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November 13, 2014

Via Electronic Mail

Code of Conduct Review Board
c/o Robert Kidd, Compliance Officer
Bernalillo County Office of Compliance
Bernalillo County Annex
415 Tijeras NW, First Floor
Albuquerque, NM 87102
Email: rfloryance@bernco.gov

Re: Answer/Response to Complaint No. 2014-SC003

Dear Chair and Members of the Code of Conduct Review Board:

This letter responds to Complaint Number 2014-SC003 (“the complaint”) filed by Carolyn Freeman on October 21, 2014 pursuant to Section 3(D) (“Answers shall include a response to each allegation in the Complaint....”)¹ Although it is vague, the complaint appears to allege that Ms. Toulouse Oliver, who serves as the Bernalillo County Clerk, violated numerous sections of the Bernalillo County Code of Conduct and the anti-donation clause of the New Mexico Constitution. Ms. Toulouse Oliver denies these allegations and respectfully requests that the Board dismiss this matter at the preliminary hearing pursuant to Section 3(B)(1)(d)(iv) of the Rules and Regulations of the Code of Conduct Review Board (“Code of Conduct Rules”). A separate Motion to Dismiss is being filed along with this Response. Ms. Toulouse Oliver responds to the complaint as follows:

¹ Ms. Toulouse Oliver recognizes that her Answer is not formally due until after a preliminary hearing has taken place. *See* Section 3(D) (explaining that Answer shall be filed “at a date as provided for in the Preliminary Order after the Respondent receives notice that the Board has accepted the Complaint at a preliminary hearing....” By providing her Answer at this time, Ms. Toulouse Oliver in no way concedes that Complaint Number 2014SC003 is true and accurate or that it merits a formal evidentiary hearing. Instead, Ms. Toulouse Oliver believes that filing her formal Answer now may assist the Board in its decision-making process.

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I. Background Information

Although the complaint does not adequately provide the Board with context or with any accompanying materials, it alleges that Ms. Toulouse Oliver either created or directed the creation of “[a]n improper and false campaign ad” with public funds. Upon information and belief, what the complaint is referring to is a Press Release issued by Ms. Toulouse Oliver’s office on September 21, 2014 related to the mailing of absentee ballots to overseas and military voters. The September 21, 2014 press release is attached as Exhibit 1.

As the Board is aware, prior to the November 4, 2104 General Election the Bernalillo County Commissioners voted to place two advisory questions on the ballot in order to obtain input from Bernalillo County voters. Those two questions, which ultimately appeared on the ballot, appear below:

1. Are you in favor of the Bernalillo County Commission supporting County, City and Statewide efforts to decriminalize possession of one ounce or less of marijuana?
2. Are you in favor of the Bernalillo County Commission establishing a one-eighth percent gross receipts tax to be used for the purpose of providing more mental and behavioral health services for adults and children in the Albuquerque and Bernalillo County area, to provide a safety net system that develops continuum of care not otherwise funded in New Mexico?

The Bernalillo County Commissioners sought to ask voters whether they each were “for” or “against” the issues above. The advisory questions, or at least the question pertaining to the decriminalization of marijuana, received widespread news coverage.

On September 5, 2014, the New Mexico Attorney General’s Office issued a letter in response to a request from New Mexico State Senator Jacob Candelaria seeking the Attorney General’s legal opinion “on whether a county may propose a question on the statewide election ballot that does not carry the force of law.” *See* Exhibit 2, Letter from Charles B. Kraft, Assistant Attorney General to Senator Jacob Candelaria (September 5, 2014). The Attorney General’s Office concluded that a county had the legal authority to place such questions on the ballot and outlined the requirements for a county to do so.

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In response to the Attorney General's opinion letter, Secretary of State Diana Duran issued a Press Release and a Memorandum on September 10, 2014. In her Press Release and in her Memorandum, Secretary Duran provided her opinion that advisory questions were not allowed under the law and indicated that she would not place the Bernalillo County's advisory questions (or similar questions from Santa Fe County) on the November 4, 2014 general election ballot. Secretary Duran's Press Release and Memorandum are attached as Exhibits 3 and 4, respectively.

Following Secretary Duran's refusal to place the advisory questions on the ballot, the County Commissioners from Bernalillo and Sandoval Counties sought relief from the New Mexico Supreme Court in order to require the Secretary of State to place the advisory questions on the ballot. On September 19, 2014, the New Mexico Supreme Court held that the advisory questions could indeed appear on the general election ballot and ordered the Secretary of State's Office to place them on the ballot. *See* Exhibit 5, Order from New Mexico Supreme Court.

On September 20, 2014, Secretary of State Duran issued another press release stating, among other things, that "[t]he Office of the Secretary of State has informed both the Bernalillo and Santa Fe County Clerks that they must comply with federal and state law—and ensure that ballot go out to servicemen and women today, Saturday, September 20, 2014." *See* Exhibit 6, Secretary of State Press Release (September 20, 2014). The September 20, 2014 press release also contained a quote from Secretary Duran that "both counties have delayed this by court action..." and stated that "Bernalillo County has missed the deadline for getting ballots to servicemen and women for the past three consecutive elections. It is the only county to have missed that deadline." Bernalillo County had not, in fact, missed the deadline for providing ballots to servicemen and women in the last three elections. However, a Bernalillo County citizen reading the Secretary's press release might reach the incorrect conclusion that the Bernalillo County Clerk had failed to timely mail ballots to military voters in the past and was about to do so again in the November 2, 2014 general election.

On September 21, 2011, Ms. Toulouse Oliver's Office issued the press release announcing that absentee ballots had been successfully mailed, which apparently forms the basis of Ms. Freeman's complaint. *See* Exhibit 1. Ms. Toulouse Oliver's Press Release accurately informed the public that her office had met the federal deadline for sending ballots to overseas and military voters, described the legal process that preceded finalizing the ballots, and provided the public with the expenses her office had incurred ensuring that the absentee ballots reached voters on time. The September 21, 2014 Press Release was necessitated by the Secretary of State's inaccurate preceding press release and sought to correct the inaccurate information that had been provided to the public in Secretary Duran's press release.

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II. Response to Allegations

Without significant explanation, the complaint alleges that the September 21, 2011 Press Release violated Sections 2-127, 2-130(a), and 2-130(h)(5) & (6) of the Bernalillo County Code of Conduct. The Complaint also alleges that the September 21, 2011 Press Release violates the anti-donation clause of the New Mexico Constitution. As demonstrated below, these allegations are without merit.

A. Section 2-127

The September 21, 2014 Press Release does not violate Section 2-127 of the Bernalillo County Code of Conduct, which is the Declaration of Policy for the Code of Conduct. The relevant portion of Section 2-127 states:

The proper operation of democratic government requires that candidates, elected officials, employees and volunteers of local governments be independent, impartial and responsible to the people; that governmental decisions and policy be made in proper channels of the governmental structure; that public office or the pursuit of public office not be used for personal gains; that the public have confidence in the integrity of its government; and, that, persons and businesses seeking to contract and contracting with the county abide by the requirements set out herein to prevent conflicts of interest and unfair contracting practices.

Although the complaint is unclear, we assume that the complaint is alleging that Ms. Oliver used the resources of the County Clerk's office for "personal gain." This is simply not the case. The September 21, 2014 Press Release was issued at the end of a long and public dialog regarding the Bernalillo County advisory questions and the impact of any delay resulting from the legal issues surrounding those questions on the issuance of absentee ballots. The press release issued by the Secretary of State's office on September 20, 2014 falsely claimed that the Bernalillo County Clerk had missed the deadline for mailing ballots in the past three elections and, at a minimum, implied that the Bernalillo County Clerk was about to do so again. The September 20, 2014 press release from the Secretary of State also appears to attribute any delay resulting from the legal proceedings to Clerk Toulouse Oliver by referring to her and the county as one entity: "both counties have delayed this by court action, so they know exactly what the questions are."

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New Mexico laws place numerous duties on county clerks with respect to elections. Among the numerous duties, county clerks must register voters (*see, e.g.*, NMSA 1978, Section 1-4-8), conduct elections (*see* NMSA 1978, Section 1-12-1 *et seq.*), and prepare, mail, and process ballots. *See, e.g.*, Section 10-10-1 *et seq.* With respect to absentee ballots, there are numerous duties placed on county clerks to ensure that absentee, overseas, and military voters timely receive their ballots and are able to exercise their constitutional right to vote. *See* NMSA 1978, Section 1-6-1 *et seq.* Of particular importance for this proceeding, county clerks are required to mail absentee ballots to overseas and military voters forty-five days before the election. NMSA 1978, Section 1-6-5(E).

In addition to these statutory duties, our elected officials have an obligation to keep us informed of the functioning of our government. In other words, we have a right to know what our government officials are doing. For example, “[e]very person has a right to inspect public records” under the Inspection of Public Records Act, NMSA 1978, Section 14-2-1. We also have an expectation that our public officials will keep us apprised of important issues.

Ms. Toulouse Oliver’s September 21, 2014 Press Release addressed an important public issue, corrected false or inaccurate information provided by the Secretary of State’s office, and provided input from Ms. Toulouse Oliver correcting the false information provided to the public by the Secretary of State’s office. Our democracy thrives because it is a marketplace of ideas. Public debate is essential to the functioning of our society. The September 21, 2014 Press Release was done in Ms. Toulouse Oliver’s capacity as an elected official and was an important and fully warranted attempt to provide Bernalillo County residents with important information related to the general election.

B. Section 2-130(a)

The Complaint alleges that the September 21, 2014 Press Release violates Section “2-130(a) of the Code of Conduct, which prohibits the use of county property or resources for political activity.” Section 2-130(a) states:

(a) General ethical standards of public service.

(1) Public servants shall treat their position as a public trust, with a fiduciary duty to use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

(2) Public servants shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high

responsibilities of public service.

(3) Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

(4) No public servant may request or receive, and no person may offer any money, thing of value or promise thereof, other than any county pay received, that is conditioned upon or given in exchange for promised performance of an official act.

The Code of Conduct defines “political activity” in Section 2-129, which contains nine (9) categories outlining what actions that constitute political activity. The main section that ostensibly applies here is 2-129(9) (stating that “[p]reparation or design of any campaign materials or any form of media for a candidate for elective office” is political activity). As mentioned above, although the September 21, 2014 Press Release was one portion of a larger public discussion about advisory questions on ballots and timely providing ballots to service members, it is not campaign material. Nowhere does the Press Release identify Ms. Toulouse Oliver as a candidate for Secretary of State, seek votes, or otherwise attempt to improperly influence voters. The Press Release was an essential and important aspect of Ms. Toulouse Oliver’s job as County Clerk and provided important information to the voting public.

C. Section 2-130(h)(5) & (6)

The complaint appears to alleged that the Press Release violates Sections 2-130(h)(5) and (6) of the Code of Conduct because “this partisan political attack was conducted during business hours.” Section 2-130(h)(5) states:

Public servants shall not perform any political activity while at work and during any compensated time, other than annual leave, personal leave, holidays or other time off. Public servants shall not use any county property or resources for any political activity for the benefit of any campaign for elective office or any political organization.

Section 2-130(h)(6) states:

At no time shall any public servant solicit or require any employee to perform any political activity; (i) as part of the employee's county duties; (ii) as a condition of county employment; or (iii) during any time off that is compensated by the county (such as

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annual leave, personal leave or holidays).

Although we maintain that the complaint fails to sufficiently allege a violation of Sections 2-130(h)(5) and (6), these subsections only apply if the Press Release constitutes “political activity.” As explained in the previous section, the Press Release does not constitute political activity. The Press Release was an essential and important aspect of Ms. Toulouse Oliver’s job as County Clerk and provided important information to the voting public.

D. Anti-Donation Clause

Without explanation, the complaint alleges that the Press Release violates the anti-donation clause of the New Mexico Constitution. This issue is outside of the jurisdiction of the Board of Conduct and should not be considered. *See* Section 2-133(c) (“The jurisdiction of the review board is limited to acting within the scope of matters covered by this code.”).

In the event the Board decides to consider the allegation, the anti-donation clause simply does not apply here. The anti-donation clause states:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.

N.M. Const. art. IX, § 14. The purpose of the anti-donation clause is to prevent the government from spending public resources on private issues. As explained previously, the press release fell squarely within Ms. Toulouse Oliver’s public duties as Bernalillo County Clerk. She received no financial or other gain from the issuance of the Press Release, which was designed to provide residents of Bernalillo County with important information and to correct false or inaccurate information that had been provided to the public by the Secretary of State’s Office.

III. Conclusion

Ms. Toulouse Oliver’s office issued the September 21, 2014 Press Release to provide the residents of Bernalillo County with important information related to the 2014 General Election. One of the Bernalillo County Clerk’s principle duties is to administer elections, ensure that elections run smoothly, and provide the public with the information that it needs and deserves. The September 21, 2104 Press Release was a link in a chain of public statements and discourse related to the issue of advisory questions being placed on the ballot, the legal proceedings and

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public debate surrounding the advisory questions, and the impact of any delay stemming from those legal proceedings on the timely provision of ballots to absentee voters overseas and in the military. The Press Release provided information to the public regarding “governmental decisions and policy...made in [the] proper channels of the government structure,” and helped to promote public “confidence in the integrity of its government.” *See* Code of Conduct, Section 2-127.

Very truly yours,



JOSEPH GOLDBERG

cc: Carolyn Freeman (via First-Class and Electronic Mail)
P.O. Box 220
Sandia Park, NM 87047
Email: cfreeman1254@msn.com



NEWS RELEASE

For Immediate Release
September 21, 2014

Issued by Bernalillo County
County Clerk's Office
Liz Hamm
(505-238-0888)
(505-468-1222)

OVERSEAS BALLOTS IN BERNALILLO COUNTY MAILED BY DEADLINE

Despite a number of hurdles due to legal action and problematic ballot design processes overseen by the Secretary of State's office, Bernalillo County Clerk Maggie Toulouse Oliver announced today that her office successfully mailed ballots to overseas and military voters yesterday, meeting the federal deadline for sending those ballots to voters who had already applied before the deadline.

As a result of litigation instigated by Secretary of State Dianna Duran's refusal to place two county advisory questions on the ballot, the Supreme Court ultimately held that the Secretary did not have the authority to block the questions and was ordered to cooperate with County Clerk Toulouse Oliver and her counterpart, County Clerk Geraldine Salazar in Santa Fe County, to ensure the ballots included both counties' questions. Upon the court's ruling late Friday afternoon, Bernalillo County finally received its first set of ballot proofs from the Secretary of State's office containing the two county questions at approximately 7:30 p.m.

Prior to receiving ballots with the two questions, the clerk's staff had been unable to formally begin the ballot proofing process. After receiving the initial proofs, many errors were identified, resulting in two additional sets of proofs to be sent to Bernalillo County before the proofing process could begin in earnest. The final set of proofs without errors arrived from the Secretary of State's office yesterday at approximately 1:00 p.m.

Due to the urgency in mailing ballots pursuant to the federal deadline on Saturday, the entire county clerk's office staff worked overtime on Friday evening and all day Saturday, costing taxpayers approximately \$10,000 in overtime costs.

"I am extremely grateful to my entire staff for the professionalism they exemplified in helping to ensure our overseas and military voters were able to get their ballots on time. Once again, Bernalillo County has been able to meet this critical federal deadline and ensure that these voters are able to participate in our democratic process," says County Clerk Maggie Toulouse Oliver.

(MORE)

Exhibit 1

"It was disappointing that we found ourselves in the position of having to scramble and place all hands on deck in order to get this process done. Under normal circumstances, we would have had ample time to ensure the ballots were prepared and ready. However, the unusual actions of the Secretary of State impeded our ability to get our jobs done. I am very pleased we were able to meet this important deadline despite all the obstacles placed in our path along the way."

The County Clerk also took the time to address some disturbing and false allegations made by the Secretary of State in an apparent [press release](#) late Friday night:

"It is once again unfortunate that the Secretary of State has chosen to communicate with me and my staff via a press release rather than directly about her directive. Neither me, nor any members of my staff, received such a directive from the Secretary of State, as she suggested in her press statement. I cannot fathom how we will be able to address these types of crucial matters moving forward if we do not receive direct communication from the Secretary of State's office. It is also important to note that The Uniform Overseas Citizen Absentee Voting Act (UOCAVA) places responsibility for mailing ballots on time squarely on the shoulders of the Secretary of State."

"Furthermore, it is extremely disappointing that Secretary Duran would resort to outright lies in regard to Bernalillo County's record in mailing military and overseas ballots. During my entire tenure in office, we have never failed to mail those ballots on time. This is a very easy allegation to debunk. In the past, when other New Mexico counties failed to mail the UOCAVA ballots on time (resulting from a delay in the previous Secretary's office), the entire state was placed under a consent decree by the US Justice Department. The Secretary of State and all County Clerks operated under that consent decree during the 2012 General Election. That consent decree was subsequently lifted prior to the 2014 elections and has not been reinstated. Again, this is all a matter of very public record that can easily be researched. I am at a loss to understand the Secretary's motivation in saying something that can so easily be proved false."

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Attorney General of New Mexico

GARY K. KING
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

September 5, 2014

Senator Jacob Candelaria
New Mexico State Senate
3501 Atrisco Drive, NW Apt. 423
Albuquerque, NM 87120

Re: Opinion Request—County Ballot Proposition

Dear Senator Candelaria:

You have asked for this office's position on whether a county may propose a question on the statewide election ballot that does not carry the force of law. As discussed in more detail below, we conclude that a county may propose a question on the statewide general election ballot that does not carry the force of law.

The New Mexico Election Code, NMSA 1978, Chapter 1, applies to general elections, primary elections, statewide special elections, elections to fill vacancies in the office of representatives in Congress, and school district elections. Section 1-1-19(A). The Election Code allows both candidates and questions to be placed on ballots, stating that "questions other than proposed constitutional amendments" may be submitted to qualified electors. Section 1-16-8.

Section 1-16-8 does not discuss what types of questions may be placed on the ballot and therefore does not expressly prohibit questions that merely seek the opinion of voters. Without clear statutory direction and with no case law addressing this matter, we turn to other provisions of the Election Code for guidance.

Certain questions that carry the force of law—such as constitutional amendments and referendums—are specifically authorized outside the bounds of Section 1-16-8 by the legislature. While constitutional amendments are presented to qualified electors as a "question," they are nevertheless governed by every section in Chapter 1, Article 16 except for Section 8, which specifically excludes constitutional amendments. The significance of the exclusion of constitutional amendments from Section 1-16-8 is that constitutional amendments carry the force of law. Similarly, referendums, which are governed by Chapter 1, Article 17, might be

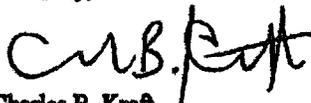
considered "questions" that carry the force of law, yet are not governed by Section 1-16-8. Because neither constitutional amendments nor referendums are governed by Section 1-16-8, yet both are "questions" that carry the force of law, it appears that the legislature intended Section 1-16-8 to cover questions that do not carry the force of law, as well as those that have the force of law but have not been expressly excluded from Section 1-16-8.

Having the authority to submit questions that do not carry the force of law to its qualified electors, counties must meet the strict requirements of Section 1-16-8 before doing so. Under Section 1-16-8, two requirements must be met for a county to legally submit a question "not statewide in application" to the qualified electors of that county: (1) the county must approve and issue a resolution proposing the question, and (2) the county clerk must submit to the Secretary of State, no later than thirty days prior to the election, the form of the ballot for that county and a copy of the county's resolution. See id.

Noted in your question to this office was a reference to the 2011 election in which the City of Albuquerque submitted to the qualified electors of Albuquerque the question of whether they were "for" or "against" Albuquerque's "Red Light Camera Program." The placing of that question on the ballot in 2011 was governed by the Municipal Election Code, NMSA 1978, Chapter 3, and Albuquerque's Municipal Election Ordinance, Albuquerque, N.M., Code § 2-4-3 (1993), and therefore has no direct effect on the question presented.¹

Your request to us was for an Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



Charles B. Kraft
Assistant Attorney General

¹ See generally Att'y Gen. Op. 12-05 (discussing whether a municipality, rather than a county, may submit a question on a statewide election ballot).

Secretary of State Advises that "Poll" Questions are not permitted under the New Mexico Constitution or Laws

IMMEDIATE RELEASE
September 10, 2014

Contact: Ken Ortiz
Office of the Secretary of State
(505) 827-3661

SANTA FE—Secretary of State Dianna Duran today informed the county commissions of Bernalillo County and Santa Fe County that her legal counsel advises her that local ballot questions that merely "poll" voters and are not questions that serve to adopt or reject public policy, are both unconstitutional and incompatible with state law.

The legal counsel for the Secretary of State stated:

"Throughout New Mexico statutes, consistent with the Constitution, the legislature has authorized specific

types of questions that can be placed before the voters on general election ballots. In each case the statutory language calls for a decision to be made by the electorate, i.e. the enactment of public policy, including the adoption of fiscal measures regarding debt, taxation and the like. In each instance the law is explicit with regard to the fact that the electorate is making law.

No reference can be found in New Mexico law in which a question may be put to the voters that is not for a decision to be made by those same voters, that is for the purpose of adopting or rejecting a constitutional

amendment, a bond issue, or a local question involving the contracting of debt or taxation. The constitutional framers and subsequent legislatures apparently viewed the role of public bodies as either: 1) making a decision themselves on questions of these types, or 2) submitting the questions to the voters

for the electorate to make the decisions. They did not contemplate, and have not written, provisions for actions that do neither. Nor have they provided for an elected body to take a poll of the constituency to determine what they should do.

Duran wrote to the Bernalillo and Santa Fe County Commissions:

"The Secretary of State, as a constitutional officer must bear in mind the long-term effect of the adoption of the extra-legal measures proposed by the Boards of County Commissioners of a county. If any county is permitted to co-opt the franchise—which belongs to New Mexico voters, and is their sacred right and responsibility—for the purpose of placing unprecedented and unauthorized questions on the ballot, specifically those that merely poll the public, there can be little question that this procedure will be taken up all around the state. Commissions, councils and boards will all soon be using scarce public resources, the tax dollars that fund the already substantial costs of elections, to take polls—an activity currently restricted to partisan political campaigns which are generally funded by private contributions.

"Along the way, it is highly likely that questions involving significant and weighty matters of public policy will be squeezed out of the electoral process due to ballot length or cost, or both.

"As Secretary of State, if I were to place such extra-legal issues on the ballot then I would be taking an active role in accepting this kind of use of the ballot as lawful and appropriate, both statutorily and constitutionally. Such an action would then permanently place this constitutional office squarely in league with the adoption of ballot questions that our counsel advises is not permissible under the New Mexico Constitution or its statutes. I cannot in good conscience, and with a clear understanding of my oath of office and my constitutional duties, acquiesce to such a course of action I believe to be contrary to the laws and the constitution of the State of New Mexico.

"Based on the advice of counsel, questions that serve merely as poll questions or "advisory" questions are not authorized either by the constitution or by statute."

September 10, 2014

Memorandum for: The Board of County Commissioners
Bernalillo County

From: Dianna Duran
Secretary of State

Subject: Non-binding “Advisory” Questions, or “poll” questions placed on a General Election ballot

We have been informed that both the Bernalillo and Santa Fe County Commissions have voted to place “advisory” questions on the general election ballot. These questions are designed only to “poll” the public, and are not questions that serve to adopt or reject public policy as reflected in statute.

The legal counsel for the Office of the Secretary of State has informed me that neither a municipal council nor county commission has unlimited discretion when it comes to placing questions on a General Election ballot.

It is the opinion of counsel that “the placement of a non-binding ‘advisory’ question on a general election ballot would be both unconstitutional and incompatible with state law.”

Counsel offers five principal reasons:

- 1) All references to ballot questions, either in the constitution or in statute, call for a decision to be made by the voters, and describe the result of that decision
- 2) No authorization can be found for the expenditure of public funds to conduct an election the end result of which is not described in the same statute or constitutional provision
- 3) Neither the New Mexico Constitution nor any statute provides for the conduct, through the electoral process, of a poll of the voters with no resulting adoption or rejection of public policy
- 4) Case law from other jurisdictions regards the solicitation of “advisory opinions” to be an improper use of the local ballot process
- 5) Establishing a precedent that the General Election ballot can be used for “polling” or “advisory opinions” would almost certainly result in abuse of the electoral process in the future through the substitution of advisory questions over those that are substantive. Serious questions of public policy could then be left unaddressed while local bodies design “advisory” questions instead.

Throughout New Mexico statutes, consistent with the Constitution, the legislature has authorized specific types of questions that can be placed before the voters on general election ballots. In each case the statutory language calls for a decision to be made by the electorate, i.e. the enactment of public policy, including the adoption of fiscal measures regarding debt, taxation and the like. In each instance the law is explicit with regard to the fact that the electorate is making law.

In no instance can there be found anywhere in New Mexico statutes or in the New Mexico Constitution any authorization for the expenditure of public funds to conduct an election the end result of which is

not set forth in the same statute. That is to say, neither the drafters of the constitution nor any subsequent legislature have seen fit to authorize the expense of elections on questions for any reason other than to enact public policy. A question of what to do on a matter of public policy is either placed before the voters for a final decision, or it is taken up by the elected body itself to either enact or reject. A back-and-forth dialog based on polling through the medium of elections is neither contemplated nor authorized.

The constitutional framers and subsequent legislatures apparently viewed the role of public bodies as either: 1) making a decision themselves on questions of these types, or 2) submitting the questions to the voters for the electorate to make the decisions. They did not contemplate, and have not written, provisions for actions that do neither. Nor have they authorized an elected body to use an official ballot, and the resources provided to conduct a general election, merely to take a poll of a constituency to determine what the elected body should do. To the contrary, the statutes contain provisions indicating that questions are said to be decided—that is adopted or rejected—upon a canvass of the vote, with a majority of the voters voting either in favor of or against a particular question.

The establishment of a precedent that provides for “advisory opinions” on General Election ballots will lead to abuse of the electoral process, likely to the detriment of the legitimate, statutorily established procedures under which the people decide public policy questions.

The Secretary of State, as a constitutional officer with all the responsibilities and duties referred to previously, must bear in mind the long-term effect of the adoption of the extra-legal measures proposed by the Boards of County Commissioners of a county.

If any county is permitted to co-opt the franchise—which belongs to New Mexico voters, and is their sacred right and responsibility—for the purpose of placing unprecedented and unauthorized questions on the ballot, specifically those that merely poll the public, there can be little question that this procedure will be taken up all around the state. County commissions and possibly city councils, school boards and special districts will all soon be using scarce public resources, the tax dollars that fund the already substantial costs of elections, to take polls—an activity currently restricted to partisan political campaigns which are generally funded by private contributions.

Local boards and commissions will unquestionably do battle among themselves not for the purpose of making public policy, financing bonds, or imposing or reducing tax burdens, but merely to see which member gets to design public opinion advisory questions. Along the way, it is highly likely that questions involving significant and weighty matters of public policy will be squeezed out of the electoral process due to ballot length or cost, or both.

As Secretary of State, if I were to place such extra-legal issues on the ballot then I would be taking an active role in accepting this kind of use of the ballot as lawful and appropriate, both statutorily and constitutionally. Such an action would then permanently place this constitutional office squarely in league with the adoption of ballot questions that our counsel advises is not permissible under the New Mexico Constitution or its statutes.

I cannot in good conscience, and with a clear understanding of my oath of office and my constitutional duties, acquiesce to such a course of action I believe to be contrary to the laws and the constitution of the State of New Mexico.

Based on the advice of counsel, questions that serve merely as poll questions or “advisory” questions are not authorized either by the constitution or by statute.

Based on the foregoing, it is the opinion of this office that a county may not propose a question on a statewide general election ballot that does not carry the force of law. The attempt to place such a question on a statewide general election ballot is denied by the Office of the Secretary of State.

ATTEST: A TRUE COPY

Joey D. Mayra

Chief Clerk of the Supreme Court
of the State of New Mexico

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

September 19, 2014

NO. 34,890

**BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF BERNALILLO,**

Petitioner,

vs.

**DIANNA J. DURAN, in her
capacity as Secretary of State,**

Respondent,

and

**MAGGIE TOULOUSE OLIVER, in her capacity as
County Clerk of the County of Bernalillo,**

Real Party in Interest.

Consolidated with:

NO. 34,893

**STATE OF NEW MEXICO, ex rel.,
GERALDINE SALAZAR, and BOARD
OF COUNTY COMMISSIONERS OF
THE COUNTY OF SANTA FE,**

Petitioners,

v.

ATTEST: A TRUE COPY

Joey D. Maya

Chief Clerk of the Supreme Court
of the State of New Mexico

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**HON. DIANNA J. DURAN, in her
official capacity as Secretary of State
for the State of New Mexico,**

Respondent.

ORDER

WHEREAS, this matter came on for consideration upon emergency petitions for writs of mandamus, amicus brief of the Attorney General, response of the Secretary of State, and oral argument of the parties on September 19, 2014;

WHEREAS, on September 8, 2014, the Bernalillo County Board of County Commissioners passed Resolution No. AR 2014-52 to place two questions on the 2014 general election ballot for consideration by voters in Bernalillo County;

WHEREAS, on September 9, 2014, the Board of County Commissioners of Santa Fe County passed Resolution No. 2014-87 to place one question on the 2014 general election ballot for consideration by voters in Santa Fe County;

WHEREAS, NMSA 1978, § 1-16-8 (1977), provides that the "form for ballots on those questions not statewide in application to be submitted to the voters of the county shall be furnished by the county clerk, and a copy of the resolution proposing such question shall be sent by the county clerk to the

ATTEST: A TRUE COPY

Joey D. Moysa

Chief Clerk of the Supreme Court
of the State of New Mexico

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secretary of state”;

WHEREAS, the county clerks for Bernalillo County and Santa Fe County submitted the questions passed by the resolutions of their respective county commissions, but the Secretary of State refused to perform her non-discretionary, ministerial duty to include those questions on the ballots to be used in Bernalillo County and Santa Fe County in the upcoming general election;

WHEREAS, under state and federal law, the current deadline for sending ballots to military and overseas absentee voters is September 20, 2014, although the Secretary of State has discretion to request an extension of those deadlines under federal law; and

WHEREAS, in light of the foregoing, and the Court having considered the pleadings and oral argument of the parties and being sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, and Judge Michael D. Bustamante, sitting by designation, concurring;

NOW, THEREFORE, IT IS ORDERED that the petitions are GRANTED, and a writ shall issue directing the Secretary of State to include on the ballot for the 2014 general election the questions approved by Bernalillo County Board of

ATTEST: A TRUE COPY

Joey D. Moya
Chief Clerk of the Supreme Court
of the State of New Mexico

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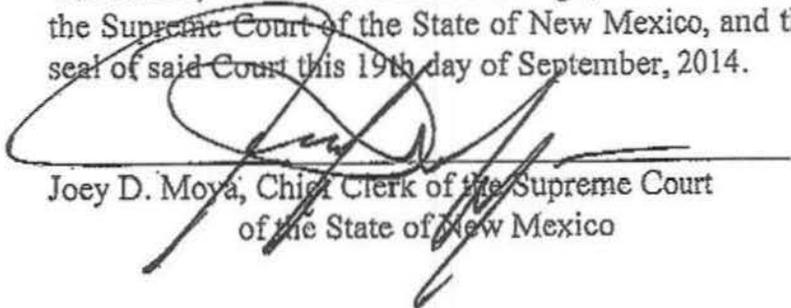
County Commissioners Resolution No. AR 2014-52 and Board of County Commissioners of Santa Fe County Resolution No. 2014-87 and to coordinate with the county clerks for Bernalillo County and Santa Fe County for the preparation and distribution of the ballots as expeditiously as possible; and

IT IS FURTHER ORDERED that the stay issued in cause numbered 34,890 is LIFTED.

IT IS SO ORDERED.

WITNESS, Honorable Barbara J. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 19th day of September, 2014.

(SEAL)



Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico

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Local Viewpoints

3:49 PM SAT SEPTEMBER 20, 2014

Duran: Bernalillo And Santa Fe County Clerks Must Send Out Ballots To Military On Time

By OFFICE OF THE NM SECRETARY OF STATE

SANTA FE—The Office of the Secretary of State has informed both the Bernalillo and Santa Fe County Clerks that they must comply with federal and state law—and ensure that ballots go out to servicemen and women today, Saturday, September 20.

Both county commissions and both county clerks know what is at stake, and they know exactly how many ballots need to be mailed tomorrow,” said Secretary of State Dianna Duran, “the latest count we have is that 124 ballots need to be mailed by Bernalillo County and 48 by Santa Fe County.”

Duran added that “both counties have delayed this by court action, so they know exactly what the questions are and exactly how many precincts are involved. The ballots are designed and they will receive their final proofs shortly. There are no surprises. They only need to proofread a small number of ballots. There is no excuse at all for not getting these ballots out the door and in the mail tomorrow.”

Bernalillo County has missed the deadline for getting ballots to servicemen and women for the past three consecutive elections. It is the only county to have missed that deadline. Santa Fe County has been in compliance.

Both Bernalillo County and Santa Fe County filed suit last week to change their ballots, thus delaying the final design by several days.

Exhibit 6

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