



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2021-05**

February 5, 2021<sup>1</sup>

### **QUESTION PRESENTED**

May a member of the legislature who is also a candidate for United States representative solicit contributions for their campaign for federal office during a legislative session?

### **FACTS<sup>2</sup>**

Members of the legislature and certain other elected officials are prohibited from “knowingly solicit[ing] a contribution governed by the Campaign Reporting Act” from January 1 to the adjournment of any regular legislative session or from the date of proclamation to the adjournment of any special session. *See* NMSA 1978, Section 1-19-34.1 (1993, as amended 2019).

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<sup>1</sup>This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C).

<sup>2</sup>The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). On January 7, 2020, the Commission received a request for an advisory opinion that detailed facts as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity.

In the November 3, 2020 general election, Deb Haaland was elected the United States Representative for New Mexico’s District 1 in the 117th United States Congress. *See* Secretary of State, Official Results, 2020 General, November 3, 2020, <https://nmresults.azurewebsites.net/resultsSW.aspx?type=FED&map=CTY> (last accessed February 5, 2021). But President Joe Biden nominated Representative Haaland to serve as Secretary of the Department of the Interior. *See* The White House, *The Cabinet*, <https://www.whitehouse.gov/administration/cabinet/> (last accessed Feb. 5, 2021). If confirmed, Representative Haaland will leave her congressional office, triggering a special election sometime this year. *See* NMSA 1978, § 1-15-18.1(A) (2019) (“Within ten days after a vacancy occurs in the office of United States representative, the secretary of state shall, by proclamation, call an election to be held not less than seventy-seven nor more than ninety-one days after the date of the vacancy for the purpose of filling the vacancy . . .”).

The First Session of the 55th Legislature began on January 18, 2021. Some members of the legislature are soliciting donations to their campaigns for the CD 1 special election. The request asks whether this fundraising activity is prohibited by Section 1-19-34.1.

## **ANSWER**

Yes.

## **ANALYSIS**

Section 1-19-34.1 does not prohibit a member of the legislature from soliciting donations to a campaign for United States representative because those donations are not subject to the Campaign Reporting Act.

Section 1-19-34.1 provides:

A. It is unlawful during the prohibited period for a state legislator, the attorney general, the secretary of state, the state treasurer, the commissioner of public lands or the state auditor or a candidate for state legislator, attorney general, secretary of state, state treasurer, commissioner of public lands or state auditor, or any agent on behalf of the attorney general, the secretary of state, the state treasurer, the commissioner of public lands or the state auditor or a candidate for attorney general, the secretary of state, state treasurer, commissioner of

public lands or state auditor, to knowingly solicit a contribution governed by the Campaign Reporting Act. For purposes of this subsection, “prohibited period” means that period beginning January 1 prior to any regular session of the legislature or, in the case of a special session, after the proclamation has been issued, and ending on adjournment of the regular or special session.

B. It is unlawful during the prohibited period for the governor or the lieutenant governor, or any agent on the governor's or the lieutenant governor's behalf, to knowingly solicit a contribution governed by the Campaign Reporting Act. For purposes of this subsection, “prohibited period” means that period beginning January 1 prior to any regular session of the legislature or, in the case of a special session, after the proclamation has been issued, and ending on the twentieth day following the adjournment of the regular or special session.

Section 1-19-34.1 prohibits a member of the legislature or one of the other above-referenced elected offices from soliciting “a contribution governed by the Campaign Reporting Act” during the “prohibited period,” i.e., between January 1 and the adjournment of any regular legislative session and between the proclamation and adjournment of any special session. So the issue is whether a contribution to a campaign for United States representative is a contribution “governed by the Campaign Reporting Act.”

What is a “contribution governed by the Campaign Reporting Act”? “[A] gift, subscription, loan, advance or deposit of money or other thing of value . . . made or received for a political purpose[.]” § 1-19-26(H)(1). What does “political purpose” mean? Something “supporting or opposing . . . the nomination or election of a *candidate*.” § 1-19-26(S) (emphasis added). What is a “candidate”? Someone “who seeks or considers an office in an election covered by the Campaign Reporting Act[.]” § 1-19-26(G).

Thus, whether a member of the legislature (or another one of the offices mentioned in Section 1-19-34.1) is prohibited from soliciting contributions for a campaign for United States representative turns on whether that office is “covered by the Campaign Reporting Act . . . .” *See* § 1-19-26(G). It is not: the Campaign Reporting Act only applies to candidates in “any primary, general or statewide special election in New Mexico . . . *but excludes federal . . . elections.*” § 1-19-26(K). The text of the Campaign Reporting Act thus excludes contributions to campaigns for federal elections from regulation, and as a result Section 1-19-34.1

does not preclude soliciting donations for campaigns for federal office during the legislative session.

In addition to following from the text of the Campaign Reporting Act itself, this conclusion is supported by federal campaign finance laws. Federal campaign finance law “supersede[s] and preempt[s] any provision of State law with respect to election to Federal office.” 52 U.S.C. § 30143. As the Attorney General noted in an opinion interpreting an earlier version of Section 1-19-34.1, federal law does not prohibit fundraising for a campaign for federal office prior to or during a state legislative session; as a result, state laws which “place a limitation on . . . fundraising for [a] federal campaign” are unenforceable. *See* 2007 Op. Att’y Gen. No. 07-01 (Feb. 7, 2007) (citing and discussing federal cases invalidating state law restrictions on the solicitation of contributions to campaigns for federal office). This likely explains the legislative history of Section 1-19-34.1, which before 2019 prohibited a member of a covered office from “knowingly solicit[ing] a contribution for a political purpose” during the prohibited period. *See* § 1-19-34.1 (1995). The 2019 amendments replaced “for a political purpose” with “governed by the Campaign Reporting Act,” clarifying that the fundraising prohibition applies only to donations that are subject to regulation by state campaign finance law. *See* Laws 2019, ch. 86, § 18.

## CONCLUSION

The Campaign Reporting Act does not prohibit a member of the legislature from soliciting contributions for a campaign for United States representative.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**RONALD SOLIMON, Commissioner**

**JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**