STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

September 2, 2021

The Honorable Maggie Toulouse Oliver
New Mexico Secretary of State
325 Don Gaspar, Suite. 300
Santa Fe, New Mexico 87501

Re: Opinion Request – Campaign Reporting Act

Dear Secretary Toulouse Oliver,

You have requested our opinion as to the application of the Campaign Reporting Act (hereinafter the "Act"), NMSA 1978, Sections 1-19-25 to -36 (1979, as amended through 2019) to donations from the campaign funds of state election candidates to federal election candidates.[1] In particular, you asked whether the Secretary of State may, pursuant to the Act, restrict a state candidate or candidate's agent from providing a campaign donation to a federal candidate, or whether federal law preempts such a restriction. As explained in greater detail below, and based on the applicable statutory and federal legal authority, we conclude that federal law appears to preempt an interpretation or implementation of the Act which would restrict a state candidate or candidate's agent from providing a campaign donation to a federal candidate.

Background

The New Mexico Campaign Reporting Act generally governs fundraising, reporting, and expenditures related to certain state elections. The Act requires all political committees to register with the Secretary of State by filing a "statement of organization," Section 1-19-26.1, provides that most independent expenditures over "one thousand dollars ($1,000) in a non-statewide election or three thousand dollars ($3,000) in a statewide election" must be reported to the Secretary of State, Section 1-19-27.3, and prohibits certain state officials from soliciting campaign contributions during legislative sessions. *See* § 1-19-34.1. These provisions are implemented by administrative rules promulgated by the Secretary of State, see 1.10.13 NMAC, whom the Act vests with administrative rulemaking authority. *See* § 1-19-26.2 ("The secretary of state may adopt

[1] You originally requested that we address an additional question regarding campaign donations to municipal candidates, but in a September 1, 2021 communication with our Office, you withdrew that question in light of a recent opinion issued by the State Ethics Commission. *See* State Ethics Comm'n, Advisory Op. No. 2021-11 (Aug. 13, 2021).

and promulgate rules and regulations to implement the provisions of the Campaign Reporting Act.").

Several statutory provisions effectively outline the scope of the Campaign Reporting Act. First, the statute is limited by its definition of the word "election," which is defined as "any primary, general or statewide special election in New Mexico and includes county and judicial retention elections but excludes federal, municipal, school board and special district elections." Section 1-19-26(K). By its plain language, the Act does not apply to elections (or candidates running in elections) outside of this definition. *Id*. In addition, Section 1-19-37 specifically states that the Act's provisions "do not apply to any candidate subject to the provisions of the federal law pertaining to campaign practices and finance."

Importantly, the Campaign Reporting Act limits the use of campaign funds by candidates and campaign committees. *See* § 1-19-29.1. The Act specifically states that "[i]t is unlawful for a candidate or the candidate's agent to make an expenditure of contributions received" unless the expenditure satisfies one of seven criteria. Section 1-19-29.1(A); *see also* N.M. Att'y Gen. Adv. Letter to Paula Tackett, Legislative Council Service (July 23, 2009) (hereinafter "Tackett Letter I") ("The Campaign Reporting Act provides seven permitted uses of campaign account monies."). One of these seven classifications of permissible expenditures is "donations to a political committee or to another candidate seeking election to public office." Section 1-19-29.1(A)(6).

Our Office has, on several occasions, previously analyzed the Act's limitations on expenditures and "donations to a political committee or to another candidate seeking election to public office." Section 1-19-29.1(A)(6). For instance, in two advisory letters issued in 2009 and 2010, we expressed our opinion that Section 1-19-29.1 does not prohibit candidates subject to the Act from donating campaign funds to candidates for federal office. *See* Tackett Letter I and N.M. Att'y Gen. Adv. Letter to Paula Tackett, Legislative Council Service (June 24, 2010) (hereinafter "Tackett Letter II"). More recently, both of these opinion letters provided the basis for our opinion in 2020 that "the New Mexico Campaign Reporting Act does not prohibit campaign committees from contributing to local or municipal candidates or local committees advocating for a municipal candidate." N.M. Att'y Gen. Adv. Letter to Hon. Mark Moores, New Mexico State Senator, at 1 (June 17, 2020). These opinion letters have all, in varying contexts, asserted that "[t]he Act does not make a distinction between a federal, state or local candidate and a common sense reading of the law is that a donation to a candidate for any public office - federal, state or local - is permissible." Tackett Letter I.

Our interpretation of the Act and Section 1-19-29.1(A) is informed by basic principles of statutory construction. Most importantly, the ultimate objective in statutory interpretation is to determine and effectuate the statute's purpose. *See State v. Ogden*, 1994-NMSC-029, ¶ 24, 118 N.M. 234 (noting that the purpose of statutory interpretation is to "determine and effectuate the intent of the legislature"). As our Supreme Court has repeatedly recognized, "[i]t is … a cardinal rule that in construing particular statutory provisions to determine legislative intent, an entire act is to be read together so that each provision may be considered in its relation to every other part, and the legislative intent and purpose gleaned from a consideration of the whole act." *Winston v. N.M. State Police Bd.*, 1969-NMSC-066, ¶ 5, 80 N.M. 310. *See also New Mexico Pharm. Ass'n v. State*, 1987-NMSC-054, ¶ 8, 106 N.M. 73 (noting that a statute must be read in its entirety and interpreted "as a whole so that each provision may be considered in relation to every other part"). Courts will,

however, "look beyond the four corners of the statute" in cases where a literal interpretation "leads to conclusions that are unjust or nonsensical." *Inv. Co. of the Sw. v. Reese*, 1994-NMSC-051, ¶ 13, 117 N.M. 655.

In addition, our interpretation of the Act also must be informed by principles of federalism and, in particular, the law of federal preemption. Pursuant to the Supremacy Clause in the United States Constitution, the "the Laws of the United States … shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a result, and as the United States Supreme Court has observed, "it has been settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), *quoting Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). To make this determination as to whether state law is preempted by federal law, the Supreme Court has held that the intent of Congress is "the ultimate touchstone." *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). *See also English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (noting that "[p]re-emption fundamentally is a question of congressional intent") and *Cipollone*, 505 U.S. at 516.

At the outset, it is well-established that "[t]here is a strong presumption against preemption," *Montoya v. Mentor Corp.*, 1996-NMCA-067, ¶ 7, 122 N.M. 2. Courts have held that "state law is pre-empted under the Supremacy Clause … in three circumstances." *English*, 496 U.S. at 78. First and foremost, Congress may preempt state law by expressly stating as much. *See id.* (explaining that "Congress can define explicitly the extent to which its enactments pre-empt state law") and *Hillsborough Cty. Fla. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (noting that "when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms"). Alternatively, based on the specific federal law in question, congressional intent to preempt state law may be implied. *See State v. Herrera*, 2014-NMCA-003, ¶ 7 (explaining that "courts look to whether Congress has expressly preempted state law and, in the absence of express preemption, to whether such a purpose can be implied from the structure and purpose of the federal legislation in question"). Implied preemption itself may take one of two forms: field preemption, which requires federal legislation so extensive and pervasive as to leave no room for state law on the subject, or conflict preemption, the circumstance where state law actually and directly conflicts with federal law. *See id.* at ¶ 9 ("Courts have recognized two distinct forms of implied preemption: field preemption and conflict preemption") and *English*, 496 U.S. at 79. In any of these three circumstances, state law must give way to federal law, which constitutes "the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

Analysis

You have asked whether, pursuant to the Act, the Secretary of State may restrict a state candidate or candidate's agent from providing a campaign donation to a federal candidate, or whether such a restriction is preempted by federal law. As your question itself recognizes, this is an issue that implicates both state and federal law. Based on both our Office's previous opinions and the relevant legal authorities, we conclude that federal law appears to preempt an interpretation or implementation of the Act which would restrict a state candidate or candidate's agent from providing a campaign donation to a federal candidate.

Preliminarily, and as we have already explained, this is not the first occasion in which our Office has been asked to opine on whether the Act bars candidates from donating campaign funds to

candidates for federal office. Although we have addressed this issue on two prior occasions, see Tackett Letter I and Tackett Letter II, we considered it in more detail in our advisory letter issued in 2010. *See* Tackett Letter II. There, relying primarily on advisory letters issued by the Federal Election Commission (the "FEC"), we explained that "the FEC may conclude that … a New Mexico law cannot restrict a candidate in New Mexico from using his campaign funds to make a donation to a federal candidate," based on the Supremacy Clause and the issue of federal preemption. *Id.* To the extent that Section 1-19-29.1(A) might be interpreted as a prohibition against candidates donating campaign funds to candidates for federal office, we opined that "[t]he Federal Election Commission … may view [this] as a de facto campaign limitation on a federal campaign activity." *Id.* Therefore, our Office has already expressed our view that the Act cannot, consistent with federal law, be interpreted to restrict a state candidate from providing a campaign donation to a federal candidate.

Our 2010 opinion was based on the Federal Election Campaign Act (the "FECA"), 52 U.S.C. §§ 30101 *et seq*. Originally intended to prevent "actual and apparent corruption of the political process," *Buckley v. Valeo*, 424 U.S. 1, 53 (1976), the FECA governs elections to federal offices and specifically imposes limits on campaign contributions to candidates for federal office, among its other provisions related to campaign finance. *See* 52 U.S.C. § 30116. *See also Federal Election Commission v. Akins*, 524 U.S. 11, 14 (1998) ("The Act imposes limits upon the amounts that individuals, corporations, 'political committees' (including political action committees), and political parties can contribute to a candidate for federal political office."). The FECA itself contains an express preemption provision stating that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 52 U.S.C. § 30143(a). This provision is further clarified by the administrative rule promulgated by the FEC stating that "Federal law supersedes State law concerning the … [l]imitation on contributions and expenditures regarding Federal candidates and political committees." 11 C.F.R. § 108.7. This preemption language, and in particular the FEC regulation's specific reference to limitations "on contributions … regarding Federal candidates," appears to preempt New Mexico's Campaign Reporting Act to the extent that it might be interpreted to restrict state candidates from donating campaign funds to federal candidates.

Moreover, as we discussed in detail in our 2010 opinion, the FEC has repeatedly issued advisory opinions[2] expressing its view that the FECA preempts state laws governing campaign contributions to federal candidates. In analyzing the legislative history of the FECA's preemption provision, the FEC has explained that "[t]he House committee that drafted this provision explains its meaning in sweeping terms, stating that it is intended 'to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated.'" FEC Advisory Op. No. 2000-23, at 2 (2000), quoting H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). Pursuant to this interpretation of the FECA, the FEC has, among other advisory opinions, found state laws preempted by the FECA which could have "prohibit[ed] any party committee from expending any funds in aid of a Federal candidate seeking the party's nomination in a primary election," FEC Advisory Op. No. 2000-23, at 1 (2000), prevented a Georgia state senator running for the U.S.

[2] FEC advisory opinions "are responses to specific requests to the FEC about the permissibility of proposed campaign activity." Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735, 740 (2013). It has been observed that the opinions "act … as 'signals' to the political community about how the law is interpreted by the six sitting commissioners." *Id.* at 741.

Senate from fundraising during a state legislative session, see FEC Advisory Op. No. 1995-48 (1996), and prohibited certain state contract vendors in Indiana from making campaign contributions to candidates for statewide federal office. *See* FEC Advisory Op. No. 1989-12 (1989).

The FEC's interpretation of the FECA and the scope of its preemption provision appears to be consistent with prior court decisions. For instance, in *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996), the Eleventh Circuit Court of Appeals held that the FECA preempted a Georgia statute prohibiting members of the Georgia General Assembly from accepting campaign contributions during a legislative session, at least to the extent that the state statute applied to candidates for federal office.[3] *See Teper*, 82 F.3d at 999 (holding that the state statute, "as applied to candidates for federal office, is preempted"). This decision was notable insofar as it deferred to the FEC's interpretation of the FECA. *See id.* at 998-99 (explaining that "the State has failed to construct a compelling argument that the FEC's interpretation of the preemptive effect of FECA is unreasonable or inconsistent with congressional intent"). Similarly, in *Weber v. Heaney*, 995 F.2d 872, 873 (8th Cir. 1993), the Eighth Circuit held that the FECA preempted a Minnesota statute which created "a system by which federal congressional candidates may agree to limit campaign expenditures and receive state funding for their campaigns."

The United States District Court for the District of New Mexico also addressed this specific issue, albeit briefly, in one prior decision. In that case, *Republican Party of New Mexico v. King*, 850 F. Supp. 2d 1206, 1215 (D.N.M. 2012), *aff'd*, 741 F.3d 1089 (10th Cir. 2013), the State (through a number of defendant public officials) conceded that the Act's contribution limitations in NMSA 1978, Section 1-19-34.7 (2009, as amended through 2019), did not apply to contributions to federal candidates. The District Court agreed, stating: "Taking into consideration the language of the Act and of FECA, and also Defendants' concession, the Court determines that the Act does not impose limits on contributions of money directed to candidates for federal elective offices, and that if it did it would be preempted by FECA." *King*, 850 F. Supp. 2d at 1215.

The foregoing authorities – our Office's prior opinions, the language of the FECA and its accompanying regulations, advisory letters issued by the FEC, and prior judicial decisions – all appear to reach the same conclusion. Together, they demonstrate that New Mexico's Campaign Reporting Act cannot be interpreted, consistent with the FECA and federal law, to restrict a state candidate or candidate's agent from providing a campaign donation to a federal candidate. Therefore, our opinion is that the Secretary of State does not have the statutory authority to impose such restrictions.

Conclusion

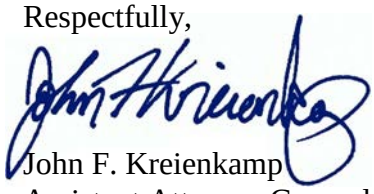
Based on our review of the relevant legal authorities, we conclude that the FECA expressly preempts any interpretation or application of New Mexico's Campaign Reporting Act that would prevent a state candidate from donating campaign funds to a candidate for federal office. The applicable legal authorities in this area all appear to support this conclusion. As a result, the

[3] Our Office issued an opinion in 2007 that relied in part on *Teper* in concluding that "the legislative session fundraising prohibition in the State Campaign Reporting Act … and State Lobbyist Regulation Act … does not apply to contributions to candidates for federal office." N.M. Att'y Gen. Op. 07-01 (2007).

Secretary of State therefore does not have the authority under the Act to restrict donations from a state candidate's campaign funds to federal candidates.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,



John F. Kreienkamp
Assistant Attorney General

Enclosure

cc: Dylan Lange, Esq.
General Counsel, Office of the Secretary of State