STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2010-01290

DENNIS W. MONTOYA, Appellant,

v.

MARY HERRERA, SECRETARY OF STATE,
STATE OF NEW MEXICO, Appellee.

MOTION FOR EXPEDITED HEARING
AND
PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW the Appellant-Petitioner, Dennis W. Montoya by and through his undersigned counsel, and moves the Court set an Expedited Hearing and/or enter an Order to Show Cause why the Court should not issue a preliminary injunction, directing the Appellee-Respondent, Mary Herrera, Secretary of State for the State of New Mexico ("the Secretary") to certify Dennis Montoya for public financing under the Voter Action Act, release such finds as are made available to him under the Act, and bar the imposition of fines pending further briefing and a final declaration of the parties' rights.

In support of said motion, Dennis Montoya states:

I.

DID DENNIS MONTOYA EXCEED THE $5,000 SPENDING CAP
FOR "SEED MONEY" UNDER THE VOTER ACTION ACT?

Dennis Montoya is a candidate for judicial office: a seat on the Court of Appeals. He has declared his intent to seeking public financing for his campaign. He believes he is the first candidate who has tried to obtain public financing to run for a statewide judicial office in New Mexico, under the Voter Action Act, NMSA 1978, § 1-19A-1, *et seq.*. The Voter Action Act was intended to address the perceived impropriety of having interested parties fund the campaign of a candidate for statewide judicial office or PRC commissioner. *See* NMSA 1978, § 1-19A-2 (D).

Public financing is a means to address the "perceived impropriety" that arises when parties to a legal proceeding (or their lawyers) have made donations to a judge's political campaign:

> **[S]tates which select judges in contested elections [should] finance judicial candidates with public funds, as a means to address the perceived impropriety associated with judicial candidates accepting private contributions from individuals and organizations interested in the outcomes of cases those candidates may later decide.**
>
> ABA Standing Commission on Judicial Independence, Report of the Commission on Public Financing of Judicial Campaigns, at 9.

A.

The Secretary's Misinterpretations of the Voter Action Act

Montoya reported to the Secretary that he spent $2,922.56 for "seed money" purposes, and thathe spent another $8,887.29 on "general" campaign expenditures. He affirmed that all of this $8,887.29 came from his own pocket, not from campaign contributions. These facts are not in dispute

The Voter Action Act puts a $5,000 limit on "seed money" spending. NMSA 1978, § 1-19A-5 (H). Dennis Montoya spent only $2,922.56 for "seed money" purposes, which is below that limit. The Secretary ruled, however, that the $5,000 limit on "seed money" applies to *all* pre-certification expenditures, not just "seed money" as the statute expressly states. The Secretary counted all of the $11,000 spent by Montoya's campaign for any purpose as "seed money", and declared him ineligible for public funds for spending over the $5,000 cap.

The Secretary's proposed $5,000 spending cap for public financing applicants is (1) contrary to the language and intent of the Voter Action Act, (2) renders the Act useless for candidates and voters who want public financing for judicial campaigns, and (3) is unconstitutional.

(1)

The Secretary's interpretation fails all known statutory construction tests

First, § 1-19A-5 does not apply to any spending other than "seed money" spending. The

statutory definition of "seed money" is limited to two specific spending purposes (getting petition signatures and $5.00 contributions) and cannot reasonably be construed to extend to all campaign spending by an "applicant candidate". *See* NMSA 1978, § 1-19A-2 (A)("applicant candidate" means a candidate who is running for a covered office and who is seeking to be a certified candidate in a primary or general election.)

The Act clearly limits "total campaign expenditures" for certified candidates, so if the Legislature had really wanted to prohibit applicant candidates from spending their own money for any campaign purpose, it knew how to do it. *See* NMSA 1978, § 1-19A-7 (C) ("A certified candidate shall limit total campaign expenditures and debts to the amount of money distributed to that candidate from the fund.")

The difference between a "certified candidate" and an "applicant candidate" is that before certification, the candidate receives no public financing. Consistent with the purpose of the statute (which is to avoid "perceived impropriety" of taking "bribes" from persons who might appear before the candidate once he or she is elected as judge or PRC commissioner) the Act expressly prohibits the applicant candidate from accepting any and all contributions except the limited, narrowly defined "seed money" and $5.00 "qualifying contributions". NMSA 1978, § 1-19A-5 (F) ("After becoming an applicant candidate and prior to certification, an applicant candidate shall not accept contributions, except for seed money or qualifying contributions."); *see also* § 1-19A-5 ("seed money" donations are limited to $100); § 1-19A-2 (H) ("qualifying contributions" are limited to $5.00 payable to the public financing fund).

Had the Legislature wanted to also prohibit the applicant candidate from spending his own money, it could easily have employed both the words "contribution" and "expenditure" in § 1-19A-5 (F). "Contribution" and "expenditure" are broadly defined terms in the Election Code, which include any and all financial transactions or transfer of value between the candidate and other persons. NMSA

1978, § 1-19-26 (F) & (J). Thus, the Legislature could have said "an applicant candidate shall not accept contributions *nor make expenditures*, except ...). The Legislature did use both terms in several sections of the Act, for example, in the reporting requirements, *see* NMSA 1978, § 1-19A-9 (B) (referring to both "seed money contributions and expenditures"), and perhaps most significantly, in the provision which imposes the $5,000 cap on "seed money contributions and expenditures". NMSA 1978, § 1-19A-5 (H). In short, when the Legislature wanted to talk about both donations and spending, it had defined terms and knew how to employ them together, but it did not do so in § 1-19A-5 (F), when it prohibited accepting contributions during the time period when an applicant candidate has not yet been certified.

In short, the "loophole" which the Secretary purports to find in the hard $5,000 cap on "seed money" is no such thing: it expressly applies only to "seed money". The $5,000 cannot reasonably be construed to extend to "total campaign expenditures" (the term used elsewhere in the Act). It is not permissible for the Secretary to administratively modify that provision to limit "total campaign expenditures" rather than "seed money". The total ban on "accepting contributions" prior to certification (aside from the well-defined and limited $100 "seed money" and $5 "qualifying contributions") likewise does not aid the Secretary. While it is all-encompassing with respect to the relevant pre-certification time period, § 1-19A-5 (F) is about contributions, not expenditures: it does not refer to "expenditures" generally, nor to the specific kinds of campaign spending at issue in this case: spending the candidate's own funds.

Montoya responds that spending your own money is not a "contribution" barred by § 1-19A-5 (F). The word "accept" in subsection § 1-19A-5 (F) implies getting the money from someone else. That addresses the "perceived impropriety" of taking "bribes" in the form of campaign contributions. When a candidate spends his or her own funds, no such concern is implicated, and it does not sow doubt in anyone's mind about a judge's potential bias. You can't "bribe" yourself.

Counsel for Intervenor, the Hon. Judge Linda Vanzi contributed some statutory interpretation arguments in support of the Secretary. To put Judge Vanzi's "intervention" into perspective, publicly available information on the Secretary's Campaign Finance Information System[1] reveals that Judge Vanzi has accepted over $85,000 in campaign contributions, mostly from lawyers. This creates the "perceived impropriety" which public financing is intended to address.

Judge Vanzi's counsel pointed to the provision of the Voter Action Act which states the applicant candidate "shall not accept contributions". NMSA 1978, § 1-19A-5 (F) ("After becoming an applicant candidate and prior to certification, an applicant candidate shall not accept contributions, except for seed money or qualifying contributions."). Vanzi argued that spending your own money is like giving yourself a contribution and therefore prohibited.

Judge Vanzi's counsel have thus exposed her to charges of gross hypocrisy, in their efforts to defend the indefensible: the Secretary's misinterpretation of the Act. On her own campaign finance disclosures, Judge Vanzi characterizes funds which she provided to her campaign as loans, for which she enjoys the status of "creditor".[2] This seems to be one correct and proper way for a candidate to report the candidate's expenditures of the candidate's own money. To turn around and accuse Dennis Montoya of making a prohibited "contribution" to himself is absurd and hypocritical. With or without public financing, no reasonable person can think spending or loaning money to your own judicial campaign is improper. You can call it a "loan" as Judge Vanzi did or an "expenditure" as Dennis Montoya did, but whatever you call it: you can't bribe yourself.

Evidently the Secretary and her designees are impervious to this logic. To conclude the administrative phase of the appeal, the Secretary adopted a hearing officer's Findings and Conclusions. The hearing officer invented terms to make it *seem* like spending your own money is a prohibited

1 https://www.cfis.state.nm.us/media/Reports.aspx

2 Report of Contributions and Expenditures dated 4/13/2010, page 13 of 17, Form B3, Loan Contributions.

"contribution". The hearing officer called Montoya's expenditure of his own funds a "**self-contribution**" (Finding No. 5), "**contributions to himself**" (Finding No. 9) and "**self-donation**" (Reasoning, page 7).

These terms all reveal total failure to interpret the Voter Action Act in light of its purpose. The Secretary does not even attempt a "plain meaning" analysis of the Voter Action Act, since no conceivable legislative intent could support this notion of self-bribery.

Nor is there any rational basis to imply a $5,000 cap on "total campaign expenditures" by an applicant candidate, before that candidate has received public funds. To the contrary, there are practical reasons why the Legislature would want applicant candidates to spend some of their own money prior to qualifying for public funding. It demonstrates the candidate is serious, shows that public funds will not be wasted on someone running a frivolous campaign. It is a necessary part of the process for becoming a serious candidate for statewide judicial office.

(2)

The Secretary's misinterpretation renders the Voter Action Act useless and kills publicly financed judicial campaigning in New Mexico

The Secretary's ruling will kill public financing of judicial campaigns. A judicial candidate seeking public financing under the Secretary's proposed rules will not have any real chance to participate in a major party primary. Public financing would not be a practical alternative.

The Democratic Party's pre-primary conventions, and the qualifying period for public financing, are always scheduled to occur at the same time, to wit, in advance of the primary election. A serious candidate for judicial office must lobby convention delegates to get on the primary ballot.[3] To the undersigned's knowledge, no minor party candidate has ever been elected to the Court of Appeals.

3 In the administrative record, there is an affidavit from an experienced politician, Ira Robinson, which explains what a judicial candidate in New Mexico must do to have any serious chance of getting elected, including how to lobby for pre-primary delegates to get on the primary ballot. Neither the Secretary not the Intervenor challenged the admission or the substance of this affidavit.

As for how much getting on the primary ballot currently costs, the Court can refer to the undisputed facts concerning Dennis Montoya's total expenditures ($11,809.85) and/or take judicial notice of Judge Linda Vanzi's total expenditures ($22,472.90) reported on the Secretary of State's "New Mexico Campaign Finance Information System"[4].

Montoya's total includes $2,922.56 in "seed money" expenses (money expended to canvass for petition signatures and qualifying contributions) to qualify for public financing. Judge Vanzi has opted not to do this. The other $8,887.29 was spent on things like printed political materials and going to Democratic Party county find-raisers to meet delegates to the pre-primary convention. In this manner, Montoya did succeed in persuading 28% of the delegates to nominate him, enough to get him a "position" below Judge Vanzi on the Democratic Party primary ballot.The Secretary would cap Montoya's pre-certification expenditures at $5,000, which, after spending around $3,000 to qualify for public financing, leaves around $2,000. This simply is not enough to go meet with delegates at a party's county-level fundraisers, which is the most efficient and cost-effective way to obtain delegate support.

In short, with a $5,000 cap on pre-certification expenses, the Voter Action Act is useless and public financing for judicial races is dead. The Secretary's interpretation is totally wrong, but worse, effectively repeals the Voter Action Act. The Secretary has no authority to repeal legislation or burden the public financing program to render it useless. The Secretary's refusal to certify Dennis Montoya was arbitrary, capricious, contrary to law, and not supported by substantial evidence and is therefore ripe for reversal under well-established administrative appeal standards.

But that is not all. Under constitutional analysis, the proposed $5,000 cap is facially discriminatory. In this case, it would give Judge Vanzi a ten-to-one advantage in pre-primary expenditures, but in every case, a cap on campaign spending suppresses one candidate's political

4 https://www.cfis.state.nm.us/media/ReportDetails.aspx?cId=2417&na=Vanzi%2c+Linda

speech while giving another freedom to spend and speak. This Court has original jurisdiction to grant declaratory and injunctive relief, which case law confirms is very appropriate for elections cases which implicate constitutional rights.

II.

CONSTIUTIONAL IMPLICATIONS OF THE SECRETARY'S ERROR

The Secretary's shocking misinterpretation of the Voter Action Act is so grotesquely discriminatory that, if it stands, no serious candidate for judicial office will ever try to use it again.

Montoya is not the only victim. The Secretary's refusal to certify him also censors the political speech of the voters who signed his petitions and gave $5.00 "qualifying contributions" payable to the fund. Those people may or may not vote for Montoya for the Court of Appeals, but they did "vote" for public financing. The Secretary has effectively thrown out those "votes".

This conduct requires strict judicial scrutiny and immediate action. The Secretary's mistakes, if not immediately corrected, will deprive New Mexico voters of a "free and open" contested judicial election, beginning with the Democratic Party primary scheduled for June 1, 2010.

The Court can and should set this election back on track. Immediate declaratory and injunctive relief would be proper to secure the "free and open" elections promised in our State's Bill of Rights.

A.

THE FIRST AMENDMENT REQUIRES STRICT SCRUTINY
OF DISCRIMINATORY CAMPAIGN FINANCE LAWS

The United States Supreme Court has recently affirmed that discriminatory campaign finance laws are subject to strict scrutiny under the First Amendment. *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010). In January, a divided United States Supreme Court overruled *Austin v. Michigan Chamber of Commerce,* 494 U. S. 652 (1990), which had held that political speech by corporations may be suppressed, but affirmed disclosure and disclaimer provisions of federal

campaign finance laws and regulations. The Court in *Citizens United* went out of its way to address what it called "an ongoing chill upon speech that is beyond all doubt protected". The Court found that the FEC's complex and prolix campaign regulations were the "equivalent" of prior restraint on speech: "If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question."

The Court thus affirmed the view that campaign money equates to political speech, but moreover held that burdening the use of campaign funds with impenetrable and unpredictable regulations is the "equivalent" of censorship. *Citizens United* is, of course, distinguishable and controversial in those areas which are not material here: the analysis of whether the government has a compelling interest in discriminating against corporate speakers.

What is notable about *Citizens United*, however, is not the controversial analysis of the speaker-identity issue, but the fundamental principles which it applied to resolve the issue. First, money used to promote political speech is, effectively, speech: to control one is to censor the other. *See, e.g. Buckley v. Valeo,* 424 U.S. 1 (1976). Second, "restrictions distinguishing among different speakers, allowing speech by some but not others" are likewise means to control political speech. *Citizens United*, at __, *citing First Nat. Bank of Boston v. Bellotti*, 435 U. S. 765, 784 (1978).

Discriminatory campaign finance laws, coupled with an unpredictable regulatory regime, trigger strict scrutiny. The Secretary's proposed $5,000 spending cap for some candidates, but not others, is facially discriminatory, but worse, it is precisely the sort of unpredictable campaign finance regulation which the Supreme Court abhors because it chills political speech. Dennis Montoya could not possibly have guessed from reading the Act that the $5,000 cap for "seed money" applied to all his campaign spending. He relied on the plain meaning of the Voter Action Act to his detriment. This is intolerable when the most fundamental right in a democracy is at stake.

Under strict scrutiny, the Secretary must demonstrate a compelling government interest in creating such drastic and severe impediments to publicly financed campaign, and then must show that the means employed are narrowly tailored to achieve the Secretary's articulated goal. *See, e.g. Citizens United.* No such rationale has been forthcoming. Instead, the Secretary has brushed off Dennis Montoya's constitutional arguments, asserting that such issues were not within her jurisdiction. The First Amendment does not command the Secretary to "adjudicate" her own suppression of free speech, it commands that she uphold and support its precepts, or explain why an exception is merited here.

The New Mexico Constitution also contains an affirmation of "freedom of speech", N.M. Const. Article II, § 17, under which Dennis Montoya cannot be afforded any *less* protection than *Citizens United, Buckley* and *Belotti* provide under the federal consyitution. Arguably, our State constitution is unique and requires consideration of some additional factors. It includes statements of democratic principle. *See* N.M. Const. Article II, §§ 2 (popular sovereignty), 3 (right of self-government). Our courts have yet to recognize any enforceable rights arising from Sections 2 and 3, but in the context of "interstitial" analysis, these statements of principle may support a claim that our Constitution need not be interpreted in lock-step with the federal constitution. And, our State constitution also guarantees "free and open" elections. N.M. Const., Article II, § 8. This provision *has* been construed to create enforceable rights.

B.

THE NEW MEXICO CONSTITUTION GUARANTEES "FREE AND OPEN" ELECTIONS *AND* GRANTS CANDIDATES STANDING TO REPRESENT VOTERS

Article II, § 8 has been construed to create specific, legally cognizable rights which can be enforced by candidates on behalf of voters. Section 8 states:

> **All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.**

Interpreting Article II, § 8, our Supreme Court has stated and re-stated that "**the voter shall not be**

deprived of his rights as an elector either by fraud or the mistake of the election officers if it is possible to prevent it." *Gunaji v. Macias,* 2001-NMSC-028 at ¶ 18, 130 N.M. 734, 31 P.3d 1008, *quoting Valdez v. Herrera*, 48 N.M. 45, 47, 145 P.2d 864, 870 (1944) (emphasis supplied).

New Mexico courts have declaratory jurisdiction to reach election issues, even after the election itself has become moot. New Mexico also recognizes "representative" standing for political candidates to assert the rights of voters in election contests. *See, e.g., Gunaji* at ¶ 20:

> We think in an election contest such as this one that the requirements for asserting the standing of a third party are met. Contestants are after all working against the impairment of the rights of voters, whose organization into a body of plaintiffs would not be as feasible or effective as allowing their interests, or possible interests at least, to be represented by contestants.

New Mexico courts assert declaratory jurisdiction when a moot election cases presents (1) matters of substantial public interest which are (2) capable of repetition yet evading final review. *See, e.g. Cobb v. State Canvassing Bd.,* 2006-NMSC-034, ¶¶ 24-32, 140 N.M. 77, 140 P.3d 498. Cases deemed of great public importance involve "clear threats to the essential nature of state government guaranteed to New Mexico citizens under their Constitution". *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277. The policies underlying representative standing, and asserting jurisdiction over moot elections cases, also support a preliminary injunction in this case. Montoya and his supporters have no other plain, speedy and adequate remedy at law. Damages are clearly beside the point. Prevention of constitutional deprivations is within the proper exercise of the Court's power, and the public interest in public financing and "free and open" elections clearly outweighs any conceivable government interest the Secretary might assert.

All references to "the Secretary" have been *pro forma* and in her official capacity. This is an elections case: the Court need not find a guilty party here. *Cf. Gunaji v. Macias,* 2001-NMSC-028 at ¶ 16 (**"the problem survives whoever is responsible for it."**). Thus, the Secretary has no personal interest in due process. Blame is not the point here: "free and open" elections are the point. No

government interest outweighs "free and open" elections. The sole question is whether the mistake commited here can be corrected and any repetition prevented.

III.

DENNIS MONTOYA, AND SUPPORTERS OF PUBLIC FINANCING, SHOULD NOT HAVE TO WAIT UNTIL AFTER THE ELECTION IS OVER BEFORE THE LAW IS PROPERLY CONSTRUED AND THEIR CONSTITUTIONAL RIGHTS ENFORCED

Dennis Montoya challenges both the Secretary's interpretation of the Voter Action Act, or in the alternative, the constitutionality of the Act as applied by the Secretary. The Declaratory Judgment Act provides both the jurisdiction and the power to fashion a remedy.[5] "The Declaratory Judgment Act is specifically designed to bring an action challenging the constitutionality or validity of [statutes]." *Smith v. City of Santa Fe*, 2007-NMSC-55 at ¶ 14, 142 N.M. 786, 171 P.3d 300.

The Secretary could frivolously contend that the availability of the statutory appeal precludes declaratory and injunctive relief. To be sure, the Voter Action Act grants Dennis Montoya a statutory right to appeal. In *Smith* the Court stated "a declaratory judgment action challenging an administrative entity's authority to act ordinarily should be limited to purely legal issues that do not require fact-finding by the administrative entity." *Id.* at ¶ 16. There are no factual issues left here: the material facts are undisputed. On procedural matters, the relationship between declaratory judgment and administrative appeals remains murky. It has hard to anticipate what procedural requirements for appeal (such as venue or notice of appeal deadlines) must be applied in a concurrent declaratory judgment action, and when procedural defects might constitute grounds for dismissal. *See, e.g. State ex rel. Regents v. Baca*, 2008 -NMSC-047, 144 N.M. 530, 189 P.3d 663 (transferring venue but allowing case to proceed); *see also Smith v. City of Santa Fe*, 2007-NMSC-055 at ¶ 23, 142 N.M. 786, 171 P.3d 300 (denying declaratory relief to a party who initiated an administrative review process but

5 NMSA 1978, § 44-6-2; § 44-6-4; § 44-6-9 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.") (1975)

failed to timely appeal to the district court).

Following the directives in these cases, Dennis Montoya filed a timely notice of appeal, and he filed it here in the judicial district where the Secretary of State maintains her principal office. Further delay occasioned by strict adherence to the Rule 1-074 briefing schedule would impair the voters right to a "free and open" election. This is constitutionally intolerable *if it can be prevented.* Rule 1-074 briefing can proceed *after* a preliminary injunction is granted and Montoya's supporters get what they "voted" for: public financing for his campaign.

IV.

THE COURT SHOULD ALSO ENJOIN THE PROPOSED $2,000 FINE

After notice of appeal was given, the Secretary further concluded that Montoya violated the Voter Action Act by reporting his campaign expenditures. *See* Letter Dated 4-20-2010, a copy of which is marked as Ex. "1" and attached hereto and included herein. The Secretary insists that all pre-certification expenditures must be reported as a single total under the heading of "seed money" (whether or not money was spent for "seed money" purposes).

In reality, spending to influence a pre-primary convention is not "seed money" spending, as defined by the Voter Action Act. Such spending is, however, clearly an "expenditure" for a "political purpose" which must be disclosed under the more general provisions of the Election Code. § 1-19-26 (M) ("political purpose" includes attempts to influence an election **or pre-primary convention**"); § 1-19-26 (J) ("expenditure" means a payment ... for a political purpose, including payment of a debt incurred in an election campaign or **pre-primary convention**"). Reading these statutes together, Dennis Montoya believed he was required to disclose *all* his "expenditures", and accurately identify the purposes for which the money was spent.

Why the Secretary instead argues that Montoya was required to falsify public records in this manner is unclear. It sure looks like retaliation. Whatever excuse she comes up with, it will not hold a

candle to the public policy which favors complete and accurate campaign finance disclosures.

Public policy supports complete disclosure of campaign expenditures, with accurate information about the sources and purposes of campaign spending. In the recent *Citizens United* case, the United States Supreme Court found that disclosure requirements in federal campaign finance laws serve a compelling government interest: to provide the electorate with information about election-related spending. *Citizens United v. FEC,* 558 U.S. ___ (2010), *Slip Op. at* 51, quoting *Buckley v. Valeo,* 424 U. S. 1, 66 (1976). The Court's desire to uphold and affirm this part of the federal campaign financing laws is all the more striking because the same Court, in the same case, struck down another provision limiting corporate spending.

In New Mexico, generally, all candidates are subject to broad disclosure requirements. *See generally* Campaign Reporting Act, NMSA 1978, §§ 1-19-25 through 1-19-36. Under the Voter Action Act, candidates who have been certified to receive public financing are required to comply with these reporting laws. NMSA 1978, § 1-19A-9 (D) ("Certified candidates shall report expenditures according to the campaign reporting requirements specified in the Election Code").

There is no reason to think the Legislature intended, by omitting reference to Montoya's general campaign expenditures, for him to *conceal* these expenditures. The Secretary cannot prove and does not find that Montoya *misrepresented* his expenditures, or falsely stated the amount of money or the purposes for which it was spent. She merely reiterates that Montoya was required to report *all* of his campaign expenditures as "seed money", even if the money was not spent for those purposes.

In reality, the Voter Action Act defines "seed money" in terms of the "primary purpose" for which the money is spent. NMSA 1978, § 1-19A-2 (K) ("seed money" "means a contribution raised for the **primary purpose** of enabling applicant candidates to collect qualifying contributions and petition signatures.") (emphasis supplied).

Reporting expenditures accurately serves a compelling government interest in providing

information to the electorate. The electorate is not informed by lumping all expenditures together under an inappropriate category. This results in a loss of information, not a gain.

There is no substantial evidence to contradict the disclosed amounts or purposes of Montoya's expenditures. These facts are undisputed and the parties only disagree about what the Voter Action Act requires, as a matter of law. The Court reviews legal conclusions *de novo* and need not defer to the Secretary's erroneous construction of the Voter Action Act.

And there is an equitable issue to consider as well. Dennis Montoya had no notice of the Secretary's surprising new reporting guidelines. "Notice" was required as a matter of due process and fundamental fairness, but "guidelines" were specifically mandated by the Legislature. NMSA 1978, § 1-19A-9 (A) ("The secretary **shall** publish guidelines outlining permissible campaign-related expenditures.") (emphasis supplied). The Secretary's designee admitted during the administrative appeal hearing that the Secretary has failed to publish the guidelines. Equity demands estoppel.

Moreover, while the imminent (June 1, 2010) Democratic Party Primary was reason enough to act promptly, now the Secretary demands payment of a fine for *disagreeing with her absurd and surprising misconstruction of the law,* within ten (10) days. This calls for an immediate judicial response. An expedited hearing before the Secretary's new deadline (April 30, 2010) is therefore requested.

CONCLUSION

The Secretary's proposed hard cap of $5,000 in total campaign expenditures renders the Voter Action Act useless and pointless. It would require a judicial candidate to choose between seeking public financing and getting the support of a major party nomination. If the Secretary's interpretation prevails, then public financing for judicial races is dead. Moreover, the Secretary's proposal to place a hard cap on total campaign expenditures for "applicant candidates" would be a discriminatory

campaign finance law which violates the United States and New Mexico constitutions. The Voter Action Act should be construed to avoid this result.

WHEREFORE Petitioner-Appellant respectfully requests the Court set a expedited hearing, prior to April 30, 2010, and/or enter an order to show cause why the relief requested herein should not be granted, to wit, (1) declaring the Secretary's interpretation of the Voter Action Act contrary to law, and (2) ordering the Secretary to certify Dennis Montoya for public financing and release public funds for his use, and (3) vacating the proposed fine.

Respectfully submitted,
HAMMEL LAW FIRM, P.C.

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I certify that a copy of the foregoing was forwarded to counsel of record as noted below, this 26th day of April, 2010:

Secretary of State c/o
Scott Fuqua, Assistant Attorney General
408 Galisteo Street
Santa Fe, NM 87501

Hon. Linda M. Vanzi, c/o
Ray M. Vargas, II
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, New Mexico 87501

STATE OF NEW MEXICO

MARY HERRERA
SECRETARY OF STATE

DON FRANCISCO TRUJILLO II
DEPUTY SECRETARY OF STATE

April 20, 2010

Dennis Montoya
c/o The Hammel Law Firm, PC
Attn: Hazen H. Hammel
3603 Gun Club Road SW
Albuquerque, NM 87121

Re: **Notice of Violation of the Campaign Practices Act and the Voter Action Act**

Dear Mr. Montoya:

As you are aware, this office has rejected your petition to receive public funds under the Voter Action Act [NMSA 1978, § 1-19A-1, *et seq.*] ("the Act"). In the course of our investigation of your petition, we determined that you had violated the Act by raising and spending seed money in an amount well over the $5,000.00 limit established by Section 1-19A-5(H). This letter is to inform you that the Secretary of State is levying a fine against you in the amount of $2,000 for your violation of the Act.

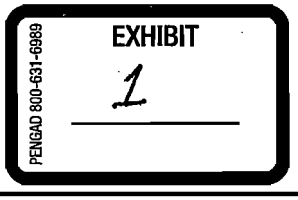
You submitted three reports to this office, each showing contributions and expenditures of seed money in excess of $5,000.00. In your final report, you purported to divide your contributions and expenditures between "seed money" and "general money." The Act does not provide for any such division. Before a candidate seeking public funds under the Act is certified to receive them, that candidate may only collect and spend money in two categories. First, a candidate must collect "qualifying contributions" under NMSA 1978, § 1-19A-4 in order to demonstrate sufficient support to receive public funds. Second, a candidate may raise and spend "seed money" under Section 1-19A-5. "Seed money" is defined in Section 1-19A-2(K) as "a contribution raised for the primary purpose of enabling applicant candidates to collect qualifying contributions and petition signatures."

Accordingly, the Act permits two, and only two, types of contributions and spending by candidates seeking public campaign funds: qualifying contributions and seed money. Your description of certain funds you spent on your campaign as "general" finds no support in the Act. Your use of those funds is thus a violation of the Act. Pursuant to NMSA 1978, § 1-19A-17, "[i]f the secretary of state makes a determination that a violation of [the Voter Action Act] has occurred, the secretary shall impose a fine or transmit the finding to the attorney general for prosecution." As described above, the Secretary of State is imposing a $2,000.00 fine on you for your violation of the Act. Please remit payment of that fine to the Secretary of State within ten business days of your receipt of this letter. If you or any legal counsel you may retain have any questions, please direct them to our legal counsel for this matter, Scott Fuqua, at the Attorney General's Office. You may reach him at 505.827.6920.

Sincerely,

Mary Herrera
New Mexico Secretary of State

C: Hon. Gary King, Attorney General
Melanie Carver, Assistant Attorney General, SOS Legal Counsel
Scott Fuqua, Assistant Attorney General, SOS Legal Counsel



STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2010-01290

DENNIS W. MONTOYA, Appellant,

v.

MARY HERRERA, SECRETARY OF STATE,
STATE OF NEW MEXICO, Appellee.

REQUEST FOR EXPEDITED HEARING

1. Jury: _____ Non-Jury__X____

2. Judge to whom assigned: Hon. RAYMOND ORTIZ, Div. III

3. Disqualified Judges: Hon. Barbara Vigil

4. Specific matter(s) to be heard: Appellant-Petitioner's MOTION FOR EXPEDITED HEARING AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

5. Estimated time for hearing all parties and witnesses: 1 hour

6. Date pretrial order was filed or date of pretrial conference: none

7. There are not any hearings presently set

8. Names, addresses and telephone numbers of all counsel or parties pro se, entitled to notice:

Dennis W. Montoya c/o Hazen H. Hammel 3603 Gun Club Road, SW Albuquerque, NM 87121 (505) 873-4141	Mary Herrera, c/o Scott Fuqua, AAG 408 Galisteo Street Santa Fe, NM 87501 (505) 827-6000	Hon. Linda M. Vanzi, c/o Ray M. Vargas, II 303 Paseo de Peralta Santa Fe, NM 87501 (505) 982-1873

Submitted by:
Hazen H. Hammel

I certify that a copy of the foregoing REQUEST FOR EXPEDITED HEARING was forwarded to counsel of record this 26th day of April, 2010:
Hazen H. Hammel

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

No. D-101-CV-2010-01290

DENNIS W. MONTOYA, Appellant,

v.

MARY HERRERA, SECRETARY OF STATE,
STATE OF NEW MEXICO, Appellee.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that this matter has been called for hearing before the Court, for the time, place, date and purpose indicated:

DATE:

TIME:

PLACE:

PURPOSE OF HEARING: Appellant-Petitioner's MOTION FOR EXPEDITED HEARING AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

TIME ALLOCATED:

JUDGE ASSIGNED:

_____
Secretary

I hereby certify that a true copy of the foregoing Notice was mailed to the following parties/ counsel of record at the following addresses this _____ day of _____, _____.

_____

Dennis W. Montoya
c/o Hazen H. Hammel
3603 Gun Club Road, SW
Albuquerque, NM 87121
(505) 873-4141

Mary Herrera, c/o
Scott Fuqua, AAG
408 Galisteo Street
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