


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**STATE OF NEW MEXICO ex rel.
WILLIAM E. SHARER, MARK MOORES
JAMES R.J. STRICKLER, and
DAVID M. GALLEGOS,**

No. S-1-SC-37435

Petitioners,

vs.

**MAGGIE TOULOUSE OLIVER, in her official
capacity as Secretary of State of the
State of New Mexico,**

Respondent.

MOTION TO STAY THE PROCEEDINGS

**STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL**

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SECRETARY OF STATE Maggie Toulouse Oliver (the “**Secretary**” or “**SOS**”) hereby moves this Court to stay these proceedings as the legislature considers legislation with a direct bearing on the claims at issue before this Court. As set forth in more detail below, because the pending legislation would effectively moot the concerns raised by Petitioners, a stay is warranted to further the ends of judicial economy and to enable the legislature to resolve this policy-oriented dispute. The Secretary asks that a stay be implemented either until the legislation dies or is enacted in the current session. The Motion is opposed.

BACKGROUND

In the Verified Petition for Writ of Mandamus and Request for Stay (Dec. 20, 2018) (the “**Petition**”) filed in these proceedings, it is alleged that regulations promulgated by the Secretary in 2017 and codified at 1.10.13 NMAC (the “**Regulations**”) violate constitutional separation of powers principles. The Regulations were enacted to provide clear guidance regarding the implementation and application of provisions contained in the Campaign Reporting Act, NMSA 1978, Sections 1-19-25 to -36 (the “**CRA**”), which authorizes the Secretary to “adopt and promulgate” such “rules and regulations.” § 1-19-26.2.

Of the thirty-one provisions contained in the Regulations, Petitioners have specifically challenged three. First, Petitioners have challenged the requirement in the Regulations at 1.10.13.11 NMAC which pertains to the “reporting of

independent expenditures.” See Pet. at 15. Second, Petitioners also take issue with the inclusion of definitions at 1.10.13.7 NMAC for the terms “independent expenditure,” “coordinated expenditure,” “advertisement,” and “ballot measure.” Id. And third, Petitioners cite what is characterized in the Petition as a “redefin[ition]” of the term “political committee” in the Regulations at 1.10.13.10 NMAC.

In the current sixty-day session of the New Mexico legislature, which commenced on January 15, 2019 and concludes at noon on March 16, 2018, see N.M. Const., art. IV., § 5, legislation has been introduced seeking to amend the CRA. That legislation, introduced by Majority Leader Wirth and numbered Senate Bill 3, includes language that would effectively codify in statute the provisions challenged by Petitioners. See S.B. 3, 54th Leg., 1st Sess. (N.M. 2019) (“**SB 3**,” attached hereto as “**Exhibit A**”).¹ With respect to “independent expenditures,” Section 1 of SB 3 contains provisions which are highly analogous to those set forth in the Regulations at 1.10.13.11. Compare SB 3 to 1.10.13.11 NMAC. With respect to the definitional provisions in 1.10.13.7 challenged in the Petition, Section 4 of SB 3 includes definitions (analogous to those in the Regulations) for

¹ Senator Wirth acknowledged in an interview with the Santa Fe New Mexican newspaper that SB 3 “tracks” the “disclosure” provisions in the Regulations. See Steve Terrell, New Mexico secretary of state sued over campaign finance rule, SANTA FE NEW MEXICAN, Dec. 21, 2018 (article attached hereto as “**Exhibit B**”).

all of the terms challenged by Petitioners. Compare SB 3 to 1.10.13.7 NMAC.

Such is also case with respect to the Regulations' alleged "redefinition" of "political committee." Compare SB 3, §§ 4(P) and 5 to 1.10.13.10 NMAC.

The legislation's outlook for passage is positive. A similar measure introduced in the 2017 legislative session received bipartisan support, passed by both legislative chambers,² but was ultimately vetoed by then-Governor Susana Martinez. See S.B. 96, 53rd Leg., 1st Sess. (N.M. 2017) ("SB 96") (attached hereto as "**Exhibit C**"). However, the current governor has indicated she is "open to supporting" SB 3 and "recognize[s] the need for transparency in campaign reporting." See Dan McKay, Campaign finance overhaul clears hurdle, ALBUQUERQUE JOURNAL, Jan. 28, 2019 (attached hereto as "**Exhibit D**").³ The bill itself has already begun moving through the senate, where it passed unamended through the rules committee on January 28 with bipartisan support on a 7-4 vote. See Id.⁴ The bill has one additional committee hearing (judiciary) prior to being

² SB 96 passed the house of representatives by a vote of 41-24 and passed the senate by a vote of 36-6.

<https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=96&year=17>

³ The Journal article is also available on the newspaper's website:

<https://www.abqjournal.com/1273924/campaign-finance-overhaul-passes-first-test.html>

⁴ The report of the rules committee is attached hereto as "**Exhibit E.**"

eligible for a vote on the senate floor. If it is approved by the full senate, it will then be considered by the house of representatives. See N.M. Const. art. IV, § 17.

ARGUMENT

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Belser v. O’Cleireachain, 2005-NMCA-073, ¶ 3, 137 N.M. 623, 114 P.3d 303 (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). While the decision to issue a stay is firmly grounded in the Court’s discretion, see id., the determination is generally guided by weighing several factors, including the interests of the parties and the court, and any implications for the broader public interest. See 1 Am. Jur. 2d Actions § 66; see also Wood v. Millers Nat. Ins. Co., 1981-NMSC-086, ¶ 13, 96 N.M. 525, 632 P.2d 1163 (weighing “judicial economy” against “party’s rights”). “The issuance of a stay halts all progress of the action, and no additional step may be taken until the stay is removed.” Id.

In the context at hand, where a stay implicates the right of the legislature to make policy, the imposition of a brief stay is warranted. The point is illustrated by a federal district court proceeding involving a similar set of circumstances. There, the court stayed consideration of a challenge to the constitutionality of a New Hampshire state law. See Planned Parenthood of N. New England v. New

Hampshire Atty. Gen., No. CIV. 03-CV-491-JD, 2007 WL 329709, at *1 (D.N.H. Feb. 1, 2007); Planned Parenthood of N. New England v. Ayotte, 571 F. Supp. 2d 265, 267 (D.N.H. 2008). The court noted that activity by the New Hampshire legislature with respect to the challenged legislation might have a “direct affect” on the litigation pending before the court. Planned Parenthood, 2007 WL 329709, at *1. In particular, the court found that a pending bill seeking to repeal the challenged statute would render the “case...moot,” or if the challenged statute were amended, it “may well change...the legal landscape of th[e] case.” Id. The court relied on “deference to the [l]egislature” in making its ruling. See Id. (“in the interest of comity and in deference to the New Hampshire [l]egislature...this action is temporarily stayed”).⁵

Similar concerns prevail in the instant matter. This Court has made clear that the legislature is entitled to deference in the exercise of its policymaking power. Torres v. State, 1995-NMSC-025, ¶ 10, 119 N.M. 609, 894 P.2d 386 (“With deference always to constitutional principles, it is the particular domain of the legislature, as the voice of the people, to make public policy.”). As in the New

⁵The stay apparently functioned as intended, as the New Hampshire legislature undertook actions resulting in the mootng of the substantive claims in the lawsuit, which was dismissed. Planned Parenthood of N. New England v. Ayotte, 571 F. Supp. 2d 265, 267 (D.N.H. 2008) (the challenged statutory provision “was repealed and the suit was dismissed as moot”).

Hampshire dispute, the enactment of SB 3 or some amended version will either moot these proceedings or change the “legal landscape” in such a fashion that the current lawsuit will no longer be a viable exercise of this Court’s extraordinary writ jurisdiction. As such, the interests of judicial economy are also served through the issuance of a stay.

With respect to the interests of Petitioners, a delay during the pendency of the legislation will not constitute a tangible impairment of their position. As the legislation moves apace through the legislature there is reason for optimism that its fate will be determined prior to the March 16 end date of the session. Even if the bill were to pass on the last day of the session, its fate would be conclusively determined no later than twenty days thereafter. See N.M. Const. art. IV, § 22.

As the Secretary has already represented to the Court in seeking a briefing extension, see Mot. for an Extension of Time to File the Secretary’s Resp. (Jan. 20, 2019), any sense of urgency claimed by Petitioners is belied by the history pertinent to this dispute. The Regulations have been in force since October of 2017, see 1.10.13.5 NMAC, and Petitioners saw fit to bide their time and wait for more than a year prior to filing what they characterize as a lawsuit requiring “expeditious resolution.” See Pet. at 8. The next reporting date for the “independent expenditures” disclosures challenged in the Petition is not until April 8, 2019. See NMSA 1978, § 1-19-29.

CONCLUSION AND REQUEST FOR RELIEF

As set forth above, because legislative action may moot or alter the legal landscape of this dispute, a stay of these proceedings is warranted. Accordingly, the Secretary asks that these proceedings (1) be postponed either until SB 3 is enacted or dies during the legislative process, and accordingly that (2) all progress in these proceedings be halted, with no additional step taken until the stay is lifted by order of the Court, and (3) that notwithstanding the stay, either party be permitted to seek leave of this Court by motion to lift the seal.

Finally, unless the stay is granted prior to the Secretary's February 8 response brief deadline, see Order (Jan. 24, 2019), the Secretary will file her response brief pursuant to the Court's deadline.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2019, I filed and served the foregoing electronically through the Odyssey Electronic Filing System, which caused all parties of record to be served by electronic means.

/s/ Sean Cunniff
Sean Cunniff