IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

UNITE NEW MEXICO, HEATHER NORDQUIST, ELECT LIBERTY PAC, LIBERTARIAN PARTY OF NEW MEXICO, and REPUBLICAN PARTY OF NEW MEXICO,

Petitioners,

v. No. S-1-SC-37227

MAGGIE TOULOUSE OLIVER, Secretary of State of New Mexico,

Respondent.

VERIFIED[1] RESPONSE TO THE EMERGENCY VERIFIED PEITION FOR WRIT OF MANDAMUS

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[1] The affirmation of the Secretary of State is included at the end of the brief. Respondent will file a verification with the Court on Monday morning.

INTRODUCTION

Petitioners ask this Court to grant a writ of mandamus prohibiting New Mexico's Secretary of State from including in the format of the ballot for the November 2018 election an option for voters to check a single box and thereby cast their vote for all candidates affiliated with one of the major political parties.[2]

Petitioners – the Republican Party of New Mexico, the Libertarian Party of New Mexico, Democratic Party write-in candidate Heather Nordquist and the Elect Liberty PAC – make three arguments. First, they claim that a writ of mandamus is required to order the Secretary to remove the straight-party option from the uniform ballot format authorized by the Secretary because it violates what the Petitioners incorrectly characterize as "mandatory and unambiguous" provisions of the Election Code prohibiting this format. Second, Petitioners claim that, even if authorized by statute, the straight-party voting option is unconstitutional because it denies independent candidates and minor party candidates equal protection of the laws.

[2] In this election, the Republican Party, the Democratic Party, and the Libertarian Party have all qualified as major parties. There are no minor party candidates on the ballot. There are independent candidates in addition to the candidates nominated by the three major parties.

Third, Petitioners claim the Secretary was required to promulgate regulations using the State Rules Act procedures rather than including straight-party vote checkboxes in the 2018 ballot format.

The Secretary of State contends that, contrary to the arguments made by Petitioners, the New Mexico Legislature has never prohibited the inclusion of a straight-party voting option on the ballot. The Legislature, instead, left this option, like other options involved in formatting the ballot, to be determined by the Secretary of State. Both the language of the Election Code as amended and the long history of discretionary decisions in each election by secretaries of state of both parties serve to clarify the intent of the Legislature to allow the Secretary of State, in the exercise of her discretion, to decide whether to include a straight-party voting option on the uniform ballot. The Election Code has been consistently construed and applied this way by both Democratic and Republican secretaries of state since the Code was amended in 2001. *See* Section B, below.

Petitioners' constitutional argument fails as well. *See* Section C, below. They claim that the placement of a single-party voting option on the ballot for each major party – Republican, Libertarian, and Democratic – violates the fundamental rights of independent candidates, unaffiliated with any party, and minor parties, which have not attracted enough voters to qualify as major parties, and their voters to associate for the advancement of their shared political beliefs and to cast their votes

effectively. *Petition*, p. 15 n 3. Petitioners seek to force all voters, including those voters who would otherwise choose to vote a straight-party ticket, to instead vote on each race individually.

The Secretary contends, contrary to the arguments of the Petitioners, that her research shows that the straight-party option effectuates the constitutional purposes of the Election Code in New Mexico. It makes it easier for voters who choose to vote based on their major-party affiliation to cast their ballots. It encourages these voters to vote on all races and ballot initiatives before they tire. It allows voters who choose to vote based on party association and on the values they share with one of the major parties to easily vote. This is a reasonable way for voters to make decisions and is protected by these voters' First Amendment right to associate with the political party of their choice.[3]

The United States Supreme Court has held that a State is not required to disregard the existence of the two-party system in designing its ballot. To the contrary, the State's interest in the stability of its political systems permits it "to enact reasonable election regulations that may, in practice, favor the traditional two-party system." Fairness to independent candidates is achieved by ensuring that the straight-party vote is an option, not a requirement. *See Woodruff v. Herrera*, 2010

[3] When the single-party option was on the ballot in New Mexico, approximately 40% of New Mexico voters used that option.

WL 11595703 (D. NM. Feb. 1, 2010) (upholding the constitutionality of New Mexico's straight-party voting option against an equal protection challenge).

Finally, Petitioners argue that the Secretary cannot implement a straight-party voting option on the ballot without first promulgating regulations pursuant to the State Rules Act, NMSA 1978, §§ 14-4-1 to -11. Petitioners are mistaken. The Legislature plainly had no intent to impose rulemaking requirements on the Secretary's authority to format the ballot. The Election Code charges the Secretary with adopting and providing to the County Clerks a uniform, statewide format for the ballot. The uniform ballot is not a single document, but one with hundreds of variations reflecting races in different districts and counties. The deadlines set by the Legislature for preparation of the ballot are tight. The function of formatting the ballot plainly is not intended to require public hearings and publication of rules or regulations. The application of the State Rules Act procedural requirements to the adoption of the uniform ballot format for an upcoming election would make an already difficult task impossible. *See* section D, below.

ARGUMENT

A. Standard of Review

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698. For a successful remedy of Mandamus, New Mexico courts

require that "the duty sought to be enforced is clear and indisputable." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 93, 149 N.M. 330. This Court has further stated that Mandamus lies only to compel the performance of mere ministerial acts or of duties imposed by law upon a public officer to do a particular act or thing upon the existence of certain facts or conditions being shown. *El Dorado at Santa Fe, Inc. v. Bd. of Cty. Comm'rs*, 1976-NMSC-029, ¶ 5, 89 N.M. 313; *State of N.M ex rel. League of Woman Voters v. Herrera*, 2009-NMSC-003, 145 N.M. 563 (mandamus lies to enforce a clear legal right); *Birdo v. Rodriguez*, 1972-NMSC-062, ¶ 5, 84 N.M. 207 (mandamus requirements not met when no showing of obligation to act).

B. The New Mexico Election Code Permits the Secretary of State, in Her Discretion, to Include a Straight-Party Option on the Ballot.

Mandamus is not appropriate here because the straight-party voting option is not prohibited by the New Mexico Election Code. The code gives the Secretary of State the discretion to format the ballot in a partisan election to include an option to vote a straight-party ticket if the Secretary determines that, on balance, including such an option serves the purposes of the Election Code and the New Mexico and United States Constitution in a given election.

As New Mexico's "chief election officer," it is the duty of the Secretary to "obtain and maintain uniformity in the application, operation and interpretation of the Election Code" (NMSA 1978, § 1-2-1) and to carry out the purposes of the

Election Code, among them "to provide for efficient administration and conduct of elections." NMSA 1978, § 1-1-1.1.

Article 10 of the Election Code addresses the Secretary's role in designing and preparing a statewide ballot format. Our Legislature has required that the ballots be uniform throughout the state and "be in the form prescribed by the Secretary of State." NMSA 1978, § 1-10-12. The Secretary is directed to determine "the position of the parties, constitutional amendments, questions, and the names of nominees to be voted on by the voters of the entire state." NMSA 1978, § 1-10-3. Section 1-2-1(B) requires that prior approval of the Secretary for every form or procedure used in any election held pursuant to the Election Code. That section states as follows:

> (B) No forms or procedures shall be used in any election held pursuant to the Election Code without prior approval of the secretary of state.

NMSA 1978, § 1-2-1(B).

Finally, the Election Code provides that the secretary of state is required to certify a party name and emblem for each party and to use that name and emblem "to designate the ticket of that political party on all ballots." NMSA 1978, § 1-7-6 (B) and (C).

The Petitioners' sole contention is that the Legislature's repeal in 2001 of former Section 1-9-4 of the Election Code should be read to prohibit straight-party voting, overriding the statutory provisions giving discretion to the Secretary set forth

above. Former Section 1-9-4[4] addressed the technical specifications for the selection of lever-type voting machines for use in New Mexico elections. The statute addresses everything from the construction materials and workmanship to the machine's ability to printout voting results. One of the requirements for selection of a particular manufacturer's lever-type voting machine was that the machine

[4] NMSA Section 1-9-4 read as follows:

No lever-type voting machine shall be approved by the secretary of state unless:

A. it permits a voter to vote for any person for any office, whether or not the name of the person appears upon a ballot label as a candidate for nomination or election;

B. it permits and requires voting in absolute secrecy and is so constructed that no person can see or know for whom any other person has voted, except a voter who is being assisted as prescribed by the Election Code [this chapter];

C. it has a protective counter or other device, the register of which cannot be reset, that records the cumulative total number of movements of the operating mechanism;

D. it is provided with a lock or locks, by the use of which, immediately after the polls are closed or the operation of the machine for an election is completed, all movement of the registering mechanism is absolutely prevented;

E. it is constructed of material of good quality, in a neat and workmanlike manner, and is easily and safely transportable;

F. it is capable of adjustment so as to permit each voter at a primary election to vote only for the candidates seeking nomination by the political party shown on the voter's certificate of registration;

G. it is constructed to prevent voting for more than one person for the same office, except where the voter is entitled to vote for more than one person for that office;

H. it permits each voter, at other than primary elections, to vote a straight party ticket in one operation; and

I. it provides a "printout" of voting results.

"permit[] each voter …to vote a straight party ticket in one operation." § 1-9-4(H) (repealed 2001).

Petitioners arrive at the unlikely result that the repeal of these specifications and the Legislature's adoption of electronic voting in 2001 expresses unambiguous legislative intent to prohibit a straight-party voting option. They do so by ignoring many basic principles of statutory construction in New Mexico.

Our courts, of course, in construing a statute aim to discern the intent of the Legislature at the time the statute was passed. The general rule is that the "plain language of a statute is the primary indicator of legislative intent." *Smith v. Bernalillo County*, 2005-NMSC-012, ¶ 26, 137 N.M 280. Generally, the court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶¶ 5, 126 N.M. 413. The third principle applicable to the legislative action is the principle of giving "persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them." *Id.* Although this is not always followed, it is particularly helpful where the Legislature's intent is not clear and where the statute in question is directed to an administrative agency or officer.

Petitioners seek to avoid these principles of law by claiming that there is no ambiguity in the statutory language and that the intent of the Legislature to prohibit

a straight-party voting option is clear. It is frankly difficult to reconcile this position with the complete absence of statutory language, either in the statute regarding the specifications of election machines which replaced the lever-system of voting in 2001 (**Exhibit 1 hereto)** or in the current Election Code providing for written ballots which can be read and tabulated electronically (Chapter 1, Article 10), prohibiting the inclusion of a straight-party voting option on the ballot. Indeed, the Election Code quite clearly gives the Secretary of State discretion on the formulation of the ballot and makes mandatory the identification of the party that nominated each candidate on the ballot. NMSA 1978, §§ 1-10-12; 1-2-1(B); 1-7-6(B) and (C).

The Petition fails to mention the complete absence of supporting legislative language and instead relies on the adage that an amendment to a statute is deemed to indicate legislative intent to change the law. *Petition*, at ¶ 21. Certainly, this is true: there was a change in the law. Why Petitioners assume that the change is from a mandatory requirement for a straight-party voting option to an absolute prohibition is not explained, particularly given that a repeal of a statutory provision is tantamount to legislative silence on the topic. *See* Interpretation of repealing statutes, 1A Sutherland Statutory Construction § 23:6 (7th ed.) ("Courts find that when a legislature passes a repealing act and does not substitute anything else for it the effect is to obliterate the act as if it had never been passed.").

The Secretary contends that the change made by the Legislature was from requiring the purchase of lever machines physically capable of straight-party voting to switching to a new electronic system which could be programed for any option. In light of this technological advance, the removal of the requirement that the machine be physically capable of straight-party voting made complete sense. Such removal simply does not indicate Legislative intent to prohibit straight-party voting. There is simply no language that Petitioners can point to imposing such a prohibition.

When the Election Code is read as a harmonious whole, as it must be, with the 2001 amendment in place, it is apparent that the secretary of state has the authority to put a straight-party option on the ballot or not, depending on her evaluation of the specific election-day challenges.

Moreover, since its passage in 2001, each New Mexico secretary of state has interpreted the Election Code to leave to the secretary's considered discretion whether to place a straight-party voting option on the ballot. From 2001 until 2011, the secretary of state interpreted the Election Code to allow her to put a straight-party voting option on the ballot: an option she embraced in each election covered by the Election Code during those years.

In 2009, The Libertarian Party along with other minor parties and independent candidates, mounted a federal court challenge to Secretary Herrera's decision to

allow straight-party voting. That lawsuit challenged only the constitutionality of straight-party voting. No mention was made of claim now raised by the Libertarian Party and the other Petitioners that the Election Code prohibited straight-party voting. *Woodruff v. Herrera, supra.* The federal district court, as noted above, approved the constitutionality of straight-party voting in New Mexico in its decision in *Woodruff.*

In 2012, a new secretary of state, Diana Duran, was elected. Secretary Duran, like her predecessor, interpreted the Election Code to give her the discretion to decide whether to include a straight-party voting option on the ballot. She decided not to include it in the election years she formulated the ballot, notably, an action she took unilaterally, without resort to rulemaking. Although they made different choices, both secretaries of state agreed that the choice was theirs to make in light of their evaluation of such factors as the length of the ballot, the available technology, and considerations of efficiency in the voting process.

The law provides that the deference is due to the officer's or administrative agency's interpretation of a statute is immediately following the enactment of the legislation. In New Mexico, a statute must be interpreted as the Legislature understood it at the time it was passed, not in retrospect. *Pan Am. Petroleum Corp. v. El Paso Nat. Gas Co.*, 1970-NMSC-156, ¶. 11, 82 N.M. 193. As the United States Supreme Court has held, deference to an administrative practice in construing a

statute is particularly due "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [wo]men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly when they are yet untried and new.'" *Udall v. Tallman,* 380 U.S. 1, 16 (1965). Recent, unexplained changes by an agency or official in the construction of a provision enacted long ago are not entitled to deference. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-139, ¶ 45 ("[c]ourts generally show little deference to an agency's interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice).

In their Petition, Petitioners contend that since Secretary Duran's action in 2012, the Legislature has tacitly acknowledged "that the law as it currently exists prohibits the use of the straight party instrument" by three times failing to "amend the Election Code to…allow straight ticket voting," *See* Pet. at ¶ 3. This history is incomplete and misleading. None of these attempts sought to *allow* (or merely *authorize*) straight-party voting. Rather, each bill sought to *mandate* the inclusion of a straight-party voting option. Petitioners fail to mention the six bills which attempted to *prohibit* straight-party voting since the repeal of Section 1-9-4 in 2001.[5]

[5] Since the repeal of Section 1-9-4 (2001), there were at least 6 attempts to ban straight-party voting ballot option by the legislature, each one failing to become law: S.B. 52, 48th Leg., 1st Sess. (N.M. 2007) (died); S.B. 106, 47th Leg., 1st Sess.

Far from constituting acknowledgment that the 2001 repeal constituted a "prohibition" on straight-party voting, Legislators have been busy ever since trying to either prohibit or mandate the use of a straight-party option. What this actually acknowledges is an understanding consistent with that of both Secretaries Duran and Toulouse Oliver and all of their predecessors since 2001 – that the inclusion of a straight-party option on the general election ballot is within the discretion of the New Mexico secretary of state.

Therefore, pursuant to these long-standing principles of statutory construction, this Court should disregard the Petitioners' challenge to a practice that has been accepted as within the discretion of the secretary of state, the chief elections official of New Mexico, since the 2001 repeal of former § 1-9-4.

C. Straight-Party Voting is Constitutional in New Mexico.

Petitioners claim that a straight-party voting option on the ballot denies them equal protection of the laws. Petitioners argue that the right of association of voters with independent candidates and minor parties is impaired by the inclusion on the ballot of a straight-party voting option for the three major parties.

(N.M. 2005) (died); S.B. 147, 46th Leg., 1st Sess. (N.M. 2003) (died); S.B. 837, 46th Leg., 1st Sess. (N.M. 2003) (died); S.B. 293, 45th Leg, 1st Sess. (N.M. 2001) (died); S.B. 183, 45th Leg, 1st Sess. (N.M. 2001) (died)

Neither the State nor the federal constitution support the Petitioners' argument. The United States Supreme Court has addressed the legal standard to be applied when a court reviews whether procedures to get on the ballot or to format the ballot discriminate against minor parties or independent candidates. That Court has explained that courts addressing constitutional challenges to a State's election laws or procedures must apply a balancing test. In short, courts must consider the character and magnitude of the injury to First and Fourteenth Amendment rights that the petitioner seeks to vindicate; must consider the interests put forth by the State which justify any burden on the petitioners' rights, and only then can the court weigh these interests to determine whether the procedure adopted is unconstitutional. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Importantly, strict scrutiny is not required. The Supreme Court has recognized that to subject every voting regulation to strict scrutiny "would tie the hand of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi,* 504 U.S. 428, 433 (1992).

This Court has confirmed that the *Anderson* balancing test governs challenges to election laws brought under our State Constitution. In *Crum v. Duran,* when assessing an independent voter's challenge under the New Mexico Constitution to the selection of candidates for the primary ballot, this Court applied the *Anderson* balancing test, not strict scrutiny, 2017-NMSC-013, ¶ 10, 390 P.3d 971. S*ee also*

Pinnell v. Bd. of County Comm'rs of Santa Fe County, 1999-NMCA-074, ¶¶ 23–26, 127 N.M. 452 (declining to apply strict scrutiny and following *Anderson* and *Burdick*); *Montano v. Los Alamos Cty.*, 1996-NMCA-108, ¶ 8, 122 N.M. 454 (applying *Burdick* and rejecting strict scrutiny).

In addressing the Petitioners' equal protection argument under the *Anderson-Burdick* balancing test, it is important to look first at the details of the ballot option adopted by the Secretary. The Secretary has formatted the paper ballot to provide an option to voters to vote with a single check-mark for any of the three major parties on the 2018 ballot: The Republican Party, the Democratic Party or the Libertarian Party. Voters who choose this option are still permitted to vote separately in any individual race. Their straight-party vote will be counted only where no other candidate is selected. Voters who wish to vote for an independent candidate in a particular race, or who simply prefer making individual candidate choices rather than voting by party affiliation, may vote separately for the candidate of their choice in every race, the very same way they would vote if there was no straight-party option on the ballot. The Secretary will require the placement in every voting booth of an instruction sheet which reminds voters who choose the straight-party option that they must vote separately in non-partisan races, judicial retentions, and on ballot questions or resolutions. They will be directed to that part of the ballot.

The burden on the Petitioners' Constitutional rights imposed by this system is minimal. First, all three major parties are treated identically, including The Libertarian Party, a Petitioner in this case. There are no minor party candidates on the ballot this year. Petitioners nonetheless claim that allowing voters to choose to vote a straight-party ticket operates to exclude independent and future minor party candidates from consideration by the voters or, at the very least, that it imposes a severe barrier to voting for such candidates. *Petition*, at 15.

The federal district court for the district of New Mexico analyzed this very question in *Woodruff v. Herrera*, 2010 WL 11505703 (D. N.M. 2010). Under facts identical to those in this case, that court held that straight-party voting does not impose a "'severe' restriction" on the right to vote. The court (Judith Herrera, J) reasoned as follows:

> [T]he Court cannot conclude that straight party voting, even when it applies to major parties but not minor parties or independents, is a "severe" restriction on the right to vote. With only slightly more effort, voters can still vote for minor party and independent candidates – they merely must cast such votes individually rather than as a straight party vote.

Woodruff, at *4.

The Secretary is permitted to consider both the case law in this and other jurisdictions and social and political science research showing that placing a straight-party vote option on the ballot makes voting easier and faster, an important

consideration given today's lengthy and complex ballots;[6] encourages voters who might not otherwise do so to vote; shortens lines at polling places; ensures that more voters complete the ballot to the end rather than voting only for the top of the ticket races; limits voter confusion,[7] and increases minority participation in elections.

These interests have been endorsed as legitimate state interests by State and federal courts alike. *See Dillon v. King,* 1974-NMSC-096, ¶ 12, 87 N.M. 79 ([t]he state also has a legitimate interest in regulating the size of the ballot so as to minimize voter confusion and to prevent the overwhelming of voting machines"); *Woodruff v. Herrrera*, at * 4 ("[g]enerally speaking, the State is justified in making it easier, rather than harder to vote"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (a state certainly ha[s] an interest in protecting the integrity, fairness, and efficiency of [its] ballots and election processes as means for electing public officials").

These interests are reflected in the New Mexico Constitution. This Court has recognized that the New Mexico Constitution, Article VII, Section 3, creates a broad

[6] For example, there are 86 races, questions or resolutions on the ballot in some parts of Bernalillo County. 54 of these items are partisanight.

[7] *See Gutierrez v, Fleming*, 13-CV-222 WJ/RHS, 2014 WL 12650657, at *3 (D.N.M. Sept. 12, 2014) ("t]he elimination of the straight party option led to more 'spoiled ballots'; a spoiled ballot is a ballot that a voter incorrectly completes. When a ballot is spoiled, the voter must go to the front of the line and ask a poll worker for another ballot. The increased number of spoiled ballots in the 2012 election caused delays although the exact length of the delay caused by spoiled ballots is uncertain").

franchise aimed at ensuring that minority voters and non-English speakers, among others, are not discriminated against in the voting booth or by election procedures. *State ex rel. League of Women Voters of New Mexico v. Advisory Committee,* 2017-NMSC-025, ¶¶ 26-31, 401 P.3d 734. Literacy requirements, limitations to Anglo-Saxons, and other restrictions on voting proposed in the early part of the century were rejected by the Founders, as were claims that Spanish-speaking New Mexicans should not be allowed to vote because they would be too easily controlled by a political party. *Id.,* at ¶ 31. Restrictions on voting were limited to certain convicted criminals and those incompetent persons who are unable to mark the ballot. Article VII, Section 1(A).

The United States Supreme Court has recognized the strong role political parties play in elections in every State. That Court has held that the State's interest in the stability of its political systems permits States "to regulate elections in ways that, may in practice, favor the traditional two-party system." *Timmons*, 520 U.S. at 367. Voters wishing to vote for all offices based on the party affiliation of each candidate have an associational right to be able to do this easily. Burdening these voters with an unnecessarily cumbersome and time-consuming process can hardly be justified by the small burden placed on any voter wishing to vote for a minor party or independent candidate –merely finding the portion of the ballot listing the office for which the candidate is running and voting for that person, the very same process

that voter would have to follow if the single-party voting option were not in place. *Wooodruff*, at* 5 (citing *Timmons* for the proposition that "states need not remove all of the hurdles minor party and independent candidate face in the American political arena", and on this and other bases, holding straight-party voting in New Mexico does not deny either minor party candidates or independent candidates equal protection of the law).

Petitioners' claim of unconstitutionality should therefore be rejected by this Court.

D. The State Rules Act Does Not Require the Secretary to Promulgate a Rule Before Including a Straight-Party Voting Option on the 2018 Ballot.

Petitioners contend, in the alternative, that the Secretary lacks the authority to offer voters a straight-party voting option without first adopting a formal rule. Such a requirement, if true, would improperly bind the Secretary's hands and prevent her from efficiently and effectively meeting the stringent timelines mandated by the Election Code for preparation of a uniform election ballot. It is simply not practicable for the Secretary to vet each ballot formatting decision she makes through formal rulemaking. The Secretary's dual obligations to obtain uniformity on the 1,600 odd ballot iterations statewide and format those ballots, renders rulemaking unworkable. This is particularly true given the many duties assigned in

the Election Code to the Secretary, coupled with the necessarily strict timelines for performing those duties.

That rulemaking is unnecessary to reinstate straight-party voting is underscored by the longstanding history of straight-party voting in New Mexico. When the Secretary reinstated the straight-party option, she merely returned New Mexico to the status quo that existed prior to Secretary Duran's 2012 decision. *See Livingston v. Ewing*, 1982-NMSC-110, ¶ 9, 98 N.M. 685, 652 P.2d 235 (noting that "an announcement to the public of past or present practice or understanding" may fall outside the scope of the State Rules Act).

Moreover, the Secretary's action impacts the ministerial duties of county clerks. *See* §1-10-3 (Secretary responsible for "uniformity" of the ballot). Voters may choose to continue to mark their ballot for each individual office, or invoke the straight/split ticket option(s). Further, Secretary Duran in 2012, did not adopt a rule even though she was adopting a change in the historical practice.

Underscoring the Secretary's position are the many decisions necessarily made by the SOS without rulemaking in prescribing the form of the ballot. These include the substance of the instructions for each ballot type, timing marks placed on ballots, shading, font, and sizing of the text of the ballot. All of these discretionary decisions made by the Secretary regarding the ballot are done without rule and merely those programming the ballots under the secretary's authority on

how to prepare the ballot. The definition of "rule" in the state act excludes directives to the agency's members or employees. NMSA 1978, § 14-4-2. Here the changes are not substantive changes to the content of the ballot itself. This Court has acknowledged that the Secretary may issue and enforce non-rule "guidelines" to County Clerks interpreting Election Code provisions. *See State of N.M. ex rel. League of Woman Voters v. Herrera*, 2009-NMSC-003, ¶ 32, 145 N.M. 563, 203 P.3d 94; *see also Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1228 (D.N.M. 2010) (same).

Even if there were some aspect of the Secretary's exercise of her authority to format the ballot that came within the definition of "rule," the Secretary's implementation of the law in the absence of rules promulgated under the State Rules Act would not void her actions absent some contradiction between her actions and the controlling law. *See Dir., Labor & Indus. Div. v. Echostar Commc'ns Corp.*, 2006-NMCA-047, ¶ 14, 139 N.M. 493 ("'If, when we agreed with an agency's application of a controlling law, we nevertheless rejected that application simply because the agency failed to comply with [required administrative procedures], then we would undermine the legal force of the controlling law.'") (citation omitted). So long as the Secretary is acting within her authority granted by the Legislature, she need not operate pursuant to rule.

CONCLUSION

This Court should refuse to issue the requested writ of mandamus. The Election Code leaves to the Secretary's considered discretion in the formatting of the ballot whether to include a straight-party voting option for the major parties. When the appropriate balancing test is applied, neither the federal nor the State Constitution prohibits a straight-party voting option. The Secretary is permitted to consider the State's interests in making voting easier, in encouraging minority voters to come to the polls, in limiting lines and long waits at the polls, in simplifying the voting process for voters and recognizing the associational rights of voters who choose to base their vote on party affiliation; in increasing the number of voters who reach the end of the ballot, and in supporting the stability of the party system. Her determination that, in the 2018 election, these factors outweigh the interests of minor party and independent candidates in forcing every voter to vote on each election individually. Finally, the Secretary need not use her rulemaking authority to format the ballot.

Dated: September 7, 2018

Respectfully submitted,

/s/ Sean M. Cunniff

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STATEMENT OF COMPLIANCE WITH RULE 12-504(G)(3)

The body of the *Response* exceeds the 20-page limit set forth in this Rule 12-504(G)(3) for a response to a Petition for an Extraordinary Writ.

I certify that this *Response* uses a proportionally spaced typeface and that the body of the *Response* contains 5,520 words, which is less than the 6,000 word maximum permitted by Rule 12-504(G)(3). This *Response* was prepared using WordPerfect, Version X3, and the word count was obtained from that program.

s/ Jane B. Yohalem
Jane B. Yohalem

AFFIRMATION

In accordance with Rule 1-011(B) NMRA, I, Maggie Toulouse Oliver, the State of New Mexico Secretary of State, hereby affirm and swear under penalty of perjury under the laws of the State of New Mexico that the statements made in this

Response to Petition for Writ of Mandamus are true and correct to the best of my knowledge, information and belief.

Dated: September 7, 2018 /s/ Maggie Toulouse Oliver

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2018, I filed the foregoing pleading electronically through the Odyssey File and Serve system, which caused counsel of record on that platform to be served by electronic means. Namely:

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