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January 3, 1997

OPINION
OF
TOM UDALL
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Opinion No. 97-01

BY: Craig B. Fretwell
Assistant Attorney General

TO: The Honorable Michael S. Sanchez
New Mexico State Senator
03 Bunton Road
Belen, New Mexico 87002

and

The Honorable Peggy J. Nelson
Chief Judge Eighth Judicial District Court
Taos County Courthouse
105 Albright Road, Suite H
Taos, New Mexico 87740

and

The Honorable William E. Porter
New Mexico State Representative
5200 N. Hwy. 85
Las Cruces, New Mexico 88005

QUESTIONS:

1. Are New Mexico's statutes making it unlawful to publish or print anonymous campaign literature (NMSA 1978, § 1-19-16 (Repl. Pamp. 1995)) or to distribute anonymous campaign literature (NMSA 1978, § 1-19-17, Repl. Pamp. 1995) enforceable in light of the United States Supreme Court's ruling in McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995), finding a similar statute in Ohio to be an unconstitutional infringement on First Amendment free speech rights?

2. Can New Mexico's statutes be amended in a way to make them constitutional under McIntyre?

CONCLUSIONS:

1. No. New Mexico's statutes on anonymous campaign literature are clearly unconstitutional and unenforceable under the decision in McIntyre.

2. Yes. New Mexico's statutes would be constitutional if they were amended to limit the prohibition to fraudulent, false or libelous statements, whether or not they are anonymous.

FACTS:

During Judge Nelson's retention election race anonymous signs were posted in Taos urging voters to "Vote No" on her retention as a District Court Judge. These signs appeared to be violations of the prohibition on the distribution of anonymous campaign literature contained in NMSA 1978, § 1-19-17. Judge Nelson sought the assistance of the Attorney General's Office in enforcing the statute.

During Senator Michael S. Sanchez' reelection campaign a letter was distributed attacking his voting record and questioning his religious views. While the letter was signed it was widely distributed in his district without the required listing of the sponsor of the distribution or printing of the letter. Senator Sanchez requested the assistance of the Attorney General's Office in enforcing the statute requiring disclosure of the person or organization sponsoring the distribution of campaign materials, NMSA 1978, § 1-19-17.

In the race for State Representative District 36, postcards were mailed to voters and newspaper ads appeared advocating the election of Jim Parks without the disclosures required by NMSA 1978, §§ 1-19-16 and 17. State Representative William E. Porter sought the assistance of the Attorney General's Office in this matter.

As a result of the legal analysis undertaken by the Attorney General's Office and summarized below, it became clear that neither this office or any district attorney's office would be able to assist in enforcing the statute because of the statute's defects under the U.S. Constitution.

ANALYSIS:

New Mexico's Campaign Practices Act contains two statutes that make it a criminal act to either print or distribute written campaign materials without specifying the sponsor of the material. NMSA 1978, § 1-19-16 states:

A. It is unlawful for any person, organization or political committee to publish or print any campaign advertising or communication which does not specify the name of the sponsor or the name of a responsible officer who authorized the printing or publication of such material, in any election, school district election or an election authorizing a bond issue. This prohibition extends only to handbills, petitions, circulars, letters or similar written material.

B. Any printing establishment shall identify itself as the printer of the campaign material.

C. Any person, organization or political committee violating the provisions of Subsection A or B of section 1-19-16 NMSA 1978 is guilty of a fourth degree felony and shall be punished as provided in the Criminal Code.

NMSA 1978, § 1-19-17 states:

A. It is unlawful for any person, organization or political committee to circulate or distribute any campaign advertising or communication which does not specify the name of the sponsor of such material, in any election, special election, school district election or an election authorizing a bond issue. This prohibition extends to handbills, petitions, circulars or similar written material.

B. Any person, organization or political committee violating the provisions of Subsection A of Section 1-19-17 NMSA 1978 is guilty of a misdemeanor and shall be punished as provided in the Criminal Code.

Ohio has a similar statute, the application of which the United States Supreme Court found to be an unconstitutional infringement on the First Amendment's protection of free speech. The Ohio statute, Ohio Rev. Code Ann. § 3599.09(A), provided:

No person shall write, print, post or distribute, or cause to be written, printed, posted or distributed, a notice, placard, dodger, advertisement, sample ballot, or any

other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, or magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore....

(Emphasis added). The Supreme Court found the Ohio statute unconstitutional in McIntyre v. Ohio Elections Commission, 115 S.Ct. 1511 (1995). That case involved a flyer opposing a school tax levy that was handed out at public meetings by Mrs. McIntyre and her family. The flyer did not contain the disclosures required by the Ohio statute. Mrs. McIntyre was prosecuted for violating the statute and fined \$100. The Supreme Court overturned the conviction stating:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent. Anonymity is a shield from the tyranny of the majority....It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

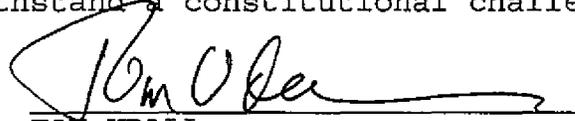
McIntyre, 115 S.Ct. at 1524. When this standard is applied to the provisions of New Mexico's statutes it is clear that they are unconstitutional and unenforceable. A number of Attorneys General have reached the same conclusion regarding their states' statutes concerning anonymous campaign literature since Mcintyre. Tenn. Atty. Gen. Op. No. 95-090(1995); Mich. Atty. Gen. Op. No. 6895 (1995); Va. Atty. Gen. Op. No. 170 (1995); Neb. Atty. Gen. Op. No. 95039 (1995). Relying on McIntyre, an appellate court in Louisiana struck down that state's statute requiring disclosures on campaign

materials. Louisiana v. Moses, 655 So.2d 779 (La.App. 4 Cir., 1995).

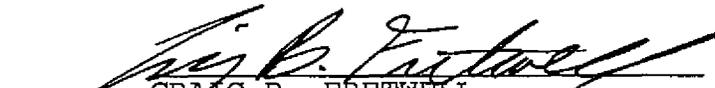
However, under McIntyre it may be possible to amend New Mexico's statutes to offer some degree of protection against fraudulent, false or libelous statements in a political campaign. In McIntyre Ohio argued that it had an interest in preventing fraudulent, false and libelous statements in elections and its statute was a way of doing so. The Court rejected this argument by pointing out that Ohio's election code had specific provisions directly punishing fraudulent statements. The Court stated that Ohio "cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented." McIntyre, 115 S.Ct. at 1524.

New Mexico's election code does not contain any prohibitions against false, fraudulent or libelous statements in campaign materials. New Mexico's statutes seek to punish the printing or distribution of anonymous campaign materials regardless of the truth or falsity of their contents. One has committed a criminal act whether the material simply says "Vote No" as in Judge Nelson's case or contains patently false statements regarding one's religious faith as in the case of the letter regarding Senator Sanchez.

While the Supreme Court in McIntyre did not rule on Ohio's statutes regarding fraudulent statements in campaign literature, the opinion at least suggests that such statutes are constitutional. Therefore, New Mexico could amend its current statutes or adopt a wholly new statute to prohibit false, fraudulent or libelous statements in campaign literature, regardless of whether the materials are published anonymously or not. Properly drafted, it is likely that such a statute would withstand a constitutional challenge.



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