



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

December 21, 1999

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

David A. Archuleta, Treasurer  
Heather Wilson for Congress  
PO Box 14070  
Albuquerque, NM 87191

RE: MUR 4754

Dear Mr. Archuleta:

On July 11, 1998, the Federal Election Commission notified Heather Wilson for Congress ("the Committee") and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, and information provided by the Committee, the Commission, on December 14, 1999, found that there is reason to believe that the Committee and you, as treasurer, violated 2 U.S.C. §§ 434(a)(2)(A)(i), 434(b), and 441a(f), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

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Mr. David Archuleta  
MUR 4754  
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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Seth H. Row, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures

Designation of Counsel Form  
Factual and Legal Analysis

2025 RELEASE UNDER E.O. 14176

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Heather Wilson for MUR: 4754  
Congress and David  
Archuleta as treasurer

This matter was generated based on a complaint filed with the Federal Election Commission ("The Commission") by Ray Sena. See 2 U.S.C. § 437g(a)(2).

**I. GENERATION OF THE MATTER**

The Democratic Party of New Mexico, by and through Ray Sena ("Complainant"), its Chair, filed a complaint alleging that the Republican Party of New Mexico ("the Party") and Laurie Fowler, as treasurer, violated the Federal Election Campaign Act of 1971, as amended ("the Act") by making excessive in-kind contributions to Heather Wilson and the Heather Wilson for Congress committee ("Wilson Committee") by paying for mailers and a phone bank campaign advocating Ms. Wilson's election. Ms. Wilson was the Party's nominee for the June 23, 1998 special election in New Mexico to fill the seat of the late Representative Steven Schiff.

**II. COMPLAINT AND RESPONSES**

The Complaint asserts that the Party sent out mailers before June 3, 1998 which advocated Ms. Wilson's election, and asserts that the Party conducted a phone bank operation around the same time which also advocated Ms. Wilson's election. In the Complaint, Mr. Sena anticipates that the Party would claim that the mailers were not "expenditures" or "contributions" because they were covered by the "volunteer materials exemption," described at 2 U.S.C. §§ 431(8)(B)(x) and 431(9)(B)(viii). The Complaint alleges that the mailers did not qualify for the "volunteer materials exemption" because they were prepared by a commercial printer.

According to the Complaint, the expenditures for the mailers and the phone bank operation were coordinated with the Wilson Committee and thus were in-kind contributions to the Wilson Committee in excess of \$5,000, in violation of 2 U.S.C. § 441a(a)(2)(A).

A photocopy of the mailer is attached to the Complaint. The mailer urged readers to "vote for Heather Wilson" and enclosed an absentee ballot application form. The Party's bulk-rate indicia appears to be hand-stamped on the mailer, while the address label appears to be professionally printed directly on the mailer. The mailer states "Paid for by the Republican Party of New Mexico."

The Wilson Committee and Ms. Wilson in their joint response state that they understood that the mailers fell within the "volunteer materials exemption," and that the Wilson Committee properly reported the phone bank activity as an in-kind contribution.

### **III. ANALYSIS**

#### **A. The Phone Banks**

##### **1. Applicable Law**

The Federal Election Campaign Act of 1971, as amended ("the Act") defines "contribution" as including "any gift, subscriptions, loan, advance... or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A).

Expenditures by a party committee that are coordinated<sup>1</sup> with the candidate are treated as contributions under the Act. 2 U.S.C. § 441a(a)(7)(B)(i); see also Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) ("Colorado Republican") (holding that expenditures by a state party committee may be independent or coordinated). The Act limits to \$5,000 per election the amount which any multicandidate committee, including a state party committee, may contribute either directly or in-kind to a candidate and his or her political

<sup>1</sup> Definitions of "coordination" are found only indirectly in the Act and in the Commission's regulations. The Act states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i); see also Buckley v. Valeo, 424 U.S. 1, 46 (1976). Applicable statutory and regulatory provisions define an expenditure as not independent when it is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate." 2 U.S.C. § 431(17); see also 11 C.F.R. §§ 109.1(a) and (b)(4). The Commission's regulations further define the concept of non-independent, and therefore coordinated, expenditures related to communications as follows:

"Made with the cooperation or with the consent of . . . .

(I) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is -

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent."

11 C.F.R. § 109.1(b)(4); see also FEC v. Christian Coalition, No. 96-1781, 1999 WL 569491 (D.D.C. Aug. 2, 1999) (discussing what level of contact is needed for "expressive expenditures" to have been "coordinated" for purposes of the Act).

committee. 2 U.S.C. § 441a(a)(2)(A). Party committees also may make "coordinated party expenditures" in connection with the campaigns of the party's nominees up to Section 441a(d) limitations. See Colorado Republican, 518 U.S. at 618. The Act prohibits political committees from knowingly accepting contributions or making expenditures in violation of statutory limitations. 2 U.S.C. § 441a(f).

Contributions (whether in-kind or direct) are reported by both the party committee and the recipient candidate committee. See generally 2 U.S.C. § 434(b). Expenditures which are in-kind contributions to the candidate's committee are reported by the donor along with the date and amount of such contribution and the committee name. See 2 U.S.C. § 434(b)(6)(B)(i). The recipient committee must disclose the in-kind contribution and the year-to-date aggregate total for the donor. See 2 U.S.C. § 434(b)(2)(D); 11 C.F.R. § 104.3(a)(4).

## 2. Analysis

The Wilson Committee acknowledges that the phone bank activity conducted by the Party was an in-kind contribution to the Wilson Committee. The Wilson Committee reported the cost of this phone bank operation, \$3,114.73, on their Post-Special Election Reports as an in-kind contribution. This contribution, when combined with other reported contributions by the Party to the Wilson Committee, was within the limits of 2 U.S.C. § 441a(a)(2)(A).

Although this contribution does not appear to be a violation of the Act, the date reported for the contribution by the Wilson Committee raises questions as to whether the entities timely reported the contributions. The Complaint in this matter was notarized on June 3, 1998, and alleges that the phone bank activity advocating the election of Ms. Wilson occurred shortly after the mailers were sent out in late May, 1998. The Wilson Committee, however, reported the expenditure for this activity as having been made on the day of the special election, June 23,

1998.

More information is required to determine when in fact the phone bank activity was conducted and when the Party became obligated to pay for the phone banks. Under Commission regulations the phone bank contribution was made on the date that the Party became obligated to pay for the phone banks, or on the date the phone banks were conducted, whichever is earlier, regardless of when the phone banks were actually paid for. See 11 C.F.R. § 100.8(a)(2); see also FEC. v. American Fed'n of State, County, and Mun. Employees - P.E.O.P.L.E., Qualified, et. al., No. 88-3208 (D.D.C. July 10, 1990) (holding that in-kind phone bank contributions made by labor union PAC to candidate committee "are reportable as of the date the contributions were made, not the date of disbursements" by union PAC to pay for phone banks.) Since it is almost certain that the event which triggered the reporting obligation occurred before June 3, 1998 (the 20<sup>th</sup> day before the election, and the day the complaint in this matter was notarized), the Wilson Committee was required to report the phone bank activity as an in-kind contribution on their respective Pre-Special Election Reports, which it did not do. See 2 U.S.C. § 434(a)(2)(A)(i)(pre-election reports of authorized committees shall be complete as of the 20<sup>th</sup> day before the election). Moreover, the Wilson Committee may have violated 2 U.S.C. § 434(b) by failing to accurately report the date of the contribution since in its Post-Election Reports it reported that the contribution took place on June 23, 1998.

For the reasons stated above, there is no reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. § 441a(f) in connection with phone bank activity conducted by the Republican Campaign Committee of New Mexico. However, for the reasons stated above, there is reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. § 434(a)(2)(A)(i) and 434(b).

**B. The Mailers**

Complainant also alleges that certain mailers sent out by the Party, described above, were an excessive in-kind contribution to the Wilson Committee. The questions raised by this allegation are: 1) whether the mailers were covered by the "volunteer materials exemption;" and 2) if the mailers were not covered by the exemption, whether the mailers were an in-kind contribution to the Wilson Committee.

1. In-Kind Contribution/Independent Expenditure

a) **Applicable Law**

If campaign materials paid for by a party committee do not qualify for the "volunteer materials exemption," then the party committee has made an "expenditure" or a "contribution" under the Act. An expenditure for communication materials, such as direct mail, may be an independent expenditure if the communication was not coordinated with the candidate. See Colorado Republican, 518 U.S. at 604. If there was coordination with the candidate, the communication may be a "coordinated party expenditure," see 2 U.S.C. § 441a(d), or an in-kind contribution.

Expenditures not made pursuant to Section 441a(d) that are coordinated<sup>2</sup> with the candidate are treated as contributions under the Act. 2 U.S.C. § 441a(a)(7)(B)(i). The Act limits to \$5,000 per election the amount which any multicandidate committee, including a state party committee, may contribute to a candidate and his or her political committee. 2 U.S.C. § 441a(a)(2)(A). The Act prohibits political committees from knowingly accepting contributions or making expenditures in violation of statutory limitations. 2 U.S.C. § 441a(f).

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<sup>2</sup> See fn. 1, supra.



Contributions (whether in-kind or direct) are reported by both the party committee and the recipient candidate committee. See generally 2 U.S.C. § 434(b). Expenditures which are in-kind contributions to the candidate's committee are reported by the donor along with the date and amount of such contribution and the committee name. See 2 U.S.C. § 434(b)(6)(B)(i). The recipient committee must disclose the in-kind contribution and the year-to-date aggregate total for the donor. See 2 U.S.C. § 434(b)(2)(D); 11 C.F.R. § 104.3(a)(4). Contributions received by candidate committees more than 20 days before any election are required to be reported on a Pre-Election Report. See 2 U.S.C. § 434(a)(2)(A)(i). Contributions by committees other than authorized candidate committees made more than 20 days before an election are also required to be reported on a Pre-Election Report. See 2 U.S.C. § 434(a)(4)(A)(ii).

**b) Analysis**

The Complaint alleges that the Party's expenditures for the mailers were an in-kind contribution because the mailers were coordinated with the Wilson Committee. Because the record is inconclusive as to whether the mailers were coordinated or independent, see Colorado Republican, 518 U.S. at 618, there is reason to believe that the Wilson Committee violated 2 U.S.C. § 441a(f).

If the Wilson Committee coordinated the mailers with the Party, it may have violated 2 U.S.C. § 441a(f) by knowingly accepting an excessive in-kind contribution in an amount close to \$140,000. Also, if the Wilson Committee received the in-kind contribution of the mailers before June 3, 1998 it was required to report the contribution on its Pre-Special Election Report, which it did not do. See 2 U.S.C. §§ 434(b) and 434(a)(2)(A)(i). Therefore, there is reason to believe that Heather Wilson for Congress and David Archuleta, as treasurer, violated 2 U.S.C. §§ 441a(f), 434(a)(2)(A)(i) and 434(b) in connection with mailers sent out by the Party

advocating Ms. Wilson's election.

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