SMALL BUSINESS LAW CENTER, LLC
P.O. Box 294
400 Gold Ave SW, Suite 500
Albuquerque, NM 87103

TELEPHONE
(505) 242-2788
FACSIMILE
(505) 898-1176

EMAIL
sara@nmsmallbusiness.com

June 6, 2008

The Honorable Mary Herrera
New Mexico Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

Dear Secretary Herrera:

We write on behalf of New Mexico Youth Organized ("NMYO") and the Center for Civic Policy ("CCP"). We submit for your review the following memorandum in support of our position that NMYO need not register as a political committee. As we stated in our letter to you dated May 30, 2008, we adamantly disagree with Mr. Lama's statements (letter to you dated May 22, 2008) that NMYO has the characteristics of a political committee and, therefore, must comply with the requirements of the Campaign Reporting Act. This memorandum will show that the Attorney General's Office based its conclusion on a misunderstanding of the facts and without consideration of NMYO's First Amendment rights. We trust that when you consider the actual history of NMYO's activities and review the well-settled law that protects these activities, you will affirm your prior determination that NMYO is not subject to the burdensome registration, reporting, and disclosure requirements of the Campaign Reporting Act.

I. Factual Background

On January 1, 2008, NMYO began its operations. NMYO is housed under CCP, a non-profit corporation formed under 26 U.S.C. § 501(c)(3) and the Center for Civic Action ("CCA"), a non-profit corporation formed under 26 U.S. C. § 501(c)(4). CCP, CCA and NMYO are nonpartisan educational organizations dedicated to educating the public on issues important to New Mexico citizens, including healthcare, clean elections, the economy and the environment.

NMYO's primary purpose is not to influence or attempt to influence elections, but rather to educate young New Mexicans regarding issues that are important to them. While NMYO is run by individuals who were previously associated with the New Mexico Chapter of the League of Young Voters, that Chapter ceased operations at the end of 2007. Mr. Lama appears to have based his determination solely on the activities undertaken by the League of Young Voters (www.theleague.com)--activities that are completely irrelevant to this analysis.

To clarify NMYO's history, since its inception in January of this year, NMYO has been engaged in the following efforts:

Jan-Feb 2008	NMYO works to support ethics and environmental legislation during the 2008 state legislative session. Keegan King, director of NMYO, registers as a lobbyist with the Secretary of State.
March – April 7, 2008	At the close of the legislative session, NMYO sends out a mail piece to New Mexico citizens criticizing State Senators Shannon Robinson, David Ulibarri and Lidio Rainaldi for their ethics and environmental votes. The direct mail discusses the 2008 legislative session, the voting records of these incumbents, and the urgency for constituent action given the possibility of a summer legislative session. Notably, the mail piece *does not* refer to any election, *does not* refer to the Senators' status as candidates, *does not* refer to challengers, *does not* refer to voting, *does not* refer to political parties, *does not* refer to the qualifications of the incumbents, and *does not* refer to specific issues that were divisive issues in any campaign race.[1] Furthermore, the mailing was done immediately following the legislative session and prior to the primary election period.
March – early May 2008	NMYO conducts phone surveys in Albuquerque gauging support for green jobs in order to build support for city council legislation in late summer 2008. Calls are made in Senator Boitano's and Representative Silva's districts.
Late May 2008	NMYO conducts nonpartisan voter turnout for the 2008 June Primary Election in Senator Rainaldi, Senator Boitano and Rep. Dan districts. These calls are separate and distinct from the green jobs calls. These calls simply urge voters to go to the polls. The caller never references any candidate, political party or issue.

II. Legal Argument

1 In fact these mail pieces were prepared and distributed well before any information about any challengers were available.

Mr. Lama at the Attorney General's Office argues that, based on his review of the website, www.theleague.com, "NMYO appears to have the characteristics of both a political committee and lobbyist organization." Letter from Al Lama dated May 22, 2008. The letter asserts that NMYO's "goal is to train young people to organize voters and support candidates who have a progressive political agenda." *Id*. The letter further states that NMYO registers people to vote, issues a voting guide, and lobbies elected officials throughout the year. *Id*. Based on this cursory and misconstrued analysis of what the Attorney General's Office considers to be the relevant facts, Mr. Lama asks you to amend your position and require NMYO to immediately comply with the requirements of the Campaign Practices [Reporting] Act.

This argument fails for several reasons. First, as we stated previously, NMYO is not affiliated with the League of Young Voters, and, therefore, whatever is stated on the League of Young Voters' website cannot be attributed to NMYO. Secondly, even if the individuals associated with NMYO had, while they worked for the League of Young Voters, supported candidates with a progressive agenda, the group is fully entitled to engage in protected issue advocacy and non-partisan GOTV efforts without having those activities attributed to past electioneering work.[2] *See Federal Election Com'n v. Wisconsin Right To Life, Inc. ("WRTL")*, 127 S.Ct. 2652, 2668 (2007) (a nonprofit organization "does not forfeit its right to speak on issues simply because in other aspects of its work it also opposes candidates who are involved with those issues"). Finally, if the Attorney General based its conclusion that NMYO has characteristics of a political committee because NMYO made phone calls encouraging the public to vote and also distributed a mail piece that criticized incumbent legislators, the First Amendment protects those activities.

A. The New Mexico Campaign Reporting Act

New Mexico statute defines "political committee" as "two or more persons, other than members of a candidate's immediate family or campaign committee or a husband and wife who make a contribution out of a joint account, who are selected, appointed, chosen, associated, organized or operated *primarily* for a political purpose." NMSA § 1-19-26(L) (emphasis added). The statute further defines "political purpose" as "influencing or attempting to influence an

2 The League of Young Voters, and its related entities, conducted activities as a 501c3 organization, a 501c4 organization, and a political committee.

election or pre-primary convention, including a constitutional amendment or other question submitted to the voters." NMSA § 1-19-26(M).

According to state statute, political committees must appoint and maintain a treasurer and register with the secretary of state by filing a statement of organization. These committees must then submit regular reports of contributions and expenditures and follow other disclosure requirements. *See generally*, NMSA §§ 1-19-1 et. seq.

B. Well-settled law supports the determination that NMYO is not a political committee.

The Courts have made it abundantly clear that governments may only interfere with, or otherwise regulate, in the narrowest of circumstances, advocacy communication that expressly and incontrovertibly urges voters to support or oppose a candidate for public office. Interpretations of the First Amendment, as they relate to federal and state campaign laws, forbid such regulations unless the communication either mentions words such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat," or "reject," *Buckley v. Valeo*, 96 S.Ct. 612, 647, fn. 52 (1976), or have some other "indicia of express advocacy" (such as mentioning an election, a political party, candidates—in their roles as candidates and not incumbents—or the candidates' challengers). *WRTL*, 127 S.Ct. 2652, 2666 (2007). Because NMYO's activities fall far short of this standard, the State of New Mexico is prohibited from requiring NMYO (and similar groups) to comply with the Campaign Reporting Act.

"Freedom of speech plays a fundamental role in a democracy…freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'" *Federal Election Com'n v. Massachusetts Citizens for Life, Inc. ("MCFL"),* 107 S.Ct. 616, 631 (1986) (*quoting Palko v. Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)). Furthermore, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley* at 632 (*quoting Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)). And, "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information

is needed or appropriate to enable the members of society to cope with the exigencies of their period. Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL,* 127 S.Ct. at 2669 (internal quotations and citations omitted).

To that end, "[w]hen a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *MCFL* at 627. *See also*, *WRTL* at 2664 (holding that because the statute at issue burdened political speech, it was subject to strict scrutiny.) Furthermore, when a statute, such as New Mexico's Campaign Reporting Act, imposes criminal penalties,[3] "[c]lose examination of the specificity of the statutory limitation is required…The test is whether the language of [the statute] affords the '(p)recision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms.'" *Buckley*, 96 S.Ct. at 645 (*quoting NAACP v. Button*, 371 U.S., at 438, 83 S.Ct., at 340). "In such circumstances, vague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at fn. 48 (internal quotations and citations omitted). The *Buckley* Court further held that in order to avoid invalidation on vagueness grounds, a statute "must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat" of a candidate for office. *Buckley* at 646-47.

A decade after the *Buckley* decision, the U.S. Supreme Court revisited this issue when it addressed the burden on free speech by governmental action requiring a nonprofit organization to adhere to political committee registration and reporting requirements. The *MCFL* Court found that the registration, disclosure and reporting requirements "may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage." *MCFL* 107 S.Ct. at

---

3 *See* NMSA § 1-19-36 (A) ("Any person who knowingly and willfully violates any provision of the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978] is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand

626. Because the practical effect of the requirements might discourage protected speech, the Court held that this was an infringement on First Amendment activities. *Id.* at 626. Furthermore, the statutes' "practical effect on [the nonprofit organization] [was] to make engaging in protected speech a severely demanding task." *Id.* at 627. Even though the "burden on [the organization's] speech [was] not insurmountable," the Court could not "permit it to be imposed without a constitutionally adequate justification." *Id.*

Just last year, the U.S. Supreme Court issued an opinion that further supports NMYO's right to be free from imposition of the Campaign Reporting Act requirements. *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652 (2007), provided clarification on distinguishing between issue advocacy (the activities of NMYO) versus campaign advocacy. The Court criticized an earlier opinion, *McConnell v. Federal Election Com'n*, 124 S.Ct. 619 (2003), that broadened Buckley's definition of express advocacy to include messages that were the "functional equivalent" of express advocacy. The *WRTL* Court found *McConnell*'s standard "impermissibly vague and thus ineffective to vindicate the fundamental First Amendment rights at issue." *WRTL* at 2659. The Court stated that it was necessary to draw a line between issue advocacy and campaign advocacy because "we have recognized that the interests held to justify the regulation of campaign speech and its "functional equivalent" "might not apply" to the regulation of issue advocacy." *Id.* (*quoting McConnell* at 206, and n. 88).

The Court went on to say that "[i]n drawing that line, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *WRTL* at 2659. The Court held that the proper standard for making this distinction was to focus "on the substance of the communication rather than amorphous considerations of intent and effect… In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy *only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate*." *WRTL* at 2666 (emphasis added). Applying this test, the Court found that WRTL's ads were not the functional equivalent of express advocacy because, like the mail campaign conducted by NMYO, " their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that

---

dollars ($1,000) or by imprisonment for not more than one year or both.")

position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office." *WRTL* at 2666.

The Court explained that "[i]ssue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose-uninvited by the ad-to factor it into their voting decisions." *WRTL* at 2667. The Court rejected the government's argument that because the timing of the ads were near elections, that supported the conclusion that they were the functional equivalent of express advocacy. The Court found that "[t]o the extent this evidence goes to WRTL's subjective intent, it is again irrelevant." *Id.* at 2668.

In conclusion, the Court stated that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban…we give the benefit of the doubt to speech, not censorship. The First Amendment's command that 'Congress shall make no law ... abridging the freedom of speech' demands at least that." *WRTL* at 2674.

C. Internal Revenue Service published guidance supports the determination that NMYO is not a political committee.

Although the rulings of the IRS are not, by law, determinative of the scope of regulations this State may impose, these regulations should be considered when assessing what kinds of speech might be restricted. Because the IRS places limitations on the activities of nonprofit organizations, it must be careful that its regulations do not run afoul of the First Amendment. In an effort to help nonprofit organizations stay within the parameters of their protected speech rights, the IRS publishes guidance in the form of fact sheets, reports and revenue rulings. This guidance provides a much-needed framework within which groups like NMYO, CCP, and countless other New Mexico organizations, operate.

NMYO's activities fall under the fiscal sponsorship of 501c3 and 501c4 organizations. CCP is a 501c3 organization. Groups like CCP are prohibited from intervening in political campaigns but may engage in issue advocacy. The IRS recognizes that "[s]ection 501(c)(3) organizations may take positions on public policy issues, including issues that divide candidates in an election for public office." Rev. Rul. 2007-41. IRS regulations state that allowable

educational activities are those that "relate to the instruction of the public on subjects useful to the individual and beneficial to the community." Rev. Rul. 76-456.

"Whether an organization is participating or intervening, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case." Rev. Rul. 2007-41. The IRS places significant weight on whether a communication makes reference to candidates or voting in an upcoming election. *Id*. However, even if those two factors are present, the IRS considers them in context before making a determination.

The IRS has provided examples from its rulings to assist nonprofits in making a determination of whether they are engaged in allowable issue advocacy. In a case that had facts and circumstances that were nearly identical to NMYO's legislative mail campaign, a 501c3 organization ran in ad, shortly before a primary election, urging voters to contact their Senator to vote in support of a certain educational bill. The ad stated that this Senator had opposed similar measures in the past. The IRS found that this ad campaign did not violate the political campaign intervention prohibition because the ad did not mention the election or the candidacy of the Senator, education issues had not been raised as distinguishing this Senator from any opponent, and the timing of the advertisement and the identification of the Senator were directly related to the specifically identified legislation the nonprofit organization was supporting. The ad appeared immediately before the Senate was scheduled to vote on that particular legislation. And the candidate identified was an officeholder who was in a position to vote on the legislation. *See* Rev. Rul. 2007-41. *See also*, Rev Rul. 76-456 (ruling that "organization is instructing the public on subjects useful to the individual and beneficial to the community…by encouraging voters to concern themselves with fair as well as unfair practices encountered in political campaigns"). Applying these factors to NMYO's ad campaign, it is clear that NMYO has not engaged in political campaign intervention. First, NMYO's ad does not mention candidates or an upcoming election. The campaign was timed to coincide with the end of the legislative session and before a possible summer session. The campaign was not run shortly before an election.[4] The issues raised by the mailings had not been raised as distinguishing these incumbent legislators from any

4 Federal regulations define the prohibited election period as 30 days before a primary election. 2 USC § 434(f)(3)(A)(II)(bb).

opponent. And, the Senators were identified as officeholders who were in a position to vote on upcoming legislation.

Conclusion

If the Secretary of State's Office were to ignore well-settled law and, instead, choose to adopt the recommendations of Mr. Lama at the Attorney General's Office requiring groups like NMYO to register as a political committee when they conduct issue advocacy campaigns, such a ruling would have a severe chilling effect on these groups' free speech rights. *See* attached letters of support from Southwest Organizing Project, Sage Council, New Mexico Community Foundation and McCune Charitable Foundation. The registration, reporting and disclosure requirements are onerous and burdensome. These organizations would be mired in attempting to resolve conflicting complex federal and state regulations. Donors may be wary of giving these organizations funding. Many groups would likely avoid the legal quagmire, choosing to remain silent on issues that are important to the public. Ultimately, New Mexicans would suffer the harm of not having access to information that only these groups provide.

Based on the foregoing, we respectfully request that you sustain your original determination that NMYO—and similar educational and charitable organizations—be free from complying with the New Mexico Campaign Reporting Act.

Respectfully submitted,

SARA BERGER
Small Business Law Center, LLC
P.O. Box 294
Albuquerque, NM 87103-0294

JOHN W. BOYD
Freedman Boyd Hollander Goldberg & Ives, PA
20 First Plaza, Suite 700
Albuquerque, NM 87102

Attorneys for NMYO and CCP

cc. Albert Lama, New Mexico Attorney General's Office (via facsimile and mail)