

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 4643
5 Friends of Eric Serna for Congress)
6 John Pound, as Treasurer)
7
8

9 **GENERAL COUNSEL'S BRIEF**

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11 **I. STATEMENT OF THE CASE**

12 MUR 4643 involves an examination of disbursements made during a special election
13 period in the spring of 1997, by the Democratic Party of New Mexico ("DPNM") on behalf of a
14 Democratic congressional candidate, Eric Serna, and the Friends of Eric Serna for Congress
15 committee ("Serna campaign"). The Federal Election Commission ("Commission") found
16 reason to believe that the Friends of Eric Serna for Congress Committee and John Pound as
17 treasurer, violated 2 U.S.C. § 441a(f).

18 Based on answers to interrogatories, depositions and documents provided pursuant to
19 Commission subpoenas, this Office has determined that the Democratic Party of New Mexico
20 and the Serna campaign had regular communications during the special election period from
21 March 1, 1997, to May 13, 1997, including discussions of state Party budgeting, planning, voter
22 drive and get-out-the-vote (GOTV) efforts. The Democratic Party of New Mexico reported
23 making numerous disbursements totaling approximately \$202,000 for candidate-specific
24 absentee ballot applications and voter identification/GOTV efforts. The DPNM disbursements
25 associated with these activities are:

Name	Reported Purpose of Disbursement	Date	Total Amount
Ink Impressions	Printing	4/3/97	\$1,624.66
Inter-Tel	Phones	4/3/97	\$168 62

The Tyson Organization	Phone Bank, Voter Polling	4/14/97	\$5,000.00
Randy Dukes	Re-imb. Canvassing, field expenses	4/14/97	\$1,000.00
Tom Eisenhauer	Consulting	4/14/97	\$4,793 00
Ink Impressions	Absentee ballot applications	4/16/97	\$1,624.66
The Tyson Organization	Phoning	4/16/97	\$24,395 00
Armando Gutierrez	Radio Ads, GOTV Spanish & Navajo Translations	4/18/97	\$100 00
KLVO Radio	Generic Voter Drive Ad	4/24/97	\$475.02
KABZ-AM Radio	Generic Voter Drive Ad	4/24/97	\$1,330.06
KXKS Radio	Generic Voter Drive Ad	4/24/97	\$1,064.05
KEXT-FM Radio	Generic Voter Drive Ad	4/24/97	\$665.03
KALY Radio	Generic Voter Drive Ad	4/24/97	\$1,064.05
KNMX Radio	Generic Voter Drive Ad	4/24/97	\$574.43
KDCE Radio	Generic Voter Drive Ad	4/24/97	\$1,092.67
KFUN-AM/KLVF-FM	Generic Voter Drive Ad	4/24/97	\$446.78
KSWV Radio	Generic Voter Drive Ad	4/24/97	\$1,339.07
KXTC Radio	Generic Voter Drive Ad	4/24/97	\$152 91
KGLX Radio	Generic Voter Drive Ad	4/24/97	\$1,189.30
Mellennium Radio	Generic Voter Drive Ad	4/24/97	\$134.94
Mellennium Radio	Generic Voter Drive Ad	4/24/97	\$1,448.56
KNDN Radio	Generic Voter Drive Ad	4/24/97	\$1,423.83
KGAK Radio	Generic Voter Drive Ad	4/24/97	\$1,444.15
KTNN Radio	Generic Voter Drive Ad	4/24/97	\$760.00
KGLX Radio	Generic Voter Drive Ad	4/24/97	\$1,189.30
KXTV Radio	Generic Voter Drive Ad	4/24/97	\$1,019.40
Mellennium Radio	Generic Voter Drive Ad	4/24/97	\$517.35
Randy Dukes	Field Expenses, Canvassing, Generic	4/24/97	\$5,000.00
American Data Mgmt.	Walk/Phone Lists	4/24/97	\$2,570.81
Diversified Printing, Inc.	Printing, Door Hangers, Generic	4/28/97	\$7,318 29
US Postmaster	Postage	4/28/97	\$1,200.00
The Tyson Organization	Phone Banks, Vote Early, Vote by Mail, Generic	4/28/97	\$24,075 00
Statewide Information	Voter Lists, Labels	5/2/97	\$6,189.26
Randy Dukes	Re-imb Voter Canvassing, Generic	5/2/97	\$5,000.00
K-VIVA Radio	Voter Drive, Ad, Generic	5/2/97	\$574.75
US Postmaster	Postage	5/2/97	\$3,100.00
Statewide Information	Voter Lists, Labels	5/2/97	\$757.20
American Data Mgmt.	Vote by Mail, Early Vote, Postcards	5/2/97	\$6,798 00

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The Tyson Organization	Phone Banks, Vote Early, Vote by Mail, Generic	5/2/97	\$18,472.91
Randy Dukes	Field Expenses, Canvassing, Generic	5/2/97	\$5,000.00
Randy Dukes	Field Expenses, Canvassing, Generic	5/5/97	\$7,000.00
The Target Group	Phoning, Voter Contact, Generic	5/8/97	\$2,500.00
KGAK Radio	Voter Drive, Ad, Generic	5/8/97	\$220.87
Randy Dukes	Field Expenses, Canvassing, Generic	5/8/97	\$7,000.00
KNDN Radio	Voter Drive, Ad, Generic	5/8/97	\$139.84
KXTC Radio	Voter Drive, Ad, Generic	5/9/97	\$129.46
General Printing Service	Printing Flyers, Polling Places, Generic	5/9/97	\$609.43
Randy Dukes	Field Expenses, Canvassing, Generic	5/9/97	\$7,000.00
Diversified Printing, Inc.	Printing, Door Hangers, Generic	5/9/97	\$2,040.42
The Tyson Organization	Phone Banks, Vote Early, Vote by Mail, Generic	5/12/97	\$18,712.91
Randy Dukes	Field Expenses, Canvassing, Generic	5/12/97	\$5,000.00
Armando Gutierrez	Radio Ad, Generic	5/12/97	\$158.34
Statewide Information	Voter File, Lists, Labels	5/12/97	\$3,506.45
Randy Dukes	Re-imb. personal expenses	5/15/97	\$836.00
MasterCard	Payment Charges, travel and lodging, Randy Dukes	5/15/97	\$3,705.68
The Target Group	Phoning, Voter Contact, Generic	??	\$1,531.60

Total \$202,184.06

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2 Additionally, the DPNM reported coordinated expenditures of \$15,127 on behalf of Eric
3 Serna for the 1997 Special Election out of a possible \$31,810 coordinated expenditure limit.
4 Thus, the DPNM could have reported only an additional \$16,683 in coordinated expenditures
5 during the 1997 Special Election, placing the DPNM \$185,501.06 over the limits of
6 2 U.S.C. § 441a(d). Furthermore, these coordinated expenditures constitute an in-kind
7 contribution to the Serna campaign. 2 U.S.C. § 441a(f). Accordingly, this Office is prepared to

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1 recommend that the Commission find probable cause to believe that the Friends of Eric Serna for
2 Congress Committee and John Pound, as treasurer, violated 2 U.S.C. § 441a(f).

3 By examining the relationships between key players of the DPNM and the Serna
4 campaign during the 1997 special election period in New Mexico, this Office will show how the
5 DPNM and the Serna campaign shared just enough information about how each campaign was
6 progressing to maximize the resources of both entities, and so that the DPNM could fill in and
7 provide help for the Serna campaign where necessary, including what the DPNM calls voter
8 drive and generic get-out-the-vote (GOTV) activities.

9 II. ANALYSIS

10 Law. The Federal Election Campaign Act of 1971, as amended ("the Act") and Federal
11 Election Commission ("Commission") regulations provide limits and prohibitions on
12 contributions that individuals, corporations, committees and other entities may make to
13 candidates and their committees. See 2 U.S.C. §§ 441a, 441b, 441c, 441e, 441f, 441g; 11 C.F.R.
14 parts 100, 110, 114 and 115. A "contribution" includes "any gift, subscription, loan,
15 advance,...or anything of value made by any person for the purpose of influencing any election
16 for Federal office...." 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.7(a)(1). "Anything of value"
17 includes in-kind contributions. 11 C.F.R. §§ 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A).
18 "[E]xpenditures made by any person in cooperation, consultation or concert, with, or at the
19 request or suggestion of, a candidate, his authorized political committees, or their agents, shall be
20 considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i). "[C]ontrolled or
21 coordinated expenditures are treated as contributions" under the Act. *Buckley v. Valeo*, 424 U.S.
22 1, 46 (1976). "There is no significant functional difference between a party's coordinated
23 expenditure and a direct party contribution to the candidate." *Federal Election Commission v.*

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1 *Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 121 S.Ct. 2351, 2371 (2001).

2 Political committees may not make or accept contributions which exceed the Act's limits under
3 section 441a. *Id.*, 2 U.S.C. § 441a(f). Such limits on contributions include coordinated
4 expenditures by a state committee in connection with the general election campaign for the
5 United States House of Representatives in that State and constitute in-kind contributions to the
6 candidate. *Id.* In New Mexico's Third Congressional District the limit for party coordinated
7 expenditures for the 1997 special election was \$31,810.

8 **Overview of the Campaign.** The 1997 Special Election in New Mexico, in which Eric
9 Serna ran as a candidate, was a three-month campaign, and the only election in the entire state
10 that calendar year. The Democratic Party of New Mexico reported over 83% of its
11 disbursements in 1997 during the special election period. Thus, clearly, the bulk of money
12 expended by the Party in 1997 focused on the special election to benefit Eric Serna in his
13 campaign.

14 During the campaign period, a steady flow of information passed between the candidate's
15 campaign and the Party. Tom Carroll, the Serna campaign manager, admits telling the state Party
16 what the Serna campaign was doing, how much money they had, where their weaknesses were,
17 and so forth. Likewise, Randy Dukes, the key person with the Party, admits providing the Serna
18 campaign with a copy of the Party program plan, which included projections for the timing, cost
19 and intended audience of some radio and press, absentee ballot application packages and other
20 get-out-the-vote ("GOTV") activity. Through a flow of information between key Party and Serna
21 campaign personnel, the Party discerned what the candidate needed, and then filled in with
22 assistance where needed. Also, some consultants and operatives overlapped with both the Party
23 and the Serna campaign, including Randy Dukes and the Tyson Organization.

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As this Brief will demonstrate, the Serna campaign and the Party worked together in cooperation and in concert with each other, and the Serna campaign consulted the Party on various aspects of the campaign. Discussions between the Party and candidate's committee amounted to control by the Serna campaign over the contents, timing, location, mode or intended audience, or volume of communications by the Party. These communications served as a means for the Serna campaign to coordinate their campaign with the Party by letting the Party know what the Serna campaign had and did not have, in order to target limited resources for the benefit of the Serna campaign.

Randy Dukes' dual role. During the 1997 special election period, Randy Dukes served as a key person both in the Democratic Party of New Mexico and the Friends of Eric Serna campaign.

Though Randy Dukes was not on the Serna campaign's payroll, he had a desk in the Serna campaign office and worked at that office daily. Carroll deposition transcript, pp. 125-128. Dukes did not travel. He was a core field operations person, there everyday full time. Carroll deposition transcript, pp. 136-137, 140. Dukes helped the Serna campaign with targeting the field in general and worked with all of the people in the field (e.g., lawn signs, street signs, etc.). Dukes attended Serna campaign staff meetings. Carroll deposition transcript, p. 128.

The DPNM lists Dukes in their disclosure reports as "DPNM staff", and notes that Dukes expended almost all of the DPNM's reported coordinated expenditures on behalf of the Serna campaign.¹ Dukes' duties for the Party during the campaign focused on get-out-the-vote (GOTV) activities. Randy Dukes is a solid political field operative, according to Jerry Tyson of

¹ See, e.g., the Democratic Party of New Mexico's 1997 30 day post-special election report, Schedule A, Itemized Receipts.

1 the Tyson Organization.² Mr. Dukes himself has admitted that he communicated regularly with
2 key persons associated with the Serna committee and the Party. His communications with both
3 entities included discussions of state party budgeting, planning and GOTV efforts, and a
4 "Democratic Party program summary." Dukes deposition transcript, pp. 165-166, 174-175, and
5 251-262.

6 This "Democratic Party Program Summary" found in the files of DPNM included
7 detailed information about various proposed activities of the Democratic Party of New Mexico
8 for the 1997 special election, including radio ads, proposed time frames for such activities and
9 estimated costs of each item. Randy Dukes admits that he created this program summary.
10 Dukes deposition transcript, p. 172. This Party program summary contains a fax-sent line
11 reading "E. Serna" and a phone number determined by this Office to be the fax line for the
12 Friends of Eric Serna campaign. The Serna campaign also had this identical fax number listed on
13 their website. The faxed date was March 31, 1997, about one month after Eric Serna was chosen
14 to be the Democratic candidate for Congress, and about six weeks prior to the special election.
15 The program summary contains handwritten notes on the left margin and at the bottom of the
16 first page (e.g., 20,000, 40,000, and at the bottom of the page showing what appears to be a total,
17 \$250,608), and time period (e.g., first two weeks) next to certain campaign activities, including
18 notations for "Hispanic/Native American radio and press" and "Absentee Ballot Program." No

² The Tyson Organization was a vendor for both the Democratic Party of New Mexico and the Serna campaign. Additionally, the Tyson Organization has close ties to Randy Dukes. Mr. Dukes' wife, Rainey Dukes, was an employee of the Tyson Organization during the special election, and she worked with him during that election. In fact, numerous facsimile transmissions were sent between them for services performed by The Tyson Organization. According to John Angle, Executive Director of Tyson organization, the Tyson Organization had an informal, verbal agreement with the Democratic Party of New Mexico and a separate agreement with the Serna campaign. The Tyson organization was involved in phone banks for the Party and the Serna campaign.

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1 one deposed or interviewed by this Office claims to recognize the handwriting on the program
2 summary; however, since this document was faxed from the Serna campaign, either the Serna
3 campaign added the handwriting or the DPNM included it. The later pages in the faxed
4 Democratic Party program summary detail the same information as the handwriting, thereby
5 suggesting that the Serna campaign approved the proposed program summary with time frames
6 and costs and writing them in and sending the program back.

7 **Tom Carroll, Serna campaign manager.** Tom Carroll was Eric Serna's campaign
8 manager, who managed the Serna campaign's strategy, hired the media consultant, organized the
9 press and field offices, and supervised the Serna campaign employees and volunteers. Carroll
10 deposition transcript, p. 65. Tom Carroll attended strategy meetings with Eric Serna and a few
11 other key people on the Serna campaign. Serna deposition transcript, pp. 37-39. Tom Carroll
12 served as one of the primary people with whom Eric Serna interacted. Lindsey deposition
13 transcript, p. 79. Tom Carroll worked on developing ads, which they would circulate among the
14 staff for input.

15 **Dukes and Carroll.** Dukes talked with Carroll at least twice a week during the
16 campaign. Dukes deposition transcript, pp. 251-259. They "certainly" talked about the
17 campaign. Dukes deposition transcript, p. 255. "[A]gain, he is a Democrat and we are the
18 Democratic Party. We talk all the time." *Id.* They talked about "[t]he campaign. What is going
19 on. [sic]" Dukes deposition transcript, p. 254. Dukes gave Carroll a copy of the Democratic
20 Party program summary and they went over it. Dukes deposition transcript, pp. 255, 262.
21 Carroll "certainly could have" received all of the Party program summary. "And based on my
22 understanding of the rules and everything, there is no reason for me not to give it to him." Dukes
23 deposition transcript, p. 255. They went over what the Democratic Party was going to do.

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1 “Really the purpose of the summary page is to be able to communicate with people that are
2 involved in the election what the Party is doing. I mean, it is talking points.” Dukes deposition
3 transcript, p. 256. In a “general way” Dukes talked to Carroll about the program. Dukes
4 deposition transcript, p. 257. Dukes says that Carroll “may have got [sic]” Dukes’ “input on
5 general campaign planning aspects,” e.g., whether to do an early vote piece on the first day or the
6 day before the election. Dukes deposition transcript, p. 304. “We certainly talked specific Serna
7 stuff but it was just kind of ongoing, the campaign how it is going, what is going on.” *Id.* Tom
8 Carroll considered Dukes as helpful on the Serna campaign, especially in field operations, and in
9 devising a field plan for the Serna campaign. Carroll deposition transcript, p. 217.

10 Carroll states that he does not specifically recall the Democratic Party program summary.
11 Carroll deposition transcript, pp. 143-149. As discussed above, however, this Office has
12 established that the Democratic Party program summary was faxed from the Serna campaign’s
13 fax number and Dukes also admits discussing this program summary with Carroll. Dukes
14 deposition transcript, pp. 255, 262.

15 **Carroll and Earl Potter, State Party Chairman.** Tom Carroll had regular discussions
16 with Earl Potter, DPNM state party chair regarding party functions during the campaign, and
17 staffing for the GOTV. Carroll deposition transcript, pp. 74-80. Carroll met with Potter,
18 “probably twice a week during the course of the campaign.” Carroll deposition transcript, p. 74.
19 Meetings with Potter lasted from 15 to 45 minutes. Carroll deposition transcript, p. 82. Carroll
20 and Potter “would get together and discuss who in which county should be in charge of what. He
21 would talk about what the Party was going to be doing during the campaign, and I would be
22 doing – I would represent the [Serna] campaign. Pretty classic, you know, relationship....”
23 Carroll deposition transcript, p. 75. Carroll updated Potter on things the Serna campaign was

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1 doing--the number of volunteers, the amount of money the Serna campaign had raised, the
2 number of signs they would put up, what the Serna campaign was doing and not doing well, and
3 so forth. Carroll deposition transcript, pp. 78-80.

4 Carroll and Potter talked about get-out-the-vote (GOTV) the last two-to-three weeks of
5 the campaign: direct mail, phone banks, vans to take people from senior centers, etc. is what the
6 Party offered. Carroll deposition transcript, p. 85. Carroll says he never discussed the ads run
7 with "soft money" and says he was very careful not to have such discussions. Carroll talked to
8 Earl Potter on a weekly basis about the Native American GOTV, election day GOTV, precinct
9 targeting, etc. Carroll also talked about GOTV needed by the Serna campaign in individual
10 counties, and they discussed GOTV planning. Carroll deposition transcript, pp. 84-88.

11 Carroll asked Potter for help with responses to Republican Party criticisms of Eric Serna.
12 Potter issued press releases in response. See Carroll deposition transcript, pp. 82-83.

13 Carroll acknowledged that an experienced person who knew what that district had spent
14 in prior elections and knew what the opposition was spending would know how to gauge what
15 was needed in the campaign. Carroll deposition transcript, pp. 95-98. Carroll admits that he
16 talked to Earl Potter about how much money the Serna campaign had raised. *Id.* Additionally,
17 Carroll recognized that "media is the bulk of any campaign" and that after media, a campaign
18 pays for staff, payroll and signs. Carroll deposition transcript, pp. 92-98. Through the exchange
19 of such information, Potter and Carroll, both experienced campaign professionals, would know
20 how the campaign was doing financially at different points in the campaign. Given the regular
21 information exchange between the Party and the Serna campaign, the Party and the Serna
22 campaign appeared to have some sort of a gentleman's agreement that certain things would be
23 handled by the Serna campaign and certain things would be taken care of by the Party.

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1 **Candidate-specific communications.** Communications between the Party and the Serna
2 campaign were substantial enough to enable the Party to conduct GOTV and other voter-related
3 communications on behalf of Eric Serna during the special election period, thereby achieving
4 maximum benefit from the limited resources of both the Party and the Serna campaign.

5 DPNM documents representing these communications to voters included radio ad scripts,
6 door hangers and ballot applications, all encouraging voters to "Vote Democratic on May 13,
7 1997." These campaign materials are candidate specific in that they state the election date and
8 call upon the reader to vote Democratic. Because there was only one 1997 election in the state of
9 New Mexico, the DPNM thus designed and targeted their communications to persuade voters to
10 vote for Eric Serna. In finding "Reason To Believe" in this matter, the Commission concluded
11 that where only one office is at stake in a special election and where only one member of that
12 party is on the ballot, the communication to vote for that specific party on that election day can
13 refer to no other candidate, i.e., a clearly identified candidate. *See* Federal Election Commission
14 Factual and Legal Analysis, pp. 10-11. The Commission further stated that the disbursements
15 urging the public to vote for such clearly identified candidate "cannot be considered generic voter
16 drive costs." Advisory Opinion Number 1998-9. Eric Serna ran as the only Democratic
17 candidate in the entire state of New Mexico in 1997. No other election and no other candidate
18 existed for which to "vote Democratic."³

19 **Conclusion.** Where only one party candidate runs for public office in a state during an
20 entire calendar year, as in the 1997 New Mexico special election, GOTV activities by that party
21 are candidate-specific. Regular discussions and planning between the party and the candidates as

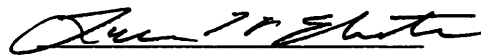
³ Although no court has required express advocacy as an element of coordination, even under a strict view involving an express advocacy analysis, the context and facts comprising this matter meet the definition of express advocacy pursuant to 11 C.F.R. § 100.22(a).

to the timing, location, mode, intended audience, volume of distribution, cost or frequency of placement of these candidate-specific activities constitute coordination. Given the regular communications between the Party and the candidate's committee concerning campaign activities and projected spending, the division of labor in spending and activity by the Party, the overlapping personnel and vendors, and the fact that Eric Serna was his party's only candidate for office during the entire year of 1997, the disbursements made by the Democratic Party during the 1997 campaign period are no different than a direct party contribution to the candidate. Thus, the candidate-specific disbursements of \$202,184.06 by the DPNM on the Serna campaign's behalf, resulting from the regular discussions between key persons in the DPNM and the Serna campaign constitute excessive coordinated expenditures and an in-kind contribution to the Serna campaign in violation of section 441a(f) of the Act. As previously stated, the DPNM reported coordinated expenditures of \$15,127 on behalf of Eric Serna for the 1997 Special Election, out of a possible \$31,810 pursuant to the coordinated expenditure limits for that office in that election. Thus, the Serna campaign accepted \$ 185,501.06 in excessive in-kind contributions.

III. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that the Friends of Eric Serna for Congress Committee and John B. Pound, as treasurer, violated 2 U.S.C. § 441a(f).

2/1/02
Date


Lawrence H. Norton
General Counsel

Staff assigned: Margaret J. Toalson

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