

## MEMORANDUM

From: Dr. Gavin Clarkson, Esq.  
Michael Hendricks, Esq.  
A. Blair Dunn, Esq.  
To: New Mexico County Clerks  
Date: September 1, 2018  
Re: Lack of authority for straight-party ballots

The Secretary of State has announced that she will unilaterally make new law in New Mexico and institute straight-party ballots for the upcoming general election. This action is not only without basis in law, it is also directly in contravention of existing law. Her announcement was strategically timed so as to maximize the difficulty in enforcing the rule of law, but we have examined the relevant statutes and propose the following response. Pursuant to their statutory authority under § 1-10-4 of the Election Code, all county clerks should refuse to certify for printing any ballot that contains a straight-party option and request that the Secretary of State correct the error and produce a ballot that does not contain a straight-party option.

Please note that while the authors of this memorandum are Republican and Libertarian candidates for Secretary of State and Attorney General in the upcoming election, and the incumbent Secretary of State is a Democrat, our analysis of this issue does not include any opinion of the propriety of straight party voting, nor should it. We all believe that such policy matters appropriately belong to the Legislature as specified in the New Mexico Constitution.<sup>1</sup>

Furthermore, if elected, we all recognize that our respective roles as Secretary of State and Attorney General will be to enforce the law as enacted by the Legislature and signed by the Governor, regardless of whether we agree with the policy rationale for any given law. Thus, if either or both of us are elected, we will enforce straight-party voting only if the Legislature passes a law requiring a straight-party ballot option.

While the law previously required straight-party ballot options, in 2001, a Democratic Legislature and a Republican Governor, Gary Johnson, passed HB 931. Section 16 of that bill repealed NMSA § 1-9-4 in its entirety, including the provision authorizing general election voter “to vote a straight party ticket in one operation.”<sup>2</sup>

The straight party voting option has been subsequently revisited several times since by the Legislature and has never once been enacted into law. Senate Majority Leader Sanchez introduced SB 582 in 2011 to authorize straight-party voting.<sup>3</sup> That bill did not become law. In 2012, Senator Sanchez introduced similar legislation, SB 218.<sup>4</sup> That bill did not become law. Senator Sanchez tried a third time, introducing SB 276,<sup>5</sup> but again, that bill did not become law.<sup>6</sup>

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<sup>1</sup> See e.g. N.M. Const. art. VII, § 1 (“The legislature shall ... regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot and the purity of elections and guard against the abuse of elective franchise.”)

<sup>2</sup> Available at <https://www.nmlegis.gov/Sessions/01%20Regular/FinalVersions/house/hb0931fv.pdf>

<sup>3</sup> Available at <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=582&year=11>

<sup>4</sup> Available at <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=218&year=12>

<sup>5</sup> Available at <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=276&year=13>

<sup>6</sup> It should be noted that all three failed pieces of legislation contained the same language: “In a general election ..., the ballot shall be designed to allow the voter to vote for all of a qualified party's slate of candidates on the ballot by marking a single straight party option for that party's slate of candidates.” See n. 3, 4, and 5, *supra*.

If, as she now claims, the Secretary of State already had the authority to implement straight-party voting, why was additional legislation necessary in the opinion of the Senate Majority Leader? The fact that previous Secretaries of State failed to enforce the law and continued to promulgate straight-party ballots does not justify future actions beyond the authority granted by law. The New Mexico Supreme Court has held that, where the Election Code is unambiguous, the Secretary of State may neither contravene it nor exceed her authority under it.<sup>7</sup> Numerous courts have held that repeal is an unambiguous expression of legislative intent.<sup>8</sup>

In addition to lacking any basis in law for straight-party voting, the Secretary of State also violated the State Rules Act<sup>9</sup> by not following the rulemaking process. The deadline to adopt such a rule is 63 days prior to the election, which in this case is September 4, 2018.<sup>10</sup> In violation of her duty and promise to follow the State Rules Act, which would have required ample notice of public rule hearings<sup>11</sup> as well as conducting the hearings themselves, the Secretary of State decided to contort an unrelated statute into an attempt to claim authority that the Legislature specifically denied her. While that statute grants the Secretary of State ministerial authority to specify the *form* of the ballot, it does not give her the authority to contravene the express will of the Legislature, make new law, or specify the *substance* of the ballot.

Again, we are not arguing that straight-party ballot options cannot be made legal in New Mexico. Our position is that the current Election Code does not authorize that option because the Legislature specifically repealed that option. Furthermore, we believe the Secretary of State has violated the State Rules Act by not following the prescribed rulemaking process.

While her motives may have been purely partisan in nature, from our perspective, her motives are irrelevant. The Secretary of State needs to follow the law, not try to make new law. Therefore, we urge County Clerks throughout New Mexico, pursuant to their lawful authority under § 1-10-4 of the Election Code, to decline to certify any ballot that contains a straight-party option and request that the Secretary of State correct the erroneous inclusion of any straight-party option on any ballot until the Legislature specifically authorizes a straight-party ballot option.

In addition, using these same arguments, Dr. Clarkson and Mr. Hendricks will be filing an *amicus* brief in support of the mandamus petition that Mr. Dunn is currently litigating before the New Mexico Supreme Court on behalf of Democrats, Independents, Libertarians, and Republicans.<sup>12</sup> We invite the County Clerks to join us.

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<sup>7</sup> See e.g. *Weldon v. Sanders*, 99 N.M. 160, 164 (1982) (“Does the Secretary of State have the power to change mandatory provisions of the Election Code? The answer is ‘no.’ ... Although the Secretary of State is the chief election officer, she cannot negate mandatory provisions of the Election Code. To allow the Secretary of State to do so would violate the doctrine of separation of powers.”)

<sup>8</sup> See e.g. Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 25:4, at 589 (7th ed. 2008) (“Courts have declared that the mere fact that a legislature enacts an amendment indicates that it intended to change the original act .... Courts presume that [the legislature] was aware of the prior construction of the terms in question in the original act and deliberately limited the scope of the new act.”) See also *Martinez v. Research Park, Inc.*, 1965-NMSC-146, ¶23 (“It is a familiar rule of statutory construction that the adoption of an amendment is evidence of an intention by the legislature to change the provision of the original law.”)

<sup>9</sup> NMSA 1978, §§ 14-4-1 to 14-4-11

<sup>10</sup> See NMSA 1978, § 1-2-1(B)(2)

<sup>11</sup> See NMSA 1978 § 14-4-5.2 (“Not later than thirty days before a public rule hearing, the agency proposing the rule shall provide to the public and publish in the New Mexico register a notice of proposed rulemaking.”)

<sup>12</sup> *Unite New Mexico, Heather Nordquist, Elect Liberty Pac, Libertarian Party of New Mexico, And Republican Party of New Mexico v. Maggie Toulouse Oliver, Secretary of State of New Mexico*, S-1-SC-37227