. Limits on parties' ability to make contributions to their candidates must therefore be carefully evaluated. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 486 (D. Vt. 2000). Historically, these limits were subject to intermediate scrutiny. *Colorado-II*, 533 U.S. at 456. However, because contributions involve both association and political speech, *Randall*, 548 U.S. at 246, and the Court recently ruled that laws that burden political speech are subject to strict scrutiny, *Citizens United*, 130 S. Ct. at 898, the Plaintiffs assert that strict scrutiny review is appropriate for contribution limits. *See supra*, Part I.A.1.a.

2. The Limits Are Unconstitutional Under Either Strict Or Intermediate Scrutiny.

a. New Mexico Has No Constitutionally Cognizable Interest In Limiting The NM-GOP's Contributions To Its Candidates.

Regardless, the $5,000 contribution limit is unconstitutional as applied to the NM-GOP's contributions to its candidates under either level of scrutiny because New Mexico has no interest in it. *Citizens United* ruled that the *only* constitutionally cognizable interest in restricting political speech and association is the interest in preventing quid-pro-quo corruption. 130 S.Ct. at 901, 909. But parties cannot corrupt their candidates; the very reason parties support candidates is because the candidates *already* agree with the party's philosophy and goals. As the Supreme Court explained, "the basic object of a political party" is to "elect whichever candidates the party believes would best advance its ideals and interests." *Randall*, 548 U.S. at 257-58. So parties support candidates who agree with their political philosophy, *Anderson v. Celebrezze*, 460 U.S. 780, 821 (1983) (Rehnquist, J., dissenting), and will "make the party's message known and effective," *Colorado-I*, 518 U.S. at 628 (Kennedy, J., concurring in the judgment and dissenting in part). Political parties do not corrupt their candidates by buying their votes: the candidates *already* agree with the party, which is why it

supports them. Elected officials vote in accordance with their party's political philosophy because they share the philosophy, not because their party gave them money. It is simply preposterous to suppose that political parties corrupt their own candidates by making contributions to them.

The Supreme Court seemed to recognize this principle when it upheld the federal limits on party contributions in *Colorado-II*. The Court never suggested in that decision that contributions from parties corrupt their candidates, although that would have been the easiest way for it to dispose of the case. Rather, the Court found an interest in preventing individuals from circumventing individual contribution limits by using the party as a conduit. *Colorado-II*, 533 U.S. at 465. But the anticircumvention interest cannot support New Mexico's contribution limit as applied to the NM-GOP's contributions to its candidates for two reasons. First, the anticircumvention interest is constitutionally infirm, if not invalid, following *Citizens United*. *See supra*, Section I.A.1.b. Second, the "actual political conditions" involved in *Colorado-II* were such that donations could be funneled through the political party to its candidates, with donors to the party designating to which candidate the money should be given. *Colorado-II*, 533 U.S. at 462. That danger is not present here, where the NM-GOP does not allow donors to earmark contributions.[10]

b. Even If an Interest Exists, New Mexico's Limit Is Not Properly Tailored.

Even if New Mexico has an anticircumvention interest in limiting contributions from political parties to their candidates, its $5,000 limit is not properly tailored under either level of scrutiny. The Supreme Court has recognized that political parties exist in part to allow individuals to do

[10]In addition, New Mexico law provides that any contribution made to a political party and earmarked for a particular candidate is treated as a contribution made directly to that candidate. *See* N.M. Stat. § 1-19-34.7(B).

collectively what they cannot do independently: "a party combines its members' power to speak by aggregating contributions and broadcasting messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could, using such mechanisms as speech coordinated with a candidate," thereby making their members' political advocacy more effective. *Colorado-II*, 533 U.S. at 453. When Government imposes the same limit on individuals and political parties, the parties' *raison d'etre* is undermined in a way the Constitution will not permit.

This principle was recognized by the Supreme Court in *Randall v. Sorrell*, 548 U.S. 230. In that case, the Court evaluated Vermont's limits on political party contributions to candidates under intermediate scrutiny and ruled them unconstitutional, 548 U.S. at 236, in part because—just like in New Mexico—the political parties were subject to the same limits as individual contributors, *id.* at 238. The Court distinguished *Colorado-II*, which upheld the federal limits on party contributions to candidates. *Id.* at 258-59. The Court explained that the limits in *Colorado-II* "were much higher than the federal limits on contributions from individuals to candidates[.]" *Id.* at 258.[11] This was

[11]The limits at issue in *Colorado-II*, codified at 2 U.S.C. 441a, provide significantly more robust limits for political parties than individuals. For example, in the upcoming 2012 general election, national political parties can make direct cash contributions of $43,100 to their candidates for Senate, while individuals are limited to $2,500. 2 U.S.C. 441a(a)(1)(A), 441a(h) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See also* "Contribution Limits for 2011-12," *available at* http://www.fec.gov/info/contriblimits1112.pdf (*last visited* Oct. 11, 2011). Plus, during 2011, national political parties can make coordinated expenditures with their Senate candidates, above the contribution limits, in amounts that range from $88,400 for candidates in Alaska and Delaware to $2,458,500 for candidates in California. 2 U.S.C. 441a(d)(3)(A) (adjusted for inflation pursuant to 2 U.S.C. 441a(c)(1)(B)(i)). *See also* "Coordinated Party Expenditure Limits for 2011 General Election Senate Nominees," *available at* http://www.fec.gov/info/charts_441ad_2011.shtml (*last visited* October 11, 2011). So the total amount national political parties can contribute to their candidates for Senate ranges from $131,500 to $2,501,600, which is between 52 and 1,000 times the $2,500 that individuals can contribute.

important, because it "reflect[ed] an effort by Congress to balance (1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with (2) the need to prevent the use of political parties 'to circumvent contribution limits that apply to individuals.'" *Id*. at 258-59. But Vermont's law, "by placing identical limits upon contributions to candidates, whether made by an individual or by a political party, gives to the former consideration *no weight at all*." *Id*. at 259 (emphasis in original). The Court ruled that subjecting political parties to the same contribution limits as individuals "would reduce the voice of political parties in Vermont to a whisper." *Id*. (internal quotation and citation omitted). New Mexico has done the same. It does not matter that New Mexico's contribution limit is higher than Vermont's was; the constitutionally significant fact is that New Mexico imposes the same limit on political parties as individuals, just as Vermont did. Thus, two individual contributors can out-speak a political party in New Mexico, just as could happen in Vermont. This is not constitutionally permissible. *Id*. at 236.

The *Randall* Court noted numerous constitutional problems with imposing identical limits on political parties and individuals. Already mentioned is the fact that identical limits reduce the voice of a political party to a whisper because two individuals can out-speak the party. The Court was also concerned that identical limits for political parties and individuals "inhibit collective political activity" by preventing political parties from providing "meaningful assistance" to their candidates. *Id*. at 258. This leads to another problem: identical contribution limits directly threaten the right of citizens to associate in a political party for the purpose of electing candidates. *Id*. at 256. Using pooled money from its members to "elect whichever candidates the party believes would best advance its ideals and interests" is, after all, "the basic object of a political party." *Id*. at 257-58. But

when political parties are restricted to the same contribution that a single individual may make, they cannot provide meaningful assistance to their candidates and so their reason for existing is undermined. This imperils the right to associate in a political party, since the benefit of association is eliminated by the limits on the ability of parties to assist their candidates. *Id*. It also threatens our democracy. *California Democratic Party*, 530 U.S. at 574 (explaining that if parties were unable to promote candidates who espouse the political views of their members, representative democracy would be "unimaginable"). Also, identical contribution limits for political parties and individuals discourages small-money donors from contributing to political parties, because the donors recognize that the party is not able to effectively assist their candidates. *Randall*, 548 U.S. at 257.

The *Randall* Court ruled that Vermont's contribution limits, which imposed identical limits on contributions to candidates regardless of whether they were made by political parties and individuals, "burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance." *Id*. at 262. New Mexico's limits likewise impose the same limit on political parties and individuals. It is therefore unconstitutional as applied to contributions made by the NM-GOP to its candidates under strict or intermediate scrutiny because it is not properly tailored to whatever interest the State has in limiting contributions.

D. New Mexico's Contribution Limit Is Unconstitutional as Applied to Contributions Made for the Purpose of Independent Expenditures.

New Mexico law prohibits NMER PAC and NMTA from soliciting or accepting contributions in amounts greater than $5,000 for the purpose of making independent expenditures ("IEs").[12] N.M.

[12]An "independent expenditure" is an expenditure that is not coordinated with any candidate or candidate's committee for communications that expressly advocate the election or defeat of a clearly identified candidate. *See* 2 U.S.C. § 431(17) (definition).

Stat. §§ 1-19-34.7(A)(1)-(2). This contribution limit is unconstitutional as applied to contributions designated for IEs, as well as contributions made to committees that only make IEs. *Citizens United*, 130 S. Ct. 876; *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C.Cir. 2010).

1. Contributions Made for Independent Expenditures Are Noncorrupting.

The making of independent expenditures is political speech. *Citizens United*, 130 S. Ct. at 897 (recognizing that a ban on IEs is a ban on speech). *See also Long Beach*, 603 F.3d at 687 (*citing Emily's List v. FEC*, 581 F.3d 1, 5 (D.C. Cir. 2009) ("That political spending is constitutionally protected 'speech' has become a 'cardinal tenet' of the Supreme Court's campaign finance jurisprudence."). The only constitutionally cognizable interest in restricting political speech is the anticorruption interest associated with large contributions to candidates. *Citizens United*, 130 S. Ct. at 901-02. No other interest supports restricting political speech. *Id*. at 903-12. But the anticorruption interest has no application to IEs, because IEs are, as a matter of law, noncorrupting. *Id*. at 909 (ruling that "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

It is not only IEs that are noncorrupting: contributions earmarked for IEs, or made to committees making only IEs, are noncorrupting, too. Justice Blackmun recognized this in his *Cal Med* concurrence when he wrote that "contributions to a committee that makes only independent expenditures pose no such threat" of "actual or potential corruption." *Cal Med*, 453 U.S. at 203 (Blackmun, J., concurring). Courts of Appeal have also recognized this principle. As the D.C. Circuit

explained, "In light of the Court's holding as a matter of law [in *Citizens United*] that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." *SpeechNow.org*, 599 F.3d at 694. This is because "[t]he Court has effectively held that there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" *Id*. at 694-95. So "[g]iven this analysis from *Citizens United*, we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group[.]" *Id*. at 695. *See also Thalheimer*, 645 F.3d at 1121 (explaining that contributions to IE committees cannot corrupt candidates because the committees act independently of candidates); *Long Beach*, 603 F.3d at 699 ("the City's anti-corruption rationale does not support the LBCRA's limitations on contributions to the Chamber PACs [making IEs]"); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir.2008) (ruling that it is "implausible that contributions to independent expenditure political committees are corrupting.").

2. No Constitutionally Cognizable Interest Supports the IE Contribution Limits.

Contributions are both political speech and association. *Randall*, 548 U.S. at 246; *see supra*, Part I.A.1.a. Limits on contributions should therefore be evaluated under strict scrutiny, *see supra*, *id*., because "laws that burden political speech are subject to strict scrutiny," *Citizens United*, 130 S. Ct. at 898. Several courts have recognized this principle, *see supra*, Part I.A.1.a, including *Carey v. FEC*, __F.Supp.2d__, 2011 WL 2322964 (D.D.C. 2011), which held that strict scrutiny is proper for limits on contributions to committees making IEs. *Id*. at *4 and *7. Regardless, restrictions on contributions designated for IEs, or made to committees making only IEs, are unconstitutional under

any level of scrutiny. *Thalheimer*, 645 F.3d at 1118 (unnecessary to determine level of scrutiny because limits on contributions made for IEs are unconstitutional under any level); *Long Beach*, 603 F.3d at 693 (same); *SpeechNow*, 599 F.3d at 696 ("No matter which standard of review governs contribution limits, the limits on contributions to SpeechNow cannot stand.").

Because the anticorruption interest is the only constitutionally cognizable interest in restricting political speech, and the interest cannot support limits on IEs or on contributions to those making IEs, *see, e.g.*, *SpeechNow.org*, 599 F.3d at 694, New Mexico's contribution limits are unconstitutional as applied to NMER PAC, which only makes IEs. Similarly, the contribution limits are unconstitutional as applied to contributions made to NMTA that are earmarked by the donor for IEs.

II. Plaintiffs Will Suffer Irreparable Injury If Injunctive Relief Is Denied.

Irreparable harm is established where, as here, First Amendment freedoms are impermissibly burdened. "The loss of First Amendment freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 & n.2 (10th Cir. 2001); *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Cmty. Commc'n Co. v. City of Boulder*, 660 F.2d 1370, 1380 (10th Cir. 1981). Therefore, when a plaintiff states a colorable First Amendment claim, the risk of irreparable injury is to be presumed. *Utah Licensed Beverage Ass'n*, 256 F.3d at 1076; *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citations omitted).

The fact that First Amendment rights are burdened and chilled, as they are in this case establishes the preliminary injunction "irreparable harm" standard. Each of the plaintiffs wants to engage in constitutionally protected speech *right now*, and would do so, except that the law prevents them. Their speech is burdened and chilled and they have stated a colorable First Amendment claim. Thus, under the Tenth Circuit Court of Appeals' First Amendment jurisprudence, irreparable injury has occurred and will continue to occur until an injunction issues.

III. The Balance of Harms Favors Issuance of Injunctive Relief.

The Plaintiffs have established both likelihood of success on the merits as well as a clear irreparable injury. In addition, the balance of harms tips decidedly in favor of the Plaintiffs. In the Tenth Circuit, "the [government's] *potential* harm must be weighed against [plaintiffs'] *actual* First Amendment injury." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007) *rvs'd other grounds by* 555 U.S. 460 (2009). Where the government's harm is speculative, as it is here, it cannot outweigh an injury to the First Amendment rights of plaintiffs who have established a substantial likelihood of success on the merits. *See id.*

If preliminary injunctive relief is not granted, and the Court later finds that the challenged laws impermissibly infringe constitutional rights, the Plaintiffs will have suffered irreparable harm. And at that point, this Court will be unable to make things right again. By contrast, if this Court grants preliminary injunctive relief and later finds against the Plaintiffs, the Defendants will not have suffered any real hardship, because the State has no interest that would be harmed.

Because the State will not suffer harm if an injunction is granted, but the Plaintiffs will suffer harm in the absence of injunctive relief, the balance of hardships favors the Plaintiffs. When

plaintiffs establish that a case raises First Amendment issues, as the Plaintiffs have in this case, the Court should presume that the balance of harms tips in their favor. *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002).

IV. An Injunction Is in the Public Interest.

Finally, Plaintiffs establish that issuance of a preliminary injunction is in the public interest. The Tenth Circuit Court of Appeals recognizes that "[v]indicating First Amendment freedoms is clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Utah Licensed Bev.*, 256 F.3d at 1076; *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997) ("The public interest also favors plaintiffs' assertion of their First Amendment rights."). Plaintiffs' political speech—and the political speech of others like them—is being burdened and chilled. Enjoining the offending laws is the only way to overcome that pernicious effect. Thus, an injunction is in the public interest and this Court should grant it.

Conclusion

All the elements for preliminary injunctive relief are met. This Court should expeditiously grant the requested injunctive relief.

Dated: October 12, 2011

Respectfully Submitted,

/s/ Submitted Electronically 10/12/2011
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I certify that this pleading was faxed and emailed to all Defendants on October 12, 2011, at addresses and email addresses provided by the State Bar of New Mexico or at their respective websites.

/s/ Submitted Electronically 10/12/2011
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