BEFORE THE CITY OF SANTA FE ETHICS AND CAMPAIGN REVIEW BOARD

ALAN WEBBER FOR
MAYOR CAMPAIGN,

Complainant,

v. Case No. 2021-2

UNION PROTECTIVA, VFW
POST 2951, and AMERICAN
LEGION POST 1,

Respondents.

ANSWER OF RESPONDENT UNION PROTECTIVA

Understandably unhappy with the views of Union Protectiva de Santa Fe, a century-old fraternal organization in Santa Fe, the campaign of Mayor Alan Webber asks this Board to fine Union Protectiva, require it to file as a "political committee," as that phrase is used in the Santa Fe Municipal Code, and require it to provide information about its donors and expenditures related to the upcoming municipal election.[1] The requested relief is foreclosed by both the Municipal Code and federal case law concerning the extent to which governmental entities may burden the First Amendment rights of organizations like Union Protectiva in the electoral context. The Board should dismiss the complaint or otherwise deny to Complainant the relief it seeks.

1 In connection with its allegations concerning expenditures coordinated with the campaign of Joann Vigil Coppler, Complainant also asks the Board to "assess whether Ms. Vigil Coppler filed as a political committee within ten days of the coordinated expenditure; whether he reported these coordinated expenditures; and whether she violated any applicable contribution limits." Neither Ms. Vigil Coppler nor any person or entity formally associated with her campaign is a party to this matter.

Background

Respondent is one of the oldest Hispanic fraternal organizations in the United States. Founded in 1915 and chartered in 1916, it has continuously operated in Santa Fe for more than a century. It was formed to preserve the language, history, arts, traditions, and culture of the Spanish colonists who arrived in Santa Fe in the 1600s. Its primary mission at its founding and today is to provide financial aid for the burial of its members and spiritual support to their families.

Respondent is undeniably disappointed with Mayor Webber, particularly with his handling of the circumstances surrounding the removal of the Soldier's Monument obelisk in the Santa Fe plaza. To express its disappointment, Respondent took out one full page advertisement in the Santa Fe Reporter and funded another. The first advertisement ran on March 31, 2021 and again on April 7, 2021. The second ran on July 28, 2021. The graphic used for the second advertisement also appeared as a Facebook advertisement in July and was printed on yard signs. These advertisements cost Respondent a fraction of its annual budget.

Answer

The Municipal Code cannot be construed to require of Respondent the steps Complainant urges the Board to require. The complaint alleges that, by funding the ads and posters identified in the complaint, Respondent has violated four provisions of the Municipal Code: (1) Section 9-2.5(B); (2) Section 9-2.7(A); (3) Section 9-2.7(B); and (4) Section 9-2.8(A). Each of these provisions set forth obligations of a "political committee," a term defined in Section 9-2.3.

Respondent is not a political committee. The only provision that could even possibly apply to Respondent to require reporting of any kind is Section 9-2.6. While the complaint refers to it, Complainant does not seek relief based on any alleged violation of Section 9-2.6. Even if it did, Respondent did not violate the provision.

Lastly, Complainant seeks relief – some of which would be directed to a person not a party to this proceeding, a notion offensive to the most fundamental tenets of due process – on the basis of rank conjecture. Nothing in the complaint resembles a credible allegation of coordination between Respondent and Complainant's opponent, and the Board should dismiss it out of hand.

I. RESPONDENT IS NOT A POLITICAL COMMITTEE AND IS THUS NOT SUBJECT TO THE REQUIREMENTS OF SECTIONS 9-2.5, 9-2.7, OR 9-2.8.

First and foremost, the complaint fails because each and every violation it posits is a violation of a provision that governs "political committees," and Respondent is not a political committee. Complainant contends that each of the communications identified in the complaint violate the same four provisions of the Municipal Code: Section 9-2.5(B), Section 9-2.7(A), Section 9-2.7(B), and Section 9-2.8(A).

Section 9-2.5(B) requires that "[c]ampaign materials disseminated or communicated by a political committee . . . conspicuously identify the name of an officer or other responsible person of the political committee sponsoring such materials." Section 9-2.7(A) requires "[e]very political committee" to "file a statement of organization with the city clerk" no later than the date on which it "contracts for or initiates the dissemination of any campaign materials." Section 9-2.7(B) sets forth the information to be contained in that statement of organization. Lastly, Section 9-2.8(A) requires a "political committee, at the

time it is required to file a statement of organization," to identify a treasurer and a "campaign depository."

So what is a "political committee" that must comply with these provisions? The answer is found in Section 9-2.3(N):

> Political committee means any entity formed for the principal purpose of:
>
> (1) Raising or collecting, and expending or contributing money or anything of value for supporting the election or defeat of any identifiable candidate or candidates or for supporting he approval or defeat of ballot propositions; or
>
> (2) Coordinating or cooperating in efforts to support the election or defeat of any identifiable candidate or of supporting the approval or defeat of any ballot proposition.

Respondent simply does not meet either definition. Respondent's "principal purpose" is the preservation of Hispanic heritage in Santa Fe and, even more particularly, ensuring that its members and their families have the resources they need to pay for the burial of a member. For over a century, that purpose has neither wavered nor changed. Respondent rarely wades into anything resembling political waters. Indeed, as best any current member of Respondent knows, the advertisements underlying the complaint are the the ***only*** advertisements of this nature that Respondent has ***ever*** paid for in its entire history.

Because it is not a political committee, none of the provisions Complainant contends Respondent has violated apply in any way to Respondent. It is thus impossible for Respondent to have violated those provisions and Complainant is not entitled to any of the relief it seeks.

II. THE COMPLAINT DOES NOT SEEK RELIEF ON THE BASIS OF ANY VIOLATION OF SECTION 9-2.6, BUT RESPONDENT DID NOT VIOLATE THAT PROVISION EITHER.

The complaint urges the Board to find violations only of the provisions identified above. The complaint does, however, cite to Section 9-2.6 and also engages in a brief discussion of express advocacy and its functional equivalent, concepts federal courts have crafted in examining the role of the First Amendment in the regulation of electioneering communications. Out of an abundance of caution, Respondent will address whether it must file the contribution and expenditure reports required by Section 9-2.6(A). It is not, for two reasons. First, the advertisements are not express advocacy or its equivalent. Second, even if they were, the communications were made well outside of the 60-day window triggering the disclosure requirement.

A. The Material Underlying the Complaint Is Not Express Advocacy or its Equivalent.

The United States Supreme Court has consistently held that the reporting burdens on free speech like those found in Section 9-2.6(A) are constitutionally permissible only when they apply to express advocacy or its functional equivalent. Express advocacy consists of language unambiguously urging a reader or listener to vote for or against a particular candidate. Complainant does not, to its credit, urge that either of the advertisements at issue meet this standard.

Instead, Complainant contends that both advertisements are the functional equivalent of express advocacy, a standard requiring a finding that the advertisements are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

Neither advertisement meets this standard. The second advertisement presents the easier case. It identifies what is perhaps best described as a philosophical platform of Mayor Webber – his CHART (Culture, History, Art, Reconciliation, and Truth) – and uses it to express displeasure with the removal of the plaza obelisk, the removal of a statue of Don Diego de Vargas from Cathedral Park, and the boarding up of the Kit Carson memorial. The advertisement is classic issue advocacy. It identifies an issue and states Respondent's viewpoint concerning that issue. It identifies Mayor Webber but does not even faintly suggest that anyone should vote for or against him. Indeed, it does not even mention the upcoming municipal election. In short, the most reasonable interpretation of the advertisement is that the speaker is unhappy with Mayor Webber. The First Amendment robustly protects that speech.

The first advertisement is perhaps a closer question, as it asserts that Mayor Webber does not deserve a second term and suggests that the reader should vote for leaders who "take their hands out of their pockets" under a photograph of Mayor Webber standing in front of the plaza obelisk with his hands in his pockets. The entirety of the advertisement is approximately two columns of print. The vast majority of the advertisement expresses displeasure with Mayor Webber in much the same way as the CHART advertisement. If the advertisement were limited to the text identified by Complainant, it might well be the equivalent of express advocacy. But Claimant has cherry picked two sentences out of two columns of print, ignoring the remainder. Claimant stretches too far by arguing that the advertisement can only be reasonably interpreted as advocacy against Mayor Webb in an election seven months away at the time of printing.

B. Even if the Advertisements Are the Equivalent of Express Advocacy, They Were not Published Within Sixty Days of the Municipal Election and thus not Subject to Regulation.

The distance in time between the advertisements and the municipal election is important for a second reason. Section 9-2.6(A) requires any person (not just political committees) to file a contribution and expenditure report with the City Clerk if that person spends $250.00 or more on a communication that either (1) expressly advocates for the election or defeat of a candidate; or (2) refers to a clearly identifiable candidate and is published within 60 days of the election in which that candidate is running. As discussed above, Complainant does not suggest – rightly – that either advertisement constitutes the kind of express advocacy that would trigger the reporting obligation of Section 9-2.6(A). It is also undeniable that none of the advertisements appeared within 60 days of the municipal election, which will be held on November 2, 2021. That cutoff is September 1, 2021. The most recent advertisement, published on July 28, 2021, ran 35 days before that cutoff. None of the advertisements are sufficient to subject Respondent to the reporting obligations found in Section 9-2.6(A). Thus, even if Complainant had alleged a violation of Section 9-2.6(A), the allegation would fail.

III. THE COMPLAINT SEEKS RELIEF NOT LEGALLY AVAILABLE.

The relief available to a complainant under the Municipal Code for violations of the provisions Complainant has identified is set forth in Section 6-16.7. Complainant seeks imposition of a fine of $500.00 for each alleged violation and two types of injunctive relief: (1) an order requiring the removal of yard signs; and (2) an order requiring Respondent to file as a political committee. Section 6-16.7 does not provide any authority whatsoever for

the injunctive relief Complainant seeks (or, indeed, any injunctive relief at all). Instead, that provision authorizes the Board to: (1) issue a public reprimand; (2) issue a fine of not more than $500.00 per violation; (3) recommend removal of a public officer; (4) refer complaints against public officials to law enforcement; and (5) in the case of a violation of the Public Campaign Finance Fund, revoke a candidate's public finance certification. The injunctive relief Complianant seeks finds no expression anywhere in the Municipal Code, and the Board lacks the authority to provide it.

IV. THE COMPLAINT DOES NOT CONTAIN COMPETENT ALLEGATIONS OF COORDINATED EXPENDITURES, AND ANY RELIEF FLOWING FROM SUCH ALLEGATIONS WOULD LIE NOT WITH RESPONDENT, BUT WITH A PERSON NOT A PARTY TO THIS PROCEEDING.

The complaint alleges, based on a single email of support sent to Joanne Vigil-Coppler by Virgil Vigil, that the expenditures made by Respondent on the advertisements in question constituted coordinated expenditures under the Municipal Code. That allegation lacks any semblance of factual support. It instead constitutes little more than fanciful musing by an entity politically opposed to Councilor Vigil-Coppler that *maybe* the expenditures were coordinated with her campaign.

Equally problematically, even if Complainant had competent evidence (or any evidence) of the kind of coordination it alleges, such coordination would only trigger reporting obligations for the candidate with whom the expenditures were coordinated. Indeed, in describing the relief Complainant seeks from the Board, Complainant asks the Board to determine whether these were coordinated expenditures and, if they were, to "assess whether Ms. Vigil Coppler filed as a political committee within ten days of the

coordinated expenditure; whether she reported these coordinated expenditures; and whether she violated any applicable contribution limits."

In other words, in connection with its unsupported allegations of coordinated spending, Complainant seeks relief *only* against Councilor Vigil-Coppler. She is, of course, not a party to this proceeding. The guarantees of due process enshrined in the constitutions of both the United States and New Mexico flatly prohibit that relief.

Conclusion

Complainant has failed to identify any violations of the Municipal Code by Respondent. Respondent is not a political committee, making Sections 9-2.5, 9-2.7, and 9-2.8 flatly inapplicable. The only provision that could even possibly apply to Respondent's communications is Section 9-2.6, and Complainant seeks no relief under that section. The request would, in any event, be futile because the advertisements at issue are not express advocacy or its functional equivalent and did not occur within the 60-day window Section 9-2.6 provides. The Board should summarily dismiss the complaint.

Respectfully submitted,

/s/ Scott Fuqua
Scott Fuqua
Fuqua Law & Policy, P.C.
P.O. Box 32015
Santa Fe, NM 87594
(505)982-0961 – Telephone
scott@fuqualawpolicy.com

Attorney for Respondent Union Protectiva de Santa Fe