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VIA EMAIL ONLY

Board of Ethics & Campaign Practices
City of Albuquerque
c/o Clerk Ethan Watson

Re: Request for Advisory Opinion Transfer of Funds from County Campaign Account to Mayoral Account

Chairman Schultz et al.:

I am writing on behalf of my client, Bernalillo County Sheriff and Albuquerque mayoral candidate Manny Gonzales, to request an advisory opinion pursuant to § 3(h) of the City Ethics Code and § 3 of the Board of Ethics and Campaign Practices Rules and Regulations. Sheriff Gonzales currently has roughly \$36,000 in his Bernalillo County campaign account from his past campaign for Sheriff; I am writing today to inquire about the Board's opinion regarding whether he can legally transfer this money to his mayoral campaign account without running afoul of any non-unconstitutional provisions of the City Election Code or its regulations (I am not asking about the Open and Ethical Elections Act or its regulations).

I am particularly interested in whether our federal district court's decisions in *People for Pearce v. Oliver*, No. 17-CV-0752-JCH-SMV, 2017 WL 5891763 (D.N.M. Nov. 28, 2017) (Herrera, J.) (final judgment on unconstitutionality entered Apr. 2, 2018) (agreement of the Secretary of State to pay \$133,032,15 in plaintiff attorneys' fees entered Apr. 16, 2018), or *New Mexicans for Bill Richardson v. Gonzales*, No. 93-CV-1135-JP (D.N.M. Aug. 2, 1996) (Parker, J.), either supersede any prohibition on such transfers that may exist in the Election Code or its regulations, or counsel, in the name of preserving constitutionality, an interpretation of ambiguous provisions¹ in such a way as to permit such transfers. In the more-recent case, Judge Herrera struck down a provision of the state Campaign Reporting Act barring FECA-to-CRA campaign-account transfers under circumstances that would appear to me to be indistinguishable from the county-to-city transfer inquired about here:

¹ For example, Part N of the Election Code Regulations provides that, “[p]ursuant to NMSA 1978, Section 1-19-26(K), municipal elections are not covered elections under the Campaign Reporting Act, [and] thus individuals with state campaign finance account funds may not use those funds to make expenditures in any City election, nor may state campaign finance account funds be transferred to a City campaign finance account.” While this doesn't say anything about county-level campaign accounts, the drafters of these regulations could arguably have been trying to include county-election campaign accounts — the definition of “election” cited in § 26(K) of the CRA does include county elections.

The Secretary of State's interpretation of the CRA to limit the amount Plaintiffs can transfer from their federal campaign account to the state campaign account is a restriction on expenditures. Representative Pearce already controls the collectively pooled contributions and is seeking to use the funds for his own speech; therefore, the transfer itself is not a symbolic expression of support. The Secretary of State's restriction instead limits Representative Pearce's ability to directly communicate his message. As a limitation on expenditures, the Secretary of State's interpretation is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest.

....

Plaintiffs have therefore met their heightened burden of showing that they are likely to succeed on the merits of their First Amendment claim that the CRA's \$5,500 per-election campaign contribution limit is unconstitutional as applied to restrict the transfer of funds from the PFP account to Representative Pearce's PFNM account to only \$11,000 per election cycle

People for Pearce, 2017 WL 5891763, at *11.

Given our campaign's transition from public to private financing, this issue has not been ripe for decision prior to now, and, given the unusual circumstances of the timing of that transition, we do as a practical matter require a fast answer. Although the only requirement under law is that this *request* precede the contemplated course of action, my client currently intends to refrain from transferring these funds for the time being in the hopes of obtaining a usable timely advisory opinion. I cannot, however, guarantee that we're able to wait for an opinion no matter how long it takes, and this issue does seem to be fairly amenable to back-end resolution via adversarial proceedings in front of the Board and civil litigation under § 1983.

Very truly yours,

HARRISON & HART, LLC



Carter B. Harrison IV

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No enclosures