

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
LEAGUE OF WOMEN VOTERS
OF NEW MEXICO,

Petitioner,

No. _____

vs.

The Honorable MARY HERRERA, in her
official capacity as SECRETARY OF STATE
OF NEW MEXICO,

Respondent.

Original Proceeding in Mandamus

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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Introduction and Jurisdictional Statement

1. This proceeding presents urgent questions regarding the interpretation and validity of provisions of the New Mexico Election Code affecting the current general election. At issue is the Secretary of State's interpretation of what marking by a voter on a hand-tallied paper ballot is sufficient for the voter's marking to be counted as a vote. Also at issue is the Secretary of State's determination not to enforce a provision of the Election Code, NMSA 1978, § 1-9-4.2(B)(4) (2007), directing that a hand-tallied paper ballot vote be counted without regard to the specific form of marking when the voter's intent is clearly discernable to the election judges. The Secretary's narrow interpretation of valid ballot markings, contrary to legislative intent, and the Secretary's determination to disregard legislative intent altogether with respect to Section 1-9-4.2(B)(4) threaten the disenfranchisement of many New Mexico voters who will cast paper ballots in this election that, while not marked in accordance with the ballot instructions, are clearly marked and discernable.

2. “[T]he supreme right guaranteed by the Constitution of the state is the right of a citizen to vote at public elections.” State ex rel. Walker v. Bridges, 27 N.M. 169, 174, 199 P. 370, 372 (1921). Petitioner, the League of Women Voters of New Mexico, is a nonpartisan political organization that encourages the

informed and active participation of citizens in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. Petitioner and its affiliated national organization work to improve the election and voting processes in the United States, with a current emphasis on protecting every citizen's right to vote and making the system as accessible as possible to voters. Petitioner has standing to pursue this matter, which presents issues not only of great concern to Petitioner but of great public importance relating to the constitutional right to vote and to have one's vote counted. See ACLU of New Mexico v. City of Albuquerque, 2008-NMSC-045, ¶¶ 12, 33, 144 N.M. 471, 188 P.3d 1222 (great public importance doctrine provides overarching basis for individual or organizational standing, generally exercised "in the context of our original jurisdiction in mandamus," under which Court "ha[s] . . . granted standing in election cases implicating the guarantee of 'free and open' elections under Article II, Section 8 of the New Mexico Constitution").

3. Respondent, as Secretary of State, occupies a constitutionally established office of the executive branch of state government, see N.M. Const. art. V, § 1, and is "the chief election officer of the state." NMSA 1978, § 1-2-1(A) (1979). The Secretary is obligated to "administer the Election Code in its

statewide application,” to “prepare instructions for the conduct of election . . . matters in accordance with the laws of the state,” and to “advise county clerks . . . as to the proper methods of performing their duties prescribed by the Election Code” and is authorized to “make rules and regulations pursuant to the provisions of, and necessary to carry out the purposes of, the Election Code.” NMSA 1978, §§ 1-2-1(A)(2), 1-2-2(B), (C), (D) (2005). The Secretary is under a duty to follow the Election Code and has no power to alter it. Weldon v. Sanders, 99 N.M. 160, 165, 655 P.2d 1004, 1009 (1982).

4. This Court has original jurisdiction to issue writs of mandamus against all state officers. N.M. Const. art. VI, § 3. Mandamus is an appropriate means to compel official action that is legally required or to prevent a public official from acting unlawfully. State ex rel. Clark v. Johnson, 120 N.M. 562, 569-70, 904 P.2d 11, 18-19 (1995). Petitioner has appropriately invoked this Court’s jurisdiction in the first instance because this is a matter of great public concern, the material facts are sufficiently developed leaving questions of law for determination, and an immediate determination of the issues is necessary. State ex rel. Taylor v. Johnson, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768.

Grounds for Relief

The Statute at Issue and Its Proper Interpretation

5. NMSA 1978, § 1-9-4.2(B) (2007) provides:
 - B. For paper ballots that are hand-tallied, a vote shall be counted if:
 - (1) the ballot is marked in accordance with the instructions for that ballot type;
 - (2) the preferred candidate's name or answer to a ballot question is circled;
 - (3) there is a cross or check within the voting response area for the preferred candidate or answer to the ballot question; or
 - (4) the presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly discernable.

In enacting this statute, the Legislature anticipated that a paper ballot might be marked by the voter in a variety of ways, not in accordance with the instructions for that ballot type,¹ and expressed its intention that the marked ballot be counted in specified circumstances. If a candidate's name or the answer to a ballot question is "circled," subparagraph B(2) applies. If the voting response area for a candidate or question contains a "cross or check," subparagraph B(3) applies. In

¹Instructions for sample paper ballots posted on the Secretary's web site ([see http://www.sos.state.nm.us/sos-SampleBallot.html](http://www.sos.state.nm.us/sos-SampleBallot.html) (follow hyperlink to applicable precinct) (last visited Oct. 22, 2008)) state: "To vote complete the oval to the LEFT of your choice, like this [example]."

these instances, the voter's indicated preference is counted. Subparagraph B(4) operates as a catch-all provision for ballots that are not marked in accordance with instructions and do not have a preference circled or marked in the voting response area by a cross or check. In those instances, the vote is counted if there is unanimous agreement among the presiding judge and election judges that the voter's intent is clearly discernable.

6. The statute should be construed to give effect to the Legislature's intent, as determined by the language of the statute viewed as a whole, its history, and the object the Legislature sought to accomplish. Maes v. Audubon Indem. Ins. Group, 2007-NMSC-046, ¶ 11, 142 N.M. 235, 163 P.3d 934, cert. denied, 128 S. Ct. 908 (2008); Sun Country Sav. Bank of N.M., F.S.B. v. McDowell, 108 N.M. 528, 533, 775 P.2d 730, 735 (1989). "The voter should not lightly be deprived of his right . . . if by any reasonable interpretation of the laws governing elections it can be prevented." State ex rel. Read v. Crist, 25 N.M. 175, 199, 179 P. 629, 637 (1919).

7. Prior to its most recent amendment in 2007, Section 1-9-4.2(B) read:

B. A vote on a paper ballot card used on an electronic vote tabulating marksense voting system, optical scan vote tabulating system or high-speed central count marksense vote tabulator consists of a voter's selection of a candidate or answer to a ballot question indicated in the voting response area of the paper ballot card marked

in accordance with the instructions for that ballot type. If the paper ballot card is marked indistinctly or not marked according to the instructions for that ballot type, only a cross (X) or a check (√) within the voting response area shall be counted.

Act Relating to Elections, ch. 270, 2005 N.M. Laws 2544, § 58. (Due to typographical limitations, the “check” symbol in parentheses in the next-to-last line appears here slightly differently than in the official text.) The amendment updates the statute to address the current paper ballot system, adds subparagraphs B(1) through B(4), and eliminates any typographical or pictorial definition of the words “cross” or “check.”

8. By amending the statute, the Legislature indicated its intent to change the law as it previously existed. Atencio v. Bd. of Educ., 99 N.M. 168, 171, 655 P.2d 1012, 1015 (1982) (“We must presume that the Legislature, in enacting a new provision of the . . . Act, or in enacting amended provisions thereof, intended to change the law as it had theretofore existed.”). The amendment indicates a legislative intent not to require a voter to mark any particular form of “cross” or “check” in the voting response area in order for a vote to be counted.

Furthermore, in some other statutes pertaining to marked ballots, the Legislature has included a broader, but specific, definition of these terms. See, e.g., NMSA 1978, § 1-12-55 (1979) (“The cross used in marking emergency paper ballots shall

be two lines intersecting at any angle within the circle or box. The check shall be a ‘V’-shaped mark with it being permissible for either side of the ‘V’ being longer than the other side. Any mark discernible either as a cross or a check, whether or not any of the lines extend outside the circle or box, shall be counted as a valid marking of the ballot. ”). In amending Section 1-9-4.2(B), the Legislature could have, but did not, include such a definition. See Sedillo v. N.M. Dep’t of Pub. Safety, 2007-NMCA-002, ¶ 12, 140 N.M. 858, 149 P.3d 955 (filed 2006) (inferring from fact that legislature could have but did not include language in statute creating private right of action that no such right was created), cert. quashed, 2007-NMCERT-088, 142 N.M. 436, 166 P.3d 1090. By incorporating no specific definition of the terms, the Legislature indicated its intent that the terms be used in their ordinary sense. See NMSA 1978, § 12-2A-2 (1997); Cooper v. Chevron U.S.A., Inc., 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (statutory language is given “its ordinary and plain meaning unless the legislature indicates a different interpretation is necessary”). Furthermore, to achieve the legislative intent evident in the design of Section 1-9-4.2(B) as a whole, seeking to give effect to a voter’s ballot markings as long as they clearly display the voter’s preference, the terms should be given the broadest possible interpretation.

9. The ordinary meaning of “cross” is “[a]ny mark . . . formed by the intersection of two lines.” American Heritage Dictionary of the English Language 315 (2d ed. 1981). The ordinary meaning of “check” is “[a] mark to show verification or approval.” *Id.* at 229. Cf. *Stevenson v. Louis Dreyfus Corp.*, 112 N.M. 97, 100, 811 P.2d 1308, 1311 (1991) (referring to dictionary definition to interpret statutory term). Consequently, where a hand-tallied paper ballot is not marked in accordance with instructions and the voter has not circled his or her preferred candidate or choice, any mark consisting of two intersecting lines or any other mark placed within the voting response area indicative of the voter’s preference between or among candidates or choices should be counted as a vote pursuant to Section 1-9-4.2(B)(3). If the foregoing does not apply, Section 1-9-4.2(B)(4) should apply to determine whether a vote can be discerned and counted.

The Secretary’s Interpretation: Absentee Ballots

10. By emergency amendment to section 1.10.12.15(C), effective September 30, 2008, the Secretary promulgated the following regulation regarding the hand-tallying of absentee paper ballots:

If a ballot is marked indistinctly or not marked according to the instructions for that ballot type, precinct board members shall count the ballot only if the voter has marked a cross (X) or a check (√) within the voting response area, circled the name of the candidate or both. In no case, shall the precinct board mark or re-mark the ballot.

In the instance of machine malfunction, the precinct board shall hand tally ballots.

Absentee Precinct Bds., Office Sec’y State, 1.10.12.15(C) NMAC (10/15/08), 19 N.M. Reg. 943 (2008).

11. The regulation fails to comply with Section 1-9-4.2(B) in two respects. First, the regulation includes specific, narrow typographical or pictorial definitions of “cross” or “check” that are contrary to the clear intent of the Legislature to interpret these terms broadly to count any markings within the voting response area indicative of the voter’s preference. See supra ¶¶ 6-9. On information and belief, the Secretary intends to instruct and has instructed county clerks and election workers to apply the regulation narrowly so that only ballot markings closely conforming to the typographical or pictorial representations of a cross or check shown in the regulation will be counted as votes.

12. Second, the regulation makes no provision at all to count votes that are required to be counted pursuant to subparagraph B(4) of Section 1-9-4.2 where a voter has indicated a clearly discernable intent but the vote does not qualify to be counted under subparagraphs B(1) through B(3) of the statute.

13. In the November 2006 general election, according to information from the Secretary’s web site, more than 96,000 absentee ballots were cast by New

Mexico voters. For the current election, on information and belief, a substantially greater number of absentee ballots are likely to be cast. If even a small percentage of voters fails to mark the absentee ballots in accordance with the instructions, a significant number of votes may be subject to the Secretary's interpretation of Section 1-9-4.2(B) and a significant number of voters may be disenfranchised despite having marked their ballot indicating their preference within the voting response area as permitted by subparagraph B(3) of the statute or having otherwise expressed a clearly discernable intent cognizable under subparagraph B(4).

14. A voter who casts a ballot in person and does not comply with the ballot marking instructions has an opportunity to correct the error and have the voter's expressed preference counted. The Secretary's interpretation of Section 1-9-4.2(B) not only fails to give effect to the legislative intent underlying that statute but, by denying effect to a voter's ballot markings that are permissible under subparagraph B(3) or discernable under subparagraph B(4), also violates the Legislature's clear directive that "[a]ny voter may vote by absentee ballot . . . as if he were able to cast his ballot in person at his regular polling place on election day." NMSA 1978, § 1-6-3(A) (1999).

15. On information and belief, the Secretary has based her determination not to enforce subparagraph B(4) of Section 1-9-4.2 on an opinion letter from the

New Mexico Attorney General (**Exhibit A**) which takes the position that subparagraph B(4) adopts a nonuniform standard for what counts as a vote, contrary to the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301- 15545, and to equal protection principles articulated in Bush v. Gore, 531 U.S. 98 (2000), and therefore cannot be applied in counting votes. In addition to promulgating the regulation mentioned above, the Secretary has provided the Attorney General's letter to county clerks as the operative instruction governing the counting of hand-tallied votes. Under the Attorney General's letter, a ballot that is not marked in accordance with instructions will be counted only if the preferred candidate's name is circled or there is a cross or check within the voting response area for the preferred candidate. While the Secretary may appropriately have sought and relied upon advice from the Attorney General's office, the guidance provided by the Attorney General is incorrect. This Court should correct the error. Cf. Local 2238, Am. Fed'n of State, County & Municipal Employees v. Stratton, 108 N.M. 163, 169, 769 P.2d 76, 82 (1989) (declining to follow Attorney General's opinion that did not correctly state the law). There is no infirmity in Section 1-9-4.2(B)(4) that prevents its application.

16. The Attorney General's opinion that Section 1-9-4.2(B)(4) cannot be enforced because it adopts a nonuniform standard stems from an excessively

cautious interpretation of HAVA and Bush v. Gore. HAVA requires states to adopt “uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote.” 42 U.S.C. § 15481(a)(6). Section 1-9-4.2 applies statewide. Because subparagraph B(4) of Section 1-9-4.2 permits a vote to be counted only if the voter’s intent can be “clearly” discerned from the ballot in the unanimous view of bipartisan election judges, the statute assures sufficient consistency in application to satisfy the requirement of uniformity imposed by HAVA.

17. Similarly, there is no equal protection issue in the situation at hand that rises to the level the United States Supreme Court found impermissible in examining the Florida recount procedure in Bush v. Gore. There the Supreme Court identified three distinct problems in addition to the failure of the state to adopt a more specific recount standard than the “clear indication of the intent of the voter”: all ballots were recounted in some counties; partial totals were included from at least one county; and ad hoc panels of untrained judges were used in canvassing ballots. 531 U.S. at 107-09. The Court cautioned that its consideration was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” Id. at 109. The situation at hand differs materially. First, the additional problems identified

in Bush v. Gore are not present. Second, the particular counting problem there – the treatment of “hanging” or “dimpled” chads on punch-card ballots – presented a scenario in which “[t]he formulation of uniform rules to determine intent based on these recurring circumstances is practicable.” Id. at 106. In Section 1-9-4.2(B) the Legislature has addressed the counting of paper ballots which can be marked in a multitude of ways, rather than a punch card ballot that could exist in one of three states – fully punched out, partially punched out, or impressed but not dislodged. There is no means of prescribing uniform standards for the wide variety of paper ballot markings that might confront election judges and still achieve the legislative goal of counting clear expressions of voter intent however indicated, except to develop an enormous compilation of potential markings and their effect or to adopt standards of such generality that human judgment must of necessity be brought to bear in applying them. In situations calling for the interpretation of markings on paper ballots, subparagraph B(4) of Section 1-9-4.2 provides a uniform, practicable standard for determining voter intent that can be applied with sufficient consistency to satisfy any dictates of equal protection.

18. Even assuming the Attorney General’s position regarding Section 1-9-4.2(B)(4) is correct, there is no bar to applying the statute provided the deficiency perceived by the Attorney General is remedied – i.e., provided there are

uniform standards in place to supply adequate guidance to election judges in determining what kinds of ballot markings are sufficient to clearly demonstrate the voter's intent. See Dolan v. Powers, 260 S.W.2d 376 (Mo. Ct. App. 2008) (discussing HAVA requirements, and describing or applying specific standards prescribed by state regulation or statute to be used in ascertaining voter intent).

19. On information and belief, after the Attorney General's letter was issued, the Secretary provided instructions to county clerks as to how absentee and provisional ballots that are hand-tallied should be counted. (**Exhibit B.**) These instructions sought to establish uniformly applicable statewide standards for determining what constitutes a vote. For instance, the Secretary instructed that a ballot containing a clear mark in the voting response area for one candidate, which does not enter into the response area for any other candidate, should be counted. (Id., at 3.) The Secretary instructed that a ballot on which the voter did not mark the voting response area but used a consistent mark on or around a candidate's name to denote a preference should be counted. (Id., at 15.) However, the Secretary subsequently informed county clerks that these instructions should be replaced by the Attorney General's letter, which is to be followed for the current election. (See Exhibit C.) By withdrawing the previously issued uniform standards and substituting the Attorney General's letter, which treats Section 1-9-

4.2(B)(4) as unenforceable, the Secretary has compounded the perceived problem and prevented the counting of votes that could have been counted pursuant to Section 1-9-4.2(B)(4) by application of the uniform standards.

*Related Issues: Provisional Ballots,
Two Percent Audit, Recounts*

20. The Secretary has issued other regulations relating to the tallying of votes that share the unduly narrow typographical or pictorial definition of “cross” or “check,” contrary to the intent of Section 1-9-4.2(B)(3), or that fail to give effect to Section 1-9-4.2(B)(4), as discussed above in connection with section 1.10.12.15 NMAC and absentee ballots.

21. For instance, the Secretary’s regulation relating to provisional ballots and recounting, 1.10.22 NMAC, requires ballots that are rejected by the tabulating equipment to be hand-tallied and incorporates as the standard for a vote subsection C of 1.10.12.5 NMAC [sic, presumably 1.10.12.15 NMAC]. See 1.10.22.11(I), (M) NMAC. The secretary’s regulation relating to the two percent audit and recounts, 1.10.23 NMAC, includes a definition of “vote” that excludes votes countable under Section 1-9-4.2(B)(4), see 1.10.23.7(X) NMAC, and in describing hand counting procedures for recounts the regulation includes a typographical or pictorial definition of “cross” and “check,” see 1.10.23.10(E)(3) NMAC.

22. The Secretary's use of unduly narrow definitions of "cross" and "check" in some regulations and the Secretary's unwillingness to implement Section 1-9-4.2(B)(4) in her regulations relating to vote counting will lead to inconsistency and uncertainty with regard to tallying votes and will deny voters who have cast countable votes in accordance with Section 1-9-4.2(B) the right to have their votes counted.

Conclusion and Relief Sought

23. The Secretary of State has a mandatory, non-discretionary duty to instruct county clerks regarding the conduct of the current election in accordance with the Election Code. See supra ¶ 3. The duty includes providing correct instruction regarding the counting of votes on hand-tallied paper ballots that are not marked in compliance with instructions. By promulgating regulations for the hand-tallying of paper ballots that impose a narrow, typographic or pictorial definition of "cross" or "check" in describing the kind of markings within the voting response area that will be counted and that do not permit the counting of a vote that is unanimously recognized by the election judges as expressing the voter's clearly discernable intent, and by adopting as an instruction to county clerks the Attorney General's letter opinion which erroneously precludes any counting of votes pursuant to Section 1-9-4.2(B)(4), the Secretary has failed to

properly fulfill this duty.

24. Consequently, this Court in the exercise of its original jurisdiction in mandamus over state officers in this matter of great public concern should issue a writ of mandamus directing the Secretary to immediately instruct county clerks that, in hand-tallying paper ballots that are not marked in accordance with the ballot instructions, a vote shall be counted if:

A. A preferred candidate's name or answer to a ballot question is circled, pursuant to subparagraph B(2) of Section 1-9-4.2;

B. There is within the voting response area a mark consisting of two crossed lines, or any other mark indicative of the voter's preference, pursuant to subparagraph B(3) of Section 1-9-4.2; or

C. The presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly discernable, pursuant to subparagraph B(4) of Section 1-9-4.2.

25. Alternatively, if the Court concludes that subparagraph B(4) of Section 1-9-4.2 cannot be implemented without the adoption of additional standards for uniformity of application, the Court should issue a writ of mandamus directing the Secretary:

A. To immediately adopt and provide to county clerks uniform

standards designed to give the fullest practicable effect to the Legislature's intent underlying Section 1-9-4.2(B); and

B. To instruct county clerks that votes shall be counted as stated in paragraphs 24(A), (B), and (C) above and, in applying paragraph 24(C), in accordance with the Secretary's uniform standards.

26. In addition, the Court should direct the Secretary to correct and amend her regulations regarding the counting of absentee ballots and provisional ballots, the two percent audit, and recounts to eliminate any requirement that votes marked by a cross or check must match any pictorial or typographical definition in order to be counted, to give effect to votes that are found to reflect the clearly discernable intent of the voter pursuant to Section 1-9-4.2(B)(4), and otherwise to comply with the foregoing.

C E R T I F I C A T E O F S E R V I C E

We hereby certify that a copy of the foregoing Petition was served upon

The Honorable Mary Herrera
Secretary of State of New Mexico
New Mexico State Capitol
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

The Honorable Gary King
Attorney General of New Mexico
c/o Litigation Division
408 Galisteo St.
Santa Fe, NM 87504

by hand-delivery and that a copy of the petition was e-mailed to

Scott Fuqua, Esq.
Office of the Attorney General

this _____ day of October, 2008.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By _____
Edward Ricco