



WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP

1005 MARQUETTE AVE NW  
ALBUQUERQUE NM 87102  
T: (505) 750-3060 F: (505)226-8500

LICENSED IN NM AND SD\*

LICENSED IN AZ AND CO\*\*

## MEMORANDUM

**DATE: March 20, 2017**  
**TO: BOB PERLS, NMOP Board of Directors**  
**FROM: A. Blair Dunn, Esq.**  
**RE: Anti Donation Clause Lawsuit.**

### LEGAL ARGUMENTS

The New Mexico Constitution says:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation  
N.M. Const. art. IX, § 14

By funding private closed primary elections that are not open to all citizens of the State of New Mexico the State is funding a private election for the benefit of a private corporation. Further, by denying certain persons the right to participate in these publicly funded elections unless they forego their liberty to remain unaffiliated they are creating an exclusive right in violation of the following:

The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.  
N.M. Const. art. IV, § 26

Going further, a case can be made that denying a person the opportunity to participate in a publicly funded election unless they affiliate with a party runs afoul both the New Mexico Constitution art. II, § 18 and the 1<sup>st</sup> Amendment to the United States Constitution. This was not presented in the *Crum* case but the NM Const. states:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. N.M. Const. art. II, § 18

Essentially, in New Mexico we have allowed the private parties to deny non-party members the benefit of voting in state funded state controlled primary elections by denying them equal protection of the laws funding our elections. In this regard Justice Stevens dissent in *California Democratic Party v. Jones* stating that:

the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. California Democratic Party v. Jones, 530 U.S. 567, 598, 120 S. Ct. 2402, 2421, 147 L. Ed. 2d 502 (2000)

is illustrative of where the New Mexico Supreme Court might go a different route based upon our Constitution. I think the following from the same dissent is telling of why this argument is worth including in our case here in New Mexico:

As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. 169 F.3d 646, 654–655 (1999); cf. Timmons, 520 U.S., at 360, 117 S.Ct. 1364 (concluding that while regulation of endorsements implicates political parties' internal affairs and core associational activities, \*594 regulation of access to election ballot does not); La Follette, 450 U.S., at 120–121, 101 S.Ct. 1010 (noting that it “may well be correct” to conclude that party associational rights are not unconstitutionally infringed by state open primary); id., at 131–132, 101 S.Ct. 1010 (Powell, J., dissenting) (concluding that associational rights of major political parties are limited by parties' lack of defined ideological orientation and political mission). I think it clear—though the point has never been decided by this Court—“that a State may require parties to use the primary format for selecting their nominees.” Ante, at 2407. The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action.<sup>4</sup> It is because the primary is state action that an organization—whether it calls itself a political party or just a “Jaybird” association—may not deny non-Caucasians the right to participate in the selection of its nominees. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Smith v. Allwright, 321 U.S. 649, 663–664, 64 S.Ct. 757, 88 L.Ed. 987 (1944). The Court is quite right in stating that those cases “do not stand for the proposition that party affairs are [wholly] public affairs, free of First Amendment protections.” Ante, at 2407. They do, however, \*\*2419 stand for the proposition that primary elections, unlike most “party affairs,” are state action.<sup>5</sup> The protections that the First \*595 Amendment affords to the “internal processes” of a political party, *ibid.*, do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election. California Democratic Party v. Jones, 530 U.S. 567, 593–95, 120 S. Ct. 2402, 2418–19, 147 L. Ed. 2d 502 (2000).

**OPINION:** I believe that the law supports an action to find that the funding and the manner in which primary elections in NM are conducted violate these three sections of our New Mexico Constitution.

## LOGISTICS AND FORM

The New Mexico Declaratory Judgment Act NMSA 44-6-1 *et seq.* provides a vehicle to address unconstitutional statutes or actions by the State or the municipalities. Specifically, the NM DJA provides that:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. NMSA 1978 § 44-6-4

Meaning that a suit to challenge the laws passed by the State of New Mexico that appropriate money and provide for the conducting of closed primary elections would be proper and we can seek injunctive relief against the appropriation and conducting of elections in violation of the New Mexico Constitution at the next legislative session.

New Mexico Open Primaries can be the named Plaintiff under NMSA 44-6-2 and the State of New Mexico can be sued as the Defendant under NMSA 44-6-13.

I would expect to keep this very simple as a Complaint for Declaratory and Injunctive Relief addressing the HB 2 in 2016 provided funding for private closed primary elections pursuant to NMSA 1-8-1 *et seq* which violate the aforementioned Constitutional provisions and seeking an injunction against the New Mexico Secretary of State from using public money to conduct primary elections in 2018.

I expect that this case should be filed in the First Judicial District in Santa Fe. Given that there are no questions of fact at the district court level that the case may be decided upon the law in a motion for summary judgment. I expect that the drafting of the complaint, the briefing for summary judgment, and oral argument prep will take approximately 75 hours of attorney time. I expect that this case will likely need to be appealed all the way to the New Mexico Supreme Court and that at each stage approximately 75 hours of attorney time will need to be expended to brief and argue bringing the total hours to 225. I would anticipate that \$150.00 per hour (this is a 50% reduction in our normal rate for this type of work) that a safe budget for completion of this case through the New Mexico Supreme Court is \$35,000.00.