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October 22, 2008

The Honorable Cisco McSorley
New Mexico State Senator
3205 Berkeley Place NE
Albuquerque, NM 87106

Re: Opinion Request - Challenges to Qualifications of Voters

Dear Senator McSorley:

You have requested our opinion whether the New Mexico Election Code permits an election challenger stationed at the polls to challenge a voter presenting himself to vote based on the belief that the voter does not reside at the address listed on his/her voter registration. According to your letter, "nonpartisan voter protection [groups] are concerned that there is a national movement ... to use home mortgage foreclosure lists and return-to-sender letters to challenge voters at polling locations at the general election." It is our understanding that "home mortgage foreclosure lists" are public documents that list properties that are part of, but have not yet completed, the foreclosure process and "return-to-sender letters" are government election agency issued public documents regarding election matters sent to voters that are returned "undeliverable." Based on our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, these two items are not permissible grounds for a challenge under the New Mexico Election Code.

The Election Code provides that the "county chairman of each political party represented on the ballot may appoint in writing one challenger ... for each precinct." NMSA 1978, § 1-2-21 (1975). The challenger is allowed to sit next to the election workers and inspect the signature roster and make notes regarding the activities of the election workers. NMSA 1978, § 1-2-23(B) (1975). In addition, a challenger, pursuant to Section 1-2-20, may pose a challenge to a voter when:

- A. the person presenting himself to vote is not registered;
- B. the person presenting himself to vote is listed on the purge list placed with the signature rosters....

- C. the person presenting himself to vote is improperly registered because he is not a qualified elector;
- D. in the case of the primary election, the person presenting himself to vote is not affiliated with a political party represented on the ballot; or
- E. in the case of an absentee ballot, the official outer envelope of the absentee voter has been opened prior to the counting of the ballots.

It appears that subsection B is relevant to your inquiry regarding return-to-sender letters and subsection C is relevant to your inquiry regarding home mortgage foreclosure lists.

New Mexico law does not permit a single return-to-sender letter to constitute sufficient grounds to challenge a voter presenting himself to vote. New Mexico has a multi-step/multi-year process for moving a voter from the rolls to a purge list. The Secretary of State's rules provide: "Voters shall ... be [first] placed on inactive status whenever a general mailing returns mail as undeliverable." 1.10.26.8.F NMAC. It further provides that: "A general mailing may consist of absentee ballots, voter identification cards, letters of information sent to all voters in a county, or any other mailing that is not targeted to a specific group or to non-voters." *Id.* A voter on "inactive" status, however, is still an eligible voter and is still listed on the rolls. It is only after "four consecutive federal elections with an inactive status and failure to vote in any state or local election ..., the voter shall be removed from the voter file through the board of registration cancellation process." 1.10.26.8.D NMAC. The state then must send one last notice to the voter and if the voter does not respond to the notice, then the voter is purged from the rolls. *See* 1.10.26.9.B NMAC.¹ Therefore, the presence of a return-to-sender letter, by itself, does not constitute permissible grounds to challenge a voter under Section 1-12-20.

New Mexico law does not permit a home mortgage foreclosure list to constitute sufficient grounds to challenge a voter presenting himself to vote. A qualified elector, as used in Section 1-12-20 means "any who person who is qualified to vote under the provisions of the constitution of New Mexico." NMSA 1978, Section 1-1-4 (1969). The Constitution provides that a citizen who "has resided ... in the precinct in which he offers to vote thirty days ... shall be qualified to vote at all elections for public officers." N.M. Const. art. VII, § 1. The New Mexico Election Code explains that "resides" means "the residence of a person is that place in which ... he has the intent to return." NMSA 1978, § 1-1-7(A) (1969). In addition, "a change of residence is made only by the act of removal **joined** with the intent to remain in another place." NMSA 1978, § 1-1-7(C) (1969) (emphasis added). Intent is measured through the eyes of the voter. *See* N.M. Att'y Gen. Op. 70-72 (1972); N.M. Att'y Gen. Op. 60-94 (1960); N.M. Att'y Gen. Op. 1939-40-142 (1939-1940). Therefore, a voter whose home is in the process of foreclosure, but is attempting or intending to remain at his residence, is still a qualified elector. Therefore, the

¹ According to the Secretary of State's rules, the purge process occurs in "odd numbered years" and not election years. *See* 1.10.26.9.A NMAC. Therefore, the purge list process should have occurred and been completed in 2007, and any 2008 return-to-sender mailings would appear to be moot for purposes of the November 2008 election.

The Honorable Cisco McSorley

October 22, 2008

Page 3

inclusion of property on a home mortgage foreclosure list does not constitute permissible grounds to challenge a voter under Section 1-12-20.

While your letter notes that there may be a "national movement" to use these tactics, we note that the two major political parties in New Mexico have explicitly refuted their use.²

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with 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 general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



ZACHARY A. SHANDLER

Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General
The Honorable Mary Herrera, New Mexico Secretary of State
Gerald T. E. Gonzalez, Elections Bureau Director, SOS

² The tactic is also not relevant to voter identification issues because Section 1-1-24 of the Election Code permits several forms of identification and does not require that an address on the identification match the voter's certification of registration.