

Secretary of State's response to lawsuit on matching funds under the Voter Action Act

The Voter Action Act, § 1-19A-1 NMSA 1978, provides for public financing of campaigns for candidates for the Public Regulation Commission, New Mexico Court of Appeals and the New Mexico Supreme Court. One provision of the Act provides for “matching funds,” allowing publicly-financed candidates to receive additional funds, based on the amounts spent by their opponents who have not received public financing.

The “matching funds” provision of an Arizona statute, similar to New Mexico's, was found by the United States Supreme Court to be unconstitutional. The court found that providing matching funds to publicly financed candidates violated the free speech rights of non-publicly financed candidates and their supporters without serving a compelling state interest. In the 2012 legislative session, a bill was introduced which would have removed the unconstitutional language from the statute. However, the legislature did not take action to pass that bill, even though both the Secretary of State's office and the Attorney General's office expressed concern over the unconstitutionality of the existing law.

This spring, opponents of the New Mexico law brought suit, citing the US Supreme Court ruling, and asking that no matching funds be issued in New Mexico primary elections.

On Friday, May 25, 2012, the Attorney General's office provided legal advice to the Secretary of State's office on this issue. The Attorney General recommended that the Secretary issue the matching funds, despite the constitutional concerns with the law, unless a court ordered the Secretary to withhold the matching funds. Subsequently, two separate hearings have been held in federal court on the issue of whether the court should issue a temporary restraining order to stop the issuance of matching funds.

The Secretary of State was not represented at the first hearing on Friday evening, May 25, 2012. Another hearing was held on Tuesday, May 29, 2012. At the second hearing, the Secretary was represented by an attorney from the Attorney General's office. During the second hearing, the attorney stated, unequivocally, that it was the Attorney General's position that the “matching funds” provision of the law is unconstitutional. He also reiterated his opinion that in spite of that fact the Secretary should nonetheless issue the matching funds, unless the court ordered her not to do so. The federal court judge, the Honorable M. Christina Armijo, expressed her concern that the Attorney General's office had a conflict of interest in representing and providing advice to the Secretary of State in this case. She also stated that she was not convinced that the Secretary of State had been adequately represented in the hearing. However, in ruling to deny the motion for a temporary restraining order, Judge Armijo did not rule on whether the statute is constitutional or not.

The Secretary of State is faced with two conflicting legal directives: one from state law—the language of the Voter Action Act; and the other from a ruling by the United States Supreme Court.

If the language of the Voter Action Act is followed, it is argued that such a course of action would result in a violation of the constitutional rights of non-publicly financed candidates and donors. In fact, Judge Armijo expressly addressed her concern that such action might give rise to a lawsuit for violation of those constitutional rights against both the Attorney General and the Secretary of State under 42 U.S.C. § 1983.

On the other hand, if the legal reasoning of the United States Supreme Court is followed, the Secretary of State's office would not reasonably be permitted to issue the matching funds. In such an instance, it could be reasonably expected that candidates seeking matching funds might file an immediate petition for writ of mandamus to obtain a court ruling requiring that the funds be issued.

Following the definitive statement from the Attorney General's office regarding the unconstitutionality of the statute, and the court's observation that such a course of action could represent a violation of constitutional rights under federal law, the Secretary of State's office will not issue the matching funds at this time.